NOTE

A Pool of Candidates Who Refuse to Swim: The 2016 Presidential Election and the Demise of Testing the Waters

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ABSTRACT

In the 2016 presidential election, many candidates delayed announcing their candidacy until long after anyone who was paying attention realized that they were considering a run for office. In the past, these candidates may have been considered to be "testing the waters," a special status proscribed by the Federal Election Campaign Act ("FECA") that still requires full compliance with federal campaign finance laws but allows potential candidates to test the efficacy of a candidacy without having to publicly disclose any campaign contributions or expenditures unless they decide to run. The 2016 election, however, was special. Several eventual candidates took extreme measures to not only avoid candidacy, but also to avoid admitting they were even testing the waters of a candidacy, in order to engage in activities—like coordinating with their super PACs—that would otherwise be prohibited by FECA. This Note contends that a potential candidate cannot avoid being subject to FECA simply by denying they are considering a run for office. First, it gives a brief overview the testing the waters provision and the current state of federal campaign finance law. Then, it examines the pre-candidacy activity of the 2016 presidential candidates. Finally, it proposes a straightforward rule to determine whether such pre-candidacy activity triggers testing the waters status.

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Introduction

Should candidates be able to decide when they are subject to federal campaign finance regulations? Many of the 2016 presidential candidates—both Democratic and Republican—seemed to think so: Jeb Bush,[1] Martin O'Malley,[2] John Kasich,[3] George Pataki,[4] and Scott

[1] *See, e.g.*, Mary Sanchez, *Campaign Finance Law: America's Unfunny Joke*, Chi. Trib. (May 29, 2015, 10:30 PM), http://www.chicagotribune.com/news/columnists/sns-201505291230—tms—msanchezctnms-a20150529-20150529-column.html ("[A]s long as they do not officially declare their candidacy, politicians can raise loads of money for their super PACS without having to report the donations or stay within limits that keep individuals from contributing more than

Walker,[5] to name just a few. All of these candidates, in one way or another, engaged in pre-candidacy behavior that would be illegal if they were subject to the limits and prohibitions of the Federal Election Campaign Act of 1971 ("FECA").[6] However, by delaying the official announcement of their candidacy and with a bit of verbal gymnastics, these candidates attempted to maintain their noncandidate status in order to avoid the substantial restrictions FECA places on presidential hopefuls.[7] For example, FECA restricts from whom

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$2,700 in the primary season. . . . It's why Jeb Bush quickly backtracks each time he verbally stumbles and refers to his run for the White House.").

2 *See, e.g.*, Ben Wolfgang, *O'Malley Faces Steep Climb to 2016 White House Bid*, WASH. TIMES (Oct. 19, 2014), http://www.washingtontimes.com/news/2014/oct/19/martin-omalley-faces-steep-climb-to-2016-president/?page=all ("[O'Malley] hasn't officially declared his candidacy, but the formation of an O'Malley PAC and frequent trips to key presidential primary states such as Iowa and New Hampshire indicate a high likelihood he'll seek the office.").

3 *See, e.g.*, Darrel Rowland, *Super-PAC Rules Are Super-Vague*, COLUMBUS DISPATCH (Oct. 5, 2015, 6:11 AM), http://www.dispatch.com/content/stories/local/2015/10/05/super-pac-rules-are-super-vague.html ("[L]eaders of John Kasich's official campaign team and his super-PAC considered it legal to work together until virtually the minute the Ohio governor officially announced his presidential candidacy in July.").

4 *See, e.g.*, James Pindell, *Pataki, Considering a Run for President, Plans N.H. Trip*, BOS. GLOBE (Jan. 22, 2015), https://www.bostonglobe.com/metro/2015/01/22/pataki-considering-run-for-president-plans-trip/pJELVBfFdAKtokDZeTYLwM/story.html ("[Pataki] formed a super PAC, an important logistical step before running for president. 'If it weren't for the election laws today, I could be running for president,' Pataki told The New York Times.").

5 *See, e.g.*, *Governor Scott Walker Remarks at CPAC* (C-SPAN3 television broadcast Feb. 26, 2015), http://www.c-span.org/video/?324557-12/governor-scott-walker-remarks-cpac ("Should we choose[—]my lawyers love that, when I say, we are exploring a campaign[—]should we choose to run for the highest office in the land."); Paul S. Ryan, *How 2016ers Are Breaking the Law and Getting Away with It,* POLITICO MAG. (Mar. 24, 2015), http://www.politico.com/magazine/story/2015/03/2016-candidates-campaign-finance-law-116331#.VafOxqRVhHz ("For example, in late January [2015] Wisconsin Gov. Scott Walker had formed a committee 'in preparation for [a] 2016 presidential bid' and soon thereafter opened an office in Iowa.").

6 Federal Election Campaign Act of 1971, 52 U.S.C. §§ 30101–30126, 30141-30146 (2012). *See supra* notes 1–5.

7 Notably missing from this list are the two 2016 Democratic frontrunners, Hillary Clinton and Bernie Sanders. Hillary Clinton seemed to have self-funded her exploratory activities and was careful to avoid any coordination with her main super PAC, though some claim she may have violated a host of other campaign finance laws. *See* Paul S. Ryan, *Republican FEC Commissioner Admittedly Blocking Complaints Against Republicans*, THE HILL (June 4, 2015, 12:00 PM), http://thehill.com/blogs/congress-blog/campaign/243828-republican-fec-commissioner-admittedly-blocking-complaints ("Why not Hillary Clinton, you might be thinking. Because she was reportedly self-financing her exploratory activities and not violating the laws we believe others have violated. But don't worry—we have a complaint against Ms. Clinton in the pipeline."); Nicholas Confessore, *Democrats Lay Groundwork to Expand Use of 'Super PACs'*, N.Y. TIMES (Sept. 14, 2015), http://www.nytimes.com/2015/09/15/us/politics/democrats-seek-to-expand-use-of-super-pacs.html; *see also* David Sirota & Andrew Perez, *Hillary Clinton Says She Does Not Coordinate With Super PAC She Reportedly Raised Money For*, INT'L BUS. TIMES (Feb. 12, 2016, 12:11 AM), http://www.ibtimes.com/political-capital/hillary-clinton-says-she-does-not-coor

candidates can solicit, with whom candidates can coordinate, and how much money candidates can solicit.[8]

Candidate or noncandidate are not the only two options, however. The Federal Election Commission ("FEC") has created a third category: those who are "testing the waters" of candidacy.[9] This category was created to allow potential candidates to explore the viability of a candidacy, while remaining subject to the limits and prohibitions of FECA, but without having to publicly disclose the donations they have received, or the expenditures they have made.[10] The purpose of this optional intermediate status is to allow potential candidates an opportunity to test the efficacy of a campaign without having their efforts exposed to the public, so if they determine a candidacy would not be practicable, they can decide not to go forward without facing the potential embarrassment of having to publicly withdraw.[11] As former FEC spokeswoman Mary Brandenberger explained, "[i]f you test the waters and then never announce, we're never going to see it if you haven't registered with us."[12]

Because those who are testing the waters of candidacy still must comply with federal campaign finance laws[13]—other than the require-

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dinate-super-pac-she-reportedly-raised-money (noting that "another super PAC called 'Correct the Record' has asserted it's permitted to coordinate with her campaign because its work is only online"). Bernie Sanders is a staunch opponent of super PACs and did not have a super PAC affiliated with his campaign. *See* Linda Qiu, *Is Bernie Sanders the Only Presidential Candidate Without a Super PAC?*, PolitiFact (Sept. 30, 2015, 4:35 PM), http://www.politifact.com/truth-o-meter/statements/2015/sep/30/bernie-s/bernie-sanders-only-presidential-candidates-withou/. However, individuals not associated with the campaign created unaffiliated pro-Sanders super PACs. *Id.* Sanders denounced these super PACs, making it clear he did not want their support. Clare Foran, *Bernie Sanders's Super PACs*, Atlantic (Dec. 17, 2015), http://www.theatlantic.com/politics/archive/2015/12/bernie-sanders-super-pac/420930/ (Bernie Sanders' campaign sent supporters an email stating: "we don't want this super PAC's help" after it was reported that a super PAC was planning to support him); Qiu, *supra* ("Sanders[']team has asked the unaffiliated super PACs to cut it out.").

8 *See* 52 U.S.C. § 30116.

9 Fed. Election Comm'n, Federal Election Commission Campaign Guide: Congressional Candidates and Committees 1 (June 2014), http://fec.gov/pdf/candgui.pdf.

10 *See id.*

11 *See* Robert Yoon, *To Announce or Not: Explaining Presidential Exploratory Committees*, CNN (May 12, 2011, 10:13 AM), http://www.cnn.com/2011/POLITICS/05/11/exploratory.committees.faq/.

12 Chris Good, *What's an Exploratory Committee?*, Atlantic (Apr. 14, 2011), http://www.theatlantic.com/politics/archive/2011/04/whats-an-exploratory-committee/237309/.

13 Fed. Election Comm'n, *supra* note 9, at 1 ("[A]ll funds raised and spent during the testing the waters period must comply with the Federal Election Campaign Act's contribution limits and prohibitions."); *see also* Fed. Election Comm'n, Advisory Opinion 1985-40 on Republican Majority Fund at 5 (Jan. 24, 1986) [hereinafter AO 1985-40], http://saos.fec.gov/aodocs/1985-40.pdf.

ment to register and report to the FEC[14]—merely denying being a full-fledged candidate is not enough to avoid the limits and prohibitions of FECA.[15] Instead, the 2016 presidential candidates hedged their words, seemingly refusing to even admit to testing the waters of candidacy. For example, Jeb Bush announced he had "decided to actively explore the possibility of running for President of the United States."[16] At first glance, this statement may indicate Bush's intention to begin testing the waters of candidacy. However, some believed that the double hedge—he did not say he decided to explore a run for presidency, he said he decided to "actively explore the *possibility* of running for President"[17]—meant he did not admit to any such thing.[18] Verbal acrobatics, however, should not be enough to escape the limits and prohibitions imposed by FECA. Because one does not have to admit to being a candidate to be a candidate under FECA,[19] it follows that one does not have to explicitly admit to testing the waters to fall within that category of regulation under FECA.[20] Individuals who are testing the waters of candidacy are subject to contribution limits, and cannot directly coordinate with super PACs.[21]

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14 *See* Fed. Election Comm'n, FEC Matter Under Review 6819 (Krulick for Congress), Factual and Legal Analysis, at 6 n.7 (Feb. 25, 2015), http://eqs.fec.gov/eqsdocsMUR/15044371517.pdf.

15 *See* Ann M. Ravel, *Delaying Your Candidacy Doesn't Mean You Can Avoid Campaign Finance Rules*, WASH. POST (Mar. 31, 2015), https://www.washingtonpost.com/opinions/if-it-walks-like-a-candidate-and-talks-like-a-candidate-/2015/03/31/87a91a14-d490-11e4-8fce-3941fc548f1c_story.html (FEC Chairwoman Ravel writes: "The rules are clear: Individuals who are, as the Federal Election Commission puts it, 'testing the waters'—considering whether to become candidates—are not in an anything-goes zone. Quite the contrary, they are subject to the same fundraising limits as declared candidates, and they cannot establish and coordinate future support with outside groups.").

16 Jeb Bush, *A Note from Jeb Bush*, FACEBOOK (Dec. 16, 2014, 9:59 PM), https://www.facebook.com/notes/jeb-bush/a-note-from-jeb-bush/619074134888300 [https://perma.cc/FH3G-ZWM9].

17 *Id.* (emphasis added).

18 Even more drastically, some believe that as long as an individual does not declare him or herself a candidate they are free to coordinate with their super PACs. *See* Pindell, *supra* note 4.

19 *See* Ravel, *supra* note 15; *see also* Fed. Election Comm'n, Advisory Opinion 2015-09 on Senate Majority PAC & House Majority PAC at 6 (Nov. 13, 2015) [hereinafter AO 2015-09], http://saos.fec.gov/aodocs/2015-09.pdf ("Where the circumstances demonstrate that an individual's statement regarding candidacy reflects that individual's decision to run for office, mere assertions that the individual's subjective intent differs from his or her statement generally will not negate the objective indication of candidacy arising from the statement.").

20 *See* Lawrence Noble, *The Outlaw Candidate*, U.S. NEWS (June 15, 2015, 6:00 AM), http://www.usnews.com/news/the-report/articles/2015/06/15/jeb-bush-presidential-candidate-campaign-finance-outlaw.

21 *See* AO 2015-09, *supra* note 19, at 5 ("If an individual becomes a candidate, payments that were made for any testing-the-waters activities must have been made with 'funds permissi-

While the semantics of it all may seem frivolous, the results certainly are not. These "uncandidates"—a term that will be used throughout this Note to denote those individuals who obfuscate their intentions in an attempt to avoid triggering candidacy or testing the waters status—have directly coordinated with super PACs and solicited uncapped donations in the months before they declared their candidacies. During the first half of 2015, a period of time in which Jeb Bush was coordinating with his super PAC, Right to Rise USA, it was able to raise over $100 million.[22] In an incident that gained nationwide attention, Right to Rise USA was receiving so many huge contributions that Bush requested that his donors limit their contributions to $1 million for the time being.[23] By contrast, both candidates and individuals who are testing the waters are prohibited from soliciting contributions of over $5000 per donor to political action committees ("PACs")[24] who support their candidacy.[25]

This practice of pre-campaigning while an uncandidate to avoid campaign finance laws is not only in violation of the spirit of campaign finance laws, but also the letter. This Note thus proposes a per se rule for identifying whether someone is testing the waters and is aimed at the uncandidates whose pre-candidacy activity involves working

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ble under the Act.'" (quoting 11 C.F.R. §§ 100.72(a), 100.131(a) (2016))). Super PACs are unique entities that can raise unlimited funds from individuals, unions, and corporations because they are prohibited from coordinating with candidates. *See infra* Part I. Thus, in the eyes of the courts, super PACs only make independent expenditures. *See* 52 U.S.C. § 30116(a)(2)(A) (2012).

22 FEC Form 3X, Report of Receipts and Disbursements, Right to Rise USA, at 3 (July 31, 2015), http://docquery.fec.gov/pdf/336/201507319000550336/201507319000550336.pdf (Bush's super PAC's midyear report). Bush reportedly asked for $100,000 per person from Wall Street financiers during one super PAC fundraising event. *See* David Catanese, *Blurred Lines: The Covert Funding of the 2016 Campaign*, U.S. News (Feb. 13, 2015, 12:01 AM), http://www.usnews.com/news/articles/2015/02/13/blurred-lines-the-covert-funding-of-the-2016-campaign.

23 Noble, *supra* note 20; Matea Gold, *Awash in Cash, Bush Asks Donors Not to Give More Than $1 Million—For Now*, Wash. Post (Mar. 4, 2015), https://www.washingtonpost.com/politics/awash-in-cash-bush-asks-donors-to-limit-gifts-to-1-million—for-now/2015/03/04/0b8d3fc6-c1c8-11e4-9271-610273846239_story.html.

24 Political action committees are entities that are formed to raise and spend money to support or oppose political candidates. All PACs other than super PACs (e.g., traditional PACs or multicandidate PACs) are subject to the limits and prohibitions of FECA regarding both how much they can accept and how much they can give. *See What's a PAC? A Money in Politics Glossary*, Friends Comm. on Nat'l Legislation (2014), http://fcnl.org/resources/newsletter/janfeb13/glossary/ [https://web.archive.org/web/20160419024624/http://fcnl.org/resources/newsletter/janfeb13/glossary/].

25 11 C.F.R. § 300.64(b)(2) (2016); *see also* Office of Cong. Ethics, U.S. House of Representatives, Review No. 12-9525 (Aug. 24, 2012), http://oce.house.gov/disclosures/Review_No_12-9525_Referral.pdf (describing a congressional representative's solicitation of "contributions for an independent expenditure-only political committee in excess of $5000 per donor" as a "violation of federal law").

closely with their super PAC. It does not cover all pre-candidacy behavior that should trigger testing-the-waters status (for example, founding a multicandidate PAC whose primary purpose is supporting their candidacy), but it would still have a significant effect on future elections by preventing presidential hopefuls from skirting the law to coordinate with super PACs early in their campaigns. Although this Note is focused on presidential elections, candidates running for Congress could employ the same tactics to skirt campaign finance regulations in the future. As such, this Note's discussion of federal campaign finance laws and the proposed rule applies to congressional candidates as well.

Part I of this Note begins with a brief history of federal campaign finance regulations, and a description of where the law stands today. Part II analyzes how Congress and the courts have defined candidacy thus far, taking a particularly close look at the testing the waters exception. Part III examines how super PACs have created an incentive for potential candidates to evade triggering candidacy or testing the waters status and explores some of the ways candidates have gone about doing this. Part IV discusses how merely denying testing the waters does not allow individuals who are considering candidacy to avoid federal campaign finance regulations, and proposes a per se rule for determining whether an individual is testing the waters. Lastly, Part V evaluates the pre-candidacy activity of three 2016 presidential candidates under this proposed rule.

I. Campaign Finance and the Rise of the Super PAC

A. *Campaign Finance Regulation in the Pre-*Citizens United *Era*

Although money has played a role in American politics since the nation's founding,[26] the first federal campaign finance law was not passed until 1867, and was rather narrow in scope.[27] The first expansive attempt to regulate campaign finance was the Tillman Act of

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26 *See* Frank E. Grizzard, Jr., George Washington: A Biographical Companion 291–92 (2002). George Washington lost his first run for the Virginia House of Burgesses because his opponent "treated the voters better." *Id.* In the next election, Washington spent nearly £40 on alcohol for potential voters and won the election by a large margin. *Id.*

27 *See* Audra L. Wassom, Comment, *Campaign Finance Legislation: McCain-Feingold/Shays-Meehan—The Political Equality Rationale and Beyond*, 55 SMU L. Rev. 1781, 1782 (2002) ("The first such measure came in 1867 with passage of the Naval Appropriations Bill that 'prohibited officers and employees of the government from soliciting money from naval yardworkers.'" (quoting *Public Policy Inquiry: Campaign Finance History*, Hoover Institution, http://www.campaignfinancesite.org/history/financing1.html [https://web.archive.org/web/20101030160126/http://www.campaignfinancesite.org/history/financing1.html])).

1907,[28] which prohibited corporations and national banks from contributing to national party committees.[29] However, without an entity enforcing the laws, the Tillman Act and subsequent attempts to regulate campaign finance were largely toothless.[30]

It was not until the passage of FECA in 1971 and its subsequent amendments that substantial and enforceable federal campaign finance regulations were born.[31]

The current iteration of FECA, among many other things, requires candidates to disclose the names and addresses of donors who give over $200 in an election cycle;[32] requires disclosure of all political action committees ("PACs") or party committees that contribute to them;[33] caps contributions from individuals to candidates at $2700 per election (primary and general elections serve as individual elections for the purposes of this provision);[34] limits contributions from individuals to PACs to $5000 a year;[35] prohibits contributions from corporations and unions to candidates or PACs that coordinate with candidates;[36] and prohibits foreign nationals from making contributions to candidates or PACs that coordinate with the candidate.[37]

The primary purpose of FECA was—and still is today—to prevent "corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office."[38] Many believe FECA was meant to serve several ancillary interests as well,

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28 Tillman Act of 1907, Pub. L. No. 59-36, 34 Stat. 864, Ch. 420 (1907) (codified as amended at 52 U.S.C. § 30118 (2012)).

29 *See generally id.* § 30118; *see also* David B. Magleby & Jay Goodliffe, *Interest Groups*, *in* FINANCING THE 2012 ELECTION 215, 224 (David B. Magleby ed., 2014) (noting the "long-standing restriction that corporations . . . could not use general treasury funds for election advocacy" that "dat[es] back to the Tillman Act of 1907").

30 *See* BRADLEY A. SMITH, UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM 23–25 (2001).

31 *Id.* at 32 (explaining that the 1974 amendments to FECA created the Federal Election Commission, an independent administrative agency tasked with enforcing federal campaign finance laws).

32 52 U.S.C. § 30104(b)(3)(A).

33 52 U.S.C. § 30104(b)(3)(B).

34 FED. ELECTION COMM'N, CONTRIBUTION LIMITS FOR 2015–2016 FEDERAL ELECTIONS, http://www.fec.gov/info/contriblimitschart1516.pdf. FECA also limits contributions to candidate committees to $2000 from other candidate committees; $2700 from non-multicandidate PACs; and $5000 from multicandidate PACs, State/District/Local Party Committees, and National Party Committees. *Id.*

35 *Id.*

36 52 U.S.C. § 30118.

37 *Id.* § 30121(a)(1).

38 Buckley v. Valeo, 424 U.S. 1, 25 (1976).

such as political equality or reducing the burden of time consuming fundraising efforts;[39] however, the Supreme Court has refused to recognize these as legitimate governmental interests.[40] In *Davis v. FEC*,[41] the Court even found that "'level[ing] electoral opportunities' was a constitutional vice, not a virtue."[42]

Which purposes are or are not legitimate governmental interests is especially important in the context of campaign finance regulation because of its complex interplay with the First Amendment.[43] The First Amendment right to free speech and association is a right that has been jealously guarded as a core principle of a participatory democracy.[44] The Court has recognized that political speech merits the highest level of protection under the First Amendment because the ability of a democracy's citizenry to gain access to robust and uninhibited information about candidates is vital to the health of the nation.[45] In *Mills v. Alabama*,[46] the Court proclaimed that "a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs . . . . includ[ing] discussions of candidates."[47]

This First Amendment protection of political expression extends beyond the preservation of pure speech to the protection of the right to spend money to communicate such speech. "A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."[48]

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39 Richard Briffault, *On Dejudicializing American Campaign Finance Law*, *in* MONEY, POLITICS, AND THE CONSTITUTION: BEYOND *Citizens United* 173, 182–85 (Monica Youn ed., 2011).

40 *See, e.g.*, Randall v. Sorrell, 548 U.S. 230, 245–46 (2006) (rejecting the "time protection rationale"); *Buckley*, 424 U.S. at 48–49 (refusing to recognize the concept of equalizing the voices of members of the electorate as a legitimate governmental interest).

41 554 U.S. 724 (2008).

42 Briffault, *supra* note 39, at 184 (alteration in original) (quoting *Davis*, 554 U.S. at 742).

43 *Id.* at 181–85.

44 Landell v. Sorrell, 406 F.3d 159, 168 (2d Cir. 2005) (Walker, C.J., dissenting) (declaring there is "no doubt that the constitutional protection of political speech is essential to the very framework on which our political system is built"); Mark C. Alexander, Citizens United *and Equality Forgotten*, *in* MONEY, POLITICS, AND THE CONSTITUTION: BEYOND *Citizens United*, *supra* note 39, at 153, 155.

45 *See Buckley*, 424 U.S. at 14–15; Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971) ("[I]t can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.").

46 384 U.S. 214 (1966).

47 *Id.* at 218.

48 *Buckley*, 424 U.S. at 19.

This is not to say that any and all regulation of political speech is per se unconstitutional.[49] Courts have had to find a balance between furthering the governmental interest in maintaining an electoral process free from corruption, and protecting the First Amendment rights to free speech and association.[50] In *Buckley v. Valeo*,[51] the Supreme Court articulated that "[e]ven a '"significant interference" with protected rights of political association' [or speech] may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment" of these First Amendment rights.[52] Therefore, in determining whether a campaign regulation is constitutional, courts must weigh the governmental interest advanced by the regulation against the regulation's imposition on First Amendment protection of free political speech.[53]

Under this framework, reasonable limits on contributions to candidates and coordinated-expenditure PACs have continuously been upheld.[54] The rationale is that contribution limits serve the compelling government interest of preventing corruption and the appearance of corruption, while not unduly burdening an individual's right to political speech because individuals are still free to communicate with voters in an unrestricted fashion through independent expenditures.[55] The Court has found that independent expenditures do not have the same corruption risks because,

> [u]nlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the

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49 *See id.* at 25; *see also* United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, AFL-CIO, 413 U.S. 548, 567 (1973) ("Neither the right to associate nor the right to participate in political activities is absolute . . . .").

50 L. Paige Whitaker, Cong. Research Serv., RL30669, The Constitutionality of Campaign Finance Regulation: *Buckley v. Valeo* and Its Supreme Court Progeny 1 (2008), https://fas.org/sgp/crs/misc/RL30669.pdf.

51 424 U.S. 1 (1976).

52 *Id.* at 25 (quoting Cousins v. Wigoda, 419 U.S. 477, 488 (1975)).

53 *See id.*

54 *See id.* at 27–29.

55 *See id.*

> The term independent expenditure means an expenditure by a person for a communication expressly advocating the election or defeat of a clearly identified candidate that is not made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents.

11 C.F.R. § 100.16 (2016).

> expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.[56]

It is because of this perceived lack of prearrangement and coordination that limits on independent expenditures have repeatedly been struck down as unconstitutional.[57]

B. Citizens United *and the Dawn of the Super PAC*

In *Citizens United v. FEC*,[58] the Supreme Court continued on its path towards more narrowly construing the definition of corruption.[59] While in previous cases, such as *McConnell v. FEC*,[60] the Court had interpreted corruption to include situations in which money is used to gain influence or access to federal officials,[61] in *Citizens United* the Court narrowed its definition of corruption to only encapsulate quid pro quo transactions between a donor and a candidate.[62] Because the Court found the "absence of prearrangement and coordination . . . with the candidate" made it impossible for an independent expenditure to give rise to quid pro quo corruption, it held that it was unconstitutional to prevent corporations from making them.[63] This opened the doors for corporations to make their own independent expenditures and contribute to PACs, as long as the PAC did not make any coordinated expenditures.[64]

Citizens United may have unlocked the door to the super PAC, but *SpeechNow.org v. FEC*[65] took the door off its hinges. In *SpeechNow.org*, a case heard just one week after the Supreme Court announced its ruling in *Citizens United*, the D.C. Circuit reasoned: if independent expenditures do not corrupt nor cause the appearance of

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56 *Buckley*, 424 U.S. at 47.

57 *See* Stop This Insanity, Inc. Emp. Leadership Fund v. FEC, 902 F. Supp. 2d 23, 38 (D.D.C. 2012); *see also* Michael D. Gilbert & Brian Barnes, *The Coordination Fallacy*, 43 FLA. ST. U. L. REV. 399, 403–06 (2016).

58 558 U.S. 310 (2010).

59 *See generally id.*

60 540 U.S. 93 (2003).

61 *See id.* at 147.

62 Anthony Corrado, *The Regulatory Environment of the 2012 Election*, *in* FINANCING THE 2012 ELECTION, *supra* note 29, at 46, 50.

63 *Citizens United*, 558 U.S. at 357 (quoting Buckley v. Valeo, 424 U.S. 1, 47 (1976)).

64 Corrado, *supra* note 62, at 60. The FEC defines "coordinated" as "cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or a political party committee." 11 C.F.R. § 109.20(a) (2016). *See generally* R. SAM GARRETT & L. PAIGE WHITAKER, CONG. RESEARCH SERV., RS22644, COORDINATED PARTY EXPENDITURES IN FEDERAL ELECTIONS: AN OVERVIEW (2014).

65 599 F.3d 686 (D.C. Cir. 2010).

quid pro quo corruption, then there is no justification for limiting contributions to political committees that only make independent expenditures.[66] And so the super PAC was born.[67]

Under *Citizens United* and *SpeechNow.org*, super PACs may solicit and accept unlimited contributions from individuals, corporations, labor unions, and political committees.[68] Therefore, the most significant restriction on super PACs is the prohibition on them coordinating with candidates.[69] Super PACs remain prohibited from contributing—directly or in-kind[70]—to candidates or political committees; they cannot in any way consult, confer, or coordinate with a candidate, his campaign, or an agent of a candidate or campaign.[71] The logic underlying this scheme is that even if an individual (or corporation) gives $50 million to a super PAC that supports a federal candidate, the candidate does not receive the money and has no control over how it is spent; thus, there is no danger of the contribution having improper and corrupting influence over the candidate.

It is unlikely that when the D.C. Circuit claimed there was no risk that contributions to super PACs would have an improper influence on elections in *SpeechNow.org,* it envisioned a system where politicians help create and run the super PAC that will later support their candidacy. In fact, this practice contradicts the very foundation of the D.C. Circuit's presumption that the candidate would have no control over how the money raised by the super PAC is spent.

*C. Post-*Citizens United *Campaign Finance*

The 2012 election was the first presidential election since *Citizens United* and the advent of the super PAC. That election cycle, super PACs funneled $609,417,654 into federal elections.[72] Because super

66 *Id.* at 694 ("In light of the [Supreme] Court's holding as a matter of law that independent expenditures do not corrupt or create the appearance of *quid pro quo* corruption, contributions to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption.").

67 *See* Corrado, *supra* note 62, at 52, 56–57.

68 *Id.* at 56.

69 *See* 52 U.S.C. § 30116(a)(2), (7) (2012); *see also* Corrado, *supra* note 62, at 56; Covington & Burling LLP, Forming and Operating Super PACS: A Practical Guide for Political Consultants in 2016, at 4 (2016).

70 In-kind contributions are anything of value (supplies, services, printing, even discounts) given to a candidate and count against contribution limits. *See* 11 C.F.R. § 100.52(a), (d)(1) (2016).

71 *See* Fed. Election Comm'n, Citizens' Guide (2015), http://www.fec.gov/pages/brochures/citizens.shtml [https://perma.cc/R2HP-HZV4]; *see also* Covington & Burling LLP, *supra* note 69, at 4.

72 Ctr. for Responsive Politics, *2012 Outside Spending, by Super PAC*, OpenSecrets.org,

PACs were unable to coordinate with candidates, their efficacy in the 2012 election was questionable.[73] For example, in the 2012 presidential election, super PACs had to heavily rely on negative ads about opponents rather than positive ones in support of their candidate because it was difficult to create positive ads without input from the candidate.[74] As Charles Spies, counsel for and treasurer of Mitt Romney's super PAC, Restore Our Future,[75] explained: "Outside groups cannot effectively run positive ads because the best positive ads feature the candidates themselves, and outside groups can't coordinate with campaigns to generate candidate-to-camera footage."[76] Further, the activity of super PACs was focused on advertising, and thus they were not well suited to counteract opposition spending on on-the-ground field operations.[77] Even with these limitations in 2012, the independence of super PACs was still being questioned;[78] however, the contenders in the 2016 presidential primary went on to push the limits of this independence in ways that make any charge of coordination in the 2012 election seem minute in comparison.[79]

Both the premise and the practicability of the *SpeechNow.org* court's reasoning for the legitimacy of super PACs have been widely criticized.[80] Those who support strong campaign finance regulations criticize it as opening the floodgates to unregulated money from special interests in politics.[81] Others argue that such reactions to "[s]uper

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https://www.opensecrets.org/outsidespending/summ.php?cycle=2012&chrt=V/type=S (last visited Dec.15, 2016).

73 *See* Paul Blumenthal, *Super PACs, Outside Money Influenced, But Didn't Buy The 2012 Election*, HUFFINGTON POST (Nov. 7, 2012, 7:09 AM), http://www.huffingtonpost.com/2012/11/07/super-pacs-2012-election-outside-money_n_2087040.html.

74 John C. Green et al., *Financing the 2012 Presidential Nomination Campaigns*, *in* FINANCING THE 2012 ELECTION, *supra* note 29, at 77, 110.

75 Candice J. Nelson, *Financing the 2012 Presidential General Election*, *in* FINANCING THE 2012 ELECTION, *supra* note 29, at 123, 128–29.

76 Green, *supra* note 74, at 110.

77 Nelson, *supra* note 75, at 123–24.

78 *See, e.g.*, Magleby & Goodliffe, *supra* note 29, at 242.

79 *See infra* Part V.

80 *See, e.g.*, Michael S. Kang, *After* Citizens United, 44 IND. L. REV. 243, 246 (2010) (stating that it "is absurd as a matter of political reality [to assert] that contributions are potentially corrupting, but that independent expenditures are not at all"); Laurence H. Tribe, *Dividing* Citizens United*: The Case v. the Controversy*, 30 CONST. COMMENT. 463, 483 (2015) ("[M]any have argued [that] quid pro quo corruption is far too narrow a governmental interest to identify as constitutionally relevant.").

81 *See, e.g.*, President Barack Obama, State of the Union Address (Jan. 27, 2010), https://www.whitehouse.gov/the-press-office/remarks-president-state-union-address [https://perma.cc/8E9F-3Y93] ("[*Citizens United*] reversed a century of law that I believe will open the floodgates for special interests, including foreign corporations, to spend without limit in our elections.").

PACs, and even the *Citizens United* decision itself, have turned out to be much ado about nothing."[82] This Note, however, is neither a criticism nor endorsement of *Citizens United* and the advent of the super PAC. Instead, it shows that several 2016 presidential candidates broke campaign finance laws *as they stand today* because of a perceived legal loophole that supposedly allowed them to coordinate with super PACs before officially declaring their candidacy. This Note argues that no such loophole exists—the language of FECA, subsequent FEC regulations, and the rationale in *Citizens United* for the legality of such super PACs make this clear.

II. Candidacy and Testing the Waters

The testing the waters period allows a candidate to proactively contemplate and test the viability of candidacy without having to divulge this information until they make the decision to enter the race.[83] Candidates have been exploiting this perceived loophole by avoiding any action that they believe would trigger candidacy. In essence, these testing the waters candidates are still subject to campaign finance regulations—such as contribution limits and a ban on coordinating with super PACs—but are exempt from reporting their contributions and expenditures, so they do not have to reveal themselves as potential candidates. In the 2016 election, however, potential candidates were not only avoiding triggering candidacy, but were acting in a manner that they believed would avoid triggering the testing the waters period as well.[84] Through these tactical maneuvers, candidates sought to remove themselves from the control of campaign finance regulations altogether in order to coordinate with their super PACs in ways that would not otherwise be legal. This has allowed them to help their super PACs raise unprecedented amounts of money,[85] provide their super PACs footage to use in commercials once the campaign gets under way,[86] and to otherwise coordinate a plan of attack that the

82 Robert Kelner, *The Mythology of Super PACs: Much Ado About (Almost) Nothing*, 49 Willamette L. Rev. 671, 671 (2013). "Or at least, much ado about close to nothing." *Id.*

83 *See supra* Introduction.

84 *See infra* Part III.

85 FEC Form 3X, Report of Receipts and Disbursements, Right to Rise USA, *supra* note 22 (showing that Bush's super PAC raised over $100 million dollars in its first six months).

86 *See* Andrew Perez, *Election 2016: Republican Candidates Fiorina, Bush, Walker Filmed Ads with Super PACs Backing Their Campaigns*, Int'l Bus. Times (Sept. 15, 2015, 4:34 PM), http://www.ibtimes.com/election-2016-republican-candidates-fiorina-bush-walker-filmed-ads-super-pacs-backing-2098050. Jeb Bush, John Kasich, and Scott Walker all filmed ads with super PACs that were aired after they announced their candidacies. *Id.* Similarly, the super PAC "Carly

super PAC can follow once the candidate has officially declared and can no longer coordinate.[87]

A. An Overview of Testing the Waters

According to Federal Law,

> [t]he term "candidate" means an individual who seeks nomination for election, or election, to Federal office, and for purposes of this paragraph, an individual shall be deemed to seek nomination for election, or election—
> (A) if such individual has received contributions aggregating in excess of $5,000 or has made expenditures aggregating in excess of $5,000; or
> (B) if such individual has given his or her consent to another person to receive contributions or make expenditures on behalf of such individual and if such person has received such contributions aggregating in excess of $5,000 or has made such expenditures aggregating in excess of $5,000.[88]

At a time when presidential candidates are raising and spending hundreds of millions of dollars per election cycle,[89] the $5000 threshold for candidacy does seem absurdly low.

Perhaps in recognition of this objectively low triggering amount, the FEC created what has become known as the "testing the waters" exemption.[90] This exemption allows an individual to accept and spend funds in excess of the $5000 candidacy threshold amount "solely for the purpose of determining whether an individual should become a candidate" without triggering candidacy.[91] The purpose of this excep-

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for America" shot a favorable documentary of Carly Fiorina that included personal details provided by Fiorina herself before she announced her bid for the presidency. *Id.*

87 *See* Andrew Kaczynski & Ilan Ben-Meir, *We Crashed Jeb Bush's Super PAC's Donor Call, And Here's What They Said*, BUZZFEED (June 17, 2015, 6:53 PM), http://www.buzzfeed.com/andrewkaczynski/we-crashed-jeb-bushs-super-pacs-donor-call-and-heres-what-th#.dnNonn24M0.

88 52 U.S.C. § 30101(2) (2012).

89 *2012 Presidential Campaign Finance*, FED. ELECTION COMM'N, http://www.fec.gov/disclosurep/pnational.do [https://perma.cc/UWE5-8F37] (select 2012 election cycle on the map graphic) (showing that Obama raised over $700 million and Romney raised almost $450 million) (last visited Dec. 15, 2016).

90 *See* 11 C.F.R. §§ 100.72, 100.131 (2016).

91 *Id.* §§ 100.72(a), 100.131(a).

> Funds received solely for the purpose of determining whether an individual should become a candidate are not contributions. Examples of activities permissible under this exemption if they are conducted to determine whether an individual should become a candidate include, but are not limited to, conducting a poll, telephone calls, and travel. Only funds permissible under the Act may be used for such activities.

tion is to allow someone who is legitimately trying to determine whether or not to enter a race to test if they would have enough support, both in poll numbers and financially, before having to publicize their consideration of a candidacy.[92] Therefore, individuals who are testing the waters are not required to report contributions and expenditures until *after* they have become candidates.[93] If they decide against running for office, they will never have to report contributions and expenditures, and thus in theory the public would never know that individual even contemplated a run for office.[94] Individuals who are testing the waters must still comply with all other federal campaign finance regulations, such as keeping records of contributions and expenditures in order to accurately report upon declaration of candidacy;[95] not accepting individual contributions over $2,700;[96] not accepting contributions from corporations or unions;[97] and most significantly for this Note's purposes, not coordinating with super PACs.[98]

A person who has decided to become a candidate is by definition no longer testing the waters.[99] Often, this determination is made public through an announcement by the candidate; however, those who are not forthright with their decision to run may still trigger candidacy through other means. The FEC has articulated a nonexhaustive set of factors to determine whether a candidate has gone beyond testing the waters and has become a candidate.[100] These factors include:

Id. § 100.72(a).

92 *See* FED. ELECTION COMM'N, *supra* note 9, at 1.

93 *See* 11 C.F.R. §§ 100.72(a), 100.131(a).

94 *See* FED. ELECTION COMM'N, TESTING THE WATERS BROCHURE, 2–3 (2011), http://www.fec.gov/pages/brochures/testing_waters.pdf. This is interesting because it prevents us from ever knowing how many people utilize this exemption and ultimately decide against running.

95 *See* 11 C.F.R. § 101.3 ("When an individual becomes a candidate, all funds received or payments made in connection with activities conducted under 11 CFR 100.72(a) and 11 CFR 100.131(a) or his or her campaign prior to becoming a candidate shall be considered contributions or expenditures under the Act and shall be reported in accordance with 11 CFR 104.3 in the first report filed by such candidate's principal campaign committee. The individual shall keep records of the name of each contributor, the date of receipt and amount of all contributions received (see 11 CFR 102.9(a)), and all expenditures made (see 11 CFR 102.9(b)) in connection with activities conducted under 11 CFR 100.72 and 11 CFR 100.131 or the individual's campaign prior to becoming a candidate.").

96 *See* FED. ELECTION COMM'N, *supra* note 34.

97 FED. ELECTION COMM'N, *supra* note 9, at 31.

98 *Id.* at 50.

99 11 C.F.R. § 100.131(b).

100 *See id.* §§ 100.72(b), 100.131(b).

> (1) using general public political advertising to publicize his or her intention to campaign for federal office;
> (2) raising funds in excess of what could reasonably be expected to be used for exploratory activities or undertaking activity designed to amass campaign funds that would be spent after he or she becomes a candidate;
> (3) making or authorizing written or oral statements that refer to him or her as a candidate for a particular office;
> (4) conducting activities in close proximity to the election or over a protracted period of time; and
> (5) taking action to qualify for the ballot under state law.[101]

Any one of these factors can be enough to show an intention to become a candidate.[102] This test aims to differentiate those who are truly trying to determine whether candidacy is viable and desirable from those who have already made the decision that they will become candidates.[103]

B. Avoiding Testing the Waters

For many years there was not a significant incentive for candidates to fraudulently avoid triggering candidacy status once they had decided to run, because avoiding candidacy merely delayed the disclosure of the funds they had received and spent.[104] In fact, many candidates chose to register their exploratory committees with the FEC and disclose receipts and expenditures as they explored the possibility of candidacy instead of utilizing the testing the waters exception.[105] Because the only advantage the testing the waters exception bestows is anonymity, candidates often chose to forgo it.[106]

Still, there were some instances where the FEC found individuals were wrongfully attempting to maintain their pre-candidate status when they had already triggered candidacy under FECA. For example, in 1986, presidential hopeful Pat Robertson held a broadcast that reached around 150,000 people followed by a mass mailing to over a million people that collected $2.3 million in funds.[107] Both of these

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101 *See id.* §§ 100.72(b), 100.131(b).

102 *See* FED. ELECTION COMM'N, *supra* note 94, at 1.

103 Fed. Election Comm'n, Advisory Opinion 1981-32 on Reubin Askew at 4 (Oct. 2, 1981), http://saos.fec.gov/aodocs/1981-32.pdf.

104 *See* Yoon, *supra* note 11.

105 *See id.*

106 *See* 52 U.S.C. § 30101(2) (2012); *see also* FED. ELECTION COMM'N, *supra* note 94, at 1, 3; Good, *supra* note 12.

107 Second General Counsel's Report, *In re* M.G. (Pat) Robertson, MUR 2262, at 4–5 (Fed. Election Comm'n Dec. 30, 1988), http://www.fec.gov/disclosure_data/mur/2262.pdf. This mailing

communications contained a message that his candidacy was conditioned on amassing a certain number of pledges of support.[108] The FEC General Counsel Report noted that "any activity was to be judged in the overall context of other activities and statements of the potential candidate and of his or her representatives,"[109] and concluded that Robertson's activities did not fall within the testing the waters exemption because they were aimed at amassing support and indicated Robertson had already made the decision to become a candidate.[110] The FEC ultimately found probable cause to believe Robertson violated what is now codified as 52 U.S.C. § 30102(e)(1).[111] Robertson entered a conciliation agreement with the FEC that stated his broadcast and direct mail activities "went beyond the testing of the feasibility of a campaign and therefore exceeded the scope of the exemptions established at 11 CFR § 100.7(b) and § 100.8(b)."[112]

Traditionally, any discussion of the boundaries of testing the waters has focused on when testing the waters ends and candidacy begins. The 2016 presidential election, however, raises a new question: when does the testing the waters period begin? While the pre-candidacy activities of presidential hopefuls in the 2016 election cycle made waves, it is not the first time politicians have skirted campaign finance laws by delaying the announcement of their candidacy.[113] For example, as early as the 1970s, Ronald Reagan exploited his noncandidate status in order to build support for his next presidential bid without

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included language such as "[y]ou can successfully launch this campaign" and "I'm stepping out on your behalf, believing that you are backing me up." *Id.* at 5.

108 *Id.* at 3.

109 *Id.* at 4.

110 *Id.* at 2. The Second General Counsel's Report stated:

> In the present matter the recommendations anticipated in this Office's Brief are based upon the large scale of the public contact involved in the September 17, 1986, broadcast and the follow-up solicitation letters, the fact that more than $2.3 million was raised as a result of the broadcast and follow-up letters, the protracted period of one year which Mr. Robertson established for receiving affirmations of support for his candidacy, and the content of the speeches at the September 17 event which this Office finds to be promotional of his candidacy rather than a testing of potential support. Given all of these factors taken together, this Office is of the opinion that these activities were not for testing the waters, but, rather, caused Mr. Robertson to exceed the threshold for candidate status.

Id.

111 *See* Conciliation Agreement, *In re* M.G. (Pat) Robertson, MUR 2262, at 1, (Fed. Election Comm'n Dec. 30, 1988), http://www.fec.gov/disclosure_data/mur/2262.pdf.

112 *Id.* at 5–6. Robertson was required to pay $25,000 in civil penalties for the violation. *Id.* at 7.

113 ANTHONY CORRADO, CREATIVE CAMPAIGNING: PACS AND THE PRESIDENTIAL SELECTION PROCESS 3 (1992).

being subject to the ordinary candidate contribution limits.[114] A significant difference between what Reagan did and what the 2016 candidates did is that all of Reagan's pre-candidacy activity was much further in advance—he declared his bid for the presidency in November of the year before the general election.[115] After he lost his 1976 bid for the White House, he changed his campaign committee into a leadership PAC[116]—Citizens for the Republic—of which he served as chairman.[117] Though the official objective of Citizens for the Republic was to contribute to the campaigns of fellow Republicans, the majority of the funds were used in a way that would increase Reagan's visibility and support in key election states.[118] Because PACs were (and still are) subject to different and less stringent campaign finance laws than candidates, Reagan was able to raise money in excess of the candidate contribution limits while not having to comply with the disclosure laws that heavily regulate contributions to federal candidates.[119]

By avoiding any actions that would trigger official candidacy, Reagan was successfully able to de facto run for president without having to comply with the campaign finance laws that apply to federal candidates.[120] In the decades since Reagan discovered and exploited this apparent legal loophole, candidates of both major parties have followed suit, methodically creating a more and more expansive loophole.[121] Never has this exploitation been greater than among the candidates in the 2016 presidential election.

III. A New Era: The 2016 Presidential Election and the "Uncandidate"

Because any funds raised or contributions received during the testing the waters phase of candidacy are still subject to the limits and prohibitions of FECA, presidential candidates for the 2016 election

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114 *Id.* at 2–3.

115 *See id.* at 2.

116 A leadership PAC is a political action committee that can be established by current and former members of Congress as well as other prominent political figures. Leadership PACs are designed for two things: to make money and to make friends, both of which are crucial to ambitious politicians looking to advance their careers. Ctr. for Responsive Politics, *Leadership PACs*, OpenSecrets.org, http://www.opensecrets.org/industries/indus.php?ind=Q03 (last visited Dec. 15, 2016).

117 Corrado, *supra* note 113, at 72–73.

118 *Id.* at 2.

119 *Id.* at 3.

120 *Id.* at 3–4.

121 *Id.* at 4; *see* Miriam Galston, *Emerging Constitutional Paradigms and Justifications for Campaign Finance Regulation: The Case of 527 Groups*, 95 Geo. L.J. 1181, 1182 (2007).

not only denied being candidates, but also denied considering a run for the presidency altogether.[122] Up until at least 2008—the last presidential election where a sitting president was not running—testing the waters or exploratory committees were the norm in presidential elections.[123] Then, in 2010, the super PAC was born.[124] Since the advent of the super PAC, there have been two midterm elections and one presidential election.[125] In the 2012 presidential election, almost every major candidate had a super PAC; however, no candidates used their super PACs for pre-candidacy activities.[126] Instead, candidates continued to use the loopholes that their forbearers had forged for them:[127] laying the foundation for their campaign using multicandidate PACs[128] and 527 groups.[129]

Make no mistake: to the extent that these groups made contributions (actual or in-kind) to the pre-candidate's testing the waters activities in excess of the contribution limits, they were breaking campaign

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122 *See supra* Introduction.

123 *See* Yoon, *supra* note 11.

124 *See supra* Section I.B.

125 *SpeechNow.org* was decided months into the 2010 midterm, and thus it was not until the 2012 presidential election that super PACs were truly unleashed. *Compare* Ctr. for Responsive Politics, *2010 Outside Spending, by Super PAC*, OpenSecrets.org, https://www.opensecrets.org/outsidespending/summ.php?cycle=2010&chrt=V&type=S (last visited Dec.15, 2016) (providing that in 2010 a total of 83 super PACs spent around $62.5 million), *with* Ctr. for Responsive Politics, *supra* note 72 (providing that in 2012 a total of 1310 super PACs spent almost $610 million).

126 Paul S. Ryan, Campaign Legal Ctr., "Testing the Waters" and the Big Lie: How Prospective Presidential Candidates Evade Candidate Contribution Limits While the FEC Looks the Other Way 7 (2015), http://www.campaignlegalcenter.org/sites/default/files/Testing_the_Waters_and_the_Big_Lie_2.19.15.pdf.

127 Galston, *supra* note 121, at 1182 ("Even designing creative ways to evade campaign finance laws, through legal 'loopholes' or arguably illegal ones, is hardly new.").

128 A multicandidate PAC is:

> a political committee which (i) has been registered with the Commission or Secretary of the Senate for at least 6 months; (ii) has received contributions for Federal elections from more than 50 persons; and (iii) (except for any State political party organization) has made contributions to 5 or more Federal candidates.

11 C.F.R. § 100.5(e)(3) (2016). For example, Romney used a multicandidate PAC that raised $7.4 million, but less than 12% of that went to other candidates and committees. *See* Fredreka Schouten, *GOP Fundraising Avoids Campaign Limits Through PACs Ahead of 2012*, USA Today (Dec. 30, 2010, 7:43 AM), http://www.usatoday.com/news/washington/2010-12-30-1Agopprez30_ST_N.htm.

129 527 groups are a type of tax-exempt political organization that must have the primary purpose of influencing elections. *See generally* 26 U.S.C. § 527 (2012). "Organizations claiming section 527 tax-exempt status are permitted under the tax code to accept unlimited contributions, but must comply with political committee-like disclosure requirements by filing disclosure reports with the Internal Revenue Service." Ryan, *supra* note 126, at 36. Newt Gingrich used a 527 group to raise almost $14 million in anticipation of the 2012 presidential election. *Id.* at 8.

finance law.[130] However, there is a stark difference between a candidate receiving financial support from a multicandidate PAC and a candidate receiving financial support from a super PAC. Multicandidate PACs are not allowed to accept funds from corporations, and can only accept up to $5000 from individual donors.[131] By contrast, super PACs can raise unlimited funds from corporations, unions, and wealthy individuals.[132] For example, one wealthy donor gave Jeb Bush's Right to Rise super PAC $10 million,[133] *two thousand* times the amount it could have contributed to a multicandidate PAC. When a single person can be the primary funder of a multi-million-dollar super PAC that works directly with a presidential candidate before he announces his candidacy, it is difficult to see how this does not create a substantial risk of quid pro quo corruption. The 2016 election was the first election in which presidential candidates worked with super PACs before declaring candidacy to raise money outside the limits and prohibitions of FECA.[134]

Jeb Bush's pre-candidacy coordination with his super PAC received the most media coverage (and scrutiny) of any 2016 candidate. This is likely because of the initial perception that he was a, if not *the*, Republican frontrunner,[135] as well as the sheer success of his pre-can-

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130 11 C.F.R. § 110.2(b)(l).

131 FED. ELECTION COMM'N, *supra* note 34.

132 *See* Matea Gold & Anu Narayanswamy, *The New Gilded Age: Close to Half of All Super-PAC Money Comes from 50 Donors*, WASH. POST (Apr. 15, 2016), https://www.washingtonpost.com/politics/the-new-gilded-age-close-to-half-of-all-super-pac-money-comes-from-50-donors/2016/04/15/63dc363c-01b4-11e6-9d36-33d198ea26c5_story.html.

133 Beth Reinhard, *Hank Greenberg Gives $10 Million to Super PAC Backing Jeb Bush*, WALL ST. J. (Jan. 7, 2016, 3:48 PM), http://www.wsj.com/articles/hank-greenberg-gives-10-million-to-super-pac-backing-jeb-bush-1452164402. This type of huge individual donation to a super PAC is not unique: Cruz's super PAC has collected $15 million from one wealthy fracking family, $11 million from a hedge-fund manager, and $10 million from a private equity-fund founder. *Id.*

134 *See* Thomas Beaumont, *Jeb Bush Prepares to Give Traditional Campaign a Makeover*, ASSOCIATED PRESS (Apr. 21, 2015, 6:19 PM), http://bigstory.ap.org/article/409837aa09ee405493ad64a94b8c2c3d/bush-preparing-delegate-many-campaign-tasks-super-pac (quoting David Keating, the president of the Center for Competitive Politics, a group that opposes limits on campaign donations: "Nothing like this has been done before.").

135 *See, e.g.*, Husna Haq, *Meet Your 2016 GOP Front-Runners: Jeb Bush, Yes, and a Midwestern Surprise*, CHRISTIAN SCI. MONITOR (Feb. 16, 2015), http://www.csmonitor.com/USA/Politics/Decoder/2015/0216/Meet-your-2016-GOP-front-runners-Jeb-Bush-yes-and-a-Midwestern-surprise; Domenico Montanaro et al., *Jeb Bush Moves to Republican Front-Runner for the Presidency*, PBS NEWS HOUR (Dec. 17, 2014, 9:41 AM), http://www.pbs.org/newshour/updates/jeb-bush-moves-republican-front-runner-presidency/; James Pindell, *Analysis: Jeb Bush Is a 2016 Front-Runner, But Not Like Hillary Clinton*, WMUR (Dec. 19, 2014, 10:22 AM), http://www.wmur.com/political-scoop/analysis-bush-2016-is-a-2016-frontrunner-but-not-like-clinton/30282160; Karen Tumulty & Matea Gold, *Jeb Bush has Become the GOP Front-Runner for 2016—So Now What?*, WASH. POST (Jan. 31, 2015), https://www.washingtonpost.com/politics/jeb-bush-has-

didacy efforts.[136] From Right to Rise's inception, it was clear Bush was planning a candidacy unlike any other. The super PAC was established and announced on January 6, 2015—the same day that Bush's multi-candidate PAC, also named Right to Rise, was established.[137] The FEC filings of super PACs do not include the names of its organizers (except the name of the treasurer), but it appears that it was formed by close allies of the former Governor.[138] Until he finally declared his candidacy in June of 2015, Bush headlined countless high-dollar fundraising events for his super PAC.[139]

The Bush camp seemed to function under the belief that as long as he did not trigger candidacy, he could coordinate with his super PAC all he wanted. For example, Bush stated "I have decided to actively explore the possibility of running for President of the United States" in late 2014,[140] and he and those close to him continued to emphasize that he was merely "explor[ing] the possibility" of a presidential run. The legal implications of this hedge were not widely understood. For example, Democratic National Committee spokesman Mo Elleithee seemed to think this was merely a ploy to keep his name in the news, stating: "I don't know what the difference is between

become-the-gop-front-runner-for-2016—so-now-what/2015/01/31/0105ca68-a96e-11e4-a06b-9df2002b86a0_story.html.

136 Right to Rise USA Super PAC Financial Summary: 2015–2016, FED. ELECTION COMM'N, https://beta.fec.gov/data/committee/C00571372/ (showing total receipts of $121,145,774 as of Sept. 23, 2016) (last visited Dec. 18, 2016); *see also* Alex Isenstadt, *Jeb Bush's $100M May*, POLITICO (May 8, 2015, 5:10 AM), http://www.politico.com/story/2015/05/jeb-bush-right-to-rise-super-pac-campaign-117753.

137 FEC Form 1, Statement of Organization, Right to Rise PAC, Inc. (Jan. 6, 2015) [hereinafter Statement of Organization, Right to Rise PAC], http://docquery.fec.gov/pdf/812/15031363812/15031363812.pdf; FEC Form 1, Statement of Organization, Right to Rise Super PAC, Inc. (Jan. 6, 2015) [hereinafter Statement of Organization, Right to Rise Super PAC], http://docquery.fec.gov/pdf/818/15031363818/15031363818.pdf.

138 *Compare* Carrie Levine, *Is a Pro-Bush Super PAC Obscuring Its Spending?*, TIME (Oct. 7, 2015), http://time.com/4063597/jeb-bush-right-rise-super-pac/, *with* Beth Reinhard, *Jeb Bush Registers 'Right to Rise PAC'*, WALL ST. J.: WASH. WIRE (Jan. 6, 2015, 11:53 AM), http://blogs.wsj.com/washwire/2015/01/06/jeb-bush-registers-right-to-rise-pac/. Mike Murphy, a close friend of Jeb Bush who has worked with him for over eighteen years, took the reins of the Right to Rise super PAC when Jeb announced his presidency. *See* Sasha Issenberg, *Mike Murphy of Right to Rise Explains His Theory That Jeb Bush Is Still the Candidate to Beat*, BLOOMBERG POL. (Oct. 20, 2015, 5:00 AM), http://www.bloomberg.com/politics/features/2015-10-20/mike-murphy-of-right-to-rise-explains-his-theory-that-jeb-bush-is-still-the-candidate-to-beat.

139 *See, e.g.*, Gold, *supra* note 23; Beth Reinhard, *Jeb Bush Plans a Website on His Tenure as Florida Governor*, WALL ST. J.: WASH. WIRE (Feb. 9, 2015, 11:47 AM), http://blogs.wsj.com/washwire/2015/02/09/jeb-bush-plans-a-website-on-his-tenure-as-florida-governor/.

140 Bush, *supra* note 16; Benjy Sarlin, *Bush Surprise Announcement Jump-Starts 2016 Contest*, MSNBC (Dec. 16, 2014, 11:49 PM), http://www.msnbc.com/msnbc/jeb-bush-explore-run-gop-presidential-nomination.

'thinking about' running and 'actively exploring' running, but I suspect it has a lot to do with keeping his name in the news."[141]

This particular phrasing served a much more significant purpose than baiting the media. By denying that he was not even actively exploring a candidacy but merely "actively explor[ing] the possibility of running," it appeared as though Bush was attempting to avoid the campaign finance laws that are triggered when one begins to test the waters. At other times, however, Bush's camp did not seem to think testing the waters prevented Bush from being able to coordinate with his super PAC.[142] As Bush's candidacy date grew near, strategists from both his official campaign and his super PAC worked together to create a plan for working cohesively even after "they [become] legally barred from coordinating once he officially becomes a candidate."[143]

Although Bush's pre-candidacy activity drew the most media coverage, he was not the only presidential hopeful in the 2016 election cycle blatantly coordinating with his super PAC. For example, John Kasich's super PAC, New Day for America, aired ads that featured original footage of Kasich speaking directly into the camera.[144] Even the head of Bush's super PAC, Mike Murphy, criticized these videos as potentially breaking campaign finance laws.[145] Connie Wehrkamp, a spokeswoman for Kasich's super PAC maintained, however, that "[i]n order for there to be coordination, there must be a candidate. . . . The footage featuring Gov[ernor] Kasich was filmed before any decision was made to seek the presidency."[146] In another example, former

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141 James Hohmann & Maggie Haberman, *Bush 'Actively' Exploring 2016 Run*, POLITICO (Dec. 16, 2014, 11:24 PM), http://www.politico.com/story/2014/12/jeb-bush-exploring-2016-run-113599.

142 *See* Eric Lichtblau, *Campaign Finance Complaints Filed Against 4 Presidential Hopefuls*, N.Y. TIMES (Mar. 31, 2015), http://www.nytimes.com/2015/04/01/us/campaign-finance-complaints-filed-against-4-presidential-hopefuls.html.

143 Isenstadt, *supra* note 136.

144 New Day for America, *New Day for America -"Us"*, YOUTUBE (July 10, 2015), https://www.youtube.com/watch?v=7X48njuJdVM; New Day for America, *John Kasich -Balancing the Budget*, YOUTUBE (July 20, 2015), https://youtu.be/S5MHotEOO-4; New Day for America, *John Kasich's for Us - Live*, YOUTUBE (Sept. 28, 2015), https://youtu.be/762wogDccxg. New Day for America also posted a five-minute video on its YouTube page featuring footage of Kasich directly speaking to the camera. New Day for America, *John Kasich's for Us*, YOUTUBE (July 19, 2015), https://youtu.be/1PqA6S7rMnk.

145 *See* Sasha Issenberg, *Mike Murphy: Rubio's Campaign is 'Cynical,' Kasich's Plays Close to the Line*, BLOOMBERG POL. (Oct. 21, 2015, 5:00 AM), http://www.bloomberg.com/politics/features/2015-10-21/mike-murphy-rubio-s-campaign-is-cynical-kasich-s-plays-close-to-the-line.

146 Fredreka Schouten, *Experts: John Kasich Political Ads Chart New Territory*, USA TODAY (Oct. 7, 2015, 12:38 PM), http://www.usatoday.com/story/news/politics/elections/2015/10/07/john-kasich-presidential-campaign-ads-super-pac/73505108/.

Governor Pataki stated shortly after he had formed a super PAC to support his candidacy that "[i]f it weren't for the election laws today, I could be running for president,"[147] which seemed to indicate a belief that he could avoid campaign finance regulations by delaying his candidacy announcement.

The mistaken belief that candidates could avoid being subject to campaign finance regulations by coyly denying they were considering running for office resulted in an election cycle where candidates had previously worked closely with their dedicated super PAC *prior* to their candidacy.[148] During that time, these uncandidates discussed and coordinated strategy with their super PAC and solicited money well above the $5000 they are limited to under FECA, and from entities they could not otherwise solicit. The very premise of the legality of super PACs is that they must be completely independent from candidates to remove any risk of quid pro quo.[149] If candidates are able to coordinate with their respective super PACs until they decide to publicly declare their candidacy, this rationale falls by the wayside.

IV. The Proposal and Its Purpose

In 2015, the Senate Majority PAC and House Majority PAC (super PACs supporting Democratic Candidates for the Senate and House respectively) requested an advisory opinion from the FEC on the legitimacy of the aforementioned activity.[150] The FEC was unable to come to an agreement as to the answer to these questions, so the issue remains up for debate.[151] Additionally, the Campaign Legal Center filed FEC complaints against four candidates who engaged in

147 Pindell, *supra* note 4.

148 *See* Nicholas Confessore & Eric Lichtblau, *'Campaigns' Aren't Necessarily Campaigns in the Age of 'Super PACs'*, N.Y. Times (May 17, 2015), http://www.nytimes.com/2015/05/18/us/politics/super-pacs-are-remaking-16-campaigns-official-or-not.html?_r=0.

> Much rides on this apparent distinction. Because of it, Mr. Bush and several other contenders have delayed registering their campaigns with the Federal Election Commission, even as they travel the country, meet with voters, attend candidate forums and ask donors for money. That allows them—or so their representatives argue—to personally raise money for and coordinate spending with super PACs.

Id.

149 *See supra* Section I.B.

150 Letter from Marc E. Elias et al., Perkins Coie, LLP, to Daniel A. Petalas, Acting General Counsel, Fed. Election Comm'n 4–8 (Sept. 11, 2015), http://saos.fec.gov/aodocs/1320488.pdf (request for advisory opinion 2015-09). An advisory opinion issued by the FEC is a nonadjudicatory decision that advises the requestor as to the legality of the activity they propose in their request. *See* 52 U.S.C. § 30108 (Supp. II 2014).

151 *See* AO 2015-09, *supra* note 19, at 9.

unlawful pre-candidacy activity: Democrat Martin O'Malley[152] and Republicans Jeb Bush,[153] Rick Santorum,[154] and Scott Walker.[155] So far, the FEC has been unable to reach a decision on this matter, and given its pattern of deadlocking and nonenforcement, it is unlikely to do so in the near future.[156] The purpose of this Note's proposal is to make it clear that this type of fraudulent pre-candidacy behavior is against the law, in hopes that the FEC would be left with no choice but to enforce it, instead of slipping into its normal pattern of nonenforcement.

The reasoning of many of the 2016 presidential candidates seemed to espouse the flawed assumption that testing the waters is an intermediate step between noncandidacy and candidacy. This, however, is an inaccurate reflection of the law. A candidate is broadly defined in the U.S. Code as "an individual who seeks nomination for election, or election, to Federal office."[157] More specifically, an individual becomes a candidate for federal office—and thus subject to FECA—when that individual or someone they have consented to acting on their behalf either receives contributions[158] in excess of $5000 *or* makes expenditures in excess of $5000.[159]

In what is projected to be a five billion dollar presidential election,[160] a paltry $5000 triggering amount may seem comically low. Just one cross-country trip to court potential donors to a campaign could

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152 Complaint Against Martin O'Malley Before the FEC, Campaign Legal Center (Mar. 31, 2015), http://www.campaignlegalcenter.org/sites/default/files/CLC%20%20D21%20v.%20Martin%20O%27Malley_Complaint_3.31.15.pdf.

153 Complaint Against Jeb Bush Before the FEC, Campaign Legal Center (Mar. 31, 2015), http://www.campaignlegalcenter.org/sites/default/files/CLC%20%20D21%20v.%20Jeb%20Bush_Complaint_3.31.15.pdf.

154 Complaint Against Rick Santorum Before the FEC, Campaign Legal Center (Mar. 31, 2015), http://www.campaignlegalcenter.org/sites/default/files/CLC%20%20D21%20v.%20Rick%20Santorum_Complaint_3.31.15.pdf.

155 Complaint Against Scott Walker Before the FEC, Campaign Legal Center (Mar. 31, 2015), http://www.campaignlegalcenter.org/sites/default/files/CLC%20%20D21%20v.%20Scott%20Walker_Complaint_3.31.15.pdf.

156 *See* Letter from J. Gerald Herbert, Campaign Legal Ctr., and Fred Wertheimer, Democracy 21, to Daniel A. Petalas, Acting General Counsel, Fed. Election Comm'n 3 (Oct. 27, 2015), http://saos.fec.gov/aodocs/1322339.pdf (advisory opinion request 2015-09) (noting the "woefully small chance that the Commission will shoulder its responsibility to enforce the law").

157 52 U.S.C. § 30101(2) (2012).

158 The gift of money, goods, services, or anything of value given "for the purpose of influencing any election for Federal office" is a contribution. *Id.* § 30101(8)(A)(i).

159 *Id.* § 30101(2).

160 *See* Amie Parnes & Kevin Cirilli, *The $5 Billion Presidential Campaign?*, THE HILL (Jan. 21, 2015, 4:54 PM), http://thehill.com/blogs/ballot-box/presidential-races/230318-the-5-billion-campaign.

easily surpass the $5000 mark when flights, ground transportation, hotel rooms, and the bill at a restaurant fit for schmoozing billionaires are all added up. A single telephone poll meant to test the level of support in potential voters also could easily surpass this threshold. The testing the waters provision exempts individuals who are sincerely engaging in this sort of activity from having to disclose, providing an opportunity to gracefully retreat from a campaign they have determined is not worth running, without having to publicize that the idea was even considered in the first place.[161]

The testing the waters exception does not protect potential candidates from having to comply with all other campaign finance laws, including the laws that prohibit coordination with super PACs.[162] This is presumably why many 2016 presidential candidates were so careful to avoid directly stating that they were exploring a candidacy. However, testing the waters is not a prerequisite for candidacy. It is not meant to serve as some sort of protective intermediary step between noncandidacy and candidacy that individuals must take to become a candidate. Instead, it is an optional exception that allows would-be candidates to not have to disclose certain information until they have made the determination to run.[163] That means that even if a candidate has never tested the waters, if they have received or spent more than $5000 and made the personal decision to run for office, he or she is a candidate under federal law.

This Note, however, focuses not on when an individual becomes a candidate, but rather when an individual crosses the threshold between being an uncandidate and testing the waters. Just as denying that one is a candidate does not make it so, denying that one is testing the waters does not make it so either.[164] This proposal fills a major void in the FEC regulations that was not exposed until the 2016 election. By creating a rule prohibiting much of the pre-candidacy behavior that the 2016 presidential candidates engaged in, it could prevent future candidates—presidential and congressional alike—from engaging in the same objectionable behavior.

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161 *See supra* Part II.

162 *See supra* Part II.

163 *See supra* Part II.

164 Matea Gold, *Why Super PACs Have Moved from Sideshow to Center Stage for Presidential Hopefuls*, WASH. POST (Mar. 12, 2015), https://www.washingtonpost.com/politics/once-the-sideshows-super-pacs-now-at-the-forefront-of-presidential-runs/2015/03/12/516d371c-c777-11e4-a199-6cb5e63819d2_story.html ("The intense super PAC fundraising is also viewed by some critics as evidence that the presumptive candidates are 'testing the waters.'").

A. The Proposal: A Test for When the Testing the Waters Provision Has Been Triggered

The best way to address this recent phenomenon of fraudulent uncandidacy is by employing a per se rule, via the adoption of the following FEC regulation:

> If an individual (or his or her agents) is working with a super PAC whose major purpose is to support that individual's candidacy, then they are per se testing the waters.
>
> (a) *Working with.* Examples of activities that indicate that an individual is working with a super PAC include, but are not limited to:
>
> (1) the individual, or his or her agents, is involved in the formation of the super PAC;
> (2) the individual, or his or her agents, is involved with the selection of super PAC management;
> (3) the individual appears at super PAC fundraising events;
> (4) the individual solicits contributions for the super PAC;
> (5) the individual records audio or visual footage that is used by the super PAC during the course of the election year;
> (6) the individual, or his agents, communicates election-related plans, strategy, needs, or advice to the super PAC.
>
> (b) *Major Purpose.* The major purpose of a super PAC is to support an individual's candidacy when either:
>
> (1) the super PAC has explicitly stated that its purpose is to support an individual candidate:
> (i) on the super PAC website;
> (ii) in emails to the organization's listserv;
> (iii) public statements by authorized super PAC officials;
> (iv) any other authorized public statement by super PAC; or
> (2) the super PAC's mandatory independent expenditure filing with the FEC reveals that it has:
> (i) devoted 50% or more of its election spending to a single candidate; or
> (ii) the election spending on its leading candidate equaled 150% or more than what was spent on the next leading candidate, and makes up at least 30% of its election spending total.

This test, at its core, articulates the intuitive notion that if an individual is working with a super PAC whose purpose is to support his or her candidacy, it is fair to say that they are at least testing the waters of candidacy. While simple in the abstract, this test would have a slightly more complex application.

1. The Major Purpose Prong

What would be considered a super PAC whose major purpose is to promote one person's candidacy? When super PACs register with the FEC, they do not have to provide the name of the candidate(s) they intend support or oppose.[165] Instead, they file a Statement of Organization declaring their intent to raise funds in unlimited amounts pursuant *SpeechNow.org*, and to use those funds for independent expenditures only.[166] That means that from the initial FEC filings of a super PAC, it may not be explicit whom that super PAC is meant to support. In reality, however, the connections between super PACs and campaigns are obvious. For example, there was little doubt from its inception that the Right to Rise super PAC, which was created by Bush allies on the same day Bush created a leadership PAC by the same name,[167] was created to support Jeb Bush's presidential candidacy.[168] Even super PACs that do not go as far as adopting the same name as the candidate's PAC make it clear whom they are supporting through their fundraising.[169] For example, the super PAC Generation Forward stated on its homepage in prominently placed text: "We're going to build on all the energy of the campaigns that inspired Martin O'Malley to run. Every campaign that Martin O'Malley has run, and

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165 *See* FEC Form 1, Statement of Organization, http://www.fec.gov/pdf/forms/fecfrm1.pdf (template).

166 *See, e.g.*, Statement of Organization, Right to Rise Super PAC, *supra* note 137; FEC Form 1, Statement of Organization, Generation Forward PAC (May 27, 2015), http://docquery.fec.gov/pdf/621/15031430621/15031430621.pdf#navpanes=0.

167 *See supra* note 137 and accompanying text. As early as February 2015, Jeb Bush's Right to Rise Leadership PAC made over $120,000 worth of contributions to Republican state parties and congressional Republicans. *See* Nicholas Confessore, *Bush's PAC Spreads Money Around to Other Republicans*, N.Y. TIMES: FIRST DRAFT (Feb. 13, 2015, 5:20 PM), http://www.nytimes.com/politics/first-draft/2015/02/13/bushs-pac-spreads-money-around-to-other-republicans/.

168 *About*, RIGHT TO RISE, https://righttorisesuperpac.org/about/rtrusa?lang=EN [https://web.archive.org/web/20160221041625/https://www.righttorisesuperpac.org/about/rtrusa?lang=en] ("Right to Rise USA is the leading independent political action committee strongly supporting Jeb Bush for President.").

169 *See, e.g.*, GENERATION FORWARD, generationforwardpac.org [https://web.archive.org/web/20150803221919/http://generationforwardpac.org/].

every real movement in this country, has started with community organizing."[170]

If this test were adopted, however, super PACs would undoubtedly be less explicit in regard to which candidate they were supporting in order to evade the new rule. This could make the analysis slightly more difficult, because depending on how closely a super PAC held its cards, it may not be clear which candidate it is supporting until it starts making independent expenditures in support or opposition of candidates, which it is required to report to the FEC within forty-eight hours.[171] In these FEC reports, super PACs must list exactly which candidate they are supporting or opposing in the electioneering communication they are purchasing, which makes it clear which candidate they support.[172] Therefore, if a super PAC's FEC expenditure reports show that their primary purpose is supporting the candidacy of an individual who has been working with that super PAC, that individual has triggered testing the waters under this proposed rule.[173]

Most single-candidate super PACs, however, do not start spending until well into the primary, after the candidate has already announced.[174] If it was not clear which candidate a super PAC was

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170 *Id.* Generation Forward claims to be a multicandidate super PAC that will be active in the 2016 presidential election as well as other campaigns. However, no other candidate's name or image is featured on the main page. *Id.* It is because of this type of maneuvering that this test incorporates a definition of "super PAC whose major purpose to support that individual's candidacy" that would encapsulate purported multicandidate super PACs such as this one.

171 "A person (including a political committee) that makes or contracts to make independent expenditures aggregating $10,000 or more at any time up to and including the 20th day before the date of an election shall file a report describing the expenditures within 48 hours." 52 U.S.C. § 30104(g)(2)(A) (2012). Independent expenditures aggregating in excess of $1000 that are made within twenty days of an election must be reported within 24 hours. *Id.* § 30104(g)(1)(A).

172 *Id.* § 30104(b)(6)(B)(iii) (requiring the FEC filing to include, among other things, "the date, amount, and purpose of any such independent expenditure and a statement which indicates whether such independent expenditure is in support of, or in opposition to, a candidate, as well as the name and office sought by such candidate").

173 In all likelihood, this would mean they were in violation of campaign finance laws and thus would be subject to penalties.

174 *See, e.g.*, 24/48 Hour Report of Independent Expenditures, We The People, Not Washington (July 27, 2015), http://docquery.fec.gov/pdf/802/201507279000427802/20150727900042780 2.pdf (showing Pataki's super PAC We the People, Not Washington did not make its first independent expenditure until July 24, 2015, more than a month after Pataki filed his statement of candidacy); 24/48 Hour Report of Independent Expenditures, Right to Rise USA (July 8, 2015), http://docquery.fec.gov/pdf/419/201507089000068419/201507089000068419.pdf (showing Bush's super PAC Right to Rise did not make its first independent expenditure until July 6, 2015, almost a month after Bush filed his statement of candidacy); 24/48 Hour Report of Independent Expenditures, New Day for America (Aug. 4, 2015), http://docquery.fec.gov/pdf/187/201508049000801187/201508049000801187.pdf (showing Kasich's super PAC New Day for America did not

supporting until after the candidate has already announced their candidacy, the FEC may not be able to definitively apply this test to a candidate simultaneously with the pre-candidacy violation. While this situation is not ideal, it certainly is not the kiss of death to enforcement. The FEC can retroactively apply this test to a candidate's pre-candidacy activity. If this rule shows that the candidate indeed was engaging in testing the waters activity during a certain period prior to announcing his candidacy, FEC complaints can be filed (or DOJ prosecutions initiated) for any violations of federal election law during that period.

Another way candidates and their super PACs may attempt to avoid triggering this rule is by modifying their structure in order to support more than one candidate. For example, in Professor Richard Briffault's proposal that single candidate super PAC's independent expenditures should be treated as contributions to their candidate, he expresses concern that super PACs would try to circumvent this regulation "by adding some nominal spending for an additional candidate."[175] To prevent this possible loophole, this test does not apply to only single candidate super PACs, but instead to any super PAC whose major purpose is to support said candidate. A super PAC's major purpose would be to support an individual's candidacy if: (1) it devotes 50% or more of its election spending to the candidate;[176] or (2) the election spending on its leading candidate equals 150% or more than what was spent on the next leading candidate, and makes up at least 30% of their election spending total.[177] This test is an attempt to serve the interest in capturing any super PACs that are merely supporting additional candidates as a guise, while avoiding being so broad as to include super PACs who are genuinely multicandidate focused.

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make its first independent expenditure until August 4, 2015, two weeks after Kasich filed his statement of candidacy). *But see* 24/48 Hour Report of Independent Expenditures, Unintimidated PAC (July 14, 2015), http://docquery.fec.gov/pdf/660/201507149000118660/201507149000118660.pdf (showing Scott Walker's super PAC Unintimidated made its first independent expenditure July 13, 2015, almost a month before Walker filed his statement of candidacy).

175 Richard Briffault, *Coordination Reconsidered*, 113 COLUM. L. REV. SIDEBAR 88, 98 (2013).

176 *See id.* (suggesting "focusing on a committee that devotes more than half (or some other very large fraction) of its election spending on only one candidate regardless of the total number of candidates supported").

177 This would mean even if a super PAC only devoted 30% of its election spending to Candidate 1, if it devoted only 20% or less of its total election spending to the next most supported candidate, it would still trigger the per se rule for Candidate 1.

2. *The "Working with" Prong*

What does "working with" mean? This factor would employ a similar analysis to the FEC's determination of whether an individual who is testing the waters has triggered candidacy.[178] Just as the FEC provides an illustrative but not exhaustive list of activities that could trigger candidacy, this rule includes an equally illustrative but not exhaustive list. Unlike the FEC's list of activities that could trigger candidacy,[179] however, if an individual engages in *any* of the enumerated activities, then they have per se satisfied the "working with" prong of the proposed rule. Thus, when an individual has engaged in any of the six listed activities, there is no need for any further analysis—they have met the definition of "working with" under the rule.

While various activities could fall under this label, one of the most obvious ones is fundraising for the super PAC, be it through attending super PAC fundraising events or otherwise soliciting funds for the super PAC.[180] A candidate helping to raise money for a super PAC that is aimed at supporting his or her candidacy clearly indicates that the candidate is considering running for office. Another obvious activity that would fall under this category is working with super PAC officials in order to establish a game plan for candidacy. Outlining a strategy or plan for how a super PAC will support the individual once they declare candidacy and thus are no longer able to coordinate[181] surely would mean they were at least considering a run for office. A candidate having been filmed by a super PAC for use in ads they would run after declaring candidacy is yet another obvious example of "working with." Involvement in the formation and hiring of a super PAC would be one of many other ways a candidate's pre-candidacy behavior would meet this prong as well.

This first prong has a more ad hoc application as well. Though as discussed, an individual engaging in any of the six enumerated activi-

178 FED. ELECTION COMM'N, *supra* note 9, at 1.

179 *See supra* note 101 and accompanying text.

180 Another giveaway is when these uncandidates ask for contributions in excess of the $5000 that their own PAC could accept, because this would naturally mean they were asking for a contribution to an entity that could accept this amount of money—their super PAC.

181 The legality of coordinating with a super PAC while testing the waters is dubious at best, so when this activity is the triggering mechanism for testing the waters under this test, the candidate will also be simultaneously breaking the law. *See generally* Marc E. Klepner, Note, *When "Testing the Waters" Tests the Limits of Coordination Restrictions: Revising FEC Regulations to Limit Pre-Candidacy Coordination*, 84 FORDHAM L. REV. 1691 (2016) (detailing how such coordination while testing the waters violates campaign finance law). Therefore, as a practical matter, this test would have the added benefit of preventing uncandidates from coordinating with their super PACs. *See id.*

ties is per se "working with" a super PAC, it is also possible that activities that are not listed could satisfy this prong as well. Because campaign finance is an area of law where individuals are continuously pressing the boundaries, it is necessary to leave some flexibility in any test to ensure that the innovative behavior of future candidates cannot easily skirt it.

B. Why This Solution is Better than the Alternatives

This proposal is not the only solution that could help prevent future elections from being tainted by a pool of candidates who are shirking campaign finance regulations by attempting to avoid triggering the testing the waters phase of their candidacy. However, this section explains how the rule proposed in this Note is superior to alternative solutions in three key ways.

1. Why a Testing the Waters Rule, Rather than a Candidacy Rule?

It may very well be the case that an individual who has helped a super PAC raise tens of millions of dollars to be used in support of their candidacy (or is working with the super PAC to create an election game plan) has already made the determination to run for office, and thus is a candidate by law.[182] This test, however, does not go that far for a couple of reasons. First, while no test has ever been adopted to determine whether a candidate is testing the waters, a test to determine whether an individual has triggered candidacy has existed for almost forty years.[183] This rule is meant to fill a void in the law rather than to propose an addition to an already existing—though poorly enforced—rule. Second, the FEC has been reluctant to find individuals to have triggered candidacy. This reluctance likely has two causes: the FEC has demonstrated a general disinclination to enforce campaign finance regulations over the past decade or so;[184] and candidacy comes with substantial affirmative duties. Candidates must file a statement of candidacy and designate a principal campaign committee with the

182 For a proposal that advocates adding an additional factor to both 11 C.F.R. §§ 100.72 and 100.131 that would make involvement with a super PAC a trigger for candidacy, see Klepner, *supra* note 181, at 1730–32.

183 *See* FED. ELECTION COMM'N, CHAIRMAN EXPLANATION AND JUSTIFICATION OF PROPOSED REGULATIONS, H.R. DOC. 95-44, at 39–40 (1977).

184 *See, e.g.*, Eric Lichtblau, *F.E.C. Can't Curb 2016 Election Abuse, Commission Chief Says*, N.Y. TIMES (May 2, 2015), http://www.nytimes.com/2015/05/03/us/politics/fec-cant-curb-2016-election-abuse-commission-chief-says.html.

FEC within fifteen days of becoming a candidate,[185] and regularly disclose all contributions and expenditures.[186] The FEC has been reluctant to impose such a substantial burden on someone,[187] especially when a subjective determination of the individual's intention to run for office is the trigger for candidacy, which can only be proven circumstantially if the person does not admit to it.

A test for determining whether an individual is testing the waters, on the other hand, imposes no such affirmative duties, while still having the positive effect of subjecting him or her to all the other limits and prohibitions of FECA. It is true that this test is still used for the herculean task of determining the subjective intent of an individual; however, the risk of error is not as great. If the person truly is not considering candidacy, then in all likelihood they will not become a candidate, and thus anything they did during the alleged testing the waters period would never come under FEC scrutiny.[188] By contrast, determining that someone is a candidate subjects him or her to criminal liability without them having to take any additional affirmative steps. Therefore, implementing this definition of testing the waters is not unduly burdensome, because even if this definition somehow included individuals who had no intention of running—or even considering a run—for federal office, it would have no detrimental effect on them.

2. *Why Major Purpose Instead of a More Sweeping Standard, like Partial Purpose?*

This rule requires the super PAC's major purpose be the candidacy of the relevant individual to avoid being overinclusive by including super PACs that are genuinely multicandidate focused. As

185 52 U.S.C. §§ 30102(e), 30103(a) (2012); *see also 2016 Presidential Form 2 Filers*, FED. ELECTION COMM'N, http://www.fec.gov/press/resources/2016presidential_form2nm.shtml [https://perma.cc/8ZTX-8WNJ] (last visited Dec. 18, 2016).

186 11 C.F.R. § 104.22(a)(5)(i)–(iii) (2016) (semi-annually, quarterly, or monthly).

187 *See* Rebecca Kaplan, *2016 Presidential Fundraising: What's in a Name?*, CBS NEWS (Jan. 16, 2015, 5:53 AM), http://www.cbsnews.com/news/2016-presidential-fundraising-whats-in-a-name/ (quoting former FEC General Counsel Lawrence Noble calling the FEC "notoriously weak" when it comes to enforcing campaign finance laws when candidates are pushing the limits of what they are legally allowed to do).

188 If a person engaging in testing the waters activity decides not to run for federal office, "there would have been no obligation to report the monies received and spent for testing the waters activity." FED. ELECTION COMM'N, *supra* note 9, at 2. If a person is never obligated to report any of the money they received nor the expenditure they made, as a practical matter, there would be no way for the FEC to know whether or not they had violated campaign finance laws. *See also* AO 2015-09, *supra* note 19, at 5 ("The Commission could not agree whether a violation of the Act would occur if the individuals never decide to become candidates.").

discussed above, the test attempts to balance the dueling interests of capturing the super PACs that are merely supporting other candidates to obfuscate their true purpose, and avoiding penalizing genuine multicandidate super PACs as well.

Some may argue that even working with genuine multicandidate super PACs carries a risk of quid pro quo corruption, and thus should be covered by this rule as well.[189] For example, one commentator has argued that an individual coordinating with a super PAC "whose purpose is, *in whole or in part*, to support such individual's candidacy" should trigger candidacy.[190] While this proposal is appealing at first glance, it does not include any standard by which to determine the purpose—in whole or in part—of a super PAC.[191]

This Note's proposal aims to provide an objective way to determine whether a super PAC's activity triggers the provision by including an objective test using the super PAC's FEC independent expenditure reports. If, instead of requiring a substantial percentage of the super PAC's spending be aimed at supporting an individual's candidacy, the rule merely required that any amount of money be spent, the rule would be hopelessly overbroad. For example, according to its FEC Year-End Report for 2015, Kasich's super PAC, New Day for America, made an expenditure of $5233.36 in support of Marco Rubio, despite the fact that it also spent $6793.16 in opposition to Rubio.[192] Under this partial purpose objective test, this spending would be enough to fulfill the "purpose" prong of the rule, notwithstanding the roughly $11 million the super PAC spent in support of Kasich's presidential bid.[193] Though it would be unlikely that a scenario such as this would also fulfill the "working with" prong of this rule, a more narrowly tailored "major purpose" prong bolsters the legitimacy of the test by focusing on the precise activity it seeks to cover.

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189 *See* Klepner, *supra* note 181, at 1731 ("[T]he danger of corruption is present regardless of whether the Super PAC is a single-candidate Super PAC or supports more than one candidate.").

190 *Id.*

191 *See id.*

192 *See* FEC Form 3X, Report of Receipts and Disbursements, New Day for America, at 93, 94, 98 (Feb. 20, 2016), http://docquery.fec.gov/pdf/340/201602209008576340/201602209008576340.pdf. It is possible that this expenditure was accidentally marked in support of Rubio, when it should have said in opposition of Rubio, however this example is still useful to show just how difficult an objective partial purpose test would be to create.

193 *New Day for America: Independent Expenditures: 2015–2016,* FED. ELECTION COMM'N, https://beta.fec.gov/data/committee/C00581868/?cycle=2016&tab=independent-expenditures-committee (last visited Dec. 18, 2016).

3. *Why a Per Se Rule as Opposed to a Multifactor Test?*

One reason a per se rule is preferable to a multifactor test is because it will be easier for the FEC to apply consistently and in a nonpartisan manner. At a time when the FEC commissioners have had difficulty reaching a consensus and have subsequently become what some regard as a "feckless" agency,[194] a concise and per se rule is ideal. With fewer elements to debate and no weighing of factors required, rules such as this have the best chance of being positively applied by the FEC.

Further, unlike a multifactor test, a per se rule is much more comprehensible to the public. Having a test that the public can objectively and confidently apply makes this test not only preferable in regard to enforceability, but also for deterrent purposes. At times, it seems like candidates intentionally use the complexity of campaign laws to create subterfuge around their activity, thereby shielding any potential wrongdoing from public perception. With such a simple rule to apply here, the public would not have to rely on campaign finance experts and reporters to interpret and apply the statute for them. Instead, the straightforward and intuitive nature of this rule allows even those not adept in campaign finance to apply it to the activity of potential candidates and make the determination themselves. Unable to hide behind the obscurity and inaccessibility of the law, candidates may be deterred from illicit activity by fear of public backlash even if the FEC continues on its path of nonenforcement.[195]

V. Application of the Proposed Rule to the 2016 Presidential Election

A. *Former Governor Jeb Bush*

Governor Bush first indicated he was "actively explor[ing] the possibility of running for President of the United States" in December

194 Russ Choma, *Four 2016 Hopefuls Accused of Breaking Law*, OpenSecrets.org (Mar. 31, 2015), https://www.opensecrets.org/news/2015/03/four-2016-hopefuls-accused-of-breaking-law/; *see also* Gold, *supra* note 164 ("There's little chance, however, that such issues will be wrestled with at a sharply divided Federal Election Commission, which has deadlocked over whether to even open up enforcement investigations.").

195 *See* Evan Halper, *Presidential Candidates-to-Be Make the Most of Fundraising Rule-Bending*, L.A. Times (Apr. 6, 2015, 4:00 AM), http://www.latimes.com/nation/la-na-campaign-cash-20150406-story.html (quoting UC Irvine law professor Richard Hasen as saying, "[t]he system has become so porous that you can just push the envelope further and further. The FEC is not enforcing the law . . . . It's created these gray areas where campaigns can do these things and not get into trouble.").

2014.[196] Less than a month later, on January 6, 2015, his multicandidate PAC and super PAC (both called "Right to Rise") were formed.[197] Bush did not officially declare his candidacy until months later, on June 15, 2015.[198]

In the five months between the creation of both the Right to Rise PAC and super PAC and Bush officially declaring himself a candidate, the former Governor's actions put him squarely in the testing the waters zone under the proposed rule: the Right to Rise Super PAC's major purpose was very clearly to support Bush's candidacy,[199] and Bush had worked with this super PAC by headlining countless fundraising events for it.[200] Further, Bush also worked closely with super PAC officials before announcing his presidential run, another behavior that would fulfill the second prong of the proposed testing the waters rule.[201] Because Bush did not comply with FECA (including the ban on coordinating with independent expenditure groups) at all times during this period, he was in violation of the law.

B. Former Governor George Pataki

Former Governor George Pataki has not had an FEC complaint filed against him for his pre-candidacy activity. Unlike the majority of his cohorts, on May 19, 2015, Pataki did form a traditional exploratory committee.[202] Less than 10 days later, on May 28, he filed his statement of candidacy.[203] Despite Pataki forming an exploratory committee, however, his activity before its creation placed him in the testing the waters zone for months prior. His super PAC, We the People, Not

196 Bush, *supra* note 16.

197 Statement of Organization, Right to Rise PAC, *supra* note 137; Statement of Organization, Right to Rise Super PAC, *supra* note 137.

198 FEC Form 2, Statement of Candidacy, Jeb Bush (June 15, 2015), http://docquery.fec.gov/pdf/747/15031431747/15031431747.pdf.

199 *About*, RIGHT TO RISE, *supra* note 168 ("Right to Rise USA is the leading independent political action committee strongly supporting Jeb Bush for President.").

200 *See, e.g.*, Noble, *supra* note 20; Gold, *supra* note 23; Reinhard, *supra* note 139.

201 *See* Beaumont, *supra* note 134 (Heading the super PAC was Mike Murphy, a longtime confidant of Bush who was "deeply involved in Bush's steps, courting donors, selecting staff and developing strategy. The idea is that once Bush breaks away to form a campaign, Murphy [and others] will have spent enough time working together so that the two groups will move in sync."); Kaczynski & Ben-Meir, *supra* note 87 ("Murphy noted that he 'can't coordinate any more' with the campaign, but said he was 'well informed as of a week ago.'").

202 FEC Form 1, Statement of Organization, Pataki for President Exploratory Committee (May 19, 2015), http://docquery.fec.gov/pdf/606/15031424606/15031424606.pdf.

203 FEC Form 2, Statement of Candidacy, George E. Pataki (June 2, 2015), http://docquery.fec.gov/pdf/946/15031430946/15031430946.pdf.

Washington, was created in January 2015.[204] Unlike other candidates, who at least tried to maintain some sort of façade of separation from their super PAC, Pataki unabashedly announced that he had created the We the People, Not Washington super PAC to explore his presidential bid.[205] A potential candidate heading a super PAC[206] aimed at exploring a presidential bid alone is enough to put them into testing the waters zone under the proposed rule. Because Pataki did not comply with FECA—including the ban on coordinating with independent expenditure groups—at all times during this period, he was in violation of the law.

C. Former Governor Martin O'Malley

The Campaign Legal Center filed a complaint with the FEC against Governor Martin O'Malley for breaking campaign finance laws during a time period they claim, and he denies he was testing the waters.[207] The pre-candidacy activity of Governor Martin O'Malley, however, would likely not trigger this rule. Governor O'Malley announced his candidacy on May 29, 2015.[208] His super PAC Generation Forward was created a mere two days prior.[209] Unlike the other candidates, it does not appear that Governor O'Malley worked with his super PAC before declaring his candidacy.[210] Instead, Governor O'Malley has been accused of engaging in testing the waters activity with money from his multicandidate PAC, O'Say Can You See PAC,[211]

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204 FEC Form 1, Statement of Organization, We The People, Not Washington (Jan. 5, 2015), http://docquery.fec.gov/pdf/678/15031363678/15031363678.pdf.

205 *See* Dan Tuohy, *Pataki Forms Super PAC, Plans Another NH Visit*, UNION LEADER (Jan. 22, 2015, 3:20 PM) http://www.unionleader.com/apps/pbcs.dll/article?AID=/20150122/NEWS06/150129619.

206 Freeman Klopott, *George Pataki Super-PAC Opens Office in New Hampshire*, BLOOMBERG POLITICS (Apr. 2, 2015, 12:04 PM), http://www.bloomberg.com/politics/articles/2015-04-02/george-pataki-super-pac-opens-office-in-new-hampshire.

207 Complaint Against Martin O'Malley Before the FEC, *supra* note 152.

208 FEC Form 2, Statement of Candidacy, Martin O'Malley (May 29, 2015), http://docquery.fec.gov/pdf/604/15031430604/15031430604.pdf; *see also* David Jackson, *Martin O'Malley Jumps into Presidential Race*, USA TODAY (May 30, 2015, 2:10 PM), http://www.usatoday.com/story/news/politics/elections/2015/05/30/martin-omalley-president-announcement/27330857/.

209 FEC Form 1, Statement or Organization, Generation Forward PAC (May 27, 2015), http://docquery.fec.gov/pdf/621/15031430621/15031430621.pdf; *see also* Jonathan Easley, *O'Malley Backers Form Super-PAC*, THE HILL (May 28, 2015, 12:08 PM), http://thehill.com/blogs/ballot-box/presidential-races/243314-omalley-backers-form-super-pac.

210 Easley, *supra* note 209; Jackson, *supra* note 208.

211 FEC Form 1, Statement or Organization, O'Say Can You See PAC (June 12, 2015), http://docquery.fec.gov/pdf/853/15971205853/15971205853.pdf.

in excess of the $5000 in contributions, actual or in-kind,[212] that he is legally allowed to accept from it.[213]

This behavior, while a violation of campaign finance law,[214] is not of the nature that this proposed rule is created to cover. Multicandidate PACs have existed since the testing the waters provision was created, and therefore, at least in theory, potential candidates could have been fraudulently denying testing the waters in order to use PAC money for half a century. Further, there is already an FEC regulation in existence that bans individuals from accepting in-kind contributions from multicandidate PACs in excess of $5000, even if they have not declared candidacy yet.[215] This proposed rule is instead aimed at preventing the misuse of a relatively new political device capable of accepting unlimited money from both people and corporations—the super PAC—by candidates trying to avoid being subject to FECA regulations by denying testing the waters.

Conclusion

This proposed rule is only applicable to those purported uncandidates who are working with their super PACs, not those who are wrongfully avoiding testing the waters for other strategic reasons. This is because 2016 was the first election where candidates fraudulently avoided testing the waters in order to coordinate with super PACs. By making it clear that potential candidates cannot work with their super PACs while maintaining their uncandidacy status, the FEC could prevent such behavior from becoming standard practice in the next election.[216] This rule is particularly important because it would prevent pre-candidacy coordination between candidates and their super PACs from becoming common practice, because any such coordination would ultimately trigger testing the waters and thus place the individual in violation of campaign finance laws. Though narrow in scope, perhaps this is the best way to handle a system in which candidates and committees continuously stretch the limits of the law and widen perceived loopholes during every election cycle; to identify the newest

212 Because O'Say Can You See is a multicandidate PAC, it can contribute no more than $5000, directly or in-kind, to a candidate. 52 U.S.C. § 30116(a)(2)(A) (2012); *see also* Fed. Election Comm'n, *supra* note 34.

213 Complaint Against Martin O'Malley Before the FEC, *supra* note 152, at 10–12.

214 AO 1985-40, *supra* note 13, at 5 ("[I]f an individual becomes a candidate, any in-kind gift of a thing of value to that individual for the purpose of determining whether he or she should become a candidate will become reportable as both a contribution and an expenditure.").

215 11 C.F.R. § 110.2(b)(l) (2016).

216 *See* Noble, *supra* note 20.

ploy to stretch the boundaries of the law and nip it in the bud before it becomes an ubiquitous and accepted practice.[217]

217 "If Jeb Bush gets away with bankrolling a $100-million shadow campaign, that becomes the new normal[.] Every major House and Senate candidate will start postponing their campaign launch, setting up a super PAC, ignoring fundraising limits as long as they can, and then at the last minute they will file their paperwork to run." Halper, *supra* note 195 (quoting Paul S. Ryan, senior counsel with the nonprofit Campaign Legal Center).