

Facing the Coordination Reality: Removing Individual and Party Limits on Contributions to Presidential Campaigns

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Since Citizens United, a new era of campaigning has emerged in which traditional campaign functions have been outsourced to candidate-centric outside groups. In the 2016 presidential election, ten campaigns had raised less money than their allied Super PACs and other outside groups. Federal election regulations that restrict coordination between these outside groups and campaigns are outdated and poorly enforced. American democracy is weakened by this unprecedented electoral activity because of decreased donor transparency, increased negativity without accountability, and voter confusion.

This Note concludes, after examining outside group political activity in the 2012 and 2016 presidential cycles, that candidate-centric outside groups create the same risk of corruption as direct contributions to campaigns. Therefore, this Note proposes that proponents of stricter campaign finance regulation should consider removing limits on individual and political party contributions to presidential campaigns. Allowing individuals and parties to provide unlimited funds to campaigns would diminish the appeal of outside groups and increase the political pressure on campaigns to disavow their use. This realistic, if not pessimistic, proposal offers a simple legislative solution to some of the concerning elements of an increased reliance on outside groups, while

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leaving the possibility for a different Supreme Court to permit radical change.

I. INTRODUCTION

The Supreme Court has grown increasingly skeptical of campaign finance regulations in the past several decades. In 2014, in its latest landmark campaign finance case, *McCutcheon v. FEC*, the Court overturned a federal statute that limited the aggregate amount of candidate contributions by an individual donor.¹ The Court also narrowed the constitutionally permissible objectives of campaign finance regulations.² Now, the only compelling interest that can justify an infringement on political expression is a specific type of corruption akin to bribery.³

It was not always this way. In *Austin v. Michigan Chamber of Commerce*, the 1990 Supreme Court upheld a state law ban on independent expenditures — political communications made without cooperation from a candidate or her committee — from corporate treasury funds.⁴ The Court held the burdens on free expression were justified by the state interest in combating “the corrosive and distorting effects of immense aggregations of wealth” by corporations with political influence disproportionate to their public support.⁵ In addition to such corporate influence, modern-day proponents of campaign finance regulations point to several other reasons to restrict political contributions and

1. *McCutcheon v. Fed. Election Comm’n*, 572 U.S. 185, 238 (2014).

2. *Id.* “This Court has identified only one legitimate governmental interest for restricting campaign finances: preventing corruption or the appearance of corruption.” *Id.* at 206. “Congress may target only a specific type of corruption — *quid pro quo*’ corruption.” *Id.* at 207. The Government’s efforts to prevent the “appearance of corruption” are “equally confined to the appearance of *quid pro quo* corruption.” *Id.* at 208.

3. *Id.*

4. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990); 11 C.F.R. § 100.16 (2019). Independent expenditures must be an expression of advocacy, defined by the FEC as “communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s).” 11 C.F.R. § 100.22. Other types of political communication are referred to as “issue advocacy” and are unregulated at the federal level, since campaign finance requirements are constitutionally justified only when advertising is intended to influence the outcome of federal elections. See *Buckley*, 435 U.S. at 44 (“We agree that in order to preserve the provision against invalidation on vagueness grounds, § 608(e)(1) must be construed to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office.”).

5. *Id.* at 660.

expenditures, such as: preventing conflicts of interest, fostering political equality, and promoting public confidence in the democratic process by limiting the appearance of corruption.⁶ Justice Breyer's dissent in *McCutcheon* even made the argument that capping contribution limits *enhanced* the freedom of political expression, rather than infringed upon it, by preserving a responsive democracy that reflects the views and ideas the First Amendment protects.⁷ But in no uncertain terms, the majority in *McCutcheon* was only persuaded by restrictions on speech that prevent *quid pro quo* corruption.⁸

In *Citizens United v. FEC*, the Court held that independent expenditures cannot corrupt or cause an appearance of corruption, and thus cannot be restricted.⁹ The D.C. Circuit Court has extended that ruling to contributions, holding that contributions to outside groups engaged in independent spending also cannot corrupt, and therefore also cannot be limited.¹⁰ In short, unlimited funds are able to flow to outside groups that can spend unlimited amounts on political advocacy, so long as the advocacy is not being coordinated with a campaign.¹¹

Professor Richard Hasen identifies the fundamental error in *Citizens United's* blanket determination that independent expenditures cannot corrupt:

The potential for *quid pro quo* bribery appears nearly as strong when it comes to large contributions flowing to a reliable single-candidate Super PAC — understood as one staffed by close associates of the candidate and backed by the candidate's friends and family — as with contributions flowing to the candidate directly. When the Super PAC is reliable, the money is just as valuable as in the campaign coffers[.]¹²

6. Richard L. Hasen, *Super PAC Contributions, Corruption, and the Proxy War over Coordination*, 9 DUKE J. CONST. L. & PUB. POL'Y 1, 2 (2014).

7. *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 238 (2014).

8. *Id.* at 206.

9. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 359–61 (2010).

10. *SpeechNow.org v. Fed. Election Comm'n*, 599 F.3d 686 (D.C. Cir. 2010).

11. This note refers to “outside groups” as any political spending vehicle other than a candidate committee or a party committee.

12. Hasen, *supra* note 6, at 13.

In light of the recent Supreme Court decisions in *McCutcheon* and *Citizens United*, reforms that limit contributions and spending by outside groups are unlikely to be upheld.¹³ Thus, proponents of stricter campaign finance regulations on political activity have focused on an alternative route to regulate this conduct: more stringent regulations and enforcement on cooperation between outside groups and candidates or their committees.¹⁴

However, this Note argues that reforming coordination rules is just as improbable as imposing contribution limits on independent expenditures. The Federal Election Commission (FEC) has an outdated definition of coordination that does not accommodate modern spending vehicles and campaign tactics, making reform difficult.¹⁵ And the agency's structurally flawed enforcement process results in deadlocks that incentivize pushing the legal limits.¹⁶ After reviewing the current state of presidential campaign coordination, this Note concludes that supporters of stricter campaign finance regulations should consider *removing* all individual and party contribution limits for presidential campaigns.¹⁷ This realistic, if not pessimistic, proposal offers a simple legislative solution to some of the concerning elements of a presidential race dominated by outside groups while leaving the door open for a different Supreme Court to permit radical change.

13. *Id.* at 15.

14. *Strengthen Rules Preventing Candidate Coordination with Super PACs*, BRENNAN CTR. FOR JUST. (Feb. 4, 2016), <https://www.brennancenter.org/analysis/strengthen-rules-preventing-candidate-coordination-super-pacs> [<https://perma.cc/BT2J-9S4S>].

15. *See infra* Part V(0).

16. For more information on the causes of FEC blocked investigations and deadlock, see OFFICE OF COMM'R OF FED. ELECTIONS COMM'N, DYSFUNCTION AND DEADLOCK: THE ENFORCEMENT CRISIS AT THE FEDERAL ELECTION COMMISSION REVEALS THE UNLIKELIHOOD OF DRAINING THE SWAMP (2017), https://classic.fec.gov/members/ravel/ravelreport_feb2017.pdf [<https://perma.cc/2DVM-4W39>]. Commissioner Ann Ravel claims three of the six FEC commissioners vote in lockstep 98% of the time and are dismissing major campaign finance violations due to ideological opposition. *Id.* at 1. Four votes are required for the Commission to take action on most matters. *Id.* at 7.

17. This Note investigates specifically how outside groups played new and indispensable roles in the 2016 presidential campaign to highlight how the contribution limits on these campaigns do not serve the constitutionally protected purpose of preventing corruption. Other scholarship has advocated for the general removal of contribution limits because of the prevalence of outside groups. *See, e.g.*, Bruce Ledewitz, *The Threat of Independent Political Spending to Democratic Life and a Plan to Stop It*, 64 CLEV. ST. L. REV. 133 (2016).

Part II of this Note provides an overview of the different spending vehicles used to influence elections. Part III explores the legal framework of contribution and expenditure limits, and how coordination is central to their legal distinction. Part IV then investigates the FEC's definition of coordination and how outside groups interacted with campaigns in the 2012 presidential campaign before Part V highlights the unprecedented level of coordination between candidates and outside groups in 2016. Lastly, Part VI proposes removing contribution limits on individual donors and political parties to presidential campaigns and examines how this reform would improve the democratic process.

II. UNDERSTANDING THE VARIOUS SPENDING VEHICLES

In campaign finance law, the key distinction in election spending is between “contributions” and “expenditures.” In *Buckley v. Valeo*, the Supreme Court upheld regulations limiting contributions (things of value given to a candidate committee, party committee, or other political committee), but found expenditure limits (restrictions on what an individual or committee spends overall) unconstitutional infringements on free speech.¹⁸ “Before delving into the interaction between candidates and the various spending vehicles, this Part identifies their respective political advantages and limitations.

A. POLITICAL COMMITTEES

Political committees are regulated both by the FEC and federal law and come in several forms. Any political committee that contributes to federal candidates is subject to limits by the Federal Election Campaign Act on both the amount the entity can contribute and the amount of contributions the entity can receive from individual persons, corporations, organizations, or

18. *Buckley v. Valeo*, 424 U.S. 1, 20 (1976); 11 C.F.R. §§ 100.52(a), 100.54 (2019). Contributions include money, in-kind contributions (i.e., “goods or services offered for free or less than usual charge”), and proceeds from sales (e.g., tickets to fundraisers or campaign merchandise). *Types of Contributions*, FED. ELECTION COMM'N, <https://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/contribution-types> [<https://perma.cc/UP3N-9N84>] (last visited Jan. 30, 2019).

other political committees.¹⁹ There are three types of committees relevant to this Note: candidate committees, party committees, and political action committees.

“Campaign committees” or “candidate committees” are popular terms for authorized committees which make contributions and expenditures on behalf of a candidate.²⁰ Similarly, “party committees” are part of an official party structure at the national, state, or local level.²¹ A party committee can accept contributions and make special expenditures in connection with general election campaigns (“coordinated party expenditures”).²²

The third type of political committees are “political action committees.” The term “political action committee” is recognized by the FEC as referring to two distinct types of political committees: separate segregated funds (SSFs) and nonconnected committees (nonconnected PACs).²³ SSFs can make contributions directly to a candidate. However, there are limits on the amount of contributions per candidate and on the amount of contributions the entity can receive from the same individual or organization.²⁴ “Nonconnected PAC” is an umbrella term for any type of political committee that is not a party committee, authorized committee of a candidate, or SSF.²⁵ These committees have various contribution and expenditure rules, but are all free to solicit from anyone who may lawfully make a contribution related to a federal election.²⁶ All types of nonconnected PACs can make independent expenditures.²⁷ Super PACs, a type of nonconnected PAC also

19. 52 U.S.C. § 30116 (2012).

20. 11 C.F.R. § 100.5(f) (2019).

21. *Id.* at (e)(4).

22. 11 C.F.R. § 109.32 (2019).

23. *Political Action Committees (PACs)*, FED. ELECTION COMM’N, <https://www.fec.gov/press/resources-journalists/political-action-committees-pacs> [<https://perma.cc/LG2A-CMUE>] (last visited Jan. 30, 2019). SSFs are created by corporations, labor unions, membership organizations, or trade associations and can make contributions to candidates or engage in independent expenditures, but cannot solicit funds from those unaffiliated with the sponsoring entity. 52 U.S.C. § 30118(4)(A) (2012).

24. 52 U.S.C. § 30116 (2012).

25. *Id.*

26. *Understanding Nonconnected PACs*, FED. ELECTION COMM’N, <https://www.fec.gov/help-candidates-and-committees/registering-pac/understanding-nonconnected-pacs> [<https://perma.cc/2L2K-B2L8>] (last visited Jan. 30, 2019).

27. *Making Disbursements as a PAC*, FED. ELECTION COMM’N, <https://www.fec.gov/help-candidates-and-committees/making-disbursements-pac> [<https://perma.cc/T6UC-A4V9>] (last visited Jan. 30, 2019). Leadership PACs and federal PACs are the more

known as independent-expenditure only political committees,²⁸ cannot make contributions to candidates, but have no limits on the contributions they can receive.²⁹

B. 527S AND 501(C)S

Section 527 committees and Section 501(c) organizations are additional spending vehicles engaged in political advocacy.³⁰ For tax purposes, all political committees are Section 527 political organizations, so named because Section 527 of the Internal Revenue Code exempts contributions to political organizations from income taxation.³¹ For political purposes, however, a “527” is a political committee governed primarily by the Internal Revenue Service, (IRS) rather than the FEC or its state counterparts. 527s do not need to abide by Federal Election Campaign Act requirements so long as they avoid express advocacy — directly calling for election or defeat of a particular candidate — in their campaign communications, and do not coordinate with or contribute to candidates. Thus, all federally

traditional nonconnected PACs, which can contribute directly to candidates but have caps on how much they can receive from an individual or a committee. *Types of Nonconnected PACs*, FED. ELECTION COMM’N, <https://www.fec.gov/help-candidates-and-committees/registering-pac/types-nonconnected-pacs> [<https://perma.cc/YV83-62KA>] (last visited Jan. 30, 2019). Leadership PACs are set up by political candidates or office-holders to support (and curry favor) with candidates running for office. Leadership PACs also fund certain expenses ineligible to be paid by congressional offices like travel to raise a politician’s profile. *Leadership PACs*, CTR. FOR RESPONSIVE POL., <https://www.opensecrets.org/industries/indus.php?ind=Q03> [<https://perma.cc/Y2GD-TPDR>] (last visited Jan 30, 2019). See also *Metadata Description of Leadership PAC List*, FED. ELECTION COMM’N, <http://classic.fec.gov/finance/disclosure/metadata/metadataLeadershipPacList.shtml> [<https://perma.cc/B5AM-X5UP>] (last visited Jan. 30, 2019).

28. *Id.* There are also Hybrid PACs, also known as Carey Committees, that have both a bank account for making contributions to candidates *and* a non-contribution account for making independent expenditures. While these non-traditional PACs significantly differ from other political committees, they still must register with the FEC and are subject to the same registration, reporting, and disclosure requirements. Richard Briffault, *Super PACs*, 96 MINN. L. REV. 1644, 1646 (2012).

29. See FED. ELECTION COMM’N, *supra* note 23.

30. The terms “527” and “501” refer to the sections in the Internal Revenue Code the group is organized under. *Types of Advocacy Groups*, CTR. FOR RESPONSIVE POL., <https://www.opensecrets.org/527s/types.php> [<https://perma.cc/282V-YGSB>] (last visited Jan 30, 2019).

31. A “political organization” is defined as a “party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function.” 26 U.S.C. § 527(e)(1) (2012).

registered political committees are 527 organizations, but not all 527s are federally registered political committees.³²

501(c)(4)s are organizations named after their respective provisions of the tax code and include civic leagues, social welfare organizations, and local associations of employees.³³ These organizations may engage in political activity provided that participating or interfering in political campaigns does not constitute the organization's primary activity.³⁴ The tax differences between 501(c)(4)s and 527s are minimal, but 501(c)(4)s have their own benefits for political activity. If one is seeking to engage in anonymous political activity, 501(c)(4)s have the benefit of engaging in political advocacy without publicly disclosing donor identification information.³⁵ The Trump Administration has expanded this benefit by eliminating the IRS requirement that 501(c)(4)s must report the names and addresses of contributors to the IRS, unless the information is directly requested.³⁶ 501(c)(4)s must limit their electoral spending to less than half their annual total spending (in other words, they cannot actively engage in politics as their primary function), but even this regulation has no clear interpretation.³⁷

Political committees, 527s, and 501(c)(4)s have formal legal differences, but can be closely connected. One interest group can sponsor a 527, a 501(c)(4), a Super PAC, and an ordinary PAC.

32. 527 Basics, CTR. FOR RESPONSIVE POLITICS, <https://www.opensecrets.org/527s/basics.php> [<https://perma.cc/A5JL-VL8U>] (last visited Jan. 30, 2019).

33. 26 U.S.C. § 501(c)(4)–(6) (2012).

34. JOHN F. REILLY & BARBARA A. BRAIG ALLEN, POLITICAL CAMPAIGN AND LOBBYING ACTIVITIES OF IRC 501(C)(4), (C)(5), AND (C)(6) ORGANIZATIONS, IRS: EXEMPT ORGANIZATIONS — TECHNICAL INSTRUCTION PROGRAM L-2 (2003), <https://www.irs.gov/pub/irs-tege/eotopicl03.pdf> [<https://perma.cc/QS63-3FSZ>].

35. 26 U.S.C. § 6104 (2012).

36. IRS Rev. Proc. 2018-38. See Michelle Ye Hee Lee, *FEC releases new guidance for disclosure of certain donors to political nonprofits*, WASH. POST (Oct. 4, 2018), https://www.washingtonpost.com/politics/fec-releases-new-guidance-for-disclosure-of-certain-donors-to-political-nonprofits/2018/10/04/4b1f372a-c81d-11e8-9b1ca90f1daae309_story.html?utm_term=.6e5228cfb9eb.

37. “Recently, IRS Commissioner John Koskinen testified to the Senate Finance Committee that ‘primarily’ means that at least 51 percent of a group’s activity must be devoted to social welfare — or, no more than 49 percent to political activity. This has been the agency’s rule of thumb for some time, but it failed to clarify the definition, granting all varieties of groups 501(c)(4) exemptions even though they were heavily political.” Editorial Board, *The IRS Gives Up on Fighting ‘Dark Money’*, WASH. POST (Feb. 19, 2016), https://www.washingtonpost.com/opinions/the-irs-throws-in-the-towel-on-dark-money/2016/02/19/33a544f0-d418-11e5-9823-02b905009f99_story.html?utm_term=.2d46f44de0ff [<https://perma.cc/EBA5-2W9R>].

For instance, in Wisconsin, a progressive group, the Greater Wisconsin Committee, created a 501(c)(4) also called the Greater Wisconsin Committee.³⁸ The organization declares itself to be an “issue advocacy” group to “inform and educate” about progressive policies.³⁹ The Greater Wisconsin Committee does not have to disclose its donors, and can only engage in political activity as a secondary activity.⁴⁰ A sister entity, the Greater Wisconsin Political Action Committee, is a traditional PAC with the goal to “elect leaders who share our goals of advancing a progressive public policy agenda.”⁴¹ This PAC can contribute directly to candidates and make independent expenditures.⁴² A third organization, the Greater Wisconsin Political Independent Expenditure Committee, or the Greater Wisconsin Political Fund, operates as a state Super PAC, expressly advocating for the election or defeat of candidates, disclosing all independent expenditures, but not contributing directly to candidates.⁴³

The Greater Wisconsin political entities serve as an example of how an interest group can sponsor multiple organizations to maximize political impact under a complex campaign finance scheme. Parts IV and V examine how presidential candidates and their allies also used various combinations of these spending vehicles to advance their campaigns. Prior to this review, the Part III introduces the rationale behind the United States’s campaign finance framework.

38. *About: The Greater Wisconsin Committee*, GREATER WIS. COMM., <http://www.greaterwisconsin.org/aboutus.htm> [https://perma.cc/6FUF-5ZNA] (last visited Jan. 30, 2019).

39. *Greater Wisconsin Committee*, GREATER WIS. COMM., <http://www.greaterwisconsin.org> [https://perma.cc/A3TQ-R9FX] (last visited Jan. 30, 2019).

40. *Social Welfare Organizations*, IRS, <https://www.irs.gov/charities-non-profits/other-non-profits/social-welfare-organizations> [https://perma.cc/V74C-263R] (last visited Jan. 30, 2019).

41. *About Our Pac*, GREATER WIS. POL. ACTION COMM., <https://www.greaterwispac.org> [https://perma.cc/84T4-2XHL] (last visited Jan. 30, 2019).

42. GOV’T ACCOUNTABILITY BOARD, *Campaign Finance Overview: Political Action Committees* 3, (Mar. 2016), https://ethics.wi.gov/Resources/CampaignFinanceOverview_PACS_2016.pdf [https://perma.cc/7WK2-XRT8].

43. *Campaign Finance Overview: Independent Expenditure Committees*, GOV’T ACCOUNTABILITY BD., https://ethics.wi.gov/Resources/CampaignFinanceOverview_IECs_2016.pdf [https://perma.cc/6Q2K-YYU9] (last visited Jan. 30, 2019).

III. LEGAL PRECEDENT ON COORDINATION AND SPENDING LIMITS ON OUTSIDE GROUPS

Coordination, defined by the FEC as spending “made in cooperation, consultation . . . or at the request or suggestion of, a candidate,” derives from the distinction between contributions and independent expenditures in *Buckley v. Valeo*.⁴⁴ This Part investigates how prohibiting coordination was pivotal in the Supreme Court’s justification for prohibiting regulations on independent expenditures.

In *Buckley*, the Court upheld restrictions on political contributions but not political expenditures.⁴⁵ It analyzed the constitutionality of the Federal Election Campaign Act of 1971, as amended in 1974, and in doing so introduced parameters on regulating political speech still largely followed today.⁴⁶ The Court determined that financial contributions, to the extent they are intended to secure political *quid pro quo*, harm the integrity of democracy.⁴⁷ More broadly, the Court held that “the impact of the appearance of corruption stemming from public awareness” of corrupting opportunities is “of almost equal concern.”⁴⁸ Congressional action limiting the corrupting influence of direct contributions, due to *quid pro quo* corruption and the appearance of corruption, was a sufficient justification for the intrusion on the freedom of political association.

However, the *Buckley* Court came to a different conclusion on the constitutionality of independent expenditures.⁴⁹ The Court

44. *Buckley v. Valeo*, 424 U.S. 1, 20–21 (1976).

45. *Id.* The Court defines *quid pro quo* corruption to mean no more than “a direct exchange of an official act for money.” *McCutcheon v. Fed. Election Com’n*, 572 U.S. 185, 192 (2014). For a defense of the reasoning for narrowly defining corruption, see Anthony J. Gaughan, *In Defense of McCutcheon v. Federal Election Commission*, 24-SPG KAN. J.L. & PUB. POL’Y 221, 226 (2015) (acknowledging the concern of large donors receiving disproportionate access to lawmakers, Professor Gaughan nonetheless argues that “efforts to circumscribe access and influence [are] a dangerously intrusive, subjective, and open-ended task . . . [t]hrusting the federal courts into ferociously partisan controversies over access and influence will not make the political system any less corrupt; instead, it will spread the contagion of partisan and ideological warfare to the judiciary.”).

46. *Buckley*, 424 U.S. at 20–21.

47. *Id.* at 26–27.

48. *Id.* at 27.

49. *Id.* at 22 (“The Act’s contribution ceilings thus limit one important means of associating with a candidate or committee, but leave the contributor free to become a member of any political association and to assist personally in the association’s efforts on behalf of candidates. And the Act’s contribution limitations permit associations and

held that limits on independent expenditures, meaning spending advocacy separate from a candidate and their campaign, burden the First Amendment right to engage in “vigorous advocacy” by restricting the quantity of political speech.⁵⁰ The Court found that limiting independent expenditures does not significantly serve the interest of chilling corruption or its appearance, and can be ineffective or even counterproductive as a political strategy.⁵¹ This is in part because the Court distinguished actual independent expenditures — ones that are truly separate from candidates — and expenditures that are “prearranged or coordinated expenditures amounting to disguised contributions.”⁵² The Court explained that “avoiding the contribution limitations by the simple expedient of paying directly for media advertisements or for other portions of the candidate’s campaign activities” is not of concern, since coordinated expenditures are expected to be treated as contributions, not independent expenditures, under the Federal Election Campaign Act.⁵³ The current political tactics undertaken by outside groups discussed in Part V, coupled with a lack of coordination oversight, make the reasoning used in the Court’s 1976 decision appear dangerously naïve.

The *Buckley* Court, however, did not definitively declare that independent expenditures are free from corruption or the appearance of corruption. The Court merely stated that independent advocacy “does not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions.”⁵⁴ Two years later, the Supreme Court in a famed footnote of *First National Bank of Boston v. Bellotti* noted the possibility of corruption from outside spending: “Congress might well be able to demonstrate the existence of a

candidates to aggregate large sums of money to promote effective advocacy. By contrast, the Act’s \$1,000 limitation on independent expenditures ‘relative to a clearly identified candidate’ precludes most associations from effectively amplifying the voice of their adherents, the original basis for the recognition of First Amendment protection of the freedom of association.”).

50. *Id.* at 47–48.

51. *Id.*

52. *Id.* at 47.

53. *Id.* at 46.

54. *Id.*

danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections.”⁵⁵

But *Citizens United* closed the door left open by *Bellotti*. In *Citizens United*, the 2010 Supreme Court re-affirmed the Court’s commitment to distinguishing contributions from independent expenditures, and, most significantly, concluded that independent expenditures do not give rise to corruption or the appearance of corruption.⁵⁶ Citing *Buckley*, the Court held that independent expenditure limits, even for corporations and labor unions, did not serve any substantial governmental interest in reducing corruption. The Court explained that “[t]he absence of prearrangement and coordination of an expenditure with the candidate . . . alleviates the danger that expenditures will be given as a *quid pro quo*[.]”⁵⁷ Though speakers who spend massive amounts on independent advocacy may gain influence or access, “[t]he appearance of influence or access . . . will not cause the electorate to lose faith in our democracy.”⁵⁸ This is because, “[b]y definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate.”⁵⁹ Thus, the intellectual foundation for ruling that independent expenditures do not corrupt or create the appearance of corruption is anchored in the principle that these expenditures are truly independent.

A few months after the *Citizens United* ruling, the D.C. Circuit in *SpeechNow.org v. Federal Election Commission* ruled that contribution limits on independent groups were unconstitutional.⁶⁰ The Court determined that if the government did not have a sufficient interest in the restriction of independent expenditures as a matter of law, there is no government interest

55. *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 788 n.26 (1978).

56. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010). In *Citizens United*, a nonprofit corporation created a film criticizing then-Senator Hillary Clinton and urged viewers to vote against her in the Democratic Party’s presidential primary elections. The film and its ads were covered under § 441(b) of the Bipartisan Campaign Reform Act of 2002 (BCRA), which prohibited a corporation’s use of treasury funds on independent expenditures. *Id.* at 319–21. The Supreme Court found that this provision burdened corporate political speech, protected under the First Amendment, and therefore subjected it to strict scrutiny. *Id.* at 340.

57. *Id.* at 345 (quoting *Buckley v. Valeo*, 424 U.S. 1, 47 (1976)).

58. *Id.* at 360.

59. *Id.*

60. *SpeechNow.org v. Fed. Election Comm’n*, 599 F.3d 686, 689 (D.C. Cir. 2010).

in limiting contributions to a political committee that makes only such independent expenditures, emphasizing that “[t]he independence of independent expenditures was a central consideration in the Court’s decision.”⁶¹ Because this decision enabled entities engaging in independent expenditures to accumulate unlimited resources, it magnified the importance of the coordination restriction.

IV. COORDINATION AND THE 2012 PRESIDENTIAL RACE

The 2012 presidential race marked the first presidential election post-*Citizens United*. This Part explores the rise of candidate-centric Super PACs and how their operations relate to coordination restrictions between campaigns and independent expenditure groups. Recall from Part III that the FEC defines coordination as spending “made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate’s authorized committee, or a political party committee.”⁶² Activities that constitute coordination include: (1) creating, producing or distributing a communication upon the request or suggestion by the campaign, or suggesting a communication to which the campaign consents; (2) materially involving the campaign in decision-making; or (3) substantially discussing the communication with the campaign.⁶³ The FEC specifies that neither agreement nor formal collaboration is required for a communication to be coordinated.⁶⁴

The FEC coordination regulations derive from a pre-*Citizens United* world, when outside groups were primarily corporate or labor political action committees.⁶⁵ These groups typically

61. *Id.* at 693.

62. 11 C.F.R. § 109.20(a) (2019).

63. *Id.* § 109.21(d)(1–3).

64. *Id.* § 109.21(e). The FEC also included safe harbor provisions: candidates may respond to inquiries about legislative or policy issues; the person or group paying for the communication may create content using information publicly available information; candidates may endorse or solicit funds for other candidates, political committees, or other organizations; and none of the conduct standards are satisfied if the vendor, political committee, former employee, or contractor implements a firewall (a system that prevents the sharing of information in the same organization). *Id.* § 109.21(f–i).

65. Richard Briffault, *Coordination Reconsidered*, 113 COLUM. L. REV. SIDEBAR 88, 92–93 (2013). “These rules are based on an older model of independent committee — in which the committee had independent existence long before the current election; had a set of political, ideological, and policy goals in addition to the election of a specific candidate;

existed for several years before an election, with specific policy goals and principles to advance.⁶⁶ In these cases, a group could conceivably support a candidate who shared similar policy goals while operating “totally independently” from the candidate.⁶⁷

However, the 2012 election cycle, the first cycle post-*Citizens United*, witnessed the rise of a new type of independent expenditure group: single-candidate Super PACs. These entities were created to benefit a single candidacy in a single election, without having any restrictions on contributions or expenditures. As Professor Richard Briffault reported in his analysis of coordination after the 2012 cycle:

[T]hese organizations existed solely to promote or oppose one and only one candidate: Restore Our Future . . . spent more than \$142 million on ads exclusively on behalf of Mitt Romney in the presidential primaries and general election, while Priorities USA Action . . . spent \$66 million on ads solely to aid President Barack Obama. In the Republican presidential primaries, in particular, single-candidate Super PACs played a crucial role in sustaining candidates like Newt Gingrich and Rick Santorum.⁶⁸

Winning Our Future PAC, a Super PAC created to support Republican presidential primary candidate Newt Gingrich, perhaps best demonstrated a single-candidate Super PAC's effect on the political process. In 2012, casino magnate Sheldon Adelson gave \$20 million to the Winning Our Future PAC.⁶⁹ According to news reports, his contributions “almost singlehandedly” funded the PAC's operations and was widely regarded as a lifeline to the Gingrich campaign that prolonged the Republican presidential primary.⁷⁰ Throughout the primary,

and, even if its spending focused on elections, supported or opposed multiple candidates, not just one.”

66. *Id.*

67. *Buckley v. Valeo*, 435 U.S. 1, 47 (1976).

68. Briffault, *supra* note 65, at 89.

69. Abby Phillip & Dave Levinthal, *Adelson Tally to Gingrich: \$20M*, POLITICO (Apr. 21, 2012), <https://www.politico.com/story/2012/04/gingrich-camp-mired-in-debt-075418> [<https://perma.cc/L5V2-D726>]

70. Raf Sanchez, *US Election 2012: Sheldon Adelson, The Man Keeping Newt Gingrich's Bid Afloat*, TELEGRAPH (Jan. 27, 2012), <https://www.telegraph.co.uk/news/worldnews/us-election/9044854/US-election-2012-Sheldon-Adelson-the-man-keeping-Newt>

Winning Our Future took part in various campaign operations, but primarily engaged in advertising.⁷¹ The Political Director of Winning Our Future envisioned the Super PAC as “a supplement to the work [of] the campaign,” filling the gaps on the ground that Gingrich left open.⁷² By the end of the campaign, the Super PAC had raised and spent nearly as much money as Gingrich’s authorized campaign committee.⁷³

Far from being independent, Super PACs created for one individual’s election are typically “created and operated by former aides who remain closely connected to the candidates.” Both 2012 Republican presidential candidate Mitt Romney and Democratic presidential candidate, and then-President, Barack Obama’s supporting Super PACs, along with those of numerous other presidential contenders, were founded and run by former aides.⁷⁴ Campaign committees and their supportive Super PACs often shared the same donors, the same vendors and consultants, and the same video footage to produce advertisements.⁷⁵ Paul S. Ryan of the Campaign Legal Center lamented how this blatant collaboration is acceptable under current coordination law, noting that “[t]he real scandal in 2012 is what’s legal . . . [c]ertainly the law does not prevent coordination in the way that word is generally understood by the public.”⁷⁶

Professor Briffault contends that these close connections are a *prima facie* showing of coordination:

-Gingrichs-bid-afloat.html [https://perma.cc/SLP6-ER6V]. Shortly after Gingrich exited the race, Adelson shifted to supporting Mitt Romney, donating \$10 million to the Super PAC Restore Our Future, which supported Romney’s candidacy. *Gingrich Gone, Billionaire Now Showers Romney With Money*, N.Y. TIMES: CAUCUS (June 13, 2012), https://thecaucus.blogs.nytimes.com/2012/06/13/billionaire-now-showers-romney-with-money/?_r=0 [https://perma.cc/F2G4-CU39].

71. Amy Gardner, *Pro-Gingrich Super PAC Builds a Shadow Campaign*, WASH. POST (Jan. 24, 2012), https://www.washingtonpost.com/politics/pro-gingrich-super-pac-builds-shadow-campaign/2012/01/23/gIQAplsoNQ_story.html?utm_term=.140d34fc6673 [https://perma.cc/6WHG-DE9F].

72. *Id.*

73. Briffault, *supra* note 65, at 89.

74. Mike McIntire & Michael Luo, *Fine Line Between ‘Super PACs’ and Campaigns*, N.Y. TIMES (Feb. 25, 2012), <http://www.nytimes.com/2012/02/26/us/politics/loose-border-of-super-pac-and-romney-campaign.html> [http://perma.cc/GV32-6XHG].

75. *Id.*

76. T.W. Farman, *Vendors Finesse Law Barring ‘Coordination’ by Campaigns, Independent Groups*, WASH. POST (Oct. 13, 2012), https://www.washingtonpost.com/politics/vendors-finesse-law-barring-coordination-by-campaigns-independent-groups/2012/10/13/69dcb848-f6d9-11e1-8398-0327ab83ab91_story.html?utm_term=.0a1d5e5a536b [http://perma.cc/ZEL6-VAZ7].

When a single-candidate Super PAC is created and operated by former aides to the candidate, requiring a showing of direct contact between candidate and Super PAC, let alone substantial discussion or material involvement of the candidate in the group's spending decisions, is unnecessary to establish coordination — the current staff of the candidate's committee and the former candidate staffers running the Super PAC are highly likely to share common understandings of campaign themes, tactics, and needs without direct contact.⁷⁷

Others believe an outside group's close contacts with a campaign should not be considered illegal coordination. Former FEC Chairman Bradley Smith argued in 2014 that the universe of persons capable of operating an outside group is limited to those active in politics and interested in the candidate's message.⁷⁸ Thus an outside group's operatives will naturally have “a variety of social, political, and legal connections to the candidates they support. *Of course* Super PACs will be started and run by friends, associates, and former staffers of candidates.”⁷⁹ Still, Smith agrees that FEC rules on coordination are outdated in some respects with the rise of candidate-centric outside groups. In particular, allowing candidates to fundraise directly for a Super PAC created to support the candidate “raises the same type of *quid pro quo* bargaining opportunities that constitute the appearance of corruption that concerned the *Buckley* court.”⁸⁰

Determining the appropriate modern rules of coordination law in adherence with the true purpose of *Buckley* and *Citizens United* is beyond the scope of this Note. Several pieces of legal scholarship have explored viable proposals to amend the definition of coordination or alter the FEC's decision-making

77. Briffault, *supra* note 65, at 94.

78. Bradley A. Smith, *Super PACs and the Role of “Coordination” in Campaign Finance Law*, 49 WILLAMETTE L. REV. 603, 633 (2013).

79. *Id.* He explains that campaign violations occur when Super PACs “actually confer with the candidates” and have “meetings and discussions.” *Id.* at 635. These actions provide the opportunity for, or appearance of, *quid pro quo* corruption which the law seeks to restrict. *Id.*

80. *Id.*

process.⁸¹ Then-FEC commissioner Ann Ravel highlighted the real problem with the creation and enforcement of effective campaign finance regulations: “[A] controlling bloc of three Republican commissioners who are ideologically opposed to the F.E.C.’s purpose regularly ignores violations or drastically reduces penalties.”⁸² In other words, there is enough law, but it is not being enforced.

Having reviewed coordination in the 2012 presidential election, Part V highlights the enhanced level of coordination between candidates and outside groups in 2016. As this next Part demonstrates, the 2016 presidential campaign had no shortage of formal complaints filed with the FEC by advocacy groups, but none of the candidates were ever found to violate coordination rules.

V. 2016 PRESIDENTIAL COORDINATION TACTICS BETWEEN OUTSIDE GROUPS AND CAMPAIGNS

Collaboration between outsiders groups and candidates reached new heights during the 2016 presidential campaign. As Professor Richard Hasen noted during the campaign, “[y]ou see some of these things and you have to do a double take; things we thought were established as red lines are no longer red lines . . . It’s all a mess.”⁸³ Whether such collaboration is considered illegal coordination under 11 C.F.R. § 109.20 is not particularly relevant if the FEC rarely enforces campaign violations. Rather, these examples are intended to demonstrate that contributions to outside groups, like candidate-centric Super PACs and certain tax-exempt organizations, add virtually the same value as a contribution directly to a campaign since outside groups are now

81. See, e.g., Amanda Schwartzenbart, *Coordination Is Corruption: An Argument for the Regulation of Coordinated Issue Advocacy Under Campaign Finance Law*, 66 EMORY L.J. 1493 (2017); Note, *Working Together for an Independent Expenditure: Candidate Assistance with Super PAC Fundraising*, 128 HARV. L. REV. 1478, 1481–82 (2015); Briffault, *supra* note 65, at 92.

82. Ann Ravel, *Dysfunction and Deadlock at the Federal Election Commission*, N.Y. TIMES (Feb. 20, 2017), <https://www.nytimes.com/2017/02/20/opinion/dysfunction-and-deadlock-at-the-federal-election-commission.html> [http://perma.cc/5U8T-68QF].

83. Nicholas Confessore & Eric Lichtblau, *Campaigns’ Aren’t Necessarily Campaigns in the Age of ‘Super PACs’*, N.Y. TIMES (May 17, 2015), <https://www.nytimes.com/2015/05/18/us/politics/super-pacs-are-remaking-16-campaigns-official-or-not.html> [http://perma.cc/6T4K-3UWH].

functioning as campaign arms.⁸⁴ Since the contributions are effectively the same, strictly capping contributions to candidates while permitting unlimited contributions and expenditures by outside groups does little to prevent corruption or promote the democratic process.

This Part investigates several coordination methods between campaigns, candidates, and supportive outside groups during the 2016 presidential campaign. By working with independent expenditure groups and non-profits to conduct campaign functions, campaigns circumvented the contribution limits intended to prevent donors and other interest groups from wielding a corrupting influence over candidates.

A. INCREASED FUNDRAISING FOR SUPER PACS BY CANDIDATES

In 2012, 1265 Super PACs were formed and their spending topped \$600 million.⁸⁵ In 2016, the number of Super PACs rose to 2393 and their spending exceeded \$1 billion.⁸⁶ The number of single-candidate Super PACs, along with the total spent by these groups, also doubled in this four-year span.⁸⁷

The FEC ruled in 2011 that federal candidates may raise funds on behalf of Super PACs only up to the FEC's contribution limits of \$5000 per individual.⁸⁸ While this may seem restrictive, the FEC also found that candidates for federal office may attend, speak at, or be featured guests at fundraisers for the PACs, at which unlimited individual, corporate, and labor organization

84. "Candidates are using outside groups to serve basic campaign functions." Brent Ferguson, *Candidates & Super PACs: The New Model in 2016*, BRENNAN CTR. FOR JUST. (2015), https://www.brennancenter.org/sites/default/files/analysis/Super_PACs_2016.pdf [http://perma.cc/94KL-Y7RZ].

85. *2012 Outside Spending by Super PAC*, CTR. FOR RESPONSIVE POL. <https://www.opensecrets.org/outsidespending/summ.php?cycle=2012&chrt=V&disp=O&type=S> [http://perma.cc/QP5Z-CBET] (last visited Jan. 19, 2019).

86. *2016 Outside Spending by Super PAC*, CTR. FOR RESPONSIVE POL. <https://www.opensecrets.org/outsidespending/summ.php?cycle=2016&chrt=V&disp=O&type=S> [http://perma.cc/8LDP-SQFW] (last visited Jan. 19, 2019).

87. *2012 Outside Spending by Single-Candidate Super PACs*, *supra* note 85; *2016 Outside Spending by Single-Candidate Super PACs*, *supra* note 86.

88. *Fundraising for Other Candidates, Committees and Organizations*, FED. ELECTION COMM'N, <https://www.fec.gov/help-candidates-and-committees/making-disbursements/fundraising-other-candidates-committees> [http://perma.cc/F3U5-42XY] (last visited Jan. 20, 2019).

contributions could be solicited.⁸⁹ And the 2012 presidential candidates made use of this loophole that the FEC opened. Mitt Romney made headlines for appearing at a New York dinner fundraiser hosted for Restore Our Future.⁹⁰ President Obama's campaign responded that "we will not play by two sets of rules," and announced it would be supporting Priorities USA by sending campaign staffers and government officials, though not the presidential ticket, to speak at Super PAC fundraisers.⁹¹

In the 2016 election cycle, the practice of candidates attending Super PAC events and holding meetings with PAC donors became the standard. Republican presidential candidates routinely attended fundraising events for the single-candidate Super PACs supporting them.⁹²

The Democratic frontrunner, and later Democratic presidential nominee, Hillary Clinton quickly followed suit. Less than a month after announcing her candidacy in May of 2015, Clinton openly raised money for Priorities USA.⁹³ A Clinton campaign official stated that, "[w]ith some Republican candidates reportedly setting up and outsourcing their entire campaign to Super PACs, and the Koch brothers pledging \$1 billion alone for the 2016 campaign, Democrats have to have the resources to fight

89. *Id.*

90. Alexander Burns, *Romney Addressing Super PAC Fundraisers*, POLITICO (July 28, 2011), <https://www.politico.com/story/2011/07/romney-addressing-super-pac-fundraisers-60143> [http://perma.cc/9HHH-LMWH].

91. Becky Bowers, *Obama Campaign Says Officials Will Now Appear at Super PAC Fundraisers*, POLITIFACT (Feb. 7, 2012), <http://www.politifact.com/truth-o-meter/statements/2012/feb/07/barack-obama/obama-campaign-says-officials-will-now-appear-supe/> [http://perma.cc/F59C-BNSN].

92. The lack of controversy with Republican candidates affiliating with Super PACs likely can be explained by their ideological support for deregulated political speech. For example, in 2017, House Republicans included several campaign finance deregulation provisions in the party's spending bills. Provisions included: (1) allowing "[c]orporations . . . to ask their employees to donate to unlimited numbers of trade associations' political-action groups instead of limiting employee solicitations to one group per year" and (2) "prevent[ing] the IRS from implementing a long-stalled rule that would better define the limits on political activities of organizations exempt from income taxes under section 501(C)(4) of the tax code." Cezary Podkul, *Nestled in House Spending Bill: Campaign Finance Deregulation*, WALL ST. J. (Sept. 10, 2017), <https://www.wsj.com/articles/nestled-in-house-spending-bill-campaign-finance-deregulation-1504965600> [http://perma.cc/KB44-2V2K].

93. Maggie Haberman & Nicholas Confessore, *Hillary Clinton Embraces a 'Super PAC,' Trying to Erode a Republican Edge*, N.Y. TIMES (May 6, 2015), <https://www.nytimes.com/2015/05/07/us/politics/hillary-clinton-to-court-donors-for-super-pac.html> [http://perma.cc/3UYH-67YX].

back.”⁹⁴ In a sign of a new era in campaign fundraising, by the end of the 2016 election cycle, ten of the sixteen Republican presidential candidates’ campaigns had raised less money than their allied Super PACs and other independent groups.⁹⁵

B. SUPER PACS FUNCTIONING AS CAMPAIGNS

As in the 2012 presidential primary, the 2016 presidential single-candidate PACs were run by individuals closely affiliated with the candidates. For example, Chris Christie’s longtime aid Chris Cox managed the America Leads Super PAC while also running his traditional PAC;⁹⁶ Lindsey Graham’s former Senate deputy chief of staff and former campaign finance director formed a Super PAC called Security Through Strength to support Graham’s candidacy;⁹⁷ and several Hillary Clinton staffers from her 2008 campaign joined the Priorities USA Action Super PAC to help her candidacy.⁹⁸

But one of the biggest changes in 2016 was the shifting relationship between candidates and their Super PACs. In 2012, Super PACs primarily produced television attack ads and bought television spots.⁹⁹ The main Super PAC backing Romney did not have a website or a communications aid for press inquiries.¹⁰⁰ By 2016, however, Super PACs had essentially become operational arms of campaigns.

94. *Id.* The Koch Brothers are two of America’s richest men; they have spent hundreds of millions of dollars supporting conservative causes and candidates. *Who Are the Koch Brothers?*, BBC NEWS (June 10, 2018), <https://www.bbc.com/news/world-us-canada-44385053> [http://perma.cc/TL64-47RV].

95. Anu Narayanswamy, *Money Raised as of Dec. 31, 2016*, WASH. POST, <https://www.washingtonpost.com/graphics/politics/2016-election/campaign-finance/> [http://perma.cc/K9R9-9Z54] (last visited Jan. 31, 2019).

96. Aliyah Frumin, *Christie Allies Launch Super PAC ‘America Leads’*, MSNBC (Mar. 12, 2015), <http://www.msnbc.com/msnbc/christie-allies-launch-super-pac-america-leads> [http://perma.cc/GRG7-82RC].

97. IAN VANDEWALKER, BRENNAN CTR. FOR JUST., SHADOW CAMPAIGNS: THE SHIFT IN PRESIDENTIAL CAMPAIGN FUNDING TO OUTSIDE GROUPS 23 (2015), https://www.brennancenter.org/sites/default/files/publications/Shadow_Campaigns.pdf [http://perma.cc/XA77-DQRG].

98. *Id.* at 17.

99. Dave Johnson, *Super PAC Hate-Spending*, SLATE (Mar. 9, 2012), http://www.slate.com/articles/news_and_politics/map_of_the_week/2012/03/where_super_pacs_are_spending_their_money_and_how_.html [http://perma.cc/QWJ6-RPDR].

100. Reid J. Epstein & Rebecca Ballhaus, *Roles of Presidential Super PACs Expanding*, WALL ST. J. (Apr. 30, 2015), <https://www.wsj.com/articles/roles-of-presidential-super-pacs-expanding-1430437766?tesla=y> [http://perma.cc/7LV3-P4VH].

Republican presidential primary candidate Carly Fiorina's supportive Super PAC Carly for America demonstrates the increased role that Super PACs played. The Fiorina campaign would post her schedule online, and Carly for America would arrive beforehand to do advance work at the events.¹⁰¹ The executive director of the PAC said the group would also "engage in recruiting and activating volunteers, contacting voters and even handling rapid response in the event that Mrs. Fiorina is attacked by the press or fellow candidates."¹⁰² A Washington Post fact-checker reached out to her campaign for clarification on an issue and was directed to Carly for America.¹⁰³ Fiorina's campaign spokeswoman explained, "[t]he Super PAC has just been very vocal in defending her, so I thought that they'd be good to talk to."¹⁰⁴ Her Super PAC ended up spending over \$2 million more than her presidential campaign committee.¹⁰⁵

The Fiorina campaign was not alone in delegating campaign functions to outside spending entities. Republican presidential candidate Bobby Jindal's supporting Super PAC, run by his long-time consultant, scheduled and advertised more than thirty town halls in the run up to the Iowa primary.¹⁰⁶ Jindal appeared at these events as a special invited guest.¹⁰⁷ Republican presidential candidate Ben Carson's Super PAC engaged in voter contact with voter groups that usually do not participate in GOP primaries, such as African Americans and medical workers, who may have been inclined towards Dr. Carson.¹⁰⁸ New Day for America, the Super PAC supporting John Kasich, hired an analytics team to create an advanced ground game focused on volunteer canvassing of sought-after voters.¹⁰⁹ The outsourcing of

101. Nick Corasaniti, *Carly Fiorina's 'Super PAC' Aids Her Campaign, in Plain Sight*, N.Y. TIMES (Sept. 30, 2015), <https://www.nytimes.com/2015/10/01/us/politics/as-carly-fiorina-surges-so-does-the-work-of-her-super-pac.html> [<https://perma.cc/V98T-ZMPJR>].

102. Epstein & Ballhaus, *supra* note 100.

103. Confessore & Lichtblau, *supra* note 83.

104. *Id.*

105. *Carly Fiorina*, CTR. FOR RESPONSIVE POLITICS, <https://www.opensecrets.org/pre-s16/candidate?id=N00031348> [<https://perma.cc/X3YC-HU64>].

106. David M. Drucker, *Can Bobby Jindal Ride His Super PAC to an Iowa Upset?*, WASH. EXAMINER (Nov. 5, 2015), <http://www.washingtonexaminer.com/can-bobby-jindal-ride-his-super-pac-to-an-iowa-upset/article/2575696> [<https://perma.cc/F57C-6J8J>].

107. *Id.*

108. Epstein & Ballhaus, *supra* note 100.

109. Nick Corasanti & Matt Flegenheimer, *As TV Ad Rates Soar, 'Super PACs' Pivot to Core Campaign Work*, N.Y. TIMES (Dec. 22, 2015), <https://www.nytimes.com/2015/12/23/us/>

campaign functions to Super PACs was utilized wherever possible.

C. TESTING THE WATERS: AVOIDING CANDIDACY TO COORDINATE DIRECTLY

In 2016, candidates began delaying their candidacy announcements to coordinate extensively with outside groups before the FEC's candidate coordination rules took effect. There are three categories for defining political office seekers: candidates, non-candidates, and those who are "testing the waters" of candidacy.¹¹⁰ A candidate is an individual who seeks nomination for election, or election, to federal office and has received contributions, or made expenditures, aggregating in excess of \$5000.¹¹¹ Testing the waters is an exemption to that \$5000 trigger threshold, allowing potential candidates to raise and spend more than \$5000 without being declared a candidate and thus avoiding disclosure and reporting requirements until after becoming candidates.¹¹²

The testing-the-waters period was designed to support individuals exploring a candidacy without having to publicly disclose their actions should they decide not to run.¹¹³ Testing-the-waters activity includes conducting polls, traveling around the state or district, and making telephone calls to see if there is sufficient support for his or her candidacy.¹¹⁴ The FEC has expanded on its definitions of testing-the-waters activity through

politics/as-tv-ad-rates-soar-super-pacs-pivot-to-core-campaign-work.html [http://perma.cc/UVD3-VEFU].

110. David Garr, *Testing the Waters for Possible Candidacy* (2017), FED. ELECTION COMM'N (Apr. 4, 2017), <https://www.fec.gov/updates/testing-the-waters-2017/> [http://perma.cc/R7QM-3QF4].

111. 11 C.F.R. § 100.3(a)(1) (2019).

112. *Id.* § 100.72.

113. *Testing the Waters Brochure*, FED. ELECTION COMM'N, 2 (Mar. 2011), https://transition.fec.gov/pages/brochures/testing_waters.pdf. [https://perma.cc/82AQ-MDKZ]. "Before deciding to campaign for federal office, an individual may want to 'test the waters' — in other words, explore the feasibility of becoming a candidate. An individual who merely tests the waters, but does not campaign for office, does not have to register or report as a candidate even if the individual raises more than \$5,000 — the dollar threshold that would normally trigger registration. Nevertheless, funds raised to test the waters are subject to the Federal Election Campaign Act's (the Act) contribution limitations and prohibitions."

114. 11 C.F.R. § 100.72(a) (2019).

advisory opinions and matters under review. A 1981 Advisory Opinion on Governor Reubin Askew's pre-candidacy activity approved several activities as "testing the waters," including employing consultants, renting office space, preparing and using letterhead, developing campaign literature for speaking appearances (though not for the general public), and soliciting contributions to fund testing-the-waters activity.¹¹⁵

However, the millions that candidates raise on testing-the-waters grounds are not truly used for that purpose. Prospective candidates are in fact coordinating and fundraising for other spending vehicles, such as multicandidate PACs, federal leadership PACs, federal Super PACs, 501(c)(4) organizations, and 527 organizations.¹¹⁶ These entities have higher contribution limits or none at all. Prospective candidates can use these entities to lay the groundwork for campaigns while evading the strict contribution limits of a candidate. The FEC coordination

115. Fed. Election Comm'n, Opinion Letter on Reuben Askew Advisory Opinion Request, Advisory Op. No. 1981-32, at 4 (Oct. 2, 1981), <http://saos.fec.gov/aodocs/1981-32.pdf> [<https://perma.cc/6WL2-XKP4>]. The FEC recommends segregating testing-the-waters funds from personal funds: "It is advisable for the individual to set up a separate bank account for the deposit of receipts and the payment of expenses. If the individual later becomes a candidate, a campaign account must be established to keep the campaign funds separate from the individual's personal funds." FED. ELECTION COMM'N, CAMPAIGN GUIDE FOR CONGRESSIONAL CANDIDATES AND COMMITTEES 2 (2014), <https://www.fec.gov/resources/cms-content/documents/candgui.pdf> [<https://perma.cc/ZKK5-DFG7>].

116. Paul S. Ryan, "Testing the Waters" and the Big Lie: How Prospective Presidential Candidates Evade Candidate Contribution, CAMPAIGN LEGAL CTR. ii (Feb. 2015), http://www.campaignlegalcenter.org/sites/default/files/Testing%20the%20Waters%20and%20the%20Big%20Lie_FINAL_2.19.15%20%2528typo%20corrected%208.7.15%2529.pdf [<https://perma.cc/C9RP-VSB8>]. Scott Walker created a 527 group before announcing. Nick Corasanti, *Scott Walker Starts Committee; Step Toward Presidential Run*, N.Y. TIMES (Jan. 27, 2015), <https://www.nytimes.com/politics/first-draft/2015/01/27/scott-walker-our-american-revival-president-2016/> [<https://perma.cc/27CS-6DPG>]. Jeb Bush created a Leadership PAC, 501(c)(4) and a Super PAC. Rebecca Kaplan, *2016 Presidential Fundraising: What's in a Name?*, CBS NEWS (Jan. 16, 2015), <https://www.cbsnews.com/news/2016-presidential-fundraising-whats-in-a-name> [<https://perma.cc/6N6T-VFNJ>]; Ed O'Keefe & Matea Gold, *How a Bush-allied Nonprofit Could Inject More Secret Money Into '16 Race*, WASH. POST (Mar. 31, 2015), https://www.washingtonpost.com/politics/how-secret-donors-could-play-a-big-role-boosting-jeb-bush/2015/03/31/05647310-d7cd-11e4-b3f2-607bd612aeac_story.html?utm_term=.1d10278b0e25 [<https://perma.cc/BJU5-3WNJ>]. Martin O'Malley created a federal political action committee. John Wagner, *O'Malley Launches Federal PAC as Profile Rises*, WASH. POST (July 26, 2012), https://www.washingtonpost.com/blogs/maryland-politics/post/omalley-launches-federal-pac-as-national-profile-rises/2012/07/26/gJQADPR6AX_blog.html?utm_term=.29f12f57f0a2 [<https://perma.cc/LC93-FBK4>].

regulations do not mention activities by non-candidates or those who are testing the waters.¹¹⁷

This tactic of evading individual contribution limits is far from new — then-Governor Ronald Reagan used a multicandidate PAC from 1977 to 1979 to lay the foundation for his next attempt at the presidency under the guise of supporting candidate causes and candidates.¹¹⁸ However, pre-*Citizens United*, the benefits of delaying candidacy were marginal, since leadership PACs and multi-candidate PACs still had a \$5000 contribution limit and could not accept corporate and labor union contributions. Now, avoiding candidacy enables pre-candidates to solicit unlimited amounts directly with, for example, their single-candidate Super PACs or candidate-centric non-profits and to coordinate directly with these entities.

In the 2016 cycle, several presidential candidates engaged in extensive fundraising, travel, and campaign infrastructure building without admitting their candidacy. Presidential contender Scott Walker wryly remarked that, “[s]hould we choose — my lawyers love that, when I say we are ‘exploring’ a campaign — should we choose to run for the highest office in the land.”¹¹⁹ John Kasich, Scott Walker, and Carly Fiorina filmed ads with their Super PACs prior to announcing their candidacies.¹²⁰ A spokeswoman for a pro-Kasich Super PAC explained, “in order for there to be coordination, there must be a candidate. . . . The footage featuring Governor Kasich was filmed before any decision was made to seek the presidency.”¹²¹

The elongated and innovative use of the testing-the-waters period prompted campaign finance lawyer Marc Elias, on behalf of two Democratic PACs, to request an advisory opinion on pre-candidacy activity from the FEC in September 2015.¹²² The FEC

117. 11 C.F.R. § 109.20–22 (2019).

118. Ryan, *supra* note 116, at 4.

119. Paul Blumenthal, *2016 Candidates Thumb Their Noses At Campaign Finance Rules*, HUFFINGTON POST (Mar. 18, 2015), https://www.huffingtonpost.com/2015/03/18/2016-election-campaign-finance_n_6886908.html [<https://perma.cc/NH69-22FN>].

120. Fredreka Schouten, *Experts: John Kasich Political Ads Chart New Territory*, USA TODAY (Oct. 7, 2015), <https://www.usatoday.com/story/news/politics/elections/2015/10/07/john-kasich-presidential-campaign-ads-super-pac/73505108/> [<https://perma.cc/BAS6-96Y6>].

121. *Id.*

122. The advisory opinion request, 2015-09, asked questions including (1) If a non-candidate helps form a single-candidate Super PAC created to support his or her prospective candidacy, can the committee raise or spend money after candidacy is

deadlocked on every major issue by a 3-3 vote.¹²³ Providing no guidance on how the law should apply was de facto approval, though it does not prevent the FEC from one day enforcing its rules.¹²⁴

The Campaign Legal Center wrote an extensive report on prospective candidates and the actions they took to evade contribution limits.¹²⁵ The nonpartisan organization eventually filed five complaints against presidential hopefuls Jeb Bush, Martin O'Malley, Rick Santorum, and Scott Walker, alleging violations of the testing-the-waters federal laws.¹²⁶ The complaints further alleged that Bush, Santorum, and Walker had crossed the threshold to be deemed candidates by amassing campaign funds spent after declaring candidacy and for referring to themselves publicly as candidates.¹²⁷ The FEC has not ruled on any of the testing the water complaints.

Jeb Bush's pre-candidacy activity received the most media coverage, likely due to the amount of money raised and his perceived frontrunner status. In December of 2014, Jeb Bush announced he would "actively explor[e]" the possibility of running for president in 2016.¹²⁸ In January, he set up a leadership PAC and a Super PAC, both called Right to Rise.¹²⁹ The leadership PAC enabled him to travel, fundraise, and spend money directly on candidates and committees in order to curry favor in early

triggered?; (2) Can the non-candidate and the Super PAC share "information about the individuals' plans, projects, activities, or needs?"; (3) Can non-candidates and Super PACs film footage that would later be used as public communications satisfying the "content prong" of coordination in 11 C.F.R. § 109.21? Request by Senate Majority PAC and House Majority PAC, Fed. Elections Comm'n Advisory Op. No. 2015-09 (Sept. 11, 2015), <http://saos.fec.gov/aodocs/1320488.pdf> [<https://perma.cc/P7KQ-PRWX>].

123. Certification, Fed. Elections Comm'n Advisory Op. No. 2015-09, at 1 (Nov. 10, 2015), <http://saos.fec.gov/aodocs/1323173.pdf> [<https://perma.cc/T6QY-HRJC>].

124. Michael M. Franz, *The Federal Election Commission as Regulator: The Changing Evaluations of Advisory Opinions*, 3 U.C. IRVINE L. REV. 735, 763 (2013) ("[D]eadlocks send a signal that the law can be skirted, and with little likelihood of penalty after the fact.").

125. Ryan, *supra* note 116.

126. CLC Staff, *FEC Complaints Against Presidential Hopefuls Show Widespread Violations, Total Disregard for Campaign Finance Law: They Must Take the American People for Fools*, CAMPAIGN LEGAL CTR. (Mar. 31, 2015), <http://www.campaignlegalcenter.org/news/press-releases/fec-complaints-against-presidential-hopefuls-show-widespread-violations-total> [<https://perma.cc/JJ25-ZSUK>].

127. *Id.*

128. Ryan, *supra* note 116, at 10.

129. *Id.*

primary states. The Super PAC was used to raise unlimited amounts for travel and advertising, and to hire staffers.

Additionally, Bush gave a “tacit endorsement” in February 2015 to Right to Rise Policy Solutions. Ostensibly a 501(c)(4) created by Bush’s friend and former staffer to “highlight conservative, reform-minded policies,”¹³⁰ critics viewed the organization as a policy shop for the campaign, funded by secret donors.¹³¹ In June of 2015, after exploring his candidacy for five months, Bush officially declared himself a candidate.¹³² A few weeks later, the Right to Rise Super PAC announced that it had raised a total of over \$100 million since January in a “shock and awe” strategy designed to intimidate Bush’s rivals.¹³³

Bush’s pre-candidacy activity toed the line of when one should be categorized as a “candidate” under 11 C.F.R. § 100.72(b). § 100.72 provides a non-exhaustive list of examples of candidate activity, as opposed to testing-the-waters activity:

(1) The individual uses general public political advertising to publicize his or her intention to campaign for Federal office.

(2) The individual raises funds in excess of what could reasonably be expected to be used for exploratory activities or undertakes activities designed to amass campaign funds that would be spent after he or she becomes a candidate.

(3) The individual makes or authorizes written or oral statements that refer to him or her as a candidate for a particular office.

(4) The individual conducts activities in close proximity to the election or over a protracted period of time.

130. O’Keefe & Gold, *supra* note 116.

131. *Id.*

132. Michael Barbaro & Jonathan Martin, *Jeb Bush Announces White House Bid, Saying ‘America Deserves Better’*, N.Y. TIMES (June 15, 2015), <https://www.nytimes.com/2015/06/16/us/politics/jeb-bush-presidential-campaign.html> [<https://perma.cc/35KW-LSBH>].

133. Eli Stokols, *Jeb’s Shock-and-Awe Number*, POLITICO (July 9, 2015), <https://www.politico.com/story/2015/07/jeb-bush-2016-fundraising-11-million-in-16-days-119908> [<https://perma.cc/43TU-PUER>].

(5) The individual has taken action to qualify for the ballot under State law.¹³⁴

The Campaign Legal Center's FEC Complaint arguing Jeb Bush triggered candidacy focuses on the second example — that the money Jeb Bush helped raise for his various supportive spending entities was in excess of reason for testing the waters activity and was designed to amass funds used later in the campaign.¹³⁵ But the more than \$100 million Jeb Bush raised was not technically “campaign funds,” since the money was not for a campaign committee or any other authorized committee. In his first campaign finance report, Bush reported spending \$389,000 of his own money on testing-the-waters activity.¹³⁶ Bush's campaign spokeswoman said in a statement,

Jeb 2016's first report affirms what we have publicly stated over the past few months: that if Governor Bush engaged in any testing-the-waters activities that they would be paid for appropriately, and that if Governor Bush decided to run for office that any testing-the-waters expenses would be reported at the required time.¹³⁷

Thus, Bush simply separated activities that he viewed as pre-candidacy and funded those himself from his unrelated other efforts coordinating with political spending entities created to assist his future candidacy.

Despite this loophole, it would not be difficult for a vigorous FEC to find Bush's actions violated candidate registration and reporting requirements. The 1981 Advisory Opinion on Governor Askew emphasized that candidacy would be triggered if activities “took place in a *factual context* indicating that Governor Askew ha[d] moved beyond the deliberative process of deciding to become a candidate.”¹³⁸ The examples listed in 11 C.F.R. § 100.72

134. 11 C.F.R. § 100.72(b) (2019).

135. *FEC: Complaint Filed by CLC et al. Against Jeb Bush*, CAMPAIGN LEGAL CTR. 16 (Mar. 31, 2015), <http://www.campaignlegalcenter.org/document/fec-complaint-filed-clc-et-al-against-jeb-bush> [<https://perma.cc/ED3P-PNB7>].

136. Patricia Mazzei, *Jeb Bush Put \$388K of His Own Cash into Campaign*, MIAMI HERALD (July 15, 2015), <http://miamiherald.typepad.com/nakedpolitics/2015/07/jeb-bush-put-388k-of-his-own-cash-into-campaign.html> [<https://perma.cc/XZ76-UDK9>].

137. *Id.*

138. Fed. Election Comm'n, *supra* note 115, at 5 (emphasis added).

of candidate activity “seek to draw a distinction between activities directed to an evaluation of the feasibility of one’s candidacy, as distinguished from conduct signifying that a private decision to become a candidate has been made.”¹³⁹ Since the FEC looks objectively to candidate activities, and “not to the stage of the individual’s subjective decision-making process,” to determine candidacy, a reasonable assessment of Bush’s pre-candidacy PAC formations, fundraising, hiring, traveling, and even lobbying of early primary states to change their nominating procedures, demonstrates he had made up his mind to run long before his formal declaration.¹⁴⁰ However, since the FEC has not strictly construed testing-the-waters regulations, the pre-candidacy phase of a campaign has become another avenue for candidates to work directly with outside groups.

D. OUTSIDE GROUPS USING THE MEDIA TO COORDINATE STRATEGY

As 2016 campaigns tacitly placed greater responsibility for implementing internal campaign strategies on single-candidate outside groups, they relied increasingly on the media to direct outside allies. Professor Briffault writes persuasively that coordination rules revolving around “substantial discussion” between a candidate and an outside group’s sponsors are outdated in the internet age:

This emphasis on close contact or interchange with respect to specific expenditures may be said to reflect naïve thinking about the way a candidate, or candidate’s committee, and a supportive organization can coordinate. Candidates and committees don’t have to talk to each other; they can communicate through the press. . . . Surely today, with candidates, campaigns, parties, and political committees all maintaining websites and Facebook pages,

139. Fed. Election Comm’n, Matter Under Review 6449, Factual and Legal Analysis, 6 (2013) <http://eqs.fec.gov/eqsdocsMUR/13044331943.pdf> [<https://perma.cc/TQZ5-N49V>].

140. Fed. Election Comm’n, Matter Under Review 5363, Factual and Legal Analysis, at 7–8 (Nov. 13, 2003), <http://eqs.fec.gov/eqsdocsMUR/000007F9.pdf> [<https://perma.cc/YZ7W-K52Q>]; Josh Voorhees, *Jeb Bush, the Undecider-in-Chief*, SLATE (June 1, 2015), http://www.slate.com/blogs/the_slatest/2015/06/01/jeb_bush_the_undecider_in_chief_how_the_gop_hopeful_is_making_a_mockery.html [<https://perma.cc/S8DZ-RZDR>].

and campaign operatives posting their latest thoughts to their Twitter accounts, direct contacts between campaigns and outside groups are unnecessary: Why do they have to meet when they can tweet?¹⁴¹

2016 had no shortage of communications between campaigns and outside groups through the media. As discussed in Part V.A, the Fiorina campaign posted her schedule online for her supporting Super PAC, CARLY for America, to set up events.¹⁴² Other Super PAC efforts seemingly duplicated Fiorina's campaign activities, but the executive director of CARLY for America was not concerned, explaining "I would think that if the campaign read about our approach in *The Wall Street Journal* then they wouldn't want to duplicate efforts."¹⁴³ In other words, no direct cooperation was necessary for Fiorina and her supporting Super PAC to divvy up campaign responsibilities.

The Ted Cruz campaign used the media to communicate indirectly with its supporting Super PAC. Cruz advisors, frustrated with the PAC's activities, explained to Politico that, "[t]he total absence of ads has created confusion and growing consternation."¹⁴⁴ The campaign posted several hours of positive footage to YouTube, hoping for outside groups to air ads, and told Politico that if the groups did not use the footage, the campaign would.¹⁴⁵ Similarly, after Jeb Bush declared candidacy, his supporting Super PAC Right to Rise used the media to communicate with the campaign. Prior to the Iowa Caucus, the Associated Press reported that Right to Rise was "considering placing organizing staff in Iowa and New Hampshire," to support Bush.¹⁴⁶ Two days later, the campaign "leaked" an internal document showing where in Iowa the campaign needed help.¹⁴⁷

141. Briffault, *supra* note 65, at 93–94.

142. Corasaniti, *supra* note 101.

143. Epstein & Ballhaus, *supra* note 100.

144. Shane Goldmacher, *Cruz's Silent Super PACs a Growing Worry for Campaign*, POLITICO (Nov. 2, 2015), <https://www.politico.com/story/2015/11/ted-cruz-silent-super-pacs-2016-215422> [<https://perma.cc/D6KZ-4VG5>].

145. *Id.*

146. Phillip Bump, *How Jeb Bush May Have Just Outsourced a Key Part of His Campaign*, WASH. POST (Nov. 1, 2015), <https://www.washingtonpost.com/news/the-fix/wp/2015/11/01/how-jeb-bush-may-have-just-outsourced-a-key-part-of-his-campaign/> [<https://perma.cc/Q4ZF-CZXV>].

147. *Id.*

E. OUTSIDE GROUPS USING UNPAID ONLINE COMMUNICATIONS TO COORDINATE DIRECTLY WITH CAMPAIGNS

Correct the Record, a committee supporting Hillary Clinton, ignited another method of campaign outsourcing in the 2016 election cycle.¹⁴⁸ The committee used its non-contribution account — money intended only for independent expenditures — to explicitly coordinate with the Clinton campaign through online activity.¹⁴⁹ It engaged in a digital media strategy of creating and posting video and graphic content to Correct the Record’s social media accounts, while also responding to online political attacks.¹⁵⁰ Correct the Record founder David Brock acknowledged that the group discussed strategy with Clinton and her campaign staff: when a video of Clinton falling ill went viral online, Brock stated that the committee did not respond, choosing to wait for “guidance from the campaign.”¹⁵¹

Correct the Record claims coordination regulations did not apply because certain online activity is exempted from the definition of “public communications” between candidates and outside groups in C.F.R. § 109.21.¹⁵² The exemption was made to avoid “impeding individual citizens from using the Internet to speak freely regarding candidates and elections.”¹⁵³ However, as the Campaign Legal Center makes clear in their FEC complaint about Correct the Record’s activity, this exemption does not apply to another statute, 11 C.F.R. § 109.20, which more broadly regulates coordinated expenditures.¹⁵⁴ Since coordinated expenditures are in-kind contributions, Correct the Record’s

148. Correct the Record is a Carey committee. See *supra* note 28.

149. Michael Scherer, *Hillary Clinton’s Bulldog Blazes New Campaign Finance Trails*, TIME (Sept. 10, 2015), <http://time.com/4028459/david-brock-hillary-clinton-media-matters/> [<https://perma.cc/FHN4-42N9>].

150. Clare Foran, *A \$1 Million Fight Against Hillary Clinton’s Online Trolls*, ATLANTIC (May 31, 2016), <https://www.theatlantic.com/politics/archive/2016/05/correct-the-record-online-trolls/484847/> [<https://perma.cc/6LNM-P6HN>].

151. Jason Horowitz, *Inside Hillary Clinton’s Outrage Machine, Allies Push the Buttons*, N.Y. TIMES (Sept. 22 2016), <https://www.nytimes.com/2016/09/23/us/politics/hillary-clinton-media-david-brock.html> [<https://perma.cc/8G2T-JZ3Q>].

152. Internet Communications, 71 Fed. Reg. 18589 (Apr. 12, 2006) (codified at 11 C.F.R. §§ 100, 110, and 114).

153. *Id.*

154. 11 C.F.R. § 109.20(a) (2019). In-kind contributions are “goods or services offered for free or less than usual charge.” FED. ELECTION COMM’N, *supra* note 18; 11 C.F.R. § 109.20(b).

various activities on everything from campaign trackers, to commissioning private polling, to travel expenses should be treated as in-kind contributions.

Additionally, the internet exemption to public communication exempts only those internet services for which an individual does not receive any compensation.¹⁵⁵ The payments to the staff of Correct the Record to create online content were still expenditures. These expenditures, to the extent they were coordinated with the campaign under 11 C.F.R. § 109.20, are in-kind contributions that are subject to contribution limits and should be reported by the campaign as an expenditure. The FEC has not responded to the complaint or clarified the proper regulations on paid political committee online communications. Without FEC action, future campaigns may follow this strategy of delegating rapid response duties, online content production and disbursement, and opposition research to committees that freely coordinate with candidates.

F. TAX-EXEMPT GROUPS ADOPTING CAMPAIGN FUNCTIONS

2016 witnessed increased participation of tax-exempt groups, specifically 501(c)(4)s, in campaigns. The testing-the-waters loophole applies to these tax-exempt organizations as well, allowing candidates to coordinate directly with their non-profits for several months before officially announcing their candidacies. Political activities through 501(c)(4)s are best known for pumping so-called “dark money” into the system, referred to as such since public disclosure of these contributions can be avoided.¹⁵⁶ The

155. The FEC explained that “bloggers would not lose eligibility for the exceptions by selling advertising space to defray the operating costs of the blog, but would not be eligible for the exceptions for campaign work for which the blogger is compensated by a campaign committee or any other political committee. For example, if a political committee pays a blogger to write a message and post it within his or her blog entry, the resulting blog entry would not be exempted as ‘uncompensated Internet activity.’” Internet Communications, *supra* note 152, at 18604.

156. Dark money is any political spending in which the source of the money is unknown. 501(c)(4)s can avoid disclosing their political spending in many cases and are considered dark money groups. Super PACs, while required to disclose their donors, can accept money from corporations and nonprofits that have no identifiable sources of funding themselves. Thus, super PACs can also be considered dark money groups when the source of the spending cannot be traced back to specific individuals or ideological groups. *Dark Money Basics*, CTR. FOR RESPONSIVE POL., <https://www.opensecrets.org/dark-money/basics> [<https://perma.cc/G7JV-XVXG>] (last visited Jan. 18, 2019).

“catch” to this type of political spending is that political activity cannot be the entity’s “primary activity.”¹⁵⁷ However, IRS officials concede that the rules are murky and difficult to enforce since “[a]udits for excessive campaign work are extremely rare” and records show “[c]omplaints about abuses can languish for years . . .”¹⁵⁸

501(c)(4)s are especially attractive options for candidates seeking to avoid disclosure because the entire entity could engage in political activity, affect an election, and shut down before the IRS could even begin an investigation. 501(c)(4)s are not required to notify the IRS before they begin operating, and effectively have a 22.5 month grace period before any piece of paper must be filed.¹⁵⁹ Though active in the 2012 cycle, candidate-centric 501(c)(4)s played a more vital role for candidates early in the 2016 campaign cycle. Hillary Clinton, Jeb Bush, Marco Rubio, and Rick Santorum all had candidate-centric 501(c)(4)s. The non-profits were used to hire “staffers-in-waiting” during the pre-candidacy phase, conduct policy research, and engage in express advocacy.¹⁶⁰

In May of 2017, the Center for Responsive Politics obtained documents regarding a 501(c)(4) that supported Rubio’s campaign. The group, Conservative Solutions Project (CSP) claimed it promoted a general conservative agenda, but its advertisements almost exclusively featured Rubio and aired in

157. Reilly & Allen, *supra* note 34, at L-2.

158. Eric Lichtblau, *I.R.S. Expected to Stand Aside as Nonprofits Increase Role in 2016 Race*, N.Y. TIMES (July 5, 2015), <https://www.nytimes.com/2015/07/06/us/politics/irs-expected-to-stand-aside-as-nonprofits-increase-role-in-2016-race.html> [https://perma.cc/L3CB-39UR].

159. Forms are normally due five-and-a-half months after the end of a group’s fiscal year, but “all organizations get an automatic three-month extension as a matter of course, along with another optional three-month extension, which most organizations take. Put that all together, and you could operate your 501(c)(4) for a year, then wait another ten-and-a-half months to file, and in November of 2016, all the IRS would know about your organization would be what you did in 2015. By the time you filed your 2016 returns in late 2017, you could have long since closed up shop. The fact is, we may have no way of knowing who funded the main presidential candidates next cycle until the election is long over.” Robert Maguire, *Latest Candidate Must-Have: Your Very Own Dark Money Group*, CTR. FOR RESPONSIVE POL. (Nov. 10, 2014), <https://www.opensecrets.org/news/2014/11/latest-candidate-must-have-your-very-own-dark-money-group/> [https://perma.cc/TQ3B-GYVT].

160. John D. McKinnon, *Tax-Exempt Groups Give 2016 Hopefuls a Boost*, WALL ST. J. (June 8, 2015), <https://www.wsj.com/articles/tax-exempt-groups-give-2016-hopefuls-a-boost-1433802587> [https://perma.cc/LEJ9-AZZS].

early primary states.¹⁶¹ Additionally, CSP shared the same founder and spokesperson as the pro-Rubio Super PAC Conservative Solutions PAC. The tax filings show (1) millions of dollars spent on ads, research, and polling; (2) little or no money spent on social welfare despite the requirement that the entity's primary activity is not political spending; and (3) no reports to the FEC regarding any of its spending.¹⁶² 93% of CSP's revenues came from two anonymous donations which may or may not have come from the same source.¹⁶³ The evidence suggests that CSP is best understood not as a social welfare organization, but as a single-candidate outside group funded by a few wealthy donors and serving traditional campaign functions. In October 2015, Citizens for Responsibility and Ethics in Washington requested that the IRS investigate whether CSP was operating primarily to influence political campaigns and for the private benefit of Rubio.¹⁶⁴ The IRS has not publicly announced any investigation. If the IRS continues to ignore credible allegations of tax code violations, future candidates aiming to shelter their donors from disclosure may turn to these social welfare organizations to advance their candidacies.

The increased sophistication of outside groups, and their collaboration with campaign committees, has transformed the electioneering landscape. Candidates are increasingly connected to Super PACs and 501(c)(4)s that create advertisements in all mediums, engage in grassroots campaigning, and conduct research and polling. The indispensable role of outside groups to individual campaigns creates an indispensable role for wealthy donors to fund these operations. Part VI highlights the democratic problems with this system and proposes a solution to funnel money back to candidates and their formal committees.

161. Chloe Nurik, *Conservative Solutions PAC/Conservative Solutions Project*, FACTCHECK.ORG (Feb. 4, 2016), <http://www.factcheck.org/2016/02/conservative-solutions-pacconservative-solutions-project/> [https://perma.cc/A4BD-Z7U7]

162. Robert Maguire, *Two (at Most) Secret Donors Funded 93% of Pro-Rubio Nonprofit*, CTR. FOR RESPONSIVE POL. (May 3, 2017), <https://www.opensecrets.org/news/2017/05/two-donors-funded-rubio-nonprofit/> [https://perma.cc/D66A-U7AK]

163. *Id.*

164. Letter from Noah Bookbinder, Exec. Dir., Citizens for Responsibility and Ethics in Wash., to John A. Koskinen, Comm'r, Internal Revenue Serv. (Oct. 20, 2015), http://s3.amazonaws.com/storage.citizensforethics.org/ec56d3e05c15d78afa_hom6i0req.pdf [https://perma.cc/2QLK-5XNT].

VI. REMOVING CONTRIBUTION LIMITS ON INDIVIDUAL DONORS AND POLITICAL PARTIES TO PRESIDENTIAL CAMPAIGNS

Future presidential candidates may continue to mainstream these tactics to circumvent the \$2700 contribution limits for individuals and \$5000 from SSFs and non-connected PACs, but it is unclear what democracy gains from a system that informally permits unlimited amounts of money to fund a presidential candidate. *Buckley's* primary reasoning for not limiting independent expenditures was that “the absence of prearrangement and coordination . . . not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.”¹⁶⁵ Since campaigns are delegating campaign functions to outside groups, and signaling so to donors, the reasoning in *Buckley* does not hold — the expenditure’s value is hardly undermined, and the coordination between campaigns and outside groups makes the corruption danger just as prevalent. This Part discusses how the practice of outside groups pulling campaign strings weakens U.S. democracy and then proposes that removing all contribution limits on individual and political party donations to presidential campaigns, while retaining the complete prohibition on contributions from traditional PACs, Super PACs, 527s, and 501(c)s to campaigns, can in fact strengthen democracy.

A. THE PROBLEM WITH OUTSIDE GROUPS PULLING CAMPAIGN STRINGS

American democracy is weakened by outside groups playing a significant role in campaigns because of decreased donor transparency, increased negativity without accountability, and voter confusion. Outside groups are infamous for their ability to shield the identity of donors. 501(c)(4) entities can avoid public disclosure of contributors,¹⁶⁶ and Super PACs can as well by

165. *Buckley v. Valeo*, 424 U.S. 1, 47 (1976).

166. Russ Choma, *Nonprofits, Shell Corporations Help Shield Identity of Ad Backers*, CTR. FOR PUB. INTEGRITY (Oct. 30, 2012), <https://www.publicintegrity.org/2012/10/30/11661/nonprofits-shell-corporations-help-shield-identity-ad-backers> [https://perma.cc/J3S6-7Q6P].

raising money through corporations that mask the true identity of donors.¹⁶⁷ Thus, megadonors can remain anonymous by making a contribution through an entity like a corporation or a 501(c)(4).

Donor disclosure is one of the few widely upheld campaign finance measures across the judicial ideological spectrum. Donor disclosure furthers democratic transparency and prevents wealthy individuals and groups from spending large amounts of money in the shadows, imposing their interests on lawmakers without public awareness of such influence. In the only portion of Justice Kennedy's *Citizens United* opinion with the support of eight justices, the Court upheld the disclaimer and disclosure provisions of the Bipartisan Campaign Reform Act at issue in the case.¹⁶⁸ Kennedy noted the importance of transparency to the democratic process — not only does it provide the electorate with valuable information about how to “give proper weight to different speakers and messages, but it also allows citizens to react to the speech accordingly.¹⁶⁹ Justice Scalia also defended election-related disclosure in *Doe v. Reed*, rejecting the plaintiff's concerns that disclosure of petition signatures may lead to threats or intimidation: “[r]equiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed.”¹⁷⁰

167. *Id.*

168. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 366, 371 (2010). *Citizens United* challenged BCRA's disclaimer and disclosure provisions in § 311 and § 201. “Under BCRA § 311, televised electioneering communications funded by anyone other than a candidate must include a disclaimer that “_____ is responsible for the content of this advertising.” 2 U.S.C. § 441d(d)(2) (2014). The required statement must be made in a ‘clearly spoken manner,’ and displayed on the screen in a ‘clearly readable manner’ for at least four seconds. *Ibid.* It must state that the communication ‘is not authorized by any candidate or candidate’s committee’; it must also display the name and address (or Web site address) of the person or group that funded the advertisement. § 441d(a)(3). Under BCRA § 201, any person who spends more than \$10,000 on electioneering communications within a calendar year must file a disclosure statement with the FEC. 2 U.S.C. § 434(f)(1). That statement must identify the person making the expenditure, the amount of the expenditure, the election to which the communication was directed, and the names of certain contributors. § 434(f)(2).”

169. *Id.*

170. *John Doe No. 1 v. Reed*, 561 U.S. 186, 228 (2010). Of course, there are real consequences to revealing political donations that cannot be dismissed by merely prioritizing political courage. Professor (and former Senate candidate) James Huffman argues that disclosure laws harm a challenger's ability to raise smaller dollar donations against a powerful incumbent of the same party. Interest-minded donors fear retributions for their disloyalty in the form of less attention and support on legislation or agency-

Outside groups driving U.S. presidential contests also exacerbate the maliciousness of campaigns. Candidates are not required to endorse advertisements from outside groups, allowing the office seeker to deflect blame for any negative content. One glaring example was John Kasich's spat with Senator Ted Cruz during the Republican primary. Kasich's campaign prided itself on unwavering positivity, promising to "raise the bar in presidential politics."¹⁷¹ However, a pro-Kasich Super PAC, which worked directly with Kasich before his announcement, aired an attack advertisement against Ted Cruz: "If Ted Cruz's mouth is moving, he's lying," the advertisement claimed while showing the Senator's nose growing and wrapping around his neck in Pinocchio-like fashion.¹⁷² The Kasich campaign voiced tacit disapproval of the ad and avoided responsibility since the official campaign committee did not create the ad.¹⁷³ Coincidentally, the advertisement was created in response to a negative advertisement by a Super PAC supporting Ted Cruz, not by Cruz's campaign itself.¹⁷⁴ While negative advertisements can convey important information to voters, it is important that candidates be held responsible for inaccurate or misleading content created for their benefit.¹⁷⁵

related matters. James Huffman, *How Donor Disclosure Hurts Democracy*, WALL ST. J. (Apr. 11, 2011), <https://www.wsj.com/articles/SB10001424052748704415104576250503491062220> [<https://perma.cc/8H23-8P8S>]. These concerns are less persuasive at the presidential level, where it is unusual for an incumbent president to face a challenger by a member of her own party. Also, the amount of funding required minimizes the importance of small donor donations. At the state and congressional level, a disclosed donation of a few hundred dollars may prompt placement on an incumbent's secret blacklist. But presidential campaigns require thousands of donors and millions of dollars, making it less likely a candidate would hold a grudge against a person or corporation for giving a small donation to an opponent. If the donation is substantial, then the public interest in knowing such political activity outweighs the risk the donor or entity faces in being revealed.

171. Tim Hains, *John Kasich Closing Statement: "I Have Run An Unwavering Positive Campaign,"* REAL CLEAR POLITICS (Mar. 10, 2016), https://www.realclearpolitics.com/video/2016/03/10/john_kasich_closing_statement_i_have_run_an_unwavering_positive_campaign.html [<https://perma.cc/9CES-XGE8>].

172. Ben Goldschmidt, *Pro-Kasich PAC Releases "Terrifying" Anti-Cruz Ad*, CINCINNATI ENQUIRER (Mar. 31, 2016), <https://www.cincinnati.com/story/news/politics/blogs/2016/03/31/pro-kasich-pac-releases-terrifying-anti-cruz-ad/82494724/> [<https://perma.cc/N5PG-T5MX>].

173. *Id.*

174. *Id.* (A spokeswoman for the Kasich PAC, Connie Wehrkamp, explained, "We're upset about the Ted Cruz Super PAC ad attacking John Kasich.")

175. It is no surprise that the increased negativity has a deterrent effect on voter turnout as well. See Hannah Griffin, *Keep it Clean? How Negative Campaigns Affect*

Third, outside group communications create general confusion among voters and donors. Even when their messages and strategies are aligned with the campaigns, the “intensity and multiplicity of messages emanating from various committees . . . requires substantial processing effort by citizens,” and it is unclear if voters are able to “sort through the noise to make decisions that reflect their priorities or preferences.”¹⁷⁶ In *The New Soft Money*, which investigates outside spending’s effect on congressional elections, authors Daniel Tokaji and Renata Strause found that “there was broad agreement among campaign staff that voters either do not perceive or do not care about distinctions between advertisements coming from outside groups and ads coming from the campaign.”¹⁷⁷ The onslaught of communications also confuses donors that are unsure if they have given to a campaign or outside group.¹⁷⁸ Shifting money away from poorly regulated outside groups would result in a more transparent and positive presidential contest.

B. THE PROPOSAL AND ITS BENEFITS

At this troubling point in judicial precedent and regulatory enforcement, ending certain contribution limits on individual and political party donations to presidential campaigns, while retaining the current regulations and prohibitions on contributions from traditional PACs, Super PACs, 527s, and 501(c)s, offers tangible benefits to democracy.

This proposal would not affect current contribution regulations on outside groups to campaigns because, as discussed in Part VI.A, outside groups have fewer disclosure requirements. If those groups could contribute unlimited amounts directly to campaigns, their increasingly dominant role in presidential campaigns would likely remain. Similarly, the proposal does not

Voter Turnout, 17 RES PUBLICA – J. UNDERGRADUATE RES. 1, 1 (2012) (“This study examines the effects of negative political campaigns on voter turnout over the last 10 years. . . . It is measured by state exit poll responses over the past 10 years, and its effect on voter turnout is analyzed using multiple regression. The analysis reveals that when neither candidate is perceived to be ‘going negative,’ voter turnout goes up.”).

176. Raymond J. La Raja, *Richer Parties, Better Politics? Party-Centered Campaign Finance Laws and American Democracy*, 11 FORUM 313, 324 (2013).

177. DANIEL P. TOKAJI & RENATA E. B. STRAUSE, *THE NEW SOFT MONEY* 61 (2014).

178. *Id.*

remove contribution limits on corporations. If megadonors could contribute directly through corporate entities, there could be a surge in shell corporations to shield the true identity of the donors.

The proposal lifts individual contribution limits because megadonors, extremely wealthy individuals contributing to political activity, provide the bulk of funding to outside groups.¹⁷⁹ In October 2015, three months before the first primaries began, just 158 families contributed nearly half (\$176 million) of the money spent on the presidential race.¹⁸⁰ These donors are overwhelmingly white, middle-aged or older, and male and are likely to have made their fortunes in energy or finance.¹⁸¹ While megadonors contribute to both parties, they are more likely to contribute to Republican candidates who support paring down regulations and cutting taxes on income, capital gains and inheritance.¹⁸² Nearly 90% of the money for the pro-Jeb Bush PAC Right to Rise came from individual donors.¹⁸³ According to a Washington Post report published a week before the 2016 election, the top fifty donors supplied 37% of all the money raised.¹⁸⁴

Allowing individuals and parties to provide unlimited funds to candidates would diminish the appeal of outside groups to campaigns. Candidate-centric outside groups are less effective than direct campaign funds because of transaction and communication costs.¹⁸⁵

179. See Nicholas Confessore et al., *The Families Funding the 2016 Presidential Election*, N.Y. TIMES (Oct. 10, 2015), <https://www.nytimes.com/interactive/2015/10/11/us/politics/2016-presidential-election-super-pac-donors.html> [<https://perma.cc/HWX5-49TZ>].

180. *Id.*

181. *Id.*

182. *Id.*

183. *Right to Rise USA*, CTR. FOR RESPONSIVE POL., <https://www.opensecrets.org/pacs/lookup2.php?strID=C00571372&cycle=2016> [<https://perma.cc/AK6K-M7YQ>] (last visited Jan. 13, 2019). Right to Rise raised \$121,695,224; contributions from individual donors totaled \$108,253,837. *Id.*

184. Anu Narayanswamy et al., *Meet the Wealthy Donors Who Are Pouring Millions into the 2016 Elections*, WASH. POST (Nov. 2, 2016), <https://www.washingtonpost.com/graphics/politics/superpac-donors-2016/?noredirect=on> [<https://perma.cc/H5NN-FKWM>].

185. Smith, *supra* note 78, at 608 (“Even where the candidate provides direct instruction and content to the spender, the coordinated spending still involves transaction and monitoring costs that are almost certainly higher than those involved in a direct contribution to the campaign. There is the possibility that the orders will be garbled or misinterpreted, or that the spender will decide to alter or adjust them in ways contrary to

For instance, broadcast television and radio rates are cheaper for authorized candidate committees than outside groups.¹⁸⁶ Further, candidates would likely prefer to avail themselves of large donations without having to jump through coordination hoops that so many of the 2016 presidential contenders engaged in like delaying candidacy, siphoning off loyal campaign aides to outside groups, and publicly unveiling campaign strategies in order to indirectly communicate with supporting groups.

It is possible that some megadonors, prioritizing anonymity over maximum benefit to a campaign, would prefer the current configuration of contributing vast sums of money to outside groups that function as arms of the campaign. But there is evidence that megadonors seeking influence or access are less inclined to support an outside group that a candidate has not strongly endorsed. As discussed in Part V.A, above, both President Obama in 2012 and Hillary Clinton in 2016 endorsed the Super PAC Priorities USA.¹⁸⁷ But while Hillary Clinton openly raised money for Priorities USA and attended its events, President Obama's endorsement was much more half-hearted.¹⁸⁸ President Obama's campaign manager Jim Messina made it clear that "the president, vice president, and first lady will not be a part of [Priorities USA]; their political activity will remain

the preferences of the candidate. The candidate will lose the flexibility to rapidly reallocate spending and resources as conditions change daily in the campaign.”).

186. Political candidate committees qualify for a discounted rate on broadcast television and radio time beginning forty-five days before a primary election and sixty days before a general election. Candidate committees can only be charged the “lowest unit rates” which equals the lowest rate for a spot that is then running on the stations within any class of advertising time. See 47 C.F.R. § 73.1942(a)(1)(i) (2018) (“A candidate shall be charged no more per unit than the station charges its most favored commercial advertisers for the same classes and amounts of time for the same periods. Any station practices offered to commercial advertisers that enhance the value of advertising spots must be disclosed and made available to candidates on equal terms. Such practices include but are not limited to any discount privileges that affect the value of advertising, such as bonus spots, time-sensitive make goods, preemption priorities, or any other factors that enhance the value of the announcement.”).

187. *Supra* Part V.0.

188. Haberman & Confessore, *supra* note 93. Reports eventually surfaced that Obama did attend a Priorities USA function at a Beverly Hills donor's home. The White House described the event as a “thank you” for a “small group of donors.” Julianna Goldman & Reena Flores, *Hillary Clinton Starts Raising Money for Super PAC*, CBS NEWS (May 7, 2015), <https://www.cbsnews.com/news/hillary-clinton-starts-raising-money-for-super-pac/> [<https://perma.cc/9N3X-U6JZ>].

focused on the president's campaign."¹⁸⁹ The differences in enthusiasm likely contributed to the vast differences in amounts raised for the committee: \$79 million in 2012 and \$192 million in 2016. Bill Burton, a founder of Priorities USA, admitted that during the 2012 cycle, "one of the hardest things I've ever done professionally was try to raise tens of millions of dollars to help a candidate who donors initially thought was indifferent to the effort."¹⁹⁰

The disparity offers an interesting case study in the motivation of donors. In both 2012 and 2016, the Super PAC was endorsed by the campaign, but it was more difficult to solicit donations when the candidate was openly uncomfortable with interacting with the PAC. This supports the contention that "[i]f a candidate raises money for a certain Super PAC and sends top staffers to work for it, that is a clear signal to donors that the candidate supports the PAC's spending, and may reward Super PAC donors in the same way as campaign contributors."¹⁹¹ The massive fundraising success of Priorities USA in the 2016 cycle, when donors were more likely to feel rewarded for their contributions, compared to 2012, illustrates that megadonors seeking access and influence over policy would be less likely to support an outside group that a candidate dismisses.

Along with individual limits on contributions, limits on state and national political party donations to presidential candidates should also be eliminated.¹⁹² As with removing contribution limits on individuals, lifting the cap on political party contributions to candidates would also reduce the political power of outside groups that lack transparency and accountability. Political parties, as longstanding institutions in American society, have a unique ability to reduce polarization, improve

189. Jim Messina, *We Will Not Play by Two Sets of Rules*, HUFFINGTON POST (Feb. 6, 2012), https://www.huffingtonpost.com/jim-messina/we-will-not-play_b_1258911.html [<https://perma.cc/L3BL-N2AD>].

190. Haberman & Confessore, *supra* note 93.

191. Brent Ferguson, *Super PACs: Gobbling Up Democracy?*, BRENNAN CTR. FOR JUST. (June 23, 2015), <https://www.brennancenter.org/analysis/super-pacs-gobbling-> [<https://perma.cc/7X9X-N4VT>].

192. There is less urgency to raise the maximum amount a donor can contribute to a political party, since that number is estimated at over \$750,000. Kenneth Vogel, *The Man Behind the Political Cash Grab*, POLITICO (Dec. 13, 2014), <https://www.politico.com/story/2014/12/democratic-lawyer-crafted-campaign-finance-deal-113549> [<https://perma.cc/3DT6-FLBV>].

voter mobilization electioneering, push broader-purpose public policy, nominate moderate candidates, and empower professionals that have the incentives and expertise to properly report campaign operations.¹⁹³

In contrast to the moderating incentives of the political party network, powerful outside groups that prioritize a single issue or candidate are less accountable to wider party priorities and constituencies. As Professor La Raja contends, “the party committees are structurally accountable to a broader constituency of officeholders and activists, including those at the state and local level. This wider accountability plausibly shifts the issue agenda away from narrow policy concerns of the most engaged activists that support Super PACs.”¹⁹⁴ Removing contribution limits on political parties would strengthen their political power relative to outside groups, bolstering more widely acceptable candidates in the primary process.¹⁹⁵

However, ending the cap on individual contributions to presidential campaigns, as this Note also proposes, seemingly contradicts the idea of a moderating, party-centric campaign system. For instance, unlimited contributions to candidates would continue the trend of first term senators gaining an “independent base of power” without the need for party

193. La Raja, *supra* note 176, at 313, 326 (“In theory and practice, research shows that political parties have been essential for grooming and disciplining candidates, waging campaigns that inform and mobilize voters, and ultimately organizing government to implement broadly supported policies. . . . Despite shortcomings, their enduring party “brand” and institutionalized roles across all levels of government have promoted stability, collective action and responsiveness in the American political system.”).

194. Raymond La Raja, *Why Super PACs: How the American Party System Outgrew the Campaign Finance System*, 10 FORUM 91, 103 (2013).

195. The election of Donald Trump has cast doubt on the receptivity of voters to signals from powerful party players. Conor Friedersdorf, *How the Party Decided on Trump*, THE ATLANTIC (May 3, 2016), <https://www.theatlantic.com/politics/archive/2016/05/how-gop-influencers-cued-voters-to-choose-donald-trump/480294/> [https://perma.cc/L7XX-M5SD]. Friedersdorf argues that the party players never “decided” on a single candidate which opened the door for an outsider to capture the nomination without a majority of support in the primaries. Further, many members of “the party” that abhorred Trump sent mixed signals to voters about his candidacy. Lastly, Trump’s success does not discredit the “party decides” theory, but rather re-arranges the power dynamics of different players. The office holders and media elites that supported Trump — Rush Limbaugh, Sean Hannity, The New York Post, Breitbart, Chris Christie, Jeff Sessions — have more power than other factions that opposed him like the National Review, Mitt Romney, and John McCain.

support.¹⁹⁶ Such autonomy fosters political leaders with narrower objectives than political parties that aggregate a broad range of interests. Moreover, wealthy donors tend to be more ideologically extreme.¹⁹⁷ Giving wealthy donors such an open invitation to fund a candidate would be unhelpful to the cause of depolarization and party strengthening.

Professors La Raja and Shaffner argue that “laws limiting money to candidates but leaving party contributions unlimited would channel more money and donations to parties.”¹⁹⁸ In particular, money from extremist ideological donors “can be ‘pushed’ into supporting the parties when they face constraints against giving to candidates but not to parties.”¹⁹⁹ These theories offer a false binary choice for wealthy donors between candidates and parties, ignoring candidate-centric outside groups. While never directly addressing the issue of outside groups acting as de facto campaign arms, La Raja and Shaffner do concede that:

Outside spending in federal elections is now firmly institutionalized and is unlikely to dissipate any time soon. Super PACs and 501(c)4s have attracted the intense support of very wealthy individuals and prominent national issue groups. These political actors will continue to focus their considerable resources on targeted races, even if the parties become financially stronger. The potential for exerting national-level influence, even when races are lost, is simply too enticing for them to resist. A casino magnate like Sheldon Adelson surely understands that he advances his cause with a gamble on targeted races, even when his candidate loses.²⁰⁰

Proponents of campaign finance laws should advocate for policy changes grounded in the reality of a system in which legal

196. Richard Pildes, *How to Fix Our Polarized Politics? Strengthen Political Parties*, WASH. POST (Feb. 6, 2014), https://www.washingtonpost.com/news/monkey-cage/wp/2014/02/06/how-to-fix-our-polarized-politics-strengthen-political-parties/?noredirect=on&utm_term=.60c5ca59843c [<https://perma.cc/5C38-4J4P>].

197. RAYMOND J. LA RAJA & BRIAN F. SCHAFFNER, *CAMPAIGN FINANCE AND POLITICAL POLARIZATION: WHEN PURISTS PREVAIL* 41 (2015).

198. *Id.* at 59.

199. *Id.*

200. *Id.* at 146.

restrictions on outside groups are judicially unobtainable. Freeing political parties from contribution caps, but keeping strict contribution limits on campaigns, would do little to prevent wealthy donors from supporting their candidates through candidate-centric outside groups (particularly at the presidential level where these outside groups are increasingly common). By removing the restrictions on both campaigns *and* parties, political resources would be shifted back to traditional campaign organizations with more reporting requirements and public accountability.

Removing campaign contribution limits on individuals and political parties could also pressure candidates not to affiliate themselves with anonymous outside groups. In the post-*Citizens United* presidential cycles, candidates using outside groups have not paid a significant political price for their questionable coordination with outside groups, and can evade responsibility for misleading and malicious attack advertisements by their PACs. Working within the system, while strongly condemning its inefficiency and complexity, has been the standard playbook. However, if candidates had the opportunity to raise essentially unlimited money directly, there could be greater political costs to signaling support for an outside group that accepts dark money and produces vicious attack advertisements.

This is especially true since the political cost of associating with outside groups is rising. In the 2016 presidential race, voters signaled their concerns about money's influence in politics in the unexpected successes of Bernie Sanders and Donald Trump, both of whom refused to endorse candidate-centric outside groups during the primaries.²⁰¹ On the left, refusing to

201. Donald Trump had a unique relationship with multiple Super PACs formed to aid his candidacy; he originally used his lack of affiliation with independent expenditure groups as a campaign selling point. During the primary, he scolded his Republican rivals for being "in total cahoots with their [super] PACs, which they're not allowed to be . . . They put their friends in there. One good thing about me: I'm not." Matea Gold et al., *The Inside Story of Trump Campaign's Connections to a Big-Money Super PAC*, WASH. POST (Oct. 18, 2015), https://www.washingtonpost.com/politics/the-inside-story-of-donald-trumps-connections-to-a-big-money-super-pac/2015/10/18/532b61d4-72b5-11e5-8248-98e0f5a2e830_story.html?utm_term=.90346ca486e1&noredirect=on [<https://perma.cc/6MSQ-JK55>]. When reports surfaced of the Make America Great Again (MAGA) Super PAC, and that Trump and his aides had connections to the PAC, Trump's lawyer wrote to MAGA and eight other pro-Trump Super PACs telling the groups to stop using Trump's name and image. See *id.* However, throughout the general election numerous Super PACs emerged in support of Donald Trump without the candidate's admonishment. See *id.*

take corporate PAC money has become a progressive litmus test for candidates to prove they are not bought by special interests.²⁰² As this Note goes to press, all of the announced 2020 Democratic presidential challengers have taken a no-corporate PAC pledge, including Senators Kirsten Gillibrand Kamala Harris, and Elizabeth Warren.²⁰³ Granted, this pledge is largely symbolic since corporate PAC contributions, as opposed to Super PAC contributions, are relatively insignificant.²⁰⁴

As the 2020 Democratic primary gets underway, the candidates are grappling with how forcefully to denounce all outside groups — weighing the benefits of a grassroots reputation against the need for financial firepower in a costly primary.²⁰⁵ Removing individual and party contribution limits to campaigns would only intensify the political pressure from the left to disavow less transparent outside groups, since campaigns would be able to raise larger amounts without their assistance. And the political climate on the left would still serve as a check on wealthy donors making massive campaign contributions similar to ones made to outside groups in the previous two presidential cycles. In fact, if individual contribution limits to campaigns were removed, it is possible that Democratic candidates would want to put a self-imposed limit on high-dollar contributions. The average donation and number of contributors has long been a bellwether of a candidate's widespread appeal, but will likely play

202. Elaine Godfrey, *Why So Many Democratic Candidates Are Dissing Corporate PACs*, ATLANTIC (Aug. 23, 2018), <https://www.theatlantic.com/politics/archive/2018/08/why-so-many-democratic-candidates-are-ditching-corporate-pacs/568267> [https://perma.cc/NXE5-YBZ8].

203. Peter Overby, *Democratic Presidential Candidates Say 'No' to Corporate PAC Money*, N.Y. TIMES (Feb. 1, 2019), <https://www.nytimes.com/2015/05/07/us/politics/hillary-clinton-to-court-donors-for-super-pac.html> [https://perma.cc/G6YB-JV37].

204. *Id.* (“Incumbents typically receive more corporate-PAC donations, but they’re usually a small percentage of their total funds. For example, Gillibrand has received \$4,955,153 from business-related PACs over her political career, amounting to nine percent of her total contributions, according to the CRP [Center for Responsive Politics]. Harris has received roughly \$353,265 from business-related PACs — slightly less than two percent of her total contributions. For Senator Corey Booker, business-related-PAC donations made up almost eight percent. (According to CRP, ‘business related’ PACs count as corporate PACs, corporate-affiliated PACs, and trade associations.)”).

205. Walter Shapiro, *The Democrats’ Super PAC Dilemma for 2020*, BRENNAN CTR. FOR JUST, <https://www.brennancenter.org/blog/democrats-super-pac-dilemma-2020> [https://perma.cc/5FGL-X3H8].

an unprecedented role in 2020.²⁰⁶ In February 2019, the Democratic National Committee announced a grassroots fundraising qualification method to participate in the early primary debates, rather than relying solely on polling averages.²⁰⁷ The latest political developments from the left are a promising sign that one of the major parties will not continue down the path of increased dependence on outside groups. This proposal encourages such a shift.

Notably, this recommendation of removing contribution limits should be limited only to presidential elections — not state and other federal elections. Presidential elections are unique in their costs, with 2012 and 2016 witnessing well over \$2 billion spent on each.²⁰⁸ Since congressional races cost less, there is a greater likelihood of a few donors funding the bulk of a candidacy, raising appearance of corruption concerns. Also, the transaction costs of having to operate campaign functions through an outside group should be weighed more heavily in a less costly race. Those costs increase when a candidate does not have the resources, or a large enough network of political operatives, to manage a connected campaign effort with multiple outside entities. Because outside groups take on fewer essential campaign operations at more local levels, there is less of an urgency to channel money back to candidate committees. Most importantly, a congressperson's job involves approving complex, often underreported legislation that affects the interests of donors. Thus, the appearance of corruption is therefore higher with a policy-minded megadonor directly funding a congressional candidate.

While the presidential level may be the safest venue for a federal test case, a significant reduction in outside group spending would lend support to the proposition that individual and party contribution limits should be removed at the congressional level. Already, eleven states allow unlimited

206. Professors La Raja and Schaffner argue that “successful candidates are strategic, and raising money from many donors is a signal of candidate quality. These signals matter among influential elites who eventually choose to endorse and work on behalf of candidates (beyond fundraising).” La Raja & Schaffner, *infra* note 194, at 54.

207. David Siders, *DNC announces fundraising, polling thresholds for early debates*, POLITICO (Feb. 14, 2019), <https://www.politico.com/story/2019/02/14/dnc-fundraising-polling-early-debates-1170182> [<https://perma.cc/WL6A-PXEF>].

208. *Cost of Election*, CTR. FOR RESPONSIVE POL., <https://www.opensecrets.org/overview/cost.php?display=T&infl=Y> [<https://perma.cc/TS2T-FDQ2>] (last visited Jan. 25, 2019).

contributions for gubernatorial and legislative races.²⁰⁹ In some of these states, strict contribution limits would likely better serve the anti-corruption and transparency goals of campaign finance regulation. For instance, Virginia combines unlimited contributions with weak campaign finance oversight and no prohibition on using campaign money for personal expenditures (which is illegal for federal politicians and in most states).²¹⁰ Unrestricted contributions in this loosely regulated context pose an increased danger of having a corrupting influence. In Oregon, where unlimited contributions are permissible from individuals, corporations, and interest groups, lawmakers have found a disclosure loophole through the practice of transferring money from one legislator or committee to another, since candidates are not required to disclose original sources for pass-through contributions.²¹¹ In Iowa, however, Megan Tooker, the executive director of the Iowa Ethics and Campaign Disclosure Board, claims the state's unlimited contributions laws for PACs and individuals are responsible for reducing the influence of outside groups.²¹² She explained that:

Unlike at the federal level, we see fewer independent expenditures, and I think that's because of the unlimited campaign contributions . . . the public has a right to know who's supporting the candidates in a race, where the money is coming from, and what individuals or groups may be influencing their policy positions.

209. *State-by-State Comparison of Campaign Finance Requirements*, BALLOTPEdia, https://ballotpedia.org/State-by-state_comparison_of_campaign_finance_requirements [https://perma.cc/T5F9-HF4G] (last visited Jan. 25, 2019).

210. Alan Suderman, *Lawmakers Live Large on Campaign Cash, the Virginia Way*, VA. PILOT (Feb. 20, 2016), https://pilotonline.com/news/government/virginia/article_96691ced-66a2-5164-9d75-807e2b75bf38.html [https://perma.cc/H334-UGW2] ("Virginia's State Board of Elections does not audit or investigate campaign finance reports. Elected prosecutors can investigate campaign finance violations, but longtime political watchers could not recall a case ever being brought.").

211. Cooper Green, *Loophole Makes It Tough to Follow Money in Oregon Campaigns*, ASSOC. PRESS (Sept. 11, 2017), <https://www.apnews.com/f0bd0620b4ef4d938f0a1109cd572f7d> [https://perma.cc/3NUP-9KK2].

212. Julia DiGiacomo, *Gubernatorial Candidates Raise Record Funds*, DAILY IOWAN (Oct. 19, 2018), <https://dailyiowan.com/2018/10/19/gubernatorial-candidates-raise-record-funds> [https://perma.cc/K4RX-TX63].

For now, changing the contribution limit rules at the presidential level would provide a solution to the problem of outside group influence, with little downside of increased corruption because of the legality of highly sophisticated coordination.

VII. CONCLUSION

Removing contribution limits on donations from individual donors and political parties to presidential campaigns is an acceptance of reality, a solution that does not require waiting for a different Supreme Court or a deadlocked Federal Election Commission to change form. It seeks to rectify the failed premise under which the current campaign finance system operates: that regulatory restrictions prevent wealthy citizens and corporations from financing elections. And it is a solution with political viability, one that both political parties and incumbent lawmakers could benefit from.²¹³ We live in a system in which presidential candidates can circumvent contribution limits by coordinating directly with outside groups. The danger of corruption already exists when presidential campaigns are able to be financed by the extremely wealthy. Allowing more funds to flow directly to campaigns will increase donor transparency and force candidates to be more responsible for their negative and dubious campaign tactics. Hopefully, by shedding a light on the staggering inequality of a broken election system, this legislative proposal and its pragmatic justifications will motivate the public to support broader campaign finance reforms that foster a more democratic election process.

213. In 2014, a bipartisan deal was struck to dramatically increase the amount of money a donor could give to national party committees to reduce the money advantage of outside groups. Vogel, *supra* note 192.