NOTE

WORKING TOGETHER FOR AN INDEPENDENT EXPENDITURE: CANDIDATE ASSISTANCE WITH SUPER PAC FUNDRAISING

Suppose a candidate for Congress attends a fundraising event held by a Super PAC set up specifically to support (and which in practice *only* supports) that candidate. During the event, the candidate offers some brief welcoming remarks to the guests — most of whom have already contributed the maximum allowable amount of $5200[1] directly to the candidate for that election. The candidate asks that each individual attendee make a $5000 contribution — the maximum amount that an individual would be legally permitted to contribute to a PAC governed by traditional campaign finance limits[2] — to the Super PAC, which the candidate says he hopes "will be used for a good cause." Two minutes later, the candidate leaves to attend another event; one of the organizers of the fundraising event, acting on behalf of the Super PAC, then asks that each attendee give $100,000 instead of $5000, to be put to the benefit of the candidate who just left the room.

Some have mocked this state of affairs for creating large loopholes that functionally allow coordination between candidates and Super PACs that is prohibited by law.[3] However, under the current federal regime, this type of ostensibly "noncoordinated" collaborative fundraising is entirely legal — even commonplace.[4] This Note discusses the challenges posed by the growth of Super PACs and their increasing collaboration with candidates in fundraising efforts, and proposes a regulatory framework that maximizes the freedom for Super PACs to communicate their messages to voters and minimizes the potential for actual or apparent corruption that can occur when candidates coordinate with Super PACs.

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[1] *See Contribution Limits 2013–14*, FED. ELECTION COMMISSION, http://www.fec.gov/pages/brochures/contriblimits.shtml (last visited Feb. 1, 2015) [http://perma.cc/TN39-E6SS].

[2] *Id.*; *see also* FEC Advisory Op. 2011-12, at 3 (June 30, 2011), http://saos.fec.gov/aodocs/AO%202011-12.pdf [http://perma.cc/8ZCK-4GMB]. For a further explanation of these limitations, see *infra* p. 1489.

[3] *See, e.g.*, Katla McGlynn, *Jon Stewart, Stephen Colbert Expose More Super PAC Loopholes Without 'Coordinating,'* HUFFINGTON POST (Feb. 23, 2012, 7:44 AM), http://www.huffingtonpost.com/2012/01/18/jon-stewart-stephen-colbert-expose-super-pac-loopholes_n_1212670.html [http://perma.cc/AP3K-LV7Y].

[4] *See, e.g.*, Paul Blumenthal & Dan Froomkin, *Stephen Colbert's Super PAC Mocks Anti-Coordination Rule (Part 5)*, HUFFINGTON POST (Jan. 20, 2012, 11:44 AM), http://www.huffingtonpost.com/2012/01/20/colbert-super-pac_n_1215975.html [http://perma.cc/M4XP-S8E2].

INTRODUCTION

Coordination between candidates for elective office and independent expenditure–only political action committees — commonly dubbed "Super PACs" — is an issue of growing importance to campaign finance law. The tension over what activities are considered "coordination" hits at the heart of Super PAC activity: to maintain their legal designation, Super PACs must operate independently of the candidates they support.[5] Federal law treats any Super PAC expenditure that is coordinated with a candidate as a "contribution" to that candidate rather than as a legally allowed "expenditure."[6] Because of this limitation, a Super PAC cannot make a coordinated expenditure — if it does, the Super PAC may no longer raise unlimited contributions to make independent expenditures and must abide by the same restrictions as a traditional PAC that can legally make contributions directly to candidates.[7]

The concern about coordination is especially prominent in the area of political fundraising. Though some fundraising collaboration between candidates and outside groups has historically existed,[8] the import of this form of coordination has been amplified with the genesis of Super PACs, which can raise and spend unlimited funds to elect candidates, but only through independent (noncoordinated) expenditures.[9] The Federal Election Commission (FEC), upon request, advised that federal candidates could participate in the fundraising efforts of these new Super PACs.[10] Federal candidates jumped at this opportunity — news accounts of candidate attendance at Super PAC fundraisers have proliferated,[11] yet there has been no concurrent updating of the statutory and regulatory limitations on these fundraising activities.

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[5] *See* FEC Advisory Op. 2010-11, at 2–3 (July 22, 2010), http://saos.fec.gov/aodocs/AO%202010-11.pdf [http://perma.cc/J6CH-3V5Z]; *see also* Michael S. Kang, Essay, *The Year of the Super PAC*, 81 GEO. WASH. L. REV. 1902, 1903 (2013).

[6] 52 U.S.C.A. § 30116(a)(7)(B) (West 2014).

[7] *See* Stop This Insanity Inc. Emp. Leadership Fund v. FEC, 902 F. Supp. 2d 23, 37 (D.D.C. 2012), *aff'd*, 761 F.3d 10 (D.C. Cir. 2014). For example, traditional PACs are prohibited from accepting contributions from corporations or labor unions. *See* 52 U.S.C.A. § 30118(a).

[8] This collaborative fundraising typically does not receive the same level of public criticism as does candidate assistance with Super PAC fundraising. Because traditional PACs can contribute directly to candidates and face their own $5000 contribution limits, *see* 52 U.S.C.A. § 30116(a)(1)–(2), these PACs have not experienced the same prohibition on coordination faced by Super PACs. Additionally, the Bipartisan Campaign Finance Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of the U.S. Code), prohibits federal candidates from "solicit[ing] . . . funds in connection with an election for Federal office . . . unless the funds are subject to the limitations [and] prohibitions" of federal campaign finance law. 52 U.S.C.A. § 30125(e)(1)(A). Further, federal regulations prohibit federal candidates from soliciting funds on behalf of 501(c) organizations "for any election activity." 11 C.F.R. § 300.65(d) (2014).

[9] *See* Richard Briffault, *Super PACs*, 96 MINN. L. REV. 1644, 1644 (2012).

[10] *See* FEC Advisory Op. 2011-12, *supra* note 2, at 4.

[11] *See, e.g.*, David Firestone, *President Obama's Fundraising Scandal*, N.Y. TIMES: TAKING NOTE (July 23, 2014, 9:56 AM), http://takingnote.blogs.nytimes.com/2014/07/23/president-obamas

This Note argues that, as the number of Super PACs continues to grow,[12] the FEC and state election agencies should redefine "coordination" between candidates and Super PACs to include candidate-assisted Super PAC fundraising activities in order to ensure that Super PACs maintain the appropriate level of independence. An ideal definition would limit candidates' abilities to attend Super PAC fundraisers, solicit contributions on behalf of Super PACs, share fundraising consultants with Super PACs, and provide lists of wealthy family members and friends to Super PACs. Each of these activities pushes at the legally mandated boundaries of independence between candidates and Super PACs, and poses the threat of quid pro quo corruption that the Supreme Court has recognized as a sufficiently important interest to allow the regulation of campaign finance.[13]

This Note proceeds in three Parts. Part I describes the rise of Super PACs in the wake of *Citizens United v. FEC*[14] and discusses the collaborative fundraising efforts currently employed by candidates and Super PACs. Part II describes the current state and federal regimes governing candidate assistance with Super PAC fundraising. Part III proposes a new framework that redefines "coordination" to include collaborative fundraising efforts and justifies this regulation as necessary to prevent quid pro quo corruption or the appearance of such corruption, the primary rationale that has allowed the government to regulate campaign finance since *Buckley v. Valeo*.[15]

I. THE RISE OF SUPER PACS

Section I.A discusses the growth of Super PACs after *Citizens United*. In striking down prohibitions on corporate independent expenditures,[16] the Court also substantially limited the type of corruption considered sufficient to justify restricting campaign finance activity.[17] The section then describes the development of Super PACs following the

-fundraising-scandal [http://perma.cc/QY2N-XP3P]; Erica Werner, *Harry Reid Influences Senate Races Behind the Scenes*, HUFFINGTON POST (Nov. 30, 2014, 5:59 AM), http://www.huffingtonpost.com/2014/09/30/harry-reid-senate-races_n_5906174.html [http://perma.cc/44NN-TDD8].

[12] In 2010, approximately eighty Super PACs registered with the FEC, and these groups made independent expenditures totaling more than $90 million; by 2012, more than eight hundred Super PACs were registered with the FEC, and these groups spent approximately $800 million in the 2012 elections. R. SAM GARRETT, CONG. RESEARCH SERV., SUPER PACS IN FEDERAL ELECTIONS: OVERVIEW AND ISSUES FOR CONGRESS 13 (2013), http://fas.org/sgp/crs/misc/R42042.pdf [http://perma.cc/CWS2-TZJQ].

[13] *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 26–27 (1976) (per curiam).

[14] 130 S. Ct. 876 (2010).

[15] 424 U.S. 1.

[16] *See Citizens United*, 130 S. Ct. at 913.

[17] *See id.* at 908–09.

D.C. Circuit's decision in *SpeechNow.org v. FEC*.[18] Section I.B discusses the growth of candidate-assisted Super PAC fundraising and highlights recent criticisms surrounding this collaboration.

A. Citizens United *and the Genesis of Super PACs*

Since *Buckley*, the first major challenge to the Federal Election Campaign Act of 1971[19] (FECA), campaign finance law has been bifurcated into separate sets of regulations governing contributions and expenditures.[20] The Supreme Court in *Buckley* upheld greater overnmental restrictions on contributions than expenditures, the latter of which the Court viewed as sitting at the core of protected First Amendment speech.[21] The idea of corruption was central to the Court's reasoning — contributions were perceived as tending to corrupt recipients more than expenditures corrupted their intended beneficiaries, so contributions could be regulated more stringently.[22] Because independent expenditures lacked the same potential to corrupt, limitations on those expenditures were unconstitutional.[23] Two corruption concerns drove the *Buckley* decision: quid pro quo corruption and "the appearance of corruption."[24]

Buckley's distinction between direct contributions (which could potentially corrupt) and independent expenditures (which could not) became the basis of the Court's analysis in *Citizens United*.[25] As an adjunct to holding that corporations may make unlimited independent expenditures,[26] the *Citizens United* Court made a key determination that allowed for the creation of Super PACs: the Court found that "independent expenditures, including those made by corporations, do not

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[18] 599 F.3d 686 (D.C. Cir. 2010).

[19] Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended in scattered sections of the U.S. Code). FECA has been considered "the most sweeping act of campaign finance regulation in the nation's history." Bradley A. Smith, *Super PACs and the Role of "Coordination" in Campaign Finance Law*, 49 WILLAMETTE L. REV. 603, 609–10 (2013).

[20] *See Buckley*, 424 U.S. at 19–21.

[21] *See id.* The Court found that expenditure restrictions "necessarily reduce[] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Id.* at 19. Contributions, on the other hand, had less communicative importance, serving as "a general expression of support for the candidate and his views" though they did "not communicate the underlying basis for the support." *Id.* at 21.

[22] *See id.* at 55 ("The interest in alleviating the corrupting influence of large contributions is served by the Act's contribution limitations and disclosure provisions rather than . . . campaign expenditure ceilings."); *see also id.* at 26–27 ("To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined.").

[23] *See id.* at 45–46.

[24] *Id.* at 27.

[25] *See* Citizens United v. FEC, 130 S. Ct. 876, 908 (2010).

[26] *See id.* at 913.

give rise to corruption or the appearance of corruption."[27] The Court reaffirmed that "[t]he absence of prearrangement and coordination of an expenditure with the candidate . . . 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."[28] By finding that independent expenditures categorically lack the power to corrupt, *Citizens United* laid the groundwork for a new type of organization able to raise and spend unlimited funds, but only on independent expenditures — the modern Super PAC.

The D.C. Circuit relied on *Citizens United* in the follow-up case of *SpeechNow.org*,[29] and in doing so created the Super PAC.[30] The D.C. Circuit distinguished these new "independent expenditure–only groups," which could accept unlimited contributions and make unlimited expenditures, from traditional PACs that could contribute directly to candidates.[31] Relying on the *Citizens United* Court's determination that "preventing corruption or the appearance of corruption" was the only justification sufficient to allow the regulation of campaign finance,[32] the D.C. Circuit found that independent expenditures made by groups designed to make only such expenditures could not pose a threat of quid pro quo corruption: because these expenditures could not be coordinated with candidates, "there [was] no corrupting 'quid' for which a candidate might in exchange offer a corrupt 'quo.'"[33] The court thus held that "the government has *no* anti-corruption interest in limiting contributions to an independent expenditure group."[34] Though the Supreme Court has not officially recognized independent expenditure–only PACs

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[27] *Id.* at 909; *see also id.* at 908–11 ("[I]ndependent expenditures do not lead to, or create the appearance of, *quid pro quo* corruption. In fact, there is only scant evidence that independent expenditures even ingratiate." *Id.* at 910.).

[28] *Id.* at 908 (quoting *Buckley*, 424 U.S. at 47) (internal quotation marks omitted).

[29] *See* SpeechNow.org v. FEC, 599 F.3d 686, 695 (D.C. Cir. 2010).

[30] *Citizens United* also triggered the growth of 501(c) organizations as an outlet for corporations and individuals to fund independent expenditures. *See* Richard Briffault, *Nonprofits and Disclosure in the Wake of* Citizens United, 10 ELECTION L.J. 337, 338 (2011). Super PACs and 501(c) organizations are regulated under different regimes, with Super PACs largely regulated by the FEC and FECA, and 501(c) organizations regulated as nonprofits by the Internal Revenue Code. *See* GARRETT, *supra* note 12, at 6–7. Federal candidates cannot raise funds directly for 501(c) organizations that those entities plan to spend in federal elections, as those candidates may for Super PACs. *See* 11 C.F.R. § 300.65(d) (2014).

[31] *SpeechNow.org*, 599 F.3d at 696 (clarifying the court's position that contribution limits were invalid only as "applied to contributions to SpeechNow, an independent expenditure–only group" and did "not affect . . . limits on direct contributions to candidates").

[32] *See id.* at 692. Other potential justifications, such as "[e]qualization of differing viewpoints" and "[a]n informational interest," were insufficient to justify regulating political speech. *Id.*

[33] *Id.* at 694–95; *see also* Stop This Insanity Inc. Emp. Leadership Fund v. FEC, 902 F. Supp. 2d 23, 38 (D.D.C. 2012) ("[T]he non-coordinated nature of independent expenditures . . . serves as an essential counterweight to concerns about corruption or the appearance of corruption."), *aff'd*, 761 F.3d 10 (D.C. Cir. 2014).

[34] *SpeechNow.org*, 599 F.3d at 695 (emphasis added).

as a distinct type of political entity able to accept unlimited contributions, this understanding has been broadly accepted and adopted, including as applied to state election laws.[35]

The basic assumption that Super PACs cannot coordinate their expenditures with candidates is the assumption that allows Super PACs to exist in the first place.[36] These independent expenditure–only PACs may, as the name implies, make only "independent expenditures," defined as an expenditure that "expressly advocat[es] the election or defeat of a clearly identified candidate" and "is not made in concert or cooperation with or at the request or suggestion of such candidate."[37] If a Super PAC makes an expenditure "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate," that expenditure "shall be considered to be a contribution to such candidate" for the purposes of applicable federal limits on contributions.[38] Because certain actors, such as corporations and labor organizations, cannot contribute money directly to federal candidates,[39] a Super PAC's contribution to a candidate would be illegal if the Super PAC had raised any of its funds from those prohibited sources.[40]

This basic notion of Super PACs as independent of candidates is becoming increasingly attenuated with the growth and development of Super PACs, especially a new form of Super PAC focused on electing a single candidate.[41] Beginning with the 2012 election, major candidates

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[35] *See, e.g.*, N.Y. Progress & Prot. PAC v. Walsh, 733 F.3d 483, 487 (2d Cir. 2013) (finding that "a donor to a[] [state] independent expenditure committee . . . may not be limited in his ability to contribute to such committees" through state-law contribution limits); Texans for Free Enter. v. Tex. Ethics Comm'n, 732 F.3d 535, 538 (5th Cir. 2013) (same).

[36] *See, e.g.*, *Stop This Insanity*, 902 F. Supp. 2d at 38 ("[T]he *independence* of independent expenditures is the lynchpin that holds together the principle that no limits can be placed on contributions for such expenditures. If express advocacy for particular federal candidates were to lose its independence . . . the doctrine carefully crafted in *Citizens United* and *SpeechNow* would begin to tumble back to Earth.").

[37] 52 U.S.C.A. § 30101(17) (West 2014). Federal regulations expound on this definition to include communications made in "consultation" with the candidate. 11 C.F.R. § 100.16 (2014). Many state election laws employ a definition of "independent expenditure" similar to the federal definition. *See, e.g.*, VA. CODE ANN. § 24.2-945.1(A) (West 2014) (defining an "independent expenditure" as an expenditure that is "not made to, controlled by, coordinated with, or made with the authorization of a candidate").

[38] 52 U.S.C.A. § 30116(a)(7)(B)(i). Further, if "any person makes . . . any disbursement for any electioneering communication" and that disbursement "is coordinated with a candidate," then that disbursement "shall be treated as a contribution to the candidate supported by the electioneering communication." *Id.* § 30116(a)(7)(C).

[39] *See id.* § 30118(a).

[40] *See id.* § 30116(f) (prohibiting a candidate from "knowingly accept[ing] any contribution" in violation of the FECA limits); *see also* Smith, *supra* note 19, at 604–05 (describing the basis for Super PACs' legal independence).

[41] *See* Matea Gold & Tom Hamburger, *Must-Have Accessory for House Candidates in 2014: The Personalized Super PAC*, WASH. POST, July 18, 2014, http://www.washingtonpost.com/politics/one-candidate-super-pac-now-a-must-have-to-count-especially-in-lesser-house-races/2014/07/17

were put at a serious competitive disadvantage if they were not supported by at least one Super PAC.[42] Super PACs are often able to outspend the candidates they support, without contribution limits as an imposition.[43] The major role Super PACs have come to play in U.S. elections over a short span of time has only served to diminish candidates' incentives to remain completely independent from these new groups and to fuel the fire behind collaborative fundraising efforts.

B. The Growth of Collaborative Fundraising

Collaborative fundraising is not a new phenomenon: prior to the genesis of Super PACs, some collaborative fundraising was allowed as long as candidates did not solicit amounts that would violate FECA contribution limits.[44] Because only limited amounts could be raised and outside groups often had policy goals independent of a particular candidate's election, candidates had less incentive to engage in aggressive collaborative fundraising with PACs that could appear suspicious to observers.[45] However, the birth of Super PACs able to accept unlimited contributions and make unlimited independent expenditures has amplified the existence and import of candidate assistance with fundraising

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/aaa2fcd6-0dcd-11e4-8c9a-923ecc0c7d23_story.html [http://perma.cc/Y4NQ-QEV9]. Single-candidate Super PACs are often set up and funded by former aides, family, or close friends of the favored candidate for the express purpose of electing that candidate. *See* Ellen L. Weintraub & Alex Tausanovitch, *Reflections on Campaign Finance and the 2012 Election*, 49 WILLAMETTE L. REV. 541, 552–53 (2013). For example, the "Restore Our Future" Super PAC dedicated to electing Governor Mitt Romney as President in 2012, and "Priorities USA," a similar Super PAC focused on reelecting President Barack Obama, were run by former aides of the candidates the Super PACs were dedicated to supporting. *See* Paul S. Ryan, *Two Faulty Assumptions of* Citizens United *and How to Limit the Damage*, 44 U. TOL. L. REV. 583, 586 (2013).

[42] *See* MELISSA M. SMITH & LARRY POWELL, DARK MONEY, SUPER PACS, AND THE 2012 ELECTION 9–16 (2013); Richard L. Hasen, *Super PAC Contributions, Corruption, and the Proxy War over Coordination*, 9 DUKE J. CONST. L. & PUB. POL'Y 1, 8 (2014) ("In the 2012 elections, all of the serious presidential candidates had single-candidate Super PACs supporting them . . . .").

[43] *See* SMITH & POWELL, *supra* note 42, at 9; Weintraub & Tausanovitch, *supra* note 41, at 545.

[44] *See, e.g.*, FEC Advisory Op. 2003-3, at 5–8 (Apr. 29, 2003), http://saos.fec.gov/aodocs/2003-03.pdf [http://perma.cc/3PJS-AWMB] (allowing a federal officeholder to raise funds for state candidates, as long as the officeholder did not solicit contribution amounts that would be over the federal limits were the funds given to a federal candidate or PAC). Prior to *Citizens United*, "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year" was considered to be a "political committee." 52 U.S.C.A. § 30101(4)(A). That designation brought a fundraising restriction — "no person" could make a contribution to any "political committee . . . in any calendar year which, in the aggregate, exceed[ed] $5,000." *Id.* § 30116(a)(1)(C).

[45] However, candidates often sought permission to raise such unlimited funds for various types of political expenditures when opportunities arose. *See, e.g.*, FEC Advisory Op. 2007-28 (Dec. 20, 2007), http://saos.fec.gov/aodocs/2007-28.pdf [http://perma.cc/M4QM-BTKK] (preventing federal officeholders from soliciting unlimited contributions for state ballot measures).

efforts[46] — and the corruption concerns associated with such fundraising.[47]

Once *Citizens United* and *SpeechNow.org* laid the groundwork for corporations and labor unions to make unlimited independent expenditures, the FEC recognized as a natural outgrowth their ability to also "pool unlimited funds in an independent expenditure–only political committee."[48] Though *Citizens United* specifically addressed only unlimited independent expenditures by corporations,[49] the FEC stretched the Court's analysis to provide that any person, including individual members of the "general public," could pool their funds in these new independent expenditure–only groups as long as the common-pool expenditures were made independently of candidates.[50] After the major impact these new Super PACs had in the 2010 elections,[51] candidates rushed to take advantage of any opportunity to assist these groups in their fundraising efforts, and the FEC obliged.[52]

Candidate assistance with Super PAC fundraising has taken several forms[53]: Candidates may attend Super PAC–hosted fundraisers, and may solicit contributions up to the federal limits on behalf of those groups.[54] Candidates may use common vendors with Super PACs, such

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[46] *See supra* note 8. As Professor Lawrence Lessig argues, Super PACs have created a "change in the business model of campaign funding." *Taking Back Our Democracy: Responding to* Citizens United *and the Rise of Super PACs: Hearing Before the Subcomm. on Constitution, Civil Rights & Human Rights of the S. Comm. on the Judiciary*, 112th Cong. 75 (2012) [hereinafter *Taking Back Our Democracy Hearing*] (statement of Lawrence Lessig, Professor, Harvard Law School). Instead of appealing to a large number of potential contributors, as they must under a system with contribution limits, candidates can be more "efficient" by "appeal[ing] to large contributors alone." *Id.* at 76. This incentive "in turn radically expands the influence of large contributors over others within the electoral system." *Id.*

[47] *See, e.g.*, *Taking Back Our Democracy Hearing*, *supra* note 46, at 155–56 (statement of Bob Edgar, President & CEO, Common Cause) ("[E]ven with government officials authorized to appear at Super PAC fundraisers . . . one is supposed to presume the official campaign and its shadow Super PAC are wholly independent, with zero risk of corruption or the appearance thereof." *Id.* at 156.).

[48] FEC Advisory Op. 2010-11, *supra* note 5, at 3.

[49] *See* Citizens United v. FEC, 130 S. Ct. 876, 913 (2010).

[50] *See* FEC Advisory Op. 2010-09, at 4 (July 22, 2010), http://saos.fec.gov/aodocs/AO%202010-09.pdf [http://perma.cc/4CNY-TAZ7]. Prior to this determination, individuals had been able to spend unlimited amounts in their own independent expenditures — however, "a combination of cultural proscriptions and the transaction costs of undertaking one's own advocacy" instead of "funding a separate organization oriented to the task" tended to dissuade many from doing so. Kang, *supra* note 5, at 1918.

[51] Super PACs spent an estimated $90 million in the 2010 elections. GARRETT, *supra* note 12, at 13.

[52] *See* FEC Advisory Op. 2011-12, *supra* note 2, at 3.

[53] *See* Eliza Newlin Carney, *Firewall Between Candidates and Super PACs Breaking Down*, ROLL CALL: BELTWAY INSIDERS (Feb. 18, 2014, 11:30 AM), http://blogs.rollcall.com/beltway-insiders/candidate-super-pac-coordination [http://perma.cc/SZG4-7KUN].

[54] *See, e.g.*, Peter H. Stone, *Democrats and Republicans Alike Are Exploiting New Fundraising Loophole*, CENTER FOR PUB. INTEGRITY (May 19, 2014, 12:19 PM), http://www.publicintegrity

as fundraising consultants,[55] which often raises questions about whether these vendors are improperly sharing nonpublic information between the candidates and Super PACs.[56] Super PACs also may solicit contributions from the wealthy family and friends of a candidate above the amounts the candidate would be able to solicit directly,[57] sometimes even using lists of potential donors supplied by the candidate.[58]

Since much of this collaborative activity is so new and the line of permissibility so underdeveloped,[59] it is not rare for candidates at both the state and federal levels to be accused of engaging in impermissible coordination with Super PACs.[60] For example, election watchdog groups filed a complaint with the FEC against U.S. Senator David Vitter, a candidate for Governor of Louisiana, for violating federal contribution and source limitations in assisting with fundraising for a Super PAC that was set up to "support and promote [his] candidacies for both U.S. Senate and governor of Louisiana."[61] Additionally, at least one member of Congress has already faced an investigation by the Office of

.org/2011/07/27/5409/democrats-and-republicans-alike-are-exploiting-new-fundraising-loophole [http://perma.cc/HTU2-AUVB].

55 *See, e.g.*, T.W. Farnam, *Vendors Finesse Law Barring 'Coordination' by Campaigns, Independent Groups*, WASH. POST, Oct. 13, 2012, http://www.washingtonpost.com/politics/vendors-finesse-law-barring-coordination-by-campaigns-independent-groups/2012/10/13/69dcb848-f6d9-11e1-8398-0327ab83ab91_story.html [http://perma.cc/ZZE7-SNLB].

56 *See* Richard Briffault, *Coordination Reconsidered*, 113 COLUM. L. REV. SIDEBAR 88, 96–97 (2013).

57 *See, e.g.*, Paul Blumenthal, *Super PACs Raise Money from Family and Friends of the Candidates They Support*, HUFFINGTON POST (Apr. 17, 2014, 4:59 PM), http://www.huffingtonpost.com/2014/04/17/super-pacs-family_n_5167976.html [http://perma.cc/3Q97-A8YE].

58 *See* DANIEL P. TOKAJI & RENATA E.B. STRAUSE, THE NEW SOFT MONEY 68 (2014), http://moritzlaw.osu.edu/thenewsoftmoney/wp-content/uploads/sites/57/2014/06/the-new-soft-money-WEB.pdf [http://perma.cc/34AF-CUGS].

59 *See* Briffault, *supra* note 56, at 89 ("In the 2012 elections, . . . the coordination/independence distinction at the center of the contribution/expenditure divide essentially collapsed due to the emergence of single-candidate Super [PACs].").

60 *See, e.g.*, Jenna Johnson, *Larry Hogan Accuses Brown's Campaign of Illegally Coordinating with a Super PAC*, WASH. POST, Sept. 8, 2014, http://www.washingtonpost.com/local/md-politics/larry-hogan-accuses-browns-campaign-of-illegally-coordinating-with-a-super-pac/2014/09/08/0640395e-3787-11e4-9c9f-ebb47272e40e_story.html [http://perma.cc/NL8M-7NGA]; Peter Wong, *Democrats Challenge Wehby's Fundraising*, PORTLAND TRIB. (May 5, 2014, 3:45 PM) http://portlandtribune.com/pt/9-news/219460-80296-democrats-challenge-wehbys-fundraising [http://perma.cc/RSU8-PUQH].

61 Complaint at 2, Campaign Legal Ctr. v. Vitter (FEC Mar. 18, 2014), http://www.campaignlegalcenter.org/images/Vitter_FEC_Complaint_3-18-14.pdf [http://perma.cc/MP2G-SM56]. The complaint further alleged that Senator Vitter unlawfully solicited soft money donations through his "agents," two fundraising consultants who also served as the fundraising consultants for the Super PAC supporting Senator Vitter's candidacies. *See id.* at 12.

Congressional Ethics for soliciting contributions for a Super PAC above the legal limit of $5000.[62]

Despite the proliferation of coordination allegations,[63] candidates are unlikely to shy away from assisting Super PAC fundraising activities, considering the key role many Super PACs have played in recent elections.[64] These activities are also unlikely to be subject to substantial enforcement under the current campaign finance regime. Some legislative efforts have been undertaken to change this regime: Several state legislatures have passed resolutions urging an amendment to the U.S. Constitution that would effectively overturn *Citizens United*,[65] which could in turn impact the legal status (and fundraising ability) of Super PACs. A group of influential campaign finance scholars and practitioners has drafted a piece of model legislation, called the American Anti-Corruption Act, which would amend FECA to prohibit independent expenditures made using "any assistance, including the solicitation of funds, from any individual who is the candidate benefited by such expenditure."[66] However, given the relative difficulty of passing a constitutional amendment or federal legislation (due to partisan gridlock), FEC regulations and state legislative and regulatory efforts are likely the most viable means for addressing the growing problem of candidate assistance with Super PAC fundraising.

II. THE LIMITATIONS OF CURRENT FEDERAL AND STATE REGIMES

In the wake of increased fundraising collaboration between candidates and Super PACs, the FEC and several state regulators have begun

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[62] *See* OFFICE OF CONG. ETHICS, U.S. HOUSE OF REPRESENTATIVES, REVIEW NO. 12-9525 (Aug. 24, 2012), http://oce.house.gov/disclosures/Review_No_12-9525_Referral.pdf [http://perma.cc/LG8F-VQQS]. Representative Aaron Schock allegedly solicited contributions to the Super PAC in amounts of $25,000. *Id.* at 9–10, 13.

[63] These allegations of improper fundraising coordination have been brought to both the FEC, *see, e.g.*, Complaint at 1–2, Campaign Legal Ctr. v. Special Operations for Am. (FEC Mar. 5, 2014), http://www.campaignlegalcenter.org/images/CLC_D21_Complaint_Against_SOFA_Zinke_for_Congress_Signed__File_Stamped_3_5_14.pdf [http://perma.cc/9KWK-K6GM], and the courts, *see, e.g.*, O'Keefe v. Chisholm, 769 F.3d 936, 937–38 (7th Cir. 2014).

[64] In the 2012 election cycle, noncandidate, nonparty organizations (such as Super PACs and 501(c) groups) outspent political parties, spending an estimated $2 billion in comparison to the $1.6 billion spent by the national party committees. Weintraub & Tausanovitch, *supra* note 41, at 544. Over $970 million of that outside money was spent by Super PACs. *Id.* The impact of this spending was especially apparent in U.S. House races, where, "in a number of key races, outside groups significantly outspent the major party candidates." *Id.* at 545.

[65] *See, e.g.*, H.R. 9, 81st Leg., Reg. Sess. (W. Va. 2013); S.J. Res. 2656, 2012 Leg., Reg. Sess. (R.I. 2012).

[66] *See* TREVOR POTTER ET AL., THE AMERICAN ANTI-CORRUPTION ACT: FULL PROVISIONS 8 (2012), https://s3.amazonaws.com/s3.unitedrepublic.org/docs/AACA_Full_Provisions.pdf [https://perma.cc/MBT6-QZ4G].

drawing lines regarding what constitutes permissible coordination in this area. Because traditional PACs have not been required to maintain rigid independence from candidates in their expenditures, as is strictly required of Super PACs, the question of whether collaboration in fundraising threatened the independence of the resulting expenditure was not vital to the operation of traditional PACs. This question is key, however, to the existence of Super PACs. As many definitions of "coordination" in state and federal campaign finance law were written before the genesis of Super PACs, such laws generally do not clearly state which actions constitute coordination sufficient to threaten the independence of an expenditure made by an organization that may make *only* independent expenditures. However, a few states have begun to flesh out which actions might be sufficient to threaten Super PAC independence. Section II.A examines the FEC's permissive definition of coordination, which has allowed for the expansive collaborative fundraising discussed in section I.B. Section II.B then provides an overview of state attempts to redefine coordination for their own elections in ways that could impact the ability of candidates to assist with Super PAC fundraising efforts.

A. The FEC's Permissive Definition of "Coordination"

As with many areas of campaign finance law, the FEC was an early driving force in endorsing federal candidates' ability to assist with Super PAC fundraising efforts.[67] The FEC's permissive interpretation of coordinated activity has been criticized for allowing a greater degree of candidate engagement with Super PAC efforts than may be desirable considering the mandate of independence imposed on Super PACs.[68] While this permissive understanding of coordination pays deference to the Supreme Court's holding in *Citizens United* that election speech should be as free as possible, it does so to the detriment of the interest in preventing quid pro quo corruption.[69]

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[67] FEC rulings, made under powers granted by FECA, govern all federal elections. *See* 52 U.S.C.A. §§ 30106(b), 30107 (West 2014). Though often instructive, FEC advisory opinions — a popular mechanism to communicate the agency's likely approach to certain novel situations, such as candidate fundraising collaboration with Super PACs — do not carry the force of law unless they are adopted as a formal "rule or regulation." *Id.* § 30108(b). For an in-depth discussion of the relationship between state and federal campaign finance laws, see *Federal and State Campaign Finance Laws*, FEC, http://www.fec.gov/pages/brochures/statefed.shtml (last visited Feb. 1, 2015) [http://perma.cc/6FBR-DJEX].

[68] *See, e.g.*, Ryan, *supra* note 41, at 586 ("Federal coordination rules are so narrow and limited in scope that an 'independent' spender can be married to a candidate and share the same bed every night without running afoul of federal coordination limits, so long as the spouses refrain from discussing the details of specific ad buys.").

[69] *See* Citizens United v. FEC, 130 S. Ct. 876, 911 (2010).

The FEC is still governed by a formal definition of "coordination" that was last amended several years before the *Citizens United* decision and the genesis of Super PACs.[70] Under the current definition, an action is coordinated when it is "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."[71] This definition on its face does not clearly delineate which collaborative actions might threaten the independence of an expenditure made by an organization such as a Super PAC.[72]

The challenge of identifying categories of permissible candidate assistance with Super PAC fundraising was hastily thrust on the FEC. Shortly after the D.C. Circuit's decision in *SpeechNow.org*, several congressional leaders sought an advisory opinion regarding their ability both to participate in Super PAC fundraising events and to solicit contributions for Super PACs in unlimited amounts.[73] The FEC interpreted federal campaign finance law as authorizing candidates to "attend, speak at, or be featured guests at fundraisers for [Super PACs], at which unlimited individual, corporate, and labor organization contributions will be solicited,"[74] though the candidates themselves could "not solicit unlimited contributions" for the Super PACs.[75] Those candidates were allowed to solicit contributions of only up to $5000 for Super PACs and were limited in the source of those contributions to "individuals" — which did not include corporations or labor unions — and "any other source not prohibited by [FECA] from making a contribution to a political committee."[76]

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[70] *See* Coordinated Communications, 71 Fed. Reg. 33,190, 33,208 (June 8, 2006) (codified at 11 C.F.R. pt. 109).

[71] 11 C.F.R. § 109.20(a) (2014); *see also* 52 U.S.C.A. §§ 30101(17), 30116(a)(7)(B).

[72] One of the few federal courts to analyze the definition in depth understood "coordination" as "requir[ing] some to-and-fro between" the candidate and the outside organization. FEC v. Christian Coal., 52 F. Supp. 2d 45, 93 (D.D.C. 1999).

[73] *See* Letter from Marc E. Elias et al., Counsel to Majority PAC & House Majority PAC, to Christopher Hughey, Acting Gen. Counsel, FEC (May 19, 2011), http://saos.fec.gov/aodocs/1175585.pdf [http://perma.cc/6M8Q-4RRM].

[74] FEC Advisory Op. 2011-12, *supra* note 2, at 4.

[75] *Id.* at 3.

[76] *Id.* These limitations were imported nearly wholesale from an earlier dispute involving federal candidate solicitation at fundraising events for state and local political parties where "funds outside the amount limitations and source prohibitions of [FECA] . . . are solicited." *Id.* at 5 (quoting 11 C.F.R. § 300.64(a)) (internal quotation mark omitted). The FEC had previously interpreted FECA to limit candidate solicitation at nonfederal fundraising events to only "funds that comply with the amount limitations and source prohibitions of [FECA]." 11 C.F.R. § 300.64(b)(2). By importing the definition of allowable fundraising collaboration from a context where the issue of coordination was never addressed, the FEC failed to consider the possibilty that, in order to ensure that Super PACs maintain their necessary independence, it needed to adjust the definition in situations where candidates assist with Super PACs fundraising.

B. State Efforts to Redefine "Coordination"

Though the federal framework often provides a model for state-level campaign finance regimes,[77] fundraising collaboration is becoming a key area of divergence: because the FEC's advisory opinions to date have provided broad collaboration abilities for Super PACs and candidates, some states interested in limiting the potential for corruption have begun adjusting their election laws in response to the growth of Super PACs. Unlike the FEC's permissive approach to coordination, which allows a candidate to assist with fundraising activities for Super PACs that could impact that candidate's race, the few state regulations that specifically implicate the issue of coordinated fundraising[78] seem to recognize some room for candidate assistance with Super PAC fundraising, but with some limitation on a candidate's ability to assist Super PACs that support that candidate.[79] While still abiding by the *Citizens United* directive to balance First Amendment interests with the prevention of quid pro quo corruption,[80] these state definitions of coordination are generally more responsive to the interest in preventing corruption than the FEC's permissive regime.

1. Fundraising as Infusing Coordination into an Otherwise-Independent Expenditure. — Minnesota has taken the lead in crafting a definition of coordination that recognizes the integral role of fundraising in any Super PAC expenditure.[81] The Minnesota Campaign Finance and Public Disclosure Board determined in early 2014 that "[p]articipation by a candidate in the fundraising efforts or in the promotion of an independent expenditure political committee constitutes cooperation or implied consent that will *destroy the independence* of an expenditure later made by the independent expenditure political committee to influence the candidate's election."[82] Seizing on the state's

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[77] *See, e.g.*, Mich. Sec'y of State Interpretive Statement 2 (July 10, 2013), http://www.michigan.gov/documents/sos/Declaratory_Ruling_Response_2013-1_426842_7.pdf [http://perma.cc/GUB8-J46Z] (adopting the FEC's definition of fundraising coordination).

[78] Though state campaign finance laws may include a definition of "coordination," those state definitions — like the FEC's definition — are typically general in nature and do not clearly state what specific actions would constitute impermissible coordination in Super PAC fundraising. *See, e.g.*, N.C. GEN. STAT. ANN. § 163-278.6(6h) (West 2014) (defining "coordination" as "in concert or cooperation with, or at the request or suggestion of").

[79] Limitations on collaborative fundraising may be especially important in state and local elections, where campaigns are substantially cheaper and Super PACs "can get significantly more value for every dollar and readily outmatch opposing candidates." Garrick B. Pursley, *The Campaign Finance Safeguards of Federalism*, 63 EMORY L.J. 781, 839 (2014). This ability to heavily influence the outcome of a candidate's election raises the likelihood that state and local elected officials might engage in quid pro quo behavior with Super PAC contributors.

[80] *See* Citizens United v. FEC, 130 S. Ct. 876, 911 (2010).

[81] *See* Minn. Campaign Fin. & Pub. Disclosure Bd. Advisory Op. 437 (Feb. 11, 2014), http://www.cfboard.state.mn.us/ao/AO437.pdf [http://perma.cc/S9AJ-YRGX].

[82] *Id.* at 1 (emphasis added).

strict statutory definition of "independent expenditure,"[83] the Board assumed that the state "intended to require the highest degree of separation between candidates and independent expenditure spenders that is constitutionally permitted."[84] Because the definition of an independent expenditure prohibited the "cooperation of" the candidate in such an expenditure, the Board inferred that the state intended "no participation of the candidate in any process that *leads to* the resulting independent expenditure."[85]

Though not explicitly relying on *Buckley*, the Board based its understanding that coordinated fundraising threatened the independence of the resulting expenditure on the same fears of circumvention invoked by the *Buckley* Court. Specifically, the Board remarked that "permitting candidates to solicit contributions to an independent expenditure political committee that then makes expenditures for that same candidate would provide a way for contributors to circumvent the limits on contributions to a candidate and for candidates to circumvent the limits on campaign expenditures."[86] This circumvention language echoed the language used by the *Buckley* Court in determining that contribution limits were permissible, because those limits "prevent attempts to circumvent [FECA] through prearranged or coordinated expenditures amounting to disguised contributions."[87] By presenting fundraising as an activity that, if coordinated, could permeate the entire expenditure process and threaten the independence of the expenditure in a way that functionally circumvents permissible contribution limits, the Board thus invoked the threat of quid pro quo corruption in a manner sufficient to support the state's regulation of coordinated fundraising.[88]

California has also recognized that coordination at the planning stages of an expenditure may threaten the independence of the entire expenditure, though the state has addressed this concern in a more subtle way. California regulations identify certain actions that create a rebuttable "presumption" that an expenditure was not independent, in-

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[83] *See* MINN. STAT. ANN. § 10A.01(18) (West 2014) (requiring that an "independent expenditure" be "made without the express or implied consent, authorization, or cooperation of, and not in concert with or at the request or suggestion of" a candidate).

[84] Minn. Campaign Finance & Pub. Disclosure Bd. Advisory Op. 437, *supra* note 81, at 3.

[85] *Id.* at 4 (emphasis added).

[86] *Id.* at 5.

[87] Buckley v. Valeo, 424 U.S. 1, 47 (1976) (per curiam).

[88] The city of Philadelphia recently adopted a definition of coordination similar to Minnesota's for city elections; the new regulation considers an expenditure that benefits a candidate to be "coordinated . . . if the candidate's campaign has solicited funds for or directed funds to the person making the expenditure, but only if the solicitation occurred within the 12 months before the election that the expenditure seeks to influence." *Recent Amendment to Ethics Board Regulation No. 1 (Campaign Finance)*, CITY OF PHILADELPHIA BOARD OF ETHICS (Nov. 4, 2014), http://www.phila.gov/ethicsboard/PDF/SummaryOfChangesToBOERegNo1_Effective10.31.14.pdf [http://perma.cc/EUF2-N3T9].

cluding when: the expenditure is "based on information about the candidate's campaign needs or plans provided to the expending person by the candidate," it is made through an "agent of the candidate in the course of the agent's involvement in the current campaign," or "[t]he person making the expenditure retains the services of a person who provides the candidate with professional services related to campaign or fundraising strategy for that same election."[89] The first prong could encompass some collaborative fundraising activities — a finding of coordinated fundraising between a candidate and Super PAC could thus lead to a presumption that the resulting expenditure was not sufficiently independent. The latter two prongs suggest that sharing a fundraising consultant might not be allowed in California even if that common consultant did not share inside information about the candidate's campaign.[90]

A January 2014 Maryland State Board of Elections guidance document suggested that Maryland may similarly examine a set of established factors as evidence of coordination, though it did not specifically discuss fundraising.[91] The factors included: whether the Super PAC was "[a]cting at the request or suggestion of the candidate," "[t]he extent to which a candidate shares . . . consultants and other third party vendors with another candidate or person," "[w]hether the candidate directs or controls access to funds of a political committee," and "[w]hether the candidate's name or photo is featured on a solicitation or at the fundraiser event."[92] As with the California factors, the Maryland factors suggest that the decisionmaking process leading up to the expenditure,

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[89] CAL. CODE REGS. tit. 2, § 18550.1(b) (2014).

[90] In a decision that addressed the latter two prongs, the California Fair Political Practices Commission in 2013 approved a settlement that imposed a fine on a Super PAC for an improper donation to a candidate that was considered over the limits because of coordination between the Super PAC and the state assembly member it was supporting. *See* Cal. Fair Pol. Practices Comm'n Op. No. 10/470, at 1 (Oct. 28, 2013), http://www.fppc.ca.gov/agendas/2013/11-13/Voters%20for%20a%20New%20California%20-%20Informational%20Item.pdf [http://perma.cc/QD9X-LHLW]. Overt coordination occurred in that case: the individual serving as the campaign manager for the state assembly member also served as a principal officer of the Super PAC that made an independent expenditure in support of the assembly member. *See* Christopher Cadelago, *Luis Alejo Settles with State Over Illegal Campaign Coordinating*, SACRAMENTO BEE (Nov. 4, 2013, 3:00 PM), http://blogs.sacbee.com/capitolalertlatest/2013/11/luis-alejo-settles-with-state-over-illegal-campaign-coordinating.html [http://perma.cc/Z9HL-9AF3]. However, this decision suggests that California's election regulators might view the decisionmaking process leading up to the expenditure as an integral part of the expenditure, and coordination at the early stages of decisionmaking — such as a campaign and Super PAC sharing a decisionmaker — may destroy the independence of the resulting expenditure.

[91] Md. State Bd. of Elections Guidance on Coordination and Cooperation (Jan. 29, 2014), http://www.elections.state.md.us/campaign_finance/documents/Guidance_Coordination%20and%20Cooperation.pdf [http://perma.cc/TRR3-5USD].

[92] *Id.*

including fundraising activities, might be indicative of coordination that threatens the independence of the resulting expenditure.

2. Limiting Involvement with Directly Supportive Super PACs. — Permeating the handful of state efforts to address candidate assistance with Super PAC fundraising is the notion that, though collaboration may not be per se problematic, a threat of corruption may arise when the candidate directly assists a Super PAC that may benefit that candidate's campaign. Two recent statutes in Connecticut and Arizona have attempted to minimize corruption concerns by suggesting that Super PAC participation in a candidate's race might be an appropriate dividing line at which to impose a coordination limitation.

A Connecticut law passed in 2013 attempted to draw such a dividing line: though the law established that "solicitation or fundraising on behalf of [a Super PAC] by a candidate" should "not be presumed to constitute evidence of . . . coordination," this presumption became rebuttable if the Super PAC "has made or obligated to make independent expenditures in support of such candidate."[93] The law thus suggested that a finding of coordination became more appropriate when a candidate assisted with fundraising efforts for a Super PAC that the candidate knew would benefit his candidacy.

A 2014 Arizona law similarly established that, if a candidate provided a political committee such as a Super PAC with "information about the candidate's plans, projects or needs . . . with a view toward having the expenditure made," those interactions could be taken as presumptive evidence of coordination that would destroy an expenditure's independence.[94] This statute prevents a candidate from assisting with Super PAC fundraising that would benefit her own race, if the candidate suggested that the Super PAC make an expenditure on her behalf — such a hint would constitute the provision of information about a candidate's needs, done with a view toward having an expenditure made.[95] However, the prohibition would not apply to a candidate assisting a Super PAC not directly supportive of her candidacy.[96]

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[93] CONN. GEN. STAT. ANN. § 9-601c(c) (West 2014). A federal district court turned away on standing grounds a Super PAC's challenge to the law, determining that the law merely established a set of acceptable presumptions and thus did not actually "pose any threat of injury" to the Super PAC. Democratic Governors Ass'n v. Brandi, No. 3:14-cv-00544, 2014 WL 2589279, at *11 (D. Conn. June 10, 2014).

[94] ARIZ. REV. STAT. ANN. § 16-911(A)(4) (2014). However, some type of actual interaction between the candidate and committee is necessary to constitute coordination — "[s]erving on a host committee for a fund-raising event does not presumptively demonstrate any arrangement, coordination or direction." *Id.* § 16-911(B)(2).

[95] *See id.* § 16-911(A)(4).

[96] The Arizona Attorney General suggested in a 2013 advisory opinion that a candidate's assistance with fundraising for a Super PAC that did not support his candidacy would be acceptable. *See* Ariz. Att'y Gen. Op. No. 13-006 (R13-011) (Aug. 21, 2013), 2013 WL 5422808.

These statutes taken together suggest that states are beginning to carve out a space for candidates to participate in Super PAC fundraising activities, though their participation does not extend to situations where a Super PAC could have an impact on that candidate's race. This carveout still allows Super PACs to speak freely, and the limitation on candidate involvement is narrowly tailored to prevent only the type of coordination that most threatens actual or apparent quid pro quo corruption.

III. A NEW DEFINITION OF "COORDINATION"

Employing the principles of the state campaign finance regimes, section III.A proposes a potential framework for the FEC and state election agencies to use in redefining existing understandings of "coordination" to account for coordinated fundraising between candidates and Super PACs. The framework proposed by this Note attempts to limit the threat of corruption while maximizing First Amendment protections by prohibiting candidates from attending Super PAC fundraisers, soliciting contributions for Super PACs, sharing fundraising consultants with Super PACs, and providing lists of supporters for use in Super PAC fundraising. Section III.B argues that this proposal would be a permissible regulation of campaign finance under the Supreme Court's established justification of preventing quid pro quo corruption or the appearance of such corruption.

A. A Proposed Framework for Regulating Coordination

This Note proposes that state election agencies and the FEC adopt a new framework for regulating candidate assistance with Super PAC fundraising activities. The goal of preventing quid pro quo corruption or its appearance, upheld in *Buckley* and *Citizens United* as a permissible justification for regulating campaign finance, serves as the core organizing principle for this proposed framework. The framework builds on two major notions underlying state efforts to define coordination: collaboration in fundraising permeates (and threatens the independence of) the expenditure, and Super PACs should be completely independent from the candidates whose campaigns they seek to impact.[97] Each of

[97] Professor Richard Briffault has proposed an alternative framework for regulating coordinated fundraising: he would consider Super PAC spending to be coordinated with a candidate when the Super PAC both "focuses all of its electioneering expenditures on one or a very small number of candidates" and is "staffed by individuals who used to work for the candidate[,] . . . has received fundraising support from a candidate[,] . . . or has been publicly endorsed by the candidate as a vehicle for supporting that candidate." Briffault, *supra* note 56, at 97. While this definition would effectively limit fundraising collaboration between candidates and single-candidate Super PACs, it would leave undisturbed a broad sphere of coordinated fundraising involving Super PACs that support multiple candidates.

these concepts provides a basis for understanding how coordinated fundraising could be seen as a circumvention of contribution limits to candidates that creates a threat of corruption.[98]

This Note proposes that the FEC and state election agencies redefine "coordination" between candidates and Super PACs to include (and thus prohibit) four specific activities related to fundraising, which have in practice been the most common forms of fundraising collaboration between candidates and Super PACs.[99] First, candidates should not be able to attend Super PAC fundraising events.[100] Second, candidates should not be able to solicit contributions — whether unlimited or within FECA limits — on behalf of Super PACs.[101] Third, candidates and Super PACs should not be able to share outside fundraising consultants.[102] Fourth, candidates should not be able to provide lists of supporters directly to Super PACs for use in fundraising efforts.[103]

Within these general limitations, this Note proposes two exceptions: First, these limitations would not apply to any Super PAC that is involved with a different level or type of election than the level or type of election for which the individual either is a candidate or is considering becoming a candidate in the current election cycle.[104] If, after raising

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98 *See* Buckley v. Valeo, 424 U.S. 1, 46–47 (1976) (per curiam).

99 *See supra* pp. 1485–86.

100 The Minnesota election board viewed this limitation as important to maintaining the independence of a Super PAC expenditure. *See* Minn. Campaign Fin. & Pub. Disclosure Bd. Advisory Op. 437, *supra* note 81, at 6.

101 The similarity in purpose between candidates and Super PACs might even confuse a donor about whether she has contributed to a candidate's campaign or a Super PAC when the candidate solicits donations on behalf of a Super PAC, conflating two entities that are required to maintain legal independence. *See* TOKAJI & STRAUSE, *supra* note 58, at 61 (noting that at least one congressional campaign involved in the study had experienced this problem).

102 Regulations in California and Maryland have defined this sharing of third-party vendors as constituting impermissible coordination. *See* CAL. CODE REGS. tit. 2, § 18550.1(b)(3) (2014); Md. State Bd. of Elections Guidance on Coordination and Cooperation, *supra* note 91. Some states have limited the ability of staff and consultants to move quickly between candidates' campaigns and Super PACs, viewing recent employment by a candidate as presumptive evidence of coordination with the new Super PAC employer. *See, e.g.*, 94-270-001 ME. CODE R. § 6(9)(B)(1) (LexisNexis 2014).

103 A Super PAC may offer a means for family and friends of a candidate to circumvent limits on direct contributions to that candidate. For example, a Super PAC supporting Utah Governor Jon Huntsman's 2012 presidential bid spent more than $2.8 million to support Governor Huntsman in the Republican primary, much of which was contributed by Governor Huntsman's father. Briffault, *supra* note 9, at 1676. The Texas Ethics Commission adopted a regulation days before the 2014 election aimed specifically at limiting this workaround by defining the sharing of "mailing lists," "email lists," and "telephone lists" as coordinated activity. 1 TEX. ADMIN. CODE § 22.6(b) (2014).

104 For example, a sitting state legislator would be able to raise money for a federal Super PAC, as long as the state legislator was neither running nor currently planning to run for a federal office during that election cycle. Similarly, a federal officeholder could raise money for a Super PAC dedicated solely to a state-level ballot initiative, though that federal candidate would be limited in her

money for a Super PAC under this exception, the individual then declared her candidacy for an office of the type that the Super PAC could support, a two-way limitation would be triggered — the candidate could not assist in any future fundraising for the Super PAC during that election cycle, and the Super PAC would be prohibited from expending any funds (even independently) within that election cycle in support of the candidate.[105] Second, these limitations would only apply during the specific two-year election cycle for which that individual is an active candidate for office.[106] However, this exception would never apply to a single-candidate Super PAC — if a Super PAC made, say, ninety percent or more of its expenditures in support of a single individual within an election cycle, that individual would never be able to assist with fundraising for the Super PAC, even outside the two-year window.[107]

B. The Threat of Corruption as a Justification for the Proposal

The framework proposed in section III.A attempts to balance First Amendment protections with an interest in limiting quid pro quo corruption or its appearance.[108] After *Citizens United*, any regulation limiting a candidate's ability to assist with Super PAC fundraising activities must be justified by a substantial fear of quid pro quo corruption or the appearance of such corruption.[109] Because the Court has determined that independent expenditures as a categorical matter do not give rise to

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ability to solicit contributions for such a Super PAC based on the FECA amount limitations and source prohibitions governing federal candidates. *See, e.g.*, 11 C.F.R. § 300.65(b) (2014).

105 This same two-way limitation would also be triggered if an individual began an election cycle running for an office of the type that the Super PAC could not support, that candidate assisted the Super PAC with fundraising, and she then declared her candidacy for a different type of office for which that Super PAC could make expenditures.

106 For example, a U.S. Senator who next faced election in 2018 would be able to assist a Super PAC with fundraising during the 2015–2016 election cycle. Further, if a candidate lost a primary election and did not intend to become a candidate for another office during that election cycle, that candidate would be able to assist a Super PAC with fundraising for the remainder of that cycle.

107 If a Super PAC dedicated its support solely to one gubernatorial candidate during the 2013–2014 election cycle, for example, that individual would not be able to assist the Super PAC with fundraising during the 2015–16 election cycle even if the individual was not a candidate for office during that cycle.

108 *See* Citizens United v. FEC, 130 S. Ct. 876, 911 (2010).

109 *See id.* at 908–09; *see also* McCutcheon v. FEC, 134 S. Ct. 1434, 1450 (2014) (plurality opinion). Many scholars have argued that the definition of corruption in *Citizens United* is too severe, and have theorized alternative understandings of corruption that might hew closely enough to the quid pro quo definition adopted by the Court to serve as a potential justification for regulating campaign finance. *See, e.g.*, LAWRENCE LESSIG, REPUBLIC, LOST 17 (2011) (proposing a theory of "dependence corruption"); Michael S. Kang, *Party-Based Corruption and* McCutcheon v. FEC, 108 NW. U. L. REV. ONLINE 240, 253 (2014), http://www.law.northwestern.edu/lawreview/online/2014/5/Kang.pdf [http://perma.cc/59L2-YWV2] (proposing a theory of "group level" quid pro quo corruption, based on the notion that "[w]hat can be exchanged between two individuals . . . can be exchanged between a contributor and a group of candidates as well").

corruption or its appearance,[110] any regulation of fundraising by Super PACs on the basis of corruption will depend on a determination that their independent expenditures are "not truly 'independent' in any meaningful sense of the word."[111]

The threat of quid pro quo corruption is present where an organization is able to raise unlimited funds with a disregard for contribution limits, and spend those unlimited funds in a manner that is functionally coordinated with the candidate so as to "amount[] to disguised contributions."[112] By functionally circumventing legal contribution limits,[113] Super PACs are able to have an outsized impact on candidates compared to other contributors,[114] providing an incentive for the candidates to reward major Super PAC donors with special favors.[115] These corruption concerns are at their highest when Super PACs begin to operate as a routinized workaround for wealthy donors who have already contributed the maximum allowed amount directly to a candidate's campaign.[116] Even if fundraising collaboration does not cause actual quid pro quo corruption, this relationship provides the appearance of such corruption sufficient to justify regulation.[117]

The proposed framework seeks to vindicate this interest in preventing quid pro quo corruption or its appearance by setting the boundaries of impermissible coordination at the point where they begin to pose corruption concerns. Candidate assistance with Super PAC fundraising pushes at the boundaries of what makes an expenditure sufficiently "independent," as Super PAC expenditures must be in order for the organizations to maintain their legal status. The independence of such

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110 *See Citizens United*, 130 S. Ct. at 908–11; *see also* SpeechNow.org v. FEC, 599 F.3d 686, 696 (D.C. Cir. 2010).

111 Ryan, *supra* note 41, at 585.

112 Buckley v. Valeo, 424 U.S. 1, 47 (1976) (per curiam).

113 *See* Kang, *supra* note 5, at 1922.

114 The corrupting influence of Super PACs is often viewed as tied to the competitive advantage these groups provide for their supported candidates. *See* Anthony J. Gaughan, *The Futility of Contribution Limits in the Age of Super PACs*, 60 DRAKE L. REV. 755, 790 (2012).

115 Because there are so few major Super PAC donors, these individuals are often easy to identify and reward. For example, in the 2012 election cycle, "[j]ust over one hundred people donated roughly forty percent of all money contributed to Super PACs." Kang, *supra* note 5, at 1918.

116 *See* Briffault, *supra* note 56, at 91–92. In 2011, 205 individuals donated to the Restore Our Future Super PAC that supported Governor Mitt Romney's presidential bid — 172 of those individuals also contributed the maximum legal amount directly to Governor Romney's campaign. Briffault, *supra* note 9, at 1678.

117 The justification for regulating based on the appearance of corruption is becoming stronger as candidates have begun to publicly recognize contributions to Super PACs that support their candidacy as equivalent to contributions to them as candidates. *See, e.g.*, 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. The virtually identical messaging often used by campaigns and Super PACs may further exacerbate this problem. *See* James Sample, *The Last Rites of Public Campaign Financing?*, 92 NEB. L. REV. 349, 394 (2013).

expenditures begins to break down if fundraising is conceptualized as an integral part of the process through which an expenditure is made and which is thus inseparable from the actual monetary expenditure[118] — because an expenditure necessitates that there first be funds to be expended, fundraising can be seen as an integral portion of an independent expenditure, inseparable from the actual payment of money to purchase advertising time.[119] If Super PAC fundraising is coordinated with a candidate, this coordination permeates the entire chain of the expenditure made using those funds and destroys the independence of the resulting expenditure.[120] The four major proposed limitations thus serve to prevent Super PACs from circumventing contribution limits through coordinated fundraising activity.

The two exceptions, on the other hand, seek to preserve as much First Amendment freedom as possible by restricting these coordination limits to situations where a threat of quid pro quo behavior is present. After *Citizens United*, any rule governing campaign finance must be sufficiently narrowly tailored to the prevention of quid pro quo corruption to survive First Amendment scrutiny.[121] As Arizona and Connecticut have suggested, the greatest threat of corruption exists in situations where a candidate is able to coordinate fundraising with a Super PAC that may make expenditures on that candidate's behalf. Where the candidate is not directly affected by the Super PAC's expenditures — even where the candidate supports such expenditures — there is a lesser threat of quid pro quo corruption, and thus strict regulation of coordination is less appropriate.[122] The use of time restrictions to separate can-

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118 An alternative conception of an expenditure could also threaten Super PACs' independence. Under current campaign finance law, the tangential expenses associated with Super PAC fundraising events fall under most definitions of an "expenditure" in both federal regulations, *see* 11 C.F.R. § 100.110 (2014) (defining an "expenditure" as a "payment[], gift[] or other thing[] of value"), and state law, *see, e.g.*, OR. REV. STAT. ANN. § 260.005(8) (2013) (defining "expenditure" as including the "payment or furnishing of money or anything of value"). Thus, any payment made by a Super PAC to host a fundraising event attended by a candidate could be considered to have been made in "consultation" with the candidate, *see* 11 C.F.R. § 100.16, and thus to constitute a prohibited coordinated expenditure.

119 *See* Minn. Campaign Fin. & Pub. Disclosure Bd. Advisory Op. 437, *supra* note 81, at 3.

120 Even laws that do not specifically adopt Minnesota's conceptualization of an expenditure often contain language that would be amenable to such an interpretation by a state election agency. For example, in Arkansas, an "independent expenditure" "expressly advocates the election or defeat of a clearly identified candidate for office; is made without arrangement, cooperation, or consultation between any candidate . . . and the person making the expenditure . . . ; and is not made in concert with or at the request or suggestion of any candidate." 153-00-8 ARK. CODE R. § 700(c) (2014). Because the notion of "arrangement, cooperation, or consultation" in the statute does not expressly limit that cooperation to the moment that the expenditure was made, the statute's text seems open to an interpretation that would view coordination anywhere in the expenditure process as meaning the expenditure was "made" with sufficient "cooperation" to destroy the expenditure's independence.

121 *See* Citizens United v. FEC, 130 S. Ct. 876, 911 (2010).

122 *See* McCutcheon v. FEC, 134 S. Ct. 1434, 1461 (2014) (plurality opinion).

didate assistance with Super PAC fundraising from Super PACs' assistance to those candidates through expenditures similarly lessens the potential for quid pro quo behavior.[123]

CONCLUSION

Super PACs are limited to making only independent expenditures as a condition of their existence. Candidate assistance with Super PAC fundraising efforts has pushed at the boundaries of this legally mandated independence, allowing a level of coordination that many observers believe creates a real threat of quid pro quo corruption. State actors have begun to beat back this coordination, both by conceptualizing coordinated fundraising as an activity that permeates the entire process of making an expenditure (thereby threatening the expenditure's independence) and by imposing limits on candidate fundraising for Super PACs that might impact that candidate's success. The FEC and state election agencies should seize on these efforts and adopt new definitions of fundraising coordination that impose limitations such as those included in the framework proposed by this Note.

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[123] Time limitations have been used with some frequency to limit the potential for contributions to have a corrupting influence on their recipients. *See, e.g.*, 153.00.2 ARK. CODE R. § 204(a) (2014) (preventing a candidate from "solicit[ing] or accept[ing] campaign contributions more than two (2) years before an election in which the candidate seeks nomination or election"); VA. CODE ANN. § 24.2-954(A) (2011) (prohibiting state elected officials from "solicit[ing] or accept[ing] a contribution" during a regular session of the state General Assembly). These time limitations have typically been upheld as permissible regulations in light of a state's interest in preventing quid pro quo corruption or its appearance. *See, e.g.*, Thalheimer v. City of San Diego, 645 F.3d 1109, 1123–24 (9th Cir. 2011) (upholding a preelection time limit on contributions); N.C. Right to Life, Inc. v. Bartlett, 168 F.3d 705, 714–15 (4th Cir. 1999) (upholding a prohibition on lobbyist contributions to state legislators during the legislative session).