

Fall 2022

An Avenue for Corruption: Super PACs and the Common Vendor Loophole

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Recommended Citation

Matt Choi, *An Avenue for Corruption: Super PACs and the Common Vendor Loophole*, 18 *Nw. J. L. & Soc. PoLY.* 99 (2022).

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An Avenue for Corruption: Super PACs and the Common Vendor Loophole

Matt Choi*

ABSTRACT

In their campaign efforts, Super PACs and political candidates often engage professional media agencies or political consulting firms to aid them in production and placement of advertisements on media outlets, planning of advertising efforts, and planning campaign strategy. But an increasing number of Super PACs have taken to hiring the same media agencies and consulting firms as the candidates they support. Through the use of a so-called “common vendor,” Super PACs and their supported candidates can coordinate advertising strategies with each other without triggering the federal limits on spending and fundraising.

The Federal Election Commission (FEC) and the public must recognize the threat that the unregulated use of common vendors poses to our electoral democracy. Because the FEC has adopted regulations that make bringing complaints regarding common vendors nearly impossible, Super PACs and political candidates continue to evade accountability. The FEC should therefore reconsider adopting a rule presuming coordination whenever a Super PAC and a political candidate use a common vendor. By doing so, the FEC can require candidates and their Super PACs to truly ensure and document that no coordination takes place by performing due diligence prior to engagement and documenting their communications with the media agency. In addition, a more detailed firewall provision can serve to prophylactically stop actual coordination from taking place. Addressing the common vendor rule alone will not diminish the ever-increasing amount of funds poured into political campaigns by wealthy donors, but closing off this loophole is essential to an overall campaign regime of full disclosure from political actors.

Keywords: campaign finance, common vendor, election law, Super PAC, federal election commission

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* J.D. Candidate, 2023, at the Northwestern Pritzker School of Law. I would like to thank Professor Michael Kang for guiding me in developing this Note, David Kolker at the Campaign Legal Center for the conversation that germinated this research, and the members of the Northwestern Journal of Law and Social Policy for their help in editing and honing this Note.

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INTRODUCTION

In the past two years, the public has turned a watchful eye toward a wave of laws spreading throughout the United States seeking to restrict voters' access to polls. At the same time, a decade-old threat to democracy continues to distort U.S. elections: independent expenditure-only political action committees, more commonly known as "Super PACs," to which the ultra-wealthy donate billions of dollars in every election. In fact, Super PACs spent considerably more on political campaigns in the 2018 and 2020 elections than in any prior year since the Supreme Court started paving the way for Super PACs in 2010.¹ In the recent 2022 midterms, Super PACs spent \$1.3 billion, breaking the record for midterm Super PAC spending.² Super PAC spending now takes up an increasing proportion of overall election-related spending and "dwarfs" spending by candidates or political parties.³

Super PACs can receive donor contributions without any limit on the aggregate or individual amounts.⁴ They can also spend unlimited funds in independent advertising for

¹ Karl Evers-Hill, *Most Expensive Ever: 2020 Election Cost \$14.4 Billion*, OPENSECRETS (Feb. 11, 2021), <https://www.opensecrets.org/news/2021/02/2020-cycle-cost-14p4-billion-doubling-16/?msclkid=cc32c59ec4fc11eca93b7e6cc94b1cf4>; *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

² *2022 Outside Spending, by Super PAC*, OPENSECRETS, https://www.opensecrets.org/outside-spending/super_pacs (last visited Nov. 21, 2022).

³ Miriam Galston, *Outing Outside Group Spending and the Crisis of Nonenforcement*, 32 STAN. L. & POL'Y REV. 253, 265 (2021).

⁴ See FED. ELECTION COMM'N, *AO 2010-11: Contributions to an independent expenditure committee* (Aug. 2, 2010), <https://www.fec.gov/updates/ao-2010-11-contributions-to-an-independent-expenditure-committee/> [hereinafter *AO 2010-11: Contributions*].

political campaigns because, as groups of individuals, they are entitled to spend as much as they like as a form of free speech.⁵ The only legal damper on Super PACs' ability to raise and spend is that they cannot contribute directly to a political candidate.⁶ In addition, they cannot make coordinated expenditures, such as campaign advertisements for a candidate in collaboration with the candidate their ads support.⁷ Coordinated expenditures are considered contributions because they offer as much value to the candidates as cash.⁸ Yet, in recent years, Super PACs and political candidates have invented various legally sound methods to coordinate their expenditures while continuing to enjoy the benefits of unlimited fundraising. In this way, they skirt one of the only checks keeping mega-donations from politicians' coffers.

The use of a so-called "common vendor" is one of the methods Super PACs and candidates have taken to using to circumvent contribution limits. In this practice, a Super PAC uses a commercial vendor to develop advertising material to support a political candidate while the candidate uses the very same vendor to develop his or her own advertising material. By hiring the same media vendor for their advertising efforts, Super PACs and their supported candidates can coordinate their advertising strategies without triggering penalties. Through this common vendor loophole, some Super PACs put out advertisements precisely timed with the candidate's advertisements and with striking similarities in messaging and targeting.⁹ As a result, political candidates can rely on the bottomless pockets of Super PACs and their wealthy donors to pump out advertising to defeat their rivals. Wealthy donors who wish to throw their weight behind their favored candidates can give to a sympathetic Super PAC without being subject to the limitations that would attach to a direct donation to the candidate. In fact, nearly half of the money donated to Super PACs comes from individual wealthy donors, only 100 of whom donated \$1.6 billion, or 48%, of the \$3.3 billion total spent by Super PACs in 2020, giving more than \$2 million each.¹⁰ Because of the small pool of large donors, political candidates can easily discover the identities of their supporters and reward them with favorable legislation, creating a glaring avenue for corruption.

Despite this glaring corruption risk, the Federal Election Commission (FEC), the agency tasked with enforcing election laws, permits the use of common vendors as long as the vendor employs an adequate firewall to block communications between the Super PAC and the candidate who hired the vendor.¹¹ The firewall must be "designed and implemented

⁵ *Buckley v. Valeo*, 424 U.S. 1, 58–59 (1976) (holding that a limitation on independent expenditures "place substantial and direct restrictions on the ability candidates, citizens, and associations to engage in protected political expression, restrictions that the First Amendment cannot tolerate"); *see also Citizens United*, 558 U.S. 356–57 (2010).

⁶ *See AO 2010-11: Contributions*, *supra* note 4.

⁷ 52 U.S.C. § 30116(a)(7)(C); *AO 2010-11: Contributions*, *supra* note 4.

⁸ *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 221 (2003) ("[E]xpenditures made after a 'wink or nod' often will be 'as useful to the candidate as cash.'") (quoting *Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm. (Colo. Republican II)*, 533 U.S. 431, 446 (2001)).

⁹ *See* Complaint at 13–14, 16–17, *Giffords v. Fed. Election Comm'n*, No. 1:19-cv-01192 (D.D.C. Apr. 24, 2019) [hereinafter *Giffords Complaint*]; Complaint to FEC at 6, *Campaign Legal Ctr. & Margaret Christ v. MeToo Ohio, Renacci for U.S. Senate, & Majority Strategies*, (Nov. 13, 2018) [hereinafter *Renacci Complaint*].

¹⁰ *Evers-Hill*, *supra* note 1.

¹¹ 11 C.F.R. § 109.21(h) (2010).

to prohibit the flow of information” between the entity paying for a communication and the candidate identified in the communication.¹² The regulations do not specify how exactly this is to be achieved. Instead, the FEC allows a vendor to decide how to implement its firewall “in light of its specific organization, clients, and personnel.”¹³ Furthermore, when the Super PAC or political candidate assert that the vendor established and used a firewall, the FEC will not take action against them unless there is proof of communication between them that is material to the creation, production, or distribution of advertisements.¹⁴ This requirement is prohibitive of enforcement; furnishing such proof is nearly impossible, barring direct admission from either the Super PAC, the candidate, or the media vendor.¹⁵ Hard as it is to believe, the media agency need only deny that the Super PAC and the candidate communicated to each other, and the FEC will consider this enough to dismiss the complaint.¹⁶

As an illustration, in 2018, Senate candidate James Renacci and the Super PAC MeToo Ohio, which supported his campaign, both paid the consulting firm Majority Strategies at least \$583,000 to create and disseminate advertisements attacking Renacci’s opponent, Sherrod Brown.¹⁷ On October 12, 2018, Renacci’s campaign and MeToo Ohio both launched ads attacking Brown—focusing on allegations that Brown physically abused his wife in the 1980s—by displaying copies of Brown and his ex-wife’s divorce records on air.¹⁸ Renacci made Brown’s divorce a “primary campaign talking point” around the same time in statements to print media, on national television, local radio, and at political events.¹⁹ In addition, both ads explicitly connected the allegations against Brown with Brown’s opposition to Brett Kavanaugh’s Supreme Court nominations, and both referenced the same excerpts from court documents and used similar visuals, such as highlighted text from court documents.²⁰ This advertisement was probably a significant effort for the campaign because it was only the Renacci campaign’s second ad in Ohio’s entire general election and its first in four months. MeToo Ohio and Renacci also began

¹² *Id.*

¹³ Coordinated Communications, 71 Fed. Reg. 33190, 33206 (June 8, 2006) (to be codified at 11 C.F.R. pt. 109).

¹⁴ *Id.*

¹⁵ See Sarah E. Adams, *How Single-Candidate Super PACs Changed the Game and How to Change It Back: Adopting A Presumption of Coordination and Fixing the FEC’s Gridlock*, 85 BROOK. L. REV. 851, 866 (2020).

¹⁶ See *MUR 7542 Disposition (MeToo Ohio)*, FED. ELECTION COMM’N, <https://www.fec.gov/data/legal/matter-under-review/7542/> (last visited May 5, 2022); FED. ELECTION COMM’N, FIRST GENERAL COUNSEL’S REPORT: MUR 7542 (METOO OHIO) 36 (2020), https://www.fec.gov/files/legal/murs/7542/7542_15.pdf [hereinafter REPORT: MUR 7542] (despite not being provided with specific information about the vendor’s firewall, the FEC found there was no reason to doubt it worked as the vendor had asserted).

¹⁷ Renacci Complaint, *supra* note 9, at 3–11.

¹⁸ *Id.* at 6; Andrew J. Tobias, *In Second General Election Ad, Jim Renacci Attacks Sherrod Brown over His 1986 Divorce*, CLEVELAND.COM (Oct. 11, 2018, 9:21 PM), https://www.cleveland.com/open/index.ssf/2018/10/in_his_first_general_election.html.

¹⁹ Andrew J. Tobias, *Jim Renacci Doubles Down on Dredging up Sherrod Brown’s 30-Year-Old Divorce*, CLEVELAND.COM (Sept. 20, 2018, 8:40 PM), https://www.cleveland.com/open/index.ssf/2018/09/jim_renacci_doubles_down_on_dr.html.

²⁰ *Compare Renacci for Senate, Washington’s Worst*, YOUTUBE (Oct. 11, 2018), <https://www.youtube.com/watch?v=4uQcexM2Ib4>, with *Me Too Ohio, Turning a Blind Eye*, YOUTUBE (Oct. 10, 2018), https://www.youtube.com/watch?v=2yxyppoM_MM.

digital versions of these ads on Facebook during the second week of October 2018 at about the same time.²¹ Majority Strategies admitted that it provided advertisement services for both entities but insisted it had “all of the necessary legal firewalls in place.”²² Because the FEC does not require a media agency’s firewall policies to be public and has not inquired into Majority Strategies’ policy, there is no way of verifying their statement. Despite the substantial circumstantial evidence, the FEC declined to proceed with enforcement after the common vendor simply claimed that it had the requisite firewall in place—without even elaborating the firewall’s details.²³ Operating under this approach, the FEC has not initiated to enforcement proceedings on a single common vendor claim since 2004.²⁴

To justify its permissive treatment of common vendors, the FEC draws on First Amendment free speech values. In 1976, the Supreme Court announced in *Buckley v. Valeo* that it considers independent expenditures—political campaign spending by groups without direction by or collaboration with political candidates—to be a form of speech the First Amendment protects.²⁵ Therefore, the Constitution permits no restriction on individual and group spending as long as they take place independently of candidates running for federal office.²⁶ On the other hand, *Buckley* permitted Congress to continue to limit contributions to candidates because they can adequately express the donors’ support for candidates even when limited, and Congress was justified by its interest in reducing the risk of candidates rewarding donors to sympathetic groups.²⁷ In 2003, in *McConnell v. Federal Election Commission*, the Court recognized Congress’s authority to limit indirect contributions, such as when a Super PAC makes campaign advertisements for a candidate in collaboration with the candidate.²⁸ The Court considered these equivalent to contributions because coordination allows the candidate to utilize the Super PAC’s funds just as well as if they are donated directly.²⁹ Interpreting these decisions, the FEC determined that a flat ban on the use of common vendors would restrict some independent (and therefore protected) speech; it therefore established safe harbors to allow some usage of common vendors to continue.³⁰

However, the FEC was mistaken. A Super PAC cannot produce an entirely independent ad when employing a common vendor with the candidate it supports. First,

²¹ Renacci Complaint, *supra* note 9, at 6.

²² Jack Torry & Jessica Wehrman, *Jim Renacci Rips Sherrod Brown for Domestic Abuse; Senator’s Ex-Wife Refutes Claim*, COLUMBUS DISPATCH (Sept. 13, 2018, 1:53 PM), <https://www.dispatch.com/story/news/politics/elections/state/2018/09/14/jim-renacci-rips-sherrod-brown/10545459007/>.

²³ REPORT: MUR 7542, *supra* note 16, at 36.

²⁴ Ashley Balcerzak, *Candidates and Their Super PACs Sharing Vendors More Than Ever*, OPENSECRETS (Dec. 21, 2016, 3:25 PM), <https://www.opensecrets.org/news/2016/12/candidates-super-pacs-share-vendors/>.

²⁵ *Buckley v. Valeo*, 424 U.S. 1, 58–59 (1976).

²⁶ *Id.* (holding that a limitation on independent expenditures “place[s] substantial and direct restrictions on the ability candidates, citizens, and associations to engage in protected political expression, restrictions that the First Amendment cannot tolerate.”); *see also* *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 356–57 (2010).

²⁷ *Buckley*, 424 U.S. at 26–27.

²⁸ *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 221 (2003).

²⁹ *Id.*

³⁰ *Coordinated Communications*, 71 Fed. Reg. 33190, 33206 (June 8, 2006) (to be codified at 11 C.F.R. pt. 109).

multi-pronged media communications are now an indispensable, and arguably the most crucial, part of any successful electoral campaign. A common media vendor knows both the candidate's and Super PAC's campaign messaging and timing to such depth and degree that mutual employment inherently creates a high risk of coordination.³¹ Second, monitoring communications through common vendors is so difficult that political actors can collaborate with very little risk of enforcement.³²

The FEC and the public must recognize the threat that the unregulated use of common vendors poses to our electoral democracy. Because the FEC has adopted regulations that make it nearly impossible to bring complaints regarding common vendors, Super PACs and political candidates have evaded accountability for violating campaign finance laws for over a decade since Super PACs' creation in 2010. Thus, when a Super PAC and a candidate use common vendors, the FEC should rebuttably presume that the two entities have coordinated without requiring proof of communication. In addition, the FEC should update its "firewall" provision with more specific guidelines in order to prophylactically protect against coordination.

While closing off the common vendor loophole will not by itself eliminate corruption from our elections, it is an essential step toward a healthy campaign regime. Part I of this Note describes the creation and rise of Super PACs and the FEC's regulation and enforcement of their conduct. Part II highlights some of the most prominent instances of the use of common vendors, detailing some of the ways that the current regulations allow flagrant practices to go unenforced. Part III discusses the specific failings of the current FEC framework that allow such practices to proceed and then reviews the FEC's rationale for its current rules. Part IV compares the FEC's regulations to Congress's intent in passing the Bipartisan Campaign Reform Act of 2002 and analyzes why the regulations fall short of the statute's principles and commands. Lastly, Part V proposes adopting a presumption of coordination whenever political actors and Super PACs supporting them employ common vendors as a solution to the current failings of the FEC's regulations.

I. CAMPAIGN FINANCE AND FEC ENFORCEMENT

The Supreme Court shaped the course of campaign finance law over the past 46 years in *Buckley v. Valeo* in 1976.³³ In *Buckley*, the Supreme Court reviewed provisions of the Federal Election Campaign Act (FECA) that limited outside spending in campaigns—expenditures—or donations to political candidates—contributions.³⁴ Instead of ruling on the two categories together, the Court adopted a separate First Amendment analysis for each, finding that Congress can limit contributions but not expenditures.³⁵ Although both are forms of speech, the Court held that contributions serve as expressions of support for a candidate, while expenditures are expressions of political ideas akin to engaging in a political debate.³⁶ Thus, the Court permitted Congress to limit contributions since an

³¹ TAYLOR LINCOLN, DUAL AGENTS 5 (2021); *see infra* subpart IV(B).

³² Balcerzak, *supra* note 24.

³³ *Buckley v. Valeo*, 424 U.S. 1 (1976).

³⁴ *Id.* at 12–13.

³⁵ *Id.* at 22–23, 38–39.

³⁶ *Id.* at 22.

expression of support does not lose its speech value from being restricted to a lower dollar amount.³⁷

The Court pointedly rejected the legitimacy of Congress's asserted interest in "equalizing the relative ability of all voters to affect electoral outcomes," holding that this concept was "wholly foreign" to the First Amendment.³⁸ On the other hand, it upheld Congress's interest in preventing quid pro quo corruption—the exchange of money for legislative votes—and the appearance of corruption.³⁹ This interest, therefore, was sufficient to justify a limit on contributions.⁴⁰ However, the Court held that congressional limits on expenditures divest individuals of their ability to engage in "vigorous advocacy" in the national political discourse.⁴¹ A limit on expenditures would decrease the "quantity" of speech that an individual can make, which would impermissibly restrict First Amendment free speech rights.⁴² For the first time, the Supreme Court expounded the theory that the First Amendment protects the ability of individuals to use money to "amplify" speech.⁴³

However, the Court recognized that the First Amendment only protects expenditures made *independently* of the political candidate.⁴⁴ If an individual or group spends in coordination with a candidate, the spending is no longer independent, since it is then tantamount to the candidate's spending and not the kind of free speech the Court sought to protect.⁴⁵ But the Court did not explain exactly what kind of behavior counts as coordination,⁴⁶ leaving Congress and campaign actors mystified in the decades ahead.

Over the next 34 years, the Supreme Court operated within the framework set up by *Buckley*, slowly articulating the dividing line between independent expenditures and coordinated expenditures. Then, the Roberts Court picked up the *Buckley* strain again in 2010, pushing the envelope further in protecting independent expenditures. In *Citizens United*, the Supreme Court reviewed a challenge of a provision of the Bipartisan Campaign Reform Act of 2002 (BCRA, also known as the McCain-Feingold Act) that limited the amount that corporations could spend in independent expenditures.⁴⁷ The Court affirmed *Buckley*'s First Amendment principle protecting independent expenditures and ruled that this extended to businesses as well as people.⁴⁸

Up to this point, the law limited the amount that individuals could contribute to political groups and committees, providing one of the last checks on the overall amount of

³⁷ *Id.* at 58.

³⁸ *Id.* at 48–49.

³⁹ *Id.* at 25–28.

⁴⁰ *Id.* at 28–29.

⁴¹ *Id.* at 47–48.

⁴² *Id.* at 39.

⁴³ *Id.* at 22.

⁴⁴ *Id.* at 46–48.

⁴⁵ *Id.* at 46–47 ("Yet such controlled or coordinated expenditures are treated as contributions rather than expenditures under the Act. [The] contribution ceilings rather than [the] independent expenditure limitation prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions.").

⁴⁶ *See id.* at 46–47.

⁴⁷ *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 320 (2010).

⁴⁸ *Id.* at 339–40.

campaign spending.⁴⁹ In *SpeechNow.org v. Federal Election Commission* in 2010, however, the D.C. Circuit Court interpreted *Citizens United* to mean “the government has no anti-corruption interest in limiting contributions to an independent expenditure group”—that is, a group engaged only in independent expenditures.⁵⁰ The result was the rise of Super PACs, a new type of political action committee that could receive unlimited amounts of money as long as it declared that it would engage only in independent expenditures.⁵¹

Using the potentially unlimited funds they can raise from individual, corporate, union, and other group donors, Super PACs can engage in massive-scale campaigns in support of or in opposition to political candidates.⁵² Super PACs can also contribute to other Super PACs and regular PACs, but not to candidates or campaigns.⁵³

In their campaign efforts, Super PACs often engage professional media agencies or political consulting firms (vendors) to aid them.⁵⁴ These multi-million dollar firms specialize in political campaign advertising and cater to prominent political actors, including presidential candidates.⁵⁵ These vendors coordinate advertisement production and placement on media outlets, such as TV, radio stations, or social media platforms, and advertisement planning, market research, voter polling services, and campaign strategy planning. Of course, political candidates and their political parties also produce advertisements and engage the services of media agencies and political consulting firms to aid them. Most Super PACs and political candidates diligently avoid hiring the same vendor as their allied entities, but an increasing number have taken to hiring common vendors.⁵⁶

Super PACs and political candidates are required to register and file disclosure reports about their activities to the FEC, including their donors, donations, and expenditures.⁵⁷ The FEC can take enforcement actions if any political actor engages in prohibited activities or exceeds the federal limits on contributions, forcing them to disgorge or return any contributions given or expenditures made in excess of federal limits.⁵⁸ The FEC can act of its own accord or in response to a complaint filed by any individual or group.⁵⁹ Once it receives a complaint, the FEC will evaluate the complaint and responses.⁶⁰

⁴⁹ 52 U.S.C. § 30116(a)(1)(C).

⁵⁰ *SpeechNow.org v. Fed. Election Comm’n*, 599 F.3d 686, 693 (D.C. Cir. 2010).

⁵¹ *AO 2010-11: Contributions*, *supra* note 4.

⁵² Thomas Reuters, *Lobbying, PACs, and Campaign Finance: 50 State Handbook* § 10:91 (2022 ed.).

⁵³ *Id.*

⁵⁴ See, e.g., Lee Fang, *How Mitch McConnell is Bending Every Last Campaign Finance Rule*, NATION (Oct. 21, 2014), <https://www.thenation.com/article/archive/how-mitch-mcconnell-bending-every-last-campaign-finance-rule/>; Michael McAuliff & Paul Blumenthal, *Political Consultants from Mysterious Firm Tread Fine Legal Line ‘Putting the Lie to Reality’*, HUFFPOST (Dec. 6, 2017), <https://bit.ly/3bIBOgQ>.

⁵⁵ See, e.g., *What Do Presidents Joe Biden, Barack Obama and Bill Clinton Have in Common?* GMMB, <https://www.gmmmb.com/case/political-campaigns/> (last visited Sep. 16, 2022).

⁵⁶ Balcerzak, *supra* note 24.

⁵⁷ *Filing PAC Reports*, FED. ELECTION COMM’N, <https://www.fec.gov/help-candidates-and-committees/filing-pac-reports/> (last visited Sep. 16, 2022).

⁵⁸ *Remedying an Excessive Contribution*, FED. ELECTION COMM’N, <https://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/remedying-excessive-contribution/> (last visited Sep. 16, 2022).

⁵⁹ *Guidebook for Complainants and Respondents on the FEC Enforcement Process*, FED. ELECTION COMM’N 6–9 (May 2012), https://www.fec.gov/resources/cms-content/documents/respondent_guide.pdf [hereinafter *Guidebook for Complainants*].

⁶⁰ *Id.* at 11.

The General Counsel for the FEC then recommends the agency either proceed to formal investigation or dismiss the complaint.⁶¹ In order to proceed to formal investigation, the commissioners of the FEC must vote to find a “reason to believe”—that is, that there is enough evidence to find probable cause that a party has committed or is about to commit a violation.⁶²

The FEC is composed of six commissioners who are appointed by the President and confirmed by the Senate.⁶³ No more than three commissioners can represent either major party.⁶⁴ A minimum of four votes, representing a majority of the commissioners, is required to take any action.⁶⁵ If a proposed action does not muster the four votes it needs to proceed, it fails, and the FEC dismisses the complaint.⁶⁶ The FEC has also been plagued by paralyzing vacancies.⁶⁷ Party-line stalemates and chronic vacancies have led to frequent institutional paralysis that has been a consistent problem for the FEC.⁶⁸

When an individual suspects that a political actor has committed a federal election law violation, the individual may bring a complaint before the FEC, and must do so before seeking judicial action.⁶⁹ The FEC has 120 days to decide whether to proceed to investigation or dismiss the claim.⁷⁰ If the FEC delays beyond the 120 days, the complainant may bring a lawsuit against the FEC in a U.S. District Court and ask the court to order the FEC to take action.⁷¹ If the FEC still fails to act in the face of the court’s order within thirty more days, the original complainant has the right to bring a lawsuit directly against the allegedly violative party in federal court.⁷²

The development of campaign finance law and the FEC’s structure have led to an alarming state of affairs. Super PACs can receive and spend unlimited amounts, creating a massive stream of cash flowing from donors, to Super PACs, to media agencies and political consulting firms, and ultimately to the airwaves. All of this invites the kind of coordination the *Buckley* Court held should be treated as contributions. Yet, even when impermissible coordination occurs, the FEC rarely acts due to party-line stalemates or

⁶¹ *Id.* at 12.

⁶² *Id.*

⁶³ *Leadership and Structure*, FED. ELECTION COMM’N, <https://www.fec.gov/about/leadership-and-structure/> (last visited May 5, 2022).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Guidebook for Complainants*, *supra* note 59, at 12–13.

⁶⁷ FED. ELECTION COMM’N, RESPONSES TO QUESTIONS FROM THE COMMITTEE ON HOUSE ADMINISTRATION 24 (May 1, 2019), <https://bit.ly/3CCSpxE> [hereinafter *House Administration Responses*]; Dave Levinthal, *FEC Lays Bare Internal Conflicts and Challenges in Letters to Congress*, CTR FOR PUB. INTEGRITY (May 9, 2019), <https://publicintegrity.org/politics/federal-election-commission-congress-fec-conflict/>. In 2020, the FEC had three vacant positions for commissioners, which meant it was impossible for any action to proceed. Kate Ackley, *Senate Panel Approves Nominees to Fill All FEC Vacancies*, ROLL CALL: CAMPAIGNS (Dec. 3, 2020, 10:57 AM), <https://rollcall.com/2020/12/03/senate-panel-approves-nominees-to-fill-all-fec-vacancies>.

⁶⁸ Adams, *supra* note 15, at 880; Trevor Potter, *Money, Politics, and the Crippling of the FEC: A Symposium on the Federal Election Commission’s Arguable Inability to Effectively Regulate Money in American Elections*, 69 ADMIN. L. REV. 447, 456–57 (2017); Levinthal, *supra* note 67.

⁶⁹ 52 U.S.C. § 30109(a)(1); *Perot v. Fed. Election Comm’n*, 97 F.3d 553, 559 (D.C. Cir. 1996).

⁷⁰ 52 U.S.C. § 30109(a)(8)(A).

⁷¹ *Id.*

⁷² 52 U.S.C. § 30109(a)(8)(B).

structural gridlock. In the gap these circumstances have created, the abuse of common vendors has grown.

II. MODERN USE OF COMMON VENDORS

Super PACs have dramatically increased their use of common vendors over the past decade.⁷³ In the 2012 election cycle, candidates and their Super PACs hired the same person or company 161 times.⁷⁴ In 2016, this number jumped to 632.⁷⁵ From 2018 to 2020, the amount common vendors received from Super PACs and candidates increased from \$261 million to \$1.14 billion, a jump of 454%.⁷⁶ In these two election cycles, the spending was highly concentrated, with nearly \$1.3 billion going to just ten firms.⁷⁷ The sheer amount of money candidates and Super PACs funnel into political campaigns through common vendors demonstrates that this problem cannot be ignored.

A. Volume of Money

The common vendor that political candidates and Super PACs most heavily used in the 2018 and 2020 election cycles was a group of entities composed of Greer, Margolis, Mitchell, and Burns (GMMB), Waterfront Strategies, and Great American Media, who collectively received a total of \$930 million.⁷⁸ GMMB is a prominent consulting firm described as a “powerhouse Democratic advertising company,”⁷⁹ having served prominent clients such as Presidents Bill Clinton and Barack Obama.⁸⁰ Although GMMB claims that itself, Waterfront Strategies, and Great American Media are “separate companies with a strict firewall policy between them,” evidence suggests Waterfront Strategies and Great American Media may be subsidiary units of GMMB.⁸¹ For instance, both Waterfront Strategies and Great American Media operate out of the same offices as GMMB, and Great American Media reported its independent expenditures to the FEC under the name “Great American Media-GMMB.”⁸² The Huffington Post reported that Waterfront is in fact “an internal branch of GMMB” run by a GMMB managing partner.⁸³ This fiction of separate entities that are in fact functionally identical is a common technique vendors use to further obfuscate the link between the candidate and the Super PAC. Such “alias entities” are legally distinct from each other but operate virtually as aliases, often sharing the same

⁷³ Adams, *supra* note 15, at 870; Balcerzak, *supra* note 24.

⁷⁴ Balcerzak, *supra* note 24.

⁷⁵ *Id.*

⁷⁶ LINCOLN, *supra* note 31, at 9.

⁷⁷ *Id.* at 10.

⁷⁸ *Id.*

⁷⁹ Fang, *supra* note 54.

⁸⁰ Stuart Elliott, *The Media Business: Advertising; 3 Very Different Approaches to Pitching the Candidates*, N.Y. TIMES (May 29, 1992), <https://nyti.ms/3EFLFjS>; McAuliff & Blumenthal, *supra* note 54.

⁸¹ LINCOLN, *supra* note 31, at 12.

⁸² *Schedule E: Independent Expenditures Filing FEC-506027*, FED. ELECTION COMM’N (2010), <https://docquery.fec.gov/cgi-bin/forms/C00042366/506027/se>.

⁸³ Fang, *supra* note 54; McAuliff & Blumenthal, *supra* note 54.

directors, staff, address, facilities, intellectual property, and resources as the media vendor.⁸⁴

The three entities associated with GMMB received \$391.1 million for their work in the 2020 presidential general election while acting as a common vendor, including \$241.1 million from Joe Biden’s campaign and the Democratic Party and \$150 million from six Super PACs.⁸⁵

In response to a reporter’s inquiry about GMMB’s alias entities working for both a House candidate and a Democratic Super PAC active in that candidate’s contest, GMMB stated, “We’ve put in place strict firewalls, separate financial streams and password-protected areas on our computer networks.”⁸⁶ It assured Public Citizen, a nonprofit consumer rights advocacy group, that “relevant staff go through training conducted by legal counsel to further ensure careful compliance with regulations.”⁸⁷ Because media vendors are not required to publicize their firewall policies, these claims cannot be verified.

The second most highly paid common vendor in the past two election cycles was a group of entities called the “Slaters Lane Entities” due to their shared address at Slaters Lane in Alexandria, Virginia.⁸⁸ The Slaters Lane Entities, American Media and Advocacy, Red Eagle Media, National Media Research Planning and Placement, OnMessage, Inc., Starboard Strategic, and First Tuesday: The Ballot Initiative Group, together collected \$106.8 million for their work as common vendors in fourteen races in the 2018 and 2020 election cycles.⁸⁹ These, too, have been accused of being functionally identical to each other, sharing common registered agents, partners, and purchasing agents and accepting industry awards for work done by each other.⁹⁰ Evidence shows that candidates and the respective Super PACs supporting them have coordinated through the Slaters Lane entities—in some instances, flagrantly so.⁹¹

For other common vendors, while overt evidence of coordination is lacking, the scale of their activities alone is staggering. For instance, Democratic consulting firm Bully Pulpit Interactive collected \$76.7 million as a common vendor in four political races.⁹² In the 2020 presidential election, Bully Pulpit received \$58 million, consisting of \$41.5 million from the Biden presidential campaign and \$16.5 million from various Super PACs, including \$10.7 million from Nextgen Climate Action Committee.⁹³ In 2018, Bully Pulpit received \$8.6 million for the race in Missouri, including \$3.6 million from Democratic Senate candidate Claire McCaskill’s campaign committee and \$4.4 million from her

⁸⁴ See LINCOLN, *supra* note 31, at 11–12, 14–18, 25–26; *CLC Complaints Allege Illegal Coordination Between Super PACs and Two Senate Campaigns*, CAMPAIGN LEGAL CTR. (Dec. 17, 2020), <https://campaignlegal.org/update/clc-complaints-allege-illegal-coordination-between-super-pacs-and-two-senate-campaigns>.

⁸⁵ LINCOLN, *supra* note 31, at 12–13.

⁸⁶ Fang, *supra* note 54.

⁸⁷ LINCOLN, *supra* note 31, at 12.

⁸⁸ *Id.* at 10, 14.

⁸⁹ *Id.* at 14.

⁹⁰ *Giffords v. Fed. Election Comm’n*, No. CV 19-1192 (EGS), 2021 WL 4805478, at *8 (D.D.C. Oct. 14, 2021).

⁹¹ See *infra* subpart II(B).

⁹² LINCOLN, *supra* note 31, at 13.

⁹³ *Id.*

supporting Super PAC, Priorities USA Action.⁹⁴ Notably, the Managing Director of Bully Pulpit had served as digital director for McCaskill in her 2012 Senate campaign.

Targeted Victory, a Republican consulting firm, earned \$62.8 million as a common vendor for work in eleven races, including \$22.4 million toward the 2020 Georgia Senate race between Sonny Perdue and Jon Ossoff, in which it received \$12.6 million from Perdue's campaign and \$5.6 million from two Super PACs supporting Perdue.⁹⁵ Another collection of alias entities composed of Smart Media Group, Del Ray Media, and Del Cielo Media received \$45.9 million for work in four races as a common vendor from 2018 to 2020.⁹⁶ They received \$9.7 million from Senate candidate Marsha Blackburn and \$1.9 million from two Super PACs supporting Blackburn; \$5.5 million from Senate candidate Bill Hagerty and \$1.3 million from a Super PAC supporting Hagerty; and \$6.4 million from the National Republican Committee to assist Senate candidate John James and \$10.8 million from a Super PAC supporting James.⁹⁷

As these examples demonstrate, candidates and Super PACs channel massive volumes of money toward common vendors.

B. Cases with Persuasive Evidence of Coordination

In other cases, overt evidence indicates that a given Super PAC coordinated with a candidate. One example was the use of common vendors between James Renacci and MeToo Ohio, described above.⁹⁸ Additional instances of potential coordination have been between the Trump Campaign and the National Rifle Association (NRA), between six Senate candidates and the NRA, and between two Senate candidates and the PACs Ditch Fund and March On PAC.

1. The Trump Campaign

In 2016, the Trump campaign and the NRA's political action committee, the NRA-PVF, hired two of the Slaters Lane media strategy firms⁹⁹ to place pro-Trump, anti-Hillary Clinton advertisements for TV.¹⁰⁰ The NRA-PVF purchased a slate of fifty-two ad slots on an ABC affiliate TV channel in Virginia targeting adults aged 35 to 64, as the Trump campaign purchased thirty-three ads with complementary messages on the same station, set to air during the same week, and aimed at precisely the same demographic.¹⁰¹ While the Trump campaign and the NRA-PVF employed two legally different entities for their advertisements, at least four staffers who were employees of both entities signed FCC registration forms and ad purchase forms for both the Trump campaign and the NRA-PVF.¹⁰² In fact, one officer named Jon Ferrell signed ad purchases for both the Trump

⁹⁴ *Id.*

⁹⁵ LINCOLN, *supra* note 31, at 21.

⁹⁶ *Id.* at 22.

⁹⁷ *Id.* at 22–23.

⁹⁸ *See supra* Introduction.

⁹⁹ *See supra* subpart II(A). The Trump campaign hired American Media and Advocacy, and the NRA-PVF hired Red Eagle Media.

¹⁰⁰ LINCOLN, *supra* note 31, at 14–15.

¹⁰¹ Mike Spies, *Documents Point to Illegal Campaign Coordination Between Trump and NRA*, TRACE (Dec. 6, 2018), <https://www.thetrace.org/2018/12/trump-nra-campaign-coordination/>.

¹⁰² *Id.*

campaign and the NRA-PVF with the same ABC channel.¹⁰³ This severely undercuts any arguments that the two political organizations did not coordinate their strategies through the Slaters Lane group.¹⁰⁴ After all, as the Campaign Legal Center, a government watchdog nonprofit organization, commented, “[i]t is impossible for these consultants to have established firewalls in their brains.”¹⁰⁵ If this was the case, the NRA-PVF provided contributions to the Trump campaign in excess of the federal limits. In 2018, Giffords, a gun control advocacy group, filed administrative complaints with the FEC alleging illegal coordination between the Trump campaign and the NRA-PVF.¹⁰⁶ After the FEC failed to take any action on the complaints within 120 days as required by law, Giffords filed suit against the agency in 2019 for its failure to act.¹⁰⁷ Yet, even after a district court ordered it to do so in 2021, the FEC did not act on Giffords’s complaints.¹⁰⁸ In November 2021, Giffords sued the NRA directly in district court, as it is entitled to do after exhausting the administrative process, and the case remains pending.¹⁰⁹

2. Six U.S. Senate Candidates and the NRA

From 2014 to 2018, the NRA and Senate candidates Thom Tillis, Tom Cotton, Cory Gardner, Ron Johnson, Matt Rosendale, and Josh Hawley mutually paid \$96 million to two of the Slaters Lane entities for political consulting, with one Slaters Lane officer serving simultaneously as media strategist or consultant for all of the candidates and as the director of the alias entity that served the NRA.¹¹⁰ At times, the candidates and the NRA placed campaign ads on the same TV station on the same day with similar messaging through this common vendor.¹¹¹ Tellingly, at a 2018 fundraiser on his behalf, Rosendale accurately described the content and timing of the NRA’s advertisements on his behalf despite the fact that the ads were not disseminated until weeks later.¹¹² Giffords alleged that the NRA and the six U.S. Senators illegally coordinated in its 2018 complaints to the FEC described above.¹¹³

3. Amy McGrath, Michael Espy, and PACs Ditch Fund and March On PAC

In another case, two Senate candidates Amy McGrath and Michael Espy and the PACs that supported their respective campaigns, Ditch Fund and March On PAC,

¹⁰³ LINCOLN, *supra* note 31, at 15–16.

¹⁰⁴ Spies, *supra* note 101101.

¹⁰⁵ *Id.*

¹⁰⁶ Giffords Complaint, *supra* note 9, at 16.

¹⁰⁷ Brendan Quinn, *Victory! Federal Court Orders FEC to Take Action on NRA Complaint*, CAMPAIGN LEGAL CTR. (Sep. 30, 2021), <https://campaignlegal.org/update/victory-federal-court-orders-fec-take-action-nra-complaint>.

¹⁰⁸ See Caitlin Oprysko & Daniel Lippman, *Giffords sues NRA alleging campaign finance violations*, POLITICO (Nov. 2, 2021, 6:10 PM), <https://politi.co/3x4cFHc>.

¹⁰⁹ Orion de Nevers, *Representing Giffords, CLC Action Sues NRA, Senate Campaigns, for Illegal Spending*, CAMPAIGN LEGAL CTR. (Nov. 2, 2021), <https://campaignlegal.org/update/representing-giffords-clc-action-sues-nra-senate-campaigns-illegal-spending>.

¹¹⁰ Giffords Complaint, *supra* note 9, at 13–14, 16–17.

¹¹¹ *Id.* at 16, 17.

¹¹² *Id.* at 16.

¹¹³ *Id.* at 13–14, 16–17.

contracted with the same vendor to place ads.¹¹⁴ The PACs used the political consulting firm Targeted Platform Media to place their ads, while the McGrath and Espy campaigns both used Buying Time, a media strategy firm, to place their ads.¹¹⁵ The two firms were functionally identical, having a common employee, phone, and fax number.¹¹⁶ The same employee placed many of the ads for the senate campaigns and strategically placed the PACs' ads supporting those same campaigns.¹¹⁷ The Campaign Legal Center filed complaints with the FEC in 2020 alleging illegal coordination of over \$8 million in expenditures, but the FEC has yet to announce the resolution of this complaint.¹¹⁸

As this shows, the FEC has been reluctant to act even in cases with a great deal of circumstantial evidence indicating coordination. By requiring concrete proof of communication, the FEC has made effective enforcement all but impossible.

III. THE LIMITATIONS OF THE CURRENT FEC FRAMEWORK

Super PACs and candidates have been largely free to employ common vendors in their campaign pursuits under the FEC's current regulations. The FEC has not taken a single enforcement action on a coordination claim since *Citizens United* in 2010¹¹⁹ and has not investigated a common vendor case since 2004.¹²⁰ Consider, for instance, the above-described allegation of coordination between MeToo Ohio and Renacci for U.S. Senate, who disseminated ads with striking similarities in themes, tone, and style and with references to the same excerpted court documents and similar visuals.¹²¹ Even without any details regarding the vendor's firewall policy, the FEC still presumed the firewall to have been sufficient based merely on the complainant's failure to conclusively prove that one of the two purchasers transmitted material information to the other.¹²² Indeed, Ann Ravel, former chair of the FEC, observed that the coordination between the NRA and the Trump

¹¹⁴ *CLC Complaints Allege Illegal Coordination Between Super PACs and Two Senate Campaigns*, *supra* note 84.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Complaint to FEC at 2, Campaign Legal Ctr. & Margaret Christ v. Ditch Fund, (Dec. 16, 2020); Complaint to FEC at 2, Campaign Legal Ctr. & Margaret Christ v. March On PAC, (Dec. 16, 2020). After a complainant files a complaint, the FEC keeps enforcement matters confidential until they are resolved. If the FEC dismissed the complaint or completed enforcement, it would list the case under closed Matters Under Review on its website. Searching for closed Matters Under Review on the FEC's website for "March On PAC" and "Ditch Fund" returns no relevant results. *Enforcing Federal Campaign Finance Law*, FED. ELECTION COMM'N, <https://www.fec.gov/legal-resources/enforcement/> (last visited Nov. 5, 2022); *Closed Matters Under Review*, FED. ELECTION COMM'N, https://www.fec.gov/data/legal/search/murs/?search_type=murs&search=%22Ditch+Fund%22&case_no=&case_respondents=&case_min_open_date=&case_max_open_date=&case_min_close_date=&case_max_close_date= (last visited Nov. 5, 2022); *Closed Matters Under Review*, FED. ELECTION COMM'N, https://www.fec.gov/data/legal/search/murs/?search_type=murs&search=%22March+on+PAC%22&case_no=&case_respondents=&case_min_open_date=&case_max_open_date=&case_min_close_date=&case_max_close_date= (last visited Nov. 20, 2022).

¹¹⁹ LINCOLN, *supra* note 31, at 6; *see, e.g., House Administration Responses*, *supra* note 67, at 24.

¹²⁰ Balcerzak, *supra* note 24.

¹²¹ Renacci Complaint, *supra* note 9, at 2.

¹²² REPORT: MUR 7542, *supra* note 16, at 36.

campaign¹²³ was so “obvious” and “blatant” that it appeared “everyone involved probably just [thought] there [were not] going to be any consequences.”¹²⁴ So far, they would have been right.¹²⁵ What is it about the FEC’s regulations that allows this practice to go virtually unchecked? Subpart III(A) examines the FEC’s permissive rules for common vendors, and subpart III(B) describes the FEC’s offered rationale for its current rules.

A. *The Current Loophole*

The FEC’s common vendor regulations pose two crucial problems. First, they make finding an actionable use of common vendors too difficult. Second, the regulations’ broadly permissive definition of a “firewall” fails to articulate concrete requirements to prevent improper information from passing between a candidate and a Super PAC.

First, the regulations set the bar too high for an actionable use of common vendors. To begin with, they place the burden on the complainant to establish that a Super PAC and a political candidate have coordinated through a common vendor. In addition, they require that the vendor performed services for the Super PAC “within 120 days” of being employed by a candidate¹²⁶ and “use[d] or convey[ed] information . . . material to the creation, production or distribution of the communication.”¹²⁷ Both of these threshold requirements “significantly increase the burden for proving coordination, making violations harder to prove.”¹²⁸ In fact, the FEC’s previous dismissals of complaints indicate that, without proof of the transfer of material information, the FEC will not even inquire whether the vendor has set up a firewall at all.¹²⁹ The FEC emphasizes that its firewall provisions do not require commercial vendors to use firewalls, and that it will not draw a “negative inference” from the lack of a firewall.¹³⁰

Further, the FEC’s regulations provide for various “safe harbor” exceptions, specifying that certain conduct will not violate the common vendor rule.¹³¹ One safe harbor exception is satisfied by the use of a firewall, a system or procedure “designed and implemented to prohibit the flow of information between employees or consultants providing services for the person paying for the communication and those employees or consultants currently or previously providing services to the candidate.”¹³² The vendor must describe the firewall it implements in a written policy “distributed to all relevant employees, consultants, and clients.”¹³³

A firewall fails to qualify for the safe harbor exception if it allows information about the candidate’s campaign plans, projects, activities, or needs to pass to the person paying for the communication, and the information was material to the creation, production, or

¹²³ See *supra* subpart II(B)(1).

¹²⁴ Spies, *supra* note 101.

¹²⁵ See *supra* subpart II(B)(1).

¹²⁶ 11 C.F.R. § 109.21.

¹²⁷ *Id.*

¹²⁸ Adams, *supra* note 15, at 866.

¹²⁹ See, e.g., REPORT: MUR 7542, *supra* note 16, at 36.

¹³⁰ *Id.*

¹³¹ Coordinated Communications, 71 Fed. Reg. 33190, 33206 (June 8, 2006) (to be codified at 11 C.F.R. pt. 109).

¹³² 11 C.F.R. § 109.21(h).

¹³³ *Id.* § 109.21(h)(2).

distribution of the communication.¹³⁴ The burden is on the complainant to show the media agency failed to implement an adequate firewall to prevent material information from passing through it.¹³⁵

After receiving a complaint, the Commission engages in a factual investigation of the firewall policy weighing “the credibility and specificity of any allegation of coordination against the credibility and specificity of the facts presented in the response.”¹³⁶ The FEC recommends that the vendor “provide reliable information (*e.g.*, affidavits) about an organization’s firewall, and how and when the firewall policy was distributed and implemented.”¹³⁷

In sum, the FEC places the burden of proof on the complainant to show that the Super PAC or candidate conveyed material information through the common vendor; and, if the common vendor claims that it employed a firewall, the FEC requires the complainant to show that material information nevertheless passed through the firewall. Without cooperation from the allegedly violative parties, it is nearly impossible for any complainants to furnish this kind of evidence and succeed on their claims.

Second, the FEC fails to articulate specific standards that a vendor must meet to have an adequate firewall. Beyond the bare requirement that the firewall must prevent material information from passing through it, the regulations fail to apprise vendors of what specific policies or systems they must implement to accomplish that goal. In fact, the FEC intentionally avoided imposing more specific procedural requirements, reasoning that “a firewall is more effective if established and implemented . . . in light of [the organization’s] specific organization, clients, and personnel.”¹³⁸ The D.C. Circuit has upheld the firewall safe harbor provision despite its lack of specificity, deferring to the FEC’s discretion and experience from adjudicating a prior common vendor case regarding a PAC called EMILY’s List.¹³⁹ However, the agency’s lax regulations pose a serious problem. Since media vendors are also not required to publicize their firewall policies, the vague firewall rule fails to give media vendors any incentive to adopt rigorous, competitive measures in keeping with modern technological standards.

B. The FEC’s Rationale

Scholars observe that the FEC’s common vendor provisions appear “flimsy” even to “ordinary citizens not trained in the technical legal standards adopted by the FEC.”¹⁴⁰ The FEC’s provisions are laxer than those of many states; for example, California adopts a presumption of coordination whenever a Super PAC and a candidate employ a common

¹³⁴ *Id.* § 109.21(h).

¹³⁵ *Id.*

¹³⁶ Coordinated Communications, 71 Fed. Reg. at 33206–07.

¹³⁷ *Id.* at 33207.

¹³⁸ *Id.* at 33206.

¹³⁹ *Shays v. Election Comm’n*, 528 F.3d 914, 930 (D.C. Cir. 2008); Coordinated Communications, 70 Fed. Reg. 73946, 73955 (proposed Dec. 14, 2005) (to be codified at 11 C.F.R. pt. 109); FED. ELECTION COMM’N, FIRST GENERAL COUNSEL’S REPORT: MUR 5506 (EMILY’S LIST) (2005) [hereinafter REPORT: MUR 5506].

¹⁴⁰ Galston, *supra* note 3, at 267; *see* Club for Growth, Inc., Fed. Election Comm’n Advisory Op. 2010-09 (July 22, 2010); Eliza Newlin Carney, *Firewall Between Candidates and Super PACs Breaking Down Rules of the Game*, ROLL CALL (Feb. 18, 2014, 11:30 AM), <https://perma.cc/M2TQ-DUZN>.

vendor.¹⁴¹ Many find that, while the FEC upholds the principle of free speech from *Citizens United*, it neglects Congress’s judicially sanctioned interest in preventing quid pro quo corruption.¹⁴² The Harvard Law Review criticized the rules as “permissive” and facilitating “a greater degree of candidate engagement with Super PAC efforts than may be desirable considering the mandate of independence imposed on Super PACs.”¹⁴³ The regulations betray a highly deferential attitude toward political players, drawing a wide, permissive berth around their existing practices. Examining the FEC’s stated rationales for drafting the rules as it did could illuminate the reasons for the rules’ current deficiencies.

Administrative records indicate that, when the FEC passed its regulations on coordination and common vendors, it was more preoccupied with protecting common vendor use than it was with preventing potentially corruptive behavior.¹⁴⁴ Indeed, as I will describe below, the FEC manifested a desire to keep from chilling protected speech in accordance with *Buckley* and protect Super PACs and candidates from speculative complaints.¹⁴⁵

One of the FEC’s primary objectives in promulgating the coordination and common vendor regulations was to avoid curtailing or chilling protected speech.¹⁴⁶ During the public hearing on the rules, the commissioners repeatedly described themselves as “true believer[s]” of the First Amendment¹⁴⁷ and noted that “the Supreme Court has recognized that political party committees [and other committees] have the right to make unlimited independent expenditures.”¹⁴⁸

In addition, while forming the rules, the FEC was highly focused on protecting existing “business practices” of political actors at the time.¹⁴⁹ In the first proposal of the regulations, the FEC acknowledged the outcry from political actors concerned with the impact that a strict ban on common vendors would have on their campaign efforts.¹⁵⁰ The FEC noted the many comments it received from individuals concerned about the “potential liability that would attach . . . to candidates and party committees” for using the same vendors as other candidates and party committees, especially due to the often “limited number of qualified vendors in a given geographic area.”¹⁵¹

¹⁴¹ CAL. CODE REGS. tit. 2, § 18225.7(d)(3).

¹⁴² Note, *Working Together for an Independent Expenditure: Candidate Assistance with Super PAC Fundraising*, 128 HARV. L. REV. 1478, 1488 (2015) [hereinafter *Working Together for an Independent Expenditure*].

¹⁴³ See *id.* at 1483–84.

¹⁴⁴ See Coordinated Communications, 70 Fed. Reg. at 73955; *Proposed Rulemaking on Coordinated and Independent Expenditures: Hearing Before the Fed. Election Comm’n*, Fed. Election Comm’n 175–76 (Oct. 23, 2002) (statement of Commissioner Smith) [hereinafter *Rulemaking Hearing*].

¹⁴⁵ See *Rulemaking Hearing*, *supra* note 144, at 31; Coordinated Communications, 71 Fed. Reg. 33190, 33206 (June 8, 2006) (to be codified at 11 C.F.R. pt. 109).

¹⁴⁶ *Rulemaking Hearing*, *supra* note 144, at 31.

¹⁴⁷ *Id.* at 28 (statement of Commissioner Smith), 35 (statement of Commissioner McDonald), 41 (statement of Commissioner Toner).

¹⁴⁸ Coordinated Communications, 71 Fed. Reg. at 33190–02, 33206 (citing *Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm’n* (Colo. Republican I), 518 U.S. 604, 614, 618 (1996)).

¹⁴⁹ Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 436 (Jan. 3, 2003) (to be codified at 11 C.F.R. pts. 100, 102, 109, 110, 114).

¹⁵⁰ See Coordinated Communications, 70 Fed. Reg. 73946, 73955 (proposed Dec. 14, 2005) (to be codified at 11 C.F.R. pt. 109).

¹⁵¹ *Id.*

During the rulemaking hearings, several FEC commissioners expressed concern about the risk that a candidate could unknowingly employ a media vendor who had coincidentally worked for a Super PAC supporting his or her own campaign.¹⁵² To prevent this scenario, they considered adding a knowledge requirement for a violation, though they did not ultimately do so.¹⁵³ The commissioners repeatedly returned to the problem posed by the limited number of vendors available for media and consulting services, observing that, “if you use a common vendor and there are only two or three out there to do this extensively,” this precludes a “wide range of organizations from using media buyers in placing their ads because, if they used any media buyer, there was a high likelihood it would be one used by a party or the candidate.”¹⁵⁴ Essentially, the commissioners were concerned that, due to the limited number of vendors available, there was a high likelihood that a Super PAC seeking media services could accidentally hire a vendor also contracting with a candidate it sought to support.

In addition, the FEC weighed the burden that “speculative complaints” regarding common vendors would impose on political candidates and parties, as well as the evidentiary challenge those political actors would face in trying to “prove a negative” by showing that they had not engaged in discussions through a common vendor.¹⁵⁵ In fact, in the records accompanying the publication of the Final Rules, the FEC made it a point to assure commenters that the regulations would not establish a presumption of coordination from the mere use of a common vendor,¹⁵⁶ and that they would not “unduly intrud[e] into existing business practices.”¹⁵⁷

In general, the FEC seemed skeptical that the use of common vendors posed any corruption risk at all.¹⁵⁸ While the commissioners acknowledged that “Congress ha[d] made a judgment” on the risk of corruption from the use of common vendors in passing the common vendor provision of the BCRA, they hedged on this judgment, saying Congress could be “[r]ight or wrong” and that it remained to be seen whether the justification would “hold up or not” in Court.¹⁵⁹ In addition, while the Commission recognized the potential for circumvention of their rules by “winks and nods”¹⁶⁰ and the

¹⁵² *Rulemaking Hearing*, *supra* note 144, at 24 (statement of Vice Chairman Sandstrom) (“Let’s say one of the organizations . . . decides to produce an ad. They hire someone, unbeknownst to them, who provided some film editing services to a campaign. Should that organization then be considered to have made an in-kind contribution if, unbeknownst to them, they hired a film editor who had worked for a campaign or for a consultant of a campaign? In order for there to be an in-kind contribution, there almost has to be some sort of knowing contribution. They have to know they are employing a common vendor.”).

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 161–63 (statement of Vice Chairman Sandstrom).

¹⁵⁵ Coordinated Communications, 71 Fed. Reg. 33190, 33206 (June 8, 2006) (to be codified at 11 C.F.R. pt. 109).

¹⁵⁶ Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 437 (Jan. 3, 2003) (to be codified at 11 C.F.R. pts. 100, 102, 109, 110, 114) (“The final rule . . . does not presume coordination from the mere presence of a common vendor . . . The Commission does not anticipate that a person who hires a vendor and who . . . follows prudent business practices, will be inconvenienced by the final rule.”).

¹⁵⁷ *Id.* at 436.

¹⁵⁸ *See Rulemaking Hearing*, *supra* note 144, at 175–76 (statement of Commissioner McDonald).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 57 (statement of Commissioner McDonald) (“I think there are circumstances where vast sums of money are involved that people do wink and nod. They do that in the election business as well, I think. Or the Congress thinks that. Let’s put it like that.”); *see* *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 221 (2003).

difficulty of proving coordination without the voluntary admission of the involved parties,¹⁶¹ they also expressed skepticism about the danger of common vendors. One commissioner even stated, “I question whether there’s ever really much coordination that takes place . . . I get the impression the vendors are not really serving as some kind of conduit for a coordinated campaign strategy.”¹⁶²

The Commission downplayed and did not respond to testimony during its hearings about the growing danger of common vendors. A political scientist witness conjectured that there was “more material-sharing than I think we’re all aware of,” stating that, while she was only aware of a few concrete instances of communication through common vendors, she was certain there was more occurring without any of their knowledge.¹⁶³ She testified that electoral actors had, at the time of her testimony in 2002, already been using common vendors to avoid charges of coordination “for some time now.”¹⁶⁴ Furthermore, she warned that parties, groups, and candidates would “gravitate” toward using common vendors in the future, since it was so easy for them to identify and hire vendors who worked with the candidate or group they wanted to support.¹⁶⁵ In addition, she raised an early alarm about the use of alias entities, remarking that she was “shocked” by the prevalence of media agencies employing the “fiction” of different firms with identical principal officers, as the GMMB entities and the Slaters Lane entities have done.¹⁶⁶ She warned the FEC that its common vendor provision ran the risk of “inviting” this behavior.¹⁶⁷ The commissioners responded only with skepticism.¹⁶⁸ Of course, electoral actors are doing precisely what the witness warned the FEC about in 2002.¹⁶⁹

However, the FEC had already made up its mind from the beginning and only solidified its position as the rulemaking went on. The FEC proposed even in its first proposed version of the rules that parties should not be found liable under the common vendor standard as long as they followed “prudent business practices” (meaning maintenance of a firewall policy).¹⁷⁰ The FEC did acknowledge the comments it received during the Notice-and-Comment period of its rulemaking process arguing that “such a safe harbor [for firewalls] could compromise BCRA” by undermining its purpose.¹⁷¹ Ultimately, however, the FEC sided with other commenters who urged that the safe harbor was necessary to reduce the “chilling effect” on organizations conducting lobbying-related meetings with candidates—that is, to avoid deterring them from exercising their First Amendment rights to free speech and association.¹⁷² The pro-safe harbor commenters also argued that the safe harbor was necessary to “encourage and enhance compliance with the

¹⁶¹ *Rulemaking Hearing*, *supra* note 144, at 36–38 (statement of Commissioner McDonald).

¹⁶² *Id.* at 171 (statement of Commissioner Smith).

¹⁶³ *Id.* at 170 (statement of Robin Kolodny).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 173, 170.

¹⁶⁶ *Id.* at 171. *See supra* subpart II(A).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 171 (“Now, to what extent does this really result in coordination?”).

¹⁶⁹ *See supra* subpart III(A).

¹⁷⁰ Coordinated Communications, 70 Fed. Reg. 73946, 73955 (proposed Dec. 14, 2005) (to be codified at 11 C.F.R. pt. 109).

¹⁷¹ Coordinated Communications, 71 Fed. Reg. 33190, 33206 (June 8, 2006) (to be codified at 11 C.F.R. pt. 109).

¹⁷² *Id.*

coordination regulations” and reduce the burden on organizations to respond to speculative complaints.¹⁷³ The Commission ultimately concluded that “establishing firewalls and similar screening policies is an effective way to simultaneously protect that right and avoid improper coordination.”¹⁷⁴

The FEC’s skeptical and fleeting consideration of Congress’s interest in preventing quid pro quo corruption is curious. It indicates that, in promulgating these rules, the FEC underappreciated the constitutional harm and the risk of corruption posed by the use of common vendors. Instead, the FEC favored allowing candidates, political parties, and vendors to carry on business as usual.¹⁷⁵ The FEC seemed perturbed by the limited pool of media agencies offering political consulting services. These considerations led the FEC to conclude that a flat ban on common vendors would be overly restrictive and prohibitive of normal campaign behavior.

IV. WHY FEC’S REGULATIONS ARE DEFICIENT

Despite the FEC’s apparent rationale for drafting the common vendor rule as it did, the truth is that the threshold showing and firewall requirements do not conform with the congressional intent behind BCRA. As a result, the regulations treat as independent expenditures behavior that should be considered contributions, subverting the expectations and intent of the original drafters of BCRA.

A. Congressional Intent

The FEC’s regulations run directly counter to Congress’s intent to restrain the kind of coordinated spending it observed occurring without requiring proof of communication between the coordinating parties to find violations.¹⁷⁶

BCRA amended FECA to define coordinated expenditures as “expenditures made . . . *in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents.*”¹⁷⁷ This language indicates that Congress wanted to ensure that the law would only treat as independent those expenditures lacking any element of cooperation or concerted action.

The Supreme Court strictly protects individuals’ rights to engage in “totally” independent campaign expenditures.¹⁷⁸ This protection, however, relies on the fact that spending coordinated with political candidates will instead be considered contributions to the candidates, and therefore subject to regulation.¹⁷⁹ In other words, it is only because contributions are regulated that expenditures can be protected. The Court explained that

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ Coordinated Communications, 70 Fed. Reg. at 73955.

¹⁷⁶ See 52 U.S.C. § 30116 note (Regulations by the Federal Election Commission); 142 CONG. REC. S2096, S2145 (daily ed. Mar. 20, 2002) (statement of Sen. Russ Feingold).

¹⁷⁷ Bipartisan Campaign Reform Act of 2002 § 304, 52 U.S.C. § 30116(a)(7)(B)(i) (emphasis added).

¹⁷⁸ *Buckley v. Valeo*, 424 U.S. 1, 39, 47 (1976).

¹⁷⁹ *Id.* at 46–47.

any “prearranged or coordinated expenditures amounting to disguised contributions”¹⁸⁰ are “as useful to the candidate as cash”¹⁸¹ and could be limited as contributions.¹⁸²

BCRA’s restriction on contributions is justified by Congress’s interests in preventing corruption and the appearance of corruption—the only legitimate governmental interests the Court has recognized for limiting campaign spending.¹⁸³ Indeed, courts since *Buckley* have consistently identified contributions to candidates as the greatest potential source of corruption,¹⁸⁴ recognizing that these can spawn corruption both directly and indirectly.¹⁸⁵

According to the Court, corruption includes not only improper exchanges of money for votes, but also exchanges of money for undue influence and access to legislators.¹⁸⁶ In *Buckley* and *McConnell*, the Court recognized that corruption can arise from making politicians more “compliant” to the demands of certain interests due to large donations, giving the donors disproportionate access to the workings of the legislative process.¹⁸⁷ The Court also recognized the interest of preventing the appearance of corruption because of the discouraging effect it has on voters’ willingness to participate in democratic governance.¹⁸⁸

With the principles of *Buckley* and *McConnell* in mind, Congress directed the FEC to “promulgate new regulations on coordinated communications paid for by persons other than candidates, authorized committees of candidates, and party committees.”¹⁸⁹ Congress specified that “[t]he regulations *shall not require agreement or formal collaboration to establish coordination*” and “shall address . . . payments for the use of a common vendor.”¹⁹⁰ As both the the D.C. Circuit Court and the FEC have observed, “BCRA merely listed several topics the rules ‘shall address,’ providing no guidance as to how the FEC should address them.”¹⁹¹

Congress’s interest in limiting coordinated expenditures extends to the use of common vendors. Using common vendors allows a Super PAC and its supported candidate to act “in cooperation, . . . in concert, with, or at the . . . suggestion of” one another, which is how BCRA defines coordination.¹⁹² Because Super PACs are often run by candidates’ confidants, when they employ common vendors with their candidates, a Super PAC can

¹⁸⁰ *Id.* at 47.

¹⁸¹ *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 221 (2003) (citing *Fed. Election Comm’n v. Colo. Republican Fed. Campaign Comm.* (Colo. Republican II), 533 U.S. 431, 446 (2001)).

¹⁸² *Buckley*, 424 U.S. at 47.

¹⁸³ *Id.* at 26–29.

¹⁸⁴ *See, e.g., Austin v. Michigan Chamber of Com.*, 494 U.S. 652, 660 (1990); *Nixon v. Shrink Missouri Gov’t PAC*, 528 U.S. 377, 388 (2000); *McConnell*, 540 U.S. at 143. *See also* Jennifer Mueller, *The Unwilling Donor*, 90 WASH. L. REV. 1783, 1798–1805 (2015).

¹⁸⁵ Richard Hasen, *Of Super PACs and Corruption*, POLITICO (Mar. 22, 2012, 6:13 AM), <https://www.politico.com/story/2012/03/of-super-pacs-and-corruption-074336>.

¹⁸⁶ *McConnell*, 540 U.S. at 150, 154.

¹⁸⁷ *Buckley*, 424 U.S. at 47 (such “disguised contributions” might be given “as a quid pro quo for improper commitments from the candidate.”); *McConnell*, 540 U.S. at 143.

¹⁸⁸ *McConnell*, 540 U.S. at 144; *see also Buckley*, 424 U.S. at 27.

¹⁸⁹ 52 U.S.C. § 30116 note (Regulations by the Federal Election Commission).

¹⁹⁰ *Id.* (emphasis added).

¹⁹¹ *Shays v. Fed. Election Comm’n*, 414 F.3d 76, 97–98 (D.C. Cir. 2005); *Coordinated Communications*, 71 Fed. Reg. 33190, 33190–91 (June 8, 2006) (to be codified at 11 C.F.R. pt. 109) (citing *Shays*, 414 F.3d at 97–98).

¹⁹² 52 U.S.C. § 30116(a)(7)(B)(i).

spend on advertising that the candidate would have put out anyway, making it little different from the candidate spending the money him or herself. Thus, the Super PAC's spending is as good as "cash" for candidates, transforming the expenditure into a contribution.¹⁹³ Furthermore, since so few major Super PAC donors are out there, candidates can often easily identify and reward them,¹⁹⁴ meaning donors can "have confidence that their contributions will carry as much weight as if they were contributing directly to the candidates' campaigns."¹⁹⁵ The reason the Court treats coordinated expenditures as contributions applies equally for expenditures through common vendors.

Another problem is that, while Congress gave the FEC considerable discretion to define coordination, it specifically instructed the FEC *not* to require proof of communication.¹⁹⁶ BCRA directed the FEC to repeal its previous rule, which defined a communication as "coordinated" only if the producer created, produced, or distributed it "after substantial discussion" between the spender and the candidate about the communication, "the result of which is collaboration or agreement."¹⁹⁷ Senators Russ Feingold and John McCain, the two originators of the Senate bill, considered the previous rules to be "far too narrow to be effective in defining coordination in the real world of campaigns and elections."¹⁹⁸ They intended that BCRA's command not to require "agreement or formal collaboration" would lower the bar, reflecting the reality that "de facto understandings" and "informal understandings" "can result in actual coordination as effectively as explicit agreement or formal collaboration."¹⁹⁹

Thus, Congress and the originators of BCRA intended the FEC to pass regulations that would capture the various forms of coordination in which political actors could engage in the "real world."²⁰⁰ They directed the FEC not to require complainants and the FEC (if acting *sua sponte*) to prove that an "agreement or formal collaboration" had occurred between a Super PAC and the supported political candidate.²⁰¹ Yet, that is just what the FEC did.

¹⁹³ See *Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm.* (Colo. Republican II), 533 U.S. 431, 446 (2001).

¹⁹⁴ Michael S. Kang, Essay, *The Year of the Super PAC*, 81 GEO. WASH. L. REV. 1902, 1918 (2013) (Indeed, in the 2012 election cycle, "[j]ust over one hundred people donated roughly forty percent of all money contributed to Super PACs.").

¹⁹⁵ CHISUN LEE, BRENT FERGUSON, & DAVID EARLEY, BRENNAN CTR. FOR JUST., *AFTER CITIZENS UNITED: THE STORY IN THE STATES* 10 (2014), https://www.brennancenter.org/sites/default/files/publications/After%20Citizens%20United_Web_Final.pdf.

¹⁹⁶ 52 U.S.C. § 30116 note (Regulations by the Federal Election Commission).

¹⁹⁷ 11 C.F.R. § 100.23(c)(2)(iii) (2001) (repealed 2002).

¹⁹⁸ 142 CONG. REC. S2096, S2145 (daily ed. Mar. 20, 2002) (statement of Sen. John McCain).

¹⁹⁹ 142 CONG. REC. S2096, S2145 (daily ed. Mar. 20, 2002) (statement of Sen. Russ Feingold) ("The FEC's narrowly defined standard of requiring collaboration or agreement sets too high a bar to the finding of 'coordination.' This standard would miss many cases of coordination that result from de facto understandings . . . [T]he Commission's new regulations . . . mean that specific discussions between a candidate or party and an outside group about campaign-related activity can result in a finding of coordination, without an 'agreement or formal collaboration.'"); *Id.* (statement of Sen. John McCain) ("It is important for the Commission's new regulations to ensure that actual 'coordination' is captured by the new regulations . . . we expect the FEC to cover 'coordination' whenever it occurs, not simply when there has been an agreement or formal collaboration . . .").

²⁰⁰ § 100.23(c)(2)(iii) (2001).

²⁰¹ *Id.*

B. Deficiencies of the FEC's Regulations

Instead of shoring up the deficiencies in the FEC's pre-BCRA regulations, the FEC's new definition of coordination regarding common vendors continues to exhibit a poor fit with the "real world" behavior of Super PACs and the supported political candidates.²⁰² Activity that appears to invite quid pro quo corruption risk is "either left unaddressed by the anti-coordination rules currently in place or left unenforced because of the high burden of proof the regulations require."²⁰³ As a result, the rules permit "[a]n end-run around contribution limits," "open[ing] the door to rapidly increasing opportunities for the reality or appearance of corruption."²⁰⁴ The three main deficiencies of the FEC's regulations are as follows: (1) the FEC has not given due consideration to the risk of corruption, one of Congress's primary motivations in commanding it to form rules for common vendors; (2) the regulations require proof that material information has passed through the firewall in order to find a violation, running directly counter to Congress's command not to require "agreement or formal collaboration to establish coordination"; and (3) the FEC fails to include sufficient details in its firewall provision that would hold media vendors to a rigorous standard of behavior that would prophylactically prevent coordination. These three deficiencies will be discussed further below.

1. Failure to Contemplate the Special Corruption Risk of Common Vendors

First, the FEC has not fully contemplated the special danger posed by the use of common vendors. In its rulemaking process, at no point did the FEC contemplate the reason Congress singled out the use of common vendors for regulation. Instead, the FEC devoted most of its attention to how it could carry out Congress's command while imposing the least inconvenience on political actors.²⁰⁵ However, the use of common vendors for any services relating to campaign strategy in itself poses an extraordinarily high risk of coordination²⁰⁶ whose dangers cannot be mitigated by usual "prudent business practices."²⁰⁷ As Public Citizen notes, "[p]olitical consulting firms are perfectly positioned to harmonize the message and strategies of campaigns and super PACs."²⁰⁸ A client must share with its media vendor information that necessarily creates a close relationship, including not only the advertising message, but also key information such as the timing and target demographic of the message. When a vendor simultaneously works for a political candidate and a Super PAC supporting that candidate on the very same campaign, it is highly unlikely that the vendor will be able to produce advertising material without at least unintentionally utilizing some of the information from the political candidate. Since

²⁰² 142 CONG. REC. S2096, S2145 (daily ed. Mar. 20, 2002) (statement of Sen. John McCain).

²⁰³ Adams, *supra* note 15, at 871.

²⁰⁴ Galston, *supra* note 3, at 267.

²⁰⁵ See generally *Rulemaking Hearing*, *supra* note 144; Coordinated Communications, 70 Fed. Reg. 73946 (proposed Dec. 14, 2005) (to be codified at 11 C.F.R. pt. 109); Coordinated Communications, 71 Fed. Reg. 33190, 33206 (June 8, 2006) (to be codified at 11 C.F.R. pt. 109).

²⁰⁶ Adams, *supra* note 15, at 877.

²⁰⁷ Coordinated Communications, 70 Fed. Reg. at 73955.

²⁰⁸ *Political Consulting Firms Made \$1.4 Billion Simultaneously Working for Campaign Committees and 'Independent' Groups*, PUB. CITIZEN (Dec. 15, 2021), <https://www.citizen.org/news/political-consulting-firms-made-1-4-billion-simultaneously-working-for-campaign-committees-and-independent-groups/>.

many candidates place advertising material and messaging on their websites, Super PACs can also coordinate with their candidates through publicly known information to produce ads that are virtually identical to that of the candidates even without specific communication between the two entities. Thus, some have noted, “there’s always coordination—the media is the coordination.”²⁰⁹ Because Super PACs only emerged in 2010, the FEC’s 2006 regulations cannot fully contemplate the ease with which candidates and Super PACs can coordinate today and account for the “the current reality of coordinated activities.”²¹⁰

Consequently, the supported candidate gains access to the unlimited pool of funds drawn from wealthy donors, and major donors can rely on candidates knowing their identities. The candidate can thus reward them for their disguised donations with “special favors” of favorable legislative activity²¹¹—precisely the type of corruption that *Buckley* contemplated. For instance, out of the six Senate candidates the NRA supported through common vendors,²¹² the four candidates who won, Thom Tillis, Cory Gardner, Ron Johnson, and Tom Cotton, voted against most or all of the major gun control bills that went to a vote from 2014 to 2018.²¹³

In addition, the regulations lose sight of the limited scope of the “totally independent[.]” expenditures the Supreme Court sought to protect in *Buckley*, which must truly be independent in order merit protection.²¹⁴ Unlike these totally independent expenditures, the use of common vendors is in a grey area at best and certainly cannot be considered truly independent. As the Campaign Legal Center noted, “[s]haring vendors presents an easy way to undermine the independence of super PACs” because “[t]he common vendor could operate as a conduit for information between the two.”²¹⁵ Furthermore, a Super PAC and the supported candidate employing a common vendor raises a question of their motive in doing so, given the availability of other vendors. The decision of a Super PAC and a candidate to hire a common vendor should merit at least an investigation as to whether the two entities intend to behave “totally independently.”²¹⁶

Unless the FEC wholly rejects Congress’s interest in preventing corruption, it may instead attach more value to the practical reality for political actors, who face a limited range of options for political consulting firms or media vendors who cater to their particular needs. Indeed, this is what the FEC spent much of the rulemaking process discussing.²¹⁷ Perhaps the FEC’s reasoning is that it must balance the danger of corruption against the practical concern of candidates who must choose from a limited pool of vendors. However, this burden cannot outweigh the danger of corruption from unlimited coordinated expenditures through a common vendor. To privilege political actors’ convenience over

²⁰⁹ DANIEL P. TOKAJI & RENATA E.B. STRAUSE, *THE NEW SOFT MONEY: OUTSIDE SPENDING IN CONGRESSIONAL ELECTIONS* 65 (2014).

²¹⁰ *Working Together for an Independent Expenditure*, *supra* note 142, at 1488.

²¹¹ *Id.* at 1497.

²¹² *See supra* subpart II(B)(2).

²¹³ Danielle Kurtzleben, *Chart: How Have Your Members of Congress Voted on Gun Bills?*, NPR (Feb. 19, 2018), <https://www.npr.org/2018/02/19/566731477/chart-how-have-your-members-of-congress-voted-on-gun-bills> (last visited Nov. 4, 2022).

²¹⁴ *Buckley v. Valeo*, 424 U.S. 1, 78 (1976).

²¹⁵ Balcerzak, *supra* note 24.

²¹⁶ *Buckley*, 424 U.S. at 78.

²¹⁷ *See, e.g., Rulemaking Hearing*, *supra* note 144, at 161; *Coordinated Communications*, 70 Fed. Reg. 73946, 73955 (proposed Dec. 14, 2005) (to be codified at 11 C.F.R. pt. 109).

Congress’s legitimate interest in reducing the risk of corruption²¹⁸ is to elevate expediency over constitutional values, something the Supreme Court is unlikely to condone.²¹⁹

The FEC’s adopted regime, then, may be its attempt to take a measured approach, premised on the belief that a good firewall fully prevents any danger of corruption. However, such a reliance on the firewall is misplaced since the FEC’s firewall provision is far from airtight, as explained further below.

2. Material Information Requirement in Contravention of BCRA’s Instruction

Second, although BCRA instructed the FEC not to “require agreement or formal collaboration to establish coordination,”²²⁰ its regulations require a near-impossible showing that “material information” has passed through a firewall in order to find it deficient.²²¹ As evident from contemporaneous statements by the originators of BCRA, Congress intended to *lower* the bar for the treatment of expenditures as coordinated.²²² Yet, the FEC has kept the bar prohibitively high, making it difficult or even impossible for anyone to bring actionable complaints. As noted above, the Supreme Court has stated that the “rationale for affording special protection to wholly independent expenditures has . . . everything to do with the *functional consequences* of different types of expenditures,”²²³ not superficial labels. In *McConnell*, the Court recognized that an individual could easily act at the request or suggestion of a candidate without any agreement, which would render the expenditure “virtually indistinguishable from [a] simple contributio[n].”²²⁴

The situation BCRA’s originators feared has become reality.²²⁵ Due to the material information requirement, complaints like the one regarding MeToo Ohio and James Renacci ended up dismissed despite overwhelming circumstantial evidence pointing to coordination.²²⁶ Neither the law nor the FEC regulations provide any legal tools to allow parties to compel communication records without voluntary cooperation of the entities involved in the campaign spending.²²⁷ The FEC can issue subpoenas and orders for information, but it only does so when it finds “reason to believe” that a violation has occurred—which it will not do without evidence of shared material information.²²⁸ Thus, third parties have no way to obtain the communication records that would establish the material information requirement, which they need in order for the FEC to issue the

²¹⁸ *Id.* at 26–29.

²¹⁹ *See, e.g., Buckley*, 424 U.S. 20, 58 (some “marginal restriction” on speech is justified by “the basic governmental interest in safeguarding the integrity of the electoral process”); *United States v. U.S. Dist. Ct. for E. Dist. of Mich., S. Div.*, 407 U.S. 297, 321 (1972) (“Although some added burden will be imposed . . . , this inconvenience is justified in a free society to protect constitutional values.”).

²²⁰ 52 U.S.C. § 30116 note (Regulations by the Federal Election Commission).

²²¹ 11 C.F.R. § 109.21(h).

²²² 142 CONG. REC. S2096, S2145 (daily ed. Mar. 20, 2002) (statement of Sen. Russ Feingold) (“The FEC’s narrowly defined standard of requiring collaboration or agreement sets too high a bar to the finding of ‘coordination.’”).

²²³ *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 221 (2003) (emphasis added).

²²⁴ *Id.* at 222.

²²⁵ *See* 142 CONG. REC. S2096, S2145 (daily ed. Mar. 20, 2002).

²²⁶ REPORT: MUR 7542, *supra* note 16.

²²⁷ *Guidebook for Complainants*, *supra* note 59, at 14.

²²⁸ *Id.*; 11 C.F.R. § 109.21(h).

subpoenas necessary to find the information. It is a loophole in every sense of the word. Indeed, according to one lobbyist, a candidate's campaign and its Super PAC "can simply deny" sharing any information upon being accused.²²⁹

The result is that the common vendor rule goes underenforced, just as Congress anticipated.²³⁰ Considering Congress's specific instruction not to require "agreement or formal collaboration," this amounts to an agency failure to honor BCRA's statutory command.²³¹

3. Lack of Detailed Description of Firewall

Third, the FEC's firewall provision lacks sufficient detail to require media vendors to adopt specific measures and ensure no communication can pass through their firewalls. Instead, the provision simply commands that the firewall be drafted in such a way as to "prohibit the flow of information" from passing through.²³² The broad command is plausible from an outcome-oriented perspective—if no material communication has passed through the firewall, then the firewall must have served its purposes, whatever method the agency has chosen to adopt. However, this "no harm, no foul" argument is unconvincing because, under the FEC's enforcement structure, a lack of evidence does not indicate a lack of violation. As described above, complainants and the FEC have no way of ascertaining whether material information has passed through a firewall without direct admission from one of the potentially culpable parties. Thus, the vague standard cannot be justified by the argument that it ensures that no coordination occurs—it simply does not do so.

The vague firewall provision also fails to have any prophylactic or prescriptive function to allow actors to order their campaign behavior. To begin with, the FEC will not examine a media vendor's firewall policies until a complainant or the agency has accused it of a violation and will not progress to the formal investigation stage unless there is proof that material information actually passed through.²³³ In addition, "firewall policies are rarely, if ever, shared with the public."²³⁴ The FEC does not require vendors to perform any documentation or review of its employees' adherence to its firewall policy or, even assuming the policy is followed, that it contain sufficient safeguards to prevent coordination.²³⁵ Therefore, the public has no means to confirm the existence or effectiveness of these systems, and so the media vendor has no incentive to craft a robust firewall policy before a complaint is filed—or even afterward.

If a vendor is accused, all it has to do is point to the existence of whatever firewall policy it has and the lack of proof that material information has passed through, and the

²²⁹ Soo Rin Kim, *FEC Challenged Again to Find Coordination in Current Campaigns*, OPENSECRETS (Oct. 6, 2016, 6:49 PM), <https://www.opensecrets.org/news/2016/10/fec-challenged-again-to-find-coordination-in-current-campaigns/>.

²³⁰ As noted above, the FEC has not investigated a common vendor case since 2004. LINCOLN, *supra* note 31, at 6–7.

²³¹ 52 U.S.C. § 30116 note (Regulations by the Federal Election Commission).

²³² 11 C.F.R. § 109.21(h)(1).

²³³ Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12545, 12545 (Mar. 16, 2007) (describing that the Commission must find "reason to believe that a person has committed, or is about to commit, a violation" as a predicate to opening an investigation into the alleged violation).

²³⁴ LINCOLN, *supra* note 31, at 6.

²³⁵ *Id.*

complaint will not likely progress to the investigation stage.²³⁶ What is more, as it becomes more and more obvious that the FEC will not do anything to enforce the law, none of the media agencies, Super PACs, or candidates have a reason to strengthen their firewall policies.

In effect, the firewall provision is “permeable, if not largely illusory, at least in the way that the FEC has chosen to enforce it,”²³⁷ and contains imprecise guidelines that the FEC only enforces if someone furnishes proof that the vendor’s clients have transmitted material information through the firewall. As they stand, the regulations leave discretion at the hands of the media agency to segment the pool of data it has readily accessible, leaving the proverbial fox guarding the henhouse. As a result, political actors are disincentivized from adopting rigorous policies that would guarantee that material information could not be transmitted despite ample opportunity.

These crucial flaws in the FEC’s regulations prevent the FEC from fully honoring Congress’s interest in curtailing corruption and the appearance of corruption stemming from coordinated expenditures through common vendors.

V. PROPOSAL: A PRESUMPTION REGIME

In order to more faithfully carry out the principles and express commands of BCRA, the FEC should establish a bright-line rule presuming coordination whenever a Super PAC and a political candidate use a common vendor. Under this standard, if a complaint provides evidence that a Super PAC has hired a commercial vendor to produce advertising material within 120 days of that vendor being hired by a political candidate that the material references, the FEC should begin investigation and enforcement proceedings against the Super PAC or the candidate, unless they can furnish concrete evidence that they did not communicate through the common vendor. The existence of a firewall could rebut the presumption, but the burden would be on the parties accused to show that the firewall was sufficiently robust to prevent communication from being transmitted between the Super PAC and the candidate. To provide the standards for evaluation, the FEC should include a detailed description of the elements a firewall must have to rebut this presumption, including safeguards to ensure no communication could be transmitted through it. This should lead to increased enforcement of actual coordination taking place while causing only minimal burdens on Super PACs’ ability to engage in legitimate campaign activities.

A. *A Rebuttable Presumption of Coordination*

The FEC should presume coordination whenever a Super PAC and a political candidate use a common vendor. Adopting such a presumption would lead to increased enforcement of coordination cases that may be unregulated. For instance, in a case like the

²³⁶ Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. at 12545.

²³⁷ Paul J. Weeks, *Enhancing Responsiveness and Alleviating Gridlock: Pragmatic Steps to Balance Campaign Finance Law in Light of the Supreme Court’s Jurisprudence*, 83 GEO. WASH. L. REV. 1097, 1112 (2015); see also Trevor Potter & Bryson B. Morgan, *The History of Undisclosed Spending in U.S. Elections & How 2012 Became the “Dark Money” Election*, 27 NOTRE DAME J.L. ETHICS & PUB. POL’Y 383, 475 (2013).

Renacci campaign, in which the allegations did not progress to investigation “because the common vendor could simply point to a firewall,” a presumption of coordination “would ultimately force candidates and their Super PACs to truly ensure—and document—that no coordination had in fact taken place.”²³⁸

The proposed rebuttable presumption regime is not novel. Indeed, several states, such as California, already restrict the use of common vendors. California places the burden of proof on the candidate and Super PAC to prove that they have not communicated with each other.²³⁹ It presumes coordination whenever the Super PAC uses a vendor that has provided either political or fundraising strategy services to a candidate the Super PAC has supported within the same election campaign.²⁴⁰ However, if the consultant implements a firewall policy to separate staffers serving the two clients, California courts are less likely to find that the group and candidate have coordinated.²⁴¹

Minnesota goes further by also requiring that all steps leading up to a political communication, including “fundraising, budgeting decisions, media design . . . production, and distribution,” be independent of the candidate.²⁴² Maine presumes coordination if a spender and candidate use the same strategists or staff (regardless of vendor),²⁴³ and Vermont requires that an unlimited spending group “conduct[] its activities entirely independent of candidates” in order to accept unlimited contributions.²⁴⁴

There is a groundswell of academic and political support for the presumption regime. During the FEC’s rulemaking proceedings on the coordination rules, multiple commenters and witnesses suggested adopting a rebuttable presumption of coordination for the use of a common vendor.²⁴⁵ Scholars also recommend that the FEC adopt a rebuttable presumption of coordination for certain kinds of “specific activity,” arguing this is more faithful to the “comprehensive regulation” the Supreme Court envisioned in *Citizens United*.²⁴⁶ Former FEC commissioners also advocated for tighter coordination rules that would consider as coordinated any spending by a Super PAC that effectively operates as “the alter ego of a candidate.”²⁴⁷ The proposed Freedom to Vote Act, S. 2747, advocates for this presumption as well.²⁴⁸ The Freedom to Vote Act, proposed in 2021, treats as coordinated any expenditure in which a person employs a common vendor with a candidate, with or without a firewall.²⁴⁹ In addition, it eliminates the safe harbor for use of a firewall

²³⁸ Adams, *supra* note 15, at 877–78.

²³⁹ *Id.* at 874, 875; LEE, FERGUSON, & EARLEY, *supra* note 195, at 18.

²⁴⁰ Adams, *supra* note 15, at 874, 875; LEE, FERGUSON, & EARLEY, *supra* note 195, at 18.

²⁴¹ LEE, FERGUSON, & EARLEY, *supra* note 195, at 24.

²⁴² *Id.* at 25.

²⁴³ *Id.*

²⁴⁴ VT. STAT. ANN. tit. 17, § 2901 (2021).

²⁴⁵ *Rulemaking Hearing, supra* note 144; *see generally* Bus. Indus. Pol. Action Comm., Comment Letter on Proposed Rulemaking on Coordinated and Independent Expenditures of 2002 (Oct. 10, 2002), https://www.fec.gov/resources/legal-resources/rulemakings/nprm/coor_and_ind_expenditures/bipac.pdf.

²⁴⁶ Adams, *supra* note 15, at 877.

²⁴⁷ Letter from Ann M. Ravel & Ellen L. Weintraub to Fed. Election Comm’n 1–2 (June 8, 2015), https://www.fec.gov/resources/about-fec/commissioners/statements/Petition_for_Rulemaking.pdf.

²⁴⁸ Freedom to Vote Act, S. 2747, 117th Cong. (2021). Introduced before the Senate on September 14, 2021, the Act failed to receive the 60 votes needed to proceed to debate on the Senate floor. It currently sits untouched.

²⁴⁹ *Id.* § 325(c)(2)(D).

for a broader range of situations, including when the Super PAC or the candidate employ former employees of the other.²⁵⁰

Furthermore, this proposed regime attends to the FEC's stated and potential objections to a presumption of coordination. It addresses the FEC's concern that such a presumption would have a chilling effect on speech and cause political actors to refrain from engaging in salutary communications with the public.²⁵¹ Some lawyers argue similarly that such a provision would be an "unconstitutional penalty on free speech" because it would cause an "incorporated citizen group" to "forfeit its right to associate freely with legitimate providers of professional services in order to exercise its freedom of speech."²⁵² They argue that, because "a vendor at any point during an election cycle could unilaterally decide to sell election-related services to a candidate," such a presumption would "thereby cancel[] the free speech rights of all of the vendor's PAC clients regarding that candidate."²⁵³ However, because the presumption would be rebuttable by evidence showing that no communication has occurred, "it does not ultimately further restrict speech, . . . so long as the spending is truly independent and there is no coordination between candidate and Super PAC."²⁵⁴ Furthermore, as the Supreme Court recognizes, for coordinated communications, some "marginal restriction" on speech is justified by "the basic governmental interest in safeguarding the integrity of the electoral process" and would not have "any dramatic adverse effect on the funding of campaigns and political associations."²⁵⁵

The FEC has also shown concern with the potential for unknowing violations due to the limited number of vendors available to political actors.²⁵⁶ This can be addressed by requiring consulting firms to perform a check for possible conflicts of interest and provide their clients with notices of potential regulatory liability. Lawyers are required to perform a similar check when inquiring into prospective clients, and the legal industry accepts this practice as a professional necessity in the best interests of clients.²⁵⁷ Similarly, the Supreme Court imposes higher standards for due diligence upon sellers in the securities industry to protect the economic rights of investors.²⁵⁸ Considering that political media consulting firms operate in a highly sensitive area with critical ramifications for the functioning of our democracy, holding them to a higher standard of conduct is not unwarranted.

The FEC also cited concerns with requiring political actors to "prove a negative" by showing that communication did not occur, but this is not prohibitive of benign campaign behavior. Political actors and their vendors need only document their communications with each other, including recording the identity of the vendor employee with whom the actor spoke, the contents of their communications, the specific channels by which they conveyed information, and where the vendor stored the information. In addition, as a witness

²⁵⁰ *Id.* § 325(b)(4).

²⁵¹ *Rulemaking Hearing*, *supra* note 144, at 9 (statement of Commissioner Smith).

²⁵² James Bopp, Jr. & Richard E. Coleson, *The First Amendment Needs No Reform: Protecting Liberty from Campaign Finance "Reformers"*, 51 CATH. U. L. REV. 785, 835 (2002).

²⁵³ *Id.*

²⁵⁴ Adams, *supra* note 15, at 878.

²⁵⁵ *Buckley v. Valeo*, 424 U.S. 1, 20, 58, 21 (1976).

²⁵⁶ *Rulemaking Hearing*, *supra* note 144, at 161–63.

²⁵⁷ See MODEL RULES OF PRO. CONDUCT r. 1.7 (AM. BAR. ASS'N 2020).

²⁵⁸ *Herman & MacLean v. Huddleston*, 459 U.S. 375, 389 (1983).

suggested in the rulemaking hearings, the actors can also rebut the presumption by producing evidence of an alternative source from which they obtained information regarding the timing, targeted demographic, and messaging, including publicly available information.²⁵⁹

Lastly, many objections to a presumption regime imply that the use of common vendors is somehow essential to the typical operation of political actors.²⁶⁰ However, this implication is unlikely to be true. Although objectors claim that only a limited number of consulting firms are available to produce advertising material, two researchers estimated that, in 2016, political actors hired as many as 297 different consulting firms in relation to federal campaigns.²⁶¹ Political actors can easily avoid the limitation of the proposed regime simply by employing a separate vendor from the political candidates they seek to support. The only burden this regime would impose on political actors is to perform due diligence research on a consulting firm before engaging its services. Even if political actors determine, for some reason, that they have no choice but to employ the services of a particular vendor, they can still do so by meticulously documenting their communications with the media agency. Such a requirement is not a prohibitive burden on their free speech rights and is fully justified by Congress's interest in preventing corruption and the appearance of corruption.

B. A More Robust Firewall Provision

Second, the FEC should articulate a more specific and robust firewall provision in concert with a presumption of coordination. For the presumption regime to be effective, the FEC's provision for a firewall must specify certain features a vendor's firewall policy must have to shift the presumption. This would be a more workable standard than the outcome-based version the FEC employs. For this, the FEC can refer to its enforcement action in the EMILY's List case, the very one on which it relied in drafting its firewall provision.²⁶² For instance, the firewall provision could include a prohibition on interactions between political consultants and federal candidates, party committees, or their agents, and between the consultants and agents of a Super PAC regarding specified candidates.²⁶³ It could also ban employees who interacted with certain candidates from communicating with other employees working on that candidate's ad purchases.²⁶⁴ The firewall provision could

²⁵⁹ *Rulemaking Hearing*, *supra* note 144, at 193 (statement of Craig Holman).

²⁶⁰ *See* Coordinated Communications, 70 Fed. Reg. 73946, 73955 (proposed Dec. 14, 2005) (codified at 11 C.F.R. pt. 109); *Rulemaking Hearing*, *supra* note 144, at 9 (statement of Commissioner Smith); *Id.* at 161 (statement of Vice Chairman Sandstrom) (“[T]hat seems to me to preclude a wide range of organizations from using media buyers in placing their ads . . .”).

²⁶¹ Gregory J. Martin & Zachary Peskowitz, *Agency Problems in Political Campaigns: Media Buying and Consulting*, 112 AM. POL. SCI. REV. 231, 234 (2018).

²⁶² *See* Coordinated Communications, 70 Fed. Reg. 73946, 73955 (proposed Dec. 14, 2005) (to be codified at 11 C.F.R. pt. 109); REPORT: MUR 5506, *supra* note 139, at 5–8 (Commission found no reason to believe EMILY's List had violated BCRA based, in part, on a representation by EMILY's List that it had created a firewall whereby employees, volunteers, and consultants who handle advertising buys are “barred, as a matter of policy, from interacting with federal candidates, political party committees, or the agents of the foregoing. These employees, volunteers and consultants are also barred from interacting with others within EMILY's List regarding specified candidates or officeholders.”).

²⁶³ *See* REPORT: MUR 5506, *supra* note 139, at 6.

²⁶⁴ *See id.* at 6–7.

require vendors to keep campaign information obtained from political candidates in a confidential “silo,” accessible only to employees working on the candidate’s advertising effort. It could also require that the employees working on a candidate’s advertisement must be located physically separately from any employees working on a Super PAC’s advertisement and prohibited from interacting with each other in any way. This is unlikely to be more burdensome than the screening procedure that law firms implement when hiring new attorneys who may have an impermissible conflict of interest with a current or potential client.²⁶⁵ As noted above, the critical role vendors play in our democracy justifies the imposition of higher professional responsibilities.²⁶⁶ In addition, crucially, the firewall provision or the common vendor provision must address the issue of alias entities, requiring the same firewall requirements be implemented between entities that are functionally identical to each other.

A potential challenge to this proposal lies in the Court’s ruling in *Colorado Republican I*, in which the Court rejected the FEC’s presumption of coordination when a political party spent in support of a candidate in its fold.²⁶⁷ The Court found that the mere opportunity for coordination was insufficient to presume coordination without specific evidence.²⁶⁸ Some lawyers argue that *Colorado Republican I* signifies that “coordination may not be presumed on the basis of some relationship” and that the principle from this case applies equally to the common vendor scenario.²⁶⁹ However, *Colorado Republican I* is distinguishable. In that case, the Court noted that there was *no* evidence that the party had coordinated with the candidate, and recognized that certain acts giving rise to opportunities for corrupt bargaining would have supported a finding of coordination. With common vendors, this Note argues that the opportunity exists.²⁷⁰

CONCLUSION

The enforcement regime the FEC has maintained since 2006 fails to account for the “real world” behavior of Super PACs and the political candidates they support.²⁷¹ By imposing such a high burden of proof to show of coordination, the FEC’s regulations leave unaddressed activity that invites quid pro quo corruption risk. The result has been that the rules permit an end-run around contribution limits, opening the door to increased opportunities for candidate access to bottomless Super PAC funds. Just as Congress feared, both complainants and the FEC have found the standards prohibitive of actionable claims.

A bright-line rule is necessary to enable more robust enforcement of secret coordination. The FEC should reconsider adopting a rule presuming coordination

²⁶⁵ See MODEL RULES OF PRO. CONDUCT r. 1.7 (AM. BAR. ASS’N 2020); see, e.g., Lucian T. Pera, *Ethics: Building Ethical Screens Up to Code*, ABA (July 18, 2022), https://www.americanbar.org/groups/law_practice/publications/law_practice_magazine/2022/july-august/ethics-building-ethical-screens-up-to-code/.

²⁶⁶ See *supra* subpart V(A).

²⁶⁷ *Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm’n (Colo. Republican I)*, 518 U.S. 604, 621 (1996).

²⁶⁸ *Id.* at 621 (“In these circumstances, we cannot take the cited materials as an empirical, or experience-based, determination that, as a factual matter, all party expenditures are coordinated with a candidate.”).

²⁶⁹ Bopp, Jr. & Coleson, *supra* note 252, at 835.

²⁷⁰ See *supra* subpart IV(B).

²⁷¹ 142 CONG. REC. S2096, S2145 (daily ed. Mar. 20, 2002) (statement of Sen. John McCain).

whenever a Super PAC and a political candidate use a common vendor. By doing so, the FEC can require candidates and their Super PACs to truly ensure and document that no coordination takes place by performing due diligence prior to engagement and documenting their communications with the media agency. In addition, a more detailed firewall provision can serve to prophylactically stop actual coordination from taking place.

Because the presumption would be rebuttable by evidence showing that no communication occurred, the FEC need not consider it to pose a significant burden on speech liberty. So long as the spending is truly independent and there is no coordination between a candidate and Super PAC, political actors are free to carry on campaign activities without restraint.

Addressing the common vendor rule alone will not diminish the ever-increasing amount of funds poured into political campaigns by wealthy donors, a concern the FEC once shared with Congress. Yet, closing off this loophole is essential to an overall campaign regime of full disclosure from political actors. By adopting this presumption, it would force actors to shift their money to separate media vendors or engage only in expenditures that are truly independent of candidates, fostering the kind of free speech environment envisioned by the Supreme Court in *Buckley*. To be sure, in campaign finance, the FEC has the unenviable task of balancing democracy against free speech. It can safeguard both if it sets out prudent regulations reflecting behaviors in the “real world.”