NOTE

Of Birdies and Bribery: Closing the Corrupt Pathway Between Donors' Checkbooks and Candidates' Pockets

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ABSTRACT

Each election cycle brings about new fundraising and spending tactics, and with them, new public concern about the corrupting influence of money in politics. But while past concerns have been focused on the origins and volume of money flowing into the campaign sphere, the 2016 presidential election cycle raised a new concern: its destination. Namely, the campaign of then-candidate Donald Trump moved unprecedented amounts of donor money into businesses and vendors from which Mr. Trump himself directly profited. This practice has continued into his presidency. A system like this raises at least the possibility that large donors will donate to a campaign knowing that a substantial portion of their money will be going directly into the candidate's pockets, and that expectations between donor and candidate will change accordingly. This Note argues (1) that Congress should amend the Federal Election Campaign Act to prohibit these types of expenditures by campaigns and surrounding independent groups; and (2) that doing so would be consistent with First Amendment restraints on regulating campaign-related spending.

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INTRODUCTION

The Swamp has been drained and replaced with a golf resort. The Swamp, of course, is a shorthand for a metaphorical cesspool of federal corruption that voters of all political stripes attempted to "drain" with their votes in the 2016 presidential election.[1] Ever-increasing sums of money in federal election campaigns and ever-weakening rules governing them had resulted in a public perception that federal politics were consumed by the dollar chase.[2] In the wake of this anxiety, the top vote-getters in the general election and both major-party primary elections were candidates who expressed at least some degree of concern for the corruptive influence of money in politics.[3] Indeed, the winner of the election, President Donald Trump, espoused exceptionally strong rhetoric on money in politics and pledged to limit the influence that large donors would have on his campaign.[4] The Swamp, it seemed, was receding. What has since emerged from the drained wetlands of Washington, DC, however, is the institutionalization of a new form of campaign finance-fueled corruption—the funneling of donor money into a candidate's pockets by way of

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1 *See* John Kelly, *What's With All Trump's Talk About "Draining the Swamp"?*, SLATE: LEXICON VALLEY (Oct. 26, 2016, 10:59 AM), https://slate.com/human-interest/2016/10/why-do-trump-and-his-supports-keep-talking-about-draining-the-swamp.html [https://perma.cc/DA4S-5DNQ].

2 *See* Sarah Dutton et al., *Poll: Americans Say Money Has Too Much Influence in Campaigns*, CBS NEWS (Aug. 19, 2015, 10:13 AM), https://www.cbsnews.com/news/poll-americans-say-money-has-too-much-influence-in-campaigns/ [https://perma.cc/7R8F-Z9A4] (showing that 84% of Americans, including 80% of Republicans and 90% of Democrats, believed that money had "too much influence" on political campaigns); Drew DeSilver & Patrick van Kessel, *As More Money Flows into Campaigns, Americans Worry About its Influence*, PEW RES. CTR. (Dec. 7, 2015), http://www.pewresearch.org/fact-tank/2015/12/07/as-more-money-flows-into-campaigns-americans-worry-about-its-influence/ [https://perma.cc/WMZ3-4JT5] (stating that voters of all persuasions agree that "money has a greater—and mostly negative—influence on politics than ever before").

3 *See* Amy Chozick & Nicholas Confessore, *Hillary Clinton Announces Campaign Finance Overhaul Plan*, N.Y. TIMES (Sept. 8, 2015), https://www.nytimes.com/2015/09/09/us/politics/hillary-clinton-announces-campaign-finance-reform-plan.html [https://perma.cc/X58R-P7KE]; Clark Mindock, *Donald Trump Says Super PACs Should Give Money Back, Criticizes Opponents for Campaign Finance*, INT'L BUS. TIMES (Oct. 23, 2015, 12:00 PM), http://www.ibtimes.com/donald-trump-says-super-pacs-should-give-money-back-criticizes-opponents-campaign-2154127 [https://perma.cc/2GLW-EKXP]; Bernie Sanders, *If We Don't Overturn Citizens United, Congress Will Become Paid Employees of the Billionaire Class*, HUFFINGTON POST (May 22, 2015, 9:29 AM), https://www.huffingtonpost.com/rep-bernie-sanders/sanders-to-senate-if-we-dont-overturn-citizens-united-the-congress-will-become-paid-employees-of-the-billionaire-class_b_6918468.html# [https://perma.cc/6J9E-72Y3].

4 *See* Mindock, *supra* note 3 ("'I am self-funding my campaign and therefore I will not be controlled by the donors, special interests and lobbyists who have corrupted our politics and politicians for far too long,' Trump said in the statement.").

campaigns spending at candidates' businesses and, yes, their golf resorts. This type of corruptive spending presents even greater dangers than the types that critics have warned of in the aftermath of the Supreme Court's decisions in *Citizens United v. FEC*[5] and *McCutcheon v. FEC*.[6]

In the post–*Citizens United* and *McCutcheon* era, those who are concerned about money in politics are largely focused on the widened avenues available to donors who wish to contribute to campaigns and the increased amounts that donors are able to contribute to the political system.[7] The more money flowing into a campaign, the argument goes, the more a candidate may feel beholden to those who donated that money.[8] But while past concern focused around the wide path for money to flow into the system, the 2016 election brought about a new concern: its eventual destination. Activists, watchdog groups, and the media frequently pointed out throughout the cycle that then-candidate Donald Trump's campaign spent vast sums of donor money on businesses and vendors that Trump himself owned or had a direct financial stake in.[9]

Almost 20% of candidate Trump's campaign dollars flowed directly into these kinds of entities.[10] The practice has continued into his presidency: in 2017, President Trump's reelection campaign made payments of almost $800,000 to President Trump–owned properties.[11]

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5 558 U.S. 310 (2010).

6 572 U.S. 185 (2014).

7 *See, e.g.*, Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1, 41–42 (2012) (lamenting "[t]he reverse hydraulic effect[]" on money flow created by campaign finance deregulation); Liz Kennedy & Seth Katsuya Endo, *The World According to, and After,* McCutcheon v. FEC*, and Why it Matters*, 49 VAL. L. REV. 533, 538–41 (2015) (arguing that the loss of aggregate contribution limits harms democracy); Molly J. Walker Wilson, *Too Much of a Good Thing: Campaign Speech After* Citizens United, 31 CARDOZO L. REV. 2365, 2380–83 (2010) (focusing on the "breathtaking" financial ability of corporations to influence candidates and elections after *Citizens United*).

8 *See, e.g.*, Kennedy & Endo, *supra* note 7, at 540–41.

9 *See* Kenneth P. Vogel & Isaac Arnsdorf, *Trump's Campaign Paid His Businesses $8.2 Million*, POLITICO (Sept. 22, 2016, 5:13 AM) https://www.politico.com/story/2016/09/donald-trump-business-campaign-trail-228500 [https://perma.cc/4L49-PNCB] (finding additionally that over $500,000 of campaign money had been spent at Trump's golf resorts); Jim Zarroli, *Trump's Campaign Paid Millions to His Own Properties, FEC Documents Say*, NPR (Feb. 3, 2017, 11:32 AM), https://www.npr.org/sections/thetwo-way/2017/02/03/512888131/trumps-campaign-paid-millions-to-his-own-properties-fec-documents-say [https://perma.cc/9ANN-FBAY].

10 Alex Shephard, *Nearly 20 Percent of Trump Campaign Cash has Gone to Donald Trump and His Kids*, NEW REPUBLIC: MINUTES (Aug. 30, 2016), https://newrepublic.com/minutes/136416/nearly-20-percent-trump-campaign-cash-gone-donald-trump-kids [https://perma.cc/LX4B-VZU6].

11 *See All the President's Profiting*, CTR. FOR RESPONSIVE POLITICS: OPENSECRETS.ORG, https://www.opensecrets.org/trump/trump-properties?cycle=2018 [https://perma.cc/P44P-WTY4].

This type of spending raises a concern different in kind from that over fundraising avenues and amounts. While large amounts of money flowing into a campaign may cause a candidate to feel grateful (or beholden) to a donor,[12] it rarely amounts to or raises the specter of a corrupt *quid pro quo* exchange between a donor and a candidate.[13] When a campaign publicly and conspicuously moves donor money into the pockets of the candidate, however, it substantially changes the nature of a large donation. That large donation moves from the donor to the campaign, from the campaign to the candidate's business entity, and from the business entity to the candidate. A large donor may know that their money could be used to enrich a candidate rather than simply advance their campaign. Likewise, a candidate may know that a donation will eventually end up in their pockets through this pipeline. At its best, this type of campaign spending raises intense suspicion about the nature of an exchange between donor and candidate; at its worst, it creates a wide avenue for corrupt donors and candidates to exchange personal favors.

This Note proposes closing the bribery loophole created by the above campaign spending tactic. Federal campaign committees should be barred from spending donor money on business entities in which their candidate has a direct or indirect financial stake unless that entity provides a unique and irreplaceable service. To prevent an easy workaround of this restriction, independent expenditure groups[14] affiliated with a candidate should be subject to the same restriction. Part I of this Note outlines the jurisprudential journey the Supreme Court has taken on the constitutionality of campaign finance regulation, with an eye toward campaign expenditure restrictions. Part II illustrates how current law fails to prevent campaign-spending-fueled bribery and the appearance thereof. Part III lays out the proposal in detail and explains its various provisions and exceptions. Finally, Part IV explains why the proposal passes constitutional muster.

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12 *See* McConnell v. FEC, 540 U.S. 93, 145 (2003) ("It is not only plausible, but likely, that candidates would feel grateful for such donations and that donors would seek to exploit that gratitude.").

13 *See* Citizens United v. FEC, 558 U.S. 310, 360 (2010) ("Ingratiation and access, in any event, are not corruption.").

14 This Note will refer frequently to "independent expenditure groups." Where it does, it is referring to independent-expenditure-only political committees, which are colloquially known as Super PACs. *See* Gregory J. Krieg, *What Is a Super PAC? A Short History*, ABC NEWS (Aug. 9, 2012), http://abcnews.go.com/Politics/OTUS/super-pac-short-history/story?id=16960267 [https://perma.cc/N8LW-UWGA]. Although these terms will be used interchangeably as appropriate, they refer to the same type of political entity.

I. THE CONSTITUTIONAL TIGHTROPE OF CAMPAIGN FINANCE REGULATION

Today, campaign-related expenditure restrictions are subject to strict scrutiny under the First Amendment.[15] To better understand how this scrutiny will apply to the proposal, it is helpful to recount the evolution of the constitutional status of campaign finance regulation, from its inception and early rationales to its current bifurcated method of review.

A. Early History and Treatment

Federal campaign finance regulation was born in response to public fear of corruption arising from large, moneyed interests.[16] High-profile scandals involving corporate and union contributions to candidates for federal offices led to the first pillars of federal campaign finance restrictions[17]: the Tillman Act of 1907[18] and the Taft-Hartley Act of 1947.[19] Together, these pillars placed complete prohibitions on direct campaign contributions from corporations and unions, respectively.[20] Through the 1960s, the first generation of campaign finance regulation garnered little serious constitutional setback; campaign finance regulation touched only corporations and unions who "lacked the incentive to press their constitutional claims, since the restrictions either could be readily avoided or had been emasculated by courts"[21] that interpreted the restrictions narrowly.[22]

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15 *See, e.g.*, FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 440 (2001).

16 *See* John R. Bolton, *Constitutional Limitations on Restricting Corporate and Union Political Speech*, 22 ARIZ. L. REV. 373, 375 (1980) (quoting President Theodore Roosevelt's advocacy for the Tillman Act, in which President Roosevelt decried "improper motive[s] connected with either gift or reception" of direct corporate campaign contributions).

17 *See* Robert M. Cohan, *Of Politics, Pipefitters, and Section 610: Union Political Contributions in Modern Context*, 51 TEX. L. REV. 936, 938 (1973) ("Labor's rapidly increasing impact on national politics quickly triggered demands for control of union political activity."); John Persinger, Note, *Opening the Floodgates?: Corporate Governance and Corporate Political Activity After* Citizens United, 26 NOTRE DAME J.L. ETHICS & PUB. POL'Y 327, 330–31 (2012) (tracing the passage of the Tillman Act to the "Great Wall Street Scandal," in which widespread corporate involvement in the 1904 presidential election was exposed).

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

19 Taft-Hartley Act, Pub. L. No. 80-101, § 304, 61 Stat. 136, 159–60 (1947) (codified as amended at 52 U.S.C. § 30118 (2012)).

20 52 U.S.C. § 30118 (2012).

21 Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, *in* THE CONSTITUTION AND CAMPAIGN FINANCE REFORM: AN ANTHOLOGY 141, 142 (Frederick G. Slabach ed., 2d ed. 2006).

22 *See* Cohan, *supra* note 17, at 945 ("The lower courts, however, dutifully followed

B. Buckley *and its Progeny: The Contribution-Expenditure Dichotomy*

The limited nature of early federal campaign finance regulation gave way to the Federal Election Campaign Act of 1971 ("FECA")[23] and its 1974 amendments. FECA, particularly after its 1974 amendments, presented the first comprehensive set of federal rules governing nearly every aspect of campaigning for federal office—and thus the first opportunity for the courts to develop a coherent constitutional doctrine around campaign finance regulation. After its 1974 amendments, FECA had three core means of coercive campaign finance regulation: (1) limits on individual contributions to candidates, political parties, and political committees; (2) limits on the aggregate cyclical spending by each of those groups and by independent actors; and (3) thorough disclosure requirements of contributions and expenditures.[24]

FECA faced broad constitutional challenges which culminated in *Buckley v. Valeo*,[25] the seminal Supreme Court manifesto on the constitutionality of campaign finance regulation. The extensive opinion touched on a number of issues, but reached four fundamental conclusions for purposes of this discussion: (1) that "money is speech," thus placing First Amendment scrutiny over campaign finance regulation;[26] (2) that restrictions of campaign-related expenditures are to be evaluated separately and more searchingly than restrictions on contributions;[27] (3) that preventing corruption is the primary constitutionally legitimate rationale for regulating campaign finance;[28] and (4) that independent expenditures[29]

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the Supreme Court's lead and began fashioning their own restrictive interpretations [of Taft-Hartley's restrictions on union political contributions].").

23 Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 52 U.S.C. §§ 30101–30146 (2012)).

24 *See* Buckley v. Valeo, 424 U.S. 1, 13, 62 (1976). After its 1974 amendments, FECA prohibited individuals from contributing over $1,000 to any campaign, party, or political committee and from contributing more than $25,000 in aggregate to these groups per election cycle. *Id.* at 13. These groups, in turn, were prohibited from spending in excess of various limits over the course of the election cycle. *Id.* Individuals, additionally, were barred from independently spending over $1,000 "relative to a clearly identified candidate." *Id.* (quoting 18 U.S.C. § 608(e) (Supp. IV 1975)). Lastly, the newly created Federal Election Commission administered public disclosure requirements and an opt-in public financing mechanism for campaigns. *See* RICHARD L. HASEN, PLUTOCRATS UNITED: CAMPAIGN MONEY, THE SUPREME COURT, AND THE DISTORTION OF AMERICAN ELECTIONS 19 (2016).

25 424 U.S. 1 (1976).

26 *Id.* at 16–19.

27 *See id.* at 20–21.

28 *Id.* at 26–27.

29 Independent expenditures are campaign-related spending and communication by political committees with no official affiliation to any party or candidate. 11 C.F.R. § 100.16 (2014). For an expenditure to be considered truly independent, it must not be made in coordination with any candidate, candidate committee, or party committee. *See id.*

are exceptionally unlikely to foster corruption.[30]

The *Buckley* Court's declaration that campaign finance restrictions directly implicate First Amendment scrutiny, while still controversial,[31] is the basis of the high constitutional hurdles that these restrictions face today. In reaching its conclusion, the Court rejected the government's argument that campaign-related contributions and expenditures are merely forms of conduct that incidentally implicate speech, instead emphasizing that "virtually every means of communicating ideas in today's mass society requires the expenditure of money."[32] Money and speech are so emphatically linked, according to the Court, that no type of restriction on its use in a campaign context can escape the searching eyes of the First Amendment.[33]

Buckley's next conclusion presents this Note's proposal with its toughest constitutional barrier: that among campaign finance regulations, restrictions on expenditures most directly implicate the First Amendment and are subject to the most exacting scrutiny.[34] The Court stated that FECA's aggregate restrictions on campaign expenditures "operate to constrain campaigning by candidates," thus placing a heavy burden on their First Amendment rights.[35] FECA's restrictions on campaign contributions, on the other hand, did not impermissibly weigh on a candidate's right to speak, nor an individual's right to associate; candidates who wished to speak more could simply raise money from more people, and individuals still had the ability to associate with whomever they chose.[36] For contributions, "it was the act of contributing, not the amount of the contribution, that mattered."[37] The Court made no such parsing in choosing how to evaluate expenditure restrictions, subjecting them to traditional strict scrutiny as opposed to the more lenient "exacting scrutiny" it chose to place over contribution restrictions.[38]

Laying the seeds for future blockbuster invalidations of campaign finance regulation, the *Buckley* Court held that the government's only

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30 *See Buckley*, 424 U.S. at 45–47.

31 *See, e.g.*, HASEN, *supra* note 24, at 21 ("Campaign finance reformers have their own sloganeering, beginning with the idea that 'money isn't speech,' it's property."); J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, *in* THE CONSTITUTION AND CAMPAIGN FINANCE REFORM, *supra* note 21, at 119, 123 ("[N]othing in the First Amendment commits us to the dogma that money is speech.").

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

33 *See id.*

34 *See id.* at 20–23.

35 *Id.* at 20.

36 *See id.* at 21–22.

37 HASEN, *supra* note 24, at 23.

38 *See Buckley*, 424 U.S. at 16, 29.

compelling interest in regulating campaign finance is to prevent "corruption and the appearance" thereof.[39] In the process of doing so, the Court dismissed the government's other offered justifications for the restrictions it placed over campaign expenditures; "equalizing the relative ability of individuals and groups to influence the outcome of elections," for instance, is a concept "wholly foreign to the First Amendment."[40] Nor, the Court explained, does an interest in lowering the rapidly rising cost of campaigning justify any regulation of campaign-related expenditures.[41]

More importantly, in limiting the government's justifications for regulating campaign finance to combatting corruption and its outward appearance, the *Buckley* Court additionally limited what counts as regulable corruption. The Court referenced "corruption" almost exclusively as the existence or appearance of direct quid pro quo arrangements between donors and candidates, rather than a general atmosphere of undue influence in the hands of donors.[42] Thus, only regulations that aim to prevent these arrangements or the appearance of these arrangements can be upheld under the *Buckley* framework.[43] The *Buckley* Court's narrow definition of corruption not only invalidated independent-expenditure restrictions in the 1974 amendments to FECA,[44] but set its jurisprudence on a collision course with future independent-expenditure restrictions.

Finally, the Court observed that independent campaign-related expenditures "do[] not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions."[45] Truly independent expenditures, according to the Court, simply do not carry the same value to a candidate as that of a direct contribution.[46] The risk of resulting quid pro quo arrangements, or the appearance thereof, is accordingly minimal in most situations under the *Buckley* framework.[47]

These four conclusions in *Buckley* formed the basis of the Supreme Court's expansion of constitutional scrutiny over campaign finance

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39 *See id.* at 25, 33, 45.

40 *Id.* at 48–49.

41 *See id.* at 57.

42 *See* Samuel Issacharoff, *On Political Corruption*, *in* MONEY, POLITICS, AND THE CONSTITUTION: BEYOND *CITIZENS UNITED* 119, 121–23 (Monica Youn ed., 2011).

43 *See* First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 790–92, 795 (1978) (striking down a state ban on corporate independent expenditures in referendum elections in part because it did not target any conceivable form of quid pro quo corruption).

44 *See Buckley*, 424 U.S. at 45, 51.

45 *Id.* at 46.

46 *See id.* at 46–47.

47 *See id.*

regulation in the post–*Citizens United* era. They are thus critical to understanding how the modern jurisprudence, explained below, will impact this Note's proposal.

C. Citizens United *and* McCutcheon*: Bolstering Protection of Independent Expenditures and Narrowing the Definition of Regulable Corruption*

Buckley's above-discussed holdings stood on shaky ground in the decades following the decision.[48] The Roberts Court, however, has supercharged its commands in recent years. In *Citizens United v. FEC* and *McCutcheon v. FEC*, the Court reupholstered the *Buckley* framework and made it emphatically clear that (1) under no circumstance would campaign finance restrictions not aimed at preventing corruption find constitutional justification, (2) the definition of "corruption" cannot extend beyond quid pro quo exchanges, and (3) truly independent campaign-related expenditures are inherently uncorrupting.

In making the first point, the Court overruled its post-*Buckley* cognizance of some compelling governmental interests in campaign finance regulation beyond combatting corruption. In *Austin v. Michigan State Chamber of Commerce*,[49] the Court affirmed the constitutionality of a Michigan state law that banned "corporations from making contributions and independent expenditures [from their general treasuries] in connection with state candidate elections."[50] In doing so, the Court found a new compelling interest for regulation: the need to push back on the potential "distortion of our political discourse" that would arise when "the immensity of corporate treasuries bears no relation to the popular support for the ideas advanced therewith."[51] The "antidistortion rationale," as it became known,[52] seemed to radically depart from *Buckley*'s laser-like

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48 Subsequent Courts accepted its tenets but waxed and waned on their absolute nature in application. *Compare Bellotti*, 435 U.S. at 765, 790–92 (extending *Buckley*'s admonishment of independent expenditure restrictions in striking down a Massachusetts ban on corporate spending in referendum elections), *with* McConnell v. FEC, 540 U.S. 93, 120–21 (2003) (accepting anticorruption interests as a constitutionally legitimate reason to restrict campaign spending, but expanding the definition of corruption beyond quid pro quo exchanges), *and* Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 659–61 (1990) (declining to extend *Buckley*'s protection of independent expenditures to Michigan restriction on corporate spending in state candidate elections and recognizing the antidistortion principle as a compelling interest that can justify expenditure restrictions).

49 494 U.S. 652 (1990).

50 *Id.* at 654–55.

51 *See* Monica Youn, *First Amendment Fault Lines and the* Citizens United *Decision*, *in* MONEY, POLITICS, AND THE CONSTITUTION: BEYOND *CITIZENS UNITED*, *supra* note 42, at 95, 107 (internal quotation marks omitted).

52 Citizens United v. FEC, 558 U.S. 310, 351 (2010); *see* DANIEL HAYS LOWENSTEIN

focus on anticorruption interests.[53] Its uncomfortable existence alongside the *Buckley* framework came to an end in *Citizens United*. Decrying the antidistortion rationale's "dangerous, and unacceptable, consequence[s]" to free speech, the *Citizens United* Court overruled *Austin* and declared it an "aberration" from proper First Amendment jurisprudence.[54] In doing so, the Court definitively foreclosed any governmental interest in regulating campaign-related expenditures outside combatting corruption.[55]

After *Citizens United* curtailed *Austin*, *McCutcheon v. FEC* took aim at *McConnell v. FEC*. In *McConnell*, a divided Court concluded that constitutionally proscribable "corruption" extends not only to quid pro quo exchanges, but also to more malleably defined things like "improper influence" that donors may possess over candidates and officials.[56] With this thinking, the *McConnell* Court upheld federal restrictions on so-called "soft money," a term used to refer to unlimited sums of money that skirted general contribution limits by flowing from donors into the nonfederal election campaign accounts of national and state political parties.[57] More than a decade later, however, the *McCutcheon* Court invalidated federal aggregate contribution limits that the government attempted to defend using the same "undue influence" theory that prevailed in *McConnell*.[58] In doing so, the Court firmly proclaimed that quid pro quo exchanges are not just *a* type of corruption that the government may attempt to stamp out through campaign finance regulation, but the *only* type of corruption it may go after; in other words, the government may not use campaign finance regulation to rid the political system of amorphous, undue donor influence over politicians.[59] Chief Justice Roberts, writing for the majority, cautioned that although "[t]he line between *quid pro quo* corruption and general [undue] influence may seem vague at times, . . . the distinction must be

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ET AL., ELECTION LAW: CASES AND MATERIALS 919 (6th ed. 2017) (internal quotation marks omitted).

53 *See Austin*, 494 U.S. at 702–06 (Kennedy, J., dissenting) (criticizing the Court's antidistortion reasoning as exceptionally beyond the bounds placed by *Buckley*); *see also* HASEN, *supra* note 24, at 73 (arguing that although the *Austin* Court attempted to frame distortion as a form of corruption, it was making "at bottom an equality of inputs argument").

54 *Citizens United*, 558 U.S. at 351, 355.

55 *See id.* at 348–56.

56 McConnell v. FEC, 540 U.S. 93, 143 (2003) (quoting Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 389 (2000)); *see also id.* ("[W]e [have] recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors." (quoting *Shrink Mo. Gov't PAC*, 528 U.S. at 389)).

57 *Id.* at 123, 224.

58 *See* McCutcheon v. FEC, 572 U.S. 185, 193, 224–25 (2014).

59 *See id.* at 206–07.

respected in order to safeguard basic First Amendment rights."[60]

The Roberts Court's third line in the sand on the constitutionality of campaign finance regulation is that independent expenditures, should they be truly independent of candidates, are inherently uncorrupting and thus inherently immune from restriction.[61] At worst, according to the Court, independent expenditures may result in "[i]ngratiation and access," which "in any event, are not corruption."[62] Rather, in *Citizens United*, the Court was explicit in its view that independent expenditures are the essence of free, democratic expression.[63] Any categorical limitations on these types of campaign-related expenditures, therefore, cannot escape the buzz saw of the First Amendment. Lower courts have since followed suit by further freeing independent expenditure groups from restrictions ostensibly in place to prevent corruption.[64]

II. THE 2016 ELECTION BROUGHT ABOUT A NEW POTENTIAL BRIBERY PATHWAY THAT CURRENT LAW IS HAPLESS TO PREVENT

The law today faces a situation that it is ill-suited to prevent. The 2016 emergence of candidates spending donated campaign funds on entities that they own or have a substantial financial stake in is simply unprecedented; neither campaign finance law nor antibribery law contemplates this method of expenditure.

A. The 2016 Election and the Emergence of a New Bribery Pathway

Candidates with substantial business holdings running for and holding public office in the United States are not a new occurrence. Even before Donald Trump ran for and won the presidency, business magnates like Herman Cain[65] and Carly Fiorina[66] routinely threw their hats in the ring in

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60 *Id.* at 209.

61 *See* Citizens United v. FEC, 558 U.S. 310, 360 (2010).

62 *Id.*

63 *See id.* at 339 (declaring a federal prohibition on corporate independent expenditures in the vicinity of an election to be a "ban on speech" because any "'restriction on the amount of money a person or group can spend on political communication during a campaign . . . necessarily reduces the quantity of expression'" (quoting Buckley v. Valeo, 424 U.S. 1, 19 (1976))).

64 *See, e.g.*, SpeechNow.org v. FEC, 599 F.3d 686, 689 (D.C. Cir. 2010) (invalidating federal contribution restrictions placed on independent-expenditure-only political committees).

65 *See* David Beasley, *Former Godfather's Pizza CEO Herman Cain to Run for President*, REUTERS (May 21, 2011, 1:08 PM), https://www.reuters.com/article/us-campaign-cain/former-godfathers-pizza-ceo-herman-cain-to-run-for-president-idUSTRE74K20B20110521 [https://perma.cc/CQH4-SPTS].

66 *See* Nick Gass, *Carly Fiorina: 'Yes, I Am Running for President*,*'* POLITICO (May 4, 2015, 7:22 AM), https://www.politico.com/story/2015/05/carly-fiorina-2016-presidential-bid-

major races for public office.

But today's problem is new and multifaceted; the following discussion will focus on three key reasons why it is real and here to stay unless Congress acts to limit the flow of donor money into candidate-owned businesses. First, in the time since FECA created a comprehensive system of federal campaign finance regulation, no candidate has fused their campaign with their business holdings quite like President Trump. Second, donors are aware of this link and have responded by moving money towards avenues that may line the pockets of President Trump. Third, although no presidential candidate before 2016 spent substantial amounts of campaign money on their businesses as cavalierly as Donald Trump, there is a high possibility that future elections at every level will feature business magnate candidates with large, private business holdings—candidates who will have a roadmap to engage in the same conduct.

Between its grand opening in April 2015 and the close of 2016, President Trump's campaign committee funneled $12.8 million into Trump-owned business entities.[67] Since taking office and formally filing campaign finance paperwork for the 2020 presidential election on January 20, 2017,[68] President Trump's campaign committee has continued its "unprecedented integration"[69] with the candidate's business holdings and spent almost $800,000 at those entities in 2017.[70] This type of spending has not been limited to President Trump's campaign committee. In 2017, America First Action, Inc., a Super PAC dedicated to supporting President

117593 [https://perma.cc/33JM-977R].

67 *E.g.*, Kenneth P. Vogel, *Trump's Campaign Paid His Businesses Millions Over Course of Campaign*, POLITICO (Feb. 1, 2017, 12:02 PM), https://www.politico.com/story/2017/02/trump-campaign-paid-trump-business-234489 [https://perma.cc/TV9V-YVCY]; Zarroli, *supra* note 9. Between April 2015 and September 2017, Donald J. Trump for President, Inc. made hundreds of payments addressed to several Trump-owned businesses, including TAG Air, Trump Tower Commercial LLC, Trump National Gold Club—Bedminster, Trump Restaurants LLC, Trump Ice LLC, Trump National Golf Club DC, Trump International Hotel—Las Vegas, Trump SoHo, Trump National Golf Club, Trump National Doral, Eric Trump Wine Manufacturing, Trump International Hotel—DC, Trump International Hotel & Tower—New York, Trump Plaza LLC, Trump Payroll Corp., Trump International Hotel & Tower—Chicago, Trump Park Avenue LLC, The Trump Security, Trump National Golf Club—Westchester, Trump Virginia Acquisitions LLC, Trump CPS LLC, Trump Old Post Office LLC, Trump Grill, The Trump Corp., Trump Café, and Trump National Golf Club—Charlotte. *See* Disbursements for Donald J. Trump for President, Inc., FEC, https://www.fec.gov/data/disbursements [https://perma.cc/ENP8-Q6XK] (under "Spender Name or ID," search for "Donald J. Trump for President, Inc.").

68 Form 99 for Donald J. Trump for President, Inc., FEC, http://docquery.fec.gov/cgi-bin/forms/C00580100/1140262/ [https://perma.cc/F5SR-BKFY].

69 Vogel, *supra* note 67.

70 *See All the President's Profiting*, *supra* note 11.

Trump,[71] spent $32,688.71 at Trump-owned properties.[72] President Trump himself is clearly and conspicuously at the end of this cash pipeline—the Donald J. Trump Revocable Trust, a trust "to hold assets for the 'exclusive benefit' of the president," is the sole shareholder of the corporation that owns much of his business empire.[73] He continues to carry his heavy financial stake well into his presidency.[74]

This money comes from private donors—despite President Trump's pledge to largely self-fund his campaign, most of the hundreds of millions of dollars the committee has spent have come from private donations.[75] Donors, for the most part, have not been turned off by the campaign's Trump-business pipeline; rather, donors seem to take advantage of any opportunity to line the president's pockets.[76] The avenue for these opportunities is wide: in one particularly illustrative sequence of events, an energy corporation donated $1,000,000 out of its general treasury to America First Action, Inc. months after its CEO secured a meeting with Secretary of Energy Rick Perry.[77] America First Action, Inc. then paid tens

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71 *See* AMERICA FIRST ACTION SUPERPAC, https://www.a1apac.org/ [https://perma.cc/4KNV-3NZE].

72 *See* Year-End 2017 Schedule B Itemized Disbursements for America First Action, Inc., FEC, http://docquery.fec.gov/cgi-bin/forms/C00637512/1199534/sb/ALL [https://perma.cc/N6Y8-CQDR].

73 Susanne Craig & Eric Lipton, *Trust Records Show Trump Is Still Closely Tied to His Empire*, N.Y. TIMES (Feb. 3, 2017), https://www.nytimes.com/2017/02/03/us/politics/donald-trump-business.html.

74 *See id.*

75 Despite pledging to invest at least $100 million of his own money into his campaign, only $66 million of the $322 million the campaign committee spent during the 2016 election cycle came from President Trump's personal fortune. *See Here's How Much of His Own Money Donald Trump Spent on His Campaign*, FORTUNE (Dec. 9, 2016), http://fortune.com/2016/12/09/donald-trump-campaign-spending/ [https://perma.cc/2F5R-B745].

76 *See* Sarah K. Burris, *Pat Robertson and Other Trump Allies Are Lining President's Pockets with Trumped-Up Mar-A-Lago Events: Reporter*, RAWSTORY (Nov. 20, 2017, 8:35 AM), https://www.rawstory.com/2017/11/pat-robertson-and-other-trump-allies-lining-are-presidents-pockets-with-trumped-up-mar-a-lago-events-reporter/ [https://perma.cc/3FDK-ZBWB] (detailing a television interview with the Washington Post's David Fahrenthold on rising instances of charitable events at Trump properties that appear intended to "put money in Donald Trump's pocket"); Brad Heath et al., *Trump Gets Millions from Golf Members. CEOs and Lobbyists Get Access to President*, USA TODAY (Sept. 8, 2017, 12:25 PM), https://www.usatoday.com/story/news/2017/09/06/trump-gets-millions-golf-members-ceos-and-lobbyists-get-access-president/632505001/ [https://perma.cc/SNY3-5LPD] (describing the attempts by lobbyists and businessmen to get close to President Trump through personal enrichment).

77 Kenneth P. Vogel & Rachel Shorey, *Trump Groups Raised Millions, Then Paid It Out to Loyalists and a Trump Hotel*, N.Y. TIMES (Jan. 24, 2018), https://www.nytimes.com/2018/01/24/us/politics/pro-trump-fundraising-trump-hotel.html ("Murray's chief executive officer, Robert E. Murray, wrote confidential memos to Vice President Mike Pence and the energy secretary, Rick Perry, laying out a wish list of

of thousands of dollars to Trump-owned properties in the months following the contribution.[78] Arrangements like these are not isolated; for instance, some donors to President Trump's inaugural committee—known to spend large sums of money at the president's properties—have come under a criminal investigation seeking to uncover "whether [they] gave in return for political favors."[79] The road may twist and turn, but it has become apparent that money from grateful donors is likely ending up in the president's pockets.

If President Trump paved the roadway, future business-magnates-turned-candidates need only follow it. Celebrities with vast business empires are already inviting speculation about their presidential aspirations.[80] When billionaire Mark Cuban is not openly strategizing about running for president in 2020,[81] billionaire Oprah Winfrey is.[82] Both Cuban's[83] and Winfrey's[84] ownership of television networks may present

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environmental rollbacks, which he discussed in a meeting with Mr. Perry. The administration is on track to fulfill many of the items on Mr. Murray's list. Murray Energy's donation to America First Action came about five months after Mr. Murray's meeting with Mr. Perry.").

78 *See id.*

79 *See* Ilya Marritz & Justin Elliott, *Trump's Inauguration Paid Trump's Company—With Ivanka in the Middle*, PROPUBLICA (Dec. 14, 2018, 1:19 PM), https://www.propublica.org/article/trump-inc-podcast-trumps-inauguration-paid-trumps-company-with-ivanka-in-the-middle [https://perma.cc/RZG9-VXBK].

80 *See* Gabriel Debenedetti, *2020: Year of the Anti-Trump Billionaire?*, POLITICO (Jan. 9, 2018, 5:01 AM), https://www.politico.com/story/2018/01/09/2020-wealthy-democrats-steyer-winfrey-trump-328187 [https://perma.cc/NX6T-TXQY].

81 *See* Avi Selk, *Mark Cuban and Donald Trump, Longtime Frenemies, Could Face Off in 2020 Presidential Race*, WASH. POST (Oct. 23, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/10/23/mark-cuban-and-donald-trump-longtime-frenemies-could-face-off-in-2020-presidential-race/?utm_term=.9fc3915812e7 [https://perma.cc/4MSQ-WBLQ] ("Cuban went so far as to tease his plan for health-care reform and weighed out loud on Fox News the pros and cons of challenging Trump in the Republican primary.").

82 *See* Brian Stelter, *Sources: Oprah Winfrey 'Actively Thinking' about Running for President*, CNN (Jan. 8, 2017, 3:57 PM), http://money.cnn.com/2018/01/08/media/oprah-golden-globes/index.html [https://perma.cc/6ZEZ-Q5TG]; *see also* Michael Scherer, *Former Starbucks Chief Howard Schultz Confirms Interest in Independent 2020 Bid, as Democratic Worries Rise*, WASH. POST (Jan. 27, 2019), https://www.washingtonpost.com/politics/former-starbucks-chief-howard-schultz-confirms-interest-in-independent-2020-bid-as-democratic-worries-rise/2019/01/27/d6d8e446-2245-11e9-ad53-824486280311_story.html?utm_term=.7411af598ccf [https://perma.cc/W9WY-VCWL].

83 *See* Meg James, *CBS Taking Minority Stake in Cable Channel AXS*, L.A. TIMES (Feb. 14, 2013), http://articles.latimes.com/2013/feb/14/entertainment/la-et-ct-cbs-taking-minority-stake-in-axs-20130213 [https://perma.cc/WK3T-CHTS]. Cuban owns a 50% share of cable channel AXS TV. *Id.*

84 *See* Joe Flint, *Oprah Winfrey Sells Part of Stake in OWN Network to Discovery*,

similar issues to those that arise from President Trump's ownership of hotels and golf resorts—campaign expenditures at both types of entities are not immediately suspect because the services they offer may seem rationally related to the needs of a modern presidential campaign. Whether Cuban or Winfrey ultimately decides to run for office, they are illustrative of an issue that extends beyond them: so long as candidates with business empires emerge and money continues to be "like water,"[85] there will remain a risk that campaigns and independent expenditure groups can be used to put donor dollars into a candidate's pockets.

B. Campaign Finance Law Cannot Stop the Payments

The spending strategy of the Trump campaign and of independent groups in its orbit "raises concerns that go to the heart of why we worry about money in politics in the first place."[86] Campaign finance regulation, in theory, exists primarily to prevent ethically dubious transactions between donors and candidates.[87] Yet, federal campaign finance law contains no regulation that would prevent those groups from engaging in this kind of activity. Expenditure restrictions are exceptionally rare and limited.[88] Mandatory disclosure regimes, moreover, have proven to be hapless in preventing these transactions from taking place.

The closest that federal campaign finance law comes to prohibiting the type of campaign spending outlined above is FECA's ban on the "personal use" of donated campaign funds.[89] The personal use ban prohibits the expenditure of donated campaign funds toward "any commitment, obligation, or expense of a person that would exist irrespective of the

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WALL ST. J. (Dec. 4, 2017, 2:02 PM), https://www.wsj.com/articles/oprah-winfrey-sells-part-of-stake-in-own-network-to-discovery-1512414120 [https://perma.cc/2V2J-R9EX]. Although Discovery Communications, Inc. has acquired majority control of the Oprah Winfrey Network, Winfrey retains a substantial stake in the business and continues to serve as chief executive of the network. *Id.*

85 McConnell v. FEC, 540 U.S. 93, 224 (2003) ("Money, like water, will always find an outlet.").

86 Ashley Feinberg, *Trump's 2020 Campaign Has Already Paid Out $600k—To Trump*, WIRED (July 20, 2017, 3:59 PM), https://www.wired.com/story/trump-2020-campaign-money/ [https://perma.cc/87BY-QMND] (quoting Daniel Weiner, Senior Counsel at The Brennan Center for Justice at NYU Law).

87 *See* McCutcheon v. FEC, 572 U.S. 185, 191 (2014) ("Our cases have held that Congress may regulate campaign [finance] to protect against corruption or the appearance of corruption.").

88 *See* Michael S. Kang, *The Brave New World of Party Campaign Finance Law*, 101 CORNELL L. REV. 531, 539 (2016) (noting that the Supreme Court has "struck down expenditure limits so consistently under *Buckley* that campaign finance reformers [have] ceased legislating them in any straightforward fashion").

89 52 U.S.C. § 30114(b) (2012).

candidate's election campaign or individual's duties as a holder of Federal office."[90] Prohibited "personal use" can range anywhere from using funds to pay excessive candidate salaries[91] to paying rent[92] to paying personal legal fees.[93] While this ban can be a useful anticorruption tool, it is, by its terms, limited to the direct conversion of donations for a candidate's personal use.[94] Its exceptions, moreover, are as wide-ranging as the ban itself; campaigns are still allowed to use donated money to pay candidates to some extent,[95] and the ban does not apply to questionable expenditures that can arguably be characterized as bona fide campaign uses.[96] Payments from the Trump campaign and supportive independent expenditure groups to Trump-owned properties are typically in the form of office and event rental fees;[97] thus, they fall well outside the personal use ban.

Modern campaign finance theory contemplates mandatory disclosure as a cure-all for any ethically dubious action not directly prohibited.[98] To this end, FECA requires campaign committees and independent expenditure groups to disclose routinely and publicly most contributions they receive and most expenditures they make.[99] Mandatory disclosure is helpful in combatting questionable payments like those between the Trump campaign and Trump-owned properties; indeed, media reporting on the subject and this Note's factual foundations are entirely dependent on regular disclosures filed with the Federal Election Commission ("FEC").[100] But mandatory disclosure limits candidates and campaigns only to what they gauge they can get away with. Because payments from the Trump campaign to Trump-owned entities have continued into his presidency,[101] it is apparent that years' worth of disclosure has failed to prevent these payments.

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90 *Id.* § 30114(b)(2).

91 *See* 11 C.F.R. § 113.1(g)(1)(i)(I) (2016).

92 *See* FEC v. O'Donnell, 209 F. Supp. 3d 727, 736 (D. Del. 2016).

93 *See* FEC v. Craig for U.S. Senate, 70 F. Supp. 3d 82, 89 (D.D.C. 2014).

94 *See* 52 U.S.C. § 30114(b).

95 *See* 11 C.F.R. § 113.1(g)(1)(i)(I) (allowing candidates who win primary elections to be paid "a salary from campaign funds").

96 *See* 11 C.F.R. § 113.1(g)(1)(i)(H) (allowing campaigns to directly pay family members of candidates if they "provide[] *bona fide* services to the campaign").

97 *See* Disbursements for Donald J. Trump for President, Inc., FEC, https://www.fec.gov/data/disbursements [https://perma.cc/4QQC-LBX9] (under "Spender Name or ID," search "Donald J. Trump for President, Inc.").

98 *See, e.g.*, Doe v. Reed, 561 U.S. 186, 199 (2010) ("Public disclosure . . . promotes transparency and accountability in the electoral process to an extent other measures cannot.").

99 *See* 52 U.S.C. § 30104.

100 *See supra* Section II.A.

101 *See, e.g.*, Feinberg, *supra* note 86.

C. *Antibribery Law Cannot Stop the Payments*

Federal law prohibits both the bribery of public officials and the payment of gratuities to public officials in connection with an official act.[102] These prohibitions, however, are criminal laws that prove too narrow to safeguard the campaign finance system from abuse.[103] The elongated chain between donors' checkbooks and President Trump's pockets is impossible to break under the standards of antibribery prosecutions. Criminal bribery of a public official under 18 U.S.C. § 201(b) (2012) can be generally defined as the offering or acceptance of anything of value to or by a public official with a corrupt intent to influence an official act of that public official.[104] In practice, proof of criminal bribery requires proof (1) that the exchange or attempted exchange involved a qualifying public official; (2) that a defendant acted with a corrupt intent; (3) that the transaction involved "anything of value" that redounded or would have redounded to the public official; (4) that a defendant had an intent to influence or be influenced; and (5) that the transaction influenced or attempted to influence an "official act."[105]

The problem with relying on the federal antibribery statute to prevent expenditure schemes like that of the Trump campaign is that it is incredibly difficult to pinpoint "official acts" that may have been influenced by specific donations. "Official acts" have been narrowly construed to include only "formal exercise[s] of governmental power" and nothing less.[106] Courts have held, for instance, that arranging a meeting is *not* an "official act" for which a public official can be convicted of bribery.[107] Thus, even a sequence of events similar to those described above—in which a corporation donated $1,000,000 to a Trump-supporting independent expenditure group months after securing a meeting between its CEO and Secretary of Energy Rick Perry—would fail to support a bribery conviction at the outset. More fundamentally, however, the federal antibribery statute applies only to "public officials;"[108] unelected candidates are free to move donations into their businesses without fear of violating the ban.

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102 *See* 18 U.S.C. § 201(a)–(c) (2012).

103 *See* Buckley v. Valeo, 424 U.S. 1, 27–28 (1976) ("[L]aws making criminal the giving and taking of bribes deal with only the most blatant and specific attempts of those with money to influence governmental action.").

104 *See* 18 U.S.C. § 201(b).

105 *See* LOWENSTEIN ET AL., *supra* note 52, at 769.

106 McDonnell v. United States, 136 S. Ct. 2355, 2371–72 (2016).

107 *Id.*

108 *See* 18 U.S.C. § 201(a)(1), (b).

III. CONGRESS MUST AMEND FECA TO PREVENT CAMPAIGNS AND CLOSELY AFFILIATED INDEPENDENT EXPENDITURE GROUPS FROM MOVING DONOR MONEY INTO A CANDIDATE'S POCKETS

Congress must acknowledge the new method of corrupting campaign expenditures and recognize that current law is unable to prevent it. It must amend FECA to close the wide avenue that candidate committees and closely affiliated independent-expenditure-only committees have to move money from donors into a candidate's pockets. The amendment should be simple: it should ban both campaign committees and closely affiliated independent-expenditure-only committees from spending donor money on businesses in which their candidates have a personal financial stake. It should establish a clear definition of what a "closely affiliated" independent-expenditure-only committee is. Finally, it should contain an exception for committees to make these expenditures should they be in pursuance of a unique and irreplaceable service or good. While passing any new legislation, Congress should be aware that the 40-year sculpting of the constitutional contours of campaign finance law by the Supreme Court has left little room for new regulation.[109] Thus, any new restrictions on campaign-related expenditures must support what a skeptical Court would consider a compelling governmental interest and be narrowly tailored toward that end.[110]

A. Proposed Statutory Text

To carry out the above-mentioned goals, Congress should amend FECA to include the following section:

(a) *Definitions*. For purposes of this section,

(1) A candidate has a "personal financial stake" in any entity or vendor in which they hold or have a direct or indirect claim[111] to 25% or more of its equity.[112]

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109 *See supra* Section I.C.

110 *See, e.g.*, McCutcheon v. FEC, 572 U.S. 185, 197 (2014) (describing the Court's review of contribution restrictions as "rigorous" (quoting Buckley v. Valeo, 424 U.S. 1, 29 (1976))); Citizens United v. FEC, 558 U.S. 310, 340 (2010) (reaffirming that laws restricting campaign-related expenditures are subject to strict scrutiny).

111 When considering whether a candidate has an indirect claim to an entity's equity, regulators should borrow principles from the Federal Trade Commission's definition of Ultimate Parent Entities. Just as a corporation may be considered the Ultimate Parent Entity of another corporation if it controls the majority of shares in the latter's controlling holder, a candidate should be considered to have an indirect claim to an entity's equity if they control a majority of shares in that entity's controlling holder. *See* 16 C.F.R. § 801.1 (2018).

112 The 25% threshold is loosely based on the principle that one need not have a majority stake in a corporation to have the influence of a controlling shareholder. *See, e.g.*, Calesa Assocs., L.P. v. Am. Capital, Ltd., C.A. No. 10557-VCG, 2016 WL 770251, at *10

(2) An entity or vendor provides a "unique and irreplaceable service or good" if a similar service or good cannot be reasonably obtained through any other entity or vendor.

(3) An independent-expenditure-only political committee is "closely affiliated" with a candidate if one or more of its regularly compensated staff at any point held compensated employment with any of that candidate's campaign committees.

(b) *Campaign committee restriction.* A contribution accepted by a candidate, and any other donation received by an individual as support for the activities of the individual as a holder of Federal office, may not be spent by the candidate or individual on any entity or vendor in which the candidate or individual has a personal financial stake, unless that entity or vendor provides a unique and irreplaceable service or good.[113]

(c) *Closely affiliated independent-expenditure-only political committee restriction.* A contribution accepted by a closely affiliated independent-expenditure-only political committee may not be spent by that committee on any entity or vendor that the candidate they are closely affiliated with has a personal financial stake in, unless that entity or vendor provides a unique and irreplaceable service or good.

(d) *Approval of expenditures for unique and irreplaceable services or goods.* A committee that wishes to make otherwise prohibited expenditures on the grounds that the entity or vendor provides a unique and irreplaceable service or good may seek approval of the expenditures from the Federal Election Commission.

(e) *De minimis exception.* This section shall not apply to expenditures of $100 or less.

(f) *Candidate donation exception.* Nothing in this section shall be construed to prohibit a campaign committee or closely affiliated independent-expenditure-only political committee from spending direct contributions from their affiliated candidate at entities or vendors in which that candidate has a personal financial stake.

B. The Proposal's Effect on Campaigns

The Trump campaign spent and continues to spend large sums of money at companies in which President Trump has a significant financial stake.[114] Its largest payments to Trump holdings, for instance, went to TAG

(Del. Ch. Feb. 29, 2016) (finding that defendants exercised control over a corporation despite only holding a 26% interest in its shares).

113 This subsection borrows language from FECA's personal use ban as codified in 52 U.S.C. § 30114 (2012).

114 *See supra* Section II.A.

Air and various Trump Tower properties around the United States.[115] This proposal would put a stop to these payments. Because President Trump owns TAG Air[116] and is the beneficiary of the sole shareholder of DJT Holdings, which holds many of President Trump's largest assets,[117] the campaign would be barred from sending millions of dollars to these businesses, as they have done and continue to do. The campaign would likely be unable to prove that either of these entities provides a unique and irreplaceable service: there are other companies that provide air travel for presidential candidates.[118] In the same vein, Trump's campaign would have to prove that there is a shortage of hotels, office space, and resorts that campaigns can use to establish their headquarters and hold events.

The proposal still provides the Trump campaign the discretion to utilize Trump properties and businesses. The campaign may continue to spend at these entities should it remove the problematic elements of the transactions: President Trump may divest himself of ownership of the entities, or the campaign can spend money donated by President Trump himself. The de minimis exception will prevent the ban from becoming overly cumbersome—a Trump campaign staffer in Midtown Manhattan will not be prevented from using a campaign credit card to buy coffee at Trump Tower,[119] nor will President Trump be barred from ordering a well-done steak.[120]

Potential candidates like Mark Cuban and Oprah Winfrey will also fall under the coverage of this ban. Both hypothetical candidates' ownership of television networks raises the same concerns as President Trump's ownership of his business empire.[121] Because Cuban has a 50% ownership stake in AXS TV[122] and Winfrey continues to have a 25.5% ownership stake in the Oprah Winfrey Network,[123] both potential campaigns will be

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115 *See Expenditures Breakdown, Donald Trump, 2016 Cycle*, CTR. FOR RESPONSIVE POLITICS: OPENSECRETS.ORG, https://www.opensecrets.org/pres16/expenditures?id=n00023864 [https://perma.cc/9BUU-PA22].

116 Sy Mukherjee, *Trump's Companies Made $1.6 Million Off the Secret Service*, FORTUNE (Sept. 23, 2016), http://fortune.com/2016/09/23/donald-trump-secret-service/ [https://perma.cc/E9HL-22AG].

117 *See* Craig & Lipton, *supra* note 73.

118 *See* Mukherjee, *supra* note 116 (noting 2016 Democratic presidential nominee Hillary Clinton's use of private jet company Executive Fliteways).

119 *See* TRUMP CAFÉ ON-THE-GO, http://www.trumptowerny.com/trump-cafe-beverages [https://perma.cc/6MYN-S7U3] (listing the price of a small coffee at $1.75).

120 *See* TRUMP GRILL, http://www.trumptowerny.com/trump-grill-lunch-menu [https://perma.cc/5ESD-QZEH] (listing the price of a 14 oz. Dry Aged N.Y. Strip Steak at $32).

121 *See supra* Section II.A.

122 *See* James, *supra* note 83.

123 *See* Flint, *supra* note 84.

barred from making expenditures at their respective candidates' networks. Should the potential campaigns decide that the services of their candidates' networks are crucial to their campaigns, they will not be categorically prohibited from making use of them; under the proposal, they may still spend money at the networks if the candidate sells some or all of their ownership stake,[124] if the campaigns spend money contributed by the candidates themselves to purchase the networks' services, or if the campaigns petition the FEC to declare the networks' services as "unique and irreplaceable."

C. The Proposal's Effects on Independent-Expenditure Committees

The goal of this proposal is to restrict independent-expenditure groups that are close enough in personal affiliation to a candidate that they could effectuate a coordinated plan to move donor money into the candidate's pockets. The FEC's current definition of "coordination" in the context of campaigns and independent-expenditure groups is excessively difficult to satisfy.[125] The agency has, however, recognized the employment of former campaign staffers as a factor in determining whether a campaign and independent expenditure group are engaged in coordinated communication.[126] This proposal's definition of a closely affiliated independent expenditure group is built off of this; independent expenditure groups that are run by former campaign staffers are deemed close enough to the candidate to warrant the ban's coverage.

This definition prevents independent expenditure groups like America First Action, Inc. from making suspect payments to candidate-held entities. Independent expenditure groups routinely employ former campaign staffers with close connections to candidates.[127] America First Action, Inc. is no exception; throughout early 2017 it employed former Trump campaign aides Rick Gates and David Bossie, and at the time it paid over $30,000 to

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124 Although this Note does not attempt to address this issue, a potential side effect of this requirement is that it can limit the conflicts of interest that a candidate with large business holdings may have once in office. For more on this issue, see generally Donna M. Nagy, *Owning Stock While Making Law: An Agency Problem and a Fiduciary Solution*, 48 WAKE FOREST L. REV. 567 (2013).

125 *See* Richard Briffault, *Coordination Reconsidered*, 113 COLUM. L. REV. SIDEBAR 88, 97 (2013) (detailing the significant ties between independent expenditure groups and candidates that fail to fall under the FEC's definition of "coordination").

126 11 C.F.R. § 109.21(d)(5) (2010).

127 *See, e.g.*, Briffault, *supra* note 125, at 90 (stating that pro–Mitt Romney Super PAC Restore Our Future "was founded . . . by several former Romney aides, including treasurer Charles R. Spies, general counsel to Romney's unsuccessful run for the 2008 Republican presidential nomination, and board member Carl Forti, the 2008 Romney campaign's political director").

Trump-owned properties, it employed former Trump campaign manager Corey Lewandowski.[128] Under the proposal, the presence of former Trump campaign staffers at America First Action, Inc. would have triggered the ban on making expenditures at Trump-owned businesses and properties.

IV. THE PROPOSAL SURVIVES CONSTITUTIONAL SCRUTINY

A. The Proposal Will Face Strict Scrutiny

Under the *Buckley* regime, any limitation on campaign-related expenditures warrants the highest degree of First Amendment protection.[129] This proposal is clearly and unambiguously a restriction on campaign-related expenditures. A reviewing court will thus place the proposal under strict scrutiny.[130] To survive strict scrutiny, a campaign-related expenditure restriction must "further[] a compelling interest" and be "narrowly tailored to achieve that interest."[131] The proposal will survive this scrutiny; although strict scrutiny is often thought of as "strict in theory, but fatal in fact," campaign finance jurisprudence "leaves open the possibility that at least in some circumstances expenditure limits may withstand constitutional scrutiny."[132]

B. The Proposal Furthers a Compelling Governmental Interest

Although the Supreme Court in recent years has limited what interests may be found sufficiently compelling to justify campaign finance regulation,[133] the Court has held for decades that the government may act to limit both actual quid pro quo corruption *and* the appearance thereof.[134]

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128 *See* Dan Merica, *Ex-Trump Campaign Chief Lewandowski Joins Pro-Trump Super PAC*, CNN (Aug. 17, 2017), http://www.cnn.com/2017/08/17/politics/corey-lewandowski-trump-super-pac/index.html [https://perma.cc/J92F-TX4T]; Year-End 2017 Schedule B Itemized Disbursements for America First Action, Inc., FEC, http://docquery.fec.gov/cgi-bin/forms/C00637512/1199534/sb/ALL [https://perma.cc/9BR4-HUAC].

129 *See, e.g.*, FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 440 (2001) ("[L]imits on political expenditures deserve closer scrutiny than restrictions on political contributions."); Homans v. City of Albuquerque, 366 F.3d 900, 906 (10th Cir. 2004) ("[T]he standard [of review] for expenditure limits operates identically to strict scrutiny review.").

130 *See, e.g.*, *Homans*, 366 F.3d at 906; Kruse v. City of Cincinnati, 142 F.3d 907, 912 (6th Cir. 1998).

131 FEC v. Wis. Right to Life, 551 U.S. 449, 464 (2007).

132 *See Homans*, 366 F.3d at 906 (citations omitted).

133 *See* McCutcheon v. FEC, 572 U.S. 185, 191–92 (2014) ("[G]overnment regulation may not target the general gratitude a candidate may feel toward those who support him or his allies, or the political access such support may afford."); Citizens United v. FEC, 558 U.S. 310, 349–56 (2010) (rejecting the antidistortion rationale).

134 *See McCutcheon*, 572 U.S. at 191–92.

Indeed, an "appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of" private campaign financing is "[o]f almost equal concern as the danger of actual *quid pro quo* arrangements."[135] In light of this guidance from courts, the proposal is responsive against the substantial risk of corruption created by campaign-related expenditures at candidate-owned business entities. Indeed, if run-of-the-mill contributions to campaign committees invoke the specter of quid pro quo corruption enough to justify limits on them,[136] then campaign-related expenditures that personally enrich a candidate certainly do so as well. In particular, the interactions between Murray Energy, America First Action, Inc., and Trump-owned properties vividly raise these concerns.[137] The proposal, moreover, comes at a time in which the American public is showing increased concerns about corruption in government stemming particularly from President Trump's "failure to divest fully from his businesses."[138]

C. The Proposal is Narrowly Tailored to Advance a Compelling Governmental Interest

Unlike past campaign finance restrictions that have been invalidated by courts, this proposal does not attempt to covertly address any interest beyond the two permissible anticorruption interests. It makes no attempt to equalize speech in a manner that is "wholly foreign to the First Amendment."[139] It does not invoke the now-discarded "antidistortion rationale."[140] It does not seek to impermissibly cap the cost of federal election campaigns as a whole as the government did in *Buckley*.[141] Nor does it resemble previous cases in which the government sought to categorically exclude all speech from select entities.[142] The manner of

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135 Buckley v. Valeo, 424 U.S. 1, 27 (1976).

136 *See id.* at 26–27.

137 *See supra* Section II.A.

138 Josh Rogin, *Report: Americans View the Trump White House as the Most Corrupt Government Institution*, WASH. POST (Dec. 12, 2017), https://www.washingtonpost.com/news/josh-rogin/wp/2017/12/12/report-americans-view-trump-white-house-as-the-most-corrupt-government-institution/?utm_term=.e86c43ad9e4f [https://perma.cc/J5US-NDNH] (detailing the findings of a poll in which "69 percent of respondents said the U.S. government is fighting corruption 'fairly badly' or 'very badly,' up from 51 percent in 2016").

139 *Buckley*, 424 U.S. at 48–49; *see* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 749 (2011) ("We have repeatedly rejected the argument that the government has a compelling state interest in 'leveling the playing field' that can justify undue burdens on political speech.").

140 Citizens United v. FEC, 558 U.S. 310, 351 (2010).

141 *See Buckley*, 424 U.S. at 54.

142 *See Citizens United*, 558 U.S. at 348; First Nat'l Bank of Bos. v. Bellotti, 435 U.S.

restriction on both campaigns and closely affiliated independent expenditure groups is narrowly tailored to ensure that only those expenditures that create a risk of enabling corruption are barred.

1. Candidates are not Categorically Barred from Engaging in Protected Speech

Campaign expenditure restrictions rarely survive First Amendment challenges; those that do, however, have been expenditure restrictions that narrowly, rather than categorically, prohibit expenditures made in circumstances that pose a risk of corruption.[143] Under the proposal, campaign committees are only prohibited from spending donated money at entities in which their candidate has a significant personal financial stake. That narrow restriction is made even narrower by its two major exceptions, both of which exist so that a candidate does not have to choose between owning their business and making campaign expenditures. Candidates can still make otherwise prohibited expenditures should they use their own money, or should they seek a determination from the FEC that the services or goods that their business provides are "unique and irreplaceable."[144]

The First Amendment requires that candidates and campaigns, through their ability to spend, "retain control over the quantity and range of debate on public issues in a political campaign."[145] In this spirit, the proposal is careful so as not to prevent candidates with a large personal financial stake in a communication business from reaching that platform's audience. Candidates with large communication businesses retain control over whether they can use the platform; as stated above, potential candidates like Mark Cuban and Oprah Winfrey may still make use of their television networks so long as they largely rid themselves of potential profits that arise out of transactions between their campaigns and their networks.[146]

2. The Proposal Casts a Small Net Over Independent Committees

The proposal is cognizant of the idea that independent expenditures are at the core of protected political expression.[147] With this in mind, the proposal's definition of what qualifies as a "closely affiliated" independent-

765, 784 (1978).

143 *See* FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 465 (2001) (upholding FECA's restrictions on coordinated expenditures between political parties and candidates); *In re* Cao, 619 F.3d 410, 429 (5th Cir. 2010) ("[C]oordinated expenditures may be restricted to prevent circumvention and corruption.").

144 *See supra* Section III.A.

145 *See Buckley*, 424 U.S. at 57.

146 *See supra* Section III.B.

147 *See Citizens United*, 558 U.S. at 372.

expenditure-only political committee ensures that bona fide independent groups can support their preferred candidate with as little restriction as possible. By hinging close affiliation on past employment, the proposal consciously avoids the potential pitfalls of past proposals that have sought to rein in independent expenditure groups based on the content of their messaging.[148] The proposal veers from activating restrictions based on the ideas expressed by a committee, which would come perilously close to enacting a "presumptively unconstitutional" content-based regulation of speech.[149]

Independent committees, moreover, would benefit from the same speech-protecting safe harbors that candidate committees enjoy under the proposal. Should a closely affiliated committee find that a service or good provided by a candidate's business has no available substitute, it may still purchase those services or goods via contributions from the candidate or by asking the FEC to determine that the services are "unique and irreplaceable."[150] Unlike the exception to the expenditure ban invalidated in *Citizens United*, this exception does not operate based on the identity or the purpose of the speaker;[151] it operates based on the nature of each expenditure. This ensures that the ban operates flexibly rather than categorically.

CONCLUSION

The most basic assumption of our democratic government is that those who are entrusted to shape it do so in the interest of the people. When public officials and candidates for public office illicitly profit from campaign donations, they erode that most basic assumption.[152] This Note's proposal takes a small but necessary step toward revitalizing Americans' faith in government by closing the golf-ball-sized loophole that allows federal campaign committees to be used as means to facilitate bribery.

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148 *See* Briffault, *supra* note 125, at 96–97 (seeking to define "coordination" between candidates and independent committees based in part on the content of its "electioneering communications"); Emily M. Hoyle, Note, *A Pool of Candidates Who Refuse to Swim: The 2016 Presidential Election and the Demise of Testing the Waters*, 85 GEO. WASH. L. REV. 312, 338 (2017) (seeking to define the "major purpose" of independent committees based on the content of its public messaging).

149 *See* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226 (2015).

150 *See supra* Section III.A.

151 *See Citizens United*, 558 U.S. at 327 (detailing the "*MCFL* exemption," which was employed in the ban on corporate electioneering communications and exempted certain nonprofit corporations).

152 *See* Buckley v. Valeo, 424 U.S. 1, 27 (1976) (explaining that the existence or appearance of quid pro quo corruption undermines "confidence in the system of representative Government" (quoting U.S. Civ. Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548 (1973))).