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UN-PAC-ING CAMPAIGN FINANCE LAW IN NEW MEXICO

Eric J. Orona*

INTRODUCTION

Checkpoints at the Tamaya Resort and Spa in Bernalillo, New Mexico, are not common. On a specific weekend in August of 2013, however, all roads were closed to the resort.¹ Only with an invitation was a person admitted past the checkpoint.² Among those invited were New Mexico Governor Susana Martinez, former Vice Presidential Nominee and current Speaker of the House Paul Ryan, former U.S. House Majority Leader Eric Cantor, and several wealthy political donors.³ The fundraising event in New Mexico, the second of a bi-annual summit hosted by billionaire brothers David and Charles Koch, was one of many taking place all across the country.⁴

The relationship between political candidates and donors was forever changed by the Supreme Court decision in *Citizens United v. FEC*, which held, among other things, that corporations and non-profits could spend unlimited amounts of money either for or against political candidates.⁵ The decision monumentally shifted the flow of political contributions into the hands of independent-only political action committees (Super PACs).⁶ Law Professor Jessica Levinson of Loyola Law School describes *Citizens United* as, “[a] faucet that pumps virtually unlimited sums of money through our electoral system.”⁷ The “faucet” is not limited to federal elections either. For example, in New Mexico, approximately 2.5 million dollars was spent during the 2014 state legislative election by only two separate PACs, resulting in the GOP winning control of the House for the first time in 60 years.⁸

Pre *Citizens United*, in 2009, New Mexico passed a law that capped the amount of money individuals could contribute to PACs.⁹ One year later *Citizens United* found government limits on political contributions to PACs

* University of New Mexico School of Law, Class of 2017. I wish to thank my mom, Jeanette, for her unconditional love and support throughout the years.

1. Kenneth P. Vogel & Jake Sherman, *Cantor, Ryan Headline Koch Summit*, POLITICO (Aug. 9, 2013), <http://www.politico.com/story/2013/08/eric-cantor-paul-ryan-koch-brothers-095294>.

2. *Id.*

3. *Id.*

4. KENNETH P. VOGEL, *BIG MONEY: 2.5 BILLION DOLLARS, ONE SUSPICIOUS VEHICLE, AND A PIMP—ON THE TRAIL OF THE ULTRA-RICH HIJACKING AMERICAN POLITICS* 19 (2014).

5. See *Citizens United v. FEC*, 558 U.S. 310, 365 (2010).

6. VOGEL, *supra* note 4, at 17.

7. Jessica A. Levinson, *The Original Sin of Campaign Finance Law: Why Buckley v. Valeo is Wrong*, 47 U. RICH. L. REV. 881, 882 (2013).

8. Dan Boyd, *GOP Wins Control of NM House*, ALBUQUERQUE JOURNAL (Nov. 4, 2014), <http://www.abqjournal.com/491495/news/control-of-70-seat-new-mexico-house-hangs-in-balance.html>.

9. *Republican Party of New Mexico v. King*, 741 F.3d 1089, 1090 (10th Cir. 2013).

unconstitutional.¹⁰ Like other Circuit Courts, the U.S. Court of Appeals for the Tenth Circuit in *Republican Party of New Mexico v. King*, applied *Citizens United* and affirmed the lower court's preliminary injunction enjoining the law's enforcement.¹¹ *Citizens United* balanced a government's interest in preventing political corruption with the constitutional right to free speech and came to the resolution that PAC's and candidates must remain independent of each other and must not coordinate the spending of expenditures.¹² Illegal coordination between PACs and political candidates is increasingly being tested at the federal level, meanwhile, states are actively attempting to regulate illegal coordination in their local elections.

In Part I, this Comment explains the decision in *Citizens United*. In Part II, this Comment discusses the recent history of political corruption in New Mexico. States generally regulate campaign finances in order to prevent *quid pro quo*¹³ corruption in their local elections. New Mexico holds similar anti-corruption interests but has endured several political corruption scandals dating back to the early 2000's.¹⁴ In late 2015, New Mexico's Secretary of State, Dianna Duran—precisely the person in charge of overseeing and enforcing New Mexico's election laws—pleaded guilty to embezzlement, money laundering, and other campaign finance violations.¹⁵

In Part III, this Comment explores the actions that states have taken to prevent Super PACs and political candidates from coordinating with each other. Specifically, a considerable amount of this Comment investigates California's anti-coordination laws because they effectively regulate the relationship between candidates and supporting PACs. California has gained national attention for its anti-coordination laws and other states have adopted similar laws to ensure that Super PACs remain independent of the candidates they support.¹⁶ This Comment then builds on California's anti-coordination laws and argues that New Mexico should adopt similar laws in order to better protect its elections through the aftermath of *Citizens United*. Adopting laws that clearly define illegal coordination between Super PACs and candidates in such a way that will ensure each's independence will

10. See *Citizens United v. FEC*, 558 U.S. 310, 365 (2010).

11. 741 F.3d 1089, 1096-97 (10th Cir. 2013).

12. 558 U.S. 310, 357 (2010).

13. For purposes of this article, *quid pro quo* refers to political favors being granted in exchange for donations.

14. See, e.g., Bill Marsh, *Illinois is Trying. It Really is. But the Most Corrupt State is Actually . . .*, N.Y. TIMES (Dec. 13, 2008), http://www.nytimes.com/2008/12/14/weekinreview/14marsh.html?_r=0; see also Sheryl Gay Stolberg, *Richardson Won't Pursue Cabinet Post*, N.Y. TIMES (January 5, 2009), <http://www.nytimes.com/2009/01/05/us/politics/05richardson.html>; Dan Frosch & James C. McKinley Jr., *Political Donor's Contracts Under Inquiry in New Mexico*, N.Y. TIMES (December 18, 2008), <http://www.nytimes.com/2008/12/19/us/politics/19richardson.html>; see also Officials behaving badly: A look back at the misdeeds of New Mexico public officials, SANTA FE NEW MEXICAN (December 16, 2015), http://www.santafenewmexican.com/news/local_news/officials-behaving-badly-a-look-back-at-the-misdeeds-of/article_5236e7bf-293f-51dd-8f93-f7e739511697.html.

15. Chelo Rivera, Marissa Lucero & Aaron Drawhorn, *Dianna Duran Agrees to Plea Deal, Pleads Guilty to Charges*, KRQE NEWS 13 (Oct. 23, 2015), <http://krqe.com/2015/10/23/embattled-secretary-of-state-dianna-duran-resigns/#jp-carousel-242827>.

16. See, e.g., CHISUN LEE, BRENT FERGUSON & DAVID EARLEY, *AFTER CITIZENS UNITED: THE STORY IN THE STATES* (2014), https://www.brennancenter.org/sites/default/files/publications/After%20Citizens%20United_Web_Final.pdf.

jumpstart campaign finance reform in New Mexico. While campaign finance reform is a significantly large task, this Comment only focuses on Super PAC and candidate coordination.

Five years since the paramount decision in *Citizens United*, Super PACs now have fundamental roles in the political landscape and the amount of money influencing state and federal elections has shocked the American democratic system. Although Super PACs and candidates are prohibited from coordinating with each other, laws with an unclear definition of “coordination” can lead to abuse, corruption, and confusion. Several articles have been written analyzing the decision in *Citizens United* but none have narrowed their focus on the impact of that decision in New Mexico.¹⁷ Most scholarship has focused on the increase in the amount of money spent on federal elections and the general impact of *Citizens United* on presidential elections.¹⁸ Currently, all federal elections are regulated by a very loose definition of Super PAC and candidate coordination.¹⁹ States, however, have taken great strides to define coordination in such a way to better protect their local elections.²⁰ This Comment suggests a reasonable foundation for New Mexico to protect both free speech concerns and the principles of a functional democratic system within the decision of *Citizens United*. This Comment does not analyze *Citizens United*, critique it, or promote it. Rather, this Comment accepts *Citizens United* as law and suggests additional laws that can improve upon its foundation. Finally, this Comment is non-partisan and does not promote any political party. Political parties and candidates are mentioned throughout this Comment, however, it is purely for illustrative purposes.

I. Background

A. Definitions and Distinctions of PACs and Super PACs²¹

A Political Action Committee or “PAC” is a group or organization structured to raise and spend money in support of or against political candidates, causes, or issues.²² Super PACs differ from PACs in that they cannot directly contribute to a campaign and instead may raise and spend unlimited sums of money from corporations, unions, and individuals.²³ A Super PAC is also an independent expenditure *only* committee.²⁴ In other words, a Super PAC is a group whose only purpose is the raising and spending of money on political candidates or causes.²⁵

17. See, e.g., Michael W. McConnell, *Reconsidering Citizens United as a Press Clause Case*, 123 YALE L.J. 412 (2013); Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1 (2012).

18. See, e.g., Richard A. Epstein, *Citizens United v. FEC: The Constitutional Right That Big Corporations Should Have But Do Not Want*, 34 HARV. J.L. & PUB. POL'Y 639, 639–40 (2011).

19. 11 C.F.R. § 109.20(a) (2014); see also 52 U.S.C. §§ 30101(17), 30116(a)(7)(B) (2012).

20. See LEE, FERGUSON, & EARLEY, *supra* note 16, at 18–20.

21. For purposes of this Comment, the term Super PAC will be used throughout.

22. *What is a Pac?*, OPENSECRETRETS.ORG, <https://www.opensecrets.org/pacs/pacfaq.php> (last visited Oct. 16, 2016).

23. *Super Pacs*, OPENSECRETRETS.ORG, <https://www.opensecrets.org/pacs/superpacs.php> (last visited Oct. 16, 2016).

24. *Super Pacs*, OPENSECRETRETS.ORG, <https://www.opensecrets.org/pacs/superpacs.php>.

25. *Id.*

Because Super PACs are able to raise such large amounts of money, Super PACs are prohibited from coordinating directly with political candidates.²⁶ Federal law defines “coordination” as an action “made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate’s authorized committee, or a political party committee.”²⁷ Over the last few years, Super PACs have become necessary pieces of the election puzzle, mostly because they are able to outspend any candidate who remains subject to contribution limits.²⁸

B. *The Road to Citizens United*

Buckley v. Valeo, a landmark decision in campaign finance law that is considered to have promulgated the importance and amount of PACs in elections, first handled the Federal Election Campaign Act (FECA) of 1971.²⁹ The FECA was filled with campaign finance provisions aimed at restricting political contributions to candidates, political action committees, and parties.³⁰ The Supreme Court recognized that the FECA infringed on First Amendment rights and triggered a high level of scrutiny review.³¹ The Supreme Court upheld certain FECA regulations on direct contributions to candidates citing the state’s compelling government interest in preventing corruption.³² The Court recognized two forms of corruption: the appearance of corruption and *quid pro quo* corruption.³³ *Quid pro quo* corruption, or money in exchange for political favors, is apparent when directly contributing to an individual candidate.³⁴ Because the state’s interest in preventing corruption outweighed the First Amendment infringements, the FECA’s limits on candidate contributions was upheld.³⁵ However, the Supreme Court made an important distinction and struck down the FECA’s limits on expenditures stating, “The restrictions, while neutral as to the ideas expressed, limit political expression ‘at the core of our electoral process and of the First Amendment freedoms.’”³⁶ In sum, the Court in *Buckley* considered expenditures free speech protected by the First Amendment, yet, upheld certain provisions of the FECA that furthered a compelling government interest in preventing corruption.³⁷

26. *Id.*; see also *Citizens United v. FEC*, 558 U.S. 310, 357 (2010).

27. 11 C.F.R. § 109.20(a) (2014); see also 52 U.S.C. §§ 30101(17), 30116(a)(7)(B) (2012).

28. See Richard L. Hasen, *Super PAC Contributions, Corruption, and the Proxy War Over Coordination*, 9 DUKE J. CONST. L. & PUB. POL’Y 1, 8 (2014) (“In the 2012 elections, all of the serious presidential candidates had single-candidate Super PACs supporting them . . .”).

29. *Buckley v. Valeo*, 424 U.S. 1, 1 (1976); Bradley A. Smith, *Super PACs and the Role of “Coordination” in Campaign Finance Law*, 49 WILLAMETTE L. REV. 603, 609–10 (2013) (noting that FECA has been considered “the most sweeping act of campaign finance regulation in the nation’s history.”).

30. *Id.*

31. *Buckley*, 424 U.S. at 24–25, 75.

32. *Id.* at 58.

33. *Id.* at 26–27.

34. *Id.* at 26.

35. *Id.* at 55 (“The interest in alleviating the corrupting influence of large contributions is served by the Act’s contribution limitations and disclosure provisions rather than . . . campaign expenditure ceilings.”).

36. *Id.* at 39 (quoting *Williams v. Rhodes*, 393 U.S. 23, 32 (1968)).

37. *Id.* at 58–59.

Austin v. Michigan State Chamber of Commerce was another significant Supreme Court case that was later overruled in *Citizens United*.³⁸ In *Austin*, the Supreme Court upheld a state law that restricted corporations from spending its expenditures on state candidate elections.³⁹ The Michigan State Chamber of Commerce, a non-profit corporation, was funded partly by for-profit corporations.⁴⁰ Next, the Chamber attempted to place a newspaper ad in support of a political candidate.⁴¹ Michigan law, however, prohibited corporations from using general treasury funds for independent expenditures in connection with candidate elections.⁴² The Supreme Court held that Michigan, by seeking to prevent the distortion and corrosion of its political process, had a compelling government interest to overcome the Supreme Court's scrutiny.⁴³ In other words, the Court furthered another sufficient state interest in anti-corruption and upheld a state law that reduced the financial influence of for-profit corporations on political elections.⁴⁴

Nearly twenty years later, the U.S. Supreme Court was confronted with another law that restricted the speech of a corporation. The Bipartisan Campaign Reform Act (BCRA) of 2002⁴⁵ promoted the idea that corporations could not participate in the political process except by forming PACs. One important provision of the BCRA restricted corporations from funding political advertisements near an election date.⁴⁶ *Citizens United*, a non-profit corporation who receives money from for-profit corporations, produced *Hillary: The Movie*, a feature-length film criticizing then Senator and presidential candidate Hillary Clinton.⁴⁷ The Federal Election Commission (FEC) prohibited the distribution of the film because it violated the BCRA in what was an apparent political advertisement by a corporation near an election date.⁴⁸ *Citizens United* challenged the validity of the BCRA and argued the law infringed on its First Amendment rights.⁴⁹ The Supreme Court heard the case in March of 2009 but did not decide the case in that term.⁵⁰ Instead, the Court asked *Citizens United* to submit supplemental briefs on whether the Court should overrule *Austin*.⁵¹

In 2010, the Supreme Court in *Citizens United v. FEC* overturned *Austin* and certain provisions in the BCRA that restricted corporations from funding political advertisements near an election date.⁵² The Court found that a compelling

38. 558 U.S. 310, 365 (2010).

39. *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 668–69 (1990).

40. *Id.* at 656.

41. *Id.*

42. *Id.* at 654.

43. *Id.* at 668–69.

44. *See id.*

45. *See, e.g.*, “Bipartisan Campaign Reform Act,” 52 U.S.C. § 30116 (2012).

46. *Citizens United v. FEC*, 558 U.S. 310, 320–21 (2010).

47. ROBERT E. MUTCH, *BUYING THE VOTE: A HISTORY OF CAMPAIGN FINANCE REFORM* 176 (2014).

48. *Id.* at 176–78.

49. *Citizens United*, 558 U.S. at 321.

50. *See, e.g.*, ROBERT E. MUTCH, *BUYING THE VOTE: A HISTORY OF CAMPAIGN FINANCE REFORM* 176 (2014).

51. *Id.* at 176.

52. *Citizens United*, 558 U.S. at 365.

government interest in preventing corruption could not outweigh the scrutiny of a First Amendment infringement, therefore prohibiting corporations from using funds to make election related expenditures could no longer be satisfied by a compelling government interest.⁵³ Although the Supreme Court rejected the government's anticorruption interest, the Court indicated that a state's interest in preventing *quid pro quo* corruption could survive First Amendment infringements.⁵⁴ The Supreme Court reasoned that independent expenditures do not warrant corruption or the appearance of corruption because "[b]y definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate."⁵⁵

SpeechNow.org v. FEC, a case ruled on shortly after the decision in *Citizens United*, is largely credited for the birth of the Super PAC.⁵⁶ An independent expenditure-*only* group challenged the FECA's contribution limits as applied to its organization.⁵⁷ The D.C. Circuit Court, found that independent expenditure-*only* groups did not pose a threat of *quid pro quo* corruption because they were independent of the candidate's they support.⁵⁸ The Court concluded, echoing *Citizens United*, that "the government has *no* anti-corruption interest in limiting contributions to an independent expenditure group," which ultimately provided Super PACs with a tremendous amount of influence.⁵⁹

II. New Mexico: Reacting to Corruption

Section II.A explores the case: *Republican Party of New Mexico v. King*,⁶⁰ a 10th Circuit decision that inspired this Comment. New Mexico's history of political corruption prompted the legislature to pass meaningful campaign finance reform, however, as explained below that effort was short lived due to the ruling in *Citizens United*.⁶¹ Section II.B discusses Super PAC and candidate coordination at the federal level and reveals certain issues that can come from a loose and unclear definition of coordination.

A. *Republican Party of New Mexico v. King: Disqualifying New Mexico's Attempts at Campaign Finance Reform.*

During the time that *Citizens United* was moving its way through the courts, New Mexico was reevaluating its state campaign laws and searching for ways to reform. In late 2008, the New York Times ranked New Mexico the third most corrupt state in the nation.⁶² Less than a month after the New York Times article, Governor

53. *Id.*

54. *Id.* at 359 ("NRWC thus involved contribution limits . . . which, unlike limits on independent expenditures, have been an accepted means to prevent *quid pro quo* corruption. . . . *Citizens United* has not made direct contributions to candidates, and it has not suggested that the Court should reconsider whether contribution limits should be subjected to rigorous First Amendment scrutiny.")

55. *Id.* at 360.

56. *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010).

57. *Id.* at 689–90.

58. *Id.* at 696.

59. *Id.* at 695 (emphasis added).

60. 741 F.3d 1089 (10th Cir. 2013).

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

62. See Marsh, *supra* note 14.

Bill Richardson's "pay-to-play" scandal was gaining national attention after he withdrew his nomination as President Obama's Commerce Secretary due to a federal grand jury investigation seeking to determine whether he awarded state contracts in exchange for contributions to PACs.⁶³ At the time, New Mexico was only one of five states without laws limiting campaign contributions and many blamed the lack of restrictions as the reason for the far too often "pay-to-play" scandals.⁶⁴

Although the Department of Justice never indicted Governor Bill Richardson on the "pay-to-play" scandal,⁶⁵ a 2012 bid-rigging case, *United States of America v. Carollo*,⁶⁶ uncovered specific details about the federal "pay-to-play" investigation. At trial during cross-examination, a broker testified to handing New Mexico Governor Bill Richardson a check for \$25,000 made payable to Moving America Forward, a PAC supporting Governor Richardson.⁶⁷ Governor Richardson responded, "Tell the big guy I'm going to hire you guys."⁶⁸ Soon after, that broker's firm was hired on a \$400,000,000 government contract bid.⁶⁹ In reaction to Richardson's "pay-to-play" scandal, in 2009 the New Mexico Legislature enacted Section 1-19-34.7 of New Mexico's Campaign Practices Act that capped contributions to political committees and candidates for statewide office at \$5,000.⁷⁰ The statute defined "political committees" broadly to include political parties and non-party political committees, although, only the non-party committees challenged the constitutionality of law as applied directly to them.⁷¹

In *Republican Party of New Mexico v. King*, Section 1-19-34.7 of the Campaign Practices Act was challenged under the First Amendment.⁷² The plaintiffs, and challengers, of the law included, The Republican Party of New Mexico, New Mexicans for Economic Recovery PAC, New Mexico Turn Around PAC, and several individual citizens of New Mexico.⁷³ Both non-party and party committees sought to solicit and accept contributions in excess of the statutory minimum \$5,000.⁷⁴ The plaintiffs filed a preliminary injunction against Section 1-19-34.7 of the Campaign Practices Act citing the *Citizens United* decision.⁷⁵ Specifically, the plaintiffs argued that the state law restricted their free speech rights because it

63. See Stolberg, *supra* note 14; see also Frosch & McKinley Jr., *supra* note 14.

64. Stephanie Simon, *New Mexico's Political Wild West: Lack of Contribution Limits, Ethics Laws and Lawmaker Pay Seems to Breed Scandal*, WALL ST. J. (Jan. 17, 2009), <http://www.wsj.com/articles/SB123233959874194545>.

65. CBS News, *AP: Bill Richardson Cleared in Fed's Probe*, CBS NEWS (Aug. 27, 2009, 3:51 AM), <http://www.cbsnews.com/news/ap-bill-richardson-cleared-in-feds-probe/>.

66. Matt Taibbi, *The Scam Wall Street Learned from the Mafia*, ROLLING STONE (Jun. 21, 2012), <http://www.rollingstone.com/politics/news/the-scam-wall-street-learned-from-the-mafia-20120620?page=5>.

67. *Id.*

68. *Id.*

69. *Id.*

70. NM STAT. ANN. § 1-19-34.7 (2009).

71. NM STAT. ANN. § 1-19-26(L) (2015); see also *Republican Party of New Mexico v. King*, 741 F.3d 1089, 1091 (10th Cir. 2013).

72. *Republican Party of New Mexico*, 741 F.3d at 1091.

73. *Id.*

74. *Republican Party of New Mexico v. King*, 850 F.Supp. 2d 1206, 1210 (D.N.M. 2012).

75. *Id.* at 1210.

prevented them from engaging in political speech.⁷⁶ The U.S. District Court granted the plaintiff's motion for preliminary injunction.⁷⁷

On appeal, the U.S. Court of Appeals for the Tenth Circuit affirmed the lower court's decision, finding the law inconsistent with the decision in *Citizens United*.⁷⁸ The state argued that it held a compelling interest in preventing corruption and that limiting the amount of contributions to political committees was an acceptable furtherance of that interest.⁷⁹ New Mexico cited *Buckley* for the proposition that when states have a compelling government interest in preventing corruption, it is permitted to limit contributions.⁸⁰ Applying *Citizens United*, the Tenth Circuit reasoned, "[a]s every other circuit to consider the issue has recognized, *quid pro quo* corruption no longer justifies restriction on *uncoordinated* spending for independent expenditure-only entities, and the absence of a corruption interest breaks any justification for restrictions on contributions for that purpose."⁸¹

Although *Republican Party of New Mexico v. King* dissolved New Mexico's attempt to reform its campaign finance laws,⁸² New Mexico can find other means to protect the integrity of its elections. One path would be to restrict Super PAC and candidate coordination in such a way that could prevent fiscal abuse, confusion, corruption, and keep Super PACs and candidates truly separate from each other. Although campaign finance is a rather large body of law, and there are many other ways to strengthen campaign finance laws, creating stricter and clearer rules on illegal Super PAC and candidate coordination is a much needed weapon to combat *quid pro quo* political corruption. New Mexico law does not define illegal Super PAC and candidate coordination, leaving *quid pro quo* corruption a prevalent issue.

B. A Rare Occurrence: The First Federal Prosecution of Illegal Coordination

In 2015, five years after *Citizens United*, the first ever conviction of illegal Super PAC and candidate coordination occurred in Virginia.⁸³ During the 2012 election season, Mr. Tyler Harber, a campaign manager for a congressional candidate, pleaded guilty to coordinating illegally with a Super PAC.⁸⁴ Mr. Harber, together with his role as campaign manager, admitted to secretly operating a Super PAC that spent \$325,000 attacking a rival congressional candidate.⁸⁵ While the Department of Justice touted the conviction as an important development in

76. *Id.*

77. *Id.* at 1216.

78. *Republican Party of New Mexico v. King*, 741 F.3d 1089, 1103 (10th Cir. 2013).

79. *Id.* at 1091–92.

80. *Id.* at 1091, 1098.

81. *Id.* at 1097 (emphasis added).

82. *See id.*

83. Paul Blumenthal, *GOP Consultant Pleads Guilty in First Super PAC Coordination Conviction*, THE HUFFINGTON POST (Feb. 12, 2015), http://www.huffingtonpost.com/2015/02/12/tyler-harber-guilty-super-pac_n_6673038.html.

84. *Id.*; see also Justice News, *Campaign Manager Pleads Guilty to Coordinated Campaign Contributions and False Statements*, DEP'T OF JUST., <http://www.justice.gov/opa/pr/campaign-manager-pleads-guilty-coordinated-campaign-contributions-and-false-statements> (Feb. 12, 2015).

85. Blumenthal, *supra* note 84.

prosecuting illegal campaign coordinations,⁸⁶ the conviction was a rare occurrence and is unlikely to happen again. Mr. Harber was convicted because an official raised questions about his conduct to the Department of Justice and, after a short investigation, Mr. Harber confessed in federal court. Mr. Harber stated, “I did it, it was wrong when I did it, and I knew it was wrong when I did it.”⁸⁷ Mr. Harber was sentenced to two years in prison.⁸⁸

Rather than rely on the unusual circumstances that led to Mr. Harber’s conviction under the federal laws on illegal coordination, states are taking active measures to pass laws that clearly define illegal coordination for more practical prosecutions. In *Citizens United*, the Supreme Court made clear that Super PACs are to remain independent of candidates.⁸⁹ States have recognized, however, that Super PACs at the federal level are acting suspiciously close to candidates due to the loose and unclear definition of coordination.

III. States Define “Coordination” and New Mexico Must do the Same

States can adopt, reject, or improve upon the federal laws that define illegal coordination for their local elections. Across the country, states have dealt with drafting and enforcing the appropriate regulations for illegal coordination between Super PACs and local political candidates.⁹⁰ Section III.A. discusses California’s new laws on illegal coordination and argues that New Mexico adopt similar laws to protect the integrity of its elections. Section III.A.1-4 is organized as follows: First, this Comment will explain the California law on illegal coordination. Second, this Comment will argue that New Mexico should adopt laws similar to California’s. Finally, under the header *Application*, I will apply the proposed laws through hypotheticals. These three steps will be repeated throughout discussion of the four laws on illegal coordination that this Comment argues New Mexico should adopt.

While there are many laws that can successfully keep Super PACs independent from the candidates they support, the four mentioned below are crucial building blocks necessary to any state’s campaign finance laws. The Brennan Center for Justice, a nonpartisan law and policy institute, studied several state campaign laws across the country and ranked New Mexico one of the weakest states for regulating campaign finances.⁹¹ New Mexico was the only state studied that did not contain a definition for illegal coordination and had no known investigation of illegal

86. *Id.*; see also, Matt Zaptosky & Matea Gold, *Republican Operative Sentenced to 2 Years in Landmark Election Case*, THE WASH. POST (Jun 12, 2015), https://www.washingtonpost.com/local/crime/feds-want-nearly-4-year-sentence-for-republican-operative-convicted-of-illegal-coordination/2015/06/11/7ecbdc72-0ed0-11e5-9726-49d6fa26a8c6_story.html.

87. Peter Overby & Domenico Montanaro, *Crossing the Line: Political Operative Gets 2 Years in Prison*, NAT’L PUB. RADIO (Jun. 12, 2015), <http://www.npr.org/sections/itsallpolitics/2015/06/12/413750981/crossing-the-line-political-operative-gets-2-years-in-prison>.

88. *Id.*

89. *Republican Party of New Mexico v. King*, 741 F.3d 1089, 1095 (10th Cir. 2013) (“It is worth repeating: the Court firmly rejected the contention that independent expenditures give rise to corruption or the appearance of corruption.”) (citing *Citizens United*).

90. See, e.g., LEE, FERGUSON, & EARLEY, *supra* note 16 at 18–21.

91. *Id.* at 21.

coordination to date.⁹² In order to enforce violations of illegal coordination, the New Mexico Legislature must pass a law that clearly defines illegal coordination. This Comment argues in the following section that New Mexico should pass the following four laws in order to effectively and clearly define illegal coordination that can prevent fiscal abuse, confusion, and *quid pro quo* corruption. Minnesota, reacting to the new political landscape post *Citizens United*, passed campaign finance laws with the intention of “requir[ing] the highest degree of separation between candidates and [Super PACs] that is constitutionally permitted.”⁹³ New Mexico must take the same approach.

A. *The California Model*

California recently amended its campaign laws to define illegal coordination in such a way that ensures Super PACs remain independent from the candidates they support. Although California generally defined illegal coordination, the California Fair Political Practices Commission gained national attention by passing three new strict laws aimed to combat illegal coordination, laying a solid foundation for other states to follow.⁹⁴ First, California prohibits Super PACs from republishing candidate campaign materials. Second, California requires a cooling-off period for staff exchanges between candidates and Super PACs. Third, California restricts the behavior of the candidate at Super PAC fundraising events.

1. General Definition of Coordination

California law defines general coordination as any expenditure made “at the request, suggestion, or direction of, or in cooperation, arrangement, consultation, concert or coordination with, the candidate or committee on whose behalf, or for whose benefit the expenditure is made. To be considered coordinated, such prearrangement must occur prior to the making of a communication.”⁹⁵ California’s definition of “general coordination” is not much different from the federal definition, however, it is necessary to notify state candidates and Super PACs that at the very least there is general restriction of illegal coordination.⁹⁶

While a general definition of coordination is essential to regulating illegal coordination, and although New Mexico adopted the federal definition of coordination, it is not enough to ensure that Super PAC and candidate expenditures are not spent in coordination. In order to prevent illegal coordination between Super PACs and candidates, New Mexico at the very least must pass a law that defines coordination in general terms. Otherwise, Super PACs and candidates are free to cleverly coordinate without violating New Mexico law. Because a Super PAC can raise and spend unlimited amounts of money on elections, candidates could easily

92. *Id.*

93. Note, *Working Together for an Independent Expenditure: Candidate Assistance with Super PAC Fundraising*, 128 HARV. L. REV. 1478, 1491 (2015).

94. See, e.g., Ian Vandewalker, *California Cracks Down on Shadow Campaigns*, BRENNAN CTR. FOR JUST. (Oct. 5, 2015), <https://www.brennancenter.org/blog/california-cracks-down-shadow-campaigns>; Derek Lawlor, *California Approves Strict Rules on Super PAC Coordination*, NAT’L L. REV. (Oct. 16, 2015), <http://www.natlawreview.com/article/california-approves-strict-rules-super-pac-coordination>.

95. CAL. CODE REGS. tit. 2, § 18225.7(c)(1) (2015).

96. See 11 C.F.R. § 109.20(a) (2014); see also 52 U.S.C. §§ 30101(17), 30116(a)(7)(B) (2012).

circumvent candidate contribution limits by coordinating with a Super PAC. For example, a political candidate can only personally receive the maximum amount of \$5,000 from an individual donor, however, a Super PAC with close ties to the candidate can accept unlimited sums. Additionally, without a general definition of coordination, the political candidate and the Super PAC can coordinate all the spending of that money. In order to prohibit obvious coordination between Super PACs and candidates, New Mexico must adopt California's definition of general coordination.

A general definition also signals to its citizens and politicians that the state is taking steps to regulate its political landscape and that New Mexico is not satisfied with the federal definition of illegal coordination.

Application:

If New Mexico adopts California's definition of general coordination, the following hypothetical would be considered prohibited by New Mexico law.

Maria Candidate meets with Billionaire Bob, who operates the Super PAC "Maria Candidate for NM Governor," to discuss her campaign. An email sent from Maria Candidate to Billionaire Bob states, "Thank you for meeting with me, Bob. After our discussion, I request that you spend \$1,000,000 on a television advertisement against my opponent. This will help me in the polls. Thank you." A copy of the email is sent to the state prosecutor's office.

Maria Candidate and Billionaire Bob would be coordinating under New Mexico law because the email reveals that a candidate requested a Super PAC to expend on a political advertisement that benefits her. Under the general definition of coordination, this activity would be considered coordination.

This highlights a very basic and highly unlikely hypothetical which reveals that a definition of "general coordination," although foundational, is not enough to regulate Super PAC and candidate coordination.

2. Republication

Building upon the general definition of coordination, California law also prohibits Super PACs from republishing campaign materials created by a candidate's campaign. Under the law, "[t]he communication relating to a clearly identified candidate or ballot measure replicates, reproduces, republishes or disseminates, in whole or in substantial part, a communication, including video footage, designed, produced, paid for or distributed by the candidate or committee," will be considered coordination.⁹⁷ At the federal level, Super PACs tend to show up to campaign events, usually adding political décor and passing out campaign materials.⁹⁸ Super PACs locate the campaign events from the candidate's website and are allowed to distribute campaign materials, as long as they were created by the Super PAC.⁹⁹ But increasingly, the Super PAC materials seem to be in sync with the campaign

97. CAL. CODE REGS. tit. 2, § 18225.7(d)(4) (2015).

98. Alexandra Jaffe & Kailani Koenig, *Fiorina Super PAC Tests Legal Limits of Campaign Coordination*, NBC NEWS (Sept. 17, 2015), <http://www.nbcnews.com/meet-the-press/fiorina-super-pac-tests-legal-limits-campaign-coordination-n428056>.

99. *Id.*

materials that the candidate is producing, which probed the FEC to address republishing publically available materials. The FEC, however, has not offered any guidance on the use of publically available materials and to date a Super PAC has never been prohibited from that behavior.¹⁰⁰

New Mexico should adopt California's republication law because it would better maintain that independent expenditures remain truly independent. New Mexico does not have a law that bans Super PACs from republishing campaign manufactured materials.

Application:

If New Mexico adopts California's republication law, the first hypothetical would be considered coordination. The second hypothetical would not be considered coordination.

Scenario 1: Joe Candidate and his campaign design and manufacture a bumper sticker. Joe Candidate sells the bumper sticker on his website. Super PAC "Joe Candidate for Attorney General" purchases 200,000 bumper stickers to handout at Joe Candidate's next rally.

Under New Mexico law, this action would be considered illegal coordination. Although there was no communication between the Super PAC and the candidate, the Super PAC is merely duplicating campaign materials. Communication is not necessary for coordination. In order for Super PACs to remain independent from the candidates that they support, they must be restricted from spending expenditures on materials that a candidate has clearly endorsed.

Scenario 2: Joe Candidate and his campaign design and manufacture a bumper sticker. Super PAC "Joe Candidate for Attorney General" designs and manufactures a sign that supports Joe Candidate. The Super PAC prints 200,000 signs and plans on handing them out at a Joe Candidate rally.

Under the proposed New Mexico law, this would not be considered coordination because the Super PAC did not duplicate anything from the candidate. The Super PAC acted independent of the political candidate and produced its own materials.

3. Former Staff

California law also regulates the timeframe of when a former candidate's campaign staff can accept a position in a Super PAC. California limits the time restrictions to former senior staff who are defined as "an individual who previously worked in a senior position or advisory capacity on the candidate's or officeholder's staff within the current campaign in which the expenditure is made."¹⁰¹ The "current campaign" is 12 months before the candidate's primary and extends until the general

100. However, when a Super PAC ran a television advertisement using excerpts from a campaign video, the FEC failed to find any violation of its republication laws. Three of the FEC Commissioners remarked on the lack of any clear exception to the republication rules, yet, the FEC basically created one. The decision was split 3-3, which can always happen because there are 6 FEC commissioners, an even number. See Larry Norton, Ron Jacobs, & Margaret Rohlifing, *Candidates and Super PACs: A Complicated Relationship*, POLITICAL LAW BRIEFING (Feb. 13, 2013), <http://www.politicallawbriefing.com/2013/02/candidates-and-super-pacs-a-complicated-relationship/>.

101. CAL. CODE REGS. tit. 2, § 18225.7(d)(6) (2015).

election.¹⁰² In other words, former senior staff must wait over a year before taking a leadership position in a supporting Super PAC. Maine has a similar “cooling off” period but goes one step further to ban *any person* who worked for the candidate or campaign, regardless of seniority, essentially determining that a campaign staffer has no business working with a correlated Super PAC.¹⁰³ In contrast to California and Maine’s one year “cooling off” period, Federal law mandates that individuals considered privy to “material nonpublic information” about a candidate’s campaign plans are subject to a 120 day waiting period before joining the ranks of a Super PAC supporting that candidate.¹⁰⁴

New Mexico should pass a similar “cooling off” period law, however, whether the period is as short as the Federal law, 120 days, or as long as California’s, over a year, is not a crucial distinction. Although determining the number of months for the cooling-off period seems arbitrary, New Mexico should adopt a six month cooling-off period because it’s a reasonable time frame to best protect those who wish to express political speech and it will limit any type of meaningful coordination exchanged through the former staff member. At the federal level, candidate campaign staff and supporting Super PACs exchange staff at high levels, a behavior that states should try to prevent.¹⁰⁵

Application:

Under the New Mexico law on former staff proposed above, the first scenario would be considered coordination. The second would not be considered coordination.

Scenario 1: William Chief Strategist works for the campaign of Debbie Candidate. A Super PAC in support of Debbie Candidate is having trouble communicating a positive image of Debbie Candidate and her lead is beginning to shrink in the polls. William Chief Strategist recognizes the problem and decides to take over the Super PAC. William Chief Strategist cannot keep both jobs so he quits the campaign job of Debbie Candidate and takes a Director role at the Super PAC Debbie Candidate for Secretary of State of NM.¹⁰⁶

The action by William Chief Strategist would be considered coordination because he was previously running Debbie Candidate’s campaign. Equipped with his knowledge of the campaign and a clear vision about the direction of the Super PAC, William Chief Strategist cannot contribute to the Super PAC for Debbie Candidate. The proposed law would prohibit candidates from exchanging staff between their campaign and Super PACs and effectively prohibit coordinating the

102. *Id.* at § 18225.7(d)(2).

103. Brent Ferguson, *Beyond Coordination: Defining Indirect Campaign Contributions for the Super PAC Era*, 42 HASTINGS CONST. L.Q. 471, 485 (2015).

104. 11 C.F.R. § 109.21(d)(4), (5) (2014).

105. Priorities USA Action, a Super PAC supporting 2012 presidential candidate Barack Obama, was founded by former White House Officials. See Hans Nichols & John McCormick, *Emanuel Said to Quit Obama Campaign to Help Super-PAC*, BLOOMBERG BUSINESS (Sept. 5, 2012), <http://www.bloomberg.com/news/articles/2012-09-05/emanuel-said-to-resign-from-obama-campaign-to-help-super-pacs>.

106. This hypothetical happens often at the federal level. For example, 2016 presidential candidate Hillary Candidate sent campaign staff to a supporting Super PAC. Maggie Haberman, ‘*Super PAC*’ Backing Hillary Clinton Sees Staff Overhaul, N.Y. TIMES (May 20, 2015), http://www.nytimes.com/politics/first-draft/2015/05/20/super-pac-backing-hillary-clinton-sees-staff-overhaul/?_r=0.

same message. The Super PACs must remain independent of the candidate and cannot just be treated as an arm of the campaign.

Scenario 2: The same as facts as in Scenario 1, except William Senior Strategist waits longer than 6 months to operate a supporting Super PAC.

This is not coordination and it protects William's political speech rights. William Chief Strategist is passionate about his old boss and wants to help her get elected. Now, by waiting a reasonable amount of time, he can operate a supporting Super PAC independent of Debbie Candidate.

4. Fundraising Events

Last, California law prohibits a candidate from soliciting money at Super PAC fundraising events.¹⁰⁷ Specifically the law prohibits a candidate from attending a Super PAC fundraiser that "solicits funds for or appears as a speaker at a fundraiser for the committee making the expenditure, thereby participating in the committee's fundraising strategy."¹⁰⁸ California's law contrasts with federal law where an FEC advisory opinion permitted candidates to appear, headline, and speak at fundraisers as long as the candidate does not solicit more than the federal limit on direct contributions.¹⁰⁹ California, holding no exception for appearing as a speaker at a supporting Super PAC's fundraiser, is an important restriction that better prevents *quid pro quo* corruption.¹¹⁰

New Mexico, currently, cannot restrict a local candidate from speaking at a Super PAC fundraiser. Nor can New Mexico restrict a local candidate from directing contributions to a certain Super PAC. In order to prohibit Super PACs and candidates from coordinating fundraising efforts, New Mexico must adopt the California law on fundraising. As seen in the examples below, this restriction could limit the chance for *quid pro quo* corruption significantly.

Application:

If New Mexico adopts the California law on fundraising, the following scenario would be considered coordination. The second scenario would not be considered coordination.

Scenario 1: Rhonda Candidate attends a Super PAC fundraiser that supports her candidacy for New Mexico State Auditor. The audience is filled with wealthy political donors and Rhonda Candidate gives a speech to the audience about the causes she believes in. Rhonda Candidate does not mention any donations at any time during his speech. Afterward, Rhonda Candidate mingles with the wealthy political donors never mentioning fundraising or soliciting donations.

Under the proposed New Mexico law, this activity would be considered illegal coordination because Rhonda Candidate simply appeared as a speaker at the fundraising event. Although Rhonda Candidate did not solicit funds from the donors, the Super PAC and candidate are fundraising together at the same event. Picture a scenario in which Rhonda Candidate speaks at the Super PAC fundraiser. She makes

107. CAL. CODE REGS. tit. 2, § 18225.7(d)(5) (2015).

108. *Id.*

109. Fed. Election Comm'n, Advisory Opinion 2015-09 (Nov. 13, 2015).

110. CAL. CODE REGS. tit. 2, § 18225.7(d)(5).

comments like, “I endorse this Super PAC,” or, “I will remember everyone in this room that donates to this Super PAC.” The room for *quid pro quo* corruption is largely relevant and the chances of coordination is high.

Scenario 2: The same facts as Scenario 1, except Rhonda Candidate does not speak at the event. Rhonda Candidate is in attendance but is not headlining or speaking at the Super PAC fundraising event.

Under New Mexico law, this would not be considered coordination because Rhonda Candidate did not appear as a speaker at the fundraising event.

CONCLUSION

This Comment started out by describing the substantial security at the Tamaya Resort in New Mexico. Questions that will never be fully answered, per the lack of journalists in the room, should highlight the need for stricter campaign finance laws. Reports of candidates and donors inside the Tamaya Resort piques questions like: Did candidates suggest to Super PACs types of campaign strategies? Did a Super PAC make a purchase order for materials designed and made by the campaign? Did a candidates’ staffer accept a job with a Super PAC? Was a candidate a headliner at the event? And last, was this event scheduled in New Mexico because of its weak campaign finance laws? Although this Comment does not seek to answer these questions, or suggest any foul play at the event, nonetheless, New Mexico should adopt laws that support the separation of Super PACs from the candidates they support. *Citizens United* was clear: Super PACs may exist on the condition that they remain independent. But in order for Super PACs to remain independent, laws must clearly define what it means to be independent. New Mexico must adopt a comprehensive definition of Super PAC and candidate illegal coordination in order to better protect from *quid pro quo* corruption. This Comment suggested 4 basic laws that will help New Mexico define and prohibit illegal coordination in such a way that will prevent or mitigate fiscal abuse, confusion, and corruption. First, New Mexico must generally define coordination. Second, New Mexico must ban Super PACs from duplicating campaign materials created by the candidate. Third, New Mexico cannot allow the exchange of staff between candidates and Super PACs without a “cooling off” period. And Finally, New Mexico must restrict a candidate’s suggestive behavior at Super PAC fundraising events.

Campaign finances have been forever changed by the decision in *Citizens United*, and states can protect their elections by ensuring that Super PACs remain independent of the candidates they support. Hopefully, this Comment revealed some ways in which legislation can reform campaign finance laws, post *Citizens United*, to better balance free speech with a government’s interest in preventing *quid pro quo* corruption.