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If it Looks Like a Super PAC, Acts Like a Super PAC, and is Restricted Like a Super PAC, Then Treat it Like a Super PAC: Why Contribution Limits on a Hybrid PAC's Independent-Expenditure Arm are Impermissible

Jacob N. Kipp

IF IT LOOKS LIKE A SUPER PAC, ACTS LIKE A SUPER PAC, AND IS RESTRICTED LIKE A SUPER PAC, THEN TREAT IT LIKE A SUPER PAC: WHY CONTRIBUTION LIMITS ON A HYBRID PAC'S INDEPENDENT-EXPENDITURE ARM ARE IMPERMISSIBLE

Jacob N. Kipp*

* J.D. Candidate, William & Mary Law School, 2017; B.A., Indiana University, 2013. I would like to thank my parents, Brian and Elaine Kipp, who have contributed more to my academic success than they would ever admit, and my fiancée, Rachel Bond, who inspires me every day.

INTRODUCTION

Citizens United v. FEC[1] is a decision some have decried as the worst Supreme Court ruling of modern times—a democracy-destroying precedent that was the product of conservative judicial activism.[2] A mere six years after that decision, however, the most prominent display of American democracy, the presidential election cycle, is

[1] 558 U.S. 310 (2010).

[2] *See* Jeffrey Rosen, *Ruth Bader Ginsburg Is an American Hero*, NEW REPUBLIC (Sept. 28, 2014), https://newrepublic.com/article/119578/ruth-bader-ginsburg-interview-retirement-feminists-jazzercise [http://perma.cc/M4JQ-BXM2] (detailing Justice Ginsburg's desire to overrule *Citizens United* because the decision "strays so far from what our democracy is supposed to be"); *see also* Ramsey Cox, *Franken:* Citizens United *Is One of the 'Worst' Rulings*, HILL (Sept. 9, 2014, 12:27 PM), http://thehill.com/blogs/floor-action/senate/217105-franken-citizens-united-decision-is-worst-ever [http://perma.cc/336A-J2MZ] (reporting Sen. Al Franken's view that *Citizens United* is among the Supreme Court's worst decisions).

showing that those concerns likely were over-exaggerated.[3] Contrary to the fears of reformers who have predicted our democracy's downfall, the 2016 primary election cycle was marked by significant anti–super PAC sentiment and calls for campaign finance reform.[4] Donald Trump and Bernie Sanders, both populist candidates, disavowed super PACs,[5] and the candidate with perhaps the most super PAC support struggled to remain relevant and ultimately dropped out of the race.[6] The 2016 presidential primaries are proof that the money available because of *Citizens United* simply does not guarantee political success. What *Citizens United* does allow, though, is another avenue for the expression of First Amendment political speech rights. Rights that, with the passing of Justice Antonin Scalia, may quickly come under attack.

The 2016 presidential election cycle has shown that campaign finance issues are still in the public consciousness, but Justice Scalia's unexpected death in February 2016 has shown that campaign finance issues are still of legal relevance too. Justice Scalia, an ardent, stalwart supporter of political free speech rights, was part of the five-justice voting bloc that decided many of the most influential campaign finance decisions of the last decade.[7] Those decisions struck down many of the contribution limits that campaign finance reformers would like to see reinstated.[8] Now, however,

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[3] Jack Shafer, *Three Cheers for Citizens United!*, POLITICO (Aug. 25, 2015), http://www.politico.com/magazine/story/2015/08/citizens-united-2016-121739 [http://perma.cc/A43Z-E7HM] ("But these expectations that big money would float the best-financed candidate directly to the White House have yet to materialize this campaign season.").

[4] *See* Peter Overby, *Presidential Candidates Pledge to Undo 'Citizens United.' But Can They?*, NPR (Feb. 14, 2016, 6:00 AM), http://www.npr.org/2016/02/14/466668949/presidential-candidates-pledge-to-undo-citizens-united-but-can-they [http://perma.cc/AQC8-H9VU] (discussing the salience of political spending in the 2016 election cycle for both ends of the ideological spectrum).

[5] *See id.* ("Like [Democrat Sen. Bernie] Sanders, [Republican] Donald Trump has made money in politics one of the biggest targets of his campaign . . . .").

[6] *See* Shafer, *supra* note 3 ("On the Republican side, Jeb Bush has collected $120 million in donations to lead all Republicans in the money sweepstakes, yet he trails Donald Trump badly in the polls."); *see also* David S. Bernstein, *How Dynasties Sank the GOP and the Democrats*, POLITICO (Feb. 28, 2016), http://www.politico.com/magazine/story/2016/02/2016-elections-jeb-bush-dynasties-213682 [http://perma.cc/75UN-3967] (discussing Jeb Bush's impact on super PACs and his inability to turn super PAC support into a successful campaign, which he ultimately suspended in mid-February 2016).

[7] *See, e.g.*, Associated Press, *Scalia on Unlimited Political Ads: Turn off TV*, CBS NEWS (Jan. 21, 2012, 5:04 PM), http://www.cbsnews.com/news/scalia-on-unlimited-political-ads-turn-off-tv/ [http://perma.cc/K4XQ-BZQZ] (discussing Scalia's role in the *Citizens United* decision and his "the more the merrier[ ]" approach to political free speech).

[8] *See, e.g.*, Ian Millhiser, *Scalia: Blame Congress for My Decision to Turn Campaign Finance into the Wild West*, THINK PROGRESS (Jan. 23, 2012, 9:50 AM), https://thinkprogress.org/scalia-blame-congress-for-my-decision-to-turn-campaign-finance-into-the-wild-west-a1a9cb9e7291#.f7201a2v3 [http://perma.cc/QPV8-2EUU] (discussing how "*Citizens United* is best remembered for opening the floodgates to corporate money in politics").

despite Justice Scalia's careful and patient tailoring of his dissenting opinions up until the time he was finally able to join the Court's majority in the mid-2000s,[9] matters of campaign finance and restrictions on political speech have once again taken center stage. The First Amendment freedoms for which Justice Scalia fought for so long could be overturned by a reform-friendly appointee or a zealous lower court seeking to take advantage of a deadlocked Supreme Court.[10]

This Note addresses a campaign finance issue on which the circuit courts are split, namely, the permissibility of contribution limits on a hybrid PAC's independent-expenditure arm. Part I of this Note provides a general background of the relatively complex campaign finance law involved in the circuit split. Hybrid PACs and other related organizations are entirely legal entities created either by statute or judge-made law. Those entities are then subject to a variety of controls and restrictions including, most importantly for this Note, contribution limits. Part II examines the Supreme Court's campaign finance jurisprudence from *Buckley v. Valeo*[11] through *McCutcheon v. FEC*[12] and evaluates the likely outcome of future decisions based on past precedent and the Justices' leanings. Part II then scrutinizes the closely drawn standard as applied to a hybrid PAC's independent-expenditure arm. Finally, Part III suggests that the Tenth Circuit Court of Appeal's decision in *Republican Party of New Mexico v. King*[13] should be recognized as the best way to resolve the current circuit split to ensure that overbroad, prophylactic contribution limits are not used to unconstitutionally burden First Amendment political speech rights.

I. BACKGROUND

A. Political Action Committees

A political action committee (PAC) is an organization tailor-made for engaging in political speech.[14] PACs emerged in the mid-1940s because of two prominent

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[9] *See* FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 457 (2007) (holding that the justifications for restricting corporate political speech do not apply to issue advocacy, partially overturning *McConnell v. FEC*, 540 U.S. 93 (2003), and taking the first major step toward *Citizens United*).

[10] *See* Richard L. Hasen, *How Scalia's Death Could Shake up Campaign Finance*, POLITICO (Feb. 14, 2016), http://www.politico.com/magazine/story/2016/02/antonin-scalia-death-campaign-finance-reform-213633 [http://perma.cc/GQJ4-MC3Q] (noting ways in which Justice Scalia's death could impact campaign finance jurisprudence in the near future).

[11] 424 U.S. 1 (1976) (per curiam).

[12] 134 S. Ct. 1434 (2014).

[13] 741 F.3d 1089, 1103 (10th Cir. 2013) (holding that a hybrid PAC's dual nature does not indicate an inherent corruption concern).

[14] *See* L.B. WHEILDON, *Campaign Spending and the Law*, *in* EDITORIAL RESEARCH REPORTS 1946, at 385–406 (1946).

federal laws that limited political involvement: one that restricted individual political contributions and another that banned labor union contributions.[15] Since that time, PACs have proliferated and become the preeminent vehicle for organizations—from corporations to special interest groups—to engage in political speech.[16] PACs today, unlike early PACs, are subject to many restrictions.[17] These restrictions largely depend on which organizations, if any, are associated with a PAC and what sort of political activity a PAC will engage in.[18]

A federal PAC can be formed as a separate segregated fund (SSF) or a non-connected committee.[19] SSFs and non-connected committees have differing reporting[20] and solicitation requirements,[21] as well as other regulatory differences.[22] A non-connected PAC may act either as a candidate-expenditure (traditional) PAC or an independent expenditure-only[23] (super) PAC. An SSF, however, may not act as a

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[15] *See id.* (considering early PACs to be the result of loopholes in federal campaign finance law, specifically the Smith-Connally Act of 1943, which banned labor union election campaign contributions, and the Hatch Act of 1940, which capped individual political contributions).

[16] *Are Super PACs Harming U.S. Politics?*, U.S. NEWS & WORLD REP., http://www.usnews.com/debate-club/are-super-pacs-harming-us-politics [http://perma.cc/75LA-623P] (discussing Super PAC activity post–*Citizens United*).

[17] *See generally Super PACs*, CTR. FOR COMPETITIVE POL., http://campaignfreedom.org/external-relations/super-pacs/ [http://perma.cc/QQ8S-QMCE] (describing the regulations to which Super PACs are subject).

[18] *Id.*

[19] *What Is a Political Action Committee?*, FED. ELECTION COMMISSION, http://www.fec.gov/ans/answers_pac.shtml#pac [http://perma.cc/V89K-H39G] (describing SSFs as "political committees established and administered by corporations, labor unions, membership organizations or trade associations . . . [that] can only solicit contributions from individuals associated with connected or sponsoring organization[,]" and non-connected committees as "committees . . . not sponsored by or connected to any of the aforementioned entities and . . . free to solicit contributions from the general public").

[20] *Separate Segregated Funds and Nonconnected PACs*, FED. ELECTION COMMISSION, http://www.fec.gov/pages/brochures/ssfvnonconnected.pdf [https://perma.cc/X4FR-TAYT] (noting that a non-connected PAC "must report all its operating and solicitation expenses[,]" but an SSF does not need to report "fundraising or administrative expenses" if the connected organization pays).

[21] *Id.* (noting that non-connected PACs may accept contributions from the general public, whereas SSFs are statutorily limited to certain donors, and are more restricted than non-connected PACs in the manner in which they are permitted to solicit contributions).

[22] *Id.* (indicating other variations between regulatory requirements for SSFs and non-connected PACs, including registration and naming requirements).

[23] *Independent Expenditure-Only Committees*, FED. ELECTION COMMISSION, http://www.fec.gov/press/press2011/ieoc_alpha.shtml [http://perma.cc/JT6K-DZCT] (defining an independent expenditure as "spending by individuals, groups, political committees, corporations or unions expressly advocating the election or defeat of clearly identified federal candidates. These expenditures may not be made in . . . cooperation with, . . . a candidate, the candidate's campaign or a political party").

super PAC.[24] These PAC designations are functions of federal election law and do not reflect the additional federal and state laws by which political groups also must abide.[25] This Note will utilize federal PAC designations unless otherwise noted.[26]

B. Contribution Limits

Contribution limits are one way the states and federal government combat electoral corruption.[27] *Buckley v. Valeo* formed the basis for how contribution limits are evaluated.[28] Contributions, unlike expenditures, are considered to be more general in nature and farther removed from the core of political speech.[29] This does not mean, however, that contributions are not due First Amendment protection.[30]

Contribution limits, despite invoking the First Amendment, are subject to intermediate, not strict, scrutiny.[31] Contribution limits only need to be closely drawn to serve a sufficiently important state interest.[32] As long as contribution is not banned outright, contribution limits are generally permissible[33] because the act of contributing is

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[24] *See* Stop This Insanity Inc. Emp. Leadership Fund v. FEC, 761 F.3d 10, 17 (D.C. Cir. 2014), *cert. denied*, 135 S. Ct. 949 (2015) (noting that an SSF is a "vehicle capable of soliciting without transparency [ ]" and that those organizations that "wish[ ] to solicit freely" as super PACs do, "must do so in the light[ ]").

[25] *See Compliance with Laws Outside the FEC's Jurisdiction*, FED. ELECTION COMMISSION, http://www.fec.gov/pages/brochures/compliance_nonfec.shtml [http://perma.cc/9D8P-FMSN] (listing numerous laws beyond the FEC's jurisdiction with which political committees must comply, perhaps most importantly, IRS tax law and state election law). Note that confusion may arise from overlapping, or differing, state and federal terminology. *See, e.g.*, *Campaign Contribution Limits Per Cycle 2015–2016 Election Cycle*, ARIZ. SECRETARY ST., n.21, http://www.azsos.gov/sites/azsos.gov/files/campaign_contribution_limits_7-21-2015.pdf [http://perma.cc/9KD3-VLFQ] (noting the former use of the term "Super PAC" under ARIZ. REV. STAT. § 16-905(G), which was in conflict with the federal usage).

[26] State laws are included later in this Note to show how PAC speech is regulated, not to show the difference between federal and state PAC formation or terminology.

[27] Expenditure limits and disclosure requirements are additional ways the government combats corruption. *See, e.g.*, 11 C.F.R. § 109.32 (2016) (federal coordinated party expenditure limits); ALA. CODE § 17-5-8 (2015) (Alabama candidate and PAC campaign finance disclosure requirements).

[28] *See* 424 U.S. 1, 20–21 (1976) (per curiam).

[29] *Id.* ("By contrast with a limitation upon expenditures . . . , a limitation upon the amount that any one person or group may contribute . . . entails only a marginal restriction upon the contributor's ability to engage in free communication.").

[30] *See infra* Part III.

[31] The *Buckley* Court attempted to apply the "exacting scrutiny" standard under which restrictions on First Amendment speech rights are heavily scrutinized. *See* 424 U.S. at 16. Expenditure and contribution limits, however, were ultimately evaluated under a bifurcated standard based on the perceived value of each form of speech. *See id.* at 25 (indicating that contributions are more like associational rights rather than pure speech rights).

[32] *See id.* at 25.

[33] *But see* Randall v. Sorrell, 548 U.S. 230, 237 (2006) (striking down Vermont's contribution limits because those limits were too low).

considered to be the important speech element, not the amount of the contribution.[34] There are notable exceptions to the general permissibility of contribution limits. Contribution limits to independent-expenditure groups are impermissible,[35] as are aggregate contribution limits.[36]

The contribution limits most important to this Note are those limits on individual-to-candidate contributions, individual-to-PAC contributions, and PAC-to-candidate contributions. There are no individual-to-super-PAC contribution limits since those committees do not coordinate with or contribute to candidates.[37] Thus, PAC contribution limits will indicate limits on traditional PACs unless otherwise specified.

1. Federal Contribution Limits

The Federal Election Campaign Act of 1974 (FECA) and the Bipartisan Campaign Reform Act of 2002 (BCRA) form the backbone of federal election contribution law.[38] Individuals may contribute nearly twice as much to traditional PACs as compared to candidate committees.[39] PAC-to-candidate contributions vary depending on whether that PAC supports multiple candidates.[40] A multicandidate PAC may contribute nearly twice as much to candidate committees as a non-multicandidate PAC.[41]

2. State Contribution Limits

Contribution limits vary greatly by state. Some states have flat contribution limits, whereas others have tiered limits based on the office for which a candidate is running.[42] Some states do not have contribution limits at all.[43] Some states apply contribution limits only for certain contributions, such as PAC-to-candidate contributions but not

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[34] *See Buckley*, 424 U.S. at 21.

[35] *See* SpeechNow.org v. FEC, 599 F.3d 686, 694 (D.C. Cir.) (holding that there is no compelling government corruption concern to permit contribution limits on independent expenditure-only groups), *cert. denied*, 562 U.S. 1003 (2010).

[36] *See* McCutcheon v. FEC, 134 S. Ct. 1434, 1456 (2014) (plurality opinion) (holding that aggregate contribution limits violate the First Amendment).

[37] *See SpeechNow.org*, 599 F.3d at 694–95 (noting that, just as independent expenditures cannot be corrupt, neither can contributions to independent expenditure-only groups).

[38] *See* 52 U.S.C. § 30101(8)(A) (2012) (definition of contribution). *See generally* 52 U.S.C. § 30116 (2012) (contribution limits).

[39] *See Contribution Limits for 2015–2016 Federal Elections*, FED. ELECTION COMMISSION, http://www.fec.gov/pages/brochures/contrib.shtml [http://perma.cc/XG8X-24UF] (listing federal individual-to-PAC $5,000 limit and individual-to-candidate $2,700 limit).

[40] *See id.* (listing federal non-multicandidate PAC-to-candidate $2,700 limit and multicandidate PAC-to-candidate $5,000 limit).

[41] *See id.*

[42] *See generally* STATE LIMITS ON CONTRIBUTIONS TO CANDIDATES 2015–2016 ELECTION CYCLE, NCSL (2015) [hereinafter STATE LIMITS].

[43] *See id.*

individual-to-PAC contributions.[44] There is a significant spectrum in the way states address political contributions.

The least restrictive contribution states are those that have no contribution limits. Most states that allow unlimited contributions do so for three important categories: individual-to-candidate, PAC-to-candidate, and individual-to-PAC contributions.[45] There are currently thirteen states that allow unlimited contributions, twelve of which are unlimited for all individual and PAC contributions.[46]

The moderately restrictive contribution states are those that have limits on contributions to candidates but not on contributions to PACs. These states vary greatly in how candidate contributions are limited. All do allow, however, for unlimited individual-to-PAC contributions.[47] There are currently sixteen states that focus limits on individual-to-candidate and PAC-to-candidate contributions.[48]

The most restrictive contribution states are those that limit both contributions to candidates and contributions to PACs.[49] These states, similar to the moderately restrictive states, vary greatly in the way candidate contributions are limited. There are currently twenty-one states that limit contributions at more than one juncture.[50]

C. Hybrid PACs

A hybrid PAC, as the name suggests, is a PAC created by combining into a single organization the candidate contribution ability of a traditional PAC and the

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[44] *See, e.g.*, DEL. CODE ANN. tit. 15, §§ 8010, 8012 (West 2016) (detailing contribution limits for candidates and contribution limits generally).

[45] *See, e.g.*, IND. CODE ANN. §§ 3-9-2-4 to -12 (West 2016) (codifying very few contribution limits). *But see id.* § 12-27-7 (2016) (individual-to-candidate limits); *id.* § 12-27-9 (individual-to-PAC limits).

[46] The least restrictive states include Alabama, Indiana, Iowa, Mississippi, Missouri, Nebraska, North Dakota, Oregon, Pennsylvania, Texas, Utah, and Virginia. *See* STATE LIMITS, *supra* note 42 (listing state contribution limits and the statutes in which those contribution limits are found). South Dakota, which limits individual-to-candidate and individual-to-PAC contributions, does not limit PAC-to-candidate contributions. *See* S.D. CODIFIED LAWS § 12-27-7 (2016) (individual-to-candidate limits); *id.* § 12-27-9 (individual-to-PAC limits).

[47] *See, e.g.*, tit. 15, §§ 8010, 8012 (detailing contribution limits for candidates and contribution limits generally). *But see* WASH. REV. CODE ANN. § 42.17A. (West 2016) (creating an individual-to-PAC contribution limit within twenty-one days prior to an election).

[48] The moderately restrictive states include Arizona, Delaware, Florida, Georgia, Idaho, Kansas, Maine, Michigan, Minnesota, Montana, Nevada, New York, Tennessee, Washington, Wisconsin, and Wyoming. *See* STATE LIMITS, *supra* note 42.

[49] *See, e.g.*, ALASKA STAT. § 15.13.070 (West 2016) (detailing the range of contribution limits).

[50] The most restrictive states include Alaska, California, Colorado, Connecticut, Hawaii, Illinois, Kentucky, Louisiana, Maryland, Massachusetts, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Rhode Island, South Carolina, Vermont, and West Virginia. *See* STATE LIMITS, *supra* note 42.

unlimited independent expenditure ability of a super PAC.[51] Hybrid PACs gained federal recognition after the 2011 D.C. District Court case *Carey v. FEC*.[52] In *Carey*, the court held that hybrid PACs were permissible, provided that distinct accounts were maintained in order to keep hard money (for candidate contributions) and soft money (for independent expenditures) separate.[53]

Simply because hybrid PACs are permitted to exist[54] does not mean there is a consensus about how such PACs are to operate. This Note addresses one of the logistical concerns with hybrid PACs, namely, how to treat an individual's contribution to a hybrid PAC's independent expenditure-only account. The way these contributions are to be treated is currently the subject of a growing circuit split. Before describing the circuit split, though, there is an important relationship to note between hybrid PACs and enmeshed entities.

1. Enmeshed Entities

Enmeshed entities, similar to hybrid PACs, combine traditional PACs and super PACs. The primary difference between enmeshed entities and a hybrid PAC is that enmeshed entities are not a single organization but rather a group of organizations.[55] A non-hybrid PAC pairing of a traditional PAC with a separate super PAC is the most basic example of an enmeshed entity.[56] Enmeshed entities, however, often take a more complex form, such as a parent nonprofit corporation with an associated traditional PAC and an associated super PAC.[57]

2. The Circuit Split: Are Hybrid PACs Inherently Coordinative?

Post–*SpeechNow.org v. FEC*,[58] there is little disagreement that anti-corruption concerns are insufficient to limit contributions to independent expenditure-only

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[51] *See* Carey v. FEC, 791 F. Supp. 2d 121, 136 (D.D.C. 2011). Hybrid PACs are also known as *Carey* Committees. FEC TERMINOLOGY FOR CANDIDATE COMMITTEES, FEC (2013).

[52] *See* 791 F. Supp. 2d at 136.

[53] *Id.*

[54] *See id.* Note, though, that *Carey* was merely a D.C. District Court decision with significant federal implications only because the decision bound the FEC.

[55] *See, e.g.*, Vt. Right to Life Comm., Inc. v. Sorrell, 758 F.3d 118, 121 (2d Cir. 2014) (discussing three legally distinct entities that were closely related).

[56] *See, e.g.*, Peter Overby, *5 Years After 'Citizens United,' SuperPACs Continue to Grow*, NPR (Jan. 13, 2015, 4:16 PM), http://www.npr.org/2015/01/13/377024687/five-years-after-citizens-united-superpacs-continue-to-grow [http://perma.cc/9PSB-8NKD] (discussing the traditional and super PACs that former Florida governor Jeb Bush established before announcing his candidacy for president in 2015).

[57] *See, e.g.*, *Sorrell*, 758 F.3d at 121–22 (addressing a 501(c)(4) nonprofit organization and its associated traditional and super PACs).

[58] 599 F.3d 686 (D.C. Cir. 2010).

groups.[59] Questions arise, however, when independent expenditure-only groups begin to appear less independent. Some courts view hybrid PACs and enmeshed entities as inherently less independent than isolated super PACs,[60] and this has led to a circuit split regarding contribution limits to hybrid entities. Some courts hold that maintaining legal separation and segregated bank accounts is sufficient to overcome corruption concerns.[61] Other courts hold that those criteria do not necessarily prevent potential coordination, which could lead to actual or apparent corruption.[62] The Tenth Circuit Court's holding in *King* exemplifies the first view,[63] and the Second Circuit Court's holding in *Vermont Right to Life Committee, Inc. v. Sorrell*[64] exemplifies the second.[65]

a. Republican Party of New Mexico v. King*: Independent Expenditures Are Independent Unless Actually Impermissibly Coordinated*

In *King*, New Mexico Turn Around (NMTA), a hybrid PAC, challenged a New Mexico statute[66] containing numerous political contribution limits, including limits on individual-to-PAC contributions.[67] NMTA argued that the statutory contribution limit[68] on individual-to-PAC contributions was unconstitutional as applied to independent-expenditure groups.[69] The district court sided with NMTA and issued an injunction against the provision that restricted contributions to independent-expenditure groups.[70]

On appeal, the Tenth Circuit Court of Appeals upheld the district court's injunction because the court thought NMTA likely would succeed on the merits.[71] The court

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[59] *See id.* at 694–95 (indicating that anti-corruption concerns cannot justify contribution limits to independent expenditure-only groups); *see also* Wis. Right to Life State Political Action Comm. v. Barland, 664 F.3d 139, 153, 155 (7th Cir. 2011); Thalheimer v. City of San Diego, 645 F.3d 1109, 1118–21 (9th Cir. 2011); N.C. Right to Life, Inc. v. Leake, 525 F.3d 274, 291–92 (4th Cir. 2008).

[60] *See, e.g.*, *Sorrell*, 758 F.3d at 143.

[61] *See, e.g.*, Republican Party of N.M. v. King, 741 F.3d 1089, 1097, 1103 (10th Cir. 2013); Emily's List v. FEC, 581 F.3d 1, 12 (D.C. Cir. 2009); *N.C. Right to Life*, 525 F.3d at 305; Carey v. FEC, 791 F. Supp. 2d 121, 136 (D.D.C. 2011).

[62] *See, e.g.*, *Sorrell*, 758 F.3d at 143; Catholic Leadership Coal. of Tex. v. Reisman, 764 F.3d 409, 444 (5th Cir. 2014).

[63] *See King*, 741 F.3d at 1097, 1103.

[64] 758 F.3d 118 (2d. Cir. 2014).

[65] *See id.* at 143.

[66] N.M. STAT. ANN. § 1-19-34.7 (West 2016).

[67] *See King*, 741 F.3d at 1091.

[68] § 1-19-34.7(A)(1) (prohibiting contributions from individuals to political committees in excess of $5,000 during the primary election or $5,000 during the general election).

[69] *See King*, 741 F.3d at 1091–92 (arguing that under *Citizens United*'s reasoning and subsequent circuit court opinions, anti-corruption concerns do not overcome the political speech rights underlying contributions to independent-expenditure groups).

[70] *Id.* at 1092.

[71] *Id.* at 1103.

noted that a hybrid PAC's dual nature does not indicate an inherent corruption concern: the candidate contribution side does not implicate the independent-expenditure side, nor is there an implied coordination.[72] The court also discussed that individual-to-PAC contribution limits were unnecessary to combat corruption because existing candidate contribution limits (individual-to-candidate and PAC-to-candidate) and anti-coordination laws sufficiently mitigated corruption concerns.[73] The court held that the New Mexico statute,[74] as applied, would likely be unconstitutional because, even if independent-expenditure contribution limits were permissible, New Mexico's contribution limits did not appear closely drawn to the state's anti-corruption interest.[75]

b. Vermont Right to Life Committee, Inc. v. Sorrell*: Independent Expenditures May Appear Impermissibly Coordinated and That Makes Contribution Limits Permissible*

In *Vermont Right to Life Committee, Inc. v. Sorrell*, Vermont Right to Life Committee—Fund for Independent Political Expenditures (VRLC-FIPE), a super PAC, contested a Vermont law[76] imposing contribution limits on all political committees.[77] Vermont Right to Life Committee, a 501(c)(4) nonprofit organization, created both VRLC-FIPE and VRLC Political Committee (VRLC-PC), a traditional PAC.[78] The two PACs were legally separate and maintained separate bank accounts.[79] VRLC-FIPE contended that contribution limits as applied to super PACs were an unconstitutional abridgement of speech.[80] The Second Circuit evaluated contribution limits only as applied to VRLC-FIPE.[81]

Like the Tenth Circuit in *King*,[82] the Second Circuit in *Sorrell* did not state explicitly that contribution limits would be unconstitutional as applied to super

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[72] *Id.* at 1101 (noting that *Citizens United* established that "independent expenditures are by definition uncoordinated," thus additional associated coordination is required to invoke corruption concerns).

[73] *Id.*

[74] N.M. STAT. ANN. § 1-19-34.7(A)(1) (West 2016).

[75] *King*, 741 F.3d at 1103.

[76] *See* VT. STAT. ANN. tit. 17, § 2805(a) ("A political committee . . . shall not accept contributions totaling more than $2,000.00 from a single source, political committee or political party in any two-year general election cycle.").

[77] 758 F.3d 118, 121–22 (2d Cir. 2014).

[78] *Id.* at 122.

[79] *Id.* at 143.

[80] *Id.* at 121.

[81] *Id.* at 139 (quoting Landell v. Sorrell, 381 F.3d 91, 140 (2d Cir. 2004)) (holding that it is "unquestionably constitutional" to limit contributions to traditional PACs). *But see* Randall v. Sorrell, 548 U.S. 230, 236–37 (2006) (striking down Vermont's contribution limits because those limits were too low).

[82] *See* Republican Party of N.M. v. King, 741 F.3d 1089, 1103 (10th Cir. 2013).

PACs.[83] The court, instead, held that VRLC-FIPE was not sufficiently independent to be a super PAC.[84] VRLC-FIPE's separate bank account and declared super PAC status, according to the court, were not compelling enough measures to prevent coordination, which triggers at least the appearance of corruption.[85] In determining that VRLC-FIPE was not sufficiently independent, or "functionally distinct," the court applied a totality of the circumstances test.[86] The court noted that this test did not presume a traditional PAC and a super PAC were identical, rather, the test weighed evidence for and against finding the two entities to be functionally distinct.[87] The court determined that VRLC-FIPE was not functionally distinct from VRLC-PC because VRLC-FIPE "presented no evidence to raise a genuine dispute of material fact about its independence."[88] The court held, ultimately, that contribution limits on VRLC-FIPE were permissible because VRLC-FIPE was not functionally distinct from VRLC-PC, which maintained sufficiently close candidate relationships.[89]

II. RESOLVING THE SPLIT: WHY PRECEDENT, POLITICS, AND GOOD LEGAL SENSE PROHIBIT BROAD, PROPHYLACTIC CONTRIBUTION LIMITS ON A HYBRID PAC'S INDEPENDENT EXPENDITURE-ONLY ARM

This Note argues that limiting contributions to a hybrid PAC's independent-expenditure account is impermissible for two reasons. First, based on the Roberts Court's First Amendment jurisprudence and the Court's ongoing libertarian activism, the scope of permissible concerns about the appearance of corruption will continue to narrow. This will significantly limit the opportunity for any restrictions based on the mere appearance of corruption.[90]

Second, even if concerns about the appearance of corruption continue to be compelling, then limiting contributions to a hybrid PAC's independent expenditure account would still be an impermissible burden on speech.

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[83] *See Sorrell*, 758 F.3d at 140.

[84] *Id.* at 141, 144–45 (holding that VRLC-FIPE and VRLC-PC were "enmeshed financially and organizationally").

[85] *Id.* at 142 (expressing concern about coordination in the use of information). *But see King*, 741 F.3d at 1097 (indicating that maintaining a segregated account prevents impermissible coordination).

[86] *See Sorrell*, 758 F.3d at 142, 145 (noting factors weighing against being functionally distinct, including "the overlap of staff and resources, the lack of financial independence, the coordination of activities, and the flow of information between the entities").

[87] *Id.* at 144.

[88] *Id.* (implying that maintaining separate bank accounts and being legally separate do not "raise a genuine dispute of material fact about . . . independence").

[89] *Id.* at 145 (noting Supreme Court decisions upholding contribution limitations due to close candidate relationships).

[90] *But see* Hasen, *supra* note 10 (discussing the impact Justice Scalia's death may have on campaign finance jurisprudence going forward).

A. The Decline of the Appearance of Corruption as a Compelling Government Interest Sufficient to Restrict Political Speech

PACs are, fundamentally, vessels for exercising political speech. The money contributed to PACs and the money PACs spend, ideally, would serve only that purpose, though that is not always the case. A 2011 Harvard University study found that the mere mention of money can lead to an increase in both unethical intentions and outcomes.[91] The government, both at the state and federal levels, long has held that large sums of money can, perhaps nefariously, influence electoral outcomes.[92] Combatting corruption, accordingly, is a well-known compelling government interest in regulating PAC activity that would otherwise elicit First Amendment protection.

What qualifies as "corruption" varies greatly despite the Supreme Court's narrowing of the term to include only quid pro quo corruption.[93] The federal government, the states, and even the public, all seem to have significantly different ideas of what corruption looks like in the political process.[94]

Since *Buckley*, anti-corruption concerns have always included awareness of the problem of actual corruption and the problem of the appearance of corruption.[95] Corruption is obviously the concrete evil, but the appearance of corruption can be just as damaging as corruption itself.[96] Despite the seemingly substantial concern surrounding the appearance of corruption, the Supreme Court's recent jurisprudence has begun to weaken the appearance of corruption as a legitimate government interest. That recent jurisprudence, however, is in line with the political direction the Court has been heading in since *Buckley*, a direction that may result in an outcome like what Justice Thomas has long envisioned.

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[91] *See* Maryam Kouchaki et al., *Seeing Green: Mere Exposure to Money Triggers a Business Decision Frame and Unethical Outcomes*, 121 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 53, 53, 60 (2013) ("[M]ere exposure to money can trigger unethical intentions and behavior . . . .").

[92] *See, e.g.*, The Tillman Act, 34 Stat. 864 (1907) (codified at 18 U.S.C. § 610 (2012)) (detailing Congress's first attempt to regulate federal campaign finance by prohibiting corporations and national banks from contributing directly to presidential or congressional campaigns).

[93] *See* Citizens United v. FEC, 558 U.S. 310, 359–61 (2010) (stating that the government anti-corruption interest is limited to quid pro quo corruption).

[94] *See* Jordan May, Note, *"Are We Corrupt Enough Yet?" The Ambiguous Quid Pro Quo Corruption Requirement in Campaign Finance Restrictions*, 54 WASHBURN L.J. 357, 358–59 (2015) (highlighting the difference between the public's and the Supreme Court's conception of what corruption is).

[95] *See* Buckley v. Valeo, 424 U.S. 1, 26 (1976) (per curiam) (validating FECA's purpose to limit actual and apparent corruption).

[96] *See* Richard L. Hasen, *Opening the Political Money Chutes*, REUTERS (Apr. 7, 2014), http://blogs.reuters.com/great-debate/2014/04/07/opening-the-political-money-chutes/ [http://perma.cc/9GMY-8RSS] (discussing the implications of *McCutcheon* and why preventing the appearance of corruption is as important as preventing actual corruption).

1. *McCutcheon v. FEC* Opened the Door to Significantly Narrowing the Opportunity for Contribution Limits

In *McCutcheon v. FEC*, the Supreme Court brought to light a potentially concerning proposition: given the narrowed definition of corruption, certain contribution limits may no longer be properly tailored.[97] Though the Court's holding was limited to finding aggregate contribution limits impermissible, the Court made clear that preventing quid pro quo corruption is a narrow interest and the government has no business regulating political speech beyond that narrow purpose.[98] Where *Citizens United* highlighted the new (or reestablished) quid pro quo corruption standard, *McCutcheon* made explicit that the quid pro quo standard also applied to the appearance of corruption.[99] These views reflect a significant departure from certain prior Supreme Court cases that upheld more expansive notions of corruption.[100]

2. Corruption Concerns: Transitioning Majority Jurisprudence Amidst Shifting Political Tides

Beginning with *Buckley* in 1976, the Court began its still-ongoing struggle to balance First Amendment political speech protections with government anti-corruption interests.[101] Though the Court's jurisprudence on the matter has altered course significantly in the past few decades, any changes were largely foreseeable based on individual Justices' political tendencies and sympathies.[102]

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[97] *See* 134 S. Ct. 1434, 1452 (2014) (plurality opinion) ("If there is no corruption concern in giving nine candidates up to $5,200 each, it is difficult to understand how a tenth candidate can be regarded as corruptible if given $1,801, and all others corruptible if given a dime.").

[98] *Id.* at 1441 (plurality opinion) (emphasizing that, beyond restrictions directed at quid pro quo corruption or its appearance, the government should not introduce restrictions that could affect election outcomes).

[99] *Id.* at 1451 (plurality opinion) (citing Citizens United v. FEC, 558 U.S. 310, 360 (2010)) ("[B]ecause the Government's interest in preventing the appearance of corruption is equally confined to the appearance of quid pro quo corruption, the Government may not seek to limit the appearance of mere influence or access.").

[100] *See, e.g.*, Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 660 (1990); McConnell v. FEC, 540 U.S. 93, 143–44, 154 (2003).

[101] *See generally* Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam) (establishing the framework under which subsequent campaign finance cases were decided).

[102] *See generally* Geoffrey R. Stone, Citizens United *and Conservative Judicial Activism*, 2012 U. ILL. L. REV. 485 (2012) (concluding that much of the conservative judicial activism leading up to and including *Citizens United* was the result of the Justices' personal preferences). Note that the following cases did not address exactly the same issues. The shift in priorities, however, is clear: the Roberts Court majority is far more interested in protecting political speech and the marketplace of ideas, despite the long-standing corruption concerns first enumerated in *Buckley*.

a. 1976: Buckley v. Valeo

Buckley signaled the start of Supreme Court jurisprudence weighing government anti-corruption concerns against constitutionally protected political speech in the form of money spent to influence elections.[103] In a per curiam decision, with only one dissenter, the *Buckley* Court laid the groundwork for evaluating the constitutionality of political speech restrictions, such as contribution limits, when there was a compelling government interest involved.[104] In *Buckley*, the only compelling interest was corruption, and the most blatant form of corruption is quid pro quo corruption.[105] But the *Buckley* Court seemed to go beyond mere quid pro quo corruption to include concerns about undue influence as well because such influence could give way to at least the appearance of quid pro quo corruption.[106]

b. 1990: Austin v. Michigan Chamber of Commerce

First Amendment protections for corporate speech became, as one might expect, increasingly important to the Court as it became more conservative and libertarian, favoring an open marketplace of ideas unencumbered by government interference.[107] Before *Austin v. Michigan Chamber of Commerce*,[108] there was a major shift in the Court's political makeup.[109] Justice O'Connor, a conservative, and Justice Kennedy, an ardent supporter of the First Amendment,[110] replaced the more centrist Justices Stewart and Powell.[111] The Court also experienced a significant internal shift when Justice Rehnquist rose to the position of Chief Justice after Chief Justice Burger's

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[103] *See Buckley*, 424 U.S. at 24–28.

[104] *Id.*

[105] *Id.* at 26–28.

[106] *Id.* at 27 (quoting U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers AFL-CIO, 413 U.S. 548, 565 (1973)) ("Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption . . . . Congress could legitimately conclude that the avoidance of the appearance of improper influence 'is also critical[.]'").

[107] *See* Stone, *supra* note 102, at 486–87.

[108] 494 U.S. 652 (1990).

[109] *See* William M. Landes & Richard A. Posner, *Rational Judicial Behavior: A Statistical Study*, 1 J. LEGAL ANALYSIS 775, 781–84 (2009) (analyzing empirical data to determine Supreme Court Justices' political leanings).

[110] *See* Kevin Johnson, *Justice Anthony Kennedy and the First Amendment: The Pivotal Supreme Court Justice*, NAT'L COMM. ASS'N (Oct. 2011), https://www.natcom.org/CommCurrentsArticle.aspx?id=1794 [http://perma.cc/S6RM-3PAZ] (noting Justice Kennedy's "belief in the First Amendment as the protector of freedoms that are essential to a robust and unfettered democratic process").

[111] *See* Landes & Posner, *supra* note 109, at 782 (ranking Justice O'Connor slightly more conservative than Justices Powell and Kennedy, but all three far more conservative than Justice Stewart).

departure.[112] Justice Scalia, a staunch conservative libertarian, filled Justice Rehnquist's Associate Justice vacancy.[113] *Austin*, as a result, was decided on a slimmer majority than *Buckley*, with the three new justices dissenting.[114]

Anti-corruption jurisprudence reached well beyond simple quid pro quo corruption in *Austin*, despite the increase in dissenting voices. The *Austin* Court acknowledged a greater source of corruption, namely, the corporations that had amassed wealth to influence elections in their favor.[115] That Court, however, did limit its more expansive notion of corruption by noting that no corruption concern could warrant "prohibiting overt advocacy for or against a political candidate."[116]

c. 2003: McConnell v. FEC

The Court, arguably, became even more conservative and libertarian post-*Austin*.[117] This change was felt in more recent cases, including *McConnell v. FEC* in 2003, which was decided on the thinnest of majorities, with largely predictable dissenting voices.[118]

Despite the *McConnell* Court's growing conservative and libertarian bloc, the Court continued to uphold a definition of corruption broader than mere quid pro quo

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[112] *See id.* (indicating that Chief Justice Rehnquist was among the most conservative of all Justices in the past seventy years). *But see* Clements, *infra* note 118 (indicating Chief Justice Rehnquist's conservatism did not always extend to corporate speech rights).

[113] *See* Landes & Posner, *supra* note 109, at 782 (indicating Justice Scalia was one of the most conservative Justices).

[114] *See* Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 654 (1990); *id.* at 669–78 (Brennan, J., concurring); *id.* at 678 (Stevens, J., concurring); *id.* at 679–95 (Scalia, J., dissenting); *id.* at 695–713 (Kennedy, J., dissenting). Justices O'Connor and Scalia joined Justice Kennedy's dissent. *Id.* at 695. Chief Justice Rehnquist, notably, joined the opinion of the Court. *Id.* at 654 (majority opinion).

[115] *Id.* at 660 (majority opinion) (noting "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form . . . that have little or no correlation to the public's support for the corporation's political ideas").

[116] *Id.* at 683.

[117] *See* Landes & Posner, *supra* note 109, at 782–83 (indicating that this transition included the departure of two decidedly liberal Justices (Brennan and Marshall), a centrist Justice (White), and a moderately liberal Justice (Blackmun); and the arrival of two decidedly liberal Justices (Ginsburg and Breyer), an incredibly conservative Justice (Thomas), and a moderately liberal Justice (Souter, as compared to his predecessor, Justice Brennan)).

[118] *See generally* 540 U.S. 93 (2003). Perhaps the only unpredictable swap was Chief Justice Rehnquist dissenting and Justice O'Connor joining the majority. Rehnquist's departure from his position in *Austin* may be understood to reflect his unique conservative leanings, which did not include corporate sympathies. *See* Jeff Clements, *The Conservative Versus the Corporatist: Justice Rehnquist's Opposition to Justice Powell's Drive to Create "Corporate Speech" Rights*, ACS BLOG (Sept. 3, 2014), http://www.acslaw.org/acsblog/the -conservative -versus-the-corporatist-justice-rehnquist%E2%80%99s-opposition-to-justice-powell%E2 %80%99s [http://perma.cc/K2R7-MWLQ].

corruption (or its appearance).[119] The *McConnell* Court's jurisprudence was comparable to, and relied upon, *Austin*.

d. Citizens United *and* McCutcheon*: The Return to "*Buckley*"*

Only two years after *McConnell*, the Court's political tide shifted again, opening the door for a more restricted definition of corruption.[120] Likely the most significant change prior to *Citizens United* was Chief Justice Roberts replacing Chief Justice Rehnquist.[121] Chief Justice Roberts, unlike Chief Justice Rehnquist, but like Justice Kennedy, has shown himself to be less a voice for conservatism and more an ardent free speech proponent and libertarian.[122] *Citizens United*, and later *McCutcheon*, signaled a shift from a narrow majority erring on the side of government anti-corruption concerns to a narrow majority that instead erred on the side of First Amendment protection.[123]

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[119] *See McConnell*, 540 U.S. at 143 ("[I]n speaking of 'improper influence' and 'opportunities for abuse' in addition to 'quid pro quo arrangements,' we [have] recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors." (second alteration in original) (quoting Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 389 (2000)); *see also* FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 441 (2001).

[120] *See* Landes & Posner, *supra* note 109, at 782 (finding Chief Justice Roberts and Justice Alito more conservative, on average, than Chief Justice Rehnquist and Justice O'Connor).

[121] *But see* Stone, *supra* note 102, at 487 (indicating that the most significant change was Justice Alito replacing Justice O'Connor). Justice O'Connor, however, was arguably more concerned about money in *judicial* elections, not elections generally, so in certain key cases (like *Austin*) she and Justice Alito may have been aligned. *See* Adam Liptak, *Former Justice O'Connor Sees Ill in Election Finance Ruling*, N.Y. TIMES (Jan. 26, 2010), http://www.nytimes.com/2010/01/27/us/politics/27judge.html?_r=0 (citing Justice O'Connor's concerns about *Citizens United*'s implications on judicial impartiality). The other change, Justice Sotomayor replacing Justice Souter, was politically neutral. *See* Landes & Posner, *supra* note 109, at 782 (listing Justice Souter as moderately liberal); David Savage, *Sotomayor Votes Reliably with Supreme Court's Liberal Wing*, L.A. TIMES (June 8, 2010), http://articles.latimes.com/2010/jun/08/nation/la-na-court-sotomayor-20100609 [http://perma.cc/HS5G-CMH8] (noting that Justice Sotomayor is no less liberal than Justice Souter was).

[122] Some pundits have gone so far as to label Chief Justice Roberts a corporatist, the very antithesis of that for which Chief Justice Rehnquist often stood. *See, e.g.*, Clements, *supra* note 118 (stating the Roberts Court introduced a "new corporate rights doctrine").

[123] *See* McCutcheon v. FEC, 134 S. Ct. 1434, 1451 (2014) (plurality opinion). Justice Kagan replacing Justice Stevens did nothing to change the Court's direction, thus the outcome in *McCutcheon* mirrored that of *Citizens United*. *See* Linda Greenhouse, *Speaking Truth to the Supreme Court*, N.Y. TIMES (Apr. 16, 2015), http://www.nytimes.com/2015/04/16/opinion/speaking-truth-to-the-supreme-court.html (according to Justice Stevens, Justice Kagan's opinions represent his own "far more articulate[ly] and persuasive[ly] than anything that [he] might have written").

The evolution of the new quid pro quo definition of corruption in *Citizens United* and *McCutcheon* reflects a view even narrower than that of *Buckley*, the very precedent the Court has cited in developing the narrower corruption standard.[124] Though the *Citizens United* Court explicitly upheld preventing the appearance of corruption as a compelling interest, the reality seems to betray that notion.[125]

Quid pro quo corruption is necessarily a direct arrangement, requiring the transfer of some "quid" in exchange for some "quo."[126] If such a situation were possible, then concern for either quid pro quo corruption or its appearance would be valid; if such a situation were not possible, there would be no valid concern.

In practice, the opportunity for quid pro quo corruption to arise is limited. The Court has gone so far as to say that even successful political ingratiation would not constitute corruption.[127] The quid pro quo corruption standard requires something concrete (actual corruption), or at least something that conceivably could be concrete (the appearance of corruption).[128] The appearance of quid pro quo corruption cannot exist beyond the scope of those instances in which actual corruption may exist. Actual quid pro quo corruption requires involvement with a candidate; thus, for there to be the appearance of corruption, there must be involvement with a candidate.[129]

As the appearance of corruption standard narrows in scope, so too does legislatures' ability to tailor meaningful political speech regulations, especially regulations that treat expenditures and contributions differently. A breakdown in the distinction between expenditures and contributions as political speech would seem to give credence to Justice Thomas's opinion that the time has come to chop down the *Buckley* tree.[130]

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[124] *Buckley*, at times, seems to stand in direct contrast to the Roberts Court's definition of corruption. *See McConnell*, 540 U.S. at 143 ("In *Buckley*, we expressly rejected the argument that antibribery laws provided a less restrictive alternative to FECA's contribution limits, noting that such laws 'deal[t] with only the most blatant and specific attempts of those with money to influence governmental action.'" (alteration in original) (quoting *Buckley*, 424 U.S. 1, 28 (1976) (per curiam))); *cf. McCutcheon*, 134 S. Ct. at 1451 (plurality opinion) ("[B]ecause the Government's interest in preventing the appearance of corruption is equally confined to the appearance of quid pro quo corruption, the Government may not seek to limit the appearance of mere influence or access.").

[125] *See* Citizens United v. FEC, 558 U.S. 310, 359 (2010) (stating that in *Buckley*, the appearance of corruption was confined to quid pro quo).

[126] *See McConnell*, 540 U.S. at 294 (Kennedy, J., dissenting in part) (noting the likely bounds of anti-corruption regulation).

[127] *Citizens United*, 558 U.S. at 360.

[128] *See id.* at 359.

[129] *See McConnell*, 540 U.S. at 294 (Kennedy, J., dissenting in part) (stating that Congress's anti-corruption interest "provides a basis for regulating federal candidates' and officeholders' receipt of *quids*, whether or not the candidate or officeholder corruptly received them").

[130] *See* McCutcheon v. FEC, 134 S. Ct. 1434, 1464 (2014) (Thomas, J., concurring in the judgment) ("[W]hat remains of *Buckley* is a rule without a rationale."). *See generally* Marc E. Elias & Jonathan S. Berkon, *After* McCutcheon, 127 HARV. L. REV. F. 373 (2014) (discussing the "depiction of *Buckley* as an unsteady tree teetering before its final collapse").

3. Justice Thomas's Concurrence in *McCutcheon*: The Not-So-Implausible Extreme for Contribution Limit Jurisprudence

Justice Thomas has long been the Court's most steadfast proponent of libertarian free speech rights, at least in the campaign finance context.[131] He strongly believes that "[p]olitical speech is the primary object of First Amendment protection and the lifeblood of a self-governing people."[132] Accordingly, campaign finance, as an expression of political speech, is due the utmost First Amendment protection.

Justice Thomas's concurrence in *McCutcheon* is the latest in a long line of opinions in which he denounced the *Buckley* Court's differing standard of review for campaign contributions compared to campaign expenditures.[133] Contributions, according to Thomas, should be subject to the same strict scrutiny as expenditures.[134] Thomas indicated that the only remaining rationale for the bifurcated standards cannot logically stand post-*McCutcheon*.[135] That rationale, that contribution speech value is merely symbolic and not related to the amount given, seems to stand in contrast with the crux of Chief Justice Roberts's *McCutcheon* plurality opinion.[136]

To justify doing away with aggregate contribution limits, Chief Justice Roberts, writing for the plurality, proclaimed that such limits were unconstitutionally burdensome because broader political participation necessarily reduced the amount that could be contributed to each candidate.[137] But, if limiting the breadth of political contribution is unconstitutionally burdensome, why is limiting the depth of political contribution not similarly burdensome? Justice Thomas indicated that both contributing to many candidates and contributing a significant amount to one candidate are ways for someone to robustly exercise his political speech rights.[138] To continue to limit contribution amounts would be to impermissibly penalize that exercise.[139]

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[131] *See, e.g.*, *McCutcheon*, 134 S. Ct. at 1462–63 (Thomas, J., concurring in the judgment) (declaring that *Buckley*'s differing standards for campaign contributions and expenditures undercut core speech rights); *cf.* Morse v. Frederick, 551 U.S. 393, 419 (2007) (Thomas, J., concurring) (arguing that students do not have a constitutional right to free speech in public schools).

[132] *McCutcheon*, 134 S. Ct. at 1462 (Thomas, J., concurring in the judgment) (citing FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 465–66 (2001) (Thomas, J., dissenting)) (internal quotation marks omitted).

[133] *See id.* (listing Justice Thomas's past opinions that have condemned *Buckley*). See Part II.A, *supra*, for information about the differing standards under *Buckley*.

[134] *See McCutcheon*, 134 S. Ct. at 1464 (Thomas, J., concurring in the judgment) (citing Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604, 640–41 (1996)).

[135] *See id.*

[136] *See id.* at 1445 (plurality opinion) (stating that the Court had no reason to revisit *Buckley*'s bifurcated standard despite invalidating the rationale as applied to aggregate contribution limits).

[137] *See id.* at 1449 ("To require one person to contribute at lower levels than others because he wants to support more candidates or causes is to impose a special burden on broader participation . . . .").

[138] *See id.* at 1464 (Thomas, J., concurring in the judgment).

[139] *See* Davis v. FEC, 554 U.S. 724, 739 (2008) (barring the government from penalizing an individual "robustly exercis[ing]" his speech rights).

For Justice Thomas, *Buckley*'s distinction between contributions and expenditures is "a rule without a rationale."[140] That may be true, but even if *Buckley*'s distinction is overruled, contributions still will be inherently more closely related to the recognized compelling anti-corruption government interest.[141] This would mean that contribution limits likely would continue to be more tenable than expenditure limits.

Simply because contribution limits would be more tenable, however, does not mean that such limits would be as broad in scope as they are now. If contribution restrictions are elevated to strict scrutiny review, the outcome actually could be directly in line with the Court's political momentum. Strict scrutiny of contribution limits would almost certainly do away with any limits that are not narrowly tailored to preventing situations in which quid pro quo corruption could arise.[142]

B. Even if Combatting the Appearance of Corruption Continues to Be Compelling and Contribution Limits Are Subject to Lesser Scrutiny, Any Limits on Contributions to a Hybrid PAC's Independent-Expenditure Arm Are Still Unconstitutional

Limits on contributions to a hybrid PAC's independent-expenditure arm are unconstitutional even if contribution limits are subject to mere intermediate scrutiny,[143] and combatting corruption's appearance is a compelling interest. Such contribution limits are unconstitutional because they are not closely drawn.[144] Though the government interest in combatting corruption is sufficiently important, the restrictions are overly burdensome.[145]

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[140] *McCutcheon*, 134 S. Ct. at 1464 (Thomas, J., concurring in the judgment).

[141] *See* Brad Smith, *The Meaning of Corruption in Campaign Finance Law, and* Buckley*'s Contribution/Expenditure Distinction*, CTR. FOR COMPETITIVE POL. (July 31, 2013), http://www.campaignfreedom.org/2013/07/31/the-meaning-of-corruption-in-campaign-finance-law-and-buckleys-contributionexpenditure-distinction/ [http://perma.cc/L537-269M] ("Contributions are not subject to lower scrutiny because they are contributions, but because they offer a greater chance for quid pro quo corruption.").

[142] As noted at the end of Part II.A.2, *supra*, the Court's narrowing definition of corruption to include only quid pro quo corruption suggests that the only logical place to introduce limits (either expenditure or contribution) is in situations where such corruption could actually occur. *See* Citizens United v. FEC, 558 U.S. 310, 345 (2010) (indicating that the government does not have a compelling anti-corruption interest if quid pro quo corruption is not possible).

[143] *See supra* Part II.A.3 (discussing Justice Thomas's push to make contribution limits subject to strict scrutiny).

[144] *See* Buckley v. Valeo, 424 U.S. 1, 25 (1976) (per curiam) (citations omitted) (stating that rights of political association may be interfered with only if the State "employs means closely drawn to avoid unnecessary abridgement of . . . freedoms").

[145] *See infra* Part II.B.

1. Unlimited Contributions to a Hybrid PAC's Independent-Expenditure Arm Should Be Permitted Under *SpeechNow*

In *Citizens United*, the Supreme Court established, unequivocally, that independent expenditures are, by definition, uncoordinated and non-corrupting.[146] In *SpeechNow*, the D.C. Circuit Court of Appeals extended that rationale to apply also to the contributions that fund those independent expenditures.[147] Put simply, the government has no valid interest in restricting independent expenditures and so neither does it have a valid interest in restricting the funding of those expenditures.[148] A hybrid PAC's independent-expenditure arm is, by its very existence, an uncoordinated and non-corrupting entity.[149] Such independent expenditures do not warrant different treatment merely because they coexist with the same hybrid PAC's candidate contribution arm.[150] This notion, however, is not universally accepted.[151]

Those who believe that contributions to a hybrid PAC's independent-expenditure arm may be restricted rely upon the idea that hybrid PACs are ripe for improper activity that would empower individuals to circumvent valid contribution limits.[152] This belief relies on several flawed notions.

The first flawed notion is that individuals could abuse the hybrid PAC structure by contributing to the independent-expenditure arm, which would then pass the money along to the candidate contribution arm. If this were to happen, however, quid pro quo corruption still would not be possible. A hybrid PAC's candidate contributions are capped, just like a traditional PAC's.[153] Contribution to either arm of a hybrid PAC requires disclosure, so an individual could not circumvent valid contribution limits in this way.[154]

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[146] *See Citizens United*, 558 U.S. at 360.

[147] *See* SpeechNow.org v. FEC, 599 F.3d 686, 694–95 (D.C. Cir. 2010) (indicating that anti-corruption concerns cannot justify contribution limits to independent expenditure-only groups).

[148] *See id.*

[149] *See Citizens United*, 558 U.S. at 360.

[150] *See* Emily's List v. FEC, 581 F.3d 1, 12 (D.C. Cir. 2009) ("A[n] [organization] that makes expenditures to support federal candidates does not suddenly forfeit its First Amendment rights when it decides also to make direct contributions to parties or candidates.").

[151] *See* Vt. Right to Life Comm., Inc. v. Sorrell, 758 F.3d 118, 140–41 (2d Cir. 2014).

[152] *See id.* (holding that contribution limits were permissible because an independent-expenditure group was "enmeshed financially and organizationally" with a candidate-contribution group); Republican Party of N.M. v. King, 741 F.3d 1089, 1102 (10th Cir. 2013) (referring to the state's anti-circumvention argument based on the idea that hybrid PACs are differently situated).

[153] *See* FEC TERMINOLOGY FOR CANDIDATE COMMITTEES, *supra* note 51 ("The [contribution account] is subject to all of the limits and prohibitions of [FECA]. . . .").

[154] *See id.* Additionally, individuals may not control multiple PACs, so circumvention is not possible via controlling multiple PACs' candidate support. *See* McCutcheon v. FEC, 134 S. Ct. 1434, 1453–54 (2014) (plurality opinion) (discussing anti-proliferation rules); *see also*

The second flawed notion is that a hybrid PAC's independent-expenditure arm is somehow more likely to impermissibly coordinate with a candidate. Hybrid PACs, however, are subject to the same anti-coordination laws as other independent-expenditure groups.[155] Preventing impermissible candidate coordination is a valid government interest, but any restrictions must be properly tailored to that interest.[156] Simply because a hybrid PAC performs two legal speech functions in close proximity does not suddenly mean that that PAC will act illegally. Contribution limits are inherently contrary to a hybrid PAC's First Amendment speech rights with regard to independent expenditures, so a restriction beyond preexisting anti-coordination laws would be "heavy-handed" and not likely to avoid unnecessary abridgment of speech rights.[157]

2. If Not Evaluated Like Contribution Limits in *SpeechNow*, Then Limits on Contributions to a Hybrid PAC's Independent-Expenditure Arm Should at Least Be Evaluated as Necessarily Different Than Contribution Limits on Traditional PAC or Candidate Contributions

Even if a hybrid PAC's independent-expenditure arm is not identically situated to a typical independent-expenditure group (i.e., a super PAC), a hybrid PAC's independent-expenditure arm is still more similar to a super PAC than it is to a traditional PAC. Contributions to both super and traditional PACs are subject to the "closely drawn" standard. The government anti-corruption interest, however, is significantly stronger for traditional PACs compared to super PACs (for which the interest is nonexistent). If a hybrid PAC's independent-expenditure arm is deemed to be inherently negatively affected by its close proximity to the candidate contribution arm, then that influence is not so severe as to invoke the full strength of the government anti-corruption interest.[158]

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infra Part II.B.3 (discussing the redundancies that undercut the usefulness of contribution limits as a way of preventing circumvention in hybrid PACs).

[155] *See* FEC TERMINOLOGY FOR CANDIDATE COMMITTEES, *supra* note 51.

[156] *See McCutcheon*, 134 S. Ct. at 1456–57 (plurality opinion) (explaining that, for contribution limits, the limits must be reasonably and narrowly tailored to the government's interest).

[157] *See id.* at 1446 (noting that "indiscriminate" limits are "heavy-handed" because other more targeted measures are in use).

[158] *See* Vt. Right to Life Comm., Inc. v. Sorrell, 758 F.3d 118, 141 (2d Cir. 2014) (reinterpreting *Citizens United*'s holding that independent expenditures cannot give rise to quid pro quo corruption because of the inherent absence of prearrangement and coordination, to mean that there *must* be an inherent prevention of prearrangement and coordination to avoid corruption). In fact, the Supreme Court highlighted the lack of prearrangement and coordination because, without those aspects, expenditures are not as valuable to candidates. *See McCutcheon*, 134 S. Ct. at 1454 (plurality opinion) (citing Citizens United v. FEC, 558 U.S. 310, 357 (2010)). Prearrangement and coordination can be mitigated, however, without burdening a specific vehicle for speech. *See id.* at 1439 (noting base contribution limits and anti-proliferation laws as more targeted prevention measures).

Independent expenditures do not invoke the government anti-corruption interest. A hybrid PAC's independent-expenditure arm exists to make independent expenditures, despite any increased chance for coordination or circumvention of contribution limits.[159] A hybrid PAC's independent-expenditure arm, thus, should be treated as much like a typical independent-expenditure group as possible. This means that contribution limits, if applied to a hybrid PAC's independent-expenditure arm, likely would not be closely drawn to the government anti-corruption interest because that interest is significantly weaker for a hybrid PAC's independent-expenditure arm.[160]

Limits on contributions to a hybrid PAC's independent-expenditure arm serve only one purpose, to prevent improper candidate coordination that may be more likely to occur in a hybrid PAC.[161] This increased likelihood of coordination, however, does not approach the coordination levels of traditional PACs, which, by definition, are coordinated with candidates.[162] Traditional PAC contribution limits may be closely drawn to the government interest in preventing traditional PAC corruption, but those same limits would be wildly out of proportion to the relatively weak anti-coordination interest associated with a hybrid PAC's independent-expenditure arm. Accordingly, even if a hybrid PAC's independent-expenditure arm is not identically situated to a super PAC, that arm likely still should not be subject to the relatively strong traditional PAC contribution limits.

3. Neither Limits on Individual-to-PAC Contributions nor Limits on Contributions to a Hybrid PAC's Independent-Expenditure Arm Are Closely Drawn Because the Limits Are Heavy-Handed and Substantially Mismatched to the Government's Interest

If contributions to a hybrid PAC's independent-expenditure arm invoke the government anti-circumvention interest to the same degree as contributions to traditional PACs, then the hybrid PAC independent-expenditure arm contribution

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[159] *See Sorrell*, 758 F.3d at 141 (indicating that hybrid PACs have an increased opportunity for impermissible activity, though also noting that the courts disagree on what should be done to mitigate this opportunity).

[160] *See McCutcheon*, 134 S. Ct. at 1437 (plurality opinion) (stating that a contribution limit must be closely drawn to the government's anti-corruption interest to be permissible and a "substantial mismatch" between that interest and the burdens imposed would indicate the limit was not closely drawn).

[161] The other potential reason for contribution limits on a hybrid PAC's independent-expenditure arm, preventing circumvention of other limits, was foreclosed earlier in this Note. *See supra* Part II.B.1 (explaining that PAC-to-candidate contribution limits already stop this kind of circumvention and disclosure will expose any donor that is attempting to circumvent).

[162] The Supreme Court tends to delineate levels of coordinative behavior when determining whether a restriction is constitutional. *See* Republican Party of N.M. v. King, 741 F.3d 1089, 1093 (10th Cir. 2013) (detailing instances where the Supreme Court found coordinated expenditures to be, essentially, indirect candidate contributions).

limits still would not be closely drawn. In *McCutcheon*, Chief Justice Roberts discussed how statutory safeguards have improved significantly since *Buckley*.[163] Those improved statutes and regulations are much more targeted and have made broad, prophylactic measures, such as aggregate limits, no longer constitutionally permissible.[164] Roberts's reasoning suggests that redundant restrictions are not tenable, even under the looser "closely drawn" standard.[165] So long as base contribution limits[166] are protected, any additional protections designed to serve that purpose will be unconstitutionally burdensome.

Over half the states do not impose individual-to-PAC contribution limits.[167] The remaining states (with one exception)[168] and the federal government impose both individual-to-PAC and PAC-to-candidate contribution limits.[169] Utilizing both levels of contribution limits appears, at least facially, redundant. Individual-to-PAC contribution limits do not serve the government anti-corruption interest directly but, rather, are aimed at preventing circumvention of base contribution limits. In light of Chief Justice Roberts's reasoning in *McCutcheon*, these redundant contribution limits may no longer be permissible, even as a means to combat circumvention of base limits.[170] This should not be a problem, however, because most jurisdictions either already use more targeted safeguards against circumvention or can adopt those safeguards mentioned in *McCutcheon*.

The Supreme Court has yet to answer the question of whether individual-to-PAC contribution limits are constitutionally impermissible.[171] However, as the government anti-corruption interest has narrowed to include only quid pro quo corruption or its appearance, the government's anti-circumvention interest necessarily also has narrowed.[172] The availability of various, more targeted anti-circumvention measures,

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[163] *See McCutcheon*, 134 S. Ct. at 1437–38 (plurality opinion).

[164] *See id.* at 1446 (describing aggregate limits as "heavy-handed" in the presence of more targeted measures).

[165] *See id.* ("Because we find a substantial mismatch between the Government's stated objective and the means selected to achieve it, the aggregate limits fail even under the 'closely drawn' test.").

[166] Base contribution limits are those limits on contributions directly made to candidates.

[167] *See, e.g.*, DEL. CODE ANN. tit. 15, § 8012 (West 2016) (PAC-to-candidate contribution limits but no individual-to-PAC contribution limits); IND. CODE ANN. §§ 3-9-2-4 to -12 (West 2016) (no individual-to-PAC contribution limits).

[168] *See, e.g.*, S.D. CODIFIED LAWS §§ 12-27-7 to -9 (2016) (individual-to-candidate and individual-to-PAC limits but no PAC-to-candidate limits).

[169] *See* STATE LIMITS, *supra* note 42.

[170] *See McCutcheon*, 134 S. Ct. at 1446 (plurality opinion) (describing aggregate limits as "heavy-handed" in the presence of more targeted measures).

[171] *See* Republican Party of N.M. v. King, 741 F.3d 1089, 1099 (10th Cir. 2013) (noting the Supreme Court's recent contribution limit jurisprudence has not discussed "contributions to political entities unaffiliated with candidates or parties").

[172] *See id.* at 1102 ("[T]here can be no freestanding anti-circumvention interest.").

as well as the fact that less than half the states use individual-to-PAC contribution limits, seems to suggest that those limits are not closely drawn to serve the government anti-circumvention interest (let alone the anti-corruption interest).

If individual-to-PAC contribution limits could be called into question post-*McCutcheon*, then limits on contributions to a hybrid PAC's independent-expenditure arm are even more suspect.[173] The availability and use of more targeted anti-circumvention measures, and the states' trend away from individual-to-PAC contribution limits provide substantial reason to believe that broad, prophylactic contribution limits on any contribution other than those made directly to a candidate are heavy-handed and are no longer closely drawn.

III. WHY THE TENTH CIRCUIT'S HOLDING IN *KING* SHOULD DECIDE THE CIRCUIT SPLIT

The Tenth Circuit's decision in *King* provides the best guidance for resolving the circuit split regarding how to treat limits on contributions to a hybrid PAC's independent-expenditure arm. The Tenth Circuit, most notably, erred on the side of more speech.[174] Compared with other circuits' competing standards, the Tenth Circuit's standard better fit the Supreme Court's narrowing of the anti-corruption interest, acknowledged the strength of existing anti-coordination and anti-circumvention laws, and provided an easy-to-follow, bright-line rule.

A. King *Aligns With the Supreme Court's Modern Understanding of the Anti-Corruption Interest*

The Supreme Court has acknowledged that the government may have an interest in combatting actual corruption, apparent corruption, and circumvention of valid limits (aimed at preventing corruption).[175] In *King*, the Tenth Circuit discerned that apparent corruption and circumvention concerns are necessarily derivative of the underlying, primary government interest, actual quid pro quo corruption.[176] That is, without the potential for actual quid pro quo corruption, combatting either apparent corruption or circumvention is neither logical nor permissible.

In *King*, the Tenth Circuit Court evaluated whether actual quid pro quo corruption was inherently possible within a hybrid PAC.[177] The court avoided any initial

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[173] *See supra* Part II.B.2 (detailing why contributions to a hybrid PAC's independent-expenditure arm are different than contributions to a traditional PAC even if a hybrid PAC's independent-expenditure arm is not identically situated to a pure independent-expenditure group).

[174] *See* Citizens United v. FEC, 558 U.S. 310, 360 (2010) ("[M]ore speech, not less, is the governing rule.").

[175] *See supra* Part II.A.2.

[176] *See King*, 741 F.3d at 1102 (stating that there can be no freestanding anti-circumvention interest).

[177] *See id.* at 1098 (comparing a hybrid PAC with the organizations evaluated in Supreme Court decisions like *Buckley*); *id.* at 1093–94, 1102 (discussing the anti-corruption interests

assumption of impermissible coordination and specifically looked at how a hybrid PAC is situated and where it could spend its money.[178] First, the court determined that hybrid PACs are differently situated than organizations that are closely affiliated with candidates, such as political parties.[179] Though a hybrid PAC makes direct candidate contributions, those contributions do not rise to the same level of affiliation, nor do those contributions implicate the uncoordinated nature of a hybrid PAC's independent expenditures.[180] This meshes nicely with the Supreme Court's holding in *Citizens United*, which presumes that independent expenditures are uncoordinated and non-corrupting unless there is some additional reason to think otherwise.[181]

Next, the Tenth Circuit Court of Appeals identified situations in which contributions to a hybrid PAC's independent-expenditure arm could lead to quid pro quo corruption.[182] The only way such corruption could occur, the court reasoned, was if the candidate-contribution arm were to donate to a candidate using money given to the independent-expenditure arm.[183] In many jurisdictions, however, PAC-to-candidate contributions are limited, which satisfies the anti-corruption interest.[184]

The *King* court, after examining any underlying concern of actual quid pro quo corruption, then looked to the derivative corruption concerns: apparent corruption and circumvention.[185] Neither of the derivative concerns, however, are applicable to contributions to a hybrid PAC's independent-expenditure arm because the court identified no underlying potential for actual quid pro quo corruption.[186]

B. King *Acknowledges That More Targeted Measures to Combat Corruption Are Less Burdensome*

The Tenth Circuit, like the Supreme Court, still permits the government to combat corruption where corruption can occur. Both courts, however, also have sought to emphasize the importance of tailoring restrictions to avoid abridgment of speech

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associated with candidate contributions and independent expenditures and holding that corruption may arise in a hybrid PAC's candidate contributions).

[178] *See id.* at 1101–02 (noting that hybrid PACs must adhere to base contribution limits and anti-coordination laws, then evaluating opportunities for corruption within that framework).

[179] *See id.* at 1098 (indicating that a hybrid PAC's independent-expenditure arm introduces an unaffiliated aspect that is not shared by the organizations in cases like *McConnell*).

[180] *See id.* at 1101.

[181] *See id.* (relating a hybrid PAC's independent-expenditure arm to other independent-expenditure groups under *Citizens United*).

[182] *See id.* at 1102.

[183] *See id.* (addressing the possibility for circumvention of base contribution limits).

[184] *See id.* ("[T]here is no underlying risk of corruption since [the hybrid PAC's] contributions to candidates are controlled . . . .").

[185] *See id.* at 1101–02.

[186] *See id.* at 1102 ("[T]here must be an underlying risk of corruption that justifies a contribution limit[ ] . . . .").

rights.[187] Perhaps most importantly, both the *King* court and the Supreme Court have refused to permit broad prophylactic restrictions in situations where more targeted measures are available.[188]

In evaluating limits on contributions to a hybrid PAC's independent-expenditure arm, the *King* Court held that PAC-to-candidate contribution limits and anti-coordination laws were sufficient to combat the potential corruption that may arise from a hybrid PAC's activities.[189] PAC-to-candidate contribution limits prevented the potential for circumvention, and anti-coordination laws prevented the potential for corruption via independent expenditure coordination.[190] This rationale closely mirrored the Supreme Court's own in *Citizens United* and *McCutcheon*.[191]

The notable distinction between *King* and those Supreme Court cases was that *King* was decided on the basis of state law. That means that, significantly, both state law and federal law have viable alternatives to broad, prophylactic contribution limits.[192]

C. King *Provides a Bright-Line Rule*

The Tenth Circuit put forth a clear legal standard in *King*. The court's standard evaluates law before facts and is presented in a way that can be applied uniformly.[193] The court clearly states the law that contributions to independent-expenditure groups do not invoke quid pro quo corruption concerns.[194] Hybrid PACs are not solely independent-expenditure groups, though, since those PACs also have candidate-contribution arms. But allowing an independent-expenditure group to coexist with

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[187] *See id.* at 1096 n.4 ("[T]he logic of *Citizens United* would insist on the enforcement of bans on coordination, rather than targeting an entire class of contributions to independent groups.").

[188] *See* McCutcheon v. FEC, 134 S. Ct. 1434, 1446 (2014) (plurality opinion) (describing aggregate limits as "heavy-handed" in the presence of more targeted measures); *King*, 731 F.3d at 1101 (explaining that base contribution limits and anti-coordination laws are sufficient to serve the government's anti-corruption interest and less burdensome than additional prophylactic contribution limits).

[189] *See King*, 731 F.3d at 1101 (holding that base contribution limits and anti-coordination laws are sufficient).

[190] Federal anti-proliferation rules prohibiting an individual from controlling multiple PACs also help prevent circumvention of base limits. *See McCutcheon*, 134 S. Ct. at 1439 (plurality opinion).

[191] *See King*, 741 F.3d at 1096 n.4.

[192] Though some states do not have base contribution limits, those states still would not be justified in enacting broad, prophylactic contribution limits on a hybrid PAC's independent-expenditure arm. Most states without base contribution limits have strict disclosure requirements that provide the necessary targeted measure aimed at preventing corruption. *See, e.g.*, IND. CODE ANN. §§ 3-9-5-9 to -22 (West 2016) (campaign finance reporting requirements).

[193] *See King*, 741 F.3d at 1096 n.4 ("*Citizens United* did not treat corruption as a fact question to be resolved on a case-by-case basis."); *cf.* Vt. Right to Life Comm., Inc. v. Sorrell, 758 F.3d 118, 142–43 (2d Cir. 2014) (focusing on the facts of a specific case in determining that an independent-expenditure group could be subject to contribution limits).

[194] *See King*, 741 F.3d at 1095.

a candidate-contribution group does not suddenly change the underlying principles that govern either.[195]

Contributions to a hybrid PAC's independent-expenditure arm do not pose unique corruption concerns simply because of the hybrid PAC's structure. Both circumvention and coordination were concerns before hybrid PACs existed, and hybrid PACs must abide by the existing safeguards targeted at preventing circumvention and coordination.[196] The *King* court stands by the notion that contributions to a hybrid PAC's independent-expenditure arm are not inherently suspect.[197]

Since hybrid PACs are not inherently more likely to be corrupting, they need only maintain separate accounts for their candidate-contribution and independent-expenditure arms and abide by the same restrictions as any other similarly situated PAC.[198] Corruption concerns would only arise if a hybrid PAC impermissibly coordinated or violated base contribution limits.

D. The Second Circuit's Holding in Sorrell *Allows Too Much Judicial Discretion and Will Create an Impermissible Speech Gap*

The Second Circuit's competing standard put forth in *Sorrell* is heavily fact-based and perpetuates the use of unnecessarily broad prophylactic contribution limits. The Second Circuit's factual evaluation of independent-expenditure groups is in opposition to the Supreme Court's reasoning in *Citizens United*, which held that independent expenditures, categorically, were uncoordinated and non-corrupting.[199] Because independent expenditures are not the type of speech that pose a corruption risk, no corruption risk exists to be evaluated unless that independence is lost through direct candidate contribution or coordination with a candidate (or a closely affiliated group).[200]

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[195] *See id.* at 1101 (combining two non-corrupting activities does not increase the chance for corruption).

[196] *See id.* (base contribution limits and anti-coordination laws satisfy the government's anti-corruption interest).

[197] *See id.* (citing Citizens United v. FEC, 558 U.S. 310, 360 (2010)) ("[I]ndependent expenditures are by definition uncoordinated . . . and cannot lead to the appearance of quid pro quo corruption.").

[198] *See id.* at 1097 (citing Carey v. FEC, 791 F. Supp. 2d 121, 131–32 (D.D.C. 2011)) (indicating that a hybrid PAC does not violate candidate contribution restrictions if that hybrid PAC maintains segregated accounts for its different arms).

[199] *See id.* at 1096 n.4 ("*Citizens United* did not treat corruption as a fact question to be resolved on a case-by-case basis."); *cf.* Vt. Right to Life Comm., Inc. v. Sorrell, 758 F.3d 118, at 142–43 (2d Cir. 2014) (focusing on the facts of a specific case in determining that an independent-expenditure group could be subject to contribution limits).

[200] *See supra* Part III.A (discussing how a hybrid PAC's independent-expenditure arm is not inherently non-independent because the independent-expenditure arm is, by definition, uncoordinated with the candidate-contribution arm, and the candidate-contribution arm is not inherently closely affiliated with a candidate).

The *Sorrell* court also failed to recognize the broad implication of its ruling. Although contribution limits may have been a proper remedy for the specific violation in *Sorrell*, such broad, prophylactic limits are far too burdensome in light of other more targeted measures. More importantly, those contribution limits existed *before Sorrell* was decided, meaning that the court failed to address the obviously overbroad law that led to the issue in the first place. If the law had been ruled unconstitutional as applied to independent-expenditure groups—as *Citizens United* would seem to encourage—then the independent-expenditure group in *Sorrell* still may have violated anti-circumvention or anti-coordination laws. An overbroad law is not justified simply because its application happens to lead to a favorable outcome.

CONCLUSION

In 2012, Politico quoted attorney Dan Backer as saying, "Any PAC that doesn't become a hybrid PAC is run by idiots. The default is going to be hybrid PACs[.]"[201] Backer, who had successfully argued *Carey v. FEC* only a year earlier,[202] had good reason to believe hybrid PACs would become the new norm. As vehicles for political speech, hybrid PACs are unrivaled—combining the elements of both traditional and super PACs under one roof. Hybrid PACs, however, still have not even remotely come close to the fundraising power of super PACs.[203]

Perhaps the most likely reason why hybrid PACs have not become the default PAC is because of the legal uncertainty that surrounds them. Hybrid PACs were the creation of a district court decision[204] and have been subject to varying restrictions across the federal circuits. Certain decisions permitting contribution limits on a hybrid PAC's independent-expenditure arm undoubtedly have a chilling effect on political speech that should be protected. Though the government's anti-corruption interest is certainly valid, that interest is not all-powerful.

Any turn in the battle between the government's anti-corruption interest and First Amendment political speech rights predominantly rests on the political inclinations

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[201] Dave Levinthal, *Meet the Super Super PAC*, POLITICO (Jan. 21, 2012, 12:33 PM), http://www.politico.com/story/2012/01/meet-the-super-super-pac-071763 [http://perma.cc/6M3E-BDPW].

[202] *Id.*

[203] *See* Julie Bykowicz & Chad Day, *Presidential Super PACs Lost Steam in Second Half of 2015*, AP (Feb. 1, 2016, 4:24 AM), http://bigstory.ap.org/article/47a715b4f7ea4ec8a63917bad0a228de/presidential-super-pacs-lost-steam-second-half-2015 [http://perma.cc/M6Q5-HXAP] (noting that Jeb Bush's super PAC alone raised $103 million in the first half of 2015); Alex Lazar, *Hybrid PACs Collectively Beat Fundraising Records of Past Election Cycles*, CTR. FOR RESPONSIVE POL. (Aug. 17, 2015), https://www.opensecrets.org/news/2015/08/hybrid-pacs-collectively-beat-fundraising-records-of-past-election-cycles/ [http://perma.cc/6526-RXB7] (indicating that hybrid PACs collectively raised about $11.3 million in the first half of 2015).

[204] *See* Carey v. FEC, 791 F. Supp. 2d. 121 (D.D.C. 2011).

of the Supreme Court Justices. With the passing of Justice Scalia, the Court's political direction is no longer as certain as when *McCutcheon* was decided. The next Supreme Court Justice could influence campaign finance in much the same way that Justice Scalia did for nearly three decades, but the direction of that influence could substantially change contribution limit jurisprudence.

What is true now, however, is that independent expenditures are considered uncoordinated and non-corrupting. In the absence of corruption there is no government interest sufficient to warrant either expenditure or contribution limits. Regardless of the next Justice, the Court will likely hesitate to immediately overturn that precedent.

A hybrid PAC's independent-expenditure arm is, by definition, uncoordinated and non-corrupting. Contribution limits on a hybrid PAC's independent-expenditure arm should be treated the same as limits on the equally independent super PACs, that is, those limits should be deemed entirely unconstitutional. Some argue that the closeness of a hybrid PAC's candidate-contribution and independent-expenditure elements creates a situation ripe for impermissible coordination and circumvention, but that argument simply does not hold up. Hybrid PACs are subject to the same base limits and anti-coordination laws as separated traditional and super PACs. Those more targeted provisions already serve to prevent impermissible coordination and circumvention. Broad, prophylactic contribution limits on a hybrid PAC's independent-expenditure arm are heavy-handed and substantially mismatched to the government's underlying anti-corruption interest.

The Tenth Circuit stands by the notion that contribution limits on a hybrid PAC's independent-expenditure arm are unduly burdensome, and the court's decision in *King* should decide the circuit split. Unlike the Second Circuit, which is on the opposite side of the split, the Tenth Circuit's jurisprudence aligns with the Supreme Court's modern understanding of the anti-corruption interest and provides a bright-line rule for determining the legal question of whether contribution limits may be applied to a hybrid PAC's independent-expenditure arm. The Second Circuit's decision in *Sorrell*, alternatively, allows too much judicial discretion and will create an impermissible speech gap.

In *Citizens United*, the Supreme Court declared that independent expenditures did not pose a corruption risk, yet some courts still claim otherwise. Direct candidate contributions, however, certainly can pose a corruption risk, and that is why base contribution limits long have been relatively uncontroversial. Hybrid PACs can contribute to candidates and also make independent expenditures, two functions that, independently, are undeniably permissible. The only truly defining characteristic of a hybrid PAC is its efficiency; hybrid PACs do not develop an emergent property of corruption simply by existing. Hybrid PACs can become the default PAC, but first the courts need to get out of the way. For hybrid PACs to truly become the preeminent, highly efficient vehicle of political speech, broad, prophylactic contribution limits must be barred in favor of the more targeted measures that are less burdensome on the cornerstone of our First Amendment rights, the right to freely engage in political speech.