UNIVERSITY OF PITTSBURGH LAW REVIEW
Vol. 77 ● Spring 2016

DO SUPER PACS FORFEIT FIRST AMENDMENT RIGHTS WHEN THEY RESTRUCTURE AS HYBRID PACS? THE IMPLICATIONS OF *VERMONT RIGHT TO LIFE COMMITTEE, INC. V. SORRELL*

Brittney Wozniak

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2016.408
http://lawreview.law.pitt.edu

DO SUPER PACS FORFEIT FIRST AMENDMENT RIGHTS WHEN THEY RESTRUCTURE AS HYBRID PACS? THE IMPLICATIONS OF *VERMONT RIGHT TO LIFE COMMITTEE, INC. V. SORRELL*

Brittney Wozniak*

INTRODUCTION

More than a century ago, Marcus Alonzo Hanna, a politician who received political cash from businesses, made the following observation: "There are two things that are important in politics. The first is money and I can't remember what the second one is."[1] Hanna's observation remains true today. Elections are a money race that have become increasingly dependent on donors.[2] Money speaks in any facet of society, but in politics, it writes history.

The role of money in political campaigns has raised concerns of corruption and coordinated conduct between donors and candidates.[3] The government has responded to this concern with statutes and regulations.[4] Consequently, the United

* Candidate for J.D., 2016, University of Pittsburgh School of Law; B.B.A., 2012, *magna cum laude*, The George Washington University.

[1] Calvin Woodward, *Obama Picked Odd Time and Place to Jab High Court*, SEATTLE TIMES (Jan. 28, 2010, 5:16 PM), http://seattletimes.com/html/politics/2010920950_apusobamasupremecourtsmackdown.html.

[2] Dan Balz, *Just How Daunting Is the Money Race of 2016?*, WASH. POST (Dec. 10, 2014), http://www.washingtonpost.com/politics/just-how-daunting-is-the-money-chase-for-2016/2014/12/10/6ca67d1a-800d-11e4-9f38-95a187e4c1f7_story.html.

[3] *See* Buckley v. Valeo, 424 U.S. 1, 25–26 (1976) (per curiam) (identifying a governmental interest in preventing *quid pro quo* corruption).

[4] *See History of Campaign Finance Laws*, EBSCOHOST CONNECTION, http://connection.ebscohost.com/politics/campaign-finance-reform/history-campaign-finance-laws (last visited Feb. 26, 2015).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2016.408
http://lawreview.law.pitt.edu

States Supreme Court and the United States Circuit Courts have also become involved. Recently, courts have favored a donor's right to free speech[5] over the government's anticorruption interest.[6] However, in July of 2014, the Second Circuit favored a state's anticorruption interest and created a circuit split when it decided that a super political action committee ("super PAC") could be subject to Vermont's campaign finance contribution limits—the same limits to which political action committees ("PAC") are subject.[7] The Second Circuit's decision was predicated on finding that the government had a valid anticorruption interest in limiting political contributions.[8] Thus, unlike the majority of decisions regarding super PACs, the Second Circuit favored the government's anticorruption interest over free speech.[9]

The objective of this Note is to explain the implications of *Vermont Right to Life Committee, Inc. v. Sorrell* and to propose a solution for circuit courts faced with similar disputes. Part I provides a history of campaign financing. Part II explains PACs, super PACs, and hybrid political action committees ("hybrid PACs"), and then addresses the significance of super PACs in political campaigns. Part III provides the legal background of PACs and super PACs, and Part IV discusses the legal background of hybrid PACs, leading to the circuit split created by *Vermont Right to Life*. Finally, Part V proposes a solution and underscores the implications that the unresolved circuit split could have on the 2016 presidential election.

[5] Political donations are a form of free speech. *See Buckley*, 424 U.S. at 19–20.

[6] *See* Citizens United v. FEC, 558 U.S. 310 (2010); *Buckley*, 424 U.S. 1; Catholic Leadership Coal. of Tex. v. Reisman, 764 F.3d 409 (5th Cir. 2014); Republican Party of N.M. v. King, 741 F.3d 1089 (10th Cir. 2013); Long Beach Area Chamber of Commerce v. City of Long Beach, 603 F.3d 684 (9th Cir. 2010), *cert. denied*, 562 U.S. 896 (2010); SpeechNow.org v. FEC, 599 F.3d 686 (D.C. Cir. 2010); EMILY's List v. FEC, 581 F.3d 1 (D.C. Cir. 2009); N.C. Right to Life v. Leake, 525 F.3d 274 (4th Cir. 2008); Carey v. FEC, 791 F. Supp. 2d 121 (D.D.C. 2011).

[7] Vt. Right to Life Comm., Inc. v. Sorrell, 758 F.3d 118, 140–41 (2d Cir. 2014), *cert. denied*, 135 S. Ct. 949 (2015).

[8] *Id.* at 140–43 (finding that there was a risk of prearrangement and coordination where there was no organizational separation between the super PAC and its sister PAC, even though the super PAC had separate bank accounts from the sister PAC).

[9] *See* cases cited *supra* note 6. The Vermont Right to Life Committee submitted writ of certiorari, but it was denied. Vt. Right to Life Comm., Inc. v. Sorrell, 135 S. Ct. 949 (2015).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2016.408
http://lawreview.law.pitt.edu

I. A HISTORY OF CAMPAIGN FINANCE LEGISLATION

Money in politics is deeply rooted in American history. It can be traced back to George Washington[10] and Andrew Jackson.[11] Washington bribed voters with booze,[12] and Jackson appointed his campaign supporters as federal officials.[13] The influence of money in political campaigns has drastically evolved since the era of Washington and Jackson, experiencing a series of restrictions to prevent corruption.[14] In the early 1900s, Congress passed several laws to restrict contributions from corporations and unions and to enhance the transparency of federal candidate expenditures.[15] Congress then passed the Federal Election Campaign Act in 1971 to limit individual contributions and improve disclosure of campaign donations.[16] Following the Watergate scandal, Congress further restricted campaign finance laws with the 1974 amendments to the Federal Election Campaign Act.[17] The amendments imposed significant limits on individual contributions to federal candidates and enacted spending limits on federal elections.[18] These amendments also created the Federal Election Commission ("FEC"), an agency endowed with the chief responsibility of enforcing election laws.[19] Most recently, Congress passed the Bipartisan Campaign Reform Act of 2002, which restricts certain types of campaign spending and decreases limits for individual contributions to candidates.[20]

Although the legislature continues to advocate for more restrictive campaign finance laws, the era of strict campaign financing law appears to be moving in a

---

[10] Paul Bedard, *George Washington Plied Voters with Booze*, U.S. NEWS & WORLD REP. (Nov. 8, 2011, 1:08 PM), http://www.usnews.com/news/blogs/washington-whispers/2011/11/08/george-washington-plied-voters-with-booze.

[11] MICHAEL J. GERHARDT, THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 52–54 (2000).

[12] Bedard, *supra* note 10.

[13] GERHARDT, *supra* note 11, at 54.

[14] *History of Campaign Finance Laws*, *supra* note 4.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2016.408
http://lawreview.law.pitt.edu

more liberal direction. Since 1976, the Supreme Court and circuit courts have almost consistently struck down restrictive campaign finance laws that limit independent expenditures as violations of free speech.[21]

II. PACS, SUPER PACS AND HYBRID PACS

PACs and super PACs have become the primary vehicles for raising campaign money. These entities have recently morphed into a new form of campaign financing—the hybrid PAC. PACs collect money from individuals and then give contributions directly to a particular candidate or party.[22] The first PACs were established in the 1940s.[23] Since then, PACs have become increasingly important in elections, particularly because individuals can contribute more to PACs than they can contribute to a candidate or party.[24] Thus, PACs have created an avenue for individuals to contribute indirectly to campaigns and for candidates to receive campaign funding.

Super PACs became a popular form of campaign financing in 2010.[25] These committees are perhaps the greatest mechanism for raising money and campaigning on behalf of a candidate.[26] Super PACs are essentially PACs that can raise unlimited amounts of money and have no limit on independent expenditures.[27] The caveat is that, unlike PACs, super PACs cannot make contributions to a candidate

[21] *See* Citizens United v. FEC, 558 U.S. 310 (2010); Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam); Catholic Leadership Coal. of Tex. v. Reisman, 764 F.3d 409 (5th Cir. 2014); Republican Party of N.M. v. King, 741 F.3d 1089 (10th Cir. 2013); SpeechNow.org v. FEC, 599 F.3d 686 (D.C. Cir. 2010); Carey v. FEC, 791 F. Supp. 2d 121 (D.D.C. 2011).

[22] *History of Campaign Finance Laws*, *supra* note 4.

[23] *Id.*

[24] *Id.*

[25] Richard Briffault, *Super PACs*, 96 MINN. L. REV. 1644, 1644 (2012).

[26] *See* ELECTING THE PRESIDENT, 2012: THE INSIDERS' VIEW 146 (Kathleen Hall Jamieson ed., 2013) (explaining super PACs are allies to candidates and that a pro-Romney super PAC outspent the Romney campaign in 2012).

[27] Briffault, *supra* note 25, at 1647. Independent expenditures are defined "as expenditures 'expressly advocating the election or defeat of a clearly identified candidate' that are 'not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents.'" SpeechNow.org v. FEC, 599 F.3d 686, 689 (D.C. Cir. 2010) (quoting 2 U.S.C. § 431(17) (2012)). "Independent expenditures include all direct political advocacy that is not coordinated with a candidate, such as direct mailings or television advertisements." Jeremy R. Peterman, Note, *PACs Post*-Citizens United*: Improving Accountability and Equality in Campaign Finance*, 86 N.Y.U. L. REV. 1160, 1165 (2011).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2016.408
http://lawreview.law.pitt.edu

or a party or make expenditures in coordination with a candidate or a political party.[28]

Although super PACs are relatively new to campaign financing, candidates have quickly become dependent on them.[29] Super PACs are particularly valuable to candidates who are unable to raise funds on their own.[30] It is projected that for the 2016 presidential election, candidates must raise approximately $75 million to survive the first round of caucuses and primary elections.[31] Candidates who cannot raise these funds independently can receive support from candidate-centric super PACs, which are not subject to contribution limits and are permitted to spend unlimited amounts advocating on the candidate's behalf and attacking his or her opponents.[32]

Recently, PACs and super PACs have reorganized into hybrid PACs. Legally established in *Carey v. FEC*, these entities are part PAC and part super PAC.[33] Hybrid PACs can "accept unlimited donations to finance independent expenditures and accept contributions, subject to the restrictions that ordinarily apply to contributions to PACs, to be used to make contributions to candidates."[34] Thus, a hybrid PAC will "operate as a [s]uper PAC with respect to its independent spending and as an ordinary PAC with respect to its contributions."[35] Currently, hybrid PACs are less common than PACs and super PACs, but they are creating great legal problems, including the legal dispute in *Vermont Right to Life*.

---

[28] Peterman, *supra* note 27, at 1165.

[29] Balz, *supra* note 2.

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] Byron Tau, *Court: Super PAC Not Independent Enough*, POLITICO (July 2, 2014, 5:10 PM), http://www.politico.com/blogs/under-the-radar/2014/07/court-super-pac-not-independent-enough-191488.html.

[34] Briffault, *supra* note 25, at 1646–47 n.12.

[35] *Id.*

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2016.408
http://lawreview.law.pitt.edu

III. THE LEGAL BACKGROUND OF PACS, SUPER PACS, AND HYBRID PACS

A. The Federal Election Campaign Act

As mentioned above, the genesis of contemporary campaign finance laws was the enactment of the Federal Election Campaign Act ("FECA") in 1971, followed by the 1974 amendments to FECA ("1974 Amendments"). The 1974 Amendments were passed in reaction to the Watergate scandal and a growing concern for the influence of money in politics.[36] They restricted how much individuals and PACs were permitted to contribute to federal candidates and imposed spending limits on federal elections.[37]

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

In the 1976 Supreme Court decision of *Buckley v. Valeo*,[38] the Court struck down several portions of the 1974 Amendments and established a standard of review for campaign finance laws.[39] The Court's decision was predicated on finding that independent expenditure and contribution limits implicate fundamental First Amendment interests.[40] The Court struck down the 1974 Amendments' limits on independent expenditures but upheld the limits on contributions to candidates; the expenditure ceilings imposed more severe restrictions on the "protected freedoms of political expression and association" than did the limitations on financial contributions to candidates.[41] The Court reasoned that the expenditure limitations substantially restrained "the quantity and diversity of political speech," because the limitations would "exclude all citizens and groups . . . from any significant use of the most effective modes of communication."[42] On the contrary, the contribution ceiling "entail[ed] only a marginal restriction upon the contributor's ability to engage in free communication," because "[a] contribution

[36] H.R. REP. NO. 93-1239, at 120, 131 (1974).

[37] Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 101(b)(1), 88 Stat. 1263 (codified as amended at 52 U.S.C. § 30101 (2012)).

[38] 424 U.S. 1 (1976) (per curiam).

[39] *Id.* at 23, 25.

[40] *Id.* at 23.

[41] *Id.*

[42] *Id.* at 19–20.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2016.408
http://lawreview.law.pitt.edu

serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support."[43]

In reaching this decision, the Court identified the government's interest in restricting speech in campaign finance regulation. Specifically, it held that the state's interest in "limit[ing] the actuality and appearance of corruption resulting from large individual financial contributions" justifies campaign finance regulations.[44] The Court was concerned about *quid pro quo* arrangements as a result of large contributions to candidates.[45]

The Court also established a standard of judicial review for campaign finance laws. Equating political donations to free speech, it held that "significant interference" with financial contributions "may be sustained if the [s]tate demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms."[46] The Court held that the government's interest in preventing corruption justified the limits on contributions.[47] However, it held that this interest did not justify limits on independent expenditures, because expenditures do not pose a risk of *quid pro quo* corruption.[48] Thus, *Buckley* identified two competing interests in campaign finance regulations: (1) an individual's First Amendment guarantee of free speech and political expression; and (2) the government's concern for corruption and the appearance of corruption.[49]

Buckley provided the legal foundation for super PACs. The decision created an incentive for PACs to spend money through independent expenditures instead of contributions. Ultimately, the Court provided the vehicle for unlimited spending and indirect campaign funding.

---

[43] *Id.* at 20–21.

[44] *Id.* at 26.

[45] *Id.* The Court explained that actual *quid pro quo* corruption is the danger that "large contributions are given to secure a political *quid pro quo*"; however, the Court was concerned with the appearance of corruption "stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions." *Id.* at 26–27.

[46] *Id.* at 25.

[47] *Id.* at 25–30.

[48] *Id.* at 45–46.

[49] *See id.* at 24–25, 26–27.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2016.408
http://lawreview.law.pitt.edu

C. *The 1976 Amendments to FECA*

Following the Supreme Court's decision in *Buckley*, Congress passed the 1976 Amendments to FECA ("1976 Amendments").[50] The 1976 Amendments eliminated the unconstitutional provision that limited independent expenditures, and it invoked a $5,000 limit on individual contributions to PACs.[51]

In *California Medical Association v. FEC*,[52] a plurality of the Court upheld the $5,000 individual contribution ceiling to multicandidate PACs.[53] The plurality stressed that limiting the amount a contributor may give to a multicandidate PAC does not impair the contributor's rights.[54] The plurality was concerned that without a limitation, contributors would evade "the $1,000 limit on contribution to candidates . . . by channeling funds through a multicandidate political committee."[55]

Justice Blackmun gave the necessary fifth vote in this decision.[56] In his concurrence, Justice Blackmun agreed with the plurality that contributions to multicandidate political committees could be limited to $5,000 a year to prevent evasion of the limit on contributions to a candidate.[57] However, he then noted that the Court's "analysis suggests that a different result would follow if [the contribution ceiling was] applied to contributions to a political committee established for the purpose of making independent expenditures, rather than contributions to candidates."[58] Justice Blackmun explained that multicandidate PACs are "essentially conduits for contributions to candidates" and, thus, "pose a

[50] *See* Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (codified as amended at scattered sections of 2, 18, and 26 U.S.C.).

[51] *Id.* at § 320(a)(1)(C).

[52] 453 U.S. 182 (1981).

[53] *Id.* at 201; Briffault, *supra* note 25, at 1653.

[54] *Cal. Med. Ass'n*, 453 U.S. at 197; Briffault, *supra* note 25, at 1653.

[55] *Cal. Med. Ass'n*, 453 U.S. at 198; Briffault, *supra* note 25, at 1653.

[56] Briffault, *supra* note 25, at 1653.

[57] *Cal. Med. Ass'n*, 453 U.S. at 203 (Blackmun, J., concurring in part and concurring in the judgment); Briffault, *supra* note 25, at 1653.

[58] *Cal. Med. Ass'n*, 453 U.S. at 203 (Blackmun, J., concurring in part and concurring in the judgment); Briffault, *supra* note 25, at 1653.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2016.408
http://lawreview.law.pitt.edu

perceived threat of actual or potential corruption."[59] However, "contributions to a committee that makes only independent expenditures pose no such threat."[60]

Justice Blackmun's concurrence was bolstered in *Citizens Against Rent Control v. Berkeley*.[61] The case involved a campaign ordinance that limited expenditures and contributions in campaigns involving both candidates and ballot measures.[62] The Court invalidated the ordinance by distinguishing between contributions to candidates and contributions to committees that advocate for or against ballot measures.[63] The Court held that contributions to these committees implicated the First Amendment interests of political expression and association more significantly than did contributions to candidates and, thus, held that there was no anticorruption justification for restraining these interests.[64]

These decisions are significant because they stand for the proposition that, unlike contributions to candidates, donations to independent expenditure committees do not pose the threat of actual or potential corruption.[65] However, in these decisions the Court failed to define actual or potential corruption.

D. Defining "Corruption"

1. The Supreme Court Broadly Defines "Corruption"

In *Buckley*, the Court discussed "corruption" in terms of *quid pro quo* arrangements that result from large contributions to candidates.[66] The Court

---

[59] *Cal. Med. Ass'n*, 453 U.S. at 203 (Blackmun, J., concurring in part and concurring in the judgment).

[60] *Id.*; Briffault, *supra* note 25, at 1653.

[61] 454 U.S. 290 (1981); Briffault, *supra* note 25, at 1653.

[62] *Citizens Against Rent Control*, 454 U.S. at 292.

[63] *Id.* at 296–99. The Court explained that *Buckley* sustained limits on contributions to candidates and their committees because such contributions could give rise to the appearance of improper influence. *Id.* The Court further reasoned that avoiding the appearance of improper influence is necessary to maintain confidence in the system of representative government, while limiting individual contributions to a committee advocating a position on a ballot measure is not needed to preserve voters' confidence in the ballot measure process. *Id.*

[64] *Id.* at 299–300; Briffault, *supra* note 25, at 1653.

[65] *See* Briffault, *supra* note 25, at 1654 ("Justice Blackmun's concurring dictum in [*California Medical Association*] and the Court's [*Citizens Against Rent Control*] decision together indicate there is no constitutional basis for limiting contributions to an organization if neither the contribution itself nor the activity it is funding poses a danger of corruption.").

[66] Buckley v. Valeo, 424 U.S. 1, 26–29 (1976) (per curiam); Briffault, *supra* note 25, at 1654.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2016.408
http://lawreview.law.pitt.edu

broadly defined "corruption" in *Nixon v. Shrink Missouri Government PAC*, explaining that, "in addition to *quid pro quo* arrangements," the concern for corruption "extend[s] to the broader threat [of] politicians too compliant with the wishes of large contributors."[67] In *McConnell v. FEC*,[68] the Court continued to apply a broad definition of "corruption" when it upheld the soft money restrictions that Congress imposed in the Bipartisan Campaign Reform Act of 2002.[69] Soft money is not donated to a specific candidate or to a party for direct support of a candidate; it is used for party activities that indirectly help candidates.[70] Soft money contributions are valuable because they typically exceed the limits on individual contributions to candidates.[71] Despite a discussion that soft money donations are indirectly given to the candidate, the *McConnell* Court found that wealthy individuals, corporations, and unions made soft money donations to gain influence over federal officials and that "parties have *sold* access to federal candidates and officeholders."[72] Thus, the Court broadly defined "corruption" when it held that this opportunity to "purchase . . . such influence" was "substantial evidence to support Congress' determination that large soft-money contributions to national political parties [gave] rise to corruption and the appearance of corruption."[73]

2. Circuit Courts Narrowly Define "Corruption"

The cases that followed *McConnell* continued to broaden the Court's understanding of "corruption," particularly in regard to independent expenditures.[74]

---

[67] Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 389 (2000) (quotation marks omitted); Briffault, *supra* note 25, at 1654.

[68] 540 U.S. 93 (2003).

[69] *Id.* at 150, 152 (2003); Briffault, *supra* note 25, at 1654.

[70] *See McConnell*, 540 U.S. at 123–24.

[71] *See id.* at 124–26; Briffault, *supra* note 25, at 1654.

[72] *McConnell*, 540 U.S. at 145–50, 153–54; Briffault, *supra* note 25, at 1655.

[73] *McConnell*, 540 U.S. at 154; Briffault, *supra* note 25, at 1655.

[74] *See* Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 884–87 (2009) (holding that independent expenditures could create an "unconstitutional probability of bias" where the spender's donations and independent spending had a "disproportionate influence on the electoral outcome" and, thus, holding that a judge elected after receiving of three-million dollars of independent spending was required recuse himself from a case involving the spender); Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 659–60 (1990) (upholding state restrictions on independent expenditures by corporations because the state articulated a sufficient anticorruption interest, specifically preventing the corporations from using the

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2016.408
http://lawreview.law.pitt.edu

This created "two strands in Supreme Court doctrine" as to whether contributions to independent-expenditure-only committees gave rise to a risk of corruption and whether these contributions could be limited.[75] *Citizens United v. FEC* resolved this gray area of the law.[76] However, prior to *Citizens United*, circuit courts provided the foundation for this decision by narrowly defining corruption and protecting individual expenditures from spending ceilings.

a. *North Carolina Right to Life, Inc. v. Leake*, 344 F.3d 418 (4th Cir. 2003)

In 2003, the Fourth Circuit struck down a North Carolina law that limited individual contributions to independent-expenditure-only committees.[77] The court's decision was based on a determination that the state "failed to proffer sufficiently convincing evidence which demonstrate[d] that there [was] a danger of corruption due to the presence of unchecked contributions to [independent-expenditure-only committees]."[78] In arriving at its decision, the court discussed Justice Blackmun's concurrence in *California Medical Association* and reiterated that contributions to independent-expenditure-only committees do not pose the same threat of actual or potential corruption as PACs.[79] However, as with Justice Blackmun, the court did not rule that all limitations on contributions to independent-expenditure-only committees are unconstitutional.[80] Instead, it concluded that the state is subject to a heavier burden of showing "convincing evidence of corruption" when imposing

economic resources they amass in the market place to gain an unfair political advantage), *overruled by* Citizens United v. FEC, 558 U.S. 310 (2010); *see also* Briffault, *supra* note 25, at 1655–56.

[75] Briffault, *supra* note 25, at 1656 ("[O]n the eve of *Citizens United* there were two strands in Supreme Court doctrine that pointed in different directions if restrictions on contributions to political committees that make only independent expenditures were ever challenged.").

[76] *See Citizens United*, 558 U.S. at 360; Briffault, *supra* note 25, at 1660–61.

[77] N.C. Right to Life, Inc. v. Leake, 344 F.3d 418, 433–34 (4th Cir. 2003), *vacated*, 541 U.S. 1007 (2004); Briffault, *supra* note 25, at 1657. The court did not refer to the North Carolina Right to Life Committee as an independent-expenditure-only committee or a super PAC; rather, the court referred to it as an independent expenditure political action committee. *N.C. Right to Life, Inc.*, 344 F.3d at 421, 433. A super PAC is "often formally referred to as an 'independent expenditure committee' or an 'independent expenditure-only PAC.'" Briffault, *supra* note 25, at 1646–47. Therefore, "independent-expenditure-only committee," "independent expenditure political action committee" and "super PAC" are used interchangeably in this Note.

[78] *N.C. Right to Life, Inc.*, 344 F.3d at 434; Briffault, *supra* note 25, at 1657.

[79] *N.C. Right to Life, Inc.*, 344 F.3d at 434; Briffault, *supra* note 25, at 1657.

[80] *N.C. Right to Life, Inc.*, 344 F.3d at 434; Briffault, *supra* note 25, at 1657.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2016.408
http://lawreview.law.pitt.edu

limitations on donations to independent-expenditure-only committees than when imposing limitations on contributions to PACs.[81]

On petition for writ of certiorari, the Supreme Court vacated and remanded this decision for further consideration in light of *McConnell*.[82] However, the Fourth Circuit ultimately reaffirmed its prior decision.[83] The court distinguished *McConnell* from *North Carolina Right to Life*, explaining that *McConnell* only addressed limits on contributions to political parties, whereas the present case involved contributions to independent-expenditure-only committees.[84] The Fourth Circuit also distinguished independent-expenditure-only committees from political parties. Explaining that independent-expenditure-only committees are "further removed from . . . candidate[s]," the court stated that political parties "'have special access to and relationships with' those who hold public office," and "have influence and power in the [l]egislature that vastly exceeds that of any interest group."[85] As in its prior decision, the court reiterated that it is "'implausible' that contributions to [independent-expenditure-only committees] are corrupting."[86] However, the court again applied a heavy burden of proof, requiring the state "to produce convincing evidence of corruption before upholding limits" on contributions to independent-expenditure-only committees.[87]

b. *EMILY's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009)

In *EMILY's List v. FEC*,[88] the D.C. Circuit struck down an FEC rule that applied exclusively to 527 non-profit committees[89] and required half of a 527's

[81] *N.C. Right to Life, Inc.*, 344 F.3d at 434; *see* Briffault, *supra* note 25, at 1657–58.

[82] Leake v. N.C. Right to Life, Inc., 541 U.S. 1007 (2004); Briffault, *supra* note 25, at 1658.

[83] *N.C. Right to Life, Inc.*, 525 F.3d at 308; Briffault, *supra* note 25, at 1658.

[84] *N.C. Right to Life, Inc.*, 525 F.3d at 292–93; *see* Briffault, *supra* note 25, at 1658.

[85] *N.C. Right to Life, Inc.*, 525 F.3d at 293; Briffault, *supra* note 25, at 1658.

[86] *N.C. Right to Life, Inc.*, 525 F.3d at 293 (internal citation omitted); Briffault, *supra* note 25, at 1658.

[87] *N.C. Right to Life, Inc.*, 525 F.3d at 293; Briffault, *supra* note 25, at 1658.

[88] 581 F.3d 1 (D.C. Cir. 2009).

[89] 527 non-profit committees are "committees, other than candidate, party, or political action committees—that participate in elections." Briffault, *supra* note 25, at 1648. They are not required to followed FECA requirements, unless they expressly advocate for or against a federal candidate. *Id.* Therefore, "[l]ike [s]uper PACs, 527s are not subject to FECA's dollar limits and source restrictions on contributions to FEC political committees, and there are no limits on how much they can spend." *Id.*

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2016.408
http://lawreview.law.pitt.edu

non-candidate-specific activities be funded with hard money.[90] EMILY's List is a hybrid 527 non-profit committee because it engages in independent spending and makes contributions to specific candidates.[91] The court recognized that such hybrid committees could be required to make contributions to federal candidates and parties out of a hard-money account, which is "an account subject to source and amount limits."[92] The court also acknowledged that these entities may make independent expenditures "out of a soft-money or general treasury account that is not subject to source and amount limits."[93] Thus, the court recognized that a non-profit committee may make both direct contributions to a political party or candidate and independent expenditures.[94] Distinguishing non-profits from political parties,[95] the court held that EMILY's List and similar hybrid committees are not subject to dollar and source limits for their independent expenditures so long as these expenditures were not contributions to a candidate or party.[96] In arriving at this decision, the court recognized that "the regulation of non-profits does not fit within the anti-corruption rationale, which constitutes the sole basis for regulating campaign contributions and expenditures."[97]

Both *EMILY's List* and *North Carolina Right to Life* rejected an interpretation of *McConnell* that would permit regulating donations to a committee that made both independent expenditures and contributions to candidates or parties.[98] Neither

---

[90] *EMILY's List*, 581 F.3d at 15–18, 25.

[91] *Id.* at 12; Briffault, *supra* note 25, at 1658.

[92] *EMILY's List*, 581 F.3d at 12.

[93] *Id.*

[94] *Id.* ("A non-profit 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. Rather, it simply must ensure, to avoid circumvention of individual contribution limits by its donors, that its contributions to parties or candidates come from a hard-money account.").

[95] *Id.* at 14 ("Unlike . . . political parties[,] . . . there is no record evidence that non-profit entities have sold access to federal candidates and officeholders in exchange for large contributions. More fundamentally, non-profit groups do not have the same inherent relationship with federal candidates and officeholders that political parties do." (citation omitted)).

[96] *Id.* ("[N]on-profit groups—like individual citizens—may spend unlimited amounts out of their soft-money accounts for election-related activities, such as advertisements, get-out-the-vote efforts, and voter registration drives."); *see* Briffault, *supra* note 25, at 1660.

[97] *EMILY's List*, 581 F.3d at 11. The court further noted that "mere donations to non-profit groups cannot corrupt candidates and officeholders." *Id.* (emphasis omitted).

[98] Briffault, *supra* note 25, at 1660.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2016.408
http://lawreview.law.pitt.edu

decision recognized *McConnell* as broadly restricting any contribution that might be exchanged for a political favor.[99] Rather, both *EMILY's List* and *North Carolina Right to Life* narrowly labeled *McConnell* as a political party case.[100] However, these decisions did not preclude the FEC from imposing limitations on independent-expenditure-only committee, that is, super PAC, donations when there is evidence of corruption, such as a committee providing access to federal candidates in exchange for large contributions.[101]

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

Citizens United v. FEC[102] resolved the confusion resulting from *McConnell*, solidifying the principle that limitations cannot be imposed on independent-expenditure-only committees.[103] Justice Kennedy, writing for the Court, relied heavily on the principles of *Buckley* in holding that there is no government interest in limiting independent expenditures.[104] *Buckley* established that independent expenditures have no risk of corruption because they do not result in any danger of *quid pro quo* corruption and, therefore, limitations on expenditures could not be justified.[105] Accordingly, Kennedy focused on the risk of *quid pro quo* corruption.[106] Overturning *McConnell* in part, Kennedy provided that "[t]he fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt. . . ."[107] Kennedy further declared that "[t]he appearance of influence or access . . . will not cause the electorate to lose faith in our democracy. By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate."[108] While Kennedy acknowledged that the potential for candidates being influenced by independent expenditures exists, he emphasized that any congressional remedy to

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] 558 U.S. 310 (2010).

[103] *Id.* at 360; Briffault, *supra* note 25, at 1661.

[104] *Citizens United*, 558 U.S. at 345 (citing Buckley v. Valeo, 424 U.S. 1, 47–48 (1976) (per curiam)).

[105] *Buckley*, 424 U.S. at 46, 51.

[106] *Citizens United*, 558 U.S. at 359 (citing *Buckley*, 424 U.S. at 46–48).

[107] *Id.*; *see* Briffault, *supra* note 25, at 1661.

[108] *Citizens United*, 558 U.S. at 360 (citing *Buckley*, 424 U.S. at 46).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2016.408
http://lawreview.law.pitt.edu

such influence must comply with the First Amendment and the tradition of the law that favors more speech, not less.[109] The opinion concluded: "[I]ndependent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption."[110]

F. Lower Court Reactions to Citizens United

Shortly after *Citizens United*, the D.C. Circuit decided *SpeechNow.org v. FEC*,[111] which declared that limits on donations to independent-expenditure-only committees violated the First Amendment.[112] Relying on *Citizens United*, the court concluded that the government has no anticorruption interest in limiting contributions to committees that only make independent expenditures.[113] The court rejected the FEC's argument that *Speechnow.org* could be distinguished from *Citizens United* because *Speechnow.org* involved limits on contributions to independent-expenditure-only committees and *Citizens United* involved expenditure limits.[114] Moreover, the court rejected "that large contributions to independent expenditure groups lead to preferential access for donors and undue influence over officeholders."[115] The court concluded that contributions to independent-expenditure-only committees "cannot corrupt or create the appearance of corruption" because *Citizens United* held that "independent expenditures do not corrupt or create the appearance of *quid pro quo* corruption."[116]

Other circuit courts have followed *SpeechNow.org*'s holding and employed its application of *Citizens United*.[117] On First Amendment grounds, the Ninth Circuit invalidated two city ordinances that limited contributions to independent-expenditure-only committees that specifically supported or opposed candidates.[118]

---

[109] *Id.* at 360–61; Briffault, *supra* note 25, at 1661.

[110] *Citizens United*, 558 U.S. at 357.

[111] 599 F.3d 686 (D.C. Cir. 2010).

[112] *Id.* at 696.

[113] *Id.* at 695; Briffault, *supra* note 25, at 1663.

[114] *SpeechNow.org*, 599 F.3d at 694–96; Briffault, *supra* note 25, at 1663.

[115] *SpeechNow.org*, 599 F.3d at 694 (internal quotation and citation omitted); Briffault, *supra* note 25, at 1663.

[116] *SpeechNow.org*, 599 F.3d at 694; Briffault, *supra* note 25, at 1663.

[117] *See* Briffault, *supra* note 25, at 1663–64.

[118] Thalheimer v. City of San Diego, 645 F.3d 1109, 1118, 1121 (9th Cir. 2011) (relying heavily on *Citizens United* finding an "anti-corruption interest unavailing in the context of restrictions on

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2016.408
http://lawreview.law.pitt.edu

The Ninth Circuit concluded that the "*Citizens United* decision had narrowed the scope of the anti-corruption rationale to cover '*quid pro quo*' corruption only, as opposed to money spent to obtain 'influence over or access to elected officials.'"[119]

Similarly, in *Wisconsin Right to Life State Political Action Committee v. Barland*,[120] the Seventh Circuit relied on *Citizens United* to invalidate a state limit on individual contributions to independent expenditure only organizations.[121] The court rejected the state's argument "that large contributions to independent-expenditure groups create the appearance of corruption 'in more indirect ways'" and that "preventing the *indirect* appearance of corruption is enough to satisfy the intermediate standard of review."[122] The court concluded that as a result of *Citizens United*, "[a]s a categorical matter, independent expenditures 'do not give rise to corruption or the appearance of corruption.'"[123]

In 2013, the Second Circuit granted a preliminary injunction preventing the enforcement of New York State Election Law provisions that imposed an aggregate limit on an individual's contributions to independent-expenditure-only committees.[124] The Second Circuit provided no opinion on the ultimate outcome, but granted the injunction finding that the plaintiff had a substantial likelihood of success on the merits in light of *Citizens United*.[125] Moreover, in January of 2014,

---

independent expenditures," and finding that the PACs challenging the city ordinance had an indirect relationship with municipal candidates and lacked "the historical interconnection with candidates that distinguishes political parties"); Long Beach Area Chamber of Commerce v. City of Long Beach, 603 F.3d 684, 695 (9th Cir. 2010), *cert. denied*, 562 U.S. 896 (2010) (declaring that "Supreme Court precedent forecloses the City's argument that independent expenditures by independent expenditure committees . . . raise the specter of corruption or the appearance thereof," and that "the City may not impose financial limits on the . . . PACs' independent expenditures"); Briffault, *supra* note 25, at 1663–64.

[119] *Thalheimer*, 645 F.3d at 1119 (second italicization added) (quoting *Long Beach Area Chamber of Commerce*, 603 F.3d at 694 n.5).

[120] 664 F.3d 139 (7th Cir. 2011).

[121] *Id.* at 153–54; Briffault, *supra* note 25, at 1664–65.

[122] 664 F.3d at 155 (internal citation omitted) (rejecting that state's suggestion that a proverbial "wink or nod" between a donor and candidate regarding the donor's contribution to an independent expenditure political committee is an indirect appearance of corruption); Briffault, *supra* note 25, at 1665.

[123] *Wis. Right to Life State Political Action Comm.*, 664 F.3d at 155 (quoting Citizens United v. FEC, 558 U.S. 310, 357 (2010)); Briffault, *supra* note 25, at 1665.

[124] N.Y. Progress & Prot. PAC v. Walsh, 733 F.3d 483, 487, 489 (2d Cir. 2013).

[125] *Id.*

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2016.408
http://lawreview.law.pitt.edu

the Tenth Circuit applied *Citizens United* to invalidate a New Mexico campaign finance law that limited contributions to independent expenditure groups in *Republican Party of New Mexico v. King*.[126] The court declared that, "because there is no corruption interest in limiting independent expenditures, there can also be no interest in limiting contributions to non-party entities that make independent expenditures."[127] The NMTA, which was one of the political committees at issue in the case, differed from the committees that had previously challenged campaign finance laws; the NMTA made both candidate contributions and independent expenditures.[128] The court rejected New Mexico's argument that this form of a political committee creates a government interest in limiting contributions to these entities and that *Citizens United* supports such restrictions.[129]

In keeping with the six circuits above, the Fifth Circuit also followed *Citizens United*'s holding that independent expenditures do not give rise to corruption or the appearance of corruption when it invalidated provisions of the Texas Election Code.[130] The court found that Texas had no direct anticorruption justification for imposing a sixty-day waiting period on general-purpose, independent-expenditure-only committees.[131]

IV. THE LEGAL BACKGROUND OF HYBRID PACS

A. Circuit Court Decisions

As discussed in Part II, hybrid PACs are committees that make both independent expenditures and direct contributions to candidates and political parties. Although hybrid PACs are a new form of a PAC, they have already been the focus of FEC advisory opinions and federal circuit court decisions. In 2010, the FEC issued an advisory opinion pertaining to Club for Growth, Inc. ("Club"), a

[126] 741 F.3d 1089, 1097 (10th Cir. 2013).

[127] *Id.* at 1096–97.

[128] *Id.* at 1097.

[129] *Id.* at 1097–98 (finding that no anticorruption interest is furthered "as long as the NMTA maintains an account segregated from its candidate contributions").

[130] Catholic Leadership Coal. of Tex. v. Reisman, 764 F.3d 409, 428 (5th Cir. 2014) ("The Supreme Court has been unequivocal that, as a matter of law, independent expenditures do not give rise to corruption or the appearance of corruption.").

[131] *Id.* at 432 ("We therefore conclude that the 60-day, 500-dollar limit is unconstitutional insofar as it limits a general-purpose committee, such as TLC-IPA, to funding only $500 in independent expenditures.").

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2016.408
http://lawreview.law.pitt.edu

nonprofit corporation.[132] Relying on *Citizens United*, *SpeechNow.org*, and *EMILY's List*, the FEC determined that, despite the Club having a PAC, the Club could also establish an independent-expenditure-only committee that "may solicit and accept unlimited contributions from the general public even if the Club pays the [independent expenditure committee's] establishment, administrative[,] and solicitation expenses."[133] The FEC was not dissuaded by the fact that the treasurer of the Club's PAC would also serve as the treasurer of the Club's independent expenditure committee because the Club stated that the independent expenditure committee "[would] not engage in coordinated activity and [would] comply with the requirements" of the Federal Code pertaining to coordinated conduct and independent expenditures.[134]

In 2011, the D.C. Circuit considered the legal status of hybrid PACs in *Carey v. FEC*.[135] *Carey* involved the National Defense Political Action Committee ("NDPAC"), an organization that wanted to "make both independent expenditures for federal campaigns with soft money and direct contributions to federal candidates and political parties with hard money."[136] The court held that the NDPAC could solicit and spend unlimited funds for independent expenditures, as well as make contributions to candidates.[137] The court rejected the FEC's attempt to require the NDPAC to establish a second formal committee, declaring that "non-connected non-profits are *not* the same as political parties and do *not* cause the same concerns of *quid pro quo* money-for-access."[138] Likening the NDPAC to *EMILY's List*, the court concluded that maintaining separate accounts for direct contributions (a hard money account) and for independent expenditures (a soft

[132] FEC Advisory Op. 2010-09 (July 22, 2010) [hereinafter Op. 2010-09], *available at* http://saos.nictusa.com/aodocs/ AO%202010-09.pdf; Briffault, *supra* note 25, at 1665–66.

[133] Op. 2010-09, *supra* note 132, at 3–4; Briffault, *supra* note 25, at 1666.

[134] Op. 2010-09, *supra* note 132, at 4; Briffault, *supra* note 25, at 1666.

[135] 791 F. Supp. 2d 121 (D.D.C. 2011).

[136] *Id.* at 130 (internal quotations and citations omitted); Briffault, *supra* note 25, at 1667.

[137] *Carey*, 791 F. Supp. 2d at 131–32; Briffault, *supra* note 25, at 1667.

[138] *Carey*, 791 F. Supp. 2d at 131 (citing EMILY's List v. FEC, 581 F.3d 1, 18, 22 (D.C. Cir. 2009) and N.C. Right to Life, Inc. v. Leake, 525 F.3d 274, 293 (4th Cir. 2008)).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2016.408
http://lawreview.law.pitt.edu

money account) satisfies federal law.[139] The court noted that this is a narrowly tailored means of ensuring no overlap between hard and soft money.[140]

Three years after *Carey*, the Tenth Circuit decided *Republican Party of New Mexico v. King*.[141] Like the political committee in *Carey*, one of the political committees challenging the New Mexico law made both independent expenditures and contributions to candidates[142] and, thus, was a hybrid PAC. The court discussed whether the political committee's structure was permissible.[143] The Tenth Circuit concluded it was valid, finding the political committee complied with *EMILY's List*, as it had separate bank accounts for independent expenditures and contributions to candidates.[144]

B. Vermont Right to Life Committee, Inc. v. Sorrell*, 758 F.3d 118 (2d Cir. 2014)*

Exactly six months after the Tenth Circuit decided *Republican Party of New Mexico* the Second Circuit arrived at a contrary holding in *Vermont Right to Life Committee, Inc. v. Sorrell*.[145] The case involved two related entities, the Vermont Right to Life Committee, Inc. ("VRLC") and the Vermont Right to Life Committee-Fund for Independent Political Expenditures ("VRLC-FIPE").[146] Both committees advocate for the sanctity of human life from conception to birth.[147] The difference between the two entities is that the VRLC is a Vermont non-profit corporation and the VRLC-FIPE is a registered political committee created by VRLC under Vermont campaign finance statutes.[148] The VRLC also formed the Vermont Right to Life Committee, Inc. Political Committee ("VRLC-PC"), which

---

[139] *Id.* at 131–32 (approving the NDPAC's proposal of establishing separate bank accounts for hard money and soft money because this would fully comply with *EMILY's List* and be a narrowly tailored means to achieve a compelling interest); Briffault, *supra* note 25, at 1667–68.

[140] *Carey*, 791 F. Supp. 2d at 131–32.

[141] Republican Party of N.M. v. King, 741 F.3d 1089 (10th Cir. 2014); *Carey*, 791 F. Supp. 2d 121.

[142] *Republican Party of N.M.*, 741 F.3d at 1097.

[143] *Id.*

[144] *Id.*

[145] Vt. Right to Life Comm., Inc. v. Sorrell, 758 F.3d 118 (2d Cir. 2014), *cert. denied*, 135 S. Ct. 949 (2015).

[146] *Id.* at 121.

[147] *Id.*

[148] *Id.* at 121–22.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2016.408
http://lawreview.law.pitt.edu

makes direct contributions to pro-life political candidates[149] and, therefore, is a PAC. Among the issues on appeal was the VRLC-FIPE's constitutional challenge to Vermont's limit on contributions to PACs.[150] The VRLC-FIPE contended that the law violated the First Amendment as applied to the VRLC-FIPE because it is an independent-expenditure-only group, that is, a super PAC, and does not make contributions to political campaigns.[151] In support of this position, the VRLC-FIPE asserted that the VRLC's resolution that created the VRLC-FIPE "provide[d] that [the VRLC-FIPE] may not make monetary or in-kind contributions to candidates, or coordinate the content, timing[,] or distribution of its communications or other activities with candidates or their campaigns."[152]

Refusing to follow other circuits, the Second Circuit granted summary judgment against the VRLC and the VRLC-FIPE.[153] The court declared that, "even if contribution limits would be unconstitutional as applied to independent-expenditure-only groups, [the] VRLC-FIPE would not succeed here."[154] The court agreed with the district court's finding that the "VRLC-FIPE is enmeshed financially and organizationally with [the] VRLC-PC, a PAC that makes direct contributions to candidates."[155] The court concluded that, "because contribution limits are constitutional as applied to [the] VRLC-PC[,] . . . they may also be applied to [the] VRLC-FIPE."[156]

In part of its decision, the Second Circuit relied on the Supreme Court's emphasis that independent expenditures have an "absence of prearrangement and coordination" to find that the VRLC-FIPE is not an independent-expenditure-only committee.[157] The Second Circuit disagreed with the D.C. Circuit's holding in *EMILY's List*, that "the creation of separate bank accounts is by itself sufficient to

---

[149] *Id.* at 122.

[150] *Id.* at 121.

[151] *Id.*

[152] *Id.* at 122 (internal quotations omitted).

[153] *Id.* at 140–41.

[154] *Id.* at 140.

[155] *Id.* at 141.

[156] *Id.*

[157] *Id.* (quoting Citizens United v. FEC, 558 U.S. 310, 345, 357–61 (2010)).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2016.408
http://lawreview.law.pitt.edu

treat the entity as an independent-expenditure-only group."[158] Rather, the court found that "[a] separate bank account may be relevant," but it does not sufficiently prevent "prearrangement" and "coordinated expenditures."[159] Moreover, the court declined to follow the Fourth Circuit's reasoning in *North Carolina Right to Life*, where the Fourth Circuit held that the NCRL-FIPE (an organization similar to the VRLC-FIPE) was independent from its sister organization, the NCRL-PC (an entity akin to the VRLC-PC), because the NCRL-FIPE maintained organizational documents stating that the group was independent as a matter of law.[160] Although the VRLC had similar documents pertaining to the VRLC-FIPE,[161] the Second Circuit concluded that "organizational documents alone [do not] satisfy the anticorruption concern with coordinated expenditures that may justify contribution limits."[162] "Some actual organizational separation between the groups must exist to assure that the expenditures are in fact uncoordinated."[163] Thus, according to the Second Circuit, separate bank accounts and organizational documents are not sufficient to ensure that funds and information will only be used for independent expenditures.[164]

The Second Circuit suggested that determining whether two entities are separate is a fact-specific inquiry.[165] It delineated several factors for consideration, including "overlap of staff and resources, the lack of financial independence, the coordination of activities, and the flow of information between the entities."[166] The court found that the "VRLC-FIPE is functionally indistinguishable from [the]

---

[158] *Id.*

[159] *Id.*

[160] *Id.* (citing N.C. Right to Life, Inc. v. Leake, 525 F.3d 274, 294 n.8 (4th Cir. 2008)). The Fourth Circuit rejected North Carolina's argument that the NCRL-FIPE was "not actually an independent expenditure committee because it [was] closely intertwined" with the NCRL. *Id.* Its decision was predicated on the NCRL-FIPE organization documents. *Id.*

[161] *Id.* at 122 (noting that the VRLC's resolution that created the VRLC-FIPE "provide[d] that [the VRLC-FIPE] may not make monetary or in-kind contributions to candidates, or coordinate the content, timing or distribution of its communications or other activities with candidates or their campaigns." (internal quotations omitted)).

[162] *Id.* at 141–42.

[163] *Id.* at 141.

[164] *Id.*

[165] *Id.* at 142.

[166] *Id.*

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2016.408
http://lawreview.law.pitt.edu

VRLC-PC" due to the "total overlap of staff and resources, the fluidity of funds, and the lack of any informational barrier between the entities."[167] Therefore, the court concluded that the contribution limits that apply to the VRLC-PC also apply to the VRLC-FIPE.[168]

V. PROPOSED SOLUTION AND IMPLICATIONS OF THE CIRCUIT SPLIT

Since *Vermont Right to Life*, no circuit court has been presented with the issue of whether the super PAC and the sister PAC of a hybrid PAC are independent and distinct.[169] As previously discussed, campaign finance laws are rooted in two conflicting interests: (1) the government's corruption concern; and (2) the First Amendment's right of free speech.[170] The Supreme Court and circuit courts have consistently held that the anticorruption interests established thus far are insufficient to permit limitations on super PACs or limits on contributions to these committees.[171] With a circuit split on the issue and no legal discussion or application of *Vermont Right to Life*, there is uncertainty as to whether free speech preempts these limitations in the case of hybrid PACs. Furthermore, there is no guidance for hybrid PACs in the 2016 presidential election. Given that money plays an essential role in a candidate's ability to win office, politically active organizations and committees must be properly structured in order to avoid any impediment to independently supporting candidates and parties in the upcoming election.

Hybrid PACs subject to the jurisdiction of circuits that have not decided this issue should be aware of *Vermont Right to Life*; they should not, however, strictly yield to the Second Circuit's opinion. While the Second Circuit raised relevant concerns, its standard is flawed. This standard arguably prohibits forming an effective hybrid PAC. Consequently, it severely restricts free speech, particularly for hybrid PACs such as the VRLC that advocate policy and do not operate solely

[167] *Id.* at 145.

[168] *Id.*

[169] The VRLC and the VRLC-FIPE petitioned for a writ of certiorari, but it was denied. Vt. Right to Life Comm., Inc. v. Sorrell, 135 S. Ct. 949 (2015).

[170] Buckley v. Valeo, 424 U.S. 1, 24–25, 26–27 (1976) (per curiam).

[171] *See* Citizens United v. FEC, 558 U.S. 310, 359–61 (2010) (explaining that the only interest that is sufficient to limit contributions is preventing "*quid pro quo* corruption" and, thus, rejecting limits on independent expenditures).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2016.408
http://lawreview.law.pitt.edu

to elect candidates. Additionally, the Second Circuit's holding is predicated on an anticorruption theory that the Court has rejected for super PACs.[172]

A. Determining Independence

Citizens United held that independent expenditures cannot give rise to the risk of *quid pro quo* corruption, and that only this type of corruption warrants a limitation on expenditures and contributions to a super PAC.[173] Hybrid PACs complicate this determination by raising the issue of whether an organization that has both a PAC and super PAC could give rise to the risk of *quid pro quo* corruption or the appearance of corruption. Courts have consistently held that no such danger exists if the entities are independent, and these courts have imposed various tests for determining independence.[174] The Second Circuit demands a higher standard for determining independence than other circuits.[175]

Most courts determine independence if two entities have separate bank accounts.[176] Another adopted approach is whether the entities have organizational documents stating that the independent-expenditure-only committee is independent as a matter of law.[177] The Second Circuit requires actual organizational separation between the committees and holds that separate bank accounts and organizational documents are not sufficient.[178] Dispositive factors for this court were complete

---

[172] *See Vt. Right to Life Comm., Inc.*, 758 F.3d at 141, 145; *Citizens United*, 558 U.S. at 357; *Buckley*, 424 U.S. at 47.

[173] *Citizens United*, 558 U.S. at 357–61.

[174] *See* Republican Party of N.M. v. King, 741 F.3d 1089 (10th Cir. 2014); EMILY's List v. FEC, 581 F.3d 1 (D.C. Cir. 2009); N.C. Right to Life, Inc. v. Leake, 525 F.3d 274 (4th Cir. 2008); Carey v. FEC, 791 F. Supp. 2d 121 (D.D.C. 2011).

[175] *See Vt. Right to Life Comm., Inc.*, 758 F.3d at 141–42.

[176] *Republican Party of N.M.*, 741 F.3d at 1097 (finding the hybrid political committee was permissible because it complied with *EMILY's List*, having separate bank accounts for independent expenditures and contributions to candidates); *EMILY's List*, 581 F.3d at 12 (discussing that a hybrid organization is permissible if it maintains a hard money account that is subject to source and amount limits and maintains a soft money account, that is not subject to source and amount limits); *Carey*, 791 F. Supp. 2d at 131–32 (concluding that maintaining separate accounts for direct contributions and for independent expenditures satisfies federal law and is a narrowly tailored means of ensuring no overlap between hard and soft money).

[177] *See N.C. Right to Life, Inc.*, 525 F.3d at 294 n.8 (rejecting North Carolina's argument that the "NCRL-FIPE is not actually an independent expenditure committee because it is 'closely intertwined' with [the] NCRL and [the] NCRL-PAC," and finding that, although the NCRL-FIPE has staff and facility overlap with its sister and parent entities, it is independent as a matter of law).

[178] *Vt. Right to Life Comm., Inc.*, 758 F.3d at 142.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2016.408
http://lawreview.law.pitt.edu

overlap of staff and resources, the fluidity of funds, and the absence of any informational barrier between the two groups.[179]

The Second Circuit was not necessarily incorrect in demanding a certain level of distinction between the PAC and super PAC of a hybrid PAC; failure to maintain separateness creates difficulty in regulating the two entities and could increase the likelihood that their funds will be improperly used.[180] Therefore, organizational documents stating that an independent-expenditure-only committee is independent as a matter of law is too lenient of a standard; it offers no regulation or division of PAC and super PAC money.[181] The appearance of corruption and coordination can quickly become a reality when there is no precise division of money. However, requiring separate bank accounts achieves a proper balance between free speech and an anticorruption interest; it imposes minimal restrictions on political communication and prevents money donated to the super PAC from being contributed to a candidate's campaign.[182]

The Second Circuit's method is flawed because it severely restricts free speech, especially in regard to the VRLC. Contrary to public belief, not all PACs, including super PACs and hybrid PACs, solely exist and operate to elect candidates.[183] The VRLC is policy-oriented and does not seek to elect a particular

---

[179] *Id.* at 142.

[180] *See id.* at 141 (emphasizing a concern for prearrangement and spending funds in coordination with candidates, specifically in regard to assuring that expenditures are uncoordinated).

[181] *Id.* at 141–42.

[182] *See* Republican Party of N.M. v. King, 741 F.3d 1089, 1097 (10th Cir. 2013) (holding that "no anti-corruption interest is furthered as long as the NMTA maintains an account segregated from its candidate contributions"); EMILY's List v. FEC, 581 F.3d 1, 11–12 (D.C. Cir. 2009) (agreeing with the Fourth Circuit that independent-expenditure-only committees receive "full First Amendment protection" and holding that separate banks accounts are sufficient to "avoid circumvention of individual contribution limits by . . . donors").

[183] Dan Backer, *Why Hybrid PACs Matter*, CAMPAIGNS & ELECTIONS (May 20, 2012), http://www.campaignsandelections.com/campaign-insider/623/why-hybrid-pacs-matter (explaining that there is a "practical division . . . between policy-oriented PACs and electorally-oriented PACs"). Backer argued:

> Policy-oriented PACs tend to focus not on elections but on specific and often very narrow policy objectives. Regardless of who wins what election, they will spend their resources year round in D.C. to provide their grassroots, grasstops, and professional advocates with a steady stream of opportunities to effectively convey their message to whoever happens to be the key Members of Congress.

Id.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2016.408
http://lawreview.law.pitt.edu

politician.[184] Policy-oriented committees like the VRLC must engage in multiple forms of advocacy to communicate effectively and lobby their policies.[185] Successfully and efficiently achieving this requires organizational and staff overlap.[186] By rejecting organizational enmeshment and staff sharing, the court is requiring that two separate, formal entities be formed. This effectively bans hybrid PACs. These organizations need overlap for communication and support in order to reap the benefits of structuring in this mixed-entity form; to require otherwise renders them obsolete. In fact, hybrid PACs that have been upheld have organizational and staff overlap, particularly with high-level employees.[187]

By making it essentially impossible to form an effective hybrid PAC, the Second Circuit has restricted any successful form of political communication for these entities and thereby has restricted free speech. This is contrary to Supreme Court precedent. In *Citizens United*, Justice Kennedy emphasized that any congressional remedy to independent expenditures influencing candidates must comply with the tradition of the law that favors more speech, not less.[188] The Second Circuit fails to uphold this tradition by imposing a standard that essentially prohibits effective organization and communication of hybrid PACs. In attempting to prevent coordinated conduct, the Second Circuit has, in fact, prevented free speech in the absence of evidence of prearrangement and corruption.

B. The Anticorruption Interest for Hybrid PACs

Courts require some separation between the super PAC and PAC of a hybrid PAC to reduce the risks of corruption and coordination that are associated with

---

[184] *See About Us*, VT. RIGHT TO LIFE COMMITTEE, http://www.vrlc.net/about/ (last visited Mar. 2, 2014) (explaining that VRLC's mission "is to achieve universal recognition of the sanctity of human life from conception through natural death" and its purpose is seeking "changes in public opinion, public policy, [and] the law" with respect to any action that denies the right to life).

[185] *See* Backer, *supra* note 183 (explaining that policy-oriented PACs are an integral part of that three-legged stool utilized by sophisticated advocates, which includes professional advocacy, grassroots and grasstops advocacy, and money).

[186] *See id.* ("Hybrid PACs offer the best of both worlds: Hard dollars to advance specific policy initiatives the way 'traditional,' pre-Carey PACs have long done, and soft dollars to underwrite operations, hire advocacy-oriented staff, and support grassroots and grasstops advocacy—the other legs of the three-legged stool.").

[187] *See* Op. 2010-09, *supra* note 132, at 4–5 (noting that the Club has a PAC, and the president of the Club, who serves as the Club PAC's treasurer, will also serve as the treasurer of the Club's independent expenditure committee); Briffault, *supra* note 25, at 1666.

[188] Citizens United v. FEC, 558 U.S. 310, 361 (2010).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2016.408
http://lawreview.law.pitt.edu

PACs and political parties.[189] However, no anticorruption interest has been established in regard to hybrid PACs. Most courts separately analyze the anticorruption interest for each entity of a hybrid PAC, that is, for the PAC and the super PAC.[190] In this sense, the Second Circuit raised relevant concerns in assuring that expenditures are, in fact, uncoordinated with a candidate and that a hybrid PAC's independent expenditure money is not used for contributions to candidates or political parties.[191] Unlike a super PAC, which is purely an independent-expenditure-only committee, hybrid PACs directly contribute to candidates' campaigns *and* make independent expenditures. Consequently, an increased concern for corruption, or "prearrangement and coordination," logically arises where a super PAC and PAC are within the same organization.

While the Second Circuit raised a relevant concern, it failed to identify a state interest that has been recognized by the Supreme Court when limiting contributions to independent-expenditure-only committees, such as the VRLC-FIPE. The Second Circuit claimed that its decision was justified as preventing coordinated expenditures, where "funds are spent in coordination with [a particular] candidate."[192] However, the Supreme Court has declared there is no concern of prearrangement or coordination in the context of independent expenditures.[193] It has only recognized that preventing "*quid pro quo* corruption" or the appearance thereof justifies limitations on free speech.[194] Therefore, the Second Circuit is trying to claim a government interest in preventing the indirect appearance of corruption in the context of independent-expenditure-only committees, but this corruption is not recognized by the Supreme Court and has been rejected by circuit

[189] *See* Republican Party of N.M. v. King, 741 F.3d 1089, 1097 (10th Cir. 2013); EMILY's List v. FEC, 581 F.3d 1, 12 (D.C. Cir. 2009).

[190] *See* Carey v. FEC, 791 F. Supp. 2d 121, 131–32 (D.D.C. 2011) (analyzing whether the Commission identified a compelling anticorruption interest in regard to a non-profit's independent expenditure activity, while also recognizing that there is a compelling anticorruption interest for limiting the non-profit's contributions to candidates and political parties).

[191] Vt. Right to Life Comm., Inc. v. Sorrell, 758 F.3d 118, 141 (2d Cir. 2014), *cert. denied*, 135 S. Ct. 949 (2015) (emphasizing a concern for prearrangement and spending funds in coordination with candidates where the PAC activity and super PAC activity of a hybrid PAC are not sufficiently independent).

[192] *Id.*

[193] *Citizens United*, 558 U.S. at 345 (citing Buckley v. Valeo, 424 U.S. 1, 47 (1976)).

[194] *Citizens United*, 558 U.S. at 359; *Buckley*, 424 U.S. at 26–27.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2016.408
http://lawreview.law.pitt.edu

courts.[195] Furthermore, the Tenth Circuit has addressed the anticorruption interest with regard to hybrid PACs and, relying on *Citizens United*, held that no anticorruption interest exists where there are separate accounts for independent expenditures and candidate contributions.[196]

The Second Circuit held that preventing prearrangement and coordination is a valid anticorruption interest because the independent-expenditure-only committee, the VRLC-FIPE, was indistinguishable from the VRLC-PC, the non-independent-expenditure-only committee.[197] *Buckley* provides that this is a valid anticorruption interest in limiting contributions to PACs.[198] Thus, the Second Circuit's decision would not have created any conflict among the circuits if the VRLC-FIPE was, in fact, indistinguishable from the VRLC-PC. However, as discussed above, the Second Circuit's standard for determining whether the PAC and super PAC of a hybrid PAC are independent and distinct was flawed.

C. Proposed Solution

While preventing prearrangement and coordination has not been specifically articulated by the Supreme Court or recognized by other circuits, *Buckley* suggests that it is a valid anticorruption interest.[199] Thus, the test for determining independence should be tailored to this anticorruption interest. As delineated by the D.C. and Tenth Circuits, a hybrid PAC must have separate bank accounts for hard money that is associated with its PAC and for soft money that is used for independent expenditures.[200] The sole anticorruption concern is whether money contributed to an independent expenditure committee is used to pay for campaigning that is coordinated with a particular candidate,[201] and the standard

---

[195] *See Citizens United*, 558 U.S. at 357; *Buckley*, 424 U.S. at 45–48; EMILY's List v. FEC, 581 F.3d 1, 13–14 (D.C. Cir. 2009).

[196] Republican Party of N.M. v. King, 741 F.3d 1089, 1097 (10th Cir. 2013).

[197] *Vt. Right to Life Comm., Inc.*, 758 F.3d at 145.

[198] *See Buckley*, 424 U.S. at 47 (upholding limits on contributions to candidates because they pose the dangers of corruption and the appearance of corruption and invalidating limitations on expenditures because there is no "prearrangement and coordination of an expenditure with the candidate," which "alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate").

[199] *See id.*

[200] *Republican Party of N.M.*, 741 F.3d at 1097; *EMILY's List*, 581 F.3d at 12.

[201] *See Vt. Right to Life Comm., Inc.*, 758 F.3d at 141 (explaining that a separate bank account does not sufficiently prevent "prearrangement" and "coordinated expenditures").

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2016.408
http://lawreview.law.pitt.edu

employed by the D.C. and Tenth Circuits addresses this concern.[202] Additionally, with disclosure requirements still applying to the independent expenditure committee, any concerns of coordinated conduct and political favors for large donors can be flagged. In the absence of any true enmeshment of funds and spending, the corruption interest is insufficient to restrict free speech and political communication in this manner.[203]

Although the Second Circuit demands an information barrier and separate staff,[204] these are not needed to ensure against prearrangement and coordinated conduct.[205] Amount limitations are imposed on PACs because they directly contribute to a candidate or party, which gives rise to concerns of actual of *quid pro quo* corruption and the appearance of corruption.[206] However, actual corruption does not necessarily exist; the mere *appearance* of corruption is sufficient to limit contributions to PACs.[207] The independent-expenditure-only part of a hybrid PAC is further removed from the candidate and political party than is the PAC; therefore, it is also further removed from potential *quid pro quo* corruption and the risk of prearrangement and coordination.[208] Consequently, the risk of a super PAC engaging in coordinated conduct when it shares certain staff and information with a PAC is insufficient to restrict free speech.[209] This is particularly so because sharing some staff and information makes a hybrid PAC effective.[210]

---

[202] *See Republican Party of N.M.*, 741 F.3d at 1097; *EMILY's List*, 581 F.3d at 12.

[203] *See Republican Party of N.M.*, 741 F.3d at 1097; *EMILY's List*, 581 F.3d at 12.

[204] *Vt. Right to Life Comm., Inc.*, 758 F.3d at 141.

[205] *See Republican Party of N.M.*, 741 F.3d at 1097 (holding that "no anti-corruption interest is furthered as long as the NMTA maintains an account segregated from its candidate contributions"); *EMILY's List*, 581 F.3d at 12 (holding that separate banks accounts "avoid circumvention of individual contribution limits by . . . donors").

[206] *See* Buckley v. Valeo, 424 U.S. 1, 26 (1976).

[207] *See id.*

[208] *See* N.C. Right to Life, Inc. v. Leake, 525 F.3d 274, 293 (4th Cir. 2008) (distinguishing the relationship between independent-expenditure-only committees and candidates from the relationship of candidates and political parties); *see also* Citizens United v. FEC, 558 U.S. 310, 345 (2010) (quoting *Buckley*, 424 U.S at 47–48) (explaining that *Buckley* distinguished direct contributions to candidates from independent expenditures on the basis that direct contributions give rise to a risk of potential *quid pro quo* corruption whereas independent expenditures alleviate the danger of *quid pro quo* arrangements because they do not involve "prearrangement and coordination").

[209] *See* Op. 2010-09, *supra* note 132.

[210] *See* Backer, *supra* note 183.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2016.408
http://lawreview.law.pitt.edu

Requiring separate bank accounts is the solution. It achieves the proper balance between free speech and concerns of prearrangement and coordination. Furthermore, circuit court precedent supports it—the D.C. and Tenth Circuits have adopted this approach, and the Fourth Circuit has adopted a less demanding approach.[211] Finally, this approach upholds the values articulated by the Supreme Court, which emphasize that any attempt to remedy corruption concerns of independent expenditure committees must comply with the tradition of the law that favors more speech, not less.[212]

D. Implications for the 2016 Election

For the 2016 presidential election, hybrid PACs should strictly follow the separate account requirement, as well as disclose contributions and expenses. So long as the FEC has knowledge of where the funds are going, there is little concern of corruption, at least none sufficient to impose limits on contributions. Failure to abide by this requirement could affect a hybrid PAC's influence on the election. If hybrid PACs cannot benefit from the limitless contribution and spending amounts of independent-expenditure-only committees, these entities will have to depend on greater participation from individuals to make contributions. The super PAC part of hybrid PACs will no longer be able to depend on large contributions from a small group of wealthy donors, restricting funding and spending. Maintaining separate bank accounts will allow hybrid PACs to fully utilize their resources and maximize influence in elections and, more significantly, they will be able to effectively advocate policy.

CONCLUSION

While courts have consistently held that super PACs cannot give rise to the risk of corruption, they have yet to articulate a corruption interest when either a super PAC or PAC restructures as a hybrid PAC.[213] In addressing the corruption concerns of hybrid PACs, states' solutions should realize the tradition of law that favors free speech and the need for some staff overlap and no information barriers. States should be particularly lenient in their analysis if the hybrid PAC is policy-

[211] *See* Republican Party of N.M v. King, 741 F.3d 1089 (10th Cir. 2014); EMILY's List v. FEC, 581 F.3d 1 (D.C. Cir. 2009); *N.C. Right to Life, Inc.*, 525 F.3d 274.

[212] *Citizens United*, 558 U.S. at 361 (emphasizing that any congressional remedy to address independent expenditures influencing candidates must comply with the tradition of the law that favors more speech, not less).

[213] *See id.* at 357.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2016.408
http://lawreview.law.pitt.edu

oriented, as opposed to candidate-specific. Thus, states should require separate bank accounts for soft and hard money to prevent any coordinated conduct and corruption, while still maintaining free speech.

In a time where politics have become increasingly bipartisan, one's political voice is more important than ever. The ability to advocate for policies and candidates with limited restrictions is central to our democracy. This right should not be limited or forfeited when a super PAC or PAC restructures into perhaps the most effective vehicle for political advocacy—the hybrid PAC.[214]

[214] *See* Backer, *supra* note 183.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2016.408
http://lawreview.law.pitt.edu