

NOTE

SUPER PACS, PERSONAL DATA, AND CAMPAIGN FINANCE LOOPHOLES

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Personal data is a commodity—frequently bought, sold, and traded on the open market by for-profit and non-profit organizations alike. It is now commonplace for political campaigns to synthesize large amounts of personal information to tailor messaging to particular individuals for persuasion, turnout, and fundraising. As campaigns and other political organizations use data in increasingly sophisticated ways, they have also dramatically increased their data collection and transfer efforts. This Note explores how federal election laws and regulations have failed to keep pace with these developments, creating a loophole through which virtually unlimited money can flow to campaigns.

This Note argues that personal data should be regulated like any other campaign asset. Federal political campaigns are subject to strict contribution limits as well as a comprehensive disclosure regime. Current Federal Election Commission advisory opinions and agency inaction have allowed campaigns to receive valuable personal data at practically no cost, even from organizations like super PACs that are otherwise prohibited from making contributions to campaigns. Perhaps even more troubling is that these contributions are not subject to the disclosure requirements that form the backbone of the federal campaign finance system. The transfer of this class of assets is subject to neither meaningful restrictions nor public scrutiny. This Note details the problem and proposes several simple regulatory changes to close existing campaign finance loopholes.

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I. INTRODUCTION

In April 2015, Hillary Clinton’s presidential campaign suffered a minor setback. Upon officially launching on April 12, 2015, the new campaign instantly gained access to the 2.5 million email addresses of supporters that had been collected during Secretary Clinton’s unsuccessful 2008 presidential campaign.¹ But after sending their first email to known supporters, the campaign was stunned to learn that fewer than 100,000 of

¹ Dan Merica, Hillary Clinton Campaign’s ‘Highest Priority’: Getting Email Addresses, CNN (July 15, 2015, 11:55 AM), <https://www.cnn.com/2015/07/15/politics/hillary-clinton-campaign-list-buidling/index.html> [<http://perma.cc/V3TA-U3C7>]. Candidates are permitted to transfer assets—in this case an email address list—from one election cycle to the next. See 11 C.F.R. § 102.6 (2018); see also Fed. Election Comm’n, Transfers Between a Candidate’s Committees, <https://www.fec.gov/help-candidates-and-committees/making-disbursements/-transfers/> [<http://perma.cc/JG9W-BACQ>] (last visited Jan. 17, 2019) (“Funds and assets may be transferred without limit between committees authorized by a candidate for the same office in different elections as long as the transferring committee does not have net debts outstanding.”).

those 2,500,000 emails were active and usable nearly seven years later.² Building a new list quickly became a top priority.³ The campaign's fundraising and volunteer outreach depended on it. One month later, the campaign obtained a data set from a super PAC that contained close to 4 million fresh email addresses along with other personal information about likely supporters that had been collected over the previous year.⁴ It did not cost the campaign a dime.⁵

Publicly expressing support for candidates we like and donating to help them run effective campaigns are fundamental to our political system. Recognizing the value of that information, political campaigns, parties, and other politically active groups have built elaborate systems to capture, track, and analyze an ever-expanding amount of personal data, with a particular focus on donation histories and expressions of support. Political actors begin collecting information on you from the moment you browse their website or click on an email,⁶ and that data⁷ is stored, analyzed, and transferred *ad infinitum*.⁸ They have good reason to do so. In close elections, estimates suggest that sophisticated data use can yield a two to three percent improvement in results at the voting booth.⁹ And focusing on soliciting funds from targeted individuals who are more likely to donate is vital in an era of rapidly increasing campaign fundraising

² Merica, *supra* note 1.

³ *Id.*

⁴ Annie Karni, Clinton Campaign Scores Ready for Hillary Email List, Politico (May 30, 2015, 12:46 PM), <https://www.politico.com/story/2015/05/hillary-clinton-campaign-scores-ready-for-hillary-email-list-118446> [<http://perma.cc/62PB-ZM5N>].

⁵ *Id.* The campaign may have provided non-monetary reimbursement to the super PAC that provided these emails as discussed *infra* Subsection IV.C.3.

⁶ Shane Snow, An Incredibly Dorky Look at Each Presidential Candidate's Technology Stack, Fast Company (Mar. 1, 2016), <https://www.fastcompany.com/3057329/an-incredibly-dorky-look-at-each-presidential-candidates-technology-stack> [<http://perma.cc/73P8-JBNY>]. Every major party presidential candidate remaining in the race as of March 2016 was deploying multiple analytics and tracking services on their website, with the Clinton website tracking the most user data using a total of fourteen analytics scripts. *Id.*

⁷ In this Note, I follow the lead of Chief Justice Roberts (ignoring the admonitions of my college English professors) and treat "data" as a collective singular noun which takes a singular verb. See *Riley v. California*, 573 U.S. 373, 389 (2014) (writing "data becomes encrypted" (emphasis added)).

⁸ Jose Pagliery, Here's How Presidential Candidates Sell Your Personal Information, CNN Money (July 7, 2016, 12:02 AM), <http://money.cnn.com/2016/07/07/news/presidential-candidate-sell-donor-data/index.html> [<http://perma.cc/67EW-83CK>].

⁹ Politics by Numbers, The Economist (Mar. 26, 2016), <https://www.economist.com/news/special-report/21695190-voters-america-and-increasingly-elsewhere-too-are-being-ever-more-precisely> [<http://perma.cc/9K7S-WHYV>].

demands.¹⁰ A modern campaign that does not attempt to collect and use as much data as possible on both potential voters and potential donors would be operating at a competitive disadvantage.

Yet, for the ubiquity and utility of sophisticated data practices among political campaigns, the regulatory landscape at the federal level has barely adjusted.¹¹ There are two primary concerns with campaign data practices: campaign finance and privacy. This Note exclusively discusses campaign finance issues and not privacy considerations for a few reasons. First, the campaign finance implications of data collection and sharing are not as well understood as privacy concerns, which have been analyzed extensively by regulatory and legislative bodies,¹² in academia,¹³ and in the press,¹⁴ especially following the recent data breaches at Facebook.¹⁵ Second, a Note that attempted to tackle both complex topics would be unable to discuss either adequately. And finally, this Note aims to serve as a smoke signal for future researchers, the Federal Election Commission (“FEC”), and public interest organizations to explore an increasingly complicated and important area of campaign finance regulations.¹⁶ These gray areas are well known to political actors and their attorneys, as detailed below. This Note attempts to help academia and regulators catch up.

¹⁰ See Ciara Torres-Spelliscy, *Time Suck: How the Fundraising Treadmill Diminishes Effective Governance*, 42 *Seton Hall Legis. J.* 271, 277 (2018). Freshman congressmen, for example, are strongly encouraged to spend at least thirty hours a week fundraising. *Id.* at 291.

¹¹ This Note is limited to federal election regulation.

¹² Legislative bodies in the United States and the United Kingdom have launched full investigations over political data privacy concerns. Cecilia Kang & Sheera Frenkel, *Facebook’s Zuckerberg Said to Agree to Testify Before Congress over Data Privacy*, *N.Y. Times* (Mar. 27, 2018), <https://www.nytimes.com/2018/03/27/technology/facebooks-zuckerberg-said-to-agree-to-testify-before-congress-over-data-privacy.html> [<http://perma.cc/L4-H3-PF82>].

¹³ See generally Ira S. Rubinstein, *Voter Privacy in the Age of Big Data*, 2014 *Wis. L. Rev.* 861, for an excellent discussion of relevant legal privacy concerns as well as sorely needed proposals for reform.

¹⁴ See, e.g., Shane Harris & Kate Fazzini, *Computer-Security Firm Says Voter Data Set Left Unprotected Online*, *Wall St. J.* (June 19, 2017), <https://www.wsj.com/articles/computer-security-firm-says-voter-data-set-left-unprotected-online-1497877200> [<http://perma.cc/CL8-C-LNMM>].

¹⁵ Nicholas Confessore, *Cambridge Analytica and Facebook: The Scandal and the Fallout So Far*, *N.Y. Times* (Apr. 4, 2018), <https://www.nytimes.com/2018/04/04/us/politics/cambridge-analytica-scandal-fallout.html> [<http://perma.cc/9DNF-CMDC>].

¹⁶ An unfortunate side effect of the lack of legal writing in this area is that this Note will rely heavily on the news media, statutes, regulations, and FEC advisory opinions but will be comparatively light on references to legal commentators.

This Note proceeds in five parts, including this introduction. Part II provides a factual background to understand how political actors collect, use, and transfer data. Part III provides an explanation of the relevant laws and regulations that guide the federal campaign finance system. Part IV details how political actors of all types exploit gaps in this system in violation of the spirit, and occasionally the letter, of the law. It concludes with three examples to demonstrate how seemingly small loopholes can have large effects. Part V contains four straightforward proposals for reform, all of which could be implemented by the FEC. First, political organizations that intend to transfer data should obtain a valuation of that data by a disinterested party. Second, organizations that are required to disclose contributions and expenditures to the FEC should be required to disclose the acquisition or transfer of data, including data received as part of a swap of equal value. Third, such organizations should be prohibited from engaging in deferred list-swaps. Finally, the FEC should recognize that campaigns have abandoned the neat division of data into “donor lists,” “polling data,” and “mailing lists” and should change its definitions to reflect this reality.

II. BACKGROUND: AN INTRODUCTION TO CAMPAIGN DATA

In the weeks after President Obama was reelected in 2012, many news organizations published pieces on his campaign’s foray into the world of “Big Data” and the transformational power of data analytics. A Washington Post journalist anointed Obama “the ‘Big Data’ President,”¹⁷ and the Harvard Business Review declared 2012 “The First Big Data Election.”¹⁸ The articles that dug beyond buzzwords revealed the potential that sophisticated use of data held for future political campaigns. The Obama campaign created data models and scores to predict the individual behaviors of potential donors and voters, and, as one article in the MIT Technology Review put it, the campaign “knew exactly how it could turn

¹⁷ Nancy Scola, Opinion, Obama, the ‘Big Data’ President, Wash. Post (June 14, 2013), https://www.washingtonpost.com/opinions/obama-the-big-data-president/2013/06/14/1d71-fe2e-d391-11e2-b05f-3ea3f0e7bb5a_story.html [http://perma.cc/8MWT-R7KY].

¹⁸ Eric Hellweg, 2012: The First Big Data Election, Harv. Bus. Rev. (Nov. 13, 2012), <https://hbr.org/2012/11/2012-the-first-big-data-electi> [http://perma.cc/JMZ7-VNV6].

you into the type of person it wanted you to be.”¹⁹ This development did not happen by chance.

The Obama campaign set out to deploy data to inform everyday campaign decision-making, and by all accounts they succeeded in that goal. According to one account, “campaign manager Jim Messina had promised a totally different, metric-driven kind of campaign” in which the data team “measure[d] every single thing in [the] campaign.”²⁰ The campaign constantly collected, processed, and analyzed data in novel ways, and the results were clear: “The new megafile . . . allowed the campaign to raise more money than it once thought possible.”²¹ Importantly, the data used by the campaign was useful for far more than fundraising: “Messina based his [advertisement] purchases on the massive internal data sets,”²² and “microtargeting models directed volunteers to scripted conversations with specific voters at the door or over the phone.”²³ Data was used to inform or drive practically all aspects of the campaign.

President Obama’s reelection campaign was not the first political campaign to use data to influence strategy, but in the seven years since that election, data has come to play a defining role in campaigns. To see the broad reliance on data and targeting in politics, one need look no further than President Trump’s successful campaign and the recent revelations emerging about its digital efforts.²⁴ In an interesting and unusual development, the digital director of President Trump’s 2016 campaign, Brad Parscale, was named Trump’s 2020 campaign manager in February 2018.²⁵ Parscale claimed that the campaign’s ability to create

¹⁹ Sasha Issenberg, *How Obama’s Team Used Big Data to Rally Voters*, MIT Tech. Rev. (Dec. 19, 2012), <https://www.technologyreview.com/s/509026/how-obamas-team-used-big-data-to-rally-voters> [http://perma.cc/3SLT-7WXH].

²⁰ Michael Scherer, *Inside the Secret World of the Data Crunchers Who Helped Obama Win*, Time (Nov. 7, 2012), <http://swampland.time.com/2012/11/07/inside-the-secret-world-of-quants-and-data-crunchers-who-helped-obama-win/> [http://perma.cc/4RAM-JZ9U].

²¹ *Id.*

²² *Id.*

²³ Issenberg, *supra* note 19.

²⁴ See, e.g., Kurt Wagner, *Here’s How Facebook Allowed Cambridge Analytica to Get Data for 50 Million Users*, Recode (Mar 17, 2018, 3:47 PM), <https://www.recode.net/2018/3/17/17134072/facebook-cambridge-analytica-trump-explained-user-data> [http://perma.cc/U-VC4-3ENR].

²⁵ Michael Kranish, *How Brad Parscale, Once a ‘Nobody in San Antonio,’ Shaped Trump’s Combative Politics and Rose to His Inner Circle*, Wash. Post (Nov. 9, 2018), <https://www.washingtonpost.com/news/insider-lobbying/wp/2018/11/09/how-brad-parscale-rose-to-trump-s-inner-circle/>

a list of 14.4 million persuadable voters in key swing states was the reason President Trump won.²⁶ While there is certainly more to that story, it is undeniable that data, and the voter targeting made possible by that data, is increasingly valuable in modern campaigns.²⁷

Large presidential campaigns, however, are not the only ones accumulating and deploying data in increasingly sophisticated ways. Political campaigns of all sizes have always assembled lists of supporters to target for fundraising appeals or to encourage to vote on election day. However, smaller campaigns are now ramping up their data collection and utilization practices, with even mayoral campaigns and state house races engaging in these practices.²⁸ As the cost of running a successful campaign at any level rises each year, campaigns of all sizes are likely to increase their reliance on data.

Most campaigns and political parties now start with lists from state voter rolls. In the last two decades, acquiring these lists has become significantly easier. The Help America Vote Act of 2002 (“HAVA”)²⁹ required each state to create and maintain a central electronic list with a very limited amount of information³⁰ on each registered voter in the state.

www.washingtonpost.com/politics/how-brad-parscale-once-a-nobody-in-san-antonio-shaped-trumps-combative-politics-and-rose-to-his-inner-circle/2018/11/09/b4257d58-dbb7-11e8-b3f0-62607289efee_story.html?utm_term=.dc582d14b098 [<http://perma.cc/27AS-9DGN>].

²⁶ Bill Lambrecht, *Trump’s Digital Ad Exec Based in San Antonio*, *San Antonio Express-News* (Nov. 15, 2016), <https://www.expressnews.com/news/local/article/Trump-s-digital-ad-exec-based-in-San-Antonio-10616777.php> [<http://perma.cc/H6EQ-C37Z>].

²⁷ See, e.g., Elizabeth Dwoskin & Tony Romm, *Facebook’s Rules for Accessing User Data Lured More than Just Cambridge Analytica*, *Wash. Post* (Mar. 19, 2018), https://www.washingtonpost.com/business/economy/facebooks-rules-for-accessing-user-data-lured-more-than-just-cambridge-analytica/2018/03/19/31f6979c-658e-43d6-a71f-afdd8bf1308b_story.html [<http://perma.cc/6SFM-D4GN>] (explaining how both the Trump and Obama campaigns collected data from Facebook).

²⁸ Andrew Drechsler et al., *Explaining the Dark Magic of Microtargeting*, *Campaigns & Elections* (Aug. 22, 2010), <https://www.campaignsandelections.com/campaign-insider/explaining-the-dark-magic-of-microtargeting> [<http://perma.cc/V3FE-J3ZL>].

²⁹ 52 U.S.C. §§ 20901-21145 (Supp. III 2016); Pub. L. No. 107-252, § 101, 116 Stat. 1666 (2002).

³⁰ HAVA requires the voter list to contain the name and registration information of every registered voter in the state. 52 U.S.C. § 21083 (Supp. III 2016). The required information collected by states is limited to a name, address, date of birth, identification number (such as a driver’s license or Social Security number), and signature; providing a telephone number, email address, or party preference is optional, and race is only collected in a few states to comply with the Federal Voting Rights Act. Election Assistance Comm’n, *Federal Voter Registration Form and Accompanying Instructions* (revised Mar. 1, 2006), https://www.eac.gov/assets/1/6/Federal_Voter_Registration_ENG.pdf [<http://perma.cc/2G9C-SN-Q6>].

This list, combined with an individual's election participation history,³¹ is then made available to campaigns, political parties, outside groups, and individuals, subject to state law variation.³²

In general, states have some discretion over to whom and for how much they will sell these lists, but lists are available in every state to candidates³³ and to residents of the state. These official voter lists can be considerably expensive. One estimate places the cost of purchasing the voter rolls in all fifty states, as a presidential campaign likely would, at \$136,671.³⁴ The cost to purchase the state-maintained voter roll in Virginia is estimated to be \$5,000.³⁵ Alabama, meanwhile, prices its electronic records at 1 cent per voter.³⁶ Not every state charges a fee, though. The cost for these state records ranges from free of charge in Washington and Oklahoma to a high of over \$30,000 in Arizona.³⁷ And these initial costs are simply the price for purchasing a list once; updating a list to reflect newly registered voters or to remove individuals who are no longer registered frequently entails

³¹ Ruth Igielnik et al., Pew Research Ctr., Commercial Voter Files and the Study of U.S. Politics 49 (2018), <http://assets.pewresearch.org/wp-content/uploads/sites/12/2018/02/141-12947/FINAL-Voter-File-Report-2.15.18.pdf> [<http://perma.cc/SX66-2SCE>] (“The core data in voter files are the publicly available voting records of individuals. Members of the public may be unaware that voting records are public, but campaigns have long had access to them.”).

³² For further information on state law variation in voter file access, see U.S. Voter List Information, U.S. Elections Project, <http://voterlist.electproject.org> [<http://perma.cc/5N8A-JRVM>].

³³ In this Note, “candidate” is often used interchangeably with “authorized candidate campaign committee” or “principal candidate committee.” When the distinction is important, it will be noted, but it should be generally understood that candidates’ fundraising and expenditure activities, among others, are conducted through their principal campaign committees. For example, donations to President Trump’s reelection campaign are technically donations to “Donald J. Trump for President, Inc.,” which is his authorized campaign committee. For further reading, see Registration of Political Committees, 52 U.S.C. § 30103 (2012); see also Fed. Election Comm’n, Campaign Guide for Congressional Candidates and Committees (2014), <https://www.fec.gov/resources/cms-content/documents/candgui.pdf> [<http://perma.cc/9D2C-2T6D>] (providing instructions on candidate and committee registration).

³⁴ Full List Facts and Info, Voter List Information, U.S. Elections Project, <http://voterlist.electproject.org/full-list-purchase-facts-and-info> [<http://perma.cc/WN77-LM-SV>].

³⁵ Virginia, Voter List Information, U.S. Elections Project, <http://voterlist.electproject.org/states/virginia> [<http://perma.cc/A4XU-4JCK>].

³⁶ Voter Information Fee Schedule, Ala. Sec’y of State (2016), <http://sos.alabama.gov/sites/default/files/form-files/sosVoterListFeeSchedule.pdf> [<http://perma.cc/868L-C-K9H>].

³⁷ Michael McDonald et al., The Big Cost of Using Big Data in Elections, Wash. Post (Oct. 18, 2015), https://www.washingtonpost.com/opinions/the-big-cost-of-using-big-data-in-elections/2015/10/18/cb7bdf6c-7443-11e5-8248-98e0f5a2e830_story.html [<http://perma.cc/MF-8P-S2WT>].

reoccurring fees. The lack of a uniform pricing model complicates the question of valuing these lists, but for the present purpose, it is important to note that the lists being acquired from the secretary of state contain little more than basic registration information and voting histories.³⁸

The FEC also requires federal campaigns to file reports that include personal information and amounts of donations from campaign contributors.³⁹ However, unlike voter roll information, federal law prohibits the use of these public reports by other campaigns to guide their own contribution solicitations.⁴⁰ Instead, interested campaigns must create their own donor lists from scratch or obtain them from another source. As discussed below, campaigns frequently obtain these donor lists from other campaigns, rather than building one on their own.

Campaigns take these readily available voter roll lists and combine them with a vast array of non-publicly available information. This practice is highly proprietary, but there are some clues from recent leaks and interviews as to the types of information collected. A recent leak by the Republican data firm Deep Root Analytics revealed sensitive personal information collected on over 198 million American voters.⁴¹ The information the firm had compiled on individual voters went far beyond the bare minimum information on state voter rolls. The breach revealed that the firm was collecting a wide array of data including what appeared to be polling results, demographic information, and even content gleaned from Reddit and Facebook use.⁴² The firm also made attempts to predict individuals' race and religion and recorded the results of those predictions.⁴³

Perhaps the most significant development in campaign data practices over the last decade is that data is no longer siloed into particular types with discrete uses. Fundraising data has been merged with voter contact and demographic data, which has been further combined with polling

³⁸ See Help America Vote Act, *supra* note 30 and accompanying text.

³⁹ 11 C.F.R. §§ 104.1–104.3 (2018).

⁴⁰ 52 U.S.C § 30111(a)(4) (2012); 11 C.F.R. § 104.15 (2018).

⁴¹ Dan O'Sullivan, *The RNC Files: Inside the Largest US Voter Data Leak*, UpGuard (last updated on May 1, 2018), <https://www.upguard.com/breaches/the-rnc-files> [http://perma.cc/B6QC-VXZ2]. This article is written by the researchers who discovered the data breach.

⁴² *Id.*; see also Evan Halper & Paresh Dave, *A Republican Voter Data Firm Probably Exposed Your Personal Information for Days—and You Don't Have Much Recourse*, L.A. Times (June 19, 2017, 4:25 PM), <http://www.latimes.com/politics/la-na-pol-gop-data-breach-20170619-story.html> [http://perma.cc/CHX7-DTRE] (discussing the various types of personal data that was collected).

⁴³ O'Sullivan, *supra* note 41.

information. The 2012 Obama campaign appears to be the first campaign to have attempted this on a large scale.⁴⁴ That data team recognized an issue with inaccurate information and noted that “the problem in Democratic politics was you had databases all over the place.”⁴⁵ To address this concern, “the campaign started over, creating a single massive system that could merge the information collected from pollsters, fundraisers, field workers and consumer databases as well as social-media and mobile contacts with the main Democratic voter files in the swing states.”⁴⁶ The Republican Party may have been slightly slower on this adoption, but it soon emulated the Democrats.⁴⁷ There is no longer a single “email list” or a single “donor list”; all of this data now exists in combination for sophisticated campaigns. And the term “mailing list” is practically anachronistic. Campaigns no longer send a singular message to every mailbox at their disposal. Instead, campaigns rely on the rest of the data at their disposal to send specific messages to specific targets.⁴⁸

Beyond the combination of disparate types of factual data into a singular file, perhaps the next largest innovation in campaign data analytics is that all of this information is synthesized and processed into new types of predictive models.⁴⁹ These predictive models enable campaigns to micro-target campaign communications and fundraising appeals.⁵⁰ Writing in 2014, Professors Nickerson and Rogers identified three primary types of models: behavior scores, which calculate probabilities that citizens will turn out to vote, donate, volunteer, attend rallies, etc.; support scores, which predict the political leanings of individuals who have not been contacted by the campaign; and responsiveness scores, which predict how individuals may respond to

⁴⁴ Scherer, *supra* note 20.

⁴⁵ *Id.* (quoting an Obama campaign official).

⁴⁶ *Id.*

⁴⁷ Eliana Johnson, *The GOP’s Data Surge*, *Nat’l Rev.* (Jan. 16, 2014, 9:00 AM), <https://www.nationalreview.com/2014/01/gops-data-surge-eliana-johnson/> [<http://perma.cc/EKS2-W64E>].

⁴⁸ See, e.g., Dan Eggen, *Obama Campaign Puts Bo on the Trail*, *Wash. Post* (Apr. 30, 2012), https://www.washingtonpost.com/politics/obama-campaign-puts-bo-on-the-trail/2012/04/30/gIQAgrYsT_story.html?utm_term=.06b2d0d951c0 [<http://perma.cc/G5N2-BZSE>] (“[P]et lovers are just one niche among many, with specific appeals aimed at women, African Americans, students, military families, and countless others.”).

⁴⁹ David W. Nickerson & Todd Rogers, *Political Campaigns and Big Data*, 28 *J. Econ. Persp.*, Spring 2014, at 51, 54.

⁵⁰ *Id.* at 54.

outreach by the campaign, including persuasion efforts.⁵¹ These are broad categories, and the field of data analytics has not stood still in the five years since Nickerson and Rogers wrote their piece.

The 2017 Deep Roots leak discussed above demonstrated the incredible array of modeled scores available to campaigns today.⁵² That leak contained at least forty-six different types of scores, ranging from modeled support for an Obamacare repeal to opinions on whether Democratic leaders should work with President Trump to whether the voter may be a reluctant supporter of Hillary Clinton.⁵³ The data also modeled the race and religion of individuals, sensitive information that is purposefully excluded from most state voter rolls.⁵⁴

These scores, created by predictive models, have values of their own that can vastly exceed that of the raw data. Recent revelations about Cambridge Analytica and Facebook underscore the importance of these models. While Mark Zuckerberg was emphatic in his congressional testimony that Cambridge Analytica has deleted all of the data it took from Facebook,⁵⁵ any predictive models built using that data can still be deployed indefinitely. As one commentator put it, “[m]uch more important are the behavioral models Cambridge Analytica built from the data. Even though the company claims to have deleted the data sets . . . those models live on, and can still be used to target highly specific groups of voters”⁵⁶ In many instances, it is “the models, not the data, where the actual economic value resides.”⁵⁷ This proposition is intuitive. If you were able to choose between knowing a few discrete data points, like the age, race, and religion of an individual, or knowing on a scale of 1-100 how likely that individual is to vote for you without any additional

⁵¹ Id. at 54–55.

⁵² O’Sullivan, *supra* note 41.

⁵³ Id.

⁵⁴ Id.

⁵⁵ Transcript of Mark Zuckerberg’s Senate Hearing, Wash. Post (Apr. 10, 2018), <https://www.washingtonpost.com/news/the-switch/wp/2018/04/10/transcript-of-mark-zuckerbergs-senate-hearing/> [<http://perma.cc/UM3S-6Y2M>].

⁵⁶ Jacob Metcalf, Facebook May Stop the Data Leaks, But It’s Too Late: Cambridge Analytica’s Models Live On, MIT Tech. Rev. (Apr. 9, 2018), <https://www.technologyreview.com/s/610801/facebook-may-stop-the-data-leaks-but-its-too-late-cambridge-analyticas-models-live-on/> [<http://perma.cc/87MY-FC3V>]. Metcalf also raises an interesting, related campaign finance question: If a machine-learning algorithm improves a model using data shared between a campaign and a super PAC, would that constitute coordination? Id.

⁵⁷ Id.

campaign contact, the latter would frequently be more useful and, therefore, more valuable.

Concerningly, the use of this data is not limited to campaigning; many successful candidates continue to access the information in these databases after they take office.⁵⁸ Professor Eitan Hersh revealed that “[w]hen constituents seek information or assistance from a Congress member’s office, their personal information is often linked to the same targeting records that appear in campaign databases.”⁵⁹ As data is shared back and forth between official and unofficial capacities, between constituent services and campaign fundraisers, there does not appear to be any method of ensuring compliance with privacy or campaign finance regulations.

What should be clear from these accounts of the 2012 election and the developments that followed is that the data itself has *value*. This premise should not be surprising; accumulating and monetizing data is the business model of familiar technology companies like Google and Facebook.⁶⁰ To be sure, political campaigns are using this data in ways that do not always resemble the methods of large for-profit corporations, but the data is still being used to increase efficiency and yield better returns on expenditures for both campaigns and corporations.⁶¹ Furthermore, data collection and accumulation, a necessary starting point for data analysis, is a significant undertaking, one that some campaigns

⁵⁸ Eitan D. Hersh, *Hacking the Electorate: How Campaigns Perceive Voters 2–3* (2015).

⁵⁹ *Id.* at 2.

⁶⁰ Caitlin Dewey, 98 Personal Data Points that Facebook Uses to Target Ads to You, *Wash. Post: The Intersect* (Aug. 19, 2016), <https://www.washingtonpost.com/news/the-intersect/wp/2016/08/19/98-personal-data-points-that-facebook-uses-to-target-ads-to-you/> [<http://perma.cc/4XGE-2G3J>]; see also John Naughton, Why Facebook Is in a Hole over Data Mining, *The Guardian* (Oct. 8, 2017), <https://www.theguardian.com/commentisfree/2017/oct/08/facebook-zuckerberg-in-a-hole-data-mining-business-model> [<http://perma.cc/WT-V3-4ZKY>] (“Facebook, like Google, is an extractive company, rather like ExxonMobil or Glencore. It ‘mines’, refines, aggregates and sells its users’ personal information and data trails to advertisers, who then use it to target ads at said users. This data is clearly valuable. At the moment, for example, the company earns nearly \$20 per user per year (in the US and Canada, anyway) by monetising their data.”).

⁶¹ Sasha Issenberg, *Obama Does It Better*, *Slate* (Oct. 29, 2012, 12:54 PM), http://www.slate.com/articles/news_and_politics/victory_lab/2012/10/obama_s_secret_weap_on_democrats_have_a_massive_advantage_in_targeting_and.html [<http://perma.cc/75YJ-42MH>] (“Today, the most advanced political campaigns have in certain respects surpassed consumer marketers in their ability to predict individual preferences . . .”).

may not be able to afford.⁶² This Note discusses how political campaigns engage in assigning a value to this data in Part IV, but it is important to start from the assumption, perhaps not readily apparent, that this data *does* have a financial value. In fact, industry leaders like the World Economic Forum and Bain & Company now consider personal data a new asset class with the same transformational potential as oil.⁶³ If campaigns were to purchase or sell this data on the open market, it would be possible to put a dollar price on it, just as Facebook and Google do.⁶⁴ Similarly, it follows that if the data has financial value, it is likely subject to campaign finance laws and regulations that purport to govern the donation, transfer, and acquisition of items of value.⁶⁵

III. LEGAL FRAMEWORK

This Part of the Note does not attempt to provide a comprehensive overview of the rules and regulations to which political campaigns and other political committees are subject. Instead, Part III focuses narrowly on those laws and regulations that purport to shape how campaign data is valued and shared, with a particular emphasis on the transfer of data between dissimilar committees. The rise of campaign data combined with regulatory inaction has exposed significant gaps in the campaign finance regulatory framework, allowing political campaigns and other groups to sidestep contribution limits.

A. The Federal Election Commission

The FEC is the administrative agency charged with enforcing federal campaign finance laws.⁶⁶ Born in the shadow of Watergate, the FEC was intended to regulate an unruly, corrupted campaign finance landscape.⁶⁷ The FEC is composed of six members, no more than three of whom can

⁶² McDonald et al., *supra* note 37 (“[T]he big data that fuels such efforts comes at a big price.”).

⁶³ World Econ. Forum, *Personal Data: The Emergence of a New Asset Class* 5 (2011), http://www3.weforum.org/docs/WEF_ITTC_PersonalDataNewAsset_Report_2011.pdf [<http://perma.cc/Z9K4-NCN9>].

⁶⁴ Naughton, *supra* note 60.

⁶⁵ See 11 C.F.R. § 100.111 (2018).

⁶⁶ 52 U.S.C. § 30106 (Supp. II 2015).

⁶⁷ Trevor Potter, *Money, Politics, and the Crippling of the FEC: A Symposium on the Federal Election Commission’s Arguable Inability to Effectively Regulate Money in American Elections*, 69 *Admin. L. Rev.* 447, 447, 451–52 (2017). Trevor Potter was an FEC Commissioner from 1991–1995. *Id.* at 448.

be affiliated with the same political party.⁶⁸ The Commission has broad powers to conduct investigations of, and impose penalties for, alleged violations of campaign finance laws, to make, amend, and repeal rules to guide compliance with the law, and to render advisory opinions on real fact patterns upon request.⁶⁹ Notably, the FEC's establishing act requires an affirmative vote of four commissioners to exercise any of these powers.⁷⁰ The requirement of a partisan balance in composition of the Commission combined with a requirement of four votes to exercise powers is a notorious source of considerable gridlock and agency inaction today,⁷¹ but that was not always the case.⁷² For the purposes of this Note, it is important to briefly expand on the rulemaking and advisory opinion powers of the Commission.

The FEC, like many administrative agencies, has broad rulemaking authority. The Commission is explicitly granted the power to “make, amend, and repeal such rules . . . as are necessary to carry out the provisions” of federal campaign finance laws.⁷³ This rulemaking power is subject to the Administrative Procedure Act (“APA”).⁷⁴ The FEC requires four votes of the commissioners to begin the notice and comment process and to adopt any final rule as an official regulation.⁷⁵ The FEC rulemaking process, like that of any administrative agency, is significantly more time-intensive and onerous than the advisory opinion process detailed below.

52 U.S.C. § 30108 grants the Commission the power to issue advisory opinions to answer legal questions based on specific facts presented by an

⁶⁸ 52 U.S.C. § 30106(a)(1) (Supp. II 2015). This provision could technically be used to appoint three Republicans, two Democrats, and one Libertarian, but in practice the President usually nominates three individuals recommended by congressional leaders in each major party. See Robert Lenhard, *What's Next for the FEC?*, *Inside Political Law* (Feb. 20, 2017), <https://www.insidepoliticallaw.com/2017/02/20/what-next-for-the-fec/> [<http://perma.cc/V96Z-9Z99>].

⁶⁹ 52 U.S.C. §§ 30107, 30109 (Supp. II 2015).

⁷⁰ *Id.* § 30106(c).

⁷¹ Eric Lichtblau, *F.E.C. Can't Curb 2016 Election Abuse, Commission Chief Says*, *N.Y. Times* (May 2, 2015), <https://www.nytimes.com/2015/05/03/us/politics/fec-cant-curb-2016-election-abuse-commission-chief-says.html> [<http://perma.cc/V74L-3Z5D>] (quoting FEC Chairwoman Ravel as saying “[t]he likelihood of the laws being enforced is slim”).

⁷² See Potter, *supra* note 67, at 455–58. “In 2006, only 4.2% of votes on enforcement cases—known as ‘Matters Under Review’—closed with one deadlocked vote, but that number was a shocking 37.5% in 2016.” *Id.* at 457.

⁷³ 52 U.S.C. § 30107(a)(8) (Supp. II 2015).

⁷⁴ 5 U.S.C. § 553 (2012).

⁷⁵ 52 U.S.C. § 30106(c) (Supp. II 2015).

individual, group, or candidate.⁷⁶ The process of issuing an advisory opinion begins with the submission of an advisory opinion request, setting forth a transaction or activity that the requesting person is engaged in or planning to engage in.⁷⁷ The Commission then considers the legal issue and, given an affirmative vote of four commissioners, issues an advisory opinion that answers the previously ambiguous legal question.⁷⁸ The advisory opinion process includes opportunities for public notice and comment, but the requirements are not as rigorous as those under the APA.⁷⁹

The person who requested the opinion, as well as any other person involved in activity that is indistinguishable from the facts presented in the request, is entitled to rely on the advisory opinion.⁸⁰ The FEC treats reliance on an advisory opinion in good faith as a safe harbor from sanctions.⁸¹ These advisory opinions constitute a body of law unique to the FEC. New advisory opinions cite old advisory opinions for support,⁸² even though the analysis contained in each opinion is supposed to only apply to the specific facts presented. There is no clear expiration date for the validity of an advisory opinion, though facts and circumstances may change over time, and the Commission can overrule a previous advisory opinion with four votes.⁸³ The relative ease of issuing advisory opinions

⁷⁶ Id. § 30108. The FEC web page on advisory opinions is almost certainly the best source for information on the advisory opinion process. See Fed. Election Comm'n, The Advisory Opinion Process, <https://www.fec.gov/legal-resources/advisory-opinions-process/> [http://perma.cc/C3VZ-2QHE] (last visited Apr. 9, 2019).

⁷⁷ 11 C.F.R. § 112.1(a)–(f) (2018).

⁷⁸ Id. § 112.4(a).

⁷⁹ Compare id. §§ 112.2–112.3 (notice and comment procedures for FEC advisory requests), with 5 U.S.C. § 553 (2012) (APA notice and comment procedures).

⁸⁰ 11 C.F.R. § 112.5(a) (2018). But see Michael M. Franz, The Federal Election Commission as Regulator: The Changing Evaluations of Advisory Opinions, 3 U.C. Irvine L. Rev. 735, 740–41 (2013). Professor Franz argues that both FEC commissioners and the regulated community consider advisory opinions to have a “signaling” effect that extends beyond the specific circumstances of the request, alerting political actors as to how the commissioners would interpret other related questions. Id. A statement from a commissioner appears to confirm this signaling effect. Id. at 741.

⁸¹ 11 C.F.R. § 112.5(b) (2018).

⁸² Franz, *supra* note 80, at 741–43.

⁸³ Id. § 112.6. It is unsettled whether the FEC can use an advisory opinion to rescind or overrule advisory opinions issued more than thirty days ago *sua sponte*. Section 112.6 provides for reconsideration within thirty calendar days of issuance, but there is no regulation or statute that discusses overturning older opinions. In 2016, Commissioner Ann Ravel moved to rescind a 2006 advisory opinion. Ann M. Ravel, Memorandum RE: Proposal to Rescind Advisory

compared to rulemaking has led to increased reliance on advisory opinions to settle difficult legal questions.⁸⁴ After issuance, the advisory opinions have some precedential force, even as the composition of the Commission changes.⁸⁵

The FEC also has the power to investigate and adjudicate violations. Even before partisan gridlock significantly slowed investigations, however, the adjudication process was not the primary form of setting policy and refining rules as it is, for example, in the courts.⁸⁶ Some commentators have argued that this was a deliberate choice made by the

Opinion 2006-15 (TransCanada), No. 16-32-A (Aug. 9, 2016), http://www.fec.gov/agenda/2016/documents/mtgdoc_16-32-a.pdf [<http://perma.cc/G6JH-QBYT>]. The right-leaning Center for Competitive Politics responded, arguing that the FEC is not empowered to rescind advisory opinions except through a formal rulemaking process, while the left-leaning organization Citizens for Responsibility and Ethics in Washington wrote in support of rescinding the earlier opinion. Allen Dickerson, RE: Commissioner Ravel's Proposal to Rescind AO 2006-15, Center for Competitive Politics (Sept. 12, 2016), https://transition.fec.gov/law/policy/ao200615/comments_centerforcompetitivepolitics_09122016.pdf [<http://perma.cc/B6GT-USS6>]; Noah Bookbinder, RE: Proposal to Rescind Advisory Opinion 2006-15, Citizens for Responsibility and Ethics in Washington (Sept. 14, 2016), https://transition.fec.gov/law/policy/ao200615/crewcomment_09142016.pdf [<http://perma.cc/RS46-38CX>]. The Center for Competitive Politics argued that the advisory opinion process in the FEC regulations could only be initiated through an official opinion request detailing specific facts. See *supra* notes 77–79 and accompanying text. The group further argued that prior opinions can only be overturned through a formal rulemaking process. Ultimately, Commissioner Ravel's attempt was unsuccessful, but it remains unclear why. Nevertheless, this may be a distinction without a difference for two reasons. First, the current FEC believes that more recent advisory opinions have the ability to affect the validity of older opinions. Fed. Election Comm'n Op. 2018-06, at 3 (2018), <https://www.fec.gov/files-legal/aos/2018-06/2018-06.pdf> [<http://perma.cc/A9K5-A7RF>] (“[T]his advisory opinion may be affected by subsequent developments in the law including, but not limited to, statutes, regulations, *advisory opinions*, and case law.”) (emphasis added). And in the past the FEC has limited the precedential value of prior advisory opinions in the process of issuing new ones. See, e.g., Fed. Election Comm'n Op. 2011-10, at 3 (2011), <https://www.fec.gov/files-legal/aos/2011-10/AO-2011-10.pdf> [<http://perma.cc/DP4L-P7LJ>]. Second, persons are only entitled to rely on an advisory opinion if they are involved in a specific transaction or activity that is “indistinguishable in all its material aspects” from the facts presented in the opinion. 52 U.S.C. § 30108(c)(1)(B) (Supp. II 2015). The data sharing practices discussed in this Note are clearly distinguishable from the facts presented in any advisory opinion issued to date.

⁸⁴ See, e.g., Statement of Commissioner Steven T. Walther on Final Rules in *Citizens United* Rulemaking (Oct. 9, 2014), https://www.fec.gov/resources/about-fec/commissioners/walther/statements/10-9-14_Statement_of_Commissioner_Steven_T_Walther_on_2014_CU_Rulemaking.pdf [<http://perma.cc/VB2L-78AS>]. The rulemaking process to enforce the *Citizens United* decision concluded nearly four years after the case was decided, well after several relevant advisory opinions had been issued. *Id.*

⁸⁵ The jurisprudence of the FEC as reflected in advisory opinions is an under-explored area.

⁸⁶ Note, Eliminating the FEC: The Best Hope for Campaign Finance Regulation?, 131 Harv. L. Rev. 1421, 1427 (2018).

drafters of the Federal Election Campaign Act (“FECA”).⁸⁷ Allowing policy to be formed through rulemaking and advisory opinions is “forward-looking, effective for formulating policies and for guiding future actors, but less effective for policing past action and remedying past wrongs.”⁸⁸ As a result, advisory opinions and rules appear to have become increasingly important tools through which the FEC regulates campaign finance.

B. Contributions and Expenditures

Contributions, sometimes referred to as donations, are the primary source of funding for political organizations. While contributions are usually thought of as cash given to a campaign, contributions can take many forms. The FECA defines a contribution in relevant part as “any gift, subscription, loan, advance, or deposit of money or anything of value.”⁸⁹ The Act then includes at least fourteen enumerated exceptions to this general rule.⁹⁰ These exceptions run the gamut from the use of real or personal property by volunteers to payments as a condition of ballot access.⁹¹ The Act also categorizes certain types of loans from commercial banks or lines of credit from the candidate as exempt from the definition of contributions, though some loans, such as those discussed below, are considered contributions.⁹² None of the exceptions in the Act apply on their face to data, mailing lists, donor information, or polling information. In fact, it is difficult to see how even a tortured reading of these exceptions could yield that conclusion.

Transfers of campaign data could, at various times, be considered loans, advances, or in-kind contributions. Political committees frequently receive items of value or services as contributions. For example, a supporter could donate a computer to a candidate, a consulting firm could provide strategic advice for free, or a campaign could be allowed to use space in a commercial office building without paying rent. The FECA

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ 52 U.S.C. § 30101(8)(A)(i) (Supp. II 2015).

⁹⁰ *Id.* §§ 30101(8)(B)(i)–(xiv).

⁹¹ *Id.* §§ 30101(8)(B)(ii), (xii).

⁹² Compare *id.* § 30101(8)(A)(i) (general definition of contribution, including loans), with *id.* § 30101(8)(B)(vii) (exemption for commercial bank loans) and *id.* § 30101(8)(B)(xiv) (exemption for lines of credit). See 11 C.F.R. §§ 100.82–.83 (2018) for further detail on commercial bank loans and lines of credit.

captures all of these scenarios under the term “anything of value,” frequently referred to as “in-kind contributions.” In general, for in-kind donations, “the provision of any goods or services without charge or at a charge that is less than the usual and normal charge for such goods or services is a contribution.”⁹³ This definition is further refined in an FEC regulation: “[U]sual and normal charge for goods means the *price* of those goods *in the market* from which they ordinarily would have been purchased at the time of the contribution.”⁹⁴ It is clear that the FEC contemplated that the value of in-kind contributions would be determined by the market, not by a subjective internal assessment. Tellingly, the FEC regulation of in-kind contributions contains a list of examples which includes “mailing lists.”⁹⁵ If a campaign were to receive a mailing list without charge, it would presumably be considered a contribution.

The FEC has also contemplated situations where something is not permanently donated to a campaign but is instead loaned or advanced for a period of time. Unfortunately, neither the FECA nor the FEC have clearly defined the terms “loan” or “advance.” For the purpose of the regulations establishing a loan as a contribution, a “loan includes a guarantee, endorsement, and any other form of security.”⁹⁶ Further, a loan is considered a “contribution at the time it is made and [it] is a contribution to the extent that it remains unpaid.”⁹⁷ Candidate committees can obtain loans at market rates from commercial institutions or from the candidates

⁹³ 11 C.F.R. § 100.52(d)(1) (2018). However, for reasons that have not been established, money that is received by a campaign in exchange for a piece of campaign memorabilia, like a t-shirt or bumper sticker, is also considered a “contribution” by the FEC. Russell Berman, *How One Donor Is Profiting Off the Trump and Sanders Campaigns*, *The Atlantic* (Aug. 26, 2016), <https://www.theatlantic.com/politics/archive/2016/08/how-one-donor-is-profiting-off-the-trump-and-sanders-campaigns/497501> [<http://perma.cc/SKQ8-HYGG>] (discussing “a contributor selling campaign merchandise received as a result of making a contribution to a federal candidate’s campaign committee”). Logically, this makes little sense. If the receipt of an item of value is a contribution only if equal value is not provided in return, then the receipt of cash should not be a contribution if an item of value is given in return. On the other hand, one could argue that the campaign internally values a t-shirt at the cost of production, so a shirt that costs \$5 to produce could be sold for \$25, yielding a contribution of \$20. In either scenario, the full value of the amount paid by the purchaser should not be treated as a contribution. The individual discussed in the above article purchased merchandise with a value that exceeded the contribution limit and then demanded a refund for the amount in excess of the contribution limit, even though he had not returned the merchandise. *Id.* Surely, this is not a result the FEC intended.

⁹⁴ 11 C.F.R. § 100.52(d)(2) (2018) (emphasis added).

⁹⁵ *Id.* § 100.52(d)(1).

⁹⁶ *Id.* § 100.52(b).

⁹⁷ *Id.* § 100.52(b)(2).

themselves that exceed the contribution limit, but, aside from those sources, “[a] loan that exceeds the contribution limitations . . . shall be unlawful whether or not it is repaid.”⁹⁸ This definition, however, does not fully contemplate a loan of an object, which would not be a guarantee, an endorsement, or any other form of security, so it is possible to interpret an in-kind loan as a type of loan not subject to this Act.⁹⁹ Alternatively, all of the FEC’s references to loans in advisory opinions or on the FEC website seem to only contemplate monetary loans, so it is possible that the FEC did not mean to permit in-kind loans.¹⁰⁰

Similar confusion exists with “advance,” but here it is the result of FEC inaction. The regulation attempts no clear definition of “advance.”¹⁰¹ More information on what constitutes an advance is sparse, but the FEC website indicates that an advance is only “[t]he payment by an individual from his or her personal funds . . . for the costs incurred in providing goods or services to, or obtaining goods or services that are used by or on behalf of, a candidate or a political committee.”¹⁰² The emphasis here on “funds” seems to indicate that an advance can only be in the form of cash, not in-kind.

These distinctions are important though tedious. If a loan or an advance can only be in the form of money, not in-kind, then the provisions that attempt to regulate loans or advances are entirely inapplicable to the

⁹⁸ *Id.* § 100.52(b)(1).

⁹⁹ This potential loophole is worth exploring, if only because enterprising political law attorneys are undoubtedly closely parsing this language. Both a plain reading of the statute and the FEC’s subsequent commentary on loans do not appear to adequately address the idea of loans of objects. For example, if I let a candidate borrow a \$1 million Ferrari for the duration of the campaign to create a favorable impression with voters, what must the candidate report? The fair market value of a lease of a Ferrari for six months? Surely not the full value of the car, as if it were donated permanently. What if I loan the candidate the Ferrari for only one day, which happens to be the day before a filing deadline? Could the candidate pawn the car, use the cash to artificially inflate his cash-on-hand number to produce an impressive fundraising report, and then retrieve the car from the pawnshop the next day to return to me? In that case, would the “value” of the loan only be the value of a one-day lease? Murkiness abounds in the regulations’ definitions.

¹⁰⁰ See, e.g., Fed. Election Comm’n, Personal Loans from the Candidate, <https://www.fec.gov/help-candidates-and-committees/handling-loans-debts-and-advances/-personal-loans-candidate/> [<http://perma.cc/NZP8-YVJSJ>].

¹⁰¹ See 11 C.F.R. § 100.52 (2018). It is possible to infer what the regulations may intend to be considered as an “advance” through careful parsing of 11 C.F.R. § 116.5 (2018).

¹⁰² Fed. Election Comm’n, Advances by Individuals, <https://www.fec.gov/help-candidates-and-committees/handling-loans-debts-and-advances/personal-loans-candidate> [<http://perma.cc/G98G-SDJD>] (select “Glossary” on upper navigation bar; then select “Advance”) (citing 11 C.F.R. § 116.5).

transfer of an item of value. The FEC's subsequent treatment of both loans and advances as relating exclusively to monetary funds is strong evidence that items of value cannot be loaned or advanced. The FEC's specific inclusion of "mailing list" in the section that regulates in-kind contributions¹⁰³ is further evidence that the FEC contemplated the receipt of an item of value to exclusively be treated as a contribution, except in situations where that item is paid for by the recipient. Thus, a mailing list that is given to a campaign with the expectation that it will be returned after the election is an in-kind donation, not a loan. Taken one step further, an excel spreadsheet containing modeled scores and donor information would be an item of value that must either be paid for or considered a contribution upon receipt, regardless of future plans to transfer it.

Expenditures are in many ways the mirror image of contributions. Every dollar spent by a campaign is considered an expenditure, yet expenditures are not simply cash outlays. Thankfully, expenditures are much more clearly defined in the regulations and far less important for the analysis here. The FEC has defined an expenditure as "[a] purchase, payment, distribution, loan . . . advance, deposit, or gift of money or anything of value"¹⁰⁴ Like contributions, expenditures can also be in-kind: "[T]he provision of any goods or services without charge or at a charge that is less than the usual and normal charge for the goods or services is an expenditure."¹⁰⁵ And mailing lists are again listed as an example of a potential expenditure.¹⁰⁶ Finally, just as in the definition of contribution, "the usual and normal charge for goods" is again defined as "the *price* of those goods *in the market* from which they ordinarily would have been purchased."¹⁰⁷ Therefore, if a political committee provides a mailing list or a data file to a candidate without charging that candidate the usual and normal price in the marketplace, it should properly be considered an expenditure by the political committee as well as a contribution received by the candidate.

¹⁰³ 11 C.F.R. § 100.52(d)(1) (2018); see *supra* note 95 and accompanying text.

¹⁰⁴ *Id.* § 100.111(a).

¹⁰⁵ *Id.* § 100.111(e)(1).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* § 100.111(e)(2) (emphasis added).

C. Contribution Limits

Federal election law sets strict limits on contributions to some types of political committees, while others organizations, by virtue of Supreme Court rulings, can receive unlimited contributions. This Note does not wade into the debate over whether *Citizens United v. Federal Election Commission*¹⁰⁸ or *SpeechNow.org v. Federal Election Commission*¹⁰⁹ were properly decided.¹¹⁰ This Note assumes independent-expenditure-only political committees, and the accompanying jurisprudence, are here to stay.

The calculation of the contributions that count toward a limit, and the calculation of the limit itself, can often be a Byzantine affair. To keep things simple, this Note uses the example of a candidate running for a single office: President. An individual who wants to donate directly to a presidential campaign has two opportunities: before the primary and before the general election.¹¹¹ Two separate limits apply; the individual can donate \$2,700 for each of those elections for a maximum total of \$5,400 per election cycle.¹¹² A multicandidate Political Action Committee (“PAC”), like EMILY’s List,¹¹³ is allowed to contribute up to \$10,000 to a candidate per election cycle.¹¹⁴ Finally, a candidate or multicandidate PAC is completely prohibited from accepting any direct contributions from an independent-expenditure-only political committee, commonly

¹⁰⁸ 558 U.S. 310 (2010).

¹⁰⁹ 599 F.3d 686 (D.C. Cir. 2010).

¹¹⁰ For discussion of these cases, see, e.g., Richard L. Hasen, *Citizens United* and the Illusion of Coherence, 109 Mich. L. Rev. 581, 582–85 (2011); Michael W. McConnell, Reconsidering *Citizens United* as a Press Clause Case, 123 Yale L.J. 412, 414–19 (2013); Note, Working Together for an Independent Expenditure: Candidate Assistance with Super PAC Fundraising, 128 Harv. L. Rev. 1478, 1480–87 (2015).

¹¹¹ 11 C.F.R. § 110.1(b) (2018). Though this is the proper regulatory text, there is no better resource for this information than the FEC web page on contribution limits, which features an immensely readable chart. See Fed. Election Comm’n, Contribution Limits, <https://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/contribution-limits-candidates/> [http://perma.cc/KXY4-F6UD].

¹¹² Fed. Election Comm’n, *supra* note 111. These limits are indexed for inflation. The amounts used in this Note are for the 2017–2018 election cycle.

¹¹³ EMILY’s List is an influential organization that fundraises substantial amounts to support the candidacies of pro-choice Democratic women. It traditionally operated as a PAC, though recently it formed an ancillary super PAC. See Our History, EMILY’s List, <https://www.emilyslist.org/pages/entry/our-history> [https://perma.cc/PG8A-L6LT] (last visited Nov. 24, 2018).

¹¹⁴ 11 C.F.R. § 110.2(b)(1) (2018).

known as a super PAC.¹¹⁵ But super PACs themselves can accept contributions of unlimited value from other super PACs, multicandidate PACs, or even from a candidate's own committee.¹¹⁶ It is important to note that these limits do not apply to the amount that a particular committee or candidate can spend, as expenditures limits are no longer constitutional,¹¹⁷ nor do they apply to the aggregate amount that an individual can donate to multiple different candidates.¹¹⁸ Contribution limits simply cap the amount that one individual or organization can contribute to one specific candidate or committee.

D. Types of Committees

The two types of committees relevant to this Note are candidate campaign committees and independent-expenditure-only committees (super PACs). Each candidate for a federal office must create and designate one political committee to be their principal campaign committee.¹¹⁹ Principal campaign committees are subject to certain rules and restrictions, including the contribution limits discussed above, and the candidate is considered an agent of the committee.¹²⁰ This type of committee is a statutory creation, and it has many accompanying reporting and accounting requirements.¹²¹ They raise and spend money in all the traditional ways that people think of candidates campaigning. Candidates directly fundraise, the campaign hires staff, the campaign pays for advertising, mailings, and any other expenses necessary for a campaign. Until 2010, the vast majority of political donations and expenditures flowed directly to and from these principal candidate

¹¹⁵ Fed. Election Comm'n Op. 2010-11 (2010), at 2, <https://www.fec.gov/files/legal/aos/2010-11/AO-2010-11.pdf> [<http://perma.cc/R3JJ-JBWY>]; see also Fed. Election Comm'n, Who Can and Can't Contribute, <https://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/who-can-and-cant-contribute/> [<http://perma.cc/4Y56-83HM>] ("Super PACs . . . do not make contributions to candidates.").

¹¹⁶ Fed. Election Comm'n Op. 2010-11, *supra* note 115, at 2; see also Fed. Election Comm'n Op. 2012-34 (2012), at 2, <https://www.fec.gov/files/legal/aos/2012-34/AO-2012-34.pdf> [<http://perma.cc/FYG6-9V33>] (concluding that a principal campaign committee can contribute unlimited funds to a super PAC).

¹¹⁷ *Buckley v. Valeo*, 424 U.S. 1, 39–59 (1976) (*per curiam*); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 365 (2010).

¹¹⁸ *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 193 (2014).

¹¹⁹ 52 U.S.C. § 30102(e)(1) (Supp. II 2015).

¹²⁰ *Id.* § 30102(e)(2).

¹²¹ See generally *id.* § 30102 (outlining record-keeping, preservation of records, and filing requirements).

committees.¹²² While the bulk of political money still flows through these committees, donors increasingly choose to send their money elsewhere.¹²³

After the *Citizens United* ruling, independent political organizations rapidly gained importance. Super PACs were effectively created by the federal courts in *Citizens United*¹²⁴ and *SpeechNow*,¹²⁵ but neither the FEC nor Congress have created a comprehensive regulatory regime for super PACs.¹²⁶ Instead, the FEC has chosen to provide one-off guidance largely via advisory opinions.¹²⁷ Super PACs are a type of political committee that makes only independent expenditures and can solicit and accept unlimited contributions from individuals, corporations, labor organizations, and other political committees.¹²⁸ Independent expenditures are defined in 52 U.S.C. § 30101(17) and 11 C.F.R. § 100.16 as an expenditure (as discussed above) “that is not made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a candidate’s authorized committee, or their agents, or a political party committee or its agents.”¹²⁹ “Coordination” is further defined to mean “in cooperation, consultation or concert with, or at the request or suggestion of, a candidate” or other groups.¹³⁰ The oversimplified rule at the heart of *SpeechNow* and *Citizens United* is that super PACs cannot coordinate with candidates.

Super PACs, of course, also cannot provide contributions to campaigns. The *Buckley* Court noted simply that “controlled or

¹²² See, e.g., Michael E. Hartmann & Michael Watson, Capital Research Center, The Flow of Funding to Conservative and Liberal Political Campaigns, Independent Groups, and Traditional Public Policy Organizations Before and After *Citizens United 2* (Feb. 2018), <https://capitalresearch.org/app/uploads/171128-CRC-CitizensUnited-02.14.2018-v2.pdf> [<http://perma.cc/2Y27-UDF8>] (finding that in the two full election cycles after 2010, total candidate committees’ receipts remained relatively flat while independent expenditures receipts increased approximately 300%).

¹²³ See, e.g., Bob Biersack, 8 Years Later: How *Citizens United* Changed Campaign Finance, OpenSecrets.org (Feb. 7, 2018), <https://www.opensecrets.org/news/2018/02/how-citizens-united-changed-campaign-finance/> [<http://perma.cc/DS4K-5YLY>].

¹²⁴ *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

¹²⁵ *SpeechNow.org v. Fed. Election Comm’n*, 599 F.3d 686 (D.C. Cir. 2010).

¹²⁶ Marian Wang, As Political Groups Push Envelope, FEC Gridlock Gives “De Facto Green Light,” ProPublica (Nov. 7, 2011, 12:16 PM), <https://www.propublica.org/article/as-political-donors-push-envelope-fec-gridlock-gives-de-facto-green-light> [<http://perma.cc/Z65Z-EZJ7>].

¹²⁷ See Fed. Election Comm’n Op. 2012-34, *supra* note 116, at 1; Fed. Election Comm’n Op. 2011-11 (2011), at 1–2, <https://www.fec.gov/files/legal/aos/2011-11/AO-2011-11.pdf> [<http://perma.cc/T6B8-6HYW>]; Fed. Election Comm’n Op. 2010-11, *supra* note 115.

¹²⁸ Fed. Election Comm’n Op. 2011-11, *supra* note 127, at 4.

¹²⁹ 11 C.F.R. § 100.16(a) (2018).

¹³⁰ *Id.* § 109.20.

coordinated expenditures are treated as contributions rather than expenditures.”¹³¹ Legions of law review articles have been written about what coordination looks like in practice,¹³² but at its most basic, this provision, in combination with the contribution limit discussed above, means that a candidate cannot explicitly direct a super PAC to spend money in a particular way, and a candidate’s committee cannot accept a contribution directly from a super PAC. Finally, though they are not political committees, corporations are also prohibited from contributing directly to a candidate.¹³³

E. Polling Information, Supporters Lists, and Mailing Lists

Historically, the FEC has regulated lists of supporters, polling information, and fundraising mailing lists under slightly different regulatory regimes. All of these items, if given to a candidate committee, can be in-kind contributions.¹³⁴ As indicated in Part I, disparate treatment of these items is anachronistic because they no longer exist in discrete databases, but a discussion of the current system is still worthwhile because the FEC has not substantially updated their regulations or opinions.

Polling results are perhaps the easiest place to start. Well-funded political campaigns regularly conduct polls to determine not only how the candidate compares to other candidates in popularity, but also to gauge the potential electorate’s sentiment on a wide variety of issues. The FEC regulations state that “[t]he purchase of opinion poll results by a political committee or other person not authorized by a candidate to make expenditures and the subsequent acceptance of the poll results by a candidate . . . is a contribution in-kind by the purchaser to the

¹³¹ *Buckley v. Valeo*, 424 U.S. 1, 46 (1976) (per curiam).

¹³² See, e.g., Note, Working Together for an Independent Expenditure, *supra* note 110. See generally Bradley A. Smith, Super PACs and the Role of “Coordination” in Campaign Finance Law, 49 *Willamette L. Rev.* 603 (2013). A full discussion of super PAC-candidate coordination is beyond the scope of this Note.

¹³³ 11 C.F.R. § 114.2 (2018); see also Fed. Election Comm’n, Who Can and Can’t Contribute, *supra* note 115 (explaining that corporations cannot contribute directly to campaigns).

¹³⁴ See Daniel P. Tokaji, What Trump Jr. Did Was Bad, But It Probably Didn’t Violate Federal Campaign Finance Law, *Just Security* (July 14, 2017), <https://www.just-security.org/43116/trump-jr-bad-didnt-violate-federal-campaign-finance-law/> [http://perma.-cc/4J8E-5VKC] (“All of these things have ‘substantial market value’ (as the FEC’s General Counsel put it) to election campaigns. Candidates or parties would ordinarily have to shell out money to get them.”).

candidate”¹³⁵ This is true in any instance where the candidate does not refuse the polling information, unless the polling information has been made freely available to the public.¹³⁶ Therefore, an individual who has knowledge of polling results cannot impart any information about that poll to anyone employed by the candidate’s committee without it being an in-kind contribution. The value of that contribution “will be determined by calculating the share of the overall cost of the poll allocable to that particular information,”¹³⁷ subject to the declining value of this information over time.¹³⁸ The FEC also held that it is not simply the poll results themselves that have value; “any data or any analysis of the results” that is imparted to a campaign without payment would itself be an in-kind contribution.¹³⁹ The advisory opinion outlining this position was written in 1990, and there is no subsequent elaboration on how to value analysis of polling results. With the sophisticated data analysis and modeling techniques available today, it is possible, even likely, that the analysis is more valuable than the poll result itself. The FEC does not appear to have addressed a situation where poll results are used to build models that are then shared with campaigns.

The specific written regulation of lists of supporters or activists is sparse to nonexistent. Political campaigns are in many ways volunteer-powered, and having a list of potential volunteers to call is a valuable resource when launching a campaign.¹⁴⁰ No specific regulation appears to mention activist or supporter lists. The FEC has, in one instance, deemed the donation of a list of activists to a campaign as a reportable contribution. Grover Norquist’s organization, Americans for Tax Reform, Inc., gave the 2004 Bush-Cheney Campaign a contact list of activists in thirty-seven states which Norquist had developed over five years at some expense.¹⁴¹ The Bush campaign did not report the receipt of any contribution, and it used this contact list to recruit these activists to help

¹³⁵ 11 C.F.R. § 106.4(b) (2018).

¹³⁶ *Id.* § 106.4(b)(3), (c).

¹³⁷ Fed. Election Comm’n Op. 1990-12, at 2 (1990), <https://fec-dev-proxy.app.cloud.gov/files/legal/aos/1990-12/1990-12.pdf> [<http://perma.cc/EFW5-SUDT>].

¹³⁸ 11 C.F.R. § 106.4(g) (2018).

¹³⁹ Fed. Election Comm’n Op. 1990-12, *supra* note 137, at 2.

¹⁴⁰ Karni, *supra* note 4.

¹⁴¹ Comm’r Michael E. Toner, Statement of Reasons, MUR 5409 (Nov. 23, 2004), <https://www.fec.gov/files/legal/murs/5409/00002BFE.pdf> [<http://perma.cc/43Z3-2TGA>]; First General Counsel’s Report, MUR 5409 (Sept. 1, 2004), at 1–2, <https://www.fec.gov/files/legal/murs/5409/00002BF9.pdf> [<http://perma.cc/A8P4-4665>].

organize other conservatives on behalf of the campaign.¹⁴² The FEC voted 5-1 to find that the Bush campaign's acceptance of the list was an in-kind contribution, because the list was an item of value, and that since the list came from a corporate source (prohibited under the FECA), it was an improper contribution, even if it had been reported.¹⁴³ Unfortunately for future campaigns seeking guidance, the FEC did not engage in valuing the activist list, since even a contribution of \$1 from a corporate source was a violation of the FECA.¹⁴⁴ It is clear, however, that lists of potential supporters, which are valuable to campaigns, are contributions if they are received without reciprocal payment.

Finally, the FEC has considered mailing lists in several advisory opinions but has not defined the term in any regulation. Much of the FEC's jurisprudence in this area stems from a 1981 advisory opinion, which has been cited in at least nine later opinions, including as recently as 2014.¹⁴⁵ Congressman Dellums's committee sought to increase the size of its own mailing list by working with a broker.¹⁴⁶ This broker intended to exchange the Congressman's list with a third party's list.¹⁴⁷ The broker proposed that instead of the Congressman paying the fair market cash value of the information it received from the third party, the Congressman would provide the third party with names of equal value in exchange for the names he was receiving.¹⁴⁸ The FEC sanctioned this practice.¹⁴⁹ In the FEC's own words, "the Commission concludes that if the exchange of names on a contributor list is an exchange of names of equal 'value' according to accepted industry practice, the exchange would be considered full consideration for services rendered."¹⁵⁰ The FEC then

¹⁴² First General Counsel's Report, *supra* note 141, at 11.

¹⁴³ Toner, *supra* note 141; First General Counsel's Report, *supra* note 141, at 3-4.

¹⁴⁴ First General Counsel's Report, *supra* note 141, at 12; see also 11 C.F.R. § 114.2 (2018) (prohibiting corporate contributions). Campaigns of course are not prohibited from purchasing lists (like any other good) from corporations, but they must provide the usual and normal charge for that list or it would be considered a contribution.

¹⁴⁵ Fed. Election Comm'n Op. 1981-46 (1981), <http://saos.fec.gov/aodocs/1981-46.pdf> [<http://perma.cc/9U5R-QB8S>]. The web page for each advisory opinion lists later opinions that cite it, providing support for an argument that the FEC treats these opinions as having precedential force. See Fed. Election Comm'n, AO 1981-46 Summary, <https://www.fec.gov/data/legal/advisory-opinions/1981-46/> [<http://perma.cc/JMU2-4A24>].

¹⁴⁶ Fed. Election Comm'n Op. 1981-46, *supra* note 145, at 1.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 2.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

went one step further. It concluded, “thus, no contribution or expenditure would result and the transaction would not be reportable under the Act.”¹⁵¹

Unfortunately, the legal and logical basis for the conclusion reached in this advisory opinion is unclear because the Commission did not explore the relevant issues in sufficient detail.¹⁵² First, the FEC provided no definition for “mailing list” or “names.” In fact, the opinion alternates between calling the list at issue a “mailing list” and a “contributor list.”¹⁵³ And the Commission sanctioned the swap of “names,” but presumably a name alone is not what the Congressman seeks. What exactly were the parties swapping? Was it a name and a mailing address? A name and a donation history? A name and a phone number? Perhaps it was all of the above, but the Commission only expressly approved the “exchange of names.”¹⁵⁴ Furthermore, the FEC determined that this exchange was not a reportable expenditure or contribution; however, the Commission did not provide any reasoning to explain that determination.¹⁵⁵ If the Congressman had paid cash for the names he was purchasing, it would be an expenditure. But because he was instead making what was, in effect, an in-kind disbursement, the FEC declared that it was not a reportable expenditure. And because this swap was neither a reportable contribution nor an expenditure, it could occur between organizations that typically would not be allowed to provide contributions to campaigns, like super PACs or even corporations.

Advisory Opinion 1981-46’s holdings did not stop there. The FEC went on to sanction a practice that is now called a “deferred swap”¹⁵⁶ by industry professionals but which operates in practice as an advance. The Congressman asked whether he could provide names *now* to another political committee in exchange for *future* use of a corresponding number of names from that committee.¹⁵⁷ The Commission answered in the affirmative, with a limited caveat.¹⁵⁸ The Commission reasoned that this

¹⁵¹ Id.

¹⁵² This advisory opinion is barely more than three full pages and 1,500 words.

¹⁵³ See supra notes 146–151 and accompanying text.

¹⁵⁴ Fed. Election Comm’n Op. 1981-46, supra note 145, at 2.

¹⁵⁵ See id.

¹⁵⁶ This is not to be confused with the financial term.

¹⁵⁷ Fed. Election Comm’n Op. 1981-46, supra note 145, at 2.

¹⁵⁸ Id. (“Based on the assertion that this kind of exchange is an accepted practice in the field of direct mail fundraising, the Commission takes the position that when the Committee provides names to another political committee in exchange for its own future use of a corresponding number of names which are of equal value, that this constitutes an arms [sic] length business transaction between the committees and is not a reportable contribution under

was a common and widely accepted practice in the fundraising field, so it should be permitted by political committees. The only condition the Commission placed on this practice was that the future provision of names must actually take place; if not, this deal would be a contribution to the committee that originally received the names.¹⁵⁹ The FEC further clarified that a transaction of this kind was not even subject to reporting,¹⁶⁰ raising the question of how one would discover that a committee had not fulfilled its end of the bargain in the future. More concerning, the Commission seems to have accidentally or intentionally deregulated what the FECA regulated: an advance. Advances are permissible, as discussed in Section III.B, but political committees must treat advances as outstanding debt until reimbursed.¹⁶¹ Here, a candidate was receiving an advance of a certain number of names and was thereby incurring an obligation to disburse names equal in value in the future. A plain reading of 11 C.F.R. § 116.5 seems to encompass exactly the sort of activity at issue here, but the FEC has chosen to exempt advances of names on a mailing list.

Advisory Opinion 1981-46 opened and promptly sidestepped one final can of worms—valuation of names on mailing lists. The opinion at first appeared to endorse the idea that organizations can swap an equal number of names and call it a swap of equal value.¹⁶² However, it also introduced the idea of swapping a list of names for “multiple use[s] of a smaller number of names or some other variation which the parties believe is an exchange of equal value.”¹⁶³ The Commission then punted on this issue and approved all swaps “of equal ‘value’ according to accepted industry practice.”¹⁶⁴ Subjective valuations performed by interested parties combined with a lack of reporting to expose transactions to public scrutiny present significant and obvious issues.

Later FEC advisory opinions exhibit an increasing willingness to provide *sui generis* treatment for mailing and contributor lists. In 1982, the FEC clarified that a mailing list or a contributor list can constitute the

the Act. Of course, this conclusion assumes the fact that the future use will occur. If that future use does not occur for any reason a contribution may result . . .”).

¹⁵⁹ *Id.* (adding the caveat that it may be a contribution “depending on the circumstances of the particular situation”).

¹⁶⁰ *Id.*

¹⁶¹ 11 C.F.R. § 116.5(c) (2018).

¹⁶² See Fed. Election Comm’n Op. 1981-46, *supra* note 145, at 1.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 2.

“usual and normal charge” for goods if the list is equal in value.¹⁶⁵ The 1983 Commission admitted that the regulation of these lists was atypical, calling it an “exception[.]” to the normal contribution rules.¹⁶⁶ The opinion revealed that “the Commission views such lists as a unique type of asset” because the “list’s value, at least in part, is determined on the basis of the committee’s political fundraising efforts or other political use of the list.”¹⁶⁷ The disparate treatment of these lists was especially notable in 1986 when Congressman Burton’s committee attempted to sell a van that it had previously purchased for travel and advertising.¹⁶⁸ The Commission held that so long as the committee received the usual and normal charge for the van in the marketplace, the funds received would not be considered a contribution.¹⁶⁹ However, the committee was still required to report the proceeds of the sale with itemized information that identified the purchaser as well as the amount and date.¹⁷⁰ The committee argued that this situation was “materially distinguishable” from that of a mailing list, finding that the van was a “depreciated asset . . . acquired for and used by the Committee in two previous election cycles, and that it will be sold outright in a single isolated transaction.”¹⁷¹ Why this reasoning could not be equally true of a mailing list is not addressed in the opinion. Nevertheless, the reporting requirement for the sale of a van stands in stark contrast to the complete lack of required reporting for the sale of a mailing list.

The issue of how to value these mailing lists is one that the FEC has hinted at but never completely answered. In a 1989 advisory opinion, the Commission indicated that the value of goods like mailing lists “must be reasonably capable of objective verification” and that one method of satisfying that requirement was to engage in an independent evaluation.¹⁷²

¹⁶⁵ Fed. Election Comm’n Op. 1982-41, at 2 (1982), <https://www.fec.gov/files/legal/aos/19-82-41/1982-41.pdf> [<http://perma.cc/CZ3S-3RQP>] (quoting 11 C.F.R. § 100.7(a)(1)(iii)(B) (2018)).

¹⁶⁶ Fed. Election Comm’n Op. 1983-2, at 2 (1983), <https://www.fec.gov/files/legal/aos/1983-02/1983-02.pdf> [<http://perma.cc/PB2A-7WRX>].

¹⁶⁷ *Id.*

¹⁶⁸ See Fed. Election Comm’n Op. 1986-14, at 1 (1986), <https://www.fec.gov/files/legal/aos/1986-14/1986-14.pdf> [<http://perma.cc/6FUG-LHQK>].

¹⁶⁹ *Id.* at 3.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² Fed. Election Comm’n Op. 1989-04, at 2 (1989), <https://www.fec.gov/files/legal/aos/1989-04/1989-04.pdf> [<http://perma.cc/9PNY-V8PC>].

It is safe to say that campaigns did not immediately rush off to engage in independent valuations of mailing lists.

In a recent advisory opinion, the FEC extended the lax regulation of mailing and contributor lists to include email lists, and it also permitted the use of super PAC lists by campaign committees. After the *Citizens United* ruling, the group Citizens United sought guidance from the FEC on the rental of an e-mail list.¹⁷³ The group's opinion request established that the group understood email lists to be related but not identical to mailing lists.¹⁷⁴ Yet, the FEC in its reply to this request did not acknowledge any difference, providing analysis that closely tracked previous guidance for mailing lists.¹⁷⁵ There is no evidence that the Commission considered that an e-mail list may contain more or less valuable information than a physical mailing list once did.

The FEC went on to establish that as long as a group receives fair market prices for the use of its list by a federal candidate, it is immaterial whether the group is another campaign or a super PAC.¹⁷⁶ There is no FEC advisory opinion that squarely addresses the question of a permanent transfer of an email list from a super PAC to a federal campaign, but the inference from this opinion is that as long as a super PAC has been provided fair market value for its email lists, a transfer is acceptable.

Valuing these lists is a tricky proposition. The FEC appears to have settled on the cost that the list would fetch in a fair market, but there is an alternative method that it considered and rejected. The alternative is to value the list based on the cost of the list's creation.¹⁷⁷ That is to say, if an organization spends \$15 million on staff, computers, electricity, Internet, office space, and the like to produce a list, the value of the list would be \$15 million. There are, of course, accounting questions to consider with this approach, such as how much of the staff's time was spent on list

¹⁷³ Letter from Michael Boos, Vice President and General Counsel, Citizens United, to Christopher Hughey, Acting General Counsel, Fed. Election Comm'n (Nov. 1, 2010), <https://www.fec.gov/files/legal/aos/2010-30/1155400.pdf> [<http://perma.cc/3DPF-T4R6>].

¹⁷⁴ *Id.* at 2 (“This practice is in many ways an evolution of the traditional practice of renting a mailing list of physical addresses. However, the manner by which the rental of the e-mail subscribers list is conducted is substantially different than the manner in which the rental of a mailing list is conducted.”).

¹⁷⁵ Fed. Election Comm'n Op. 2010-30 (2010), <http://saos.fec.gov/aodocs/AO%202010-30.pdf> [<http://perma.cc/A9KR-FPL9>] (applying a “fair market” value analysis to assess whether list rental is an expenditure).

¹⁷⁶ *Id.* at 3.

¹⁷⁷ Lindsey Powell, Note, Getting Around Circumvention: A Proposal for Taking FECA Online, 58 *Stan. L. Rev.* 1499, 1501 (2006).

creation as opposed to other activities, but those are not unsolvable problems. However, the FEC considered and rejected this approach in 1981.¹⁷⁸

Instead, the FEC has repeatedly emphasized that the only way to value these lists is the price that the market is willing to pay for it.¹⁷⁹ That raises a somewhat existential question: what market?¹⁸⁰ Surely the “market” does not contain political opponents who may be willing to pay more than allies for a list. If an organization is only willing to sell their list to one other organization, can we really say that there is a market for that list and that the list can be fairly valued within that marketplace? The FEC appears content to allow either list brokers or the parties to the transaction themselves to create a limited marketplace and then to assign lists value within that market.¹⁸¹

F. Reporting and Disclosure Requirements

In the wake of the continual erosion of contribution limits, disclosure is increasingly considered the primary method of regulating campaigns. The *Buckley* Court recognized three valuable governmental interests in promoting disclosure: deterring corruption, providing helpful information to voters, and aiding in the enforcement of campaign finance laws.¹⁸² For

¹⁷⁸ Fed. Election Comm’n Op. 1981-53 (1982), <http://saos.fec.gov/aodocs/1981-53.pdf> [<http://perma.cc/N9A7-LEWF>] (allowing a mailing list that cost \$4,216 to generate to be sold for the fair market price of \$4,000).

¹⁷⁹ See, e.g., Fed. Election Comm’n Op. 2010-30, *supra* note 175, at 3.

¹⁸⁰ See, e.g., *id.* (endorsing the practice of renting an email list at a “fair market price” determined by a commercial list brokerage firm); see also Fed. Election Comm’n Op. 2014-06, at 8 (2014), <https://www.fec.gov/files/legal/aos/2014-06/2014-06.pdf> [<http://perma.cc/TT-5P-DYAZ>] (permitting Representative Paul Ryan to rent his campaign committee’s mailing lists for personal use at their fair market value).

¹⁸¹ For a more detailed discussion of the inadequacies of the “market” as a means of establishing the value of this data, see Michael D. Gilbert & Samir Sheth, *Super PACs and the Market for Data*, *Harv. L. Rev. Blog* (Nov. 2, 2018), <https://blog.harvardlawreview.org/super-pacs-and-the-market-for-data/> [<https://perma.cc/V4G8-GSWX>] (“The FEC isn’t blind to this problem, but its solution is inadequate. The FEC requires that the data being sold have an ‘ascertainable fair market value’ and that the parties involved engage in a ‘*bona fide*, arm’s-length transaction.’ As with many areas of campaign finance, enforcement is a challenge. ‘Fair market value’ is notoriously difficult to define, and one wonders how often transactions between candidates and super PACs supporting them are really ‘arm’s-length.’ The FEC has declined to provide instructions on how one should value data, acknowledging in 2004 that ‘[r]easonable persons can disagree about how . . . to determine the value of [a] mailing list.’” (alteration in original)).

¹⁸² Daniel Hays Lowenstein et al., *Election Law: Cases and Materials* 1099 (6th ed. 2017).

this Note, it is most relevant to focus on the *Buckley* Court's third compelling interest: "[R]ecordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limit[s]"¹⁸³ If one of the major purposes of disclosure is providing accurate information to ensure compliance, each exception permitting an undisclosed contribution or expenditure weakens the ability of the FEC or courts to ensure that campaigns are following the law.

Disclosure is provided to voters in several ways, including mandatory disclaimers on political advertisements, but for campaign finance, disclosure primarily means completing FEC forms that require a great deal of information on a political organization's finances.¹⁸⁴ These forms are now made publicly available online, a development that was apparently important to Justice Kennedy.¹⁸⁵ An explanation of reporting procedure is beyond the scope of this Note, but it is important that the reader understand that modern campaigns and other political committees are accustomed to completing regular, accurate reports of virtually all receipts and disbursements for any purpose, along with a broad array of other information.¹⁸⁶ This information is then used both to inform the electorate and to ensure compliance with campaign finance laws. Without these filings, our campaign finance laws are virtually unenforceable.

IV. THE PROBLEM

A. Super PACs Play by Their Own Rules

The complete lack of transparency surrounding transfers of campaign data disguised as "mailing lists" is a significant issue that has been

¹⁸³ *Buckley v. Valeo*, 424 U.S. 1, 67–68 (1976) (per curiam).

¹⁸⁴ An FEC web page lists all forms required for FEC filings by a candidate committee. Fed. Election Comm'n, Registration and Reporting Forms, <https://www.fec.gov/help-candidates-and-committees/forms> [<http://perma.cc/EL9F-VTH2>]. For an example of the level of detail required in these filings, see Fed. Election Comm'n, Instructions for FEC Form 3 and Related Schedules, <https://www.fec.gov/resources/cms-content/documents/fecfrm3i.pdf> [<http://perma.cc/ZW3K-WHXN>].

¹⁸⁵ *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 370 (2010) ("With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters.").

¹⁸⁶ See, e.g., Fed. Election Comm'n, Registration and Reporting Forms, *supra* note 184 and accompanying text.

compounded by the rise of super PACs. The Supreme Court has determined that disclosure is important for providing regulators and the public with the information necessary to combat corruption.¹⁸⁷ Furthermore, the Court has upheld contribution limits as applied to candidates as a tool for preventing corruption or the appearance thereof.¹⁸⁸ The mailing list loophole threatens to undermine these principles at every turn by allowing super PACs to raise and spend unlimited amounts of money to assemble valuable data that is then transferred to candidates under a veil of secrecy.

The concern with coordination between super PACs and candidates is not theoretical; it has manifested itself in every election cycle since *Citizens United* and *SpeechNow.org* were decided in 2010. The 2016 election cycle saw super PACs take on an unprecedented role in the electoral process.¹⁸⁹ Individuals who had not yet formally declared their candidacy helped establish super PACs with the sole purpose of getting themselves elected, and the FEC tacitly endorsed this tactic.¹⁹⁰ Candidates legally assisted these super PACs in raising unlimited amounts of money that was then spent to support their own bid for office.¹⁹¹ And crafty lawyers have consistently pushed the envelope, knowing that the likelihood of FEC enforcement is slim.¹⁹²

¹⁸⁷ See *Citizens United*, 558 U.S. at 370; *Buckley*, 424 U.S. at 67. While scholars debate the efficacy of disclosure, it is clear that disclosure underpins the Court's holdings, at least for now. Michael D. Gilbert, Campaign Finance Disclosure and the Information Tradeoff, 98 Iowa L. Rev. 1847, 1850–51 (2013).

¹⁸⁸ See *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 191 (2014); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 (2000); *Buckley*, 424 U.S. at 58.

¹⁸⁹ See, e.g., Alex Isenstadt, Jeb Bush's \$100M May, Politico (May 8, 2015), <https://www.politico.com/story/2015/05/jeb-bush-right-to-rise-super-pac-campaign-117753> [<http://perma.cc/68DG-ZS2Z>].

¹⁹⁰ See Fed. Election Comm'n Op. 2015-09 (2015), <http://saos.fec.gov/aodocs/2015-09.pdf> [<https://perma.cc/5N2A-B4T9>] (declining to provide answers to the Senate Majority PAC and House Majority PAC's specific requests for guidance on the issues, effectively allowing these practices to continue—note the lack of response to questions presented 1, 2, and 3).

¹⁹¹ See, e.g., Isenstadt, *supra* note 189; see also Note, Working Together for an Independent Expenditure, *supra* note 110, at 1479–89 (explaining how candidates and donors navigate FEC regulations to raise money for “independent” organizations).

¹⁹² Matea Gold, It's Bold, but Legal: How Campaigns and Their Super PAC Backers Work Together, Wash. Post (July 6, 2015), https://www.washingtonpost.com/politics/here-are-the-secret-ways-super-pacs-and-campaigns-can-work-together/2015/07/06/bda78210-1539-11e5-89f3-61410da94eb1_story.html?utm_term=.afe6b981bf7f [<http://perma.cc/SF3D-KKNY>] (“[I]f the agency launches an investigation, it would be a first. Since 2010, the FEC has yet to open an investigation into alleged illegal super PAC coordination, closing 29 such complaints.”). It would be a mistake to assume that this state of affairs is exploited only by

The 2016 cycle saw super PACs performing many of the functions traditionally handled by candidate committees.¹⁹³ The Carly Fiorina campaign was supported by a super PAC, Carly for America, which handled the task of identifying and contacting voters.¹⁹⁴ Right to Rise, Jeb Bush's super PAC, conducted data gathering work on behalf of the campaign, among other responsibilities.¹⁹⁵ Allies of Jeb Bush even discussed a plan to ensure that the super PAC and candidate committee had the same enhanced voter file data and raw polling information, enabling both entities to target voters in unison.¹⁹⁶ And the Ready for Hillary PAC existed almost solely to gather data on potential supporters and then transfer it to the official campaign.¹⁹⁷

As discussed in Part II, the data collected by these super PACs potentially has immense value, and, as discussed in Part III, it can only be exchanged without being designated a contribution or expenditure if it is swapped with another data set of equal fair market value. The FEC has never addressed the exchange of "data," but organizations that are swapping data must be relying on the guidance for mailing lists. Surely then, campaigns that wish to avoid illegal contributions rigorously ensure that the data swapped is of equal value?

In practice these swaps, even between organizations that both intend to maximize the value of the data received, are extremely informal with little

one side of the aisle. For example, super PACs supporting Hillary Clinton spent approximately 150% more than super PACs supporting Donald Trump. Anu Narayanswamy et al., *How Much Money Is Behind Each Campaign?*, Wash. Post (Feb. 1, 2017), <https://www.washingtonpost.com/graphics/politics/2016-election/campaign-finance> [<http://perma.cc/C3-3X-AGNT>]; see also Matea Gold, *How a Super PAC Plans to Coordinate Directly with Hillary Clinton's Campaign*, Wash. Post (May 12, 2015), <https://www.washingtonpost.com/news/post-politics/wp/2015/05/12/how-a-super-pac-plans-to-coordinate-directly-with-hillary-clintons-campaign> [<http://perma.cc/3B9H-VA75>] (detailing brazen, open exploitation of a loophole to allow direct coordination between a candidate and a super PAC).

¹⁹³ See Reid J. Epstein & Rebecca Ballhaus, *Roles of Presidential Super PACs Expanding*, Wall St. J. (Apr. 30, 2015, 7:49 PM), <https://www.wsj.com/articles/roles-of-presidential-super-pacs-expanding-1430437766> [<http://perma.cc/55CE-Q3UR>].

¹⁹⁴ *Id.*

¹⁹⁵ Thomas Beaumont, *Jeb Bush Prepares to Give Traditional Campaign a Makeover*, AP News (Apr. 21, 2015), <https://apnews.com/409837aa09ee405493ad64a94b8c2c3d> [<http://perma.cc/BN2S-7362>].

¹⁹⁶ Maggie Haberman, *Jeb Bush Aides Consider Data-Selling Plan*, N.Y. Times (Mar. 27, 2015, 10:48 AM), <https://www.nytimes.com/politics/first-draft/2015/03/27/jeb-bush-aides-consider-data-selling-plan/> [<http://perma.cc/2DQR-SD4G>].

¹⁹⁷ Phil Mattingly, *Inside the First Super-PAC Dedicated to Collecting Data All About You*, Bloomberg Politics (Apr. 15, 2015, 12:30 PM), <https://www.bloomberg.com/news/features/2015-04-15/the-care-and-feeding-of-the-ready-for-hillary-list>.

to no assurances of valuation and little specification of what is actually being exchanged. These swaps also reflect a willingness to trade information far beyond traditional “mailing lists.” The generic contract used by a major party committee for swaps with a candidate committee simply exchanges “computer tabulations and computer column codes in opinion poll results received by the Campaign, and voter identification data received by the Campaign” for “voter targeting data in precincts to be specified by the [party committee].”¹⁹⁸ Another contract between a party committee and a campaign swaps a “volunteer model, derived from information regarding individuals that volunteered . . . that predicts the likelihood that an individual will volunteer” for the campaign’s “information regarding its volunteers.”¹⁹⁹ Yet another contract swaps a certain number of records containing “email, first name, last name, address, city, state, zip code, and phone” for “a number of records equal to the amount of new records received by the organization.”²⁰⁰ Finally, one veteran political fundraiser recounted simply emailing a spreadsheet of a certain number of individuals’ personal data to his counterpart on another campaign, who then emailed back a spreadsheet with an identical number of individuals, no contracts involved. It should be clear from these examples that list swaps are not the neat, orderly process envisioned by the FEC that ensures both sides receive fair market value. Instead, data swaps are the Wild West, and a complete lack of disclosure prevents substantive oversight.

B. The FEC Considered a Fix

The FEC’s abdication of responsibility for transfers of data was not always a foregone conclusion. In September 2003, the Commission published a Notice of Proposed Rulemaking (“NPRM”) on Mailing Lists of Political Committees in the Federal Register.²⁰¹ The NPRM requested comments on proposed additions to the “rules covering the sale, rental, and exchange of political committee mailing lists.”²⁰² The proposed rules

¹⁹⁸ [Party Committee] Data Swap Agreement (on file with author).

¹⁹⁹ Voter File Swap Agreement (on file with author).

²⁰⁰ Data Exchange Agreement (on file with author).

²⁰¹ Mailing Lists of Political Committees, 68 Fed. Reg. 52,531 (proposed Sept. 4, 2003) (to be codified at 11 C.F.R. pts. 110, 113, 9004, 9034), https://www.fec.gov/resources/legal-resources/rulemakings/nprm/mailling_lists/fr68n171p52531.pdf [<http://perma.cc/9W9W-8F-4C>].

²⁰² *Id.*

covered situations in which an organization seeks to rent lists,²⁰³ sell lists,²⁰⁴ or exchange them for lists of equal value²⁰⁵—a wish list for reformers. The rules proposed specific, objective valuation criteria that must be met before any transaction could proceed.²⁰⁶ The rules would also have imposed record-keeping requirements of all transactions, including a valuation of the lists involved.²⁰⁷ Finally, the rules would require that all transactions be bona fide arm's length transactions, and the Commission even questioned whether list exchanges between closely aligned committees could ever be at arm's length.²⁰⁸

These proposed rules were discussed at an October 2003 public hearing that featured an impressive lineup of attorneys from both sides of the aisle.²⁰⁹ There were four categories of proposed rules to be discussed at this hearing, but discussion of the mailing list rules occupied the majority of the time.²¹⁰ The transcript reveals that the commissioners had a keen understanding of the potential dangers of leaving mailing lists unregulated. For example, Commissioner Mason voiced concern about

²⁰³ Id. at 52,532.

²⁰⁴ Id. at 52,533.

²⁰⁵ Id. at 52,535.

²⁰⁶ Id. at 52,532 (“A mailing list that is frequently rented on the open market is likely to be listed and described in a catalogue such as the *SRDS Direct Marketing List Source*. For each of thousands of lists, the catalogue states the number of names on the list, the price per thousand names, the minimum number of names that must be ordered, fees for addressing services, the amount of the commission, and credit policies. If a political committee does not routinely rent out its mailing list, it might not be listed in such a catalogue. However, even if a mailing list does not appear in a catalogue, a reasonable rental price might be ascertainable so long as the valuator is aware of the significance of various factors in the market (*e.g.*, he or she knows how lists with comparable characteristics are valued, as well as the pricing ranges for comparable lists). The price may depend upon such factors as how recently the names were updated for accurate addresses, how responsive the individuals on the mailing list have been to other similar solicitations (particularly recent solicitations), the income level of the individuals, and the classification according to list industry sector or other subject matter.”). These criteria are a dramatic departure from the current practice that often involves treating all names as fungible.

²⁰⁷ Id. at 52,534.

²⁰⁸ Id. at 52,535.

²⁰⁹ Press Release, Fed. Election Comm'n, Schedule Set for October 1 Public Hearing on FEC Regulations (Sept. 30, 2003), <http://sers.fec.gov/fosers/showpdf.htm?docid=1104> [<http://perma.cc/3N6S-7QJH>]. The presenters included Robert F. Bauer, future White House Counsel for President Obama, and Donald F. McGahn II, future White House Counsel for President Trump.

²¹⁰ Transcript of Fed. Election Comm'n Public Hearing, In the Matter of: Candidate Travel, Multi-Candidate Committee Status, Biennial Contribution Limits (Oct. 1, 2003), <http://sers.fec.gov/fosers/showpdf.htm?docid=1103> [<http://perma.cc/W4V8-84FE>].

the practice of deferred list swaps.²¹¹ Notably, in response to a question, Marc Elias revealed that the Democrats rarely use list brokers for list exchanges, leaving open the question of how the parties ensure the lists being exchanged are of equal value.²¹²

Perhaps most importantly, at least four commissioners posited the transfer of mailing lists as a method of circumventing contribution limits. Vice Chairman Smith asked about a situation in which allied groups, like EMILY's List and the Democratic Senatorial Campaign Committee, exchange a list. He queried:

Would the problem be that such groups would give you a list for more than you would give them? In other words, the problem . . . [is] that somebody who wants to help your committee out is going to give you more than you're giving them

. . . .

. . . [I]f they're limited on giving cash, perhaps names is an adequate substitute to accomplish their mission.²¹³

In response, the General Counsel for the National Republican Senatorial Campaign explained that the self-interest of both organizations was the only thing ensuring an equal value exchange.²¹⁴ Chairperson Weintraub followed up on this example, asking whether an organization that wanted to bolster the odds of a long-shot candidate might be incentivized to “lowbal[I] on the price of a mailing list, give them a good mailing list and give it to them really cheap”²¹⁵ Bob Bauer replied that the value of the mailing lists is a primary asset of some organizations like political parties, and there is no evidence that organizations are willing to part with their assets for less than their value.²¹⁶ Two other commissioners questioned whether a party or organization that wanted to

²¹¹ Id. at 161–62 (“[T]here was news coverage of the fact that the NRCC was exchanging names with Judicial Watch, and that Judicial Watch had built up a large balance owed. . . . [I]n the normal commercial marketplace, it is not unusual to have name exchanges going on where large balances are built up and owing, and maybe sometimes those never get paid back on a one-for-one basis.”).

²¹² Id. at 162 (“I’m not sure that, especially with exchanges, that [using list brokers] is the rule at all. In fact, I’d say it’s the exception.”).

²¹³ Id. at 44–46.

²¹⁴ Id. at 45.

²¹⁵ Id. at 48–49.

²¹⁶ Id. at 50.

assist a particular candidate but which had already contributed the maximum amount could exchange a list of high value for a list of lower value to bypass these limits.²¹⁷ In all of these exchanges, the attorneys appearing in front of the Commission relied on the self-interest of the parties to the transaction to prevent less than fair market value list transfers.

What is most striking about the transcript is that every attorney present argued against regulation. One month later, the FEC terminated the rulemaking process without adopting any new rules.²¹⁸ In the information provided with the notice, the FEC wrote that “the regulated community does not perceive a need for further regulation of political committee mailing list transactions.”²¹⁹ It is unusual, to say the least, to allow the regulated community to determine whether or not they would like to be regulated. As one commentator would write later of some of the attorneys present at this meeting, “Clearly, many of those who do represent SuperPACs, political parties, candidates and special interests like having a compliant, or at least ineffective, FEC.”²²⁰

The attorneys for the major parties and other political organizations present got their wish. It appears that the Commission accepted the proposition that long-standing groups, like the Sierra Club or the NRA, are the only organizations that maintain valuable, exclusive lists and they therefore have a powerful incentive to protect the market values of those lists.²²¹ In other words, the market was working as intended. While this may have been true in 2003, it is no longer true in the age of super PACs that are established to support one particular candidate and cease to exist after the election.²²²

²¹⁷ See *id.* at 139, 145–48.

²¹⁸ Mailing Lists of Political Committees: Notice of Disposition; Termination of Rulemaking, 68 Fed. Reg. 64,571 (Nov. 14, 2003), <https://www.gpo.gov/fdsys/pkg/FR-2003-11-14/pdf/FR-2003-11-14.pdf> [<http://perma.cc/YW5L-FXNZ>].

²¹⁹ *Id.* at 64,572.

²²⁰ Lawrence M. Noble, In Search of Qualified FEC Commissioners, The Campaign Legal Ctr. Blog (June 30, 2015), <http://www.campaignlegalcenter.org/news/blog/search-qualified-fec-commissioners> [<http://perma.cc/JD8M-TSKU>].

²²¹ Transcript of Fed. Election Comm’n Public Hearing, *supra* note 210, at 42–55.

²²² As this Note completed the editing process, a dispute within the Democratic Party spilled into the public. The Democratic National Committee announced a plan to store voter data with a for-profit organization, emulating a strategy already employed by the Republican National Committee. Alex Thompson, ‘We Have a Crisis’: Democrats at War over Trove of Voter Data, *Politico* (Dec. 6, 2018, 5:09 AM), <https://www.politico.com/story/2018/12/06/democratic->

*C. Three Illustrations**1. A Hypothetical Donor*

The first illustration is a hypothetical situation that should be familiar to anyone who has donated to a political campaign. It aims to illustrate how this list data appears from the perspective of the individual whose personal data is being transferred like a commodity.

Mark watches a debate featuring a candidate for his district's state house of representatives seat on local television, and he decides to check out the candidate's campaign website. He likes what he sees and decides to sign up to receive email updates. The next day, he receives an email from the campaign asking him to click to sign a petition showing his support for an issue he cares about; it only takes him a minute to click and enter his name. A few days later, perhaps inspired by advertisements he sees for the candidate around the web, Mark returns to the website and decides to make his first ever political contribution of \$100.

A week later Mark receives an email from the candidate for his district's state senate seat, asking for a \$25 donation. Next month, he receives a phone call from a volunteer for a U.S. Senate candidate, asking him to confirm his support and to join other volunteers at a phone bank next weekend. Soon, Mark is receiving fundraising emails and phone calls from congressional campaigns and political action committees all across the country that he has never heard of.

The scope of this practice is something that is difficult to grasp, largely because, as previously noted, there are no required records. One enterprising individual decided to track this swapping during the 2016 election.²²³ While the results are anecdotal, they demonstrate the scale of the problem. For example, a new email address shared with the Scott Walker campaign received unsolicited emails from Jeb Bush, Ben Carson, Senator Ted Cruz, then-Governor John Kasich, Senator Ron Johnson, and the Great America PAC.²²⁴ An email address shared with the Marco Rubio campaign received emails from Ted Cruz, Ron Paul, Mia Love, Trey Gowdy, along with John Bolton's PAC, two national Republican groups,

national-committee-voters-data-1045995 [http://perma.cc/VXW2-WDRD]. This new structure is motivated, in part, by the necessity to "swap data seamlessly with outside groups." *Id.*

²²³ Jose Pagliery, *Here's How Presidential Candidates Sell Your Personal Information*, CNN Money (July 7, 2016, 12:02 AM), <http://money.cnn.com/2016/07/07/news/presidential-candidate-sell-donor-data/index.html> [http://perma.cc/RWF8-YDQ9].

²²⁴ *Id.*

and the American Veterans Center.²²⁵ And this is only the visible result of trading email lists that are then used by other campaigns for direct fundraising solicitations. We may never know how the other data collected and shared by these organizations is used to target individuals in other ways.

2. *John Ashcroft and Spirit of America PAC*

In June 1996, U.S. Senator John Ashcroft filed to run for reelection in 2000, creating a campaign committee titled “Ashcroft 2000.”²²⁶ In July 1996, Ashcroft helped form a leadership PAC,²²⁷ Spirit of America PAC (“SOA”).²²⁸ Starting in January 1998, SOA developed a mailing list of at least 80,000 potential contributors by sending out solicitations signed by Ashcroft at a cost of over \$1.7 million.²²⁹ Six months later, SOA formed a contract with John Ashcroft personally to give him “all rights to the [SOA] mailing list in exchange for the use of his name and likeness.”²³⁰ Then, in January 1999, Senator Ashcroft gave his official campaign committee, Ashcroft 2000, the right to use this mailing list.²³¹ Following

²²⁵ *Id.*

²²⁶ Ellen L. Weintraub et al., Fed. Elections Comm’n, Statement of Reasons Regarding MUR 5181, at 2 (2003), <https://www.fec.gov/files/legal/murs/5181/000005FA.pdf> [<http://perma.cc/DKK6-ZV7M>].

²²⁷ A leadership PAC is a type of unaffiliated political committee which is “directly or indirectly established, financed, maintained or controlled by a candidate for Federal office or an individual holding Federal office but which is not an authorized committee of the candidate.” 11 C.F.R. § 100.5(e)(6) (2017). “Leadership PACs have traditionally been used by legislative leaders to contribute to the campaigns of other members of Congress as a way of gaining a party majority and earning the gratitude of their colleagues.” Trevor Potter, *Where Are We Now? The Current State of Campaign Finance Law*, in *Campaign Finance Reform: A Sourcebook* 5, 7 (Anthony Corrado et al. eds., 1997). In contrast to super PACs, leadership PACs *do* have contribution limits and can coordinate with candidates and campaigns. See Fed. Election Comm’n, Types of Nonconnected PACs, <https://www.fec.gov/help-candidates-and-committees/registering-pac/types-nonconnected-pacs/> [<http://perma.cc/YWA6-CCX4>] (stating that leadership PACs are subject to the FECA).

²²⁸ Weintraub et al., *supra* note 226, at 2.

²²⁹ *Id.*; Walter Pincus & Thomas B. Edsall, Ashcroft Not Queried on Campaign Funds, *Wash. Post* (Dec. 20, 2003), <https://www.washingtonpost.com/archive/politics/2003/12/20/ashcroft-not-queried-on-campaign-funds/4372845a-6446-455b-ad13-c9431a1caeb8/> [<http://perma.cc/NH7X-22MS>]. This dollar amount should be considered in historical context. The cost of political campaigning has risen sharply in the last few decades. See, e.g., Michael Scherer et al., *The Incredible Rise in Campaign Spending*, *Time* (Oct. 23, 2014, 12:39 PM), <http://time.com/3534117/the-incredible-rise-in-campaign-spending/> [<http://perma.cc/4PPF-PQL8>] (estimating that between 1984 and 2012 the cost of a bid for U.S. Senate rose 495%).

²³⁰ Weintraub et al., *supra* note 226, at 2.

²³¹ *Id.*

an investigation, the FEC lacked the requisite four votes to find probable cause of a campaign finance violation for this transfer.²³²

The John Ashcroft example occurred before *Citizens United*, but it raised questions that are still unanswered. The FEC deadlocked 3-3 on whether Ashcroft was guilty of a campaign finance violation for his role in the transfer of assets from the PAC to his campaign committee.²³³ This practice raises an interesting question. A political organization is generally prohibited from transferring assets to candidates without receiving compensation.²³⁴ However, the 2016 election cycle saw an unprecedented wave of future candidates delaying their formal announcements to avoid triggering candidacy and the accompanying restrictions and reporting requirements.²³⁵ Could a prospective candidate delay declaring candidacy until a super PAC has created a valuable data file and then gifted it to the individual who is at the time a private citizen? Candidates are allowed to contribute an unlimited amount to their own candidate committees, so theoretically the individual could then declare their candidacy and immediately transfer the data file to the official campaign. We have not yet seen a candidate openly attempt this maneuver, but it can only be a matter of time.

3. *Ready for Hillary*

By many accounts, former Secretary of State Hillary Clinton was actively preparing for a potential presidential campaign in the summer of 2013, despite not making any public announcements.²³⁶ But earlier, in January 2013, supporters of Clinton had created a new independent-expenditure-only super PAC, Ready for Hillary super PAC.²³⁷ This organization raised and spent funds to enable “list-building, digital

²³² Id. at 4.

²³³ Id. at 1. Ashcroft’s campaign and leadership PAC were found guilty of other violations of campaign finance law. Id. at 4.

²³⁴ 11 C.F.R. § 113.1(g)(3) (2017).

²³⁵ Marc E. Klepner, Note, When “Testing the Waters” Tests the Limits of Coordination Restrictions: Revising FEC Regulations to Limit Pre-Candidacy Coordination, 84 *Fordham L. Rev.* 1691, 1693 (2016).

²³⁶ See, e.g., Maggie Haberman, Hillary Clinton’s Shadow Campaign, *Politico* (Jan. 5, 2014 9:01 PM), <https://www.politico.com/story/2014/01/hillary-clinton-2016-shadow-campaign-101762> [<http://perma.cc/4LWJ-SG35>].

²³⁷ Lee E. Goodman, Fed. Election Comm’n, Statement of Reasons Regarding MUR 6775, at 1 (Mar. 29, 2016), <http://eqs.fec.gov/eqsdocsMUR/16044390002.pdf> [<http://perma.cc/-8J9C-FXTF>]. See generally Fed. Election Comm’n Op. 2010-11, supra note 115 (summarizing the law surrounding super PACs).

advertising and on-the-ground organizing,' with particular emphasis on cultivating a database of Clinton supporters around the country."²³⁸ The express purpose of the organization was to "make the contact list available to the presidential campaign if Clinton ultimately ran for office."²³⁹ To go along with a supporters list, Ready for Hillary was also creating a "50-state direct-mail and voter targeting program."²⁴⁰

On April 12, 2015, Hillary Clinton officially announced her campaign for president.²⁴¹ By then, the Ready for Hillary PAC (renamed Ready PAC to comply with a requirement that super PAC names not include the name of candidates)²⁴² had collected information on between three and four million supporters.²⁴³ Even before the announcement, Ready PAC was investigating how to get this information into the hands of the official campaign.²⁴⁴ Similarly, the eventual campaign manager and campaign chairman were discussing how to obtain the information after the campaign launch.²⁴⁵ Two days after the official campaign launch, a Bloomberg Politics reporter asked campaign officials how they intended to obtain the data from Ready PAC, and the campaign declined to provide details.²⁴⁶ By May 2015, the official Clinton campaign committee had received the full Ready PAC list.²⁴⁷

²³⁸ Goodman, *supra* note 237, at 1–2 (footnote omitted).

²³⁹ *Id.* at 2.

²⁴⁰ Haberman, *supra* note 236.

²⁴¹ Amy Choick, *Hillary Clinton Announces 2016 Presidential Bid*, N.Y. Times (Apr. 12, 2015), <https://www.nytimes.com/2015/04/13/us/politics/hillary-clinton-2016-presidential-campaign.html> [<http://perma.cc/XNW7-KZAB>].

²⁴² See 11 C.F.R. § 102.14 (2017).

²⁴³ Estimates of the number of names on the list varied, and the campaign did not provide concrete figures. See, e.g., Karni, *supra* note 4.

²⁴⁴ Liz Kreutz, *Ready for Hillary, Emily's List in Talks to Join Social Media Forces*, ABC News (Jan. 19, 2015), <http://abcnews.go.com/Politics/ready-hillary-emilys-list-talks-join-social-media/story?id=28278994> [<http://perma.cc/9HTX-U8BF>].

²⁴⁵ E-mail from Robby Mook to Lyn Utrecht et al., Re: Options for an exploratory or future campaign committee to obtain a direct mail or email list (Dec. 18, 2014, 12:45 AM), <https://wikileaks.org/podesta-emails/emailid/9529> [<http://perma.cc/ZAA8-GF6A>]. There are readily apparent ethical concerns about using emails obtained and released by Wikileaks. There are also reliability and validity concerns. However, I choose to include them here, because I believe that they provide insight into the legal rationale deployed by campaigns that is unlikely to be revealed through any other avenue. Furthermore, none of the information revealed in these emails is of critical importance to my argument.

²⁴⁶ E-mail from Marc Elias to Teddy Goff et al., Re: ready for hillary list swap question (Apr. 14, 2015, 8:40 PM), <https://wikileaks.org/podesta-emails/emailid/44510> [<http://perma.cc/BZ92-ZC9N>].

²⁴⁷ Karni, *supra* note 4.

Ready for Hillary PAC's list building and swapping aspirations were well reported in the popular press during the last presidential election cycle. Behind the scenes, the future campaign attorneys were wrestling with how to legally obtain the list. In January 2014, the PAC rented the email list owned by Hillary's 2008 campaign in what was widely seen as an attempt to update the old list's information.²⁴⁸ In December 2014, the future campaign's attorneys offered the campaign a few options for obtaining the new Ready for Hillary list.²⁴⁹ There were three options: payment of fair market value,²⁵⁰ transfer via an intermediary, or a list exchange.²⁵¹ The old list contained roughly 1.56 million names which had been valued at an average of \$2.62 per name for donors, \$2.00 per name for an "Online Activist," and \$1.00 per name for an "Online Supporter."²⁵² A third party had valued the sale of the entire list of 1.56 million names in 2009 at approximately \$2.55 million.²⁵³ The future campaign then wanted to obtain a list of roughly four million names from Ready for Hillary, which using the same rough valuation criteria, could be worth approximately \$6.53 million. The campaign ruled out purchasing the list at fair market value and instead pursued other, cheaper options.

The two remaining options were a transfer from Ready PAC to another super PAC, which could then engage in a list swap with the campaign, or a direct list swap between Ready PAC and the campaign. Attorneys ruled out the latter option, because Ready PAC was planning on ceasing operations and therefore would not have any subjective value for the list it received in exchange.²⁵⁴ It appears that the parties decided to go with

²⁴⁸ Zeke J. Miller, *The Real Reason Hillary Rented Her Email List: To Get It Back*, *Time* (Jan. 7, 2014), <http://swampland.time.com/2014/01/07/the-real-reason-hillary-rented-her-email-list-to-get-it-back> [<http://perma.cc/AS3U-DB54>].

²⁴⁹ E-mail from Lyn Utrecht to Robby Mook et al. (Dec. 17, 2014, 9:35 PM), <https://wikileaks.org/podesta-emails/emailid/9529> [<http://perma.cc/8M95-BVWJ>].

²⁵⁰ Would it really have been fair market value, though? See *id.* ("For reference, the following is a breakdown of what the existing HRC list has been purchased and rented for. Our goal in these transactions was a different goal than now—the prior goal was to maximize the payments. [Ready for Hillary]'s lists would not have to be valued at these same rates.")

²⁵¹ Options for an Exploratory or Future Campaign Committee to Obtain a Direct Mail or Email List from Ready for Hillary, Attachment of E-mail from Cheryl Mills to John Podesta et al. (Dec. 17, 2014, 5:19 PM), <https://wikileaks.org/podesta-emails/emailid/40985> [<http://perma.cc/U9WD-926G>] [hereinafter Options].

²⁵² E-mail from Lyn Utrecht to Robby Mook et al., *supra* note 249.

²⁵³ *Id.*

²⁵⁴ Options, *supra* note 251 ("[T]he FEC assumes that both committees are ongoing entities with a legitimate use for the lists received in exchange, thus resulting in equal value to each committee and therefore resulting in no contribution. If an exchange occurs close to

the former option. Ready PAC gave the data²⁵⁵ to a super PAC, WOMEN VOTE!,²⁵⁶ which then transferred it to the campaign by way of a list swap.²⁵⁷ Ready PAC then discharged almost all of its staff and ceased most operations.²⁵⁸ All told, Ready PAC raised and spent over \$16 million on its mission.²⁵⁹

It is likely that we will never know the amount or the value of the data that was transferred from Ready PAC to the official campaign via an intermediary.²⁶⁰ We will also likely never know what WOMEN VOTE! received in exchange from the swap with the campaign. It is, of course, possible that the campaign provided fair market value in data in return. But WOMEN VOTE!'s FEC filings do not reveal any receipts from or

termination of one of the committees, the fair market value test cannot be met because one committee has no future use for the names since it is terminating.”).

²⁵⁵ Ready PAC appears to have only handed over a copy of the data, not exclusive use. There is no source that directly stands for this claim, but Ready PAC later received rental income for its list. See, e.g., Itemized Receipts, FEC Report of Receipts and Disbursements for Ready PAC (2015), <http://docquery.fec.gov/cgi-bin/fecimg/?201606019017458796> [<https://perma.cc/9WXJ-MUJM>].

²⁵⁶ WOMEN VOTE! is EMILY's List's independent expenditure arm. See Priorities USA and EMILY's List Madam President Campaign Announce Partnership to Mobilize Women Voters, EMILY's List (Aug. 17, 2015), <https://www.emilyslist.org/news/entry/priorities-usa-emilys-list-madam-president-campaign-announce-partnership-to> [<http://perma.cc/DR5L-EF4S>].

²⁵⁷ Annie Karni, Pro-Clinton Group Teaming Up with EMILY's List, Politico (Aug. 17, 2015, 10:56 AM), <https://www.politico.com/story/2015/08/priorities-usa-emilys-list-hillary-clinton-121428> [<http://perma.cc/CDS5-KUUZ>].

²⁵⁸ Dave Levinthal, Inside Hillary Clinton's Big Money Cavalry, NBC News (Apr. 7, 2016, 5:00 AM), <https://www.nbcnews.com/news/investigations/inside-hillary-clinton-s-big-money-cavalry-n552081> [<http://perma.cc/HVJ7-ZGU2>].

²⁵⁹ See *id.*; Fed. Election Comm'n, Campaign Finance Data for Ready PAC (2013–2016), available at <https://www.fec.gov/data/committee/C00540997/?tab=summary&cycle=2016> [<https://perma.cc/K5MY-N4BZ>] and <https://www.fec.gov/data/committee/C00540997/?tab=summary&cycle=2014> [<https://perma.cc/T536-JZ7B>]. Unfortunately, the FEC segregates their database into two-year election cycles, but the reports filed by the organization follow a more irregular pattern, and no single document exists that aggregates all of an organization's contributions and expenditures.

²⁶⁰ After the election, the campaign would go on to rent (not sell or donate) its data and software to the Democratic National Committee for at least \$1.65 million. Walker Bragman & Michael Sainato, The Democratic Party Is Paying Millions for Hillary Clinton's Email List, FEC Documents Show, The Intercept (Apr. 25, 2018, 12:30 PM), <https://theintercept.com/2018/04/25/hillary-clinton-email-dnc-democratic-party/> [<http://perma.cc/6G64-G5-PU>]. It is impossible to know how much of that value can be traced back to Ready PAC, but it is an indication of the immense value of this data.

disbursements to Hillary for America, as one would expect.²⁶¹ In June 2015, an FEC complaint was filed by a conservative group, alleging that this data exchange was coordination between Ready PAC and Hillary for America, but there has been no further information on the matter.²⁶² FEC enforcement actions are confidential until thirty days after resolution,²⁶³ so this matter is not necessarily over. But until the FEC begins enforcement of even the most overt attempts to skirt contribution limits, Ready for Hillary has laid down a blueprint for super PACs everywhere to follow.²⁶⁴

V. PROPOSALS FOR REFORM

This Part offers four proposals for reform. In contrast to the parts above, these proposals are succinct, because while the problems are complicated, the solutions are sometimes very simple. In fact, these proposals could all be summarized in one phrase: regulate data like any other asset. These proposals are not a comprehensive solution, but they are a good place to start.

A. Independent Valuation

The FEC should mandate independent valuation of goods that are transferred from candidate committees. Setting aside momentarily the question of whether the disbursement of an asset should be considered an

²⁶¹ See Fed. Election Comm'n, Campaign Finance Data for WOMEN VOTE! (2015–2016), <https://www.fec.gov/data/committee/C00473918/?cycle=2016> [<http://perma.cc/S45R-FT-PH>].

²⁶² FACT Files Complaint with FEC Regarding Hillary Clinton, FACT (June 1, 2015), <https://www.factdc.org/single-post/2015/06/02/FACT-Files-Complaint-With-FEC-Regarding-Hillary-Clinton> [<http://perma.cc/V3L3-XFFK>].

²⁶³ See 11 C.F.R. § 111.20 (2018).

²⁶⁴ As this Note finished the editing process, a new group launched to support potential 2020 Democratic presidential candidate Beto O'Rourke. According to Politico, the "Draft Beto" group "has committed to transfer its email list, social media accounts, and volunteer roster to any presidential campaign." Alex Thompson, New 'Draft Beto' Group Launches to Rally Support for 2020 Bid, Politico (Dec. 18, 2018, 11:42 AM), <https://www.politico.com/story/2018/12/18/draft-beto-group-2020-bid-1067927> [<http://perma.cc/8CWR-H2-TE>]; see also David Siders, Beto Skips Town While His Brain Trust Sketches 2020 Plans, Politico (Jan. 16, 2019, 3:46 PM), <https://www.politico.com/story/2019/01/16/orourke-advisers-2020-plans-1105967> [<http://perma.cc/H6G2-9A7S>] (noting that the co-chair of "Draft Beto" stated, "We want people to have a place to go who are Beto supporters My hope is that we're able to hand over a list of those people when we're done on the draft side for him to tap into."). I expect many other potential candidates will benefit from similar groups.

expenditure or be reported in some other way, the process of obtaining a valuation would create a paper trail that could prove useful in any potential investigation. And knowing the market value of data would reduce the willingness of a campaign to exchange it for a data set of unknown value, even if this valuation is never made public. Furthermore, this valuation must not come from a political organization that is closely aligned with the candidate's party. Valuations that are offered by the candidate, the recipient, or the middleman cannot be trusted in this political environment. A valuation should only be trusted if it is provided by an independent organization with no stake in the matter. The FEC considered and abandoned this requirement in the 2003 rulemaking process.²⁶⁵ To effect this change, the FEC would likely have to follow the rulemaking process in the APA, but this minor administrative burden on campaigns should survive a constitutional challenge, given *Buckley's* compelling interests.²⁶⁶

B. Required Disclosure

Organizations that are required to disclose contributions and expenditures to the FEC should be required to disclose the acquisition or transfer of data, including data received as part of a swap of equal value. The FEC has repeatedly held that a swap of one mailing list for another is not a reportable contribution or expenditure by either party to the transaction.²⁶⁷ It does not automatically follow, however, that because something is not a contribution or an expenditure, it need not be reported. In fact, the FEC has contemplated and dealt with this issue on their reporting forms. For example, Line 15 on the reporting form for authorized committees, known as FEC Form 3, is specifically for receipts that are not contributions, like dividends and interest payments.²⁶⁸ Likewise, Line 21 exists for disbursements that do not fit into any other category.²⁶⁹

The only thing preventing campaigns from reporting the value of in-kind receipts and disbursements of data is an FEC advisory opinion that

²⁶⁵ See *supra* notes 201–218 and accompanying text.

²⁶⁶ See *supra* note 183 and accompanying text.

²⁶⁷ See *supra* Section III.E.

²⁶⁸ Fed. Election Comm'n, Instructions for FEC Form 3 and Related Schedules at 7, <https://www.fec.gov/resources/cms-content/documents/fecfrm3i.pdf> [http://perma.cc/XRF9-FEDK].

²⁶⁹ *Id.*

tells them they do not have to report them.²⁷⁰ Making this sort of information available to the public is vital to restore trust in our electoral system. The voters, not the FEC, should decide what is and is not important. It would only take four commissioners to adopt a new advisory opinion reversing this exemption. When a super PAC sends a campaign a data file worth \$6.5 million, regulators and the public have the right to know, even if that super PAC got a data file worth the same amount in return.

C. End Deferred List Swaps

Candidate committees should be prohibited from engaging in deferred list swaps. A deferred list swap is little more than a disguised loan or advance to a campaign, except it lacks any formality or regulation. The fact that obligations like these are completely unreported by campaigns runs the risk of creating perverse incentives, undetectable to voters. Campaign finance laws exist in part to prevent actual or perceived corruption, but it is difficult to imagine a more corrupting force than a completely unreported debt owed to a super PAC or corporation funded by one donor.

Right now, a candidate could legally accept data valued at \$10 million from a super PAC and provide nothing in return for two years. Suppose that the candidate did not have data worth \$10 million to swap back after election day. The only option left would be to treat that data as an in-kind contribution, which is expressly prohibited. Allowing deferred list swaps opens up the potential for massive campaign finance violations that only come to light after the election. The deferred list swap is an advisory opinion creation and therefore can be banned in the same way, by a vote of four commissioners.

D. Defining Data

The FEC should conduct a systematic reevaluation of the advisory opinions and regulations that govern campaign data to ensure that they reflect modern campaign data practices. Much of the discussion in this Note has been linguistically tortured, because it is rarely clear what the FEC means by terms like “mailing list,” “polling results,” or “contributor list.” Not only are these terms never clearly defined in regulations, but

²⁷⁰ Fed. Election Comm’n Op. 1981-46, *supra* note 145, at 2.

they also do not reflect modern campaign practices.²⁷¹ The FEC should simply collapse all of these terms into the term “data.” This inherently broad term is instantly recognizable and captures the full scope of campaign practices.

We have not yet seen an advisory opinion or enforcement action that addresses the transfer of an analytical model, built using a combination of all of the above plus more. Can campaigns legally swap models? Would it be a reportable receipt or disbursement? These questions must be answered, because campaigns are already swapping these tools. It is important that the FEC provide clear guidance to campaigns in advance, rather than passively allowing campaigns to push the limits.

VI. CONCLUSION

Data is an extremely valuable asset to political organizations, one that is only appreciating in value. As more and more campaigns realize the transformative potential of data-driven decision-making, we can expect data to play an increasingly prominent role in shaping campaign strategy. The FEC now faces a critical juncture in regulating the virtually limitless transfer of data, with both privacy issues and campaign finance issues at stake. While it is easy to imagine the current political climate resulting in privacy-focused political data regulations, we should not lose sight of the campaign finance issues. If history is any indication, the 2020 election cycle will shatter new fundraising and spending records. Rather than relying on politically contentious enforcement actions, the FEC should act now to prospectively close these loopholes and enforce the law.

²⁷¹ See *supra* Part II.