

## Forget Congress: Reforming Campaign Finance Through Mutually Assured Destruction



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### ABSTRACT

Congress will not enact meaningful campaign finance reform. Under the nation's current legislative, regulatory, and judicial regimes, remedies to the problem of money in politics appear unattainable. This Comment provides an entirely novel approach toward reducing the corrosive influence of outside money on the U.S. political system. Aided by the power of the profit motive, this Comment proposes the creation of Super PAC Insurance, a nonpartisan private entity with one central goal: deterring outside Super PACs and 501(c)(4) organizations from spending money in elections. The Comment details the mechanics of Super PAC Insurance, addresses its legality, and proposes several variations on its basic model.

Super PAC Insurance disincentivizes outside spending by applying the principle of “mutually assured destruction.” As demonstrated in the 2012 U.S. Senate race in Massachusetts—when then Professor Elizabeth Warren and Senator Scott Brown took The People’s Pledge—adding costs can effectively deter Super PACs from spending in elections. Once Super PACs know their spending will trigger a barrage of opposition spending by Super PAC Insurance, they should be less likely to spend against an insured candidate. Thus, Super PAC Insurance will reduce the influence of money in politics writ large.

In the wake of Citizens United and its progeny, American political spending has skyrocketed out of control. Rather than produce despondency among reformers, this new reality must catalyze innovation. This Comment’s private ordering solution moves beyond government paralysis and offers a workable path forward toward reducing the influence of outside money in politics.

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## TABLE OF CONTENTS

|   |     |
|---|-----|
| INTRODUCTION.....   | 211 |
| I. THE RISE AND NECESSITY OF PRIVATE ORDERING<br>IN CAMPAIGN FINANCE REFORM.....  | 214 |
| A. State Action Type Reforms .....  | 215 |
| B. Successful Non-State Action Reform: The People’s Pledge.....                   | 216 |
| II. OPERATIONS OF A SUPER PAC .....   | 220 |
| III. A WAY FORWARD: SUPER PAC INSURANCE .....                                     | 223 |
| IV. MECHANICS AND LEGALITY OF SUPER PAC INSURANCE.....                            | 224 |
| A. People-Powered Super PAC Insurance .....                                       | 227 |
| 1. Setting the Premium .....  | 227 |
| a. The Predictability of Super PAC Spending .....                                 | 229 |
| 2. Collecting Premiums.....   | 232 |
| a. Legality of Earmarking Contributions<br>for Specific Candidates.....           | 234 |
| b. Candidate Involvement in Fundraising for Premiums.....                         | 235 |
| 3. Patriotic Investment/Underwriting.....   | 236 |
| a. Policy Rationale for a Two-Tiered System<br>of Investors and Small Donors..... | 239 |
| 4. Insurable Events .....   | 240 |
| a. Independent Expenditure<br>or Electioneering Communication.....                | 241 |
| b. FEC Reporting Requirements.....  | 241 |
| c. Spent By 501(c)(4) or a Super PAC.....   | 242 |
| d. Potential Gaps in Coverage.....  | 243 |
| 5. Responses to an Insurable Event.....   | 244 |
| 6. Return on Investment.....  | 246 |
| V. ALTERNATE MODELS FOR SUPER PAC INSURANCE .....                                 | 246 |
| A. Unilateral Pledge Model .....  | 247 |
| B. Candidate-Driven Model.....  | 248 |
| C. A Not-Yet-Declared Candidate-Driven Model.....                                 | 253 |
| D. Partisan Insurance.....  | 254 |
| E. Additional Applications of the Model .....                                     | 255 |
| VI. POTENTIAL UNINTENDED CONSEQUENCES AND LIKELY CRITICISMS.....                  | 256 |
| A. Leads to More Spending.....  | 256 |
| B. Encourages Dark Money Spending .....   | 257 |
| C. Partisan Deterrence .....  | 259 |
| CONCLUSION .....  | 261 |

## INTRODUCTION

*Ambition must be made to counteract ambition.*

—James Madison, *The Federalist*, No. 51

In American politics, it is a given that the amount of money spent influencing elections will continue to increase for each election cycle.<sup>1</sup> Following the U.S. Supreme Court’s decision in *Citizens United v. Federal Election Commission (FEC)*<sup>2</sup> and the U.S. Court of Appeals for the District of Columbia Circuit’s decision in *SpeechNow.org v. FEC*,<sup>3</sup> campaign spending skyrocketed more than usual. In 2012, candidates for federal office and outside supporters spent a staggering \$6.2 billion.<sup>4</sup> This represents a 34 percent spending increase compared to the 2008 federal elections and is largely due to spending by outside groups.<sup>5</sup> Since *Citizens United*, outside spending has increased 1338 percent in U.S. Senate races, 662 percent in U.S. House of Representatives elections, and 245 percent in U.S. presidential elections.<sup>6</sup>

In particular, the proliferation of outside spending by independent expenditure-only political action committees<sup>7</sup> (commonly known as “Super

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1. In 2000, total election spending reached \$3.082 billion. In 2012, that number more than doubled to \$6.285 billion. *The Money Behind the Elections*, OPENSECRETS.ORG, <https://www.opensecrets.org/bigpicture> (last visited Sept. 16, 2015).
  2. *Citizens United v. Fed. Elections Comm'n*, 558 U.S. 310, 365 (2010) (holding that limiting corporate independent expenditures to political campaigns is unconstitutional).
  3. *SpeechNow.org v. Fed. Elections Comm'n*, 599 F.3d 686, 696 (D.C. Cir. 2010) (holding that contributions limits for entities making only independent expenditures was unconstitutional and that unlimited donations are permissible, provided that there is no coordination with the candidate or her agent).
  4. *The Money Behind the Elections*, *supra* note 1.
  5. This Comment defines “outside groups” as any legal entities that make political expenditures that are not under the control of the candidate, candidate committee, party committee, or agents thereof. One example of an outside group is independent expenditure-only political action committees (colloquially known as “Super PACs”). These groups are often controlled by special interests such as the Sierra Club or the National Rifle Association (NRA). See *Outside Spending*, OPEN SECRETS, <https://www.opensecrets.org/outsidespending> [<https://perma.cc/AR3F-CWZ5>] (last visited Nov. 5, 2015).
  6. Richard L. Hasen, *Three Wrong Progressive Approaches (and One Right One) to Campaign Finance Reform*, 8 HARV. L. & POL’Y REV. 21, 21 (2014).
  7. Independent Expenditure-only committees are organized under section 527 of the taxcode; they are tax-exempt organizations. For more see *Quick Answers to General Questions: What Is a 527*

PACs”) alters politicians’ calculations. Harvard Law Professor Lawrence Lessig, paraphrasing former Indiana Senator Evan Bayh, has noted that “[t]he single greatest fear of any incumbent is that thirty days before an election, some anonymously funded Super PAC will drop \$1 million against him.”<sup>8</sup> As documented extensively by Professor Lessig and others, Super PACs distort public policy outcomes and tarnish American democracy.<sup>9</sup> If politicians fear the wrath of a few billionaires, they will likely bend their policy proposals to accommodate these individuals’ objectives, or conversely, not propose substantive reform for fear that a moneyed interest will make expenditures against them.<sup>10</sup> While this dilemma has existed throughout U.S. history, the legal vehicles and lax regulations in the wake of *Citizens United* and *SpeechNow.org* have exacerbated the problem.<sup>11</sup>

This Comment proposes a unique private sector solution to this public problem. Given the nation’s current political dynamics, it is highly unlikely that the U.S. Congress will pass any meaningful campaign finance reform in the near future—let alone a constitutional amendment like the one proposed by former Senator Mark Udall.<sup>12</sup> Even if Congress manages to pass mean-

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*Organization*, FED. ELECTION COMM’N, [http://www.fec.gov/ans/answers\\_general.shtml#527](http://www.fec.gov/ans/answers_general.shtml#527) [<http://perma.cc/BXG7-NCXQ>] (last visited Nov. 5, 2015); *Exemption Requirements – Political Organizations*, INTERNAL REVENUE SERV., <http://www.irs.gov/Charities-&-Non-Profits/Political-Organizations/Exemption-Requirements-Political-Organizations> [<https://perma.cc/XDJ5-RXSG>] (last updated Jan. 8, 2015).

8. Lawrence Lessig, *What’s So Bad About a Super PAC?*, MEDIUM (June 4, 2014), <https://medium.com/@lessig/whats-so-bad-about-a-superpac-c7cbcf617b58> [<https://perma.cc/5AXK-SMLE>]; see also Arlen Specter, *Arlen Specter’s The Whole Truth*, MD. PUB. TELEVISION VIDEO (Jan. 1, 2012), <http://video.mpt.tv/video/2187979582/> [<https://perma.cc/K5UU-UWT2>].
9. LAWRENCE LESSIG, *REPUBLIC LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* (2011).
10. Lessig, *supra* note 8.
11. After *SpeechNow.org*, the Federal Election Commission (FEC) created independent expenditure-only committees, which can receive unlimited donations from individuals, corporations, and labor unions. The main restriction on these Super PACs is that they cannot coordinate with political candidates, their agents, or party committees. See FEC Advisory Op. 2010–11 (July 22, 2010), <http://saos.fec.gov/aodocs/AO%202010-11.pdf>; see also Richard L. Hasen, *The Numbers Don’t Lie: If You Aren’t Sure Citizens United Gave Rise to the Super PACs, Just Follow the Money*, SLATE (Mar. 9, 2012, 2:56 PM), [http://www.slate.com/articles/news\\_and\\_politics/politics/2012/03/the\\_supreme\\_court\\_s\\_citizens\\_united\\_decision\\_has\\_led\\_to\\_an\\_explosion\\_of\\_campaign\\_spending\\_.html](http://www.slate.com/articles/news_and_politics/politics/2012/03/the_supreme_court_s_citizens_united_decision_has_led_to_an_explosion_of_campaign_spending_.html) [<http://perma.cc/LU52-59KJ>] (documenting the uptick in spending since *Citizens United*, and noting that “[i]f this [increase in outside spending] was not caused by *Citizens United*, we have a mighty big coincidence on our hands.”).
12. Ganesh Sitaraman, *Contracting Around Citizens United*, 114 COLUM. L. REV. 755, 763 n.38 (2014); Michael Mathes, *Democrats Push Campaign Finance Reform, Passage Unlikely*, YAHOO!

ingful reform, the current U.S. Supreme Court's extremely broad view of what constitutes protected speech makes it likely that the Court would strike down most substantive statutory reforms.<sup>13</sup>

Thus, reforms aimed at reducing outside spending—and its influence on elections—are more likely to come from private ordering rather than from Congress or the federal bureaucracy.<sup>14</sup> Despite these seemingly intractable obstacles, the volume of third-party spending from Super PACs and 501(c)(4) corporations<sup>15</sup> can be deterred through private ordering, even under the nation's current campaign finance legal framework. The question then remains: How can the private sector best reduce an outside group's incentive to spend in a given election, even if the government is not restricting its ability to make expenditures?

Americans can collectively disincentivize outside spending by creating a new form of insurance, what I call "Super PAC Insurance."<sup>16</sup> Super PAC Insurance relies on mutually assured destruction as its guiding principal. If a Super PAC attacks an insured federal candidate, the attack will trigger an influx of spending on the opposite side, from Super PAC Insurance. This should theoretically reduce a Super PAC's incentive to spend against an insured candidate. In other words, political spending by a Super PAC will actually hurt the Super PAC's preferred candidate. If successful, Super PAC Insurance would reduce the influence of outside groups on the political landscape. Perhaps most importantly, it is unlikely that the Supreme Court will enjoin the activities of Super PAC Insurance. Without state action, the Court should not have any First Amendment qualms with this solution.<sup>17</sup> Further,

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NEWS, (Sept. 8, 2014, 7:34 PM), [http://news.yahoo.com/democrats-push-campaign-finance-reform-passage-unlikely-233450561.html?soc\\_src=copy](http://news.yahoo.com/democrats-push-campaign-finance-reform-passage-unlikely-233450561.html?soc_src=copy) [<https://perma.cc/LJG3-6PQQ>].

13. Daniel Fisher, *Both Sides Cry 'Free Speech' as Supreme Court Lifts Campaign-Finance Limits*, FORBES (Apr. 2, 2014, 12:45 PM), <http://www.forbes.com/sites/danielfisher/2014/04/02/both-sides-cry-free-speech-as-supreme-court-lifts-campaign-finance-limits> [<https://perma.cc/78RV-YR4E>].
14. This Comment does not dispute that minor reforms can theoretically come from executive agencies, including the FEC, the Federal Communications Commission (FCC), and the Internal Revenue Service (IRS). U.S. Congressional action is required, however, to tackle the root problem. See Meredith McGehee, *What's Next for Campaign Finance Reform?*, HUFFPOST POLS. (Sept. 19, 2014, 9:04 AM), [http://www.huffingtonpost.com/meredith-mcgehee/campaign-finance-reform\\_b\\_5847164.html](http://www.huffingtonpost.com/meredith-mcgehee/campaign-finance-reform_b_5847164.html) [<https://perma.cc/WKG4-4B68>].
15. Section 501(c)(4) entities are not-for-profit corporations that are dedicated towards advancing "social welfare." 26 U.S.C. § 501(c)(4) (2012).
16. Super PAC Insurance refers to the combined efforts of two legal entities, Super PAC Deterrence Co. (the Deterrence Co.), a for-profit corporation, and Level PAC, an independent expenditure-only committee (also known as a Super PAC).
17. See *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976) ("It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgment by government,

Super PAC Insurance is logistically feasible as it does not require a legislative or regulatory victory, nor does it require the mutual agreement of two opposing political candidates.<sup>18</sup>

This Comment has six Parts. Part I analyzes “The People’s Pledge,” a successful example of non-state actors reducing the influence of outside groups on elections. Part II explores the legal structure of Super PACs as well as the process for how they choose to make expenditures. Part III provides a general overview of Super PAC Insurance and its public policy goals, and Part IV articulates its precise mechanics and legality. Part V discusses the possible permutations of the basic structure for Super PAC Insurance. Finally, Part VI briefly discusses the potential unintended consequences and likely criticisms of creating Super PAC Insurance. Those well versed in campaign finance law and the operations of Super PACs may wish to skip to Part III, which begins the explanation of Super PAC Insurance.

## I. THE RISE AND NECESSITY OF PRIVATE ORDERING IN CAMPAIGN FINANCE REFORM

Since the nation’s founding, politicians have attempted to regulate and control the financing of campaigns.<sup>19</sup> Despite undeniable successes in this effort, campaign finance regulations were “eviscerated” by a series of recent Supreme Court opinions and congressional actions.<sup>20</sup> As mentioned in the earlier discussion of Senator Bayh’s concerns regarding the role of Super PACs in elections, the problem of money in politics has not waned after the

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federal or state. . . [W]hile statutory or common law may in some situations extend protection or provide redress against a private corporation or person who seeks to abridge the free expression of others, no such protection or redress is provided by the Constitution itself.” (citation omitted).

18. For example, U.S. Senators Elizabeth Warren and Scott Brown agreed to “The People’s Pledge” (the Pledge), which ultimately reduced the influence of outside groups on their U.S. Senate race. *See* Sitaraman, *supra* note 12, at 757–58.
19. Jaime Fuller, *From George Washington to Shaun McCutcheon: A Brief-ish History of Campaign Finance Reform*, WASH. POST (Apr. 3, 2014, 9:15 AM), <http://www.washingtonpost.com/blogs/the-fix/wp/2014/04/03/a-history-of-campaign-finance-reform-from-george-washington-to-shaun-mccutcheon> [<http://perma.cc/H7PF-L5HZ>].
20. *A Constitutional Amendment Relating to Contributions and Expenditures Intended to Affect Elections: Hearing on S.J. Res. 19 Before the S. Judiciary Comm.*, 113th Cong. (2014) (statement of Senator Patrick Leahy (D-Vt.)), <http://www.judiciary.senate.gov/imo/media/doc/07-10-14LeahyAmendmentStatement.pdf>; *see also* Fuller, *supra* note 19; Sam Stein & Paul Blumenthal, *Omnibus Bill Allows Wealthy Donors to Give Even More to Political Parties*, HUFFINGTON POST (Dec. 10, 2014, 1:03 AM), [http://www.huffingtonpost.com/2014/12/10/cromnibus-campaign-finance\\_n\\_6298984.html](http://www.huffingtonpost.com/2014/12/10/cromnibus-campaign-finance_n_6298984.html) [<http://perma.cc/B4GE-JH6N>].

federal courts' recent decisions.<sup>21</sup> In fact, outside spending on campaigns has skyrocketed.<sup>22</sup>

As Vanderbilt Law Professor Ganesh Sitaraman eloquently articulated, “private ordering, rather than public action,” is a viable means of reducing the untoward influence of outside spenders in politics.<sup>23</sup> To date, most scholars and reformers focus on new government mandates to correct the deluge of spending in the wake of *Citizens United*.<sup>24</sup> This Comment contends that the country's current political and legal realities demand a private ordering solution to reform the funding of campaigns.<sup>25</sup>

### A. State-Action Type Reforms

Many of the current efforts to reform election financing look at ways to democratize the process through some variation of “democracy vouchers.”<sup>26</sup> Democracy vouchers aim to flood the campaign finance system with lots of small dollar donations.<sup>27</sup> Under this proposal, the federal government would provide every American with a democracy voucher, which can be donated to any candidate(s) of their choosing.<sup>28</sup> The theory underlying the proposal is that a large volume of low dollar donations to candidates should reduce the comparative advantage that wealthy donors have within the political system.<sup>29</sup> Candidates would be less dependent on rich individuals and could instead appeal to their constituents for donations.

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21. Hasen, *supra* note 11.

22. A recent empirical study from Princeton University concludes that economic elites and organized groups that represent business interests have a substantial independent impact on U.S. government policy, while average citizens and mass-based interest groups have little or no independent influence. Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 AM. POL. SCI. ASS'N 564, 564 (2014), [http://scholar.princeton.edu/sites/default/files/mgilens/files/gilens\\_and\\_page\\_2014\\_testing\\_theories\\_of\\_american\\_politics.doc.pdf](http://scholar.princeton.edu/sites/default/files/mgilens/files/gilens_and_page_2014_testing_theories_of_american_politics.doc.pdf) [<http://perma.cc/DTC9-M9D2>].

23. Sitaraman, *supra*, note 12 at 755.

24. Professor Sitaraman provides an overview of the various reform proposals focused on changing laws and or regulations. See Sitaraman, *supra* note 12, at 763–767.

25. At least one political action committee, CounterPAC, is dedicated to this premise. The organization attempts to incent candidates to agree to a private ordering solution. For more on their important efforts, see *CounterPAC: Mutual Assured Democracy*, COUNTERPAC.ORG, <http://www.counterpac.org> [<http://perma.cc/J74U-UL29>] (last visited Nov. 5, 2015).

26. See LESSIG, *supra* note 9, at 266–70.

27. *Id.*

28. *Id.*

29. *Id.*



Other efforts at reform focus on donor transparency.<sup>30</sup> The DISCLOSE Act would require significantly more donor disclosures by organizations engaged in campaign activities.<sup>31</sup> Finally, some corporate legal scholars advocate reform through the Security and Exchange Commission (SEC).<sup>32</sup> Under these proposals, the SEC would require corporations, under its purview, to disclose the company's political donations.<sup>33</sup>

While all of the aforementioned proposals likely would achieve substantially better public policy outcomes, none of them seem politically viable. Senator Mitch McConnell is a longtime opponent of campaign finance reform.<sup>34</sup> Now, as Senate Majority Leader, it seems highly unlikely that he would allow such a bill to come before the Senate. Regulatory avenues for reform also appear to be closed. More than five years after the *Citizens United* decision, the SEC has not taken action on a corporate disclosure rule<sup>35</sup> and the FEC's Chairwoman admits that the FEC cannot even enforce existing regulations, let alone enact new rules.<sup>36</sup>

## B. Successful Non-State Action Reform: The People's Pledge

Though reforming this broken system appears impossible through government action, private ordering remains a workable and hopeful alternative. There is precedent for deterring outside political spending by non-state actors. In the extremely competitive 2012 Massachusetts U.S. Senate race, Senator Scott Brown and challenger Professor Elizabeth Warren both agreed to "The People's Pledge" (the Pledge).<sup>37</sup> The Pledge stipulated that should any third-party group spend on behalf of Warren or Brown, the candidate benefiting

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30. David Earley, *DISCLOSE Act Crucial to Transparency of Federal Election Spending*, BRENNAN CTR. JUST. (July 23, 2015), <https://www.brennancenter.org/blog/disclose-act-crucial-transparency-federal-election-spending> [<https://perma.cc/SPQ5-L8GC>].

31. *Id.*

32. Ciara Torres-Spelliscy, *Not Because It Is Easy, SEC*, BRENNAN CTR. JUST. (Dec. 4, 2013), <https://www.brennancenter.org/blog/not-because-it-easy-sec> [<http://perma.cc/R6JC-MBQT>].

33. *Id.*

34. Kenneth P. Vogel, *The Money Majority*, POLITICO (Dec. 4, 2014, 5:34 AM), <http://www.politico.com/story/2014/12/the-money-majority-113315.html> [<http://perma.cc/MJ75-7VUQ>].

35. Niels Lesniewski, *Elizabeth Warren Blasts SEC's Mary Jo White*, ROLL CALL (June 2, 2015), <http://blogs.rollcall.com/wgdb/elizabeth-warren-mary-jo-white-sec-campaign-finance-ceo> [<http://perma.cc/LC7V-GF6U>].

36. Eric Lichtblau, *F.E.C. Can't Curb 2016 Election Abuse, Commission Chief Says*, N.Y. TIMES (May 2, 2015), <http://www.nytimes.com/2015/05/03/us/politics/fec-cant-curb-2016-election-abuse-commission-chief-says.html> [<http://perma.cc/MGA4-9ARJ>].

37. Sitaraman, *supra* note 12, at 757.

from the outside expenditure must donate 50 percent of the advertisement's cost to the opposing candidates' charity of choice.<sup>38</sup>

The Pledge worked. By comparison, consider the highly competitive 2012 U.S. Senate races in Virginia, Wisconsin, and Ohio, where outside spending accounted for 62 percent, 64 percent, and 47 percent of total spending, respectively.<sup>39</sup> In these states, third-party groups outspent small donors—defined as anyone who gave under \$200—by a five-to-one margin.<sup>40</sup> In Massachusetts, however, where the Pledge was in effect, outside spending accounted for just 9 percent of total spending.<sup>41</sup> Small donors outspent third-party groups by three to one.<sup>42</sup> Moreover, spending in Massachusetts was significantly more transparent than in Wisconsin, Ohio, and Virginia.<sup>43</sup> Advertisements in Virginia, Wisconsin, and Ohio were also more than twice as likely to be negative advertisements compared to those in Massachusetts.<sup>44</sup>

Most significantly, outside groups respected the candidates' aversion to Super PAC support in Massachusetts's U.S. Senate Race. Before signing the Pledge, third-party groups like the League of Conservation Voters as well as American Crossroads, a Super PAC run by President George W. Bush's former political guru, Karl Rove, spent millions in support of their respective candidates in the race.<sup>45</sup> After the Brown-Warren agreement, these major outside groups largely stopped spending.<sup>46</sup> Third-party organizations apparently calculated that the financial penalty Warren or Brown would be assessed if an outside advertisement ran in Massachusetts, coupled with the negative media attention a candidate would receive if their side violated the Pledge, outweighed any benefit an advertisement would likely provide.<sup>47</sup> With two minor exceptions, outside groups heeded the Pledge and stayed out

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38. *Id.* at 758.

39. TYLER CREIGHTON, COMMON CAUSE MA., A PLEA FOR A PLEDGE 4 (2013), [http://www.commoncause.org/research-reports/MA\\_050113\\_Report\\_Plea\\_for\\_a\\_Pledge.pdf](http://www.commoncause.org/research-reports/MA_050113_Report_Plea_for_a_Pledge.pdf).

40. *Id.* at 5.

41. *Id.* at 9. None of the outside spending in Massachusetts was devoted to television advertisements. *Id.* at 13.

42. *Id.* at 9.

43. *Id.* at 10.

44. *Id.* at 13.

45. Sitaraman, *supra* note 12, at 785.

46. *Id.* at 786. Karl Rove's Super PAC, American Crossroads, did not spend on television advertising, but it financed robocalls—automated telephone calls to voters—which did not explicitly violate the terms of the Pledge. *Id.* at 785–86.

47. *Id.* at 783–84.

of Massachusetts's U.S. Senate race.<sup>48</sup> When the Pledge was violated, Brown paid the requisite donations to charity.<sup>49</sup>

The significance of the Pledge should not be underestimated. Both Brown and Warren were beloved by their respective party's bases.<sup>50</sup> Brown's election to Senator Ted Kennedy's former seat in 2010 reverberated across the Republican base, and Warren was and remains a favorite of the political left.<sup>51</sup> Either of them likely could have received significant outside financial support, yet both opted to fight and fund the race on their own.

While certainly successful at deterring outside spending in Massachusetts in 2012, the Pledge's subsequent national adoption has been limited. The Massachusetts Democratic Senate Primary successfully adopted the Pledge's framework in the 2013 Special Election.<sup>52</sup> The concept was either debated or offered by one candidate in the 2013 Boston and Los Angeles mayoral races and in the 2014 Rhode Island and Maryland gubernatorial races.<sup>53</sup> Ultimately, both candidates did not agree to the Pledge in any of these elections.<sup>54</sup>

Despite widespread attention and numerous attempts at replicating the Pledge, the success of the model is ultimately dependent on a mutual agreement between two ambitious opponents. The dynamics of individual races do not appear to lend themselves toward joint acceptance by both candidates. The People's Pledge of 2012 was the result of a distinct set of circumstances

48. *Id.* at 786–88.

49. Noah Bierman, *Scott Brown's Campaign Says It Will Pay \$35,000 to Comply With 'People's Pledge' Violation*, BOS. GLOBE (Mar. 29, 2012), <http://www.bostonglobe.com/news/politics/2012/03/29/scott-brown-campaign-says-will-pay-comply-with-people-pledge-violation/u06trC07fHIKhfRCBV2T2O/story.html> [<http://perma.cc/XW8P-3VK4>]; Tovia Smith, *Warren-Brown Pledge Keeps Attack Ads at Bay*, NPR (May 6, 2012), <http://www.npr.org/2012/05/06/152030297/pledge-holds-attack-ads-at-bay-in-mass-senate-race> [<http://perma.cc/84EL-UQRX>].

50. E.J. Graff, *Elizabeth Warren: Yes She Can?*, THE NATION (Apr. 4, 2012), <http://www.thenation.com/article/elizabeth-warren-yes-she-can/> [<http://perma.cc/9H78-KALU>]; PUB. POL'Y POLLING, SCOTT BROWN LOOKING GOOD FOR 2012 RE-ELECTION (2012), [http://www.publicpolicypolling.com/pdf/PPP\\_Release\\_MA\\_1202424.pdf](http://www.publicpolicypolling.com/pdf/PPP_Release_MA_1202424.pdf).

51. See Noah Bierman & Frank Phillips, *Elizabeth Warren Defeats Scott Brown*, BOS. GLOBE (Nov. 7, 2012), <https://www.bostonglobe.com/metro/2012/11/07/elizabeth-warren-defeats-incumbent-scott-brown-first-mass-woman-senate-hard-race-ends-victory-for-liberalism/i0PsrIZIRzoiQPrQtjCXML/story.html> [<https://perma.cc/RWP9-8YGN>]; Peter Beinart, *The Rise of the New Left*, DAILY BEAST (Sept. 12, 2013, 4:45 AM), <http://www.thedailybeast.com/articles/2013/09/12/the-rise-of-the-new-new-left.html> [<http://perma.cc/552G-CTV9>].

52. See Sitaraman, *supra* note 12, at 758–59.

53. *Id.*

54. *Id.* at 759.

giving rise to its acceptance by two unique politicians.<sup>55</sup> Both candidates were prolific fundraisers who feared outside spending from the other candidate.<sup>56</sup> Neither wanted large advertisement purchases late in the campaign altering the dynamics of the race.<sup>57</sup> Warren and Brown felt they could raise a sufficient amount of money to fund their campaigns, while outside groups could and likely would have changed the tenor of the race.<sup>58</sup> By contrast, politicians who are weaker personal fundraisers often depend on outside spending in order for their campaigns to survive and would thus be unlikely to take the Pledge to limit its use.<sup>59</sup> The Pledge is not an ideological position; rather, candidates and their campaigns weigh the costs and benefits of agreeing to terms that are specific to each individual election.<sup>60</sup> After losing to Warren in Massachusetts, Brown relocated to New Hampshire and rejected the Pledge in the 2014 U.S. Senate race against incumbent Sen. Jeanne Shaheen.<sup>61</sup>

Although the Pledge has had limited national adoption, its success in Massachusetts demonstrates that private ordering can work.<sup>62</sup> The weakness in the Pledge model is likely due to the fact that both sides must see it as mutually beneficial for it to be adopted. A private ordering model, which does not require mutual agreement between two opposing rivals, should be better equipped to reduce the influence of money on elections.

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55. See Sitaraman, *supra* note 12, at 757–58. Sitaraman’s piece generally provides an excellent discussion of the dynamics most likely to produce mutual agreement in a contract emulating the Pledge.

56. *Id.* at 779.

57. *Id.* at 779, 781.

58. Creighton, *supra* note 39, at 9.

59. Newt Gingrich, Rick Santorum, and Jon Huntsman all relied on outside spending to keep their campaigns afloat. See Julie Bykowicz, *Billionaire Donors Keep Favored Presidential Hopefuls Afloat*, BLOOMBERG BUS. (Feb. 2, 2012, 9:21 AM), <http://www.bloomberg.com/news/articles/2012-02-02/billionaire-donors-extending-life-of-lagging-primary-candidates> [<http://perma.cc/H4CS-P2JC>]; see also Smith, *supra* note 49.

60. Sitaraman, *supra* note 12, at 779–81.

61. Amanda Terkel, *Scott Brown Criticized for Rejecting ‘People’s Pledge’ in New Ad*, HUFFINGTON POST (Mar. 24, 2014, 12:12 AM), [http://www.huffingtonpost.com/2014/03/24/scott-brown-senate\\_n\\_5018641.html](http://www.huffingtonpost.com/2014/03/24/scott-brown-senate_n_5018641.html) [<http://perma.cc/4DS6-TQ7C>]. Some speculate that Brown regretted his decision in 2012 to accept the Pledge, as he miscalculated Warren’s fundraising abilities. Perhaps Brown did not want to repeat the same mistake in 2014 and so he rejected the Pledge in New Hampshire. See Tom Keane, *Scott Brown Should Ditch ‘People’s Pledge’*, BOS. GLOBE (Mar. 23, 2014), <https://www.bostonglobe.com/opinion/2014/03/22/scott-brown-forget-principle-ditch-people-pledge/ZhdkBmSIFRREZM6HWAD5AP/story.html> [<https://perma.cc/PC8Y-P2GB>]. One could argue that in 2010, Super PAC spending had not reached the zenith it had in 2014, and therefore Brown counted more on outside spending in 2014 than he reasonably could have expected to in 2010.

62. Sitaraman, *supra* note 12, at 758–59.

## II. OPERATIONS OF A SUPER PAC

Super PACs make up the vast majority of outside expenditures.<sup>63</sup> As such, a basic understanding of their operations should provide insight into how a significant percentage of outside spending might be deterred. National Super PACs, like Tom Steyer's NextGen Climate Action on the left, or Rove's American Crossroads on the political right, spend money on various races throughout the country.<sup>64</sup> Generally, these Super PACs concentrate their spending in swing states, where their spending will most likely change the trajectory of a given race.<sup>65</sup> Super PACs frequently operate similarly to official candidate campaigns: They conduct polling, make spending decisions, and create political advertisements.<sup>66</sup>

To date, the Supreme Court and the Federal Election Commission (FEC) permit Super PACs to raise unlimited sums of money as long as they remain on the independent side of an election.<sup>67</sup> The independent side is defined as not being coordinated with a candidate or official party committee.<sup>68</sup> For example in 2014, NextGen Climate Action committed to spending money in support of Senator Udall in Colorado but was not permitted to communicate with his campaign, the Democratic National Committee (DNC),<sup>69</sup>

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63. *Federal Election Spending: Summary*, OPENSECRETS.ORG, [https://www.opensecrets.org/outsidespending/fes\\_summ.php?cycle=201](https://www.opensecrets.org/outsidespending/fes_summ.php?cycle=201) [<http://perma.cc/9C8K-LRR3>] (last visited Nov. 5, 2015).

64. Justin Miller, *Top 5 Senate Races Where Dark Money and Outside Spending Ran Wild*, AM. PROSPECT (Nov. 5, 2014), <http://prospect.org/article/top-5-senate-races-where-dark-money-and-outside-spending-ran-wild> [<http://perma.cc/QT2U-VJNR>].

65. *Id.*

66. Martina Stewart, *Super PACs' Money Could Tip Balance of Power in Congress*, CNN POLS., <http://www.cnn.com/2012/01/26/politics/super-pac-general> [<http://perma.cc/QN3N-WQFV>] (last updated Jan. 26, 2012, 2:25 PM). For more on the strategic value Super PAC's offer to candidates, see Tim Alberta & Shane Goldmacher, *Trading Places*, NAT'L J. (Apr. 18, 2015), <http://www.nationaljournal.com/magazine/2016-election-super-pacs-staff-20150417> [<https://web.archive.org/web/20150424232825/http://www.nationaljournal.com/magazine/2016-election-super-pacs-staff-20150417>].

67. FEC Advisory Op. 2010-11, *supra* note 11, at 2-3.

68. *Id.* at 2 n.1.

69. Political party committees, such as the Republican National Committee (RNC) or the Democratic Senatorial Campaign Committee (DSCC), may also run independent expenditures themselves, but they cannot communicate with the rest of the party staff. This may be accomplished through the use of firewall policies that prevent the sharing of information about a candidate or political party's plans or activities with the independent side of the party committee. This Comment does not consider this type of party spending outside spending. The Center for Responsive Politics provides examples of independent expenditures by both parties' senatorial committees. See *Independent Expenditures and Coordinated Expenses, 2011-2012*, OPENSECRETS.ORG, <https://www.opensecrets.org/parties/index.php?cycle=2012&cmte=DSCC%20> [<https://perma.cc/N4DD-SCR9>] (last visited Nov. 5,

or the Colorado Democratic Party.<sup>70</sup> Instead, NextGen Climate Action purchased advertisements and hired campaign staffers who supported Senator Udall's reelection but were not permitted to strategize with his campaign.<sup>71</sup>

For strategic reasons, Super PACs frequently affiliate<sup>72</sup> with 501(c)(4) organizations. 501(c)(4)s are subject to much less significant disclosure requirements than Super PAC; in many cases donors can remain anonymous.<sup>73</sup> Thus, 501(c)(4)s can attract donors that Super PACs likely cannot entice to give to them directly.<sup>74</sup>

A 501(c)(4) may engage in political activity as long as it is not the primary purpose of the organization.<sup>75</sup> These social welfare organizations may even engage in "election-related activities that are not considered political activities" under the current Internal Revenue Code.<sup>76</sup> This type of election activity frequently takes the form of issue advocacy ads, which to voters are often indistinguishable<sup>77</sup> from independent expenditures or candidates' political ads.<sup>78</sup> If

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2015); *Independent Expenditures, Communication Costs and Coordinated Expenses as of April 11, 2013*, OPENSECRETS.ORG, [https://www.opensecrets.org/pacs/indexpend.php?cmte=C00027466&cycle=2012&txt=\[https://perma.cc/X2GE-8GKC\]](https://www.opensecrets.org/pacs/indexpend.php?cmte=C00027466&cycle=2012&txt=[https://perma.cc/X2GE-8GKC]) (last visited Nov. 5, 2015).

70. 11 C.F.R. § 109.20 (2015); see Amy Harder, *Democrats Bet on Climate Issue in Colorado Senate Race*, WALL ST. J. (Oct. 14, 2014, 6:37 PM), <http://blogs.wsj.com/washwire/2014/10/14/democrats-bet-on-climate-issue-in-colorado-senate-race> [http://perma.cc/A2W8-2P96].

71. *Coordinated Communications and Independent Expenditures*, FED. ELECTION COMM'N, <http://www.fec.gov/pages/brochures/indexp.shtml> [http://perma.cc/G28Q-QZA2] (last updated Jan. 2015).

72. The same individual or group of individuals often controls both organizations. For example, American Crossroads is a Super PAC affiliated with Crossroads Grassroots Policy Strategies (Grassroots GPS), a 501(c)(4) organization. Karl Rove controls both organizations, which have similar goals but are used for different purposes. For more, see Sean Sullivan, *What Is a 501(c)(4), Anyway?*, WASH. POST (May 13, 2013), <http://www.washingtonpost.com/blogs/the-fix/wp/2013/05/13/what-is-a-501c4-anyway> [http://perma.cc/C5VE-8AGW].

73. ERIKA K. LUNDER & L. PAIGE WHITAKER, CONG. RESEARCH SERV., R40183, 501(C)(4)S AND CAMPAIGN ACTIVITY: ANALYSIS UNDER TAX AND CAMPAIGN FINANCE LAWS 10 (2013), <https://www.fas.org/sgp/crs/misc/R40183.pdf>.

74. *Id.*

75. B. HOLLY SCHADLER, BOLDER ADVOCACY, *THE CONNECTION: STRATEGIES FOR CREATING AND OPERATING 501(C)(3)S, 501(C)(4)S AND POLITICAL ORGANIZATIONS* 6 (3d ed. 2012), [http://bolderadvocacy.org/wp-content/uploads/2012/10/The\\_Connection\\_paywall.pdf](http://bolderadvocacy.org/wp-content/uploads/2012/10/The_Connection_paywall.pdf).

76. *Id.* at 14.

77. The attacks by the political group Swift Boat Veterans for Truth on Senator John Kerry during the 2004 presidential election clearly attacked the Senator, but would be considered an issue advocacy advertisement as opposed to an electioneering communication. See Lauren Daniel, Comment, *527s in a Post-Swift Boat Era: The Current and Future Role of Issue Advocacy Groups in Presidential Elections*, 5 NW. J.L. & SOC. POL'Y 149, 150 (2010).

78. ERIKA K. LUNDER, *POLITICAL ADS: ISSUE ADVOCACY OR CAMPAIGN ACTIVITY UNDER THE TAX CODE?* 1 (2012), <https://www.fas.org/sgp/crs/misc/R42684.pdf>; Peter Olsen-Phillips, *Electioneering: Now Is the Time to Not See It*, SUNLIGHT FOUND. (Sept. 5, 2014, 3:39

the advertisement is considered a genuine issue ad that does not expressly advocate for or against a candidate and or is not considered an electioneering communication,<sup>79</sup> then the expenditure is not subject to the Federal Election Campaign Act (FECA),<sup>80</sup> the primary statute governing the financing of campaigns.<sup>81</sup> Organizations subject to FECA are regulated by the FEC. If 501(c)(4) organizations do not fall under FEC regulations, they likely will not have to disclose their expenditures until after an election takes place.<sup>82</sup>

There is great concern that sham issue ads frequently skirt the intent of disclosure regulations.<sup>83</sup> Groups can run ads that ostensibly advocate for policy change but are simply pushing a political agenda against a specific candidate.<sup>84</sup> This lack of disclosure, typically until months after the campaign,<sup>85</sup> may present challenges for Super PAC Insurance;<sup>86</sup> if Super PAC Insurance does not know the magnitude of outside spending it will make it markedly more difficult to deter this spending. According to the Center for Responsive Politics, 501(c)(4) organizations spent \$118.1 million to influence the 2014 Senate elections, while Super PACs spent \$345.1 million.<sup>87</sup> It is estimated

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PM), <http://sunlightfoundation.com/blog/2014/09/05/electioneering-now-is-the-time-to-not-see-it/> [<http://perma.cc/3F43-U548>].

79. *Electioneering Communications*, FED. ELECTION COMM'N, <http://www.fec.gov/pages/brochures/electioneering.shtml> [<http://perma.cc/3FZA-G6KJ>] (last updated Jan. 2010); *see also* 11 C.F.R. § 100.22 (2015).
80. LUNDER & WHITAKER, *supra* note 73, at 1–2, 9.
81. *The FEC and the Federal Campaign Finance Law*, FED. ELECTION COMM'N, <http://www.fec.gov/pages/brochures/fececa.shtml> [<http://perma.cc/6YH8-RDJX>] (last updated Jan. 2015).
82. *See* Robert Maguire, *As FEC Window Opened, Subjects of Dark Money "Issue Ads" Became Targets for Defeat*, OPENSECRETS.ORG (Nov. 3, 2014), <http://www.opensecrets.org/news/2014/11/as-fec-window-opened-subjects-of-dark-money-issue-ads-became-targets-for-defeat> [<http://perma.cc/CZ7K-SFBS>].
83. *See, e.g.*, Ian Vandewalker & Christopher Famighetti, *Dark Money Groups Dominate Independent Spending in House Toss-Up Races*, BRENNAN CTR. JUST. (July 30, 2014), <https://www.brennancenter.org/analysis/election-spending-2014-13-toss-house-districts> [<http://perma.cc/E9W9-DGHP>].
84. Bob Bauer, *Fallout From the IRS Rulemaking on Tax-Exempt "Candidate-Related Activity"*, MORE SOFT MONEY HARD L. (Mar. 5, 2014), <http://www.moresoftmoneyhardlaw.com/2014/03/fallout-irs-rulemaking-tax-exempt-candidate-related-activity> [<http://perma.cc/7ST6-PJ5R>].
85. 501(c)(4) organizations must disclose and file, with the IRS, some of their political expenditures on Form 990. Typically, this form is not filed with the IRS till months after an election. For more, *see* LUNDER & WHITAKER, *supra* note 73, at 9.
86. The IRS is currently debating whether to curb the political activity of tax-exempt nonprofits after proposing a rule and requesting comment. It received extensive commentary, which closed on February 27, 2014. *See* 26 C.F.R. 1 (2013), <http://www.regulations.gov/#%21documentDetail;D=IRS-2013-0038-0001>.
87. *Federal Election Spending: Summary*, *supra* note 63.

that \$173.6 million of outside spending in the 2014 election was nondisclosed.<sup>88</sup> Given the total breakdown of outside spending, it is a safe assumption that a significant chunk of this dark money spending<sup>89</sup> was undertaken by 501(c)(4)s or comparable 501(c)(6) membership organizations.<sup>90</sup>

How can non-disclosed or partially disclosed spending be deterred? This Comment treats nondisclosure as a unique but not insurmountable problem. While dark money expenditures may pose distinctive challenges, aggregate-spending amounts can still be determined if these expenditures are considered electioneering communications or independent expenditures.<sup>91</sup> Although the original donor for these expenditures may never be known, these types of expenditures must be disclosed and made publically available.<sup>92</sup>

A deep understanding of the operations of Super PACs will be fundamental to the success of Super PAC Insurance. What are the incentives underlying their operations and that of 501(c)(4)s? How will ongoing legal developments influence their machinations? Super PAC Insurance will need to retain significant in-house legal and political knowledge for its success.

### III. A WAY FORWARD: SUPER PAC INSURANCE

This Comment proposes a solution almost completely foreign to current suggestions for reform policies.<sup>93</sup> Aided by the power of the profit motive, Super PAC Insurance eschews models requiring state action in favor of a private sector solution. Its one central goal is to deter third-party outside spenders by adding costs to their spending decisions.

To illustrate, if an outside Super PAC decides to spend against a candidate insured by Super PAC Insurance, Super PAC Insurance will respond with an independent expenditure of its own attacking the preferred candidate

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88. *2014 Outside Spending, by Group*, OPENSECRETS.ORG, <https://www.opensecrets.org/outsidespending/summ.php?cycle=2014&chrt=D&disp=O&type=I> [<https://perma.cc/U373-NKT9>] (last visited Nov. 5, 2015).

89. Tom Murse, *What Is Dark Money? How Some Political Spending Remains Cloaked in Secrecy*, ABOUT NEWS, <http://uspolitics.about.com/od/Money-In-Politics/a/What-Is-Dark-Money.htm> [<http://perma.cc/NE9T-GU7F>] (last visited Nov. 5, 2015).

90. *Business Leagues*, INTERNAL REVENUE SERV., <http://www.irs.gov/Charities-&-Non-Profits/Other-NonProfits/Business-Leagues> [<http://perma.cc/AF7K-FCM2>] (last updated Mar. 25, 2015).

91. *See infra* Part IV.A.4.

92. LUNDER & WHITAKER, *supra* note 73 at 13–14.

93. While the concept of Super PAC Insurance is quite novel within the current campaign finance literature; famed economist, JOHN KENNETH GALBRAITH, in a satirical work, A TENURED PROFESSOR, proposes a somewhat similar solution for campaign finance reform. JOHN KENNETH GALBRAITH, A TENURED PROFESSOR 140–51 (1990).



of the outside Super PAC.<sup>94</sup> When making its spending decisions, the outside Super PAC would likely examine whether a candidate is insured and the potential commensurate response from Super PAC Insurance.

Ideally, this solution works as successfully as the Pledge in the 2012 Massachusetts Senate race.<sup>95</sup> Similarly, outside Super PACs should be deterred by the knowledge that their own expenditures will cause meaningful damage to their favored candidate. While most models for campaign finance reform require significant legislative, regulatory, or legal success, Super PAC Insurance can theoretically begin operating tomorrow. Without state action, there are no readily apparent constitutional issues.<sup>96</sup> With Super PAC Insurance, private actors can add costs to the free speech rights of others without impugning their constitutional rights.<sup>97</sup> Curtailment of speech is not necessarily the result of government action; rather, in many cases, individuals restrict their own speech because of the high financial, social, or political costs associated with that speech.<sup>98</sup> Although creating a sustainable business model presents unique challenges, Super PAC Insurance is a politically realistic and novel means of reforming a broken system.

#### IV. MECHANICS AND LEGALITY OF SUPER PAC INSURANCE

In order to achieve Super PAC Insurance's central goal of deterring outside spending, it must create a for-profit entity as well as a Super PAC. Thus, Super PAC Insurance will consist of what I call, the Super PAC Deterrence Company (Deterrence Co.), a for-profit insurance company, and Level the

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94. Though not evaluated in this Comment, the Deterrence Co. should also examine non-monetary forms of deterrence. One example are social media campaigns against outside spending, in which supporters of Super PAC Insurance all agree to "Like" the Facebook page or Retweet the Tweets of insured candidates who are attacked by an outside Super PAC supporting their opponent. Any tactics that raise the cost of an outside expenditure should be seriously considered.

95. See Sitaraman, *supra* note 12, at 758.

96. In some respects, the concept is similar to Arizona's Clean Money Campaign, which provided matching funds for candidates who accepted public financing. The U.S. Supreme Court struck down this system in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2826 (2011). Unlike in *Arizona Free Enterprise*, however, there is no state actor with this insurance model, making it extremely unlikely the Court would intervene. See *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976).

97. See *Hudgens*, 424 U.S. at 513.

98. People frequently refrain from posting content or communications on Facebook or Twitter because they foresee the possible reputational or social costs of their message. See, e.g., Jeffrey Rosen, *The Web Means the End of Forgetting*, N.Y. TIMES (July 21, 2010), <http://www.nytimes.com/2010/07/25/magazine/25privacy-t2.html> [<http://perma.cc/N2X6-D3KC>].

Playing Field PAC (Level PAC), an independent expenditure-only committee. The Deterrence Co. affords Super PAC Insurance the ability to raise the requisite investment capital to disincentivize outside spending. Meanwhile, Level PAC provides the political vehicle to effectuate an attack ad on behalf of an insured candidate. Taken together, the operations of both entities should alter and deter outside groups from making expenditures against insured candidates.

The Deterrence Co. will first determine the cost of the premium for any registered candidate for federal office to insure against a Super PAC attack. The Deterrence Co. will make its actuarial findings and work product available to Level PAC. Level PAC will publicize the topline cost of premiums for federal candidates, but not the Deterrence Co's background research into the riskiness of insuring a given candidate.<sup>99</sup>

Similar to any type of insurance market, this cost will be a function of actuarial determinations based on the candidate's risk profile.<sup>100</sup> Factors that can help assess the risk profile include the likelihood that a Super PAC will attack the candidate, the number of days until the election, and the candidate's chance of winning. Supporters will then be given the option of purchasing different tiers of insurance coverage for their favorite candidates and these donations will collectively pay for the premium. The amount of coverage provided will be based on the amount donated, for premiums, by supporters.

To fund this enterprise, Super PAC Insurance will develop a two-tiered system. First, after the candidates' supporters provide capital to purchase the insurance premiums, Level PAC will collect and pool premiums of varying amounts on behalf of all participating candidates. Supporters of any registered candidate for federal office may purchase insurance coverage. The Deterrence Co. and Level PAC will remain strictly nonpartisan.<sup>101</sup> All U.S. cit-

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99. Eventually Deterrence Co. should perform actuarial calculations for all federal candidates. In order to save resources, Deterrence Co. may wish to initially focus these determinations on candidates whose supporters are likely to purchase the premium.

100. *Insurance*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Insurance#Principle> (last modified Sept. 15, 2015).

101. In the interest of brevity, this Comment will only address an insurance model in the federal context. The concept can and should, however, be applied at the state, municipal, and judicial, levels. In many cases, states' legal systems for campaign finance may be even more favorable to Super PAC Insurance than federal regulations, particularly with respect to coordination. For example, in Florida, statewide and legislative candidates likely could purchase certain types of insurance directly using her candidate committee funds. See FLA. STAT. § 106.011(8)(c) (2014); Gina Jordan, *How Campaign Finance Laws Make Florida Governor's Race Unique*, WLRN (Oct. 8, 2014), <http://wlrn.org/post/how-campaign-finance-laws-make-florida-governors-race-unique> [<http://perma.cc/8J3C-ERFK>].

izens and legal permanent residents may help provide premium support for any candidate.<sup>102</sup>

Second, the Deterrence Co. will also solicit and obtain investment, as opposed to donations, from “patriotic investors.”<sup>103</sup> These individuals will supplement the premiums collected from candidates’ supporters by instead investing directly in the Deterrence Co.<sup>104</sup> Investors will see a return on their investment if the amount of money collected from premiums is greater than the amount of money paid out for claims. Ideally, outside groups are deterred altogether from spending against insured candidates and the Deterrence Co. would receive all of the capital contributed for premium support, while investors make a sizable return on their investment.

If and when an outside group distributes negative advertising against an insured candidate or runs ads supporting an opponent, the Deterrence Co. will decide whether an insurable event transpired by using clear and predetermined guidelines. The Deterrence Co. will release this information to Level PAC, which will fund and develop independent expenditures in support of the insured candidate.

These independent expenditures, which do not have the input of the candidate or their campaign, may take the form of ads in support of the insured candidate or attacks on an opponent.<sup>105</sup> Level PAC will retain its own political staff, which will be responsible for producing ads on behalf of an insured candidate. Financing will be secured from the money collected through insurance premiums and supplemented by the investment capital raised by Deterrence Co.

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102. Per FEC regulations, foreign nationals, federal contractors, national banks, or corporations organized by acts of Congress will not be permitted to provide premium support to Level PAC. *See* *Citizens United v. FEC*, 558 U.S. 310, 362 (2010); FEC Advisory Op. 2010–11, *supra* note 11, at 2.; FEC, Advisory Op. 2010–09, at 2 (July 22, 2010). <http://saos.fec.gov/aodocs/AO%202010-09.pdf>.

103. This Comment defines “patriotic investors” as public-interest-minded investors who are interested in reducing the influence of money in politics, while also potentially making a profit. These could be affluent and/or middle-class individuals who would like to invest in a company that can provide not only a return on their investments, but also substantive public policy impacts. This Comment considers these investors “patriotic” because they are allocating their capital to an unproven venture with the hope that their investments will alter perverse campaign finance incentives for the benefit of the country at large, not just themselves.

104. Professor Lawrence Lessig’s Mayday PAC, which was billed as the Super PAC to end all Super PACs, raised over \$12 million for his plan to curb campaign finance excesses. *See* Derek Willis, *Money Is Raised; Now Lessig’s Super PAC Must Win*, N.Y. TIMES (July 7, 2014), <http://www.nytimes.com/2014/07/08/upshot/money-is-raised-now-lessigs-super-PAC-must-win.html> [<http://perma.cc/U3MV-Y9CD>].

105. *See Coordinated Communications and Independent Expenditures, supra* note 71.

This is one of a myriad of possible permutations to Super PAC Insurance. For a variety of reasons articulated in this Comment, this model is likely the most viable form of Super PAC Insurance. Other models, which are discussed in turn below, provide distinct advantages and drawbacks compared to this supporter-driven model. Regardless of its precise structure, Super PAC Insurance has one goal: deterrence. Deterrence will be accomplished when outside Super PACs and 501(c)(4) organizations are sufficiently scared of the possibility of a barrage of spending from Level PAC against their preferred candidate.<sup>106</sup> A more extensive discussion of the mechanics of Super PAC Insurance follows.

### A. People-Powered Super PAC Insurance

#### 1. Setting the Premium

As a starting point, the Deterrence Co. will need to complete actuarial work to determine insurance premiums for all federal candidates for office.<sup>107</sup> The cost of a given candidate's premium will be based on assessments that indicate whether an outside group will attack that individual or support their opponent. The Deterrence Co. will estimate both the likelihood that a given candidate will be attacked by outside groups and the amount of money likely to be spent against her. To that end, the Deterrence Co. may wish to examine at least four predictive variables, which include political factors, demography, economic outlook, and political intangibles, such as a candidate's political and fundraising abilities.

These and other factors contribute to the calculus of Super PACs that are deciding how much money to spend against or in support of a candidate. Understanding the risk profiles created for candidates by Super PACs is fundamental to the Deterrence Co.'s success and will determine how much supporters must collectively pay for a premium. Supporters, whose candidates are likely to be attacked by outside groups, must pay large premiums to insure

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106. The Deterrence Co. and Level PAC must undertake empirical work to understand how much additional spending will be required to deter outside groups. In reality, some outside groups may spend regardless of the existence of Super PAC Insurance. In this situation, Super PAC Insurance will simply act as a response to outside spending, which may be beneficial to the insured candidate, but will not offer benefits across the political system.

107. Initially, the Deterrence Co. may need to triage which candidates are most likely to receive Super PAC Insurance and prioritize that actuarial work.

against such potential spending.<sup>108</sup> In contrast, supporters whose favored candidates are unlikely to be attacked by outside spending will pay a relatively small amount for their premiums.

The cost of a premium will also be determined by how much coverage a candidate's supporters purchase. Just like in a traditional insurance market, supporters may pay a higher premium to provide their preferred candidate with additional coverage against outside spending.<sup>109</sup> All coverage, however, will be capped at a certain value beyond which Level PAC will not make expenditures. The coverage level must be capped or the Level PAC may not be capable of paying out all its claims. One particularly expensive race could drain Super PAC Insurance of its resources at the expense of all other insured candidates.

Finally, a candidate's premium will vary depending on when supporters purchase the insurance coverage. Generally, the closer one is to Election Day, the more information is available on the likelihood that a Super PAC will attack certain candidates, making the premium easier to set. Thus about one month prior to Election Day, their likely targets are mostly set. An uninsured candidate who is already subject to a barrage of attack ads will likely not be permitted to obtain coverage by that point. In contrast, supporters of a candidate who has not been attacked four weeks before the election may be able to purchase coverage for a relatively low premium.<sup>110</sup>

To control costs and create more predictability in the market, the Deterrence Co. may wish to create an open enrollment period for candidates to receive coverage.<sup>111</sup> Similar to the health insurance market, supporters would have a defined window in which they can purchase coverage. If they do not do so during the predetermined enrollment window, their candidate may not be insured for the duration of the election cycle.

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108. Some candidates may be so risky that their insurance premiums will be prohibitively expensive. For example, U.S. presidential nominees for the major parties are almost certainly going to be attacked by hundreds of millions of dollars in outside spending. Their premiums would have to be set quite high for the business model to be viable in these races.

109. *Premiums Explained*, UNDERSTAND INSURANCE, <http://understandinsurance.com.au/premiums-explained#tab> (last visited Sept. 16, 2015).

110. The same temporal dynamics are in play in a general election or in a primary election, but the other risk factors may be different.

111. Open enrollments periods are created to control risks. If there were no defined point to purchase a premium, candidates' supporters could wait until a candidate was already subject to a barrage of attack ads by an opposing Super PAC then purchase insurance coverage. An open enrollment period lessens this risk. For more on the rationale for an open enrollment period, see Nina Roumell, *Why There's an Open Enrollment Period for Health Insurance?*, COLO. CONSUMER HEALTH INITIATIVE (Apr. 16, 2014), <http://cohealthinitiative.org/blog/2014-04-16/why-theres-open-enrollment-period-health-insurance>.

### a. The Predictability of Super PAC Spending

For the Super PAC Insurance business model to be viable, Super PAC spending must have a reasonably high level of predictability prior to an election. As previously discussed, pricing the premiums will largely be a function of (1) how likely it is that outside groups will spend against a candidate and (2) how much they are likely to spend.<sup>112</sup> This Comment demonstrates that Super PAC spending is fairly predictable.<sup>113</sup>

This Comment first uses a scatter plot to evaluate the predictability of outside spending in the 2012 U.S. Senate races. The graph plots all independent expenditures as a function of the Partisan Vote Index (PVI), a measure of how much a district leans Republican or Democratic.<sup>114</sup> A high PVI score (+30) means the district is likely safe for the incumbent party; a low PVI (+0) score suggests a highly competitive district.

As demonstrated by the curve in Figure 1, Super PAC spending trends downward as races become less competitive. In 2012 Super PAC spending in the U.S. Senate was concentrated in races with PVIs between 0 and +6. This confirms the expectation that Super PACs focus their resources on highly competitive seats, where spending is more likely to constitute the margin of victory.

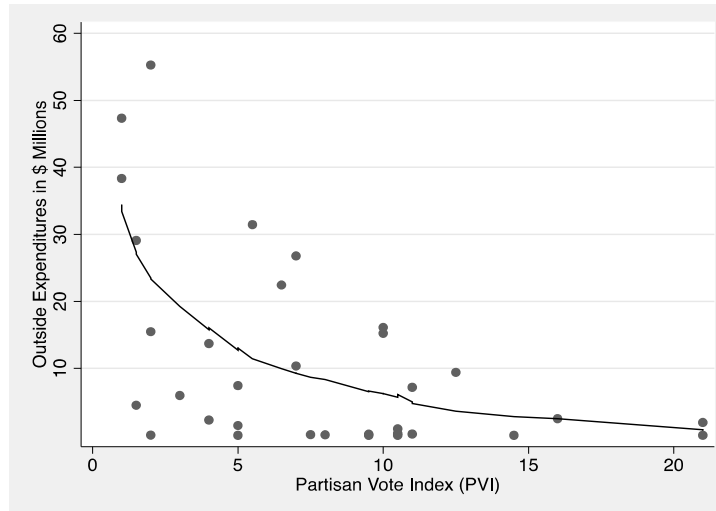
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112. While this Comment employs traditional tools of statistical analysis, University of Pennsylvania Professor Philip Tetlock's "Super Predictors" may provide an invaluable method of predicting Super PAC spending. Tetlock's work demonstrates that certain individuals are able to predict phenomena with high degrees of confidence. If they could predict Super PAC spending with a great deal of confidence, it would greatly improve the accuracy of premium setting. For more see on Super Predictors, See: Philip Tetlock, *Superforecasting: The Art and Science of Prediction*

113. If Super PAC Insurance were to become operational, significant more empirical, specifically actuarial work, would need to be undertaken. The research presented here is an initial proof of concept, showing that Super PAC spending is not random, but rather it can be predicted.

114. To evaluate outside spending, the data used in this paper includes nearly all independent expenditures and electioneering communications made for or against U.S. Senate candidates, not made by political party committees. For more on the breakdown of spending by different type of political entities, see *2014 Outside Spending*, *supra* note 88.

FIGURE 1. TOTAL OUTSIDE SPENDING BY PVI 2012 U.S. SENATE



With the knowledge that Super PAC spending correlates with the PVI, this Comment then introduces a multivariate regression model to explain Super PAC spending in the 2012 Senate Races. As denoted in Table 1, three variables are used in this regression. The independent variables in this regression are: (1) how much all candidates raised in a given district by April 30<sup>th</sup> of an election year, (2) how Republican or Democratic a district is (Partisan Voter Index), and (3) whether an incumbent was running for reelection. These variables are regressed on total amount spent by Super PACs in a Senate district.

The model explains 57 percent of the variance in outside spending on U.S. Senate races in 2012. The amount contributed to a candidate (AMOUNT CONTRIBUTED) appears to be the best predictor of the amount a Super PAC will spend on a given race. Although, the PVI and incumbency are not as statistically significant as the amount contributed to a candidate, they are still important predictors of Super PAC spending. As shown in Figure 1, PVI predicts outside spending quite well. There is likely some endogeneity between PVI, incumbency, and the amount contributed. In other words, the amount contributed to a candidate is so statistically significant that the PVI and incumbency appear less relevant.

From this regression, an expected value can be derived for how much Super PACs are expected to spend in a given race. In the 2012 Indiana Senate race, the model predicts \$25.2 million will be spent. In reality \$31.4

million was spent in the Indiana Senate Race.<sup>115</sup> In the 2012 Florida Senate Race, the model predicts \$10.2 million in outside spending; \$15.5 million was actually spent.<sup>116</sup>

**TABLE 1. PREDICTING AMOUNT SPENT BY OUTSIDE SPENDERS IN THE 2012 SENATE RACES**

| VARIABLES  | 2012 OUTSIDE SPENDING (Natural Log) |
|--|-------------------------------------|
| INCUMBENCY   | -2.11<br>(1.13)                     |
| PARTISAN VOTER INDEX 2012  | -0.15<br>(0.10)                     |
| AMOUNT CONTRIBUTED (NATURAL LOG)   | 3.71***<br>(0.86)                   |
| Constant   | -38.02**<br>(12.69)                 |
| R-squared  | 57                                  |
| Adjusted R-squared   | 53                                  |
| Observations   | 33                                  |
| Cell entries are ordinary least squares regression coefficients.<br>Standard Error in parentheses<br>***p<.001. **p<.01, *p<.05<br>† The dependent variable is the log of the amount spent by Super PACs in a given race |                                     |

115. Please note the FEC numbers total independent expenditures differ from the numbers used in this comment, as this comment defines outside spending as all independent expenditures and electioneering communications made by non party committees. This creates a discrepancy with the FEC data which presents all independent expenditures including party committees. *2012 Senate Independent Expenditures*, FED. ELECTION COMM'N, <http://www.fec.gov/disclosure/ie/national.do> (last visited Nov. 5, 2015).

116. *Id.*



To be of practical use, this model must be further refined to predict the amount likely to be spent against an individual candidate and not by how much will be spent in a given race. Furthermore, actuarial determinations will need to be made in order to set individual premiums for the candidates. The premiums must satisfy the competing demands of the candidate's supporters, who want to pay as little as possible and investors who would like to see a return on their investment. Significantly, more study is needed before establishing these numbers. This initial research, however, confirms Super PAC spending is not random; rather, it can be predicted. As such, useful actuarial determinations could be made going forward.

## 2. Collecting Premiums

Once any registered federal candidates' risk profile is determined, her supporters will have the opportunity to purchase coverage from the Level PAC. From a public policy perspective, the ideal way to fund premiums is by pooling the limited contributions of small donors exclusively. There is less concern that a small donor will hold undue influence over a political actor to the same degree as a large donor. Level PAC will thus only accept individual contributions of up to \$2,700 per cycle.<sup>117</sup>

Supporters will likely be more inclined to purchase coverage if the Level PAC adopts the Kickstarter model of contingent donations.<sup>118</sup> Under this paradigm, donors' credit or debit cards<sup>119</sup> would only be charged if they raised

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117. The amount \$2,700, is the maximum an individual may donate to a candidate per cycle. While Super PACs are not bound by this restriction, it is the maximum value that Congress deemed appropriate for individuals to give to candidates. As such, Level PAC will unilaterally limit the value of accepted donations to the individual contribution cap to candidates. Please note that this value is indexed to inflation and increases in odd-numbered years. See *Contributions*, FED. ELECTION COMM'N, <http://www.fec.gov/pages/brochures/contrib.shtml> (last updated Feb. 2015).

118. The Kickstarter model operates on an all-or-nothing basis. Supporting donors are only charged if the campaign achieves its predetermined goal. If the goal is only partially funded, no one is charged and the campaign creator receives zero dollars. For more information, see *Kickstarter Basics*, KICKSTARTER, <https://www.kickstarter.com/help/faq/kickstarter%20basics> [<https://perma.cc/C7MR-B67G>]. See also Elizabeth Gerber & Julie Hui, *Crowdfunding: Motivations and Deterrents for Participation*, NW. U. (Nov. 2012), [http://egerber.mech.northwestern.edu/wpcontent/uploads/2012/11/Gerber\\_Crowdfunding\\_MotivationsandDeterrents.pdf](http://egerber.mech.northwestern.edu/wpcontent/uploads/2012/11/Gerber_Crowdfunding_MotivationsandDeterrents.pdf) [<http://perma.cc/F6LG-2M78>] (suggesting that donors are motivated to help causes reach their defined goal under a contingent donation model).

119. Credit or debit cards will be accepted online; checks sent by mail will not be deposited until a premium is fully paid by supporters. For an example of this check by mail model, see *Donation Page*, AMS. FOR PROSPERITY, <http://americansforprosperity.org/donate> [<https://perma.cc/5WGGK-7UCA>].

sufficient capital to pay the candidate's premium.<sup>120</sup> The candidate will be insured at a certain level once a minimal amount is raised from donors. To purchase higher levels of coverage, supporters will need to raise additional capital.

For example, if supporters of Cory Gardner, U.S. Senator from Colorado, wanted to protect him from Super PAC attacks they could pledge up to \$2,700 each toward his insurance premium. They would be charged for this pledge only after they collectively paid the Senator's total premium. Hypothetically, collective pledges could result in the purchase of minimal coverage in the form of a \$500,000 premium.<sup>121</sup> Once this threshold is reached, their credit cards would be charged for the amount of their individual pledge. If donors wanted to provide Senator Gardner with more coverage, they could do so with a collective pledge of another \$250,000, if that new threshold is reached they will be charged. Unlike patriotic investors, supporters who earmark their contributions for specific candidates will be making donations rather than investments.

Level PAC will not directly accept contributions from corporations or labor unions. These entities will be permitted to invest in the Deterrence Co. broadly, but they will not be permitted to earmark contributions for specific candidates or parties. Thus, initially, the Deterrence Co. may need to pay the solicitation and administrative costs of Level PAC. Because it will raise capital from patriotic investors before Level PAC obtains cash to finance the eventual solicitation of contributions from candidates' supporters, the Deterrence Co. will cover its initial funding.

Level PAC Insurance will collect donations from anyone, regardless of political affiliation. Super PAC Insurance must remain strictly nonpartisan both from a branding and business model perspective. Level PAC and Deterrence Co. will be able to speak with more moral authority if they attempt to deter *all* outside spending, as opposed to just one party's spending. Moreover, from a financial perspective, it is crucial that the risk of the entire political

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120. The Mayday PAC operated under an identical model. Donors' credit cards were charged only if Mayday PAC reached its publicly stated fundraising goals. See Lawrence Lessig, *Our Fundraising So Far*, MAYDAY.US (Aug. 5, 2014), <http://blog.mayday.us/post/98259998165/our-fundraising-so-far> [<http://perma.cc/Y7PW-S648>]. Contingent donations present some interesting FEC filing requirements. How should contingent contributions be reported when they are not yet realized? This issue will likely be resolved by querying the FEC's Office of Compliance once Level PAC is created. For more on independent expenditure requirements, see *Coordinated Communications and Independent Expenditures*, *supra* note 71.

121. The \$500,000 and \$250,000 figures are for illustrative purposes only and are not grounded in any specific actuarial determinations for Senator Cory Gardner.

system is pooled together.<sup>122</sup> Like in all insurance markets, Super PAC Insurance should try to create a portfolio of candidates, with different risk profiles.<sup>123</sup> Allowing both sides to participate doubles the size of the potential market, which should lessen risk on its own.<sup>124</sup> Insuring both Democrats and Republicans partially mitigates the problems stemming from incorrect estimates by Deterrence Co. For example, if Deterrence Co. estimates a low probability that Democratically-aligned Super PACs will spend against a Republican candidate, it will only assess a small premium for that candidate. If Democratically-aligned Super PACs end up spending large sums of money against that candidate, Level PAC must pay out substantially more on that policy than the premium it collected. If Deterrence Co. consistently under predicts Democratically-aligned Super PAC spending and only insures Republicans, it would not have collected sufficient premiums from Democrats to offset the low premiums that Level PAC charges Republicans.<sup>125</sup>

**a. Legality of Earmarking Contributions for Specific Candidates**

FEC Advisory Opinion 2010–09 makes clear that it is legal to earmark contributions for Super PACs.<sup>126</sup> The FEC permitted the Super PAC committee for the Club for Growth, a 501(c)(4) corporation, to solicit unlimited earmarked contributions.<sup>127</sup> The opinion explains that “[the Super PAC] may solicit and accept unlimited contributions from individuals in the general public,

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122. Certain elections, like the federal elections in 1994, 2006, and 2010, are considered “wave elections” when one political party wins an unusually large number of seats in Congress. Wave elections may present Super PAC insurance with unique challenges. If Super PAC Insurance only insured one party during one of these wave cycles, it could expose itself to a disproportionate number of claims from the losing party. On the other hand, the eventual losing party’s Super PACs may want to spend more money to buttress their weakened candidates. There have not been enough wave elections in the Super PAC era to predict likely spending patterns with great confidence. For more on wave elections, see Charlie Cook, *Five Signs Define the Direction of the 2014 Midterm Elections*, NAT’L J. (June 3, 2013), <http://www.nationaljournal.com/columns/off-to-the-races/five-signs-define-the-direction-of-the-2014-midterm-elections-20130603> [<http://perma.cc/VM74-JAXG>].

123. *Insurance*, *supra* note 100.

124. *Id.*

125. It is conceivable that Deterrence Co. underestimates and or overestimates the amount of spending likely to occur by both Republican and Democratically aligned Super PACs. This would of course be harmful to Super PAC Insurance’s overall business model. Insuring both sides, however, increases the chances that Deterrence Co.’s estimations, in aggregate, are more accurate.

126. *See* FEC Advisory Op. 2010-09, *supra* note 102.

127. *See id.*

including contributions given for specific independent expenditures.”<sup>128</sup> A Super PAC is therefore allowed to accept unlimited earmarked contributions so long as it does not transfer funds directly to a candidate committee or coordinate with a candidate or her agent.<sup>129</sup> The FEC also permitted the Club for Growth to “establish, administer, and pay the solicitation costs of a new independent expenditure-only political committee.”<sup>130</sup>

Super PAC Insurance’s two tiered structure is markedly similar to the FEC’s approved structure for the Club for Growth. Specifically, Level PAC will receive unlimited earmarked contributions for certain federal candidates. Just as the Club for Growth’s 501(c)(4) entity paid for the solicitation costs of their Super PAC, the Deterrence Co. may pay the solicitation costs of Level PAC. Finally, just as the Club for Growth’s Super PAC only accepted contributions from individuals<sup>131</sup>—with the notable exception of its 501(c)(4) counterpart—Level PAC will only accept earmarked contributions only from individuals and its Deterrence Co. counterpart.<sup>132</sup>

#### b. Candidate Involvement in Fundraising for Premiums

After *Citizens United*, the FEC was solicited for guidance on whether candidates may appear and make financial solicitations at Super PAC fundraisers.<sup>133</sup> Generally, candidates may solicit no more than \$5000 for any type of political action committee, or \$2700 per election cycle for their own candidate committee.<sup>134</sup> The FEC, however, explicitly permits candidates to appear at Super PAC events that ask donors for substantially more than the \$5000

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128. The FEC reasoned, “Because there is no possibility of circumvention of any contribution limit, section 110.1(h) and its rationale do not apply to the Committee’s solicitations or any contributions it receives that are earmarked for specific independent expenditures.” *Id.* at 5.

129. *Id.*

130. *Id.* at 1.

131. *Id.*

132. The Level PAC is arguably even more compliant with the spirit of the FEC regulation than the Club for Growth because the Deterrence Co. and Level PAC will not have any communication with the candidate committee. The FEC permitted the Club for Growth to communicate strategic plans so long as the information was not conveyed to its Super PAC. This was permitted even though the same individual simultaneously served as the president of the 501(c)(4) and treasurer of its Super PAC. To remain compliant, this person had to, in effect, create a “firewall” within his brain. The Deterrence Co. and Level PAC will not have any such issues. *See id.* at 2.

133. FEC, Advisory Op. 2011-12 (June 30, 2011), [http://saos.fec.gov/aodocs/AO%202011-12%20\(Majority%20PAC%20dated%206-30-11\).pdf](http://saos.fec.gov/aodocs/AO%202011-12%20(Majority%20PAC%20dated%206-30-11).pdf).

134. *Contributions*, *supra* note 117; Note, *Working Together for an Independent Expenditure: Candidate Assistance With Super PAC Fundraising*, 128 HARV. L. REV. 1478, 1478 (2015).

limit, provided that the candidate is not making the solicitation herself.<sup>135</sup> Further, candidates may not directly solicit from corporations or labor unions.<sup>136</sup>

To illustrate, a candidate may ask event attendees to donate \$5000 to the hosting Super PAC, but once the candidate leaves the stage, a representative for the Super PAC can get on the dais and solicit \$1,000,000.<sup>137</sup> This is not a legal fiction. In 2012, former Massachusetts Governor Mitt Romney attended fundraising dinners organized by Super PACs where attendees were asked for substantially more than the Governor's contribution limits; President Obama's staff did the same.<sup>138</sup>

Thus, candidates hoping for Super PAC Insurance coverage may directly solicit funds for their premiums from individuals at Level PAC fundraising events. Given the self-imposed \$2700 contribution maximum for Level PAC, the resulting earmarked funds will not exceed the FEC's \$5000 solicitation cap. And donors may be more inclined to donate the maximum of \$2700 once they know their favorite candidates actively endorse Super PAC Insurance.<sup>139</sup> Similarly, investors may be more inclined to invest substantial capital in Deterrence Co., if they know candidates across the spectrum are readily and regularly making solicitation requests for Super PAC Insurance.

### 3. Patriotic Investment/Underwriting

Although the campaigns of President Barack Obama and Congressman Ron Paul manifested the power of the small donor,<sup>140</sup> the capital collected from insurance premiums alone is unlikely to deter a noteworthy amount of outside spending, at least initially.<sup>141</sup> To supplement these premiums, patriotic

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135. FEC, Advisory Op. 2011-12, *supra* note 133, at 3-4.

136. FEC, *supra* note 133, at 5.

137. *Id.*

138. Alexander Burns, *Mitt Romney Addressing Super PAC Fundraisers*, POLITICO (July 28, 2011, 12:35 PM), <http://www.politico.com/news/stories/0711/60143.html> [<https://perma.cc/ZNR7-QC8S>]; Glenn Thrush, *Obama Super PAC Decision: President Blesses Fundraising for Priorities USA Action*, POLITICO (Feb. 7, 2012, 12:35 PM), <http://www.politico.com/news/stories/0212/72531.html#ixzz3Vhvo5RSm> [<http://perma.cc/TRG4-XPJC>].

139. Ardent supporters of a candidate are likely more responsive to the individual touch of a candidate's solicitation of funds compared to a solicitation from a Super PAC staffer, which is probably why Governor Romney appeared at Super PAC events.

140. Dan Eggen, *Obama Fundraising Powered by Small Donors, New Study Shows*, WASH. POST (Feb. 8, 2012), [http://www.washingtonpost.com/politics/obama-fundraising-powered-by-small-donors-new-study-shows/2012/02/08/gIQANfKIzQ\\_story.html](http://www.washingtonpost.com/politics/obama-fundraising-powered-by-small-donors-new-study-shows/2012/02/08/gIQANfKIzQ_story.html) [<http://perma.cc/62AG-WPXE>].

141. Even with widespread adoption, it is unlikely that all the premiums from supporters will add up to a value close to the total amount of money spent by Super PACs in a given cycle. In

investors may need to provide capital for underwriting. Organizations on both sides of the aisle will only be deterred if they know each dollar they spend will trigger a massive onslaught of spending against their preferred candidate.<sup>142</sup> Thus, if Super PAC Insurance is to have a deterrent effect, it will either need to set premiums quite high or supplement the premiums with private investment.

To that end, all U.S. citizens, legal permanent residents, corporations, and labor unions will be permitted to invest in Super PAC Insurance. Individuals, corporations, or unions will be investing money to deter campaign spending and, ideally, to make a profit. As stated in Part IV(A)(2), unlike the individual donors who offer support for insurance premiums, patriotic investors *will not* be permitted to earmark their investment for specific candidates or political parties. Instead, they will be investing in the larger concept of deterring outside spending through Super PAC Insurance, as opposed to protecting a particular candidate. Investors' capital contributions will be locked in for the duration of the election cycle.

In 2014, Super PACs and 501(c)(4)s spent \$466.4 million influencing elections.<sup>143</sup> To realistically deter such significant spending, Level PAC must credibly be able to spend at least that amount. This hypothesis is based on the premise that organizations on both sides of the aisle will be deterred from spending only if they know that each dollar they spend will be matched by at least one dollar spent against their preferred candidate. In reality, this 1:1 deterrence ratio is likely too low. It may, for example, require a 3:1 ratio to deter an ideologically-driven interest group from spending. Regardless, deterrence demands access to a significant amount of capital.

Although Super PAC Insurance requires access to a large amount of financing, it does not necessarily require spending a commensurate amount of cash. Super PAC Insurance deters outside groups from spending only if there is enough accessible capital to intimidate and alter their political calculus. Depending on how much capital Deterrence Co. raises Super PACs will need to think twice before attacking an insured candidate. Some may be deterred from spending altogether. Therefore, the more money Super PAC Insurance has available to spend, the less likely it will actually have to spend it. For example, if the Senate Majority PAC, a Super PAC supporting Senate Demo-

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order to exceed Super PAC spending, premiums would likely need to be prohibitively expensive.

142. The more money raised by the Deterrence Co., the less likely it will need to spend it.

143. See *Outside Spending*, *supra* note 87.

crats,<sup>144</sup> knew that Super PAC Insurance had \$2 billion available to spend against their preferred candidates, it would be highly unlikely to spend money due to concerns that it would trigger an onslaught of spending against their desired candidates. Conversely, the Senate Majority PAC would unlikely be deterred if they knew Super PAC Insurance had only \$5 million available to spend.

Super PAC Insurance is unique compared to other insurance models, because the size of Deterrence Co.'s fund should decrease the number of insurable events that occur. In most insurance markets, the size of the insurance fund has minimal impact on the likelihood that an insurable event will occur<sup>145</sup>; a flood will occur regardless of whether a homeowner owns flood insurance or not. In the Super PAC Insurance context though, the amount of money available to spend should have a direct effect on the number of Super PACs, choosing to enter a race.

Access to significant sums of capital, however, presents a collective action problem for raising this investment. A substantial number of individuals must collectively decide to invest at roughly the same time, or there will be minimal deterrent effect. When discussing Mayday PAC, Reid Hoffman, founder of LinkedIn, explained "a group of us have to do it [donate money to end Super PACs] at the same time."<sup>146</sup> One potential solution is to make investment contingent on other raised capital. Similar to contingent donations, contingent investments would only be triggered by other investments. For example, Hoffman's investment might not be triggered until the Deterrence Co. raised \$100 million in commitments from other patriotic investors.<sup>147</sup>

As with all investments, investors may or may not make a profit. Similar to traditional insurance companies, profit is based on how many insurable events occur in a given period. Patriotic investors will recoup any funding that remains after accounting for use of candidates' premiums in an election cycle. It is theoretically possible, though extremely unlikely, that Super PAC Insurance deters all outside spending. Under this scenario, patriotic investors would

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144. *Our Mission*, SENATE MAJORITY PAC, <http://www.senatemajority.com/about> (last visited Nov. 5, 2015).

145. If anything, insurance coverage may create an incentive for the insured to act more recklessly making it more likely an insurable event will occur. For more on the problem of moral hazard in the insurance market context, see Liran Einav et al., *Selection on Moral Hazard in Health Insurance*, 103 AM. ECON. REV. 178 (2013), <http://economics.mit.edu/files/7870>.

146. Evan Osnos, *Embrace the Irony*, NEW YORKER (Oct. 13, 2014), <http://www.newyorker.com/magazine/2014/10/13/embrace-irony> [<http://perma.cc/55H6-VSXS>].

147. The \$100 million figure is used for example purposes only. Deterrence Co. will need to determine the appropriate values for this contingent investment.

receive a significant return on their investment, as they will collect all of the net profit from candidate premiums.<sup>148</sup> A more realistic scenario is for Super PAC Insurance to deter some, not all, spending. It will thus be forced to make expenditures on behalf of some of its insured candidates and investors will make a return should the premiums not be completely paid out.

Unlike all previous efforts at reform, Super PAC Insurance asks individuals to serve as investors, not donors.<sup>149</sup> As opposed to individuals donating money to nonprofits, the Deterrence Co. provides wealthy and casual investors alike the chance, even if slight, to see a return on their investment. The possibility of earning money, while also reforming the campaign finance system, is a potential “win-win” that should be attractive to investors throughout the country.<sup>150</sup>

#### a. Policy Rationale for a Two-Tiered System of Investors and Small Donors

The people-powered Super PAC Insurance model is divided into two tiers—patriotic investors and small donors—for business and public policy reasons. From a policy perspective, this model ensures that affluent individuals do not curry undue influence over the political system; from a business standpoint it also ensures Super PAC Insurance is fully collateralized and provides investors the opportunity to make a return on their investment.<sup>151</sup>

Patriotic investors are needed to ensure that premiums are not too costly for small donors to afford and provide the requisite deterrent rational for Super PAC Insurance to have a positive public policy outcome. Conversely, small donors are needed for patriotic investors to see a return on their investment. These donors are commonly passionate individuals who are willing to give money to see their preferred candidate in office. Level PAC provides them with an additional avenue to support their favorite candidate(s).<sup>152</sup>

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148. Net profit, as used here, means the income from candidate premiums minus any operating costs of Super PAC Insurance.

149. Cf. Byron Tau, *Mayday PAC Secures Matching Pledges*, POLITICO (June 4, 2014, 12:02 AM), <http://www.politico.com/story/2014/06/mayday-PAC-secures-matching-pledges-107398.html> [<http://perma.cc/JR2L-4E2A>].

150. Mayday PAC received donations from some of the wealthiest people in the country. Many of these same individuals should be naturally inclined to invest in the Deterrence Co. as well. See Amy Schatz, *Techie-Funded Mayday Super PAC Releases Donor Information*, RE/CODE (Aug. 6, 2014, 2:34 PM), <http://recode.net/2014/08/06/techie-funded-mayday-super-PAC-releases-donor-information> [<http://perma.cc/5U4Q-NU4V>].

151. Patriotic investment will be open to large and small investors alike.

152. Level PAC actually provides donors the opportunity to compound their donation. By pooling small donations together coupled with patriotic investment, the total support provided, their favorite candidate, holds the potential to be much more powerful than one single donation to a



While it would be significantly easier to permit wealthy individuals and special interests to donate toward candidates' premiums directly, such a model would exacerbate the precise problem Super PAC Insurance is designed to correct. Super PAC Insurance would simply become another vehicle for entrenched interests to gain favor with elected officials. Thus, they must be restricted from investing in coverage for any specific candidate.

There is less concern, however, with affluent individuals or special interests that invest in the Deterrence Co. at large, as their money is not directed at any one candidate or political party. In fact, money may likely be spent in support of candidates who are disliked by investors. Special interest groups such as EMILY's List, a pro-choice advocacy group, or the National Rifle Association (NRA) may not invest in the Deterrence Co. for this same reason. Affluent investors like those who supported Professor Lessig's Mayday PAC should be willing to put partisan concerns aside in favor of the ability to improve the nation's governance and the opportunity to make a profit.<sup>153</sup>

#### 4. Insurable Events

With the financial portion of the Super PAC Insurance model now explained, this Comment describes how the Deterrence Co. determines if an insurable event occurred. A political expenditure shall be considered an insurable event if: (1) it meets the FEC definition of an "independent expenditure"<sup>154</sup> or an "electioneering communication,"<sup>155</sup> (2) the aggregated amount spent on electioneering communication or expenditure is required by law to be reported to the FEC, and (3) the money is spent by a 501(c)(4) corporation or an independent expenditure-only committee (otherwise known as a Super PAC). If the expenditure meets these criteria, the Deterrence Co. will make its determinations regarding insurable events available to Level PAC.

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candidate. This may make Level PAC an even more attractive donation vehicle than the candidate committee itself, particularly if the candidate endorses it.

153. Schatz, *supra* note 150.

154. *See generally* 11 C.F.R. § 100.16 (2015).

155. *Id.* § 100.29. This element ignores the temporal requirement of the FEC's definition of an electioneering communication. For example, if a political expenditure otherwise meets the FEC definition but the ad is aired seventy days before an election, it will still be considered an insurable event. Under the FEC's definition, however, this would not constitute an electioneering communication.

### a. Independent Expenditure or Electioneering Communication

An independent expenditure is defined as an expenditure “expressly advocating the election or defeat of a clearly identified candidate” that is not coordinated with the candidate’s authorized committee or agents.<sup>156</sup> The Supreme Court first articulated its express advocacy standard in *Buckley v. Valeo*.<sup>157</sup> An expenditure is considered express advocacy when it included the so-called eight “magic words,” such as “vote for” and “defeat.”<sup>158</sup> In *McConnell v. FEC*, the Court expanded its definition of independent expenditures to include the functional equivalents of the magic words.<sup>159</sup> Current law further expands this definition to include communication that “when taken as a whole...could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidates.”<sup>160</sup>

Electioneering communications “refer to a clearly identified candidate for Federal Office.”<sup>161</sup> The communication must be “publically distributed” sixty days before a general election or thirty days before a primary election,<sup>162</sup> “by a television station, radio station, cable television system, or satellite system.”<sup>163</sup> Finally, the communication must be able to be received by 50,000 people in the area the candidate seeks to represent.<sup>164</sup>

### b. FEC Reporting Requirements

The FEC requires political committees to report independent expenditures aggregating \$10,000 or more in a calendar year up to and including the twentieth day before an election.<sup>165</sup> The report is due before midnight “on the second day following the date on which a communication that constitutes an independent expenditure is publicly distributed.”<sup>166</sup> On the other hand, independent expenditures that total less than \$10,000 in a calendar year must

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156. 11 C.F.R. § 100.16 (a) (2015).

157. *Buckley v. Valeo*, 424 U.S. 1, 44 (1976).

158. *Id.* at n.52. Other magic words include “elect,” “support,” “cast your ballot for,” “Smith for Congress,” “vote against,” and “reject.”

159. *McConnell v. FEC*, 540 U.S. 93, 105 (2003), *overruled by* *Citizens United v. FEC*, 558 U.S. 310, 366 (2010).

160. 11 C.F.R. § 100.22(b) (2015).

161. *Id.* § 100.29(a)(1).

162. *Id.* § 100.29(a)(2).

163. *Id.* § 100.29(b).

164. 2 U.S.C. § 434(f)(3)(c) (2012).

165. 11 C.F.R. §§ 104.4(b)(2), 104.4(f) (2015).

166. *Id.* § 104.4(b)(2).

be reported during the committees' periodic filings; there is no special filing for this type of expenditure.<sup>167</sup> If an expenditure aggregated over \$1000 and was made less than twenty days, but more than twenty-four hours before the day of the election, it must be disclosed to the FEC before midnight on the second day following the expenditure.<sup>168</sup> Electioneering communications aggregating over \$10,000 must also be reported to the FEC within twenty-four hours of the expenditure.<sup>169</sup>

The Deterrence Co. will use the FEC filings for electioneering communications and independent expenditures to determine if an insurable event occurred. This review of FEC filings may be supplemented through informal conversations with those inside the political community. Sources such as media buyers are aware of candidates' ad purchases,<sup>170</sup> and the news organizations like Politico even reports these likely purchases.<sup>171</sup> Whenever an insurable event occurs, the Deterrence Co. will inform Level PAC, which may even use the research on likely media purchases to plan effective ads in advance of outside groups' formal FEC filings.

### c. Spent By 501(c)(4) or a Super PAC

Finally, to be an insurable event, the money must be spent by either a 501(c)(4) corporation or a Super PAC. Deterrence Co. will track these expenditures on the FEC and IRS websites. Expenditures made by 501(c)(5)<sup>172</sup> or 501(c)(6)<sup>173</sup> organizations will not, at least initially, count as insurable events.

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167. *Id.* § 104.4(b)(1).

168. *Id.* § 104.4(c).

169. *Id.* § 104.20(b).

170. For more on the role of a media buyer and their insight into advertising purchases, see Abby Livingston, *Media Buyer Plays Vital, Unsung Role in Politics*, ROLL CALL (Oct. 2, 2012, 12:00 AM), [http://www.rollcall.com/issues/58\\_25/Media-Buyer-Plays-Vital-Unsung-Role-in-Politics-217923-1.html](http://www.rollcall.com/issues/58_25/Media-Buyer-Plays-Vital-Unsung-Role-in-Politics-217923-1.html).

171. *See, e.g.*, James Hohmann, *Source: Mary Landrieu Reserves \$2.6M in Ad Time*, POLITICO (Mar. 14, 2014, 6:39 PM), <http://www.politico.com/story/2014/03/mary-landrieu-bill-cassidy-louisiana-senate-election-2014-104690.html> [<http://perma.cc/9FTS-S7LZ>].

172. *Tax Treatment of Donations to Section 501(c)(5) Organizations*, INTERNAL REVENUE SERV., [www.irs.gov/Charities-&-Non-Profits/Other-Non-Profits/Tax-Treatment-of-Donations-to-Section-501%28c%29%285%29-Organizations](http://www.irs.gov/Charities-&-Non-Profits/Other-Non-Profits/Tax-Treatment-of-Donations-to-Section-501%28c%29%285%29-Organizations) [<http://perma.cc/4TDX-YWJW>] (last updated Jan. 14, 2015).

173. *Business Leagues*, *supra* note 90.

#### d. Potential Gaps in Coverage

Unfortunately, potential gaps in coverage are unavoidable due to holes in FEC and IRS regulations. For example, Congress' and the FEC's definition of an electioneering communication does not include emails, phone calls, or Internet ads.<sup>174</sup> As a result, a 501(c)(4) organization could release a negative online advertisement that attacks a federal candidate but does not meet the definition of an electioneering communication. This expenditure would not have to be reported to the FEC. The same is true if the advertisement runs on television sixty-one days before a general election.<sup>175</sup>

Moreover, 501(c) organizations that run politically-tinged issue ads, which are not considered electioneering communications or independent expenditures, do not have to report their expenditures to the FEC.<sup>176</sup> If a Super PAC makes this type of expenditure, it must be disclosed on a monthly or quarterly basis,<sup>177</sup> but, as discussed previously, when a nonprofit corporation does so, it may not have to report it until well after the election takes place.<sup>178</sup> For these types of pure issue ads, the Deterrence Co. may find it difficult to verify the amount spent on the transaction. All of these coverage gaps will not at least initially be considered insurable events.<sup>179</sup>

To reiterate, none of the following politically-oriented communications will constitute insurable events: pure issue ads; ads that are neither electioneering communications nor independent expenditures; electioneering communications that are not disseminated in the requisite time period before the election; and expenditures made by 501(c)(5) or 501(c)(6) organizations. Although strong public policy rationales justify deterring some or all of this spending, Super PAC Insurance cannot realistically consider these forms of communication to be insurable events. Much of this spending cannot be verified until after the election<sup>180</sup> and Super PAC Insurance will already be preoccupied working to deter over \$466.4 million in outside spending.

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174. FEC, ELECTIONEERING COMMUNICATIONS: EXEMPTIONS (2006).

175. See generally Keenan Steiner, *Under-the-Radar Political Ads: A Guide to Electioneering Communications*, SUNLIGHT FOUND. (May 3, 2012, 2:50 PM), <http://sunlightfoundation.com/blog/2012/05/03/brief-guide-electioneering-communications> [<http://perma.cc/7NX8-VKUW>].

176. LUNDER & WHITAKER, *supra* note 73, at 8–9.

177. 2 U.S.C. § 434 (a) (1972).

178. LUNDER & WHITAKER, *supra* note 73, at 10–11.

179. As the Deterrence Co. becomes more sophisticated, it should attempt to deter these types of expenditures as well. Initially, however, it will likely have to rely on FEC filings, as this is the cheapest and most direct way to obtain this information.

180. If Super PAC Insurance proves its model, it can use informal techniques such as outreach to television stations and other media sources to determine some 501(c)(5) and 501(c)(6) spending.

It is worth reiterating, however, that Super PAC Insurance can also insure candidates against some “dark money” attacks. 501(c)(4) organizations frequently run dark money advertisements, which originate from donors who are not disclosed to the public.<sup>181</sup> Fortunately, donor identity is irrelevant for the purposes of Super PAC Insurance, which only needs knowledge of the aggregate expenditure size. If the communication is considered an electioneering communication or an independent expenditure that must be disclosed to the FEC,<sup>182</sup> Super PAC Insurance can protect candidates from these type of dark money attacks.

### 5. Responses to an Insurable Event

If the Deterrence Co. determines that an insurable event occurred, Level PAC will come to the defense of the insured candidate by retaining political consultants, ad makers, communications experts, and pollsters to create and execute optimal political strategy. Level PAC will operate just like any other political campaign or, more precisely, like any other Super PAC.

Political consultants for Level PAC will be given full latitude to decide on the timing and content of their ads, which can support the insured candidate or attack any opponents. Neither the candidate nor her supporters or agent will have any influence over the content, distribution, or medium for the advertisement.<sup>183</sup> Instead, the political consultants will make reasoned, data-driven decisions to best support the insured candidate.<sup>184</sup>

The consultants will not necessarily respond to each discrete expenditure by an outside Super PAC. In some cases, it may be in the candidate’s best interest to spend all of their insurance policy immediately, while in other situations it may make sense to hold the policy until later in the election cycle, or it may be prudent to spend some of the policy right away and then save the rest for later in the election cycle. Further, consultants need not respond to television ads with more television ads; rather, a paid field canvass of homes in the neighborhood could be the chosen response to a television attack.

Given the size of the proposed operation, Level PAC should be able to recruit and retain the top, unaffiliated political talent, which may provide a deterrent effect in it of itself. If Charles and David Koch (known as the “Koch

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181. Murse, *supra* note 89.

182. LUNDER & WHITAKER, *supra* note 73, at 13–14.

183. Maintaining independence is crucial to complying with the FEC’s coordination regulations.

184. In order to avoid even the appearance of impropriety, Level PAC may wish to avoid hiring any consultants or vendors that have also been hired by the insured candidate for their specific race.

brothers”)<sup>185</sup> realize their expenditure will trigger a response from one of the best Democratic ad makers, they may be more concerned about spending than if it were created by an unknown political consultant.

Indeed, this highlights two crucial distinctions between Level PAC and other Super PACs. The first difference is that Level PAC is nonpartisan, and the second is that its spending amounts are capped at the maximum value of the insurance policy. Thus, Level PAC can, and will support insured candidates on both sides of the political aisle by designing a “blue team” representing Democratic candidates and a “red team” representing Republican candidates.<sup>186</sup> Consultants will be hired from each political party, and information between these two teams must remain strictly confidential.<sup>187</sup> As a condition of employment, all consultants and staff must agree that information cannot be shared between staff working on behalf of opposing candidates to avoid any conflicts of interest.<sup>188</sup> Mayday PAC navigated supporting both parties in the 2014 election cycle.<sup>189</sup> So, if Super PAC Insurance insures two or more candidates in the same primary election, Level PAC will need to create internal firewalls within even the red and blue teams themselves in order to provide appropriate service to each insured candidate.

Unlike most political entities, Level PAC may not wish to spend extra time engaging in traditional fundraising.<sup>190</sup> The amount of money it can

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185. Charles and David Koch, commonly referred to in the media as “The Koch brothers,” are the biggest donors to an expansive network of political groups, aimed at moving the country in a conservative direction. Their groups collectively intend to spend \$889 million influencing the 2016 U.S. presidential election. See Nicholas Confessore, *Koch Brothers’ Budget of \$889 Million for 2016 Is on Par With Both Parties’ Spending*, N.Y. TIMES (Jan. 26, 2015), <http://www.nytimes.com/2015/01/27/us/politics/kochs-plan-to-spend-900-million-on-2016-campaign.html> [<http://perma.cc/Z5XT-WJJQ>].

186. To cater to candidates in states such as Maine and Rhode Island, Level PAC may want to create a “purple team” for independent or third-party candidates. See generally Nora Biette-Timmons, *The Midterm Elections (Spoilers)*, THE ATLANTIC (Nov. 7, 2014), <http://www.theatlantic.com/politics/archive/2014/11/the-midterm-elections-spoilers/382475> [<http://perma.cc/CEQ9-LYHL>].

187. The consultants have an additional incentive to avoid divulging such confidential information, as their professional reputations would be damaged if they disclosed confidential information to the opposing party.

188. Creating a firewall of this type within the organization presents some interesting operational issues that are beyond the scope of this Comment. The firewall used by the PAC EMILY’s List is a possible model, given that it was viewed approvingly by the FEC in a different context. FEC, Coordinated Communications, [Notice 2006-10], 71 Fed. Reg. 33190 (June 8, 2006).

189. See Byron Tau & Kenneth P. Vogel, *How to Waste \$10 Million*, POLITICO (Nov. 6, 2014, 5:01 AM), <http://www.politico.com/story/2014/11/2014-elections-mayday-PAC-larry-lessig-112617.html> [<http://perma.cc/98YV-JLCJ>].

190. Level PAC will actively solicit donations for earmarked insurance premiums, but it may wish to focus on making advertising not general fundraising for the PAC, even though it is legally

spend on a given candidate will likely be based entirely on her insurance policy. Once the political consultant spends the maximum allotted for a candidate's policy, it is likely there will be no additional money provided. This presents the political consultants with interesting financial decisions on how to spend capped resources. Although an unusual structure, campaign professionals are well versed in using scarce resources and should be able to make smart spending decisions for Level PAC.

## 6. Return on Investment

As stated previously, investors' potential return on investment will stem from the donation-driven insurance premiums. If Level PAC has premium money remaining at the end of an election cycle, those funds will be used to pay the Deterrence Co. for its services, including fundraising solicitations, actuarial determinations, and declarations of insurable events. After Election Day, Level PAC will pay above market rate for these services, transferring most of its residual funds to the Deterrence Co.

The Deterrence Co. will make a profit if the principal investment is not paid down and there are residual funds remaining. Thus, donations to Level PAC will be spent first, allowing investors a higher probability of recouping their investment, at a minimum. If there is a net profit in the Deterrence Co.'s corporate account, after Level PAC transfers its funds, it will use those funds to pay its investors.<sup>191</sup>

## V. ALTERNATE MODELS FOR SUPER PAC INSURANCE

While the donor- and patriotic investor-driven model is legally sound, other methods could also be effective at either reducing the influence of Super PACs or providing funds to purchase insurance premiums. While these alternate methods<sup>192</sup> offer advantages, they also present distinct drawbacks that make their feasibility and efficacy less clear.

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permitted to do so. The Deterrence Co. will instead continually raise investment capital. Under the proposed structure, Deterrence Co. will be permitted to raise larger sums of money than Level PAC and as such focusing on Deterrence Co.'s fundraising should act as a bigger deterrent than the individual capped contributions that Level PAC would receive.

191. Investors will be paid after a general election cycle and once all debts and obligations are paid by both Level PAC and the Deterrence Co.

192. Numerous other variations are likely to exist and offer the same basic theme of providing a deterrent vehicle through the private sector this comment addresses five such examples.

### A. Unilateral Pledge Model

The unilateral pledge model borrows heavily from the People's Pledge in Massachusetts. Under this model, Super PAC Insurance would set a requirement that in order to obtain insurance coverage, a candidate must unilaterally agree to the Pledge. In exchange for insurance coverage, the candidate would agree that if a Super PAC either supported her or attacked her opponent, she would unilaterally donate her candidate committee funds to a non-profit.

While this would undoubtedly reduce the influence Super PACs would have on a given race, a candidate is unlikely to unilaterally disarm the Super PACs predisposed to supporting her, unless the coverage she obtains from Super PAC Insurance is so substantial as to truly insulate her from any Super PACs aligned with her opponents.<sup>193</sup>

Alternatively, agreeing to the Pledge could be used as a shield against Super PAC Insurance. Level PAC could consider any candidate who unilaterally takes the Pledge off-limits from attack. Super PAC Insurance would in effect be wielded as a sword to incentivize candidates to take the Pledge. Supporters, however, would likely be less inclined to donate to Level PAC, knowing it will not attack their favored candidate's opponent, because the opponent agreed to the Pledge. Therefore, fewer premiums might ultimately be purchased and the business model may falter. Moreover, this model is problematic, because only Level PAC would be bound to the agreement; other Super PACs could still attack the candidate. Only if Level PAC were so considerable that it intimidates candidates into committing to the Pledge would such a system likely become effective.

For either version of the unilateral pledge model to be effective, Super PAC insurance must be so massive that it intimidates a candidate to take the pledge on their own. A candidate will not unilaterally disarm, unless they are so frightened by Level PAC's ability to injure their candidacy. Although the unilateral pledge model presents unique business challenges, if the requisite capital could be raised, the model could reap substantial public policy benefits, likely reducing the influence of money on campaigns, even further.

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193. This model is somewhat complicated by the fact that the candidate cannot legally communicate with Super PAC Insurance. The candidate would have to publicly announce her commitment to the Pledge, thereby making her eligible to receive Super PAC Insurance coverage, assuming her supporters purchase(d) it.



## B. Candidate-Driven Model

The simplest model of Super PAC Insurance would see candidate committees themselves purchase insurance coverage using funds from their own candidate committees. While undeniably simpler than requiring supporters to provide the capital to purchase insurance, this candidate-driven model stands on more questionable legal footing. Specifically, there is a concern that the candidate's purchase of insurance coverage may constitute illegal coordination between a candidate committee and an independent expenditure-only committee.<sup>194</sup>

Under this model, a candidate committee could directly purchase insurance coverage from the Deterrence Co., rather than from Level PAC, (for reasons discussed later in this section). In effect, the candidate would be signing an options contract with the Deterrence Co: The candidate pays the corporation a premium in exchange for coverage, which is triggered if an opposing Super PAC attacks the candidate or supports her opponent. The Deterrence Co. would then provide Level PAC with the requisite amount of capital when an insurable event occurs.

As such, the candidate would only ever converse with the Deterrence Co., as opposed to Level PAC. Purchasing insurance coverage would be the sole interaction between the candidate and the Deterrence Co. and the candidate would never communicate with Level PAC. Thus, the Deterrence Co. would never engage in discussions with the candidate or Level PAC about political strategy, ad creation and distribution, or any other political activities.<sup>195</sup> In order to avoid even the appearance of impropriety, the governing boards of both entities could remain distinctly separate.<sup>196</sup>

The Supreme Court and the FEC set the standards for what constitutes impermissible coordination. The chief legal hurdle is centered on whether these activities rise to the level of illegal coordination.<sup>197</sup> It is a safe assumption that the FEC never anticipated the creation of Super PAC Insurance, which presents issues that potentially push the bounds of what constitutes coordination. If the FEC's current broad interpretation and lax enforcement<sup>198</sup>

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194. 11 C.F.R. § 109.21 (2015).

195. The Deterrence Co. could be viewed as a political vendor, like any other vendor from which a candidate can purchase services.

196. Although the Club for Growth's Advisory Opinion indicates that the president and treasurer may be the same individual, Super PAC Insurance may take steps to comply even more closely with the spirit of the law. See FEC, Advisory Op. 2010-09, *supra* note 102, at 2.

197. See *Coordinated Communications and Independent Expenditures*, *supra* note 71.

198. Lichtblau, *supra* note 32.

of coordination rules are any indication, candidate-driven Super PAC Insurance may also be permissible.<sup>199</sup>

In *Citizens United*, Justice Anthony Kennedy wrote for the majority and held that “by definition an independent expenditure is political speech presented to the electorate that is not in coordination with a candidate.”<sup>200</sup> He further noted that whether a “corporation, or any other speaker is willing to spend money” does not harm the “electorate[’s] faith in our democracy.”<sup>201</sup> Under federal law, an expenditure is considered “coordinated” if it is “made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate’s authorized committee or a political committee.”<sup>202</sup> Generally, coordinated communications are subject to contribution limits while independent expenditures are not.<sup>203</sup>

The FEC delineates a three-prong test to determine whether coordination would exist, and candidate-driven Super PAC Insurance seems to be permissible under its requirements. A communication is considered coordinated when the expenditure: (1) is made by someone other than the candidate (the payment prong), (2) satisfies the “content” standard (the content prong), and (3) satisfies the “conduct” standard (the conduct prong).<sup>204</sup> In order to be considered coordination, the communication must satisfy all three prongs.<sup>205</sup> If the communication is deemed coordinated, it is considered an in-kind contribution, subject to relevant contribution restrictions.<sup>206</sup> As a result, if the candidate’s purchase of their premium were deemed a coordinated communication, this candidate-driven model would not be feasible.<sup>207</sup>

Because Level PAC, as opposed to the candidate, party, or authorized committee, will pay for the expenditures, Super PAC Insurance easily meets the first prong. Further, it likely satisfies the second prong’s content standard—which is met if the communication is considered either an elec-

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199. Rachael Marcus & John Dunbar, *Rules Against Coordination Between Super PACs, Candidates, Tough to Enforce*, THE CENTER FOR PUBLIC INTEGRITY (Jan. 13, 2012, 6:00 AM), <http://www.publicintegrity.org/2012/01/13/7866/rules-against-coordination-between-super-pac-s-candidates-tough-enforce> [<http://perma.cc/KW4R-39NJ>].

200. *Citizens United v. Fed. Elections Comm'n*, 558 U.S. 310, 360 (2010).

201. *Id.*

202. 11 C.F.R. § 109.20 (2015).

203. See *Coordinated Communications and Independent Expenditures*, *supra* note 71.

204. 11 C.F.R. § 109.21 (2015).

205. 11 C.F.R. § 109.21(a) (2015).

206. 11 C.F.R. § 109.21(b) (2015).

207. Candidate committees may only transfer \$5,000 to political committees. The amount of \$5000 is likely to be substantially below the value most candidates will need to pay for their insurance premium. See *Commissions*, FEC, <http://www.fec.gov/pages/brochures/contrib.shtml> [<http://perma.cc/QG6P-XFRQ>].

tioneering communication or it expressly advocates for the election or defeat of a federal candidate<sup>208</sup>—as the ads produced by Level PAC will probably be considered electioneering communications or independent expenditures.<sup>209</sup>

The third prong’s conduct standard is the least clear. Because of this ambiguity, it is the most crucial facet for deciding whether coordination exists, and thus whether the candidate-driven model for Super PAC Insurance is subject to contribution limits.<sup>210</sup> A communication meets the conduct standard if: The communication was created at the “request or suggestion”<sup>211</sup> of the candidate or her committee; the candidate or her committee is “materially involved” in the creation of the communication;<sup>212</sup> or when the communication is created after “substantial discussions”<sup>213</sup> with the candidate or her committee.

The FEC provides a safe harbor, however, from some of these restrictions for publicly available information. If the advertisement is based on information available in the public domain, then it is exempt from some coordinated communications regulations.<sup>214</sup> Although this exemption applies to the “materially involved” and “substantial discussion” components of the conduct standard, it does not cover the “request or suggestion” component.<sup>215</sup>

This last component of the conduct standard asks whether Super PAC Insurance’s ads will be created at the “request or suggestion” of the candidate or her committee.<sup>216</sup> A communication will satisfy this part of the conduct standard if “[it] is created, produced, or distributed at the request or suggestion of a candidate, authorized committee, or political party committee.”<sup>217</sup>

In buying an options contract from the Deterrence Co., the candidate is contracting with the Deterrence Co. to defend her in the event of an insurable event. The candidate never requests a “communication” from the Deterrence

208. 11 C.F.R. § 109.21(c) (2015).

209. The expenditures are more than likely to be television ads that refer to a clearly identified federal candidate. Some of the communications by Super PAC Insurance, however, may be permissible under the content standard because they will be disseminated far enough in advance of Election Day so as not to be covered under the FEC’s test for coordination. Nevertheless, Super PAC Insurance must produce television communications to be effective, and those ads likely will be considered electioneering communications that satisfy the content standard. *Electioneering Communications*, *supra* note 79; *see also* 11 C.F.R. § 100.22 (2015).

210. *Coordinated Communications and Independent Expenditures*, *supra* note 71.

211. 11 C.F.R. § 109.21(d)(1) (2015).

212. *Id.* § 109.21(d)(2) (2015).

213. *Id.* § 109.21(d)(3) (2015).

214. *Id.* § 109.21(d) (2015).

215. *Id.*

216. *Id.* § 109.21(d)(1) (2015).

217. *Id.*

Co. Instead, the candidate is paying for protection from an opposing Super PAC.

Opponents will argue that defense of a candidate will invariably result in a public communication on her behalf that will be publicized by Level PAC. The contract essentially captures the candidate's "request" or "suggestion" for later communications. Deterrence Co. could also be considered the candidate's agent, as it is contractually obligated to defend her. Because the Deterrence Co. directly funds Level PAC to execute ads, the model will likely fail if it is deemed to be the candidate's agent. The issue will likely hinge on the FEC's interpretation of "request," "suggestion," and "communication," as the meaning of these terms do not apply neatly to this proposed design for Super PAC Insurance.<sup>218</sup>

A candidate-driven model may be able to circumvent the conduct prong of the FEC's coordination regulation through a safe harbor provision that allows for the establishment and use of a firewall.<sup>219</sup> Under this provision, if a Super PAC "designed and implemented" a firewall "to prohibit the flow of information" between agents of the candidate and representatives of the political committee, the conduct standard will not be satisfied.<sup>220</sup>

The FEC does not explicitly articulate the precise requirements of a firewall. In an enforcement action involving EMILY's List, however, the FEC approved its use of a firewall, providing an example of what a permissible one would look like.<sup>221</sup> The firewall included a ban preventing political consultants from interacting with federal candidates, party committees, or their agents.<sup>222</sup> The consultants were also banned from interacting with others within EMILY's List regarding specified candidates.<sup>223</sup> Finally, any employees who interacted with candidates were prohibited from communicating with staff that made ad purchases.<sup>224</sup> The FEC mandated that all firewalls "must be described in a written policy that is distributed to all relevant employees, consultants, and clients affected by the policy."<sup>225</sup>

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218. *Electioneering Communications*, *supra* note 79.

219. 11 C.F.R. § 109.21(h) (2015).

220. *Id.*

221. The FEC spelled out their rationale for a firewall when promulgating rule 109.21(h), which made clear that the regulation was the codification of an enforcement matter, involving EMILY's List. FED. ELECTIONS COMM'N, 71 11 CFR PART 109 [NOTICE 2006-10] COORDINATED COMMUNICATIONS (110 ed. Fed. 2006).

222. *Id.*

223. *Id.*

224. *Id.*

225. 11 C.F.R. § 109.21(h)(2) (2014).

Super PAC Insurance can easily emulate the EMILY's list firewall and could seek to impose a stricter firewall policy. Under this scenario, employees of the Deterrence Co. would only be allowed to communicate with federal candidates when they accept the insurance premiums,<sup>226</sup> and Level PAC would be banned from communicating with federal candidates or their agents. Employees of the Deterrence Co. would also be prohibited from communicating any information they learn from federal candidates to employees of Level PAC. Finally, per the FEC's requirement, the firewall must be written and distributed to the relevant individuals.<sup>227</sup>

These characteristics make the firewall even more stringent than what the FEC required of EMILY's list. The FEC notes that "mere contact or communications between persons on either side of the firewall does not in itself compromise the firewall, as long as the firewall prevents" information about the candidate's "plans, projects, activities, or needs."<sup>228</sup> For an established firewall to be vitiated, "*material information* about the candidate's or political party committee's campaign plans, projects, activities or needs must pass between persons on either side of the firewall."<sup>229</sup>

Super PAC Insurance's structure ensures the Deterrence Co. would not have access to, and Level PAC would never receive, material information about candidates' plans. The Deterrence Co. would simply know that the candidate wants to win her race and insure against attacks from Super PACs; Level PAC would learn of candidates' insurance coverage from a publicly available website.<sup>230</sup> Of course, the salient difference between other possible firewalls and the model proposed here is that the options contract obligates the Deterrence Co. to aid insured candidates. To defend or support an insured candidate, the Deterrence Co. must use the services of Level PAC or it will fail.

Moreover, if the Deterrence Co. is considered an agent of the candidate's campaign, the safe harbor provision would likely be unsatisfied. The provision states that the "firewall must be designed and implemented to prohibit the flow of information" between the individual paying for the communication and the

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226. The entire transaction could take place online, eliminating any person-to-person communication. The FEC, however, may still consider the act of purchasing a contractual insurance policy online an impermissible form of communication.

227. 11 C.F.R. § 109.21(h) (2014).

228. *Coordinated Communications and Independent Expenditures*, *supra* note 71.

229. *Id.*

230. To allow for a deterrent effect, the purchase of Super PAC Insurance must be made publicly available, otherwise opposing Super PACs will not be aware that the candidate is insured. Online communications on the candidate's own website are not considered "public communications." See 11 C.F.R. § 100.26 (2015).

consultant providing services.<sup>231</sup> The candidates' purchase of an options contract could constitute "information" because she is declaring her desire to be defended against a Super PAC attack. The FEC may contend that information flows from the candidate to the Deterrence Co. and then ultimately to Level PAC once it receives funding from the Deterrence Co.

This interpretation is arguably more aligned with the spirit of the FEC's regulations, which were designed to ensure that vendors could still make a living by providing services to both candidates and outside groups.<sup>232</sup> The regulations were never intended to incentivize the creation of an insurance intermediary that insulates candidates from direct communication with Super PACs. Ultimately, the FEC would have to decide if the flow of information between the candidate and Level PAC is sufficiently attenuated so as to not constitute a coordinated expenditure.

While supporter-driven Super PAC Insurance is manifestly legal, its candidate-driven alternative rests on shakier legal grounds. An advisory opinion affirming its legality would have to be obtained before implementing this model. If deemed legal, it provides a more desirable alternative as the candidates themselves can control the purchasing of their premiums. Because the candidates are already engaged in fundraising legally capped at the same maximum contribution limit as Level PAC will accept, all candidate committee funds could be used to purchase their insurance premium. Under the candidate-driven model, Level PAC would not have to build a premium-collecting operation; it would simply run independent expenditures on behalf of insured candidates.

### C. A Not-Yet-Declared Candidate-Driven Model

The machinations of current and former Republican Presidential candidates in 2016, presents a potential alternate model for Super PAC Insurance. Unfortunately, it may also highlight an unintended consequence of Super PAC Insurance. Republican presidential candidates such as Governor Scott Walker and former Governor Jeb Bush solicited six- and seven-figure donations before they became official candidates.<sup>233</sup> They contend that FEC regulations permit

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231. *Id.* § 109.21(h)(1) (2015).

232. *Coordinated Communications and Independent Expenditures*, *supra* note 71.

233. Matea Gold, *Why Super PACs Have Moved From Sideshow to Center Stage for Presidential Hopefuls*, WASH. POST (Mar. 12, 2015), [http://www.washingtonpost.com/politics/once-the-sideshows-super-PACs-now-at-the-forefront-of-presidential-runs/2015/03/12/516d371c-c777-11e4-a199-6cb5e63819d2\\_story.html](http://www.washingtonpost.com/politics/once-the-sideshows-super-PACs-now-at-the-forefront-of-presidential-runs/2015/03/12/516d371c-c777-11e4-a199-6cb5e63819d2_story.html) [<http://perma.cc/MC3K-37TJ>]. It should be noted that current

the direct solicitation of large funds until they officially declare their candidacies.<sup>234</sup> While some campaign finance experts express skepticism at the legality of such a move, many believe a divided FEC will not crack down on these practices.<sup>235</sup>

For Super PAC Insurance, the logical implication is for not-yet-declared candidates to first solicit funds to obtain insurance coverage against future Super PAC attacks—in a similar fashion to the Candidate-Driven Model.<sup>236</sup> Before officially declaring their candidacies, candidates could solicit contributions for offensive and defensive measures by separate distinct Super PACs. The offensive Super PAC would actively spend on behalf of the candidate, just as Super PACs do today, while Super PAC Insurance assures the candidate that there would be a response if and when an insurable event occurred.

Although the fundraising paradigm for the 2016 elections makes the Not-Yet-Declared Candidate-Driven model a legal possibility,<sup>237</sup> it would be a public policy disaster as it encourages candidates to solicit seven-figure checks for Super PAC Insurance. While it might decrease the number of ads that constituents see on television<sup>238</sup> by deterring outside spending, it does nothing to diminish the influence of the ultra-wealthy in the political zeitgeist. In fact, it likely increases their influence.

#### D. Partisan Insurance

Another possible model for Super PAC Insurance addresses the likely ideological leanings of those who fund its existence. A candidate, special interest, or individual donor paying a premium for coverage may not want to do so if

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federal officeholders cannot coordinate with Super PACs the same way as Governors Walker and Bush because it would constitute illegal coordination.

234. *Id.*

235. *Id.*

236. See generally Matea Gold, *Awash in Cash, Bush Asks Donors Not to Give More Than \$1 Million—for Now*, WASH. POST (Mar. 4, 2015), [http://www.washingtonpost.com/politics/awash-in-cash-bush-asks-donors-to-limit-gifts-to-1-million—for-now/2015/03/04/0b8d3fc6-c1c8-11e4-9271-610273846239\\_story.html](http://www.washingtonpost.com/politics/awash-in-cash-bush-asks-donors-to-limit-gifts-to-1-million—for-now/2015/03/04/0b8d3fc6-c1c8-11e4-9271-610273846239_story.html) [<http://perma.cc/HQ7M-GU4D>].

237. Before former Governor Jeb Bush declared his candidacy for the U.S. Presidency, Right to Rise Super PAC raised \$103 million to support him. At this fundraising pace, Super PAC Insurance could be logistically feasible at the presidential level. See Ed O'Keefe & Matea Gold, *Jeb Bush and Allied Super PAC Raise an Unprecedented \$ 114 Million War Chest*, WASH. POST (July 9, 2015), [http://www.washingtonpost.com/politics/jeb-bush-and-allied-super-PAC-raise-an-unprecedented-114-million-war-chest/2015/07/09/652e1206-2651-11e5-b72c-2b7d516e1e0e\\_story.html](http://www.washingtonpost.com/politics/jeb-bush-and-allied-super-PAC-raise-an-unprecedented-114-million-war-chest/2015/07/09/652e1206-2651-11e5-b72c-2b7d516e1e0e_story.html) [<http://perma.cc/HQ7M-GU4D>].

238. While voters may undoubtedly appreciate seeing fewer ads on television, the public policy implications are quite worrisome.

they know that money could eventually be used to fund an attack on a candidate from their own party. Similarly, potential investors in the Deterrence Co. will likely have a partisan preference. For example, Democratic-leaning investors want to deter spending by the Koch brothers, not spending by Tom Steyer. Conversely, Republican-leaning investors hope to discourage Steyer from spending, as opposed to the expenditures by the Koch brothers.

If the Deterrence Co. cannot be structured as a nonpartisan entity, two distinct organizations could be created instead—one for Republicans and one for Democrats. The Republican Deterrence Co. would pool the risk of Republican candidates, while the Democratic Deterrence Co. would pool the risk of Democratic candidates. Investors could opt to invest in either entity or both. Similarly, donors to Mayday PAC had the option to donate to “Democrats Only,” “Republicans Only,” or “Whatever Helps.”<sup>239</sup> A similar structure could be adopted for Super PAC Insurance.

Of course, distinct problems arise when creating two separate entities. First, Super PAC Insurance loses the moral high ground centered on deterring all outside spending. Instead, it is more likely to be viewed through a partisan lens. Spending may be unevenly deterred, with one political party’s insurance entity gaining more power and influence than the other, making it another partisan tool. Moreover, as addressed previously, the business model may depend on pooling the risk of the entire political system.

### E. Additional Applications of the Model

In theory, the Deterrence Co. could cover expenditures other than outside spending so that a candidate could insure against any type of political expenditure. For example, a candidate could purchase coverage that will attack her opponents if they or their party spent over one million dollars in a given race, thereby creating a disincentive to spend over a specified amount in a given election.

Although this model is beyond the scope of this Comment, effective deterrence of both candidate and outside spending over a specific value would certainly require substantial capital. If financially feasible, it could provide another means of reducing the influence of money in politics and impact even more than blunting the influence of Super PAC and 501(c)(4)s.

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239. *Frequently Asked Questions*, MAYDAY.US, <https://v1.mayday.us/faq/#the-options-of-whatever-helps-republicans-only-and-democrats-only-do-not-leave-room-for-an-independents3rd-party-option-why-have-you-chosen-to-exclude-independent-candidates> [https://perma.cc/22MN-83BX].



## VI. POTENTIAL UNINTENDED CONSEQUENCES AND LIKELY CRITICISMS

While Super PAC Insurance presents a unique opportunity to reform a broken system, it is not without its flaws. Implementing any one of its proposed models may lead to undesirable and unintended consequences. This Section briefly evaluates some of the more plausible unintended consequences and likely criticisms.

### A. Leads to More Spending

It is possible that few outside groups will be deterred, as they may be so motivated to spend that they will do so regardless of the financial consequences. Ideological special interests like the Sierra Club or the NRA exist to further their philosophical missions.<sup>240</sup> Their donors and supporters may want them to spend and inject their messages into the marketplace of ideas no matter the cost. Further, individuals like the Koch brothers may not be deterred from spending simply because they can draw on nearly unlimited funds. Jointly, the Koch brothers are worth an estimated \$85 billion.<sup>241</sup> Super PAC Insurance may never deter them from spending, even if the Deterrence Co. manages to raise \$1 billion in capital. Strategically, it may even make sense for the Koch brothers to attempt to bankrupt Super PAC Insurance so it does not impugn their ability to elect their favored candidates.

Under either of these scenarios, more money would enter the political system. The NRA and Sierra Club's spending would be compounded by the response ads from Level PAC, and the Koch brothers would spend more money to bankrupt Super PAC Insurance. If it simply becomes a means for candidates to respond to political attacks but does not deter outside spending, Super PAC Insurance will have failed its public policy goal.

This critique, however, ignores the success of the Pledge and the rationality of most of these actors. In Massachusetts, outside groups largely stayed out of the race because they knew their spending would actually work to the detriment of their preferred candidate.<sup>242</sup> The Koch brothers, the Sierra Club, and the NRA all existed during the Massachusetts race in 2012, yet they largely opt-

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240. See Clive S. Thomas, *Interest Groups*, ENCYCLOPAEDIA BRITANNICA, <http://www.britannica.com/topic/interest-group>.

241. *Charles Koch*, FORBES, <http://www.forbes.com/profile/charles-koch/> [<http://perma.cc/59SY-AVH7>]; *David Koch*, FORBES, <http://www.forbes.com/profile/david-koch/> [<http://perma.cc/V76H-Q9FY>].

242. Sitaraman, *supra* note 12, at 769.

ed to stay uninvolved.<sup>243</sup> Super PAC Insurance spending would similarly hurt these groups' preferred candidates.

While it is certainly possible that these groups will respond differently to a nearly identical incentive structure four years later, there is no evidence to confirm this outcome. Outside groups complete cost-benefit analyses to determine where their money is best spent to achieve their desired goals. Ideologically motivated special interest groups will probably look for alternate vehicles to spend their money,<sup>244</sup> but it seems unlikely they would spend in places where funding would actually hurt their own interests.

Moreover, as the Washington Post notes, even big donors do not like the Super PAC structure.<sup>245</sup> Private-equity executive Bill Kunkler explains: "I do not like the Super PACs. I think it is the lowest return on investment. I want to support the presumptive candidate, and that's the vehicle. We have got to reform how our political system is being financed. It's just crazy."<sup>246</sup> Affluent individuals like Kunkler are clearly making a cost-benefit determination that directs them to Super PACs as the best way to support their nominees. But if additional costs are added to their investment, they may forgo that donation altogether. At the moment, Kunkler clearly does not believe that Super PACs have a great return on his investment. If that cost was raised even further, he might not give at all.

## B. Encourages Dark Money Spending

Super PAC Insurance could also be a victim of its own success. As renowned election law scholar Professor Richard Hasen notes, Super PACs are actually more transparent than other alternatives.<sup>247</sup> He stated: "[Y]es campaign finance reform community, it has become this bad: I want *more* super PACs, because the 501(c)(4) alternative is worse!"<sup>248</sup> As discussed in Part II of this

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243. See generally Creighton, *supra* note 39, at 4.

244. Some political and legal scholars subscribe to a view that money in politics is like water; it will find a path to enter the system no matter what laws are passed. This presupposes that reforms will come through the passage of laws not private ordering. For more, see Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705 (1999), <http://www.campaignfreedom.org/wp-content/uploads/2015/06/Issacharoff-Karlan-1999-Hydraulics-Of-CF-Reform.pdf>.

245. See Gold, *supra* note 233.

246. *Id.*

247. Rick Hasen, *3 Thoughts on Super PACs: What We Now Know (and What We Don't)*, ELECTION L. BLOG (Feb. 1, 2012, 8:29 AM), <http://electionlawblog.org/?p=28973> [<http://perma.cc/P9U2/N5UF>].

248. *Id.*

Comment, Super PACs actually have substantially more disclosure requirements than 501(c)(4) organizations.<sup>249</sup>

If Super PAC Insurance is so successful that it deters a large percentage of outside spending, it may encourage political spending through other vehicles, such as 501(c)(4)s. In order to blunt the impact of Level PAC, donors may opt to donate to a 501(c)(4) as opposed to a Super PAC.

As previously noted, Super PAC Insurance can still deter 501(c)(4) spending, however, only if a particular activity is considered either an electioneering communication or independent expenditure.<sup>250</sup> The identity of the donor may not be known, but the quantity of the expenditure will be disclosed and so Level PAC can spend against it, mitigating the danger of funds being pushed to 501(c)(4)s.

The real danger arises if 501(c)(4)s air issue ads instead of direct advocacy or electioneering communications. Issue ads do not have to be disclosed to the FEC at all and are unlikely to be disclosed to the IRS until far after the election.<sup>251</sup> But politically, these ads may be just as impactful as express advocacy.<sup>252</sup> Because issue-ad disclosures take place after the election, the Deterrence Co. would have difficulty determining if an insurable event occurred—indeed making it significantly harder to deter such spending. Importantly, these donors do not have to be disclosed,<sup>253</sup> arguably leading Super PAC Insurance to unintentionally incentivize less donor disclosure.

This critique rests on assumptions and ignores certain facts. If Super PAC Insurance is so successful that it deterred a significant portion of electioneering communications and express advocacy, donors may look for alternate means of influencing an election and issue ads may provide one potential outlet for this capital. This assumes, however, that the IRS will not successfully issue a final rule limiting 501(c)(4)'s ability to engage in political activity.<sup>254</sup>

Finally, it ignores the possibility that the Deterrence Co. could actually determine if an insurable event occurred. While spending on issue ads is certainly

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249. *What Super Pacs, Non-Profits, and Other Groups Spending Outside Money Must Disclose About the Source and Use of Their Funds*, OPENSECRETS.ORG, <https://www.opensecrets.org/outsidespending/rules.php> [https://perma.cc/CAE5-7G6H].

250. LUNDER & WHITAKER, *supra* note 73, at 13–14.

251. An organization is not subject to FECA guidelines provided its major purpose is not the election or nomination of a candidate. *Id.* at 9–10; *see also* Buckley v. Valeo, 424 U.S. 1, 11 (1976).

252. *See* Crossroads GPS Channel, *Crossroads GPS: Gas Prices*, YOUTUBE (Mar. 21, 2012), <https://www.youtube.com/watch?v=3bxdaFbRWII> [https://perma.cc/9DMG-B7YB].

253. LUNDER & WHITAKER, *supra* note 73, at 10.

254. *See generally* *Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities*, REGULATIONS.GOV (Nov. 29, 2013), <http://www.regulations.gov/#%21documentDetail;D=IRS-2013-0038-0001>.

more difficult to track than spending disclosed directly to the FEC, the task is not impossible. As the Deterrence Co. becomes more sophisticated it will develop relationships with media vendors, who will likely share information about Super PAC spending. The Deterrence Co. can also keep track of news reports on political ad buys. If Super PAC Insurance is so successful as to incent this spending, it could and should add issue ads to its insurance policies. Although insuring against this type of expenditure may increase the premium cost, tweaking Super PAC Insurance's business model can accommodate the increase. Again, Super PAC Insurance does not have to wait for the government. Whether the IRS regulations are finalized or not, Super PAC Insurance can theoretically treat issue advocacy as an insurable event whenever it chooses.

### C. Partisan Deterrence

Super PAC Insurance could become more beneficial to one political party than the other. By protecting one party from outside spending at the expense of another, it runs the danger of appearing to be a partisan weapon. In 2014, Democratic-leaning Super PACs spent \$177.6 million, compared to \$152.5 million spent by Republican-leaning Super PACs.<sup>255</sup> Further, conservatives spent \$124 million through 501(c) organizations, whereas liberal groups spent \$35.7 million through these organizations.<sup>256</sup>

Liberals may argue Super PAC Insurance hurts them because they typically spend relatively more through Super PACs—which require more disclosure—and are thus more likely to trigger an attack from Level PAC.<sup>257</sup> In contrast, conservative groups tend to make relatively more political expenditures that are not considered insurable events under the Super PAC Insurance model.<sup>258</sup> While this may be true, it ignores the reality that over \$150 million was spent by Republican-leaning Super PACs. And as mentioned previously, some of the 501(c) organizational spending is insurable. Indeed, much of the \$124 million spent by conservatives through 501(c) corporations must be disclosed.

Conservative groups may counter that they are spending more in the aggregate than Democrats and therefore Super PAC Insurance will benefit liberals.<sup>259</sup>

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255. *2014 Outside Spending, Group*, OPENSECRETS.ORG, <https://www.opensecrets.org/outsidespending/summ.php?cycle=2014&chr=V&disp=O&type=> [https://perma.cc/9J1J-3HFE] (last updated May 6, 2015).

256. *Id.*

257. Creighton, *supra* note 39.

258. Gold, *supra* note 233.

259. *See id.*

They may also contend that Democrats, who are generally more supportive of campaign finance reform, will be more likely to purchase insurance coverage than Republicans.<sup>260</sup> Again, both complaints overlook how much the Democrats spend on Super PAC expenditures alone and that deterring some or all of this spending will still be advantageous to Republicans. If Super PAC Insurance is successful and Democrats are in fact purchasing coverage at a higher rate than Republicans, Republican candidates will almost certainly direct their supporters to purchase coverage through the open marketplace in the next election cycle.

In a wave election, Super PAC Insurance will likely benefit one party more than another. In 2010, Republican Super PACs and 501(c) organizations outspent Democrats by \$148.6 million to \$35.3 million.<sup>261</sup> As early as April 2010, political pundits were predicting a wave election for Republicans.<sup>262</sup> Depending on who purchased insurance and when, Democrats would have likely benefited much more than Republicans. Outside Republican groups were spending significantly more than Democrats and thus there was more potential spending to deter and more actual spending to address.

The price of the insurance premium can account for many of these criticisms. If it is clear that Republicans will spend more against Democratic candidates, then the cost of a Democratic candidate's premium will rise. Furthermore, wave elections cut both ways. Democrats swept into office during the 2006 election cycle, just as the Republicans did in 2010. As a result, over time Super PAC Insurance should impact both parties in comparable amounts. Furthermore, even in a wave election the party likely still will spend significant sums of money, to minimize their losses.<sup>263</sup>

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260. A 2014 poll revealed that 75 percent of Democrats support campaign finance reform compared to 54 percent of Republicans. See Denver Nicks, *Poll: Support for Campaign Finance Reform Strong in Key Senate Races*, TIME (July 31, 2014) <http://time.com/3063942/poll-support-for-campaign-finance-reform-strong-in-key-senate-races/> [<http://perma.cc/3QB2-NBWN>].

261. *2010 Outside Spending, By Group*, OPENSECRETS.ORG, <https://www.opensecrets.org/outsidespending/summ.php?cycle=2010&chrt=V&disp=O&type=U> [<https://perma.cc/JD9C-L7V7>]; *2010 Outside Spending, By Super PAC*, OPENSECRETS.ORG, <https://www.opensecrets.org/outsidespending/summ.php?cycle=2010&chrt=V&disp=O&type=S> [<https://perma.cc/B4Y5-G8V3>].

262. Adam Nagourney & Marjorie Connelly, *1994 Republican Rout Is Casting Shadow in 2010*, N.Y. TIMES (Apr. 11, 2010), <http://www.nytimes.com/2010/04/12/us/politics/12elect.html> [<http://perma.cc/UBA2-RCG8>].

263. Despite losing thirteen seats in 2014, Democrats aligned Super PACs spent \$176.8 million compared to Republican leaning Super PACs who spent \$151.5 million. See *2014 Outside Spending, by Group*, OPENSECRETS.ORG, <https://www.opensecrets.org/outsidespending/summ.php?chrt=V&type=S>; *House Election Results*, N.Y. TIMES (Dec. 17, 2014, 12:28 PM), <http://elections.nytimes.com/2014/results/house>.

It is vitally important that Super PAC Insurance is not viewed as a partisan tool. It will lose its ethical high ground, diminish its public standing, and potentially hurt investment if it is viewed as an extension of one political party. Thus, it must assiduously remain nonpartisan, retaining top talent from both sides of the aisle.<sup>264</sup>

### CONCLUSION

Since the Watergate scandal, Congress and the Supreme Court have wrestled with the financing of federal elections. In 1974, Congress passed limits on campaign expenditures, but the Court struck them down in *Buckley v. Valeo*.<sup>265</sup> The Court further eroded Congressional intent by overruling FECA's ban on corporate independent expenditures in *Citizens United*,<sup>266</sup> after which it struck down the Bipartisan Campaign Reform Act's (BCRA)<sup>267</sup> cap on aggregate expenditures in *McCutcheon v. FEC*.<sup>268</sup> The current Court's broad interpretation of the First Amendment is clearly not conducive to campaign finance regulation. An obstinate Court and a dysfunctional Congress should precipitate innovation, not despondency, in the campaign finance reform movement. Those hoping to curb the influence of third-party groups on elections must look elsewhere to reform a broken system.

James Madison and his celebrated Federalist 51 provide an answer. In that essay, Madison famously stated, "Ambition must be made to counteract ambition."<sup>269</sup> The patriotic investors' ambition for a return on their investment, coupled with small donors' desire to insulate their preferred candidate from attack, must be made to counteract the Super PACs' desire to influence an election. Super PAC Insurance does not rely on legislative or judicial victories; rather, it harnesses the profit motive to curb outside influence. The ability to make money while helping the country in the process ought to set up sufficient incentives for patriotic investors to participate. The chance to help ensure one's candidate

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264. Mayday PAC had the bipartisan pair of Mark McKinnon and Professor Lessig at its helm.

265. *Buckley v. Valeo*, 424 U.S. 1, 19–20 (1976).

266. *Citizens United v. Fed. Elections Comm'n*, 558 U.S. 310, 365 (2010).

267. BCRA, the Bipartisan Campaign Reform Act of 2002, otherwise known as McCain-Feingold Act, regulated campaign finance. One of the regulations included a cap on total aggregate contributions to federal candidates. Robert Kelner & Raymond La Raja, *McCain-Feingold's Devastating Legacy*, WASH. POST (Apr. 11, 2014), [http://www.washingtonpost.com/opinions/mccain-feingolds-devastating-legacy/2014/04/11/14a528e2-c18f-11e3-bcec-b71ee10e9bc3\\_story.html](http://www.washingtonpost.com/opinions/mccain-feingolds-devastating-legacy/2014/04/11/14a528e2-c18f-11e3-bcec-b71ee10e9bc3_story.html).

268. *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1436–37 (2014).

269. ALEXANDER HAMILTON, JOHN JAY & JAMES MADISON, *THE FEDERALIST* 268 (George W. Carey & James McClellan, eds., 2001).

is given a level platform to present her vision for the country ought to motivate small donors to pay candidate premiums. Raising the necessary capital for success will unquestionably be challenging, but the country's effective governance may depend on individual donors coming together with affluent and small investors alike, jointly investing in changing our democracy.