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Contribution Limits After McCutcheon v. FEC

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Articles and Speeches

CONTRIBUTION LIMITS AFTER *McCUTCHEON V. FEC*

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I. INTRODUCTION

With *McCutcheon v. FEC* having struck down particular contribution limits, this Article addresses two issues.[1] Part II addresses the constitutionality of limits on contributions for independent spending for political speech, which *Buckley v. Valeo* calls "independent contributions[,]" while Part III addresses what *Buckley* calls "direct[]" contributions to candidates.[2] Each presents important issues under the Constitution.

II. LIMITS ON CONTRIBUTIONS FOR INDEPENDENT SPENDING

A. Quid Pro Quo Corruption or its Appearance

Applying the First Amendment, the United States Supreme Court has long recognized that the only interest which suffices to ban, or otherwise limit, political speech is the prevention of corruption of

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1 McCutcheon v. FEC, 134 S. Ct. 1434, 1440–42, 1461–62 (2014).

2 Buckley v. Valeo, 424 U.S. 1, 23–24 n.24, 61, 82 n.109 (1976).

candidates or officeholders, or the appearance of corruption.[3] *Citizens United v. FEC* reaffirms this by addressing a ban on spending for political speech and holding "independent expenditures . . . do not give rise to corruption or the appearance of corruption."[4]

Arizona Free Enterprise Club's Freedom PAC v. Bennett (*AFEC*) further reaffirms this and holds that when spending for political speech is independent, the "candidate-funding circuit is broken."[5] *AFEC under*states its point here: when such spending is independent, *there is no* corrupting link to candidates or officeholders.[6] It is not that the corrupting link is "broken"—it just is not there.[7]

Independent expenditures—*i.e.,* noncoordinated *Buckley v. Valeo* express advocacy—are the highest grade of independent spending for political speech.[8] So when a person's independent expenditures "do not give rise to corruption or the appearance of corruption[,]" no independent spending for political speech by the same person "give[s] rise to corruption or the appearance of corruption."[9] Thus, a person who has a First Amendment right to engage in independent expenditures has a First Amendment right to engage in any independent spending for political speech.

Furthermore, when "*Buckley* identified a . . . government[] interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption."[10] Influence, access, favoritism, and gratitude/ingratiation are not *quid pro quo* corruption or its appearance.[11]

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3 As opposed to *regulate,* by requiring disclosure. Yamada v. Kuramoto, 744 F. Supp. 2d 1075, 1082 n.9 (D. Haw. 2010), *appeal dismissed,* No.10-17280 (9th Cir. June 10, 2011); FEC v. Nat'l Conservative PAC (*NCPAC*), 470 U.S. 480, 496–97 (1985) (citing Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 300 (1981); *Buckley,* 424 U.S. at 45); *see Citizens Against Rent Control,* 454 U.S. at 297 (referring to candidates and officeholders).

4 Citizens United v. FEC, 558 U.S. 310, 357 (2010).

5 Ariz. Free Enter. Club's Freedom PAC v. Bennett (*AFEC*), 131 S. Ct. 2806, 2826–27 (2011) (quoting *Citizens United,* 558 U.S. at 357, 360).

6 *See id.* (holding that independent spending does not cause corruption or its appearance).

7 *Id.* at 2826. *See, e.g., Citizens United,* 558 U.S. at 356–61 (holding that independent spending does not cause corruption or its appearance).

8 "Independent expenditure" means *Buckley v. Valeo* express advocacy that is not coordinated with a candidate. Buckley v. Valeo, 424 U.S. 1, 44 & n.52, 46–47, 78, 80 (1976). Thus, noncoordinated spending for political speech that is not *Buckley* express advocacy is independent *spending* but not an independent *expenditure*. *See id.* at 44 & n.52, 80 (defining express advocacy and thereby independent expenditure).

9 *Citizens United,* 558 U.S. at 357 (quoted in *AFEC,* 131 S. Ct. at 2826).

10 *Id.* at 359 (citing McConnell v. FEC, 540 U.S. 93, 296–98 (2003) (Kennedy, J., concurring in part and dissenting in part)); FEC v. NCPAC, 470 U.S. 480, 497 (1985) ("The hallmark of corruption is the financial *quid pro quo:* dollars for political favors.").

11 *Citizens United,* 558 U.S at 359–60.

Transparency does not suffice, nor is what "the public may believe" the *quid pro quo*-corruption-or-its-appearance yardstick.[12]

These *Citizens United* holdings are binding, even if lower courts disagree with them.[13] Those who believe independent spending for political speech causes *quid pro quo* corruption or its appearance must also believe, contrary to *Citizens United* and *AFEC*, that government may ban, or otherwise limit, such spending to prevent *quid pro quo* corruption or its appearance.[14] "Hence their objection is not [just] to *Citizens United* but to constitutional protection of advocacy-funding practices that are as old as the Republic."[15]

B. McCutcheon *Raises the Bar*

Any doubt that these principles apply not just to spending for political speech but also to contributions is gone after *McCutcheon*, under which government may ban, or otherwise limit, *contributions or* spending only to prevent "'*quid pro quo*' corruption or its appearance[,]" with *quid pro quo* corruption now meaning only "a direct exchange of an official act for money."[16] No "other objectives" suffice.[17] Courts "drawing" this "line" "err on the side of protecting political speech[.]"[18]

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12 Ala. Democratic Conference v. Broussard, 541 F. App'x 931, 933 (11th Cir. 2013) (unpublished). *Contra id.* at 935. Public-opinion polls do not determine constitutional law. *See* United States v. Morrison, 529 U.S. 598, 616 n.7 (2000) (citing Marbury v. Madison, 5 U.S. 137, 176 (1803); Gibbons v. Ogden, 22 U.S. 1 (1824)); Bd. of Educ. v. Dowell, 498 U.S. 237, 254 (1991) (quoting Dowell v. Bd. of Educ., 338 F. Supp. 1256, 1270 (W.D. Okla. 1972)); Stanford v. Kentucky, 492 U.S. 361, 377 (1989), *abrogated on other grounds,* Roper v. Simmons, 543 U.S. 551, 574 (2005). *Cf.* Chisom v. Roemer, 501 U.S. 380, 400 (1991) (stating that "public opinion should be irrelevant to the judge's role because the judge is often called upon to disregard, or even to defy, popular sentiment" and that because the "[f]ramers of the Constitution had a similar understanding of the judicial role, . . . they established that Article III judges would be appointed, rather than elected, and would be sheltered from public opinion by receiving life tenure and salary protection").

If public-opinion polls determined constitutional law—as *Stop this Insanity, Inc. Employee Leadership Fund v. FEC* asserts—the *Brown v. Board of Education* plaintiffs would have lost. Stop this Insanity, Inc. Employee Leadership Fund v. FEC, 902 F. Supp. 2d 23, 44 n.24 (D.D.C. 2012), *aff'd on other grounds,* Stop this Insanity, Inc. Employee Leadership Fund v. FEC, 761 F.3d 10 (D.C. Cir. 2014), *cert. denied,* 135 S. Ct. 949 (2015); Brown v. Bd. of Educ., 347 U.S. 483, 493–95 (1954).

13 *See* Am. Tradition P'ship, Inc. v. Bullock, 132 S. Ct. 1307, 1308 (2012) (Ginsburg, J., concurring) (holding that "lower courts are bound to follow" *Citizens United*).

14 *Citizens United*, 558 U.S. at 356–61; *AFEC*, 131 S. Ct. at 2826–27.

15 George Will, *Montana Attempts to Buck the Supreme Court on Citizens United*, WASH. POST (May 30, 2012), http://www.washingtonpost.com/opinions/montana-attempts-to-buck-the-supreme-court-on-citizens-united/2012/05/30/gJQA4DCi2U_story.html?wprss=rss_george-will, *archived at* http://perma.cc/8VYA-7XZQ.

16 McCutcheon v. FEC, 134 S. Ct. 1434, 1441 (2014) (quoting *Citizens United,* 558 U.S. at 359; citing McCormick v. United States, 500 U.S. 257, 266 (1991)). This is "an effort to

No "conjecture"—including about "recontributed funds" or contributions "rerouted to candidates"—suffices.[19] To limit contributions, government must show they are in turn "used for" contributions, *i.e.*, "are directed . . . to a candidate or officeholder."[20] When government shows no such *McCutcheon* "exchange" or its "appearance[,]" much less any exchange or its appearance involving "large" or "massive" contributions to candidates, contribution limits are unconstitutional, at least as applied, regardless of whether strict scrutiny or closely-drawn exacting scrutiny applies, although strict scrutiny is preferable.[21]

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control the exercise of an officeholder's official duties"—*i.e.*, "an act akin to bribery." *Id.* at 1450; *id.* at 1466 (Breyer, J., dissenting). Although government may "limit 'the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large . . . financial contributions' to particular candidates . . . [g]overnment's interest in preventing the appearance of corruption is equally confined to the appearance of *quid pro quo* corruption[.]" *Id.* at 1450–51 (quoting Buckley v. Valeo, 424 U.S. 1, 27 (1976)).

17 *McCutcheon*, 134 S. Ct. at 1441 (citing *AFEC*, 131 S. Ct. at 2826).

18 *Id.* at 1451 (quoting FEC v. Wis. Right to Life, Inc. (*WRTL-II*), 551 U.S. 449, 457 (2007)).

19 *Id.* at 1452, 1457 (quoting Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 392 (2000)).

20 Republican Party of N.M. v. King, 741 F.3d 1089, 1090–91 (10th Cir. 2013) ("limits on contributions to political committees that are to be *used for* independent expenditures" (emphasis added)), *id.* at 1092 ("the court concluded, as has nearly every circuit court since *Citizens United*, there could be no anti-corruption interest in limiting contributions to be *used for* such expenditures" (emphasis added)); *id.* at 1093 n.2 ("limits on contributions to PACs for the purpose of making independent expenditures are unconstitutional even under a lower level of scrutiny"); *id.* at 1096 ("limits on contributions for the purpose of making independent expenditures promote no anti-corruption interest"); *id.* at 1103 (holding law "unconstitutional as applied to contributions to those organizations to be used solely for independent expenditures"). *McCutcheon*, 134 S. Ct. at 1452 (quoting McConnell v. FEC, 540 U.S. 93, 310 (2003) (Kennedy, J., concurring in part and dissenting in part)).

21 *McCutcheon*, 134 S. Ct. at 1441, 1450–53 (citations omitted); *see id.* at 1445–46 (holding that the plaintiffs prevail either way). Under strict scrutiny, a court first asks whether there is a compelling government interest in regulating the speech, and only if there is does a court ask whether the law is "narrowly tailored to achieve that interest." *WRTL-II*, 551 U.S. at 464 (citing First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 786 (1978)) (quoted in Citizens United v. FEC, 558 U.S. 310, 340 (2010)).

Meanwhile, "closely[-]drawn" exacting scrutiny is different. *Shrink Mo.*, 528 U.S. at 387–88 (quoting Buckley v. Valeo, 424 U.S. 1, 16, 25 (1976)). A court first asks whether there is a "sufficiently important" government interest in regulating the speech, and only if there is does a court ask whether the law is "closely drawn" to achieve that interest. FEC v. Colo. Republican Fed. Campaign Comm. (*Colo. Republican-II*), 533 U.S. 431, 446 (2001) (quoting *Shrink Mo.*, 528 U.S. at 387–88). *McCutcheon* puts teeth into the phrase "closely drawn[.]" *McCutcheon*, 134 S. Ct. at 1456. The Court states:

> In the First Amendment context, fit matters. Even when the Court is not applying strict scrutiny, we still require "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served,' . . . that employs not necessarily the least restrictive

C. The Next Questions

Except for foreign nationals, the Supreme Court has held that government may not limit independent spending for political speech, including independent expenditures properly understood.[22] The next questions are: (1) What does this mean for contributions received by organizations engaging in only independent spending for political speech?;[23] (2) What does this mean for contributions received by organizations for independent spending when they both make contributions and engage in independent spending?;[24] and (3) May government ever limit contributions for independent spending for political speech? If so, when?

The short answer is that regardless of the scrutiny level, the principle that independent spending for political speech does not "give rise to corruption or the appearance of corruption" applies when organizations

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> means . . . but a means narrowly tailored to achieve the desired objective." Here, because the statute is poorly tailored to the [g]overnment's interest in preventing circumvention of the base limits, it impermissibly restricts participation in the political process.

Id. at 1456–57 (quoting Bd. of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989)) (citations omitted).

Regardless of the scrutiny level, government must prove political-speech law survives scrutiny. *WRTL-II*, 551 U.S. at 464 (citing *Bellotti*, 435 U.S. at 786); *Shrink Mo.*, 528 U.S. at 387–88 (quoting *Buckley*, 424 U.S. at 25) (applying closely-drawn exacting scrutiny); *see also McCutcheon*, 134 S. Ct. at 1452 (discussing government's burden to prove speech law survives scrutiny). When government seeks to ban, or otherwise limit speech, government must prove *quid pro quo* corruption or its appearance. *See, e.g.*, *McConnell*, 540 U.S. at 232 (highlighting government's burden to prove corruption or its appearance); *see also McCutcheon*, 134 S. Ct. at 1462–65 (Thomas, J., concurring) (discussing contributions and spending).

[22] Bluman v. FEC, 800 F. Supp. 2d 281, 286–89 (D.D.C. 2011), *aff'd without op.*, Bluman v. FEC, 132 S. Ct. 1087 (2012). A Supreme Court affirmance without an opinion, of a three-judge district court judgment, affirms the judgment, not the reasoning. Fusari v. Steinberg, 419 U.S. 379, 391 & n.* (1975) (Burger, C.J., concurring), *adopted in* Mandel v. Bradley, 432 U.S. 173, 176 (1977). *E.g.*, *Citizens United*, 558 U.S. at 336–66 (holding that government may not limit independent spending for political speech); Randall v. Sorrell, 548 U.S. 230, 240–46 (2006) (holding that government may not limit independent spending for political speech); Colo. Republican Fed. Campaign Comm. v. FEC (*Colo. Republican-I*), 518 U.S. 604, 613–20 (1996) (holding that government may not limit independent spending for political speech); FEC v. NCPAC, 470 U.S. 480, 496–501 (1985) (holding that government may not limit independent spending for political speech); *Buckley*, 424 U.S. at 44–51 (holding that government may not limit independent spending for political speech).

[23] Yamada v. Kuramoto, 744 F. Supp. 2d 1075, 1083 (D. Haw. 2010), *appeal dismissed*, No.10-17280 (9th Cir. June 10, 2011).

[24] *Cf. id.* (addressing contributions received by organizations engaging in only independent spending).

engage in only independent spending.[25] This principle also applies when organizations both make contributions and engage in independent spending.[26] Before *Citizens United*, and particularly after *Citizens United,* limits on contributions for independent spending are unconstitutional when contributors are not foreign nationals.[27] *McCutcheon's dictum* regarding transfers "among candidates and political committees" does not support limiting contributions for independent spending, and extends beyond transfers and contributions used for independent spending.[28]

Notwithstanding Second Circuit holdings, government may prevent "circumvention" but not with otherwise *un*constitutional law.[29]

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[25] *See Republican Party of N.M.*, 741 F.3d at 1093 n.2 (holding that the plaintiffs prevail regardless of the scrutiny level); Wis. Right to Life State PAC v. Barland (*Barland-I*), 664 F.3d 139, 154 (7th Cir. 2011) (holding that the plaintiff prevails regardless of the scrutiny level); *Yamada*, 744 F. Supp. 2d at 1082–84 (holding that the plaintiffs prevail regardless of the scrutiny level). *Stop this Insanity, Inc. Employee Leadership Fund v. FEC* incorrectly implies that the scrutiny level affects the result. *See* 902 F. Supp. 2d 23, 38–39 n.18 (D.D.C. 2012) (stating *pre-McCutcheon*, 134 S. Ct. at 1445–46, that because "any political contribution enjoys . . . lesser . . . First Amendment protection than any . . . political expenditure, . . . *Buckley* . . . was ultimately untroubled by limits on political contributions because the overall effect of contribution limits 'is merely to require candidates and political committees to raise funds from a greater number of persons'"); *Citizens United*, 558 U.S. at 357 (quoted in AFEC v. Bennett, 131 S. Ct. 2806, 2826 (2011)) (holding that independent spending does not cause corruption or its appearance). *See, e.g.*, *Republican Party of N.M.*, 741 F.3d at 1095–97 (holding that independent spending does not cause corruption or its appearance); *Barland-I*, 664 F.3d at 151–55 (holding that independent spending does not cause corruption or its appearance); Long Beach Area Chamber of Commerce v. City of Long Beach, 603 F.3d 684, 695 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 392 (2010) ("Supreme Court precedent forecloses the . . . argument that independent expenditures by independent[-]expenditure committees . . . raise the specter of corruption or the appearance thereof."); *Yamada*, 744 F. Supp. 2d at 1084 (holding that independent spending does not cause corruption or its appearance).

[26] *See, e.g.*, *Republican Party of N.M.*, 741 F.3d at 1097 (explaining that government may limit contributions that are, in turn, used for contributions yet not contributions that are, in turn, used for independent spending); Emily's List v. FEC, 581 F.3d 1, 12 (D.C. Cir. 2009) (explaining that government may limit contributions that are, in turn, used for contributions yet not contributions that are, in turn, used for independent spending).

[27] *See Emily's List*, 581 F.3d at 9–12 (rejecting a limit on contributions for independent spending *pre-Citizens United*); N.C. Right to Life, Inc. v. Leake (*NCRL-III*), 525 F.3d 274, 291-95 (4th Cir. 2008) (rejecting a limit on contributions for independent spending *pre-Citizens United*); *see also Republican Party of N.M.*, 741 F.3d at 1093 n.2, 1095–97 (rejecting a limit on contributions for independent spending *post-Citizens United*); *Barland-I*, 664 F.3d at 151–55 (rejecting a limit on contributions for independent spending *post-Citizens United*); *Yamada*, 744 F. Supp. 2d at 1083–84 (rejecting a limit on contributions for independent spending *post-Citizens United*); *Bluman*, 800 F. Supp. 2d at 285–89 (upholding a ban on contributions and independent expenditures by foreign nationals).

[28] McCutcheon v. FEC, 134 S. Ct. 1434, 1458–59 (2014).

[29] *McCutcheon*, 134 S. Ct. at 1452–60; *see* Vt. Right to Life Comm., Inc. v. Sorrell, 758 F.3d 118, 140 n.20 (2d Cir. 2014) (*VRLC-II*), *cert. denied,* 135 S. Ct. 949 (2015) (citing Ognibene v.

Preventing "circumvention" cannot justify otherwise *un*constitutional law.[30] This is because "there can be no freestanding anti-circumvention interest."[31] In other words, "anti-circumvention is not an independent state interest."[32] This applies to contribution limits and beyond.[33] The fact that "speakers find ways to circumvent campaign[-]finance laws" does not mean preventing circumvention can justify *un*constitutional law.[34] Otherwise, government could justify limits on contributions to one's own campaign, banning contributions by minors, unconstitutional *Randall v. Sorrell*-like limits, or aggregate contribution limits by somehow preventing "circumvention" of the same or other limits.[35] This is

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Parkes, 671 F.3d 174, 194–95 (2d Cir. 2012)) (holding that contribution limits "could be justified as preventing circumvention of contribution limits").

30 *McCutcheon*, 134 S. Ct. at 1452–60.

31 *Republican Party of N.M.*, 741 F.3d at 1102.

32 Landell v. Sorrell, 406 F.3d 159, 169 (2d Cir. 2005), *rev'd on other grounds*, 548 U.S. 230, 246–62 (2006) (Walker, J., dissenting) (citing McConnell v. FEC, 540 U.S. 93, 161 (2003)).

Even *pre-McCutcheon* Supreme Court opinions rely on an "anti-circumvention" rationale to uphold contribution limits only when they are "otherwise valid[.]" *McConnell*, 540 U.S. at 138 n.40, 185 (citing FEC v. Beaumont, 539 U.S. 146, 161–62 (2003)) (referring to "circumvention of otherwise [valid] contribution limits"); *see id.* at 205 (referring to "circumvention of valid contribution limits" (brackets omitted)) (quoting *Beaumont*, 539 U.S. at 155, quoting, in turn, FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 456 n.18 (2001)); Randall v. Sorrell, 548 U.S. 230, 259 (2006) (quoting *Colo. Republican-II*, 533 U.S. at 453); *McConnell*, 540 U.S. at 126, 129, 134, 137, 139, 144, 145, 163, 165, 170, 171–72, 174, 176 (quoting *Colo. Republican-II*, 533 U.S. at 453, 456); *Beaumont*, 539 U.S. at 160 & n.7; *Colo. Republican-II*, 533 U.S. at 446, 453, 455, 457 & n.19, 460 & n.23, 461, 464 & n.28 (quoting Buckley v. Valeo, 424 U.S. 1, 47 (1976)); Cal. Med. Ass'n v. FEC, 453 U.S. 182, 197–98 & n.18 (1981).

They are *otherwise* valid only if they prevent *quid pro quo* corruption or its appearance, with *quid pro quo* corruption now defined as "a direct exchange of an official act for money." *McCutcheon*, 134 S. Ct. at 1441 (quoting Citizens United v. FEC, 558 U.S. 310, 359 (2010)). *See* Davis v. FEC, 554 U.S. 724, 736–44 (2008) (considering only corruption). *See, e.g.*, *Randall*, 548 U.S. at 241–42, 244–45, 246–49; *Colo. Republican-II*, 533 U.S. at 441, 444–45, 456; Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 388–96 (2000); FEC v. Nat'l Right to Work, 459 U.S. 197, 208–10 (1982); *Cal. Med. Ass'n*, 453 U.S. at 195, 197–99; *McCutcheon*, 134 S. Ct. at 1441 (citing McCormick v. United States, 500 U.S. 257, 266 (1991)). This is "an effort to control the exercise of an officeholder's official duties," *i.e.*, "an act akin to bribery." *McCutcheon,* 134 S. Ct. at 1450; *id.* at 1466 (Breyer, J., dissenting).

33 *See Buckley*, 424 U.S. at 44–48 (applying this principle to contributions and independent spending).

34 *Citizens United*, 558 U.S. at 364 (citing *McConnell,* 540 U.S. at 176–77).

35 *Contra Buckley*, 424 U.S. at 51–54 (holding that limits on contributions to one's own campaign are unconstitutional); *McConnell*, 540 U.S. at 232 (holding a ban on contributions by minors unconstitutional); *Randall*, 548 U.S. at 246–62 (holding a limit on contributions unconstitutional); *McCutcheon*, 134 S. Ct. at 1452–60 (holding aggregate contribution limits unconstitutional).

contrary to the principle that contribution limits must rise or fall on their own merits.[36]

To put it another way: on the one hand, when law *is* constitutional, there is nothing wrong with *legally* circumventing it; however, there *is* something wrong with *il*legally circumventing it. This is the difference between avoiding and evading taxes—avoiding taxes is legal, while evading them is not.[37] On the other hand, when a court enjoins *un*constitutional law, government may not enforce it, and there is nothing wrong with circumventing it.

D. Organizations Engaging in Only Independent Spending

The District of Columbia Circuit holds that government may never limit contributions to organizations engaging in only independent spending.[38] A Supreme Court concurrence agrees.[39] This is the controlling opinion in *California Medical Association v. FEC*.[40] The Fourth Circuit also agrees, holding that "contribution limits are . . . unacceptable when applied to . . . independent[-]expenditure committees[.]"[41] The organizations "furthest removed from the candidate" are those that engage in only independent spending.[42] It "is 'implausible' that contributions to independent[-]expenditure political committees are corrupting."[43] The Seventh and Tenth Circuits resoundingly agree.[44]

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[36] *McCutcheon*, 134 S. Ct. at 1452–60; *McConnell*, 540 U.S. at 232; *Randall*, 548 U.S. at 246–62; *Buckley*, 424 U.S. at 51–54.

[37] THE LAW DICTIONARY, *What is Tax Avoidance?*, *available at* http://thelawdictionary.org/tax-avoidance (last visited Feb. 13, 2015), *archived at* http://perma.cc/R9JR-U32Y.

[38] SpeechNow.org v. FEC, 599 F.3d 686, 694–95 (D.C. Cir. 2010) (*en banc*), *cert. denied*, 131 S. Ct. 553 (2010); *see Emily's List*, 581 F.3d at 9–11, 14–15 & n.13, 15–16 n.14 (holding that government may not limit contributions to organizations engaging in only independent spending).

[39] *See* Cal. Med. Ass'n v. FEC, 453 U.S. 182, 203 (1981) (Blackmun, J., concurring) (stating that "contributions to a committee that makes only independent expenditures pose no . . . threat . . . of actual or potential corruption").

[40] Republican Party of N.M. v. King, 741 F.3d 1089, 1099 (10th Cir. 2013) (citing Marks v. United States, 430 U.S. 188, 193 (1977)); *Emily's List*, 581 F.3d at 9 n.8 (citing *Marks*, 430 U.S. at 193).

[41] NCRL-III v. Leake, 525 F.3d 274, 292–93 (4th Cir. 2008).

[42] *Id.* at 293.

[43] *Id.* (quoting N.C. Right to Life, Inc. v. Leake (*NCRL-II*), 344 F.3d 418, 434 (4th Cir. 2003), *cert. granted and judgment vacated on other grounds*, 541 U.S. 1007 (2004)).

[44] *See Republican Party of N.M.*, 741 F.3d at 1095–97 (holding that government may not limit contributions to organizations engaging in only independent spending); Wis. Right to Life State PAC v. Barland (*Barland-I*), 664 F.3d 139, 151–55 (7th Cir. 2011) (holding that government may not limit contributions to organizations engaging in only independent spending). *Barland-I* holds:

The Fifth Circuit holds not that a limit, but a source ban on contributions from corporations, and by extension unions, for independent spending is unconstitutional.[45] The Ninth Circuit's approach in effect closes the door on limiting contributions for independent spending except when contributors are foreign nationals. The key to the inquiry is whether contributors themselves are "entitled to exercise individually" the First Amendment right to spending for political speech that they "enjoy and effectuate" by making contributions for independent spending.[46] Only

> Wisconsin's $10,000 aggregate annual contribution limit is unconstitutional as applied to organizations, like the [Wisconsin] Right to Life [State] PAC, that engage only in independent expenditures for political speech. This is true even though the statute limits *contributions,* not *expenditures*. Whether strict scrutiny or the [exacting,] "closely drawn" standard applies, the anticorruption rationale cannot serve as a justification for limiting fundraising by groups that engage in independent spending on political speech. No other justification for limits on political speech has been recognized, and none is offered here.

Barland-I, 664 F.3d at 154 (emphasis in original). Quoting *Barland-I*, *Republican Party of New Mexico* holds "there is no valid governmental interest sufficient to justify imposing limits on fundraising by independent-expenditure organizations." *Republican Party of N.M.*, 741 F.3d at 1095.

[45] Texans for Free Enter. v. Texas Ethics Comm'n, 732 F.3d 535, 536–37 (5th Cir. 2013). *See* Thalheimer v. City of San Diego, 706 F. Supp. 2d 1065, 1088 (S.D. Cal. 2010), *aff'd* 645 F.3d 1109, 1118–21 (9th Cir. 2011) (ordering a preliminary injunction against, *inter alia,* a contribution-source ban). Treating contributions by corporations and unions differently violates the Equal Protection Clause. *See* Dallman v. Ritter, 225 P.3d 610, 634–35 (Colo. 2010) (holding that there was no compelling government interest in treating corporations and unions differently). *Iowa Right to Life Committee, Inc. v. Tooker* held otherwise and left this question for the Supreme Court. 717 F.3d 576, 603 (*IRLC-II*) (8th Cir. 2013), *cert. denied,* 134 S. Ct. 1787 (2014). *Texans for Free Enter.*, 732 F.3d at 538.

[46] *Long Beach Area Chamber of Commerce v. City of Long Beach* holds organizations engaging in only independent spending:

> [P]rovide a distinct medium through which citizens may collectively enjoy and effectuate those expressive freedoms that they are entitled to exercise individually. Many "individuals contribute to a political organization in part because they regard such a contribution as a more effective means of advocacy than spending the money under their own personal direction." Just as the soloist's song becomes more powerful when joined by a chorus of people singing along, . . . citizen[s'] message[s] may become more widely and effectively disseminated when [t]he[y] join[] an [organization] of like-minded citizens.

603 F.3d 684, 698 (9th Cir. 2010); *see* Buckley v. Valeo, 424 U.S. 1, 44–51 (1976) (holding that government may not limit spending for political speech); *see also Long Beach*, 603 F.3d at 698 (holding that government may not limit contributions to organizations engaging in only independent spending); Farris v. Seabrook, 677 F.3d 858, 867–68 n.8 (9th Cir. 2012) (applying *Long Beach* to recall elections); *Thalheimer*, 645 F.3d at 1118–21 (9th Cir. 2011) (holding that government may not limit contributions to organizations engaging in only independent spending); Yamada v. Kuramoto, 744 F. Supp. 2d 1075, 1085–87 (D. Haw. 2010), *appeal dismissed*, No.10-17280 (9th Cir. June 10, 2011) (applying *Long Beach,* granting a

when contributors are foreign nationals do they not have a First Amendment right to engage in the same speech as the "contributees."[47]

E. Organizations Making Contributions Too

The Tenth and District of Columbia Circuits apply these same principles when organizations both make contributions and engage in independent spending for political speech from separate accounts. Each of these circuits holds limits on contributions that organizations receive for independent spending are unconstitutional.[48]

How can *quid pro quo* corruption of candidates or officeholders, or its appearance, ever arise when organizations engaging in *only independent spending for political speech* receive contributions from persons who themselves have a First Amendment right to engage in the same speech as the organizations? And how can *quid pro quo* corruption of candidates

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preliminary-injunction motion on an as-applied contribution-limit claim, and inadvertently rejecting a facial holding the plaintiffs did not seek); Yamada v. Weaver, 872 F. Supp. 2d 1023, 1039–42 (D. Haw. 2012), *appeal docketed on other grounds*, No.12-15913 (9th Cir. Apr. 20, 2012) (granting summary judgment on the contribution-limit claim and correcting the previous holding).

Whether the person challenging a contribution limit is a contributor or a contributee is immaterial. *See, e.g.*, *Yamada*, 744 F. Supp. 2d at 1080–81 (addressing contributors); *Barland-I*, 664 F.3d at 147 (addressing a contributee). A contributor's right to make contributions would be useless if a contributee lacked the right to receive them. Similarly, a contributee's right to receive contributions would be useless if a contributor lacked the right to make them—it would be like a beautiful car without gasoline. *Cf. Buckley*, 424 U.S. at 19 n.18 (cited in *Long Beach*, 603 F.3d at 692) (comparing being "free to engage in unlimited political expression subject to a ceiling on expenditures" with "being free to drive an automobile as far and as often as one desires on a single tank of gasoline").

[47] *See supra* notes 22, 27 and accompanying text (explaining that limits on contributions for independent spending are unconstitutional when the contributors are not foreign nationals). *Cf.* Citizens United v. FEC, 558 U.S. 310, 362 (2010) (citing 2 U.S.C. § 441e (now 52 U.S.C. § 30121 (2012)) (stating the Court "need not reach the question of whether the [g]overnment has a compelling interest in preventing foreign individuals or associations from" making contributions or independent expenditures).

[48] 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). *Republican Party of New Mexico* states:

> If a contribution to outside groups for the purpose of making independent expenditures implicates the government's anti-corruption interest, then the same interest is implicated by the independent expenditures themselves. This would mean that "the entire *Buckley* edifice, built on a foundation of a contribution-expenditure dichotomy, falls." Richard L. Hasen, Buckley *Is Dead, Long Live* Buckley*: The New Campaign Finance Incoherence of* McConnell v. Federal Election Commission, 153 U. PA. L. REV. 31, 70 (2004). "Is that what the Court really intended buried in a few sentences of a footnote in one of the longest cases in Supreme Court history?" *Id. See also Emily's List*, 581 F.3d at 14 n.13 (declining to adopt expansive reading of footnote 48).

741 F.3d at 1100 n.7 (discussing McConnell v. FEC, 540 U.S. 93, 152 n.48 (2003)).

or officeholders, or its appearance, ever arise when organizations *making contributions and engaging in independent spending for political speech* receive contributions for independent spending from persons who themselves have a First Amendment right to engage in the same speech as the organizations?

Since there is no corrupting link between candidates or officeholders and organizations' independent spending, the presence of contributions from persons who themselves have a First Amendment right to engage in the same speech as the organizations, cannot somehow create that missing corrupting link. First, as a matter of law, organizations' independent spending cannot be a "corrupt '*quo*'"; second, as a matter of law, contributions for organizations' independent spending cannot be a "corrupting '*quid*[,]'" because only government officials have the power to grant corrupt or apparently corrupt "political favors."[49] Again, it is not that the corrupting link is "broken"—it is just not there.[50] It does not matter whether the contribution limit is 1 cent, $1, $1000, or $1 million.[51] Except as to contributions from foreign nationals, contribution limits are unconstitutional *per se* as applied to contributions for independent spending, so government is without power to say how big is big enough.[52] The size of the contribution limit is immaterial.[53]

Even if a contributee has "interests closely aligned with a political party, this alignment would not change the analysis because, under

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[49] SpeechNow.org v. FEC, 599 F.3d 686, 694–95 (D.C. Cir. 2010), *cert. denied,* 131 S. Ct. 553 (2010) (followed in Wis. Right to Life State PAC v. Barland (*Barland-I*), 664 F.3d 139, 154 (7th Cir. 2011)); *see Emily's List*, 581 F.3d at 12 (explaining that government may limit contributions that are, in turn, used for contributions yet not contributions that are, in turn, used for independent spending); FEC v. NCPAC, 470 U.S. 480, 497 (1985) (quoted in Citizens United v. FEC, 558 U.S. 310, 359 (2010)). The *NCRL-III* dissent—which *VRLC-II* follows—misses this by focusing on whether *organizations* can cause corruption or its appearance instead of whether *particular speech* can. VRLC-II v. Sorrell, 758 F.3d 118, 141 n.22 (2d Cir. 2014), *cert. denied,* 135 S. Ct. 949 (2015). *Compare* NCRL-III v. Leake, 525 F.3d 274, 336 (4th Cir. 2008) (Michael, J., dissenting) (focusing on whether organizations are coordinated), *with infra* notes 86–87 and accompanying text (explaining that the question is not whether organizations are coordinated but whether the particular speech is coordinated with a candidate).

[50] AFEC v. Bennett, 131 S. Ct. 2806, 2826 (2011).

[51] *See* McCutcheon v. FEC, 134 S. Ct. 1434, 1448 (2014) (quoting *NCPAC,* 470 U.S. at 493) (holding that "First Amendment rights are important regardless whether the individual is, on the one hand, a 'lone pamphleteer or street corner orator in the Tom Paine mold,' or is, on the other, someone who spends 'substantial amounts of money in order to communicate his political ideas through sophisticated' means" (brackets and ellipses omitted)).

[52] *See supra* notes 22, 27 and accompanying text (explaining that limits on contributions for independent spending are unconstitutional when the contributors are not foreign nationals).

[53] *Cf.* Buckley v. Valeo, 424 U.S. 1, 50–54 (1976) (striking down limits on contributions made to one's own campaign).

Supreme Court precedent, political parties [can] also make unlimited independent expenditures."[54] *Republican Party of New Mexico v. King's* "caveat" about political parties' receiving contributions for independent spending is *dictum,* because no political party even had a claim at stake in the *Republican Party of New Mexico* appeal, much less sought to receive unlimited contributions for independent spending.[55]

Under *McCutcheon,* "the risk of *quid pro quo* corruption is generally applicable only to 'the narrow category of money gifts that are directed . . . to a candidate or officeholder.'"[56] That is not what happens when organizations use contributions for independent spending.[57] There is no "risk of" a "direct exchange of an official act for money."[58] Such contributions are not "used for" contributions.[59] They are not "directed . . . to a candidate or officeholder."[60] There is no *McCutcheon* exchange or its appearance, much less any involving "large" or "massive" contributions to candidates.[61]

F. Circuit Splits

Three circuit opinions have created circuit splits, with *Vermont Right to Life Committee, Inc. v. Sorrell* (*VRLC-II*) alone splitting in multiple

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54 Republican Party of N.M. v. King, 741 F.3d 1089, 1091 (10th Cir. 2013) (recalling the district court's holding).

55 *Id.* at 1098–99, 1102–03; *infra* notes 129–132 and accompanying text. *Republican Party of N.M.* 741 F.3d at 1091, 1092, 1097 ("only non-party political committees have challenged the constitutionality of the law as applied to them"). By contrast, in *Republican Nat'l Comm. v. FEC,* political parties *did* challenge limits on contributions for independent spending. No.14-00853, VERIFIED COMPL. ¶¶1–5, 11–16 (D.D.C. May 23, 2014), *voluntarily dismissed,* (D.D.C. Dec. 3, 2014), *archived at* http://perma.cc/V96J-3LWT. However, the result would be the same, because political parties present no "special danger[] of [*quid pro quo*] corruption" or its appearance, so government may not limit contributions that political parties receive for independent spending. Colo. Republican-I v. FEC, 518 U.S. 604, 616 (1996). And "the constitutionally significant fact" in assessing whether particular speech—not the entire political-party organization, but the particular speech—is independent, "is the lack of coordination" with candidates. *Id.* at 617.

56 *McCutcheon,* 134 S. Ct. at 1452 (quoting McConnell v. FEC, 540 U.S. 93, 310 (2003) (Kennedy, J., concurring in part and dissenting in part)).

57 Anyway, "there is not the same risk of *quid pro quo* corruption or its appearance when money flows through independent actors to a candidate, as when a donor contributes to a candidate directly." *Id.*

58 *Id.* at 1441, 1452 (citing McCormick v. United States, 500 U.S. 257, 266 (1991)). There is no "effort to control the exercise of an officeholder's official duties," *i.e.,* no "act akin to bribery." *Id.* at 1450; *id.* 1466 (Breyer, J., dissenting).

59 *See supra* note 20 (quoting Republican Party of N.M. v. King, 741 F.3d 1089, 1091–93 n.2 (10th Cir. 2013)) (holding that government may not limit contributions that are "used for" independent spending, even when the contributee also makes contributions).

60 *McCutcheon,* 134 S. Ct. at 1452.

61 *Id.* at 1441, 1450–53 (citations omitted).

ways.[62] First, the plaintiff-contributee, Vermont Right to Life Committee Fund for Independent Political Expenditures ("VRLC-FIPE"), is a political committee connected to Vermont Right to Life Committee, Inc. ("VRLC").[63] *VRLC-II* finds VRLC-FIPE is part of one organization with another political committee, Vermont Right to Life Committee—Political Committee ("VRLC-PC"), which makes contributions.[64] *VRLC-II* expressly splits with *North Carolina Right to Life Committee, Inc. v. Leake* (*NCRL-III*). *NCRL-III* addresses parallel North Carolina organizations and holds NCRL-FIPE is "independent as a matter of law" from NCRL and NCRL-PAC.[65] As a matter of law, a political committee that an organization forms/has is a legal person unto itself; it is not part of another organization—its speech is its own.[66]

Second, *VRLC-II* addresses "circumvention of contribution limits" without acknowledging that government may prevent "circumvention" but *not* with otherwise *un*constitutional law.[67] In other words, preventing "circumvention" cannot justify otherwise *un*constitutional law.[68] *VRLC-II* splits with *Republican Party of New Mexico's* holding that "there can be no freestanding anti-circumvention interest."[69]

Third, *VRLC-II* holds the government *may* limit contributions to organizations making contributions and may *not* limit contributions to organizations engaging in *only* independent spending.[70] However, even conceding *arguendo* all of Defendants' asserted undisputed facts, including that VRLC-FIPE and VRLC-PC are one organization and that

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62 VRLC-II v. Sorrell, 758 F.3d 118, 139–45 (2d Cir. 2014), *cert. denied,* 135 S. Ct. 949 (2015).

63 VRLC is not a political committee and challenges Vermont law requiring it to be one. *Id.* at 135–39.

64 *See id.* at 140, 142, 143–44 (describing the organizations).

65 *Id.* at 141 (quoting NCRL-III v. Leake, 525 F.3d 274, 294 n.8 (4th Cir. 2008)).

66 *See* Citizens United v. FEC, 558 U.S. 310, 337 (2010) (holding that a political committee that an organization forms/has "is a separate association from the" organization); Cal. Med. Ass'n v. FEC, 453 U.S. 182, 196 (1981) (holding that a political committee that an organization forms/has "is a separate legal entity" from the organization). *Alaska Right to Life Committee v. Miles* (*ARLC*) implicitly recognizes this even when "three entities share the same director and the same board of directors" and the "degree of financial separation among the three entities is unclear from the record." 441 F.3d 773, 776 (9th Cir. 2013), *cert. denied,* 549 U.S. 886 (2006). Claiming that a political committee that an organization forms/has "is merely the mouthpiece" of another organization "is untenable." *Cal. Med. Ass'n,* 453 U.S. at 196. The fact that another organization "agree[s] with the views" of the political committee "does not convert" the political committee's "speech into that of" the other organization. *Id.*

67 *VRLC-II*, 758 F.3d at 140 n.20; McCutcheon v. FEC, 134 S. Ct. 1434, 1452–60 (2014).

68 *McCutcheon*, 134 S. Ct. at 1452–60.

69 Republican Party of N.M. v. King, 761 F.3d 1089, 1102 (10th Cir. 2013).

70 *VRLC-II,* 758 F.3d at 139 (quoting Landell v. Sorrell, 382 F.3d 91, 140 (2d Cir. 2004), *rev'd on other grounds*, 548 U.S. 230 (2006)); *id.* at 140 (citing New York Progress & Protection PAC v. Walsh, 733 F.3d 483, 487 (2d Cir. 2013)).

VRLC-FIPE "is completely enmeshed with VRLC-PC[,]" *VRLC-II* does *not* recognize a crucial point.[71] It does *not* recognize that organizations that both make contributions and engage in independent spending—as the alleged "single" VRLC-FIPE and VRLC-PC organization does—may receive unlimited contributions *for independent spending*.[72] The organization "merely needs to ensure that its contributions to parties [other than for independent spending] or candidates come from an account set up for that purpose, not one used for independent expenditures."[73] VRLC-PC and VRLC-FIPE have separate accounts, just as a victorious *Republican Party of New Mexico* plaintiff does.[74] Thus, *VRLC-II* splits with *Republican Party of New Mexico* and *Emily's List v. FEC*.[75]

Fourth, along that same line *and most importantly,* even conceding *arguendo* all of Defendants' asserted undisputed facts, including that VRLC-FIPE and VRLC-PC are one organization and that VRLC-FIPE "is enmeshed completely with VRLC-PC[,]" VRLC-FIPE still prevails because Defendants did not prove any contribution VRLC-FIPE receives is "used for" anything other than independent spending for political speech.[76] That, not Defendants' facts, is the crucial—and now a circuit-splitting—question. Defendants never responded to, much less

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71 *Id.* at 141–44.

72 *See id.* at 140–41 (recognizing only "independent-expenditure-only" organizations). *VRLC-II* implies they may not, and this is at the heart of the *VRLC-II* circuit split. *See id.* at 141 (citing Stop this Insanity, Inc. Employee Leadership Fund v. FEC, 902 F. Supp. 2d 23, 43 (D.D.C. 2012) (holding that "separate bank account[s]"—which VRLC-FIPE and VRLC-PC have—do "not prevent *coordinated* expenditures"); *id.* at 144 (finding "VRLC-FIPE is not meaningfully distinct from VRLC-PC" and therefore affirming summary judgment on the contribution limit). But *preventing* organizations' *coordinated* spending—*i.e.,* contributions—is unnecessary for the organizations to receive unlimited contributions for *independent* spending. Buckley v. Valeo, 424 U.S. 1, 46–47, 78 (1976); *Republican Party of N.M.*, 741 F.3d at 1097; Emily's List v. FEC, 581 F.3d 1, 12 (D.C. Cir. 2009). Instead, the relevant inquiry is whether Defendants proved any contribution VRLC-FIPE receives is used for anything other than independent spending for political speech. *Infra* notes 76–77 and accompanying text.

73 *Republican Party of N.M.,* 741 F.3d at 1097 (citing *Emily's List,* 581 F.3d at 12).

74 *VRLC-II,* 758 F.3d at 143; *Republican Party of N.M.*, 741 F.3d at 1097.

75 *Republican Party of N.M.*, 741 F.3d at 1097; *VRLC-II,* 758 F.3d at 141 (citing *Emily's List*, 581 F.3d at 12).

76 *VRLC-II,* 758 F.3d at 141–44 & n.23 (finding that "the record does not show that funds from VRLC-FIPE were used for candidate contributions"); *see supra* note 20 (quoting Republican Party of N.M. v. King, 741 F.3d 1089, 1091, 1092, 1093 n.2 (10th Cir. 2013) (holding that government may not limit contributions that are "used for" independent spending, even when the contributee also makes contributions); *see also Republican Party of N.M.,* 741 F.3d at 1096 ("contributions for the purpose of making independent expenditures"); *id.* at 1103 ("used solely for"). *Cf.* Cal. Med. Ass'n v. FEC, 453 U.S. 182, 203 (1981) (Blackmun, J., concurring) (stating that "contributions to a committee that makes only independent expenditures pose no . . . threat . . . of actual or potential corruption").

disputed, this. What remains is "conjecture" regarding "recontributed funds" or contributions "rerouted to candidates[.]"[77]

Indeed, *VRLC-II* acknowledges "that the record does not show that funds from VRLC-FIPE were used for candidate contributions."[78] However, *VRLC-II* means only *direct* contributions to candidates.[79] Yet Defendants also did not prove any contribution VRLC-FIPE receives is "used for" any *in*direct contribution to candidates, *i.e.*, contributions to candidates *via* intermediaries or spending for political speech coordinated with candidates.[80] By nevertheless holding that Vermont may limit contributions that VRLC-FIPE receives, *VRLC-II* splits with *Republican Party of New Mexico* and *Emily's List*.[81]

Holding that mere voter guides are coordinated spending splits with *Clifton v. FEC,* because "coordination" implies "collaboration beyond"

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77 McCutcheon v. FEC, 134 S. Ct. 1434, 1452, 1457 (2014) (quoting Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 392 (2000)).

78 *VRLC-II,* 758 F.3d at 143 n.23 (finding that "the record does not show that funds from VRLC-FIPE were used for candidate contributions"); *cf. id.* at 143 (explaining voter guides and fundraising). *VRLC-II* finds this even while finding "fluidity of funds between VRLC-FIPE and VRLC-PC." *Id.* at 143. The reason is that the "fluidity" Defendants allege all flows from VRLC and VRLC-PC (which makes contributions) to VRLC-FIPE (which does not), not *vice-versa. E.g., id.* at 143 & n.23 (finding "fluidity of funds between VRLC-FIPE and VRLC-PC" while overlooking that "funds" flow from VRLC and VRLC-PC (which makes contributions) to VRLC-FIPE (which does not), not *vice-versa*)); Vt. Right to Life Comm., Inc. v. Sorrell, No.2:09-cv-188, PLS.' SUMM. J. RESP. BR. at 41–42 & n.48 (D. Vt. Nov. 18, 2011) (refuting Defendants' fluidity-of-funds argument and showing that the alleged fluidity of funds is not a genuine issue of material fact, because the only alleged fluidity of "funds" flows from VRLC and VRLC-PC (which makes contributions) to VRLC-FIPE (which does not), not *vice-versa*); *accord VRLC-II,* PLS.-APPELLANTS' VRLC & VRLC-FIPE'S REPLY BR. at 39–48 (2d Cir. Dec. 19, 2012) (citing the district-court record and showing that Defendants did not prove any contribution VRLC-FIPE receives is used for anything other than independent spending for political speech). So the "fluidity" Defendants allege cannot mean any contribution VRLC-FIPE itself receives is used for anything other than independent spending. *VRLC-II*, 758 F.3d at 143.

79 *See VRLC-II*, 758 F.3d at 143 n.23 (finding that "the record does not show that funds from VRLC-FIPE were used for candidate contributions"). Direct contributions are one form of contributions to candidates under the Constitution. *E.g.*, Buckley v. Valeo, 424 U.S. 1, 23 n.24 (1976).

80 *VRLC-II,* 758 F.3d at 143 n.23; *see supra* note 76 and accompanying text (highlighting the term "used for"); *Buckley,* 424 U.S. at 23 n.24; McConnell v. FEC, 540 U.S. 93, 219–21 (2003); Colo. Republican-I v. FEC, 518 U.S. 604, 610–11 (1996); *Buckley*, 424 U.S. at 46–47, 78 (quoted in FEC v. Survival Educ. Fund, Inc., 65 F.3d 285, 294 (2d Cir. 1995)) (discussing particular speech coordinated with candidates). Contributions can lead to *quid pro quo* corruption or its appearance only when candidates are involved. *McCutcheon,* 134 S. Ct. at 1452.

81 *Republican Party of N.M.,* 741 F.3d at 1097; *VRLC-II*, 758 F.3d at 141 (citing Emily's List v. FEC, 581 F.3d 1, 12 (D.C. Cir. 2009)).

merely asking for candidates' positions on issues.[82] So asking for and publishing candidates' positions on issues is not coordinated spending.[83] Nor did Defendants show under *McCutcheon* any "direct exchange of an official act for money" or its appearance, or that contributions "are directed . . . to a candidate or officeholder."[84] Much less did they show any "large"/"massive" contributions to candidates.[85]

Fifth, even conceding *arguendo* that VRLC-FIPE and VRLC-PC are one organization, *VRLC-II* errs in *how* it assesses under *constitutional* law whether VRLC-FIPE engages in coordinated spending: *VRLC-II* asks whether *organizations* are coordinated.[86] Instead, the question is whether

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82 *VRLC-II*, 758 F.3d at 144; Clifton v. FEC, 114 F.3d 1309, 1311 (1st Cir. 1997), *cert. denied,* 522 U.S. 1108 (1998) (citing *Buckley,* 424 U.S. at 46–47).

83 *Cf. Colo. Republican-I,* 518 U.S. at 613–20 (cited in *Clifton,* 114 F.3d at 1311). Otherwise, *every* voter guide would be coordinated spending, and therefore a contribution. *But see* 11 C.F.R. § 109.21.f (establishing *post-Clifton* that a "candidate's or a political[-]party committee's response to an inquiry about that candidate's or political[-]party committee's positions on legislative or policy issues, but not including a discussion of campaign plans, projects, activities or needs," is not coordinated spending).

84 *McCutcheon,* 134 S. Ct. at 1441 (citing McCormick v. United States, 500 U.S. 257, 266 (1991)). They showed no "effort to control the exercise of an officeholder's official duties,"—*i.e.,* no "act akin to bribery." *Id.* at 1450, 1452; *id.* at 1466 (Breyer, J., dissenting).

85 *Id.* at 1450–53.

86 *See VRLC-II,* 758 F.3d at 142 (asking "whether a *group* is functionally distinct from a non-independent-expenditure-only" organization (emphasis added)); *id.* at 144 (finding that VRLC-FIPE and VRLC-PC coordinated voter guides and the VRLC's executive director advised a gubernatorial candidate/campaign on issues); *id.* at 144–45 (focusing on VRLC-FIPE and "its independence from" VRLC-PC, not the independence of particular speech); *id.* at 145 (focusing on whether "VRLC-FIPE is indistinguishable from VRLC-PC" and not the independence of particular speech). The *NCRL-III* dissent, which *VRLC-II* follows, makes the same mistake. *See* NCRL-III v. Leake, 525 F.3d 274, 336 (4th Cir. 2008) (Michael, J., dissenting). This *VRLC-II* holding makes it more than "difficult at times" for low-budget organizations to receive unlimited contributions for independent spending. *VRLC-II,* 758 F.3d at 145. It makes it nearly impossible. Low-budget organizations such as VRLC, VRLC-FIPE, and VRLC-PC cannot afford *not* to work together. Their working together is not coordination under the Constitution. *See infra* note 87 and accompanying text (discussing further whether particular speech is coordinated with candidates); *cf.* Long Beach Area Chamber of Commerce v. City of Long Beach, 603 F.3d 684, 698 (9th Cir. 2010), *cert. denied,* 131 S. Ct. 392 (2010) (holding that persons who "individually" have a First Amendment right to engage in particular speech may "collectively enjoy and effectuate those expressive freedoms"). If their working together were coordination, if their joint speech were coordinated, and if VRLC-FIPE were constitutionally ineligible to receive unlimited contributions for independent spending, then two other similarly-situated, low-budget plaintiffs would have lost—but they won. *See* Wis. Right to Life State PAC v. Barland (*Barland-I*), 664 F.3d 139, 151–55 (7th Cir. 2011); *NCRL-III,* 525 F.3d at 291–95. Firewalls are not affordable for low-budget organizations—not even the FEC requires them. *See* 11 C.F.R. § 109.21.h. Besides, under *McCutcheon,* First Amendment rights are important regardless of the size of the speaker. *McCutcheon*, 134 S. Ct. at 1448 (quoting FEC v. NCPAC, 470 U.S. 480, 493 (1985)).

particular speech is coordinated with candidates.[87] Defendants did not show VRLC-FIPE coordinates *particular speech* with candidates, much less that any contribution VRLC-FIPE receives is "used for" coordinating particular speech with candidates.[88] Considering whether *organizations* are coordinated splits with *Republican Party of New Mexico* and *Clifton*.[89] Nor did Defendants show any "approval (or wink or nod)" by any candidate/candidate's committee—*i.e.*, an "arrangement with a candidate[,]" or a "request or suggestion" from the candidate/candidate's committee.[90]

Sixth, VRLC may and does "wholly control" its own political committees.[91] Yet if such control meant VRLC-FIPE may not receive unlimited contributions for independent spending, then plaintiff-

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87 *See McCutcheon*, 134 S. Ct. at 1454 (quoting Citizens United v. FEC, 558 U.S. 310, 357 (2010), quoting, in turn, Buckley v. Valeo, 424 U.S. 1, 47 (1976)) ("The absence of prearrangement and coordination *of an expenditure* with the candidate or his agent . . . undermines the value of the expenditure to the candidate" (emphasis added)); FEC v. Colo. Republican-II, 533 U.S. 431, 437–45 (2001) (focusing repeatedly on "expenditures" and "spending"). The fact that organizations coordinate *some* speech with candidates does not prevent them from engaging in *other*, independent speech. *Colo. Republican-II*, 533 U.S. at 437–65; McConnell v. FEC, 540 U.S. 93, 215–18 (2003). Otherwise, the government would have won in *Colorado Republican-I*—but instead the Court held that "the constitutionally significant fact" in assessing whether particular speech—not the entire political-party organization, but the particular speech—is independent from "the lack of coordination" with candidates. Colo. Republican-I v. FEC, 518 U.S. 604, 617 (1996). So coordination among *organizations*—*i.e.*, organizations' working together—does not establish that VRLC-FIPE makes contributions, or that any contribution VRLC-FIPE receives is used for anything other than independent spending. Otherwise, no corporation, union, or other organization and its political committee could ever work together without coordinated spending, and therefore contributions, occurring.

88 *See supra* note 79 and accompanying text (explaining coordination). Even under *Vermont* law, Defendants did not prove coordination. *Compare* VRLC-II v. Sorrell, 758 F.3d 118, 143 (2d Cir. 2014), *cert. denied*, 135 S. Ct. 949 (2015), *with* VT. STAT. 2941.B, VT. ADMIN. RULE 2000-1.2, *and* Vt. Right to Life Comm., Inc. v. Sorrell, 875 F. Supp. 2d 376, 408 n.25 (D. Vt. 2012) ("The record does not evidence any expenditures designated as [VRLC-]FIPE's that were undertaken at the [Brian] Dubie [gubernatorial] campaign's explicit direction.").

89 *See* Republican Party of N.M. v. King, 741 F.3d 1089, 1096 n.4 (10th Cir. 2013) (citing Citizens United v. FEC, 558 U.S. 310, 360 (2010)) (stating that "*Citizens United* did not treat corruption as a fact question to be resolved on a case-by-case basis. Instead, the Court considered whether *independent speech* is the type that poses a risk of *quid pro quo* corruption or the appearance thereof. . . . The Court determined that speech through independent expenditures does not pose such a risk."). Clifton v. FEC, 114 F.3d 1309, 1311 (1st Cir. 1997), *cert. denied*, 522 U.S. 1108 (1998) (citing *Buckley*, 424 U.S. at 46–47) (focusing on particular speech).

90 *Vt. Right to Life*, 875 F. Supp. 2d at 408 n.25; *Colo. Republican-II*, 533 U.S. at 442–43; McConnell v. FEC, 540 U.S. 93, 222 (2003). Even the FEC requires this. 11 C.F.R. §§ 109.20–21.

91 FEC v. Beaumont, 539 U.S. 146, 149 (2003).

organizations in three other appeals would have lost—but they won.[92] Moreover, by looking to the board-appointment process, board membership, committee membership, identical meeting times, and VRLC-FIPE's and VRLC-PC's discussing "important tactical campaign issues" together, *VRLC-II* splits with *Alaska Right to Life Committee v. Miles* (*ARLC*).[93] Under *ARLC,* VRLC-FIPE and VRLC-PC are separate even if they "share the same director and the same board of directors" and the "degree of financial separation among the three entities is unclear from the record."[94] *VRLC-II* also splits with *Republican Party of New Mexico,* under which "overlapping leadership" among VRLC, VRLC-PC, and VRLC-FIPE does not help Defendants.[95] Like the parallel, low-budget plaintiffs in *NCRL-III,* VRLC, VRLC-FIPE, and VRLC-PC "share staff"; sharing leadership/staff is not only legal but also common, because it saves money and prevents operating at cross purposes.[96]

The second of three circuit splits is in *Alabama Democratic Conference v. Broussard,* which upholds limits on contributions to an organization that both makes contributions and engages in independent spending, because "both accounts are controlled and can be coordinated by the same entity."[97] Without saying so, this presumes the question is whether the organization—in any of its activity—can cause *quid pro quo* corruption or its appearance.[98] But instead, the question is whether particular speech can.[99] The fact that organizations may and do "wholly control" political committees that they form/have does not mean their

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92 VRLC-II v. Sorrell, 758 F.3d 118, 143 (2d Cir. 2014), *cert. denied,* 135 S. Ct. 949 (2015). Wis. Right to Life State PAC v. Barland (*Barland-I*), 664 F.3d 139, 151–55 (7th Cir. 2011); Long Beach Area Chamber of Commerce v. City of Long Beach, 603 F.3d 684, 696–99 (9th Cir. 2013), *cert. denied,* 131 S. Ct. 392 (2010); NCRL-III v. Leake, 525 F.3d 274, 291–95 (4th Cir. 2008).

93 *VRLC-II*, 758 F.3d at 143–44.

94 *Id.* at 143–44; ARLC v. Miles, 441 F.3d 773, 776 (9th Cir. 2006), *cert. denied,* 549 U.S. 886 (2006). Even the FEC understands the same people can be part of both an organization and its political committees. *See* ADVISORY OP. 2010-09 at 1–4 (Club for Growth) (FEC July 22, 2010).

95 Republican Party of N.M. v. King, 741 F.3d 1089, 1102-03 (10th Cir. 2013).

96 *NCRL-III*, 525 F.3d at 294 n.8; *see Barland-I,* 664 F.3d at 143 (addressing other parallel plaintiffs).

97 Ala. Democratic Conference v. Broussard, 541 F. App'x 931, 935 (11th Cir. 2013) (unpublished).

98 While discussing organizations that make contributions and engage in independent spending, *Stop this Insanity, Inc. Employee Leadership Fund v. FEC* expressly inquires whether the *organizations* cause *quid pro quo* corruption or its appearance. 902 F. Supp. 2d 23, 38, 40–44 (D.D.C. 2012) (addressing entities, a PAC, a hybrid PAC, and a single entity).

99 *See supra* notes 79, 83 and accompanying text (asking whether particular speech by an organization, not the organization itself, can cause *quid pro quo* corruption or its appearance). *Republican Party of New Mexico*, 741 F.3d at 1096 n.4, 1102 n.11, expressly disagrees with *Alabama Democratic Conference*, 541 F. App'x at 931.

independent spending can cause *quid pro quo* corruption or its appearance.[100] Merely finding that organizations contribute to each other, have common members, or receive contributions from candidates cannot establish that contributions the organizations make cause *quid pro quo* corruption or its appearance absent evidence that the contributions go to candidates.[101]

The third of three circuit splits is *Stop this Insanity, Inc. Employee Leadership Fund v. FEC*.[102] *Stop this Insanity* misses the point when it tells the plaintiff-political committee, which wants to receive unlimited contributions for an independent-spending fund/account, that the political committee's *connected organization* may instead receive unlimited contributions for independent spending.[103] The plaintiff-political committee is "a separate association" and "a separate legal entity" and has its own rights.[104] If *Stop this Insanity* were correct, connected political committees in three other appeals would have lost—but they won.[105] *Stop this Insanity* also relies on the need for "disclosure" to support limiting contributions for independent spending.[106] However, disclosure and limits are separate concepts.[107]

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100 FEC v. Beaumont, 539 U.S. 146, 149 (2003); *supra* note 92 and accompanying text.

101 *Ala. Democratic Conference,* 541 F. App'x at 936; McCutcheon v. FEC, 134 S. Ct. 1434, 1452 (2014).

102 Stop this Insanity, Inc. Employee Leadership Fund v. FEC, 761 F.3d 10, 17 (D.C. Cir. 2014), *cert. denied,* 135 S. Ct. 949 (2015). The Supreme Court denied *certiorari* in *Stop this Insanity* on the same day that—and on the same page where—it denied *certiorari* in VRLC-II v. Sorrell, 758 F.3d 118 (2d Cir. 2014), *cert. denied,* 135 S. Ct. 949 (2015).

103 *See generally* 52 U.S.C. § 30101.7 (2012) (defining connected organization); Emily's List v. FEC, 581 F.3d 1, 8 n.7 (D.C. Cir. 2009) (presenting a facial challenge). *Stop this Insanity*, 761 F.3d at 14; *see Stop this Insanity*, 902 F. Supp. 2d at 32, 44 (saying the same both about the connected organization and about another political committee).

104 Citizens United v. FEC, 558 U.S. 310, 337 (2010); Cal. Med. Ass'n v. FEC, 453 U.S. 182, 196 (1981).

105 Wis. Right to Life State PAC v. Barland (*Barland-I*), 664 F.3d 139, 155 (7th Cir. 2011) (addressing WRTL-SPAC, a political committee connected to WRTL); Long Beach Area Chamber of Commerce v. City of Long Beach, 603 F.3d 684, 699 (9th Cir. 2010), *cert. denied,* 131 S. Ct. 392 (2010) (addressing political committees connected to the chamber); NCRL-III v. Leake, 525 F.3d 274, 295 (4th Cir. 2008) (addressing NCRL-FIPE, a political committee connected to NCRL).

106 *Stop this Insanity*, 761 F.3d at 16–17.

107 *See* Yamada v. Kuramoto, 744 F. Supp. 2d 1075, 1082 n.9 (D. Haw. 2010), *appeal dismissed,* No.10-17280 (9th Cir. June 10, 2011) (recognizing that disclosure and limits are separate concepts).

G. Aberrant District Court Orders

The *Stop this Insanity* district court order believes *Emily's List* does not address contributions for independent spending.[108] But *Emily's List* does.[109] *Stop this Insanity* also believes case law on contributions received for independent spending does not apply to such contributions received by *connected* political committees.[110] But it does.[111] The order further believes case law does not apply to *connected* political committees making contributions and *independent expenditures properly understood* from separate accounts.[112] But it does.[113] And, notwithstanding *Stop this Insanity,* whether independent spending is an independent expenditure does not matter here.[114]

Meanwhile, *Catholic Leadership Coalition of Texas v. Reisman* upholds a limit on contributions for independent spending—it presumes that a contribution/contact list which an organization receives only for independent spending *must also be* for contributions that the organization makes, which is not true.[115]

H. Possible Counterarguments

Any holding regarding the facial constitutionality of contribution limits in general is of no moment to challenges to limits on contributions for independent spending, because the latter challenges are as-applied

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108 *See Stop this Insanity,* 902 F. Supp. 2d at 41 (holding incorrectly that Emily's List v. FEC, 581 F.3d 1 (D.C. Cir. 2009), does not control).

109 *Emily's List,* 581 F.3d at 4–5, 15–18.

110 *Stop this Insanity,* 902 F. Supp. 2d at 29, 31–32, 42 n.23 (saying incorrectly and without explanation that "disclosure requirements" would be "meaningless").

111 *See supra* note 105 and accompanying text (discussing connected political committees).

112 Buckley v. Valeo, 424 U.S. 1, 44 & n.52, 80 (1976) (defining express advocacy and thereby independent expenditure); *Stop this Insanity,* 902 F. Supp. 2d at 41. The plaintiff-political committee seeks to make contributions *and* engage in independent spending from separate funds/accounts, so it *is* a "hybrid" political committee. *Emily's List*, 581 F.3d at 12; *contra Stop this Insanity*, 761 F.3d at 15 ("not a 'hybrid'").

113 *See* Republican Party of N.M. v. King, 741 F.3d 1089, 1097 (10th Cir. 2013); *Emily's List*, 581 F.3d at 12.

114 *Stop this Insanity,* 902 F. Supp. 2d at 40–42 & n.19 ("express advocacy"); *see supra* note 8–9 and accompanying text (explaining that a person who has a First Amendment right to engage in independent expenditures has a First Amendment right to engage in any independent spending for political speech).

115 Catholic Leadership Coal. of Tex. v. Reisman, No.A-12-CA-566-SS, 2013 WL 2404066, at *15–16 & n.3 (W.D. Tex. May 30, 2013). The Fifth Circuit affirmed on this claim, and otherwise affirmed in part and reversed on other grounds. Catholic Leadership Coal. of Tex. v. Reisman, 764 F.3d 409, 442–45 (5th Cir. 2014).

challenges.[116] Only in the *California Medical Association* concurrence, which is the controlling opinion, does the Supreme Court address the constitutionality of limiting contributions for independent spending.[117] Other Supreme Court opinions do not.

The *California Medical Association* plurality addresses a political committee that by definition makes contributions to candidates.[118] The fact that the political committee may also engage in independent spending does not change the fact that the plurality does not address independent spending.[119] Only the concurrence does.[120] When the plurality refers to a political committee's "independent political advocacy[,]" that means the California Medical Association PAC's political advocacy is independent of the California Medical Association in the sense that the political committee "is a separate legal entity" from the California Medical Association as a matter of law.[121]

FEC v. National Conservative PAC's statement about limiting contributions for independent spending is *dictum,* because no contribution limit was at issue.[122] Even if this *dictum* supported limiting contributions for independent spending when the Court decided *NCPAC,* subsequent opinions control for the reasons discussed next in addressing *Colorado Republican Federal Campaign Committee v. FEC* (*Colorado Republican-I*).[123]

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116 *E.g., Republican Party of N.M.*, 741 F.3d at 1095–97 (ruling on an as-applied challenge); Wis. Right to Life State PAC v. Barland (*Barland-I*), 664 F.3d 139, 151–55 (7th Cir. 2011) (ruling on an as-applied challenge).

117 Cal. Med. Ass'n v. FEC, 453 U.S. 182, 203 (1981) (Blackmun, J., concurring); *see supra* notes 39–40 and accompanying text (discussing the concurring opinion, which is the controlling opinion and states that government may never limit contributions to organizations engaging in only independent spending).

118 *Cal. Med. Ass'n,* 453 U.S. at 185 n.1, 197 n.17; *id.* at 203 (Blackmun, J., concurring); *Republican Party of N.M.*, 741 F.3d at 1093, 1098–99.

119 *E.g.*, McConnell v. FEC, 540 U.S. 93, 152 n.48 (2003) (stating that the *California Medical Association* statute "restricted . . . the source and amount of funds available to engage in noncoordinated expenditures").

120 *Cal. Med. Ass'n*, 453 U.S. at 203 (Blackmun, J., concurring); *Republican Party of N.M.*, 741 F.3d at 1098–99. *Stop this Insanity, Inc. Employee Leadership Fund v. FEC* incorrectly believes the *California Medical Association* plurality and the *Buckley v. Valeo* Court address contributions for independent spending. *See Stop this Insanity,* 902 F. Supp. 2d at 33, 43 (misinterpreting *California Medical Association* and *Buckley*).

121 *Cal. Med. Ass'n*, 453 U.S. at 196; *see* Citizens United v. FEC, 558 U.S. 310, 337 (2010) ("a separate association").

122 FEC v. NCPAC, 470 U.S. 480, 484, 495 (1985) ("the present cases involve [limits] on expenditures by PACs, not on the contributions they receive; and in any event these contributions are predominantly small and thus do not raise the same concerns as the sizable contributions involved in *California Medical Ass*[*ociatio*]*n*").

123 *NCPAC* and *Colorado Republican-I* did *not* support limiting contributions for independent spending, and courts did *not* need *Citizens United* to hold that government

The *Colorado Republican-I* plurality's statement regarding contributions that political parties receive for independent spending incorrectly presumes independent spending can cause corruption, and does *not* contemplate receiving contributions *for a separate independent-spending account*.[124] Anyway, the statement is *dictum,* because no contribution limit was at issue.[125] Even if this *dictum* supported limiting contributions for independent spending when the Court decided *Colorado Republican-I,* subsequent opinions—including *Citizens United, AFEC,* and *McCutcheon*—control in a way that extends beyond limits on independent spending for political speech to limits on *contributions for* independent spending for political speech.[126] Regardless of whether *pre-Citizens United* opinions helped the cause of limiting contributions for independent spending before *Citizens United,* they do not do so after

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may not limit contributions for independent spending. *See* Emily's List v. FEC, 581 F.3d 1, 9–12 (D.C. Cir. 2009) (rejecting a limit on contributions for independent spending *post-NCPAC, post-Colorado Republican-I,* and *pre-Citizens United*); NCRL-III v. Leake, 525 F.3d 274, 291 (4th Cir. 2008) (rejecting a limit on contributions for independent spending *post-NCPAC, post-Colorado Republican-I,* and *pre-Citizens United*).

[124] *See* Colo. Republican-I v. FEC, 518 U.S. 604, 617 (1996). *Colorado Republican-I* states:

> The greatest danger of corruption, therefore, appears to be from the ability of donors to give sums up to $20,000 to a party which may be used for independent party expenditures for the benefit of a particular candidate. We could understand how Congress, were it to conclude that the potential for evasion of the individual contribution limits was a serious matter, might decide to change the statute's limit[]s on contributions to political parties.

Id. And *Colorado Republican-I* cites the *California Medical Association v. FEC* plurality, 453 U.S. at 197–99, which does not address contributions for independent spending. *See supra* notes 117–121 and accompanying text (discussing the *California Medical Association* plurality's opinion).

[125] *See Colorado Republican-I,* 518 U.S. at 608–13 (discussing independent expenditures).

[126] Again, the *Colorado Republican-I dictum* did not support limiting contributions for independent spending. *See supra* note 123 and accompanying text (discussing *post-Colorado Republican-I* opinions holding that government may not limit contributions for independent spending); *see also* Long Beach Area Chamber of Commerce v. City of Long Beach, 603 F.3d at 694–95 n.5, *cert. denied,* 131 S. Ct. 392 (2010) (holding *post-Citizens United* that government may not limit contributions for independent spending); SpeechNow.org v. FEC, 599 F.3d 686, 694 (D.C. Cir. 2010) (*en banc*), *cert. denied,* 131 S. Ct. 553 (2010) (holding *post-Citizens United* that government may not limit contributions for independent spending). Republican Party of N.M. v. King, 741 F.3d 1089, 1094–95, 1098–99 (10th Cir. 2007) (holding *post-Citizens United* that government may not limit contributions for independent spending); Wis. Right to Life State PAC v. Barland (*Barland-I*), 664 F.3d 139, 153–54 (7th Cir. 2011) (holding *post-Citizens United* that government may not limit contributions for independent spending); Yamada v. Kuramoto, 744 F. Supp. 2d 1075, 1083–84 (D. Haw. 2010), *appeal dismissed,* No.10-17280 (9th Cir. June 10, 2011) (holding *post-Citizens United* that government may not limit contributions for independent spending).

Citizens United.[127] The only government interest in banning, or otherwise limiting, political speech—whether contributions or spending—is the prevention of *quid pro quo* corruption or its appearance. Independent spending does not cause *quid pro quo* corruption or its appearance, especially after *McCutcheon* narrows *quid pro quo* corruption and its appearance. Contributions for independent spending, even ones that are large/massive, are not directed to candidates, so they cannot cause *quid pro quo* corruption or its appearance.[128]

Even circuit opinions issued between *Citizens United* and *McCutcheon* apply the *Citizens United quid pro quo*-corruption-or-its-appearance framework to *contributions for* independent spending, not just independent spending itself.[129]

The reasons *McConnell v. FEC* does not support limiting contributions for independent spending are simpler and more basic than some circuits' analyses.[130]

While *McConnell* addresses, for example, 2 U.S.C. § 441i (now 52 U.S.C. § 30125), part of the Federal Election Campaign Act ("FECA"), *McConnell* is entirely a facial challenge.[131] Law can be facially

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127 *E.g., Republican Party of N.M.*, 741 F.3d at 1096, 1098–1102 (discussing how *Citizens United* impacts the analysis).

128 *See supra* notes 16–21 and accompanying text (defining *quid pro quo* corruption).

129 *E.g., Republican Party of N.M.*, 741 F.3d at 1094–95 (applying the *quid pro quo*-corruption-or-its-appearance framework to *contributions for* independent spending); *Barland-I*, 664 F.3d at 153–54 (applying the *quid pro quo*-corruption-or-its-appearance framework to *contributions for* independent spending); Thalheimer v. City of San Diego, 645 F.3d 1109, 1118 (9th Cir. 2011) (applying the *quid pro quo*-corruption-or-its-appearance framework to *contributions for* independent spending); *Long Beach,* 603 F.3d at 696–99; *SpeechNow.org,* 599 F.3d at 694–96 (applying the *quid pro quo*-corruption-or-its-appearance framework to *contributions for* independent spending).

130 The analysis is not complicated. *See supra* note 20 (quoting *Republican Party of N.M.,* 741 F.3d at 1091, 1092, 1093 n.2) (holding that government may not limit contributions that are "used for" independent spending, even when the contributee also makes contributions). Nevertheless, three circuits have indulged complicated *dicta*. *See Republican Party of N.M.,* 741 F.3d at 1099–1100 (addressing political parties, the discussion of which is *dictum,* because no political party sought to receive unlimited contributions for independent spending); *Thalheimer,* 645 F.3d at 1121 (quoting *Long Beach,* 603 F.3d at 696) (stating that "the contribution limits in *McConnell* and [*Cal. Med. Ass'n*] were justified by an anti-corruption interest because the regulated entities had unusually close relationships with the candidates they supported"—all of which was *dictum,* because no "unusually close relationships" were at issue in *Thalheimer* or *Long Beach*); Emily's List v. FEC, 581 F.3d 1, 13–14 (D.C. Cir. 2009) (addressing political parties, the discussion of which is *dictum,* because no political party sought to receive unlimited contributions for independent spending).

131 McConnell v. FEC, 540 U.S. 93, 154–85 (2003). *See also* Wis. Right to Life, Inc. v. Barland (*Barland-II*), 751 F.3d 804, 836–37 (7th Cir. 2014) (recognizing that *McConnell's* decision to uphold the law facially does not mean it is always constitutional as applied).

constitutional and still be unconstitutional as applied to particular speech.[132]

Moreover, this part of FECA reaches donations for speech other than independent spending. That is, this part of FECA reaches not just donations to organizations that engage in only independent spending, or organizations that both make contributions and engage in independent spending from separate accounts. This part of FECA also reaches donations to other organizations.[133] In addressing what was solely a facial challenge, *McConnell* had no need to parse facts for subsequent as-applied challenges.[134] Thus, the issues in *McConnell* are distinguishable. Because *McConnell* is not about only independent spending, it is incorrect to believe *McConnell* applies.

Caperton v. Massey does not support limiting contributions for independent spending. Rather, *Caperton* addresses whether an elected state-court justice should have recused himself when an officer of a corporation before the Court had engaged in independent expenditures, and had contributed to a committee that engaged in independent

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E.g., *McConnell*, 540 U.S. at 134 ("a facial First Amendment challenge"); *id.* at 174 ("on its face"); *id.* at 181 ("plaintiffs' facial challenge").

132 *Compare McConnell*, 540 U.S. at 190–94 (upholding the FECA electioneering-communication ban facially), *with* Wis. Right to Life, Inc. v. FEC (*WRTL-I*), 546 U.S. 410, 411–12 (2006) (holding that *McConnell's* facial holding does not preclude as-applied challenges).

133 *See* 52 U.S.C. §§ 30125(a)–(b), (d)–(f) (2012) (reaching donations to other organizations). For example, Sections 30125(a) and (b) address federal political-party committees, and state and local political-party committees, respectively. *Id.* § 30125(a)–(b). While parties engage in independent spending for political speech, they do far more than that. *See, e.g.*, *McConnell*, 540 U.S. at 154–85 (discussing party activities); Colo. Republican-I v. FEC, 518 U.S. 604, 608–13 (1996) (discussing spending limits). One example is coordinated spending for political speech, which counts as an indirect contribution. *See* FEC v. Colo. Republican-II, 533 U.S. 431, 437–40 (2001); Buckley v. Valeo, 424 U.S. 1, 46–47, 78 (1976).

Section 30125(d) bans some donations to Internal Revenue Code Section 501(c) and 527 organizations. 52 U.S.C. § 30125(d). Except as the law forbids, Section 501(c) and 527 organizations may contribute directly and indirectly to candidates and political parties. *E.g.*, 52 U.S.C. § 30118(a) (2012) (banning corporate and union contributions to federal political committees).

Section 30125(e) addresses how federal candidates, federal officeholders, their agents, and organizations they establish, finance, maintain or control, and raise money. 52 U.S.C. § 30125(e). In particular, 52 U.S.C. § 30125(e)(4)(B) refers to money they raise for activity in 52 U.S.C. § 30101(20)(A)(i) and 30101(20)(A)(ii). Such solicitations can be for speech other than independent spending for political speech. 52 U.S.C. § 30125(e).

Section 30125(f) addresses particular speech by state and local candidates. *Id.* § 30125(f).

134 *See, e.g.*, *WRTL-I*, 546 U.S. at 411–12 (holding that "[i]n upholding § 203 against a facial challenge, we did not purport to resolve future as-applied challenges").

expenditures, for the then-candidate for justice.[135] The judicial-recusal standard does not inquire after corruption or its appearance as in *Citizens United*.[136] Instead, the threshold is lower.[137] As Justice Anthony Kennedy, *Caperton*'s author, explains in *Citizens United, Caperton* is different from *Citizens United*.[138]

Nor do appellate opinions such a *Cao v. FEC* support limiting contributions for independent spending—*Cao* is about "in-kind and direct contributions" by parties to candidates, not contributions for independent spending.[139]

I. Conclusion on Contributions for Independent Spending

Advocates of limiting contributions for independent spending can assign any label they please—such as "crabbed view of corruption"—to *post-Citizens United* law, but that does not change the law.[140] These labels are not legal argument, nor are they helpful.[141] Contributions for independent spending for political speech do not cause *quid pro quo* corruption or its appearance, so government may not limit such contributions from persons other than foreign nationals.

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135 Caperton v. A.T. Massey Coal Co., Inc., 556 U.S. 868, 872–73 (2009).

136 Citizens United v. FEC, 558 U.S. 310, 356–61 (2010).

137 *See Caperton,* 556 U.S. at 881 (noting that "[t]he Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias'").

138 *Citizens United,* 558 U.S. at 360. *Citizens United* states:

> *Caperton* held that a judge was required to recuse himself "when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent." The remedy of recusal was based on a litigant's due[-]process right to a fair trial before an unbiased judge. *Caperton*'s holding was limited to the rule that the judge must be recused, not that the litigant's political speech could be banned.

Id. (citations omitted).

139 In re Cao, 619 F.3d 410, 421 (5th Cir. 2010) (*en banc*), *cert. denied,* 131 S. Ct. 1718 (2011).

140 *See* McConnell v. FEC, 540 U.S. 93, 152 (2003) (quoted in *Citizens United,* 558 U.S. at 447 (Stevens, J., dissenting)). *Cf. Citizens United,* 558 U.S. at 447 (Stevens, J., dissenting) (lamenting *Citizens United* while quoting the same text from *McConnell*); Emily's List v. FEC, 581 F.3d 1, 40 (D.C. Cir. 2009) (Brown, J., concurring) (lamenting *McConnell pre-Citizens United*).

141 *See* Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equality by any Means Necessary (BAMN), 134 S. Ct. 1623, 1639 (2014) (Roberts, C.J., concurring) (stating that "[p]eople can disagree in good faith on this issue, but it similarly does more harm than good to question the openness and candor of those on either side of the debate").

III. LIMITS ON DIRECT CONTRIBUTIONS TO CANDIDATES

A. McCutcheon*'s Impact on Contribution Limit Review*

On April 2, 2014, in a five-to-four decision, the United States Supreme Court struck down federal aggregate contribution limits to candidates or committees.[142] These limits supplemented base contribution limits on how much could be given to each candidate or committee.[143] So although plaintiff Shaun McCutcheon desired to contribute the maximum legal amount to numerous federal candidates and non-candidate political committees, he was restricted by overarching aggregate limits.[144] A plurality of the Court found that those aggregate limits served neither a corruption nor an anti-circumvention interest.[145] And even if the anti-circumvention interest were served, the Court found that the limits were mismatched to that interest, particularly because more reasonable alternatives exist.[146]

While directed towards aggregate contribution limits, the *McCutcheon* decision redefines and clarifies the legal principles governing contribution limit challenges in several key ways. First, the decision makes clear that contributions are not simply an associational right but political expression in their own right:

> [T]he First Amendment safeguards an individual's right to participate in the public debate through political expression and political association. . . . When an individual contributes money to a candidate, he exercises both of those rights: [t]he contribution "serves as a general expression of support for the candidate and his views" and "serves to affiliate a person with a candidate."[147]

Second, the decision expressly identified which state interests are cognizable and which are not. The government cannot adopt

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142 McCutcheon v. FEC, 134 S. Ct. 1434, 1440, 1462, 1465 (2014).

143 *Id.* at 1442.

144 *Id.* at 1443.

145 Justice Thomas concurred in the judgment, reasoning that *Buckley v. Valeo*'s distinction between independent expenditures and contributions were "two sides of the same First Amendment coin," and so *Buckley*'s less rigorous scrutiny for contribution limits—which the plurality used in reaching its result—ought to be overturned. *Id.* at 1464 (quoting Buckley v. Valeo, 424 U.S. 1, 241 (1976), Burger, C.J., concurring in part and dissenting in part); *Id.* at 1454–56.

146 *McCutcheon*, 134 S. Ct. at 1456–59.

147 *Id.* at 1448 (citations omitted).

contribution limits as a means of "reduc[ing] the amount of money in politics," of "restrict[ing] the political participation of some in order to enhance the relative influence of others," or of preventing "general gratitude a candidate may feel toward those who support him or his allies, or the political access such support may afford."[148] It cannot attempt to "level the playing field," "level electoral opportunities," or "equaliz[e] the financial resources of candidates."[149] Nor may the government "seek to limit *the appearance* of mere influence or access."[150] Not only are efforts to "'restrict the speech of some elements of our society to enhance the relative voices of others . . . wholly foreign to the First Amendment[,]'" these objectives "impermissibly inject the Government 'into the debate over who should govern' . . . the *last* people [who should] help decide who *should* govern."[151] Such limits only penalize "an individual for 'robustly exercising' his First Amendment rights."[152]

The only cognizable justification for contribution limits is preventing *quid pro quo* corruption, with *quid pro quo* corruption now meaning only "a direct exchange of an official act for money," or "dollars for political favors," "an act akin to bribery."[153] The government "may permissibly seek to rein in 'large contributions [that] are given to secure a political *quid pro quo* from current and potential office holders.'"[154] And it may "limit 'the appearance of corruption'"—that is, "'public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions' to particular candidates."[155] The plurality cautioned, however, that "[s]pending large sums of money in connection with elections, but not in connection with an effort to control the exercise of an officeholder's official duties, does not give rise to such *quid pro quo* corruption."[156] Nor do large sums spent to garner influence or access to elected officials or political parties.[157] "[T]he risk of corruption arises when an individual makes large contributions to the candidate or officeholder himself."[158]

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148 *Id.* at 1441.
149 *Id.* at 1450.
150 *Id.* at 1451 (emphasis added) (citing Citizens United v. FEC, 558 U.S. 310, 359 (2010)).
151 *Id.* at 1450 (quoting Buckley v. Valeo, 424 U.S. 1, 48–49 (1976)); *McCutcheon*, 134 S. Ct. at 1441–42 (citing Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2826 (2011)).
152 *McCutcheon*, 134 S. Ct. at 1449.
153 *Id.* at 1441; *id.* at 1466 (Breyer, J., dissenting).
154 *Id.* at 1450 (quoting *Buckley*, 424 U.S. at 26).
155 *Id.* (quoting *Buckley*, 424 U.S. at 27).
156 *McCutcheon*, 134 S. Ct. at 1450.
157 *Id.* at 1451.
158 *Id.* at 1460.

The government may also justify contribution limits "by demonstrating that they prevent circumvention" of laws designed to prevent *quid pro quo* corruption.[159] Contribution limits targeting *quid pro quo* corruption through circumvention must still, however, guard "against an individual's funneling [of] 'massive amounts of money to *a particular candidate*.'"[160]

Third, the decision allocates the burden of proof in reviewing contribution limits: "[w]hen the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions."[161] This burden applies both to proof of a cognizable interest, as well to prove the limits are closely drawn.[162] And whether it offers proof of *quid pro quo* corruption, proof of circumvention, or proof the limits are closely drawn, the government's evidence cannot be speculative, "mere conjecture," "highly implausible," irrational, premised on illegal conduct, largely inapplicable, or "divorced from reality."[163]

Fourth, the decision discards the argument that contributions from organizations corrupt more than those from individuals: "there is not the same risk of *quid pro quo* corruption or its appearance when money flows through independent actors to a candidate, as when a donor contributes to a candidate directly."[164] An individual cedes control over his contribution when he gives to an independent actor, and "if the funds are subsequently rerouted to a particular candidate, such actions occur[] at the initial recipient's discretion—not the donor's."[165] This creates an ever-growing chain of attribution, with credit "shared among the various actors along the way."[166] Such contributions are thus diluted by all the other contributions from others to the same independent actors.[167]

Last, the decision shows the analysis required under the "closely drawn test" to assess whether contribution limits were adequately

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159 *Id.* at 1439.

160 *Id.* at 1460 (quoting *Buckley*, 424 U.S. at 38); *see supra* text accompanying note 32 (discussing anti-circumvention as a state interest).

161 *McCutcheon,* 134 S. Ct. at 1452 (quoting United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 816 (2000)).

162 *See id.* at 1452–53 (reasoning that Congress's selection of a $5200 base limit suggests that a contribution of that amount or less would not create a cognizable risk of corruption).

163 *Id.* at 1452–56 (explaining that in the *Buckley* decision, the fear of an individual contributing substantial amounts of money to one candidate was far too speculative).

164 *Id.* at 1452.

165 *Id.*

166 *Id.*

167 *See McCutcheon*, 134 S. Ct. at 1452 (explaining that any credit has to be shared with all of the various actors along the line, which consequently makes the chain of attribution much longer).

tailored.[168] The Court evaluated whether "a substantial mismatch [existed] between the Government's stated objective and the means selected to achieve it," whether there was a "reasonable fit" to serve that objective.[169] This reasonable fit, while "not necessarily the least restrictive means," must still be "a means narrowly tailored to achieve the desired objective."[170] The availability of better, more reasonable alternatives belie a "closely drawn" claim.[171] The closely drawn test is applied especially rigorously where a limit is part of "prophylaxis-upon-prophylaxis" regulation, that is, layers of regulation ostensibly designed to address the same anti-corruption interest.[172]

B. McCutcheon*'s Effect on Candidate Contribution Limits Analysis*

Because of *McCutcheon*, key circuit court decisions that previously upheld limits on direct contributions to candidates are no longer legally sound. In the Ninth Circuit's *Montana Right to Life v. Eddleman*, issued in 2003, the court upheld both base contribution limits on individuals and PACs as well as aggregate limits on PACs.[173] Its rationale for doing so conflicts with *McCutcheon*.

Significantly, the *Eddleman* decision focuses on the state's interest in "preventing undue influence."[174] Relying on *Nixon v. Shrink Missouri Gov't PAC*, *Eddleman* contends that a state's interest in preventing corruption or the appearance of corruption is not confined to instances of bribery of public officials, but extends "to the broader threat from politicians too compliant with the wishes of large contributors."[175] The court in *Eddleman* considered as evidence of this threat the testimony of a Montana legislator that "special interests funnel more money into campaigns when particular issues approach a vote 'because it gets results'," citing a letter from a state senator to his colleagues urging a

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168 *Id*. at 1446.

169 *See id.* at 1456 (stating that the Court requires a fit that is reasonable when not applying strict scrutiny).

170 *Id.* at 1456–57 (quoting Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989)) (internal quotation marks omitted).

171 *See id*. at 1458 (discussing the many alternatives Congress can use to adhere to the government's anticircumvention interest) (citation omitted).

172 *See id.* (analyzing the closely drawn test).

173 Montana Right to Life v. Eddleman, 343 F.3d 1085, 1098 (9th Cir. 2003) (affirming the district court's holding that Montana's base and aggregate contribution limits are constitutional and do not violate the First Amendment).

174 *Id.* at 1096, 1099 (Teilborg, J., dissenting) ("the State has chosen to enact an aggregate PAC contribution limit to prevent a candidate from being overly influenced by special interests generally").

175 Nixon v. Shrink Missouri Gov't PAC, 528 U.S. 377, 389 (2000); *Eddleman*, 343 F.3d at 1092 (quoting *Shrink Missouri PAC,* 528 U.S. at 389) (internal quotation marks omitted).

favorable vote on a bill because it would ensure that a higher proportion of PAC money would flow to the Republican party, and citing a poll showing that "69% of Montanans [suspect] that elected officials give special treatment to individuals and businesses that make large contributions"—evidence that shows not bribery but influence and access.[176]

Under *McCutcheon*, these concerns do not rise to the level of a cognizable state interest.[177] Corruption is a cognizable interest only when defined as *quid pro quo* corruption, that is, "a direct exchange of an official act for money," "dollars for political favors," or "akin to bribery."[178] So the *Eddleman*'s state interest analysis—and the *Shrink*'s analysis on which it relies—are no longer valid.[179]

Additionally, as to PAC contribution limits both base and aggregate, the *Eddleman* court held that undue influence is bolstered by the fact that the "danger of corruption in the political system is greater with respect to PAC contributions than it is for individuals."[180] *McCutcheon* rejects this contention, observing that "there is not the same risk of *quid pro quo* corruption or its appearance when money flows through independent actors to a candidate, as when a donor contributes to a candidate directly."[181] Because PACs, like political parties, are independent from individual donors, there is *less* danger of corruption from individuals through PAC contributions.

After establishing an "undue influence" interest, the *Eddleman* court determined that the focus of base contribution limits' tailoring analysis is "as much on those aspects of associational freedom unaffected by the law as the limitations that are imposed," justifying this approach with the *Shrink* presumption that "the dollar amounts employed to prevent corruption should be upheld unless they are 'so radical in effect as to

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176 *Eddleman*, 343 F.3d at 1093 (describing an incident in 1981 where a Republican state senator sent a letter persuading his colleagues to vote to pass a bill allowing variable annual annuities to secure a substantial portion of PAC contributions for the Republican party).

177 *See McCutcheon,* 134 S. Ct. at 1451 (quoting Citizens United v. FEC, 558 U.S. 310, 360 (2010)) (explaining that "the appearance of corruption is equally confined to the appearance of *quid pro quo* corruption" and that "the Government may not seek to limit the appearance of mere influence or access").

178 *Id.* at 1441; *id*. at 1466 (Breyer, J., dissenting) (citations omitted).

179 Indeed, concerns about a politician being "too compliant" to large contributors speaks to undue influence concerns, not *quid pro quo* corruption concerns. *Id*. at 1469 (Breyer, J., dissenting); *see also Eddleman,* 343 F.3d at 1099 (Teilborg, J., dissenting) ("having a limit on the amount an individual PAC may contribute to a candidate sufficiently prevents . . . 'unfair influence' over a candidate").

180 *Eddleman,* 343 F.3d at 1097 (citation omitted).

181 *McCutcheon*, 134 S. Ct. at 1452.

render political association ineffective, drive the sound of a candidate's voice beyond the level of notice, and render contributions pointless.'"[182] So the *Eddleman* analysis offset burdens on association with opportunities that remained unaffected, finding that the PAC aggregate limits before it "in no way prevents PACs from affiliating with their chosen candidates in ways other than direct contributions. . . ."[183]

This analysis fails under *McCutcheon* for two reasons. First, it focuses tailoring solely on the associational aspect that the contribution limits affect.[184] But as *McCutcheon* states, when an individual contributes money to a candidate, he exercises both an expressive as well as an associational right.[185] And second, while theoretically, supporters can associate and express themselves in numerous ways other than contributing, as a practical matter, many supporters, whether individuals or groups, do not have available to them a panoply of alternative, effective means to support all of their preferred candidates or causes.[186] *Eddleman* considered no evidence that such alternatives were plausible and practical.

Indeed, *Eddleman* fails to even consider, much less assess, less restrictive alternatives for fulfilling the state's interests in averting actual or apparent corruption, such as disclosure.[187] As *McCutcheon* unequivocally establishes, the government must show that the contribution limits are the more reasonable fit.[188] *Eddleman* considered no such evidence.

Finally, *Eddleman*'s tailoring analysis nowhere considers the prophylaxis-upon-prophylaxis aspect of Montana's contribution limit scheme.[189] *McCutcheon* expresses concern about layering aggregate contribution limits on top of base limits and mandates use of a particularly rigorous closely drawn test in such a context: a "'prophylaxis-upon-prophylaxis approach' requires . . . particular[]

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182 *Eddleman*, 343 F.3d at 1094 (quoting Nixon v. Shrink Missouri Gov't PAC, 528 U.S. 377, 397 (2000)) (internal quotation marks omitted).

183 *Id.*

184 *Id.*

185 *See McCutcheon,* 134 S. Ct. at 1448 (explaining that a donor has expressive and associational rights that are denied by the base limits).

186 *See id.* at 1449 (describing how the numerous other ways of contributing to a political party is unrealistic).

187 *See id.* at 1460 ("disclosure often represents a less restrictive alternative . . . [and] offers much more robust protections against corruption").

188 *See id.* at 1456 ("[e]ven when the Court is not applying strict scrutiny, we still require a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served . . . " (internal quotation marks omitted)).

189 *Eddleman*, 343 F.3d at 1094.

diligen[ce] in scrutinizing the law's fit."[190] But *Eddleman* does not analyze the fit of the PAC aggregate limits before it as *McCutcheon* requires.[191] *McCutcheon* calls *Eddleman* into serious doubt.

The same can be said of the 2011 Second Circuit decision *Ognibene v. Parkes*.[192] It too considered contribution limits: one that is a direct, "doing business" limit, and two that are bans—a matching fund ban and a business entity ban. New York City's regulations:

> [R]estrict[] contributions from [] individuals and entities who have business dealings with the City . . . [and] lower[] these donors' contribution limits approximately twelve-fold, to $400 (from the generally-applicable level of $[4950]) for three City-wide offices; to $320 (from $[3850]) for Borough offices; and to $250 (from $[2750]) for City Council. The law also makes these contributions ineligible for public matching, and extends the ban on corporate contributions to LLCs, LLPs, and partnerships.[193]

As in *Eddleman,* the rationale and outcome of *Ognibene* would be much different under *McCutcheon*.

First, as in *Eddleman*, the state interest is invalid. The Second Circuit held that while "mere influence or access to elected officials is insufficient . . . *improper* or *undue* influence presumably still qualifies as a form of corruption."[194] Such "[i]mproper or undue influences includes both traditional *quid pro quo* and more discreet exchanges of money for favorable outcomes."[195] Additionally, the Second Circuit reasoned that:

> [B]ecause the scope of *quid pro quo* corruption can never be reliably ascertained, the legislature may regulate certain indicators of such corruption or its appearance, such as when donors make large contributions because they have business with the City, hope to do business

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190 *McCutcheon*, 134 S. Ct. at 1458.

191 *See id.* (stating that the Court "cannot conclude that the sweeping aggregate limits are appropriately tailored to guard against any contributions that might implicate the [g]overnment's anticircumvention interest").

192 Ognibene v. Parkes, 671 F.3d 174, 185, 193–94 (2d Cir. 2012).

193 *Id.* at 179–80 (citing N.Y.C. ADMIN. CODE §§ 3–703(1)(l); 3–703(1-a); 3–719(2)(b)).

194 *Id.* at 186.

195 *Id.* at 187.

> with the City, or are expending money on behalf of others who do business with the City.[196]

Whether the initial limits have been successful and make the lower limits unnecessary, said the Second Circuit, "is a matter of policy better suited for the legislature."[197] So it held that all three limits—the doing business contribution limits, the matching fund ban, and the business entity ban—served this interest.[198]

Under *McCutcheon,* averting or curbing influence—undue or otherwise—is not a recognized interest.[199] Nor is "regulat[ing] certain indicators of [] corruption or its appearance" because "the scope of *quid pro quo* corruption can never be reliably ascertained."[200] Moreover, *McCutcheon* states that though '[t]he line between *quid pro quo* corruption and general influence may seem vague at times, . . . the distinction must be respected to safeguard basic First Amendment rights," with the line "err[ing] on the side of protecting political speech rather than suppressing it."[201] Not only did the Second Circuit accept what *McCutcheon* has since invalidated as a state interest, it extended the government too much deference, erring on the side of unproved corruption than on that of protected speech.[202]

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196 *Id.*

197 *Id.* at 189.

198 The evidence on which the court relied suggests that the real objective of the "doing business" contribution limits and the matching fund ban was to level the playing field by offsetting perceived access with lower contribution receipts. In a report on which the district court relied, the City Council states:

> While there is nothing intrinsically wrong with contributions from those doing business with the City, the ability of such individuals to contribute could create a perception, regardless of whether such perception is accurate, that such individuals have a higher level of access to the City's elected officials. It is important to eradicate this perception and reduce the appearance of undue influence associated with contributions from individuals doing business with the City.

Ognibene v. Parkes, 599 F. Supp. 2d 434, 441 (S.D.N.Y. 2009). *But see* McCutcheon v. FEC, 134 S. Ct. 1434, 1450–51 (2014) (stating that such interests are improper).

199 *See McCutcheon*, 134 S. Ct. at 1450–51 (stating that averting or curbing influence is not a recognized interest).

200 *Ognibene,* 671 F.3d at 187.

201 *McCutcheon,* 134 S. Ct. at 1451 (quoting FEC v. Wisconsin Right to Life, 551 U.S. 449, 457 (2007)).

202 *See McCutcheon,* 134 S. Ct. at 1451–52 ("The line between *quid pro quo* corruption and general influence may seem vague at times, but the distinction must be respected in order to safeguard basic First Amendment rights"); *see also* Citizens United v. FEC, 558 U.S. 310, 361 (2010) ("When Congress finds that a problem exists, we must give that finding due deference; but Congress may not choose an unconstitutional remedy . . .").

The Second Circuit's tailoring analysis is also inadequate under *McCutcheon*. All three contribution regulations are what *McCutcheon* refers to as "prophylaxis-on-prophylaxis" regulations.[203] Base limits already exist establishing a contribution baseline at which the City has presumably determined that its officials are not corrupted. So to justify the lower limits and bans for business-dealing donors and business entities, their "fit" is subject to especially rigorous review, something the Second Circuit failed to do.[204]

Under such review, the "doing business" limits would fail because the City's evidence nowhere demonstrated that while a $4951 contribution in a city-wide campaign can bribe or appear to bribe a candidate, anything larger than $400 from a business-dealing donor results in bribery or would appear to be a bribe. The matching fund ban would fail because the City nowhere demonstrated that matching funds triggered by a contribution from someone doing business with the City will corrupt a candidate any more than funds triggered at the same rate by any other contributor. And the business-entity ban would fail because the City offered no evidence demonstrating that even $1 of corporate contributions would corrupt while contributions as high as $4950 from the corporate owners' spouses, domestic partners, employees, and children would not. This is the type of evidence required under *McCutcheon*. Lacking such evidence, the limits fail.

Additionally, the Second Circuit acknowledged that more narrow regulations—bribery laws, earmarking bans, and disclosure—are more narrow options.[205] While the government does not need to choose the least restrictive means of regulating contribution limits, it must show that other alternatives are a less reasonable fit so as to avoid unnecessarily burdening protected speech.[206] The Court did not assess why these were not more reasonable options as *McCutcheon* requires.[207]

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203 *McCutcheon*, 134 S. Ct. at 1458.

204 *See Ognibene*, 671 F.3d at 187 (deferring to the City on the proper way to regulate *quid pro quo* corruption given its nebulous scope). Indeed, this reasonable fit analysis underscores that the limits serve an interest in leveling the playing field and equalizing voices. *Id*. at 200. The only credible reason a business donor's contribution might have more impact dollar-for-dollar than another, non-business dealing donor, is that she may already have access to, and a relationship with, public officials—things beyond the contribution itself—that can influence a public official. *Id*. at 187. Attempts to equalize influence by offsetting access with contribution limits are expressly disapproved of in *McCutcheon*. 134 S. Ct. at 1450–51.

205 *See Ognibene*, 671 F.3d at 196 (explaining that it was for lack of these types of regulations that the Second Circuit upheld the ban).

206 *McCutcheon*, 134 S. Ct. at 1456–57.

207 Such regulations would afford a better, more reasonable fit. Since the only recognized interest for regulating contribution limits is *quid pro quo* corruption, imposing uniform

The existence of more reasonably fitting regulations is especially obvious for the matching fund ban and the business entity ban, which extends to spouses, domestic partners, employees, and children. The City allows these individuals to contribute at the higher base amount. If the City were genuinely concerned about circumvention, the most immediate potential avenue of circumventing would be through family and employee contributions. Yet the City leaves the base limits alone for both family and employees, instead banning matching funds and business entity contributions. The City's failure to address the most obvious source of potential circumvention suggests the bans are not a reasonable fit, and indeed, that anti-circumvention interests are not the true impetus for them. As with *Eddleman*, *McCutcheon* calls *Ognibene* into serious doubt.

IV. CONCLUSION

McCutcheon not only substantially changes, but makes more rigorous the analysis used in challenges to regulations of contributions for independent spending and of direct contributions to candidates. Both types of contribution limits are likely unconstitutional under its framework.

limits with disclosure requirements and a bribery prohibition with strict penalties for incumbents would more reasonably address *quid pro quo* corruption without unduly restricting protected expression and association.