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CLOSING THE "POLITICAL ACTION COMMITTEE LOOPHOLE": THE CONSTITUTIONALITY OF PROHIBITIONS ON PAC TO PAC DONATIONS

Michael C. Peretz*

The 2020 election cycle is now officially in full-swing. Over the next year, President Donald J. Trump and the various Democratic candidates seeking their party's nomination for President will crisscross the country to gain voter support in the form of votes and campaign contributions. Meanwhile, Congressional and Senatorial candidates will increasingly spend more time in their districts and states to meet with voters and raise funds to fend off serious challengers. If recent history repeats itself, these candidates will collectively raise billions of dollars for their campaigns.[1] While the media will undoubtedly report on the amount of dollars raised by many of these candidates—an important measure to determine the viability of any campaign for federal office—these reports will *not* accurately reflect the true strength of these organizations unless they also account for

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[1] Madi Alexander, *PACs Made Up Nearly Half of 2016 Election Spending*, BLOOMBERG LAW, Apr. 18, 2017, https://www.bna.com/pacs-made-nearly-n57982086803/.

expenditures made by Political Action Committees[2] ("PACs") in support of each of these candidates.

During the two most recent election cycles,[3] PACs received and spent a record amount of campaign contributions.[4] For instance, during the 2016 general election cycle, expenditures made by PACs[5] "made up a forty-six percent share of all dollars spent on federal campaigns during the 2016 election cycle," whereas spending made by presidential and congressional candidates constituted a lesser thirty-six percent share combined.[6] This phenomenon illustrates a seismic shift in American politics.[7] The power and influence of the traditional campaign apparatus, one that is permitted to raise and spend money solely for the

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[2] Although this Note will use the term "PAC" or "political action committee," neither formally exists under federal law. The federal government formally recognizes and regulates "political committee[s]," which is defined as any committee, club, association or other group of persons that receives contributions in excess of $1000 or makes expenditures in excess of $1000 in a calendar year to influence elections for federal office. 52 U.S.C. § 30101(4)(A) (2018).

[3] The "two most recent election cycles" refers to the 2018 midterm election and the 2016 presidential election.

[4] *See* Alexander, *supra* note 2.

[5] Bloomberg's analysis of campaign contributions categorized all PACs the same, including super PACs permitted to take in unlimited donations. *See id.*

[6] Alexander, *supra* note 2.

[7] The 2016 general election was the second consecutive general election in which the expenditures of Political Action Committees accounted for the largest share of spending, when compared to the campaign spending of "Presidential Candidates," "Congressional Candidates," and "Party Committees." *Id.* However, the 2016 election was the first on record in which PACs raised and spent more than "Presidential Candidates" and "Congressional Candidates" combined. *Id.*

benefit of a specific candidate, has waned when compared to PACs that are lawfully raising and spending money to influence the outcome of multiple elections at once.[8]

This is not necessarily an alarming phenomenon. PACs serve a unique and often beneficial role in American democracy—they provide citizens who feel strongly about a particular political issue or platform the opportunity to donate to organizations that will spend their donations towards get-out-the-vote efforts; voter registration drives; and even candidates who, if victorious, will govern in accordance with the committees' values. In essence, PACs can serve as a vehicle to amplify the voices of citizens.

For example, the Tea Party Patriots PAC, with donations from the general public, amplifies the voices of private citizens who advocate for limited government and fiscal responsibility.[9] Similarly, the Vote Climate U.S. PAC speaks on behalf of citizens who are concerned about the state of the environment and want to elect candidates who will vote for legislation to regulate carbon emissions.[10] Both of these organizations, among thousands of

[8] *See* 52 U.S.C. § 30101(4)(A) (2018).
[9] TEA PARTY PATRIOTS PAC, https://www.teapartypatriots.org/ourvision/ (last visited Apr. 6, 2019).
[10] VOTE CLIMATE U.S. PAC, https://voteclimatepac.org/vote-climate-mission-and-approach/ (last visited Apr. 6, 2019).

others, make it easier for citizens to exercise their constitutional rights to engage in civic discourse.[11]

For all the benefits that PACs provide Americans, there still exists one tremendous problem that calls into question existing state and federal campaign finance laws: under the current legislative schemes enacted by Congress and most state legislatures, PACs are permitted to donate funds to other PACs.[12] This may sound well and good, for it is certainly possible that PACs wish to share funds with other likeminded committees to jumpstart certain initiatives. However, legislative schemes that permit PAC to PAC donations but restrict how much a citizen may donate to a candidate campaign create what this Note calls the "Political Action Committee Loophole." This loophole, albeit difficult to exploit, allows sophisticated citizens to conceivably use PACs as a vehicle to circumvent campaign finance laws that prohibit how much a citizen may donate to any single campaign on an annual basis. This loophole will be discussed in greater detail in Part III of this Note. In brief, under a statutory scheme where PAC to PAC donations are legal, but citizens may not donate

[11] The right to engage in civic discourse is encapsulated by the rights to free speech, assembly, and association. *See* U.S. CONST. amend. I.

[12] BALLOTPEDIA, https://ballotpedia.org/PACs_and_Super_PACs (last visited Jan. 6, 2020); *see also* OPENSECRETS, https://www.opensecrets.org/pacs/pacfaq.php (last visited Jan. 6, 2020).

more than a specified amount to a PAC or campaign, a wealthy donor could conceivably funnel his or her donations through multiple PACs for the sole benefit of one PAC, one candidate's campaign apparatus, or both.[13] This would allow the sophisticated donor to not only exceed statutory contribution limits for a donation to a PAC or campaign in a given election cycle, but to also shield his or her contribution(s) from the public.

Recognizing that existing loopholes may allow certain donors and PACs to assert undue influence in federal elections, multiple state legislatures have appropriately responded by prohibiting PACs from making certain expenditures to other PACs. For example, both the Alabama and Missouri legislatures enacted prohibitions on PAC to PAC donations, ridding most PACs of the ability to donate monies they have on hand to other likeminded PACs.[14]

[13] A hypothetical example of this practice is presented in Part III of this Note.

[14] Missouri's prohibition took form of a constitutional amendment. MO. CONST. art. 8, § 23. Although the amendment was formally approved by the voters of the state, it was initially introduced in the legislature as "Amendment 2." Jason Rosenbaum, *Amendment 2 Could Bring Campaign Donation Limits Back to Missouri*, ST. LOUIS PUBLIC RADIO (Oct. 14, 2016), https://news.stlpublicradio.org/post/amendment-2-could-bring-campaign-donation-limits-back-missouri#stream/0. On the other hand, Alabama placed a probation on PAC-to-PAC donations by means of a statute. ALA. CODE § 17–5–15(b) (2018).

The motivation behind these two legislative actions was reasonable: (1) to prevent sophisticated donors from being able to influence elections by circumventing proper protocols involving contribution limits and disclosure and (2) to prevent PACs from coordinating with candidate campaigns and party committees. Both Alabama and Missouri's legislative actions were challenged in federal court by PACs on the basis that they violated the First Amendment rights to freedom of speech and association.[15] The ensuing litigation resulted in a circuit split between the Eight and Eleventh Circuits on the same question: are prohibitions on PAC to PAC donations constitutional under the First Amendment?[16]

This Note seeks to explore how the recent circuit split between the Eighth and Eleventh Circuits fits into the existing framework of First Amendment jurisprudence and to subsequently weigh the constitutionality of prohibitions on PAC to PAC donations. The implications of this circuit split can only be fully understood with an understanding of the relationship between the First Amendment rights to freedom of speech and association,

[15] Ala. Democratic Conference v. Att'y Gen. of Ala., 838 F.3d 1057, 1060 (11th Cir. 2016); Free & Fair Elections Fund v. Mo. Ethics Comm'n, 903 F.3d 759, 762 (8th Cir. 2018).

[16] Alabama's statute survived its constitutional challenge, *Ala. Democratic Conf.*, 838 F.3d 1057, 1058, whereas Missouri's constitutional amendment did not, *Free & Fair Elections Fund*, 903 F.3d 759, 762.

America's campaign finance laws, and the United States Supreme Court's foundational case law interpreting them.[17]

The analysis will proceed in five parts. Part I provides a background on the First Amendment's protection for the freedom of speech and right to associate and explains how these constitutional rights are implicated by campaign finance law. Part II introduces the two central tenets of campaign finance law and surveys the foundational case law on campaign finance to provide a legal backdrop under which to properly analyze the two recent cases at issue: *Alabama Democratic Conference. v. Attorney General of Alabama*[18] and *Free & Fair Elections Fund v. Missouri Ethics Commission.*[19] Part III further argues this Note's position: placing prohibitions on PAC to PAC donations is a reasonable policy but, in light of recent Supreme Court precedent, likely does not serve a legitimate state interest as a matter of law. Part IV analyzes the two circuit courts' decisions in question within the appropriate legal framework. Part V examines, and criticizes, how the current campaign finance case law restricts a state's ability to be proactive when trying to stop corruption before it happens and will discuss

[17] *See* U.S. CONST. amend. I.
[18] 838 F.3d 1057 (11th Cir. 2016).
[19] 903 F.3d 759 (8th Cir. 2018).

the implications of this circuit split on the upcoming 2020 general election.

I. THE FIRST AMENDMENT AND CAMPAIGN FINANCE LAW

The First Amendment to the Constitution[20] is a "cluster of distinct but related rights[.]"[21] Particularly relevant to this discussion involving campaign finance laws is the First Amendment rights of free speech and peaceful assembly, and the implicit right of association. These rights are implicated whenever the government enacts regulations limiting the extent to which any citizen may express themselves politically or limiting any citizen's ability to associate with a certain political group.[22]

A. The Right to Free Speech and the Protection of Political Expression

The "[d]iscussion of public issues and debate on the qualifications of candidates" are firmly within the purview of First Amendment protection.[23] In light of the Framers' motivations for drafting the First Amendment, expressions of political speech are considered to be "integral to the operation of the system of government established by our Constitution."[24] It follows that

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[20] U.S. CONST. amend. I.
[21] David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 484 (1983).
[22] *See* Buckley v. Valeo, 424 U.S. 1, 13–17 (1976).
[23] *Id.* at 14.
[24] *Id.*

"[t]he First Amendment affords the broadest protection to such political expression in order to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[25]

There exists "practically universal agreement that a major purpose of [the First Amendment] was to protect the free discussion of governmental affairs," which includes the "discussions of candidates."[26] The U.S. Supreme Court in *Monitor Patriot Co. v. Roy*[27] even went so far as to declare "the constitutional guarantee [of free speech] has its fullest and most urgent application precisely to the conduct of campaigns for political office," conveying that political expression is considered fundamentally important within the context of the right to free speech.[28] This powerful assertion directly implicates the rights of PACs advancing the interests of their donors in the public forum by independently buttressing the campaigns of certain candidates or advocating for certain issues.

B. The Right to Peacefully Assemble and the Right to Freely Associate

[25] *Id.* (citing Roth v. United States, 354 U.S. 476, 484 (1957)).
[26] *Id.* (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966)).
[27] 401 U.S. 265 (1971).
[28] *Id.* at 272.

With the exception of speech, the right of citizens to freely assemble[29] is the "most widely and commonly practiced action that is enumerated in the Bill of Rights."[30] To understand how campaign finance laws implicate the freedom of association, it is first important to discuss the origin of the specifically enumerated First Amendment protection for peaceful assembly, as these rights are intrinsically related.

The Assembly Clause was inspired[31] by the impact colonial taverns and "tavern talk"[32] had on the revolution[33] against the British Crown.[34] These taverns played a vital role as hubs of colonial assembling. Baylen Linnekin explains that these taverns were the "most common and important situs for building a consensus for American opposition to the British:"[35]

> Taverns were the only colonial space outside the home that permitted participants in all social classes the opportunity

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[29] U.S. CONST. amend. I. ("Congress shall make no law respecting . . . the right of the people peaceably to assemble . . . .").

[30] Baylen J. Linnekin, *"Tavern Talk" and the Origins of the Assembly Clause: Tracing the First Amendment's Assembly Clause Back to Its Roots in Colonial Taverns*, 39 HASTINGS CONST. L.Q. 593, 593 (2012).

[31] It is important to understand the Framers' reasons for protecting the right to peacefully assemble in the First Amendment, as it provides a logical framework to better understand how the right to peacefully assemble and the right to freely associate are related.

[32] Linnekin, *supra* note 31 at 595.

[33] *Id.* at 598 ("As the years passed, informal discussions continued alongside more formal meetings as colonists began to explore the machinations of revolution.").

[34] *Id.* ("In the British view, the homeland was merely asking prospering colonists to repay their protectors.").

[35] *Id.* at 599.

> to decide whether, how, and to what extent they would participate and shape their interactions with others. It was in these informal community cells that colonists found the most egalitarian context for gatherings. . . . Taverns fostered a deep sense of community and offered the perfect milieu for political debate. In this way, taverns served as political spaces where citizens could participate in civic life.[36]

For instance, some of the most influential Founding Fathers, including George Washington, Patrick Henry, and Thomas Jefferson, chose to assemble at taverns as they plotted against the British.[37] It is unsurprising, then, that American assertions of a right to peacefully assemble were not just included in the Bill of Rights but also in several State constitutions before the U.S. Constitution was ratified in 1787.[38]

Although the First Amendment explicitly protects the right to peacefully assemble with fellow citizens, it does not include any direct language that protects the rights of Americans to freely associate with whichever group(s) or political party they may choose to join. Even though both these rights are inherently related—they both permit citizens to join together with likeminded individuals to effect change—the constitutional right of

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[36] *Id.* at 603-04 (internal citations and quotations omitted).

[37] *Id.* at 605 (stating that Founding Fathers planned successful boycotts after assembling at colonial taverns).

[38] *See* United States v. Cruikshank, 92 U.S. 542, 551 (1876) ("The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States.").

association[39] was not formally recognized until 1958.[40] The U.S. Supreme Court formally recognized the right of association after acknowledging that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association,"[41] thereby making it an essential aspect of First Amendment protections.

Most relevant to this Note's discussion of campaign finance, however, are the Court's subsequent decisions that determined that the right of association goes so far as to protect the ability "to associate with others for the common advancement of political beliefs and ideas," which includes "[t]he right to associate with the political party of one's choice."[42] Therefore, one's freedom to freely associate is the constitutional right most often implicated by legislation regulating campaign finance because these laws regulate the extent to which one can support a specific candidate's campaign, party committee, or PAC.

II. THE CENTRAL TENETS OF CAMPAIGN FINANCE LAWS AND THE DEVELOPMENT OF THE REGULATORY FRAMEWORK

[39] Campaign finance provisions often implicate this right. *See infra* notes 45–54.

[40] *See* NAACP v. Alabama, 357 U.S. 449, 460 (1958).

[41] *Id.*

[42] Kusper v. Pontikes, 414 U.S. 51, 56-57 (1973).

The modern campaign finance framework is a "muddled mixture of legislative reforms" and Supreme Court decisions that limit the impact of those laws.[43] Even though campaign finance regulations have changed significantly over the past forty years, the two central tenets of campaign finance law—contribution limits and disclosure thresholds—remain the same.[44]

The modern regulatory framework policing campaign finance is largely based upon the structure originally enacted as part of the Federal Election Campaign Act of 1971 ("FECA"),[45] even though the act has been reformed by Congress on multiple occasions and successfully challenged at the Supreme Court.[46]

The first significant Congressional reform to FECA was passed in 1974, just two years after President Richard Nixon

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[43] Paul J. Weeks, Note, *Enhancing Responsiveness and Alleviating Gridlock: Pragmatic Steps to Balance Campaign Finance Law in Light of the Supreme Court's Jurisprudence,* 83 GEO. WASH. L. REV. 1097*,* 1103 (2015).

[44] *See* Anthony Johnstone, *Recalibrating Campaign Finance Law*, 32 YALE L. & POL'Y. REV. 217, 228-30 (2013).

[45] Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972).

[46] Weeks, *supra* note 44, at 1104 (stating that Congress made some small changes to FECA before making more substantial reforms to the law in 2002). The most recent overhaul of FECA occurred in 2002 with the Bipartisan Campaign Reform Act (BCRA). *Id.* at 1106. Although there have not been any major reforms to the BCRA since 2002, the FEC "puts forth new rules attempting to effectuate the Court's decisions" that deem certain provisions unconstitutional. *Id.* at 1104.

originally signed it into law.[47] The 1974 reforms to FECA[48] placed more stringent restrictions on campaign finance, including codifying contribution limits for individuals wishing to donate to campaigns and placing spending limits on individuals or groups (PACs) that decide to independently support or oppose a candidate.[49] At the time, the statutory individual contribution limit to campaigns was set at $1000 for individuals and $5000 for political committees (PACs), per campaign.[50]

Furthermore, the codified spending limits imposed by the amendments were rather severe. Individuals or organized groups, such as PACs, were only allowed to independently spend $1,000 in support of or in opposition to particular candidates.[51] The legislative history surrounding FECA indicates that Congress was focused on enacting campaign finance reform to address both actual corruption and the appearance of corruption, which it "believ[ed] ecompass[ed] both undue influence and unequal access."[52] The provisions of this reform bill were ultimately

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[47] *Id.*

[48] Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974).

[49] Weeks, *supra* note 44, at 1105.

[50] Federal Election Campaign Act Amendments of 1974, *supra* note 49. Furthermore, individual contributors could not donate more than $25,000 annually to political campaigns. Buckley v. Valeo, 424 U.S. 1, 1 (1976).

[51] Federal Election Campaign Act Amendments of 1974, *supra* note 49.

[52] Jonathan S. Krasno & Frank J. Soraf, *Evaluating the Bipartisan Campaign Reform Act (BCRA)*, 28 N.Y.U. REV. L. & SOC. CHANGE 121, 123 (2003)

challenged in federal court by various candidates for federal office and associated political parties and organizations.[53]

A. Buckley v. Valeo *(1976)*

Buckley v. Valeo[54] is the foundational case in the Supreme Court's campaign finance jurisprudence. This decision was particularly noteworthy for two reasons: First, it "introduced corruption as a concern with weight enough to allow limiting First Amendment freedoms."[55] Second, the Court developed a balancing framework, still in use today, to determine whether a particular campaign finance regulation is constitutional. In this decision, the Court held that FECA's contribution provisions[56] were constitutional, but that the independent expenditure

(explaining that the Members of Congress who passed FECA in 1979 and the BCRA in 2002 had a similar definition of the word "corruption"). Although Congress did not closely define what "undue influence" and "unequal access" meant in real terms, as the term corruption is "a technical term of political science" that has remained the same since the Founding Era, as evidenced by Framers' overwhelming concern that corruption would ultimately destroy any chance that the United States would ever flourish. Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 346–350, 373 (2009). In fact, "[c]orruption was discussed more often the in the Constitutional Convention than factions, violence, and instability," and "was a topic of concern on almost a quarter of the days that the members [of the Constitutional Congress] convened." *Id.* at 352.

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

[54] *Id.*

[55] Teachout, *supra* note 53.

[56] At the time, the contributions to candidates for federal office were limited to $1000 from individuals and $5000 from political committees. Weeks, *supra* note 45*,* at 1104-05.

provisions violated the First Amendment.[57] The holding of this case was rather clear: it "creat[ed] a dichotomy between contribution limits (generally permissible) and expenditure limits (generally impermissible)."[58]

When making its decision to uphold the statutory limits placed on individual campaign contributions and large donations made directly to political committees (now more commonly referred to as PACs), the Court adopted a balancing framework.[59] This framework balances the First Amendment interest of citizens to freely associate against the government's interest to combat actual or apparent corruption.[60] On one hand, the Court recognized that FECA's statutory limitations on campaign contributions "impose[d] direct quantity restrictions on political communication and association by persons, groups, candidates,

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[57] The term "independent expenditures" refers to fiscal outlays any person or political organization, such as a PAC, makes in support of a candidate *without* coordinating with the campaign. For instance, if a citizen and their family wished to create elaborate signs on behalf of President Donald J. Trump when he visited their town on a campaign stop, the monies spent by the family in creating these signs would constitute independent expenditures, as they were not made in coordination with the campaign. Statutory limits on such independent expenditure were deemed unconstitutional by the *Buckley* Court, as discussed in the subsequent paragraphs. Weeks, *supra* note 44*,* at 1104-05.

[58] Marc E. Elias & Jonathan S. Berkon, *After McCutcheon*, 127 HARVARD L. REV. F. 373, 374 (2014).

[59] *See Buckley*, 424 U.S. at 35–36, 38.

[60] *See id.*

and political parties,"[61] thereby regulating the extent to which one can associate with a specific candidate or campaign. However, the Court also recognized that the federal government had an interest in regulating one's right to freely associate—by means of monetary donations to a campaign or PAC—in order to prevent actual corruption, or even the appearance of corruption.[62]

Even though the Court properly described the substantial First Amendment interest at issue, the Court nonetheless dismissed the appellants' argument that the $1000 individual contribution limit was "unrealistically low because much more than that amount would still not be enough to enable an unscrupulous contributor to exercise improper influence over a candidate or office holder, especially in campaigns for statewide or national office."[63]

In response to the appellants' claim that FECA's contribution limits were entirely arbitrary and did not actually serve the purpose of rooting out actual or apparent corruption,[64]

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[61] *Id.* at 18.
[62] Weeks, *supra* note 45, at 1105.
[63] *Buckley*, 424 U.S. at 30.
[64] The non-government appellants contended that the contribution limits were not narrowly tailored enough to serve the government's stated purpose: to stop *quid pro quo* corruption, or even the appearance of it. They argued that bribery laws and the disclosure requirements enumerated in FECA "constitute[d] a less restrictive means of dealing with proven and suspected

the Court reasoned that certain restrictions on political donations were constitutional because the federal government had a rather significant interest[65] "in preventing actual and apparent corruption—specifically the danger, or even the appearance, of quid pro quo corruption."[66] This interest, the Court concluded, was paramount and outweighed the individual interest to freely donate, without limits, to campaigns and political committees. [67]

On its face this decision was reasonable. After all, the Framers were rightfully concerned that corruption would ultimately overwhelm the American Republic as it did Rome, and thus ensured "[t]he Constitution carrie[d] with it an anti-corruption principle."[68] With this in mind, it would appear that the *Buckley* Court's decision properly reflected the Framers' intent, and thus is rightfully considered "a seminal case."[69]

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quid pro quo arrangements." *Buckley,* 424 U.S. at 27-28 (emphasis added) (quotations omitted).

[65] The Court described this interest as "weighty." *Id.* at 29.

[66] Weeks, *supra* note 44, at 1105.

[67] *See Buckley*, 424 U.S. at 28-29. The Court noted that the contributions limits enumerated in FECA "still provided substantial opportunities to engage in politically expressive activity and to associate with candidates and political committees." Weeks, *supra* note 44, at 1105.

[68] Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 342 (2009).

[69] *See* FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 485 (2007) (Scalia, J., concurring).

Legal theorists often refer to this case as the "original campaign finance decision,"[70] as it was the first instance in which the Court formally held that Congress may adopt certain contribution limits to control how citizens may associate with political campaigns or PACs.[71] Here, the Court accepted the federal government's assertion that it was necessary for Congress to enact contribution ceilings, in conjunction with disclosure requirements, to fulfill the government's stated interest:

> And while disclosure requirements serve the many salutary purposes discussed elsewhere in this opinion, Congress was surely entitled to conclude that disclosure [requirements were] only a partial measure, and that contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption inherent in a system permitting unlimited financial contributions, even when the identities of the contributors . . . are fully disclosed.[72]

Nonetheless, the Court in *Buckley* also held that there are some limits to the regulations Congress may enact. For instance, the Court found that the government lacks a substantial interest in limiting independent expenditures of these entities because they are ultimately made without coordination with either the candidate or their campaign; in other words, there is a decreased

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[70] Dennis F. Thompson, *Two Concepts of Corruption: Making Campaigns Safe for Democracy*, 73 GEO. WASH. L. REV. 1036, 1036 (2005).

[71] *See id.*

[72] *Buckley*, 424 U.S. at 28. In other words, the Supreme Court concluded that the Congressional action was narrowly tailored to fit the government's interest.

chance of quid pro quo corruption, or the appearance of such malfeasance.[73] The Court reasoned that, on balance, "independent expenditure limits were unconstitutional based on this lack of governmental interest coupled with the increased interference with the First Amendment right to political expression that limitations on independent expenditures pose."[74]

As noted by Paul J. Weeks and other astute legal commentators, the *Buckley* Court altered FECA "in a manner that undermined the overall regulatory scheme" initially enacted by Congress.[75] In the years following *Buckley*, however, the Supreme Court, under Chief Justices Burger and Rehnquist, published decisions that "subtly expanded" the "permissible grounds" for campaign finance regulation by Congress and state legislatures.[76] In fact, the Rehnquist Court consistently upheld legislative schemes regulating campaign finance "under increasingly expansive conceptions of the government interest in preventing actual and apparent corruption."[77]

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[73] *Id.* at 45–47.
[74] Weeks, *supra* note 44, at 1105.
[75] *Id.*; *see also* Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1710–11 (1999).
[76] Michael S. Kang, *After Citizens United*, 44 IND. L. REV. 243, 243 (2010); *See e.g.* McConnell v. FEC, 540 U.S. 93 (2003); FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431 (2001); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000).
[77] Kang, *supra* note 77, at 248.

For example, in *Austin v. Michigan Chamber of Commerce*,[78] the Court expanded the government's interest in preventing actual and apparent corruption when it upheld regulations of campaign finance aimed at mitigating "the corrosive effects of corporate money."[79] In 2003, the Rehnquist Court yet again deferred to the government's interest in preventing actual and apparent corruption in *McConnell v. FEC*,[80] where it upheld portions of the Bipartisan Campaign Reform Act of 2002 ("BCRA")[81] that were aimed at preventing "improper influence and opportunities for abuse that extended beyond the usual concern about quid pro quo arrangements."[82]

The Rhenquist Court's deference to the governmental interest in preventing apparent or actual corruption has been completely reversed in recent years by the Roberts Court. *Citizens United v. FEC*[83] and *McCutcheon v. FEC*[84] serve as profound examples for how the modern Supreme Court, moving increasingly in a conservative direction, determines whether pieces

[78] 494 U.S. 652, 668–69 (1990).
[79] Kang, *supra* note 77, at 248.
[80] 540 U.S. at 188–89.
[81] The BCRA, signed into law in 2002, was the most significant piece of campaign reform adopted by Congress since FECA. *See* Jonathan S. Krasno & Frank J. Sorauf, *Evaluating the Bipartisan Campaign Reform Act (BCRA)*, 28 N.Y.U. REV. L. & SOC. CHANGE 121, 121–23 (2003).
[82] Kang, *supra* note 77, at 248.
[83] 558 U.S. 310 (2010).
[84] 134 S. Ct. 1434 (2014).

of campaign finance legislation enacted by Congress and state legislatures are constitutional. A brief discussion of the doctrinal impact of these two cases is necessary to lay the groundwork for a proper analysis of the central question of this Note—are state campaign finance regulations prohibiting PAC to PAC donations constitutional under the First Amendment?

B. Citizens United v. FEC[85] *(2010)*

Citizens United invalidated "federal prohibitions on independent corporate expenditures in connection with federal elections,"[86] holding that there was no constitutional basis "for allowing the [g]overnment to limit corporate independent expenditures."[87] While the Court's holding did not speak to the constitutionality of PAC to PAC donations, as they were not at issue in the case, this landmark decision is entirely relevant when analyzing the constitutionality of any campaign finance regulation. This particular decision illustrates the Roberts Court's

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[85] Political pundits and candidates for federal office often refer to *Citizens United* in a negative light to make a broader point about the need for further campaign finance reform. *See e.g.,* Thomas B. Edsall, *After Citizens United, a Vicious Cycle of Corruption*, N.Y. TIMES, Dec. 6, 2018, https://www.nytimes.com/2018/12/06/opinion/citizens-united-corruption-pacs.html.
This Note, however, takes no position on the merits of this particular Supreme Court decision. It aims to properly apply this decision, in conjunction with its other precedent, to analyze the circuit split between the Eighth and Eleventh Circuits at issue.

[86] Kang, *supra* note 77, at 244.

[87] Citizens United v. FEC, 558 U.S. 310, 365 (2010).

substantial winnowing of the legitimate government interest in campaign finance regulation—preventing actual corruption or the appearance of corruption—to actual or apparent quid pro quo corruption, thereby making it more difficult for the government to prevail when restricting speech in campaigns.[88]

The Court relied mainly upon the majority's opinion in *Buckley v. Valeo* to explain its rationale deeming federal prohibitions on independent expenditures by corporations unconstitutional.[89] It reaffirmed that government has no interest in limiting independent expenditures, whether it be by individuals or corporations, and explained that the impact of the prohibition in question extended well beyond preventing quid pro quo corruption:

> Limits on individual expenditures, such as § 441b, have a chilling effect extending well beyond the Government's interest in preventing quid pro quo corruption. The anticorruption interest is not sufficient to displace the speech here in question. Indeed, 26 States do not restrict independent expenditures by for-profit corporations. The

[88] Kang, *supra* note 77, at 243 ("*Citizens United*, reflecting Justice Kennedy's views previously expressed mainly in dissent, represents the Roberts Court's clear reversal of [the Rehnquist Court] trend and a narrow focus on quid pro quo corruption as the exclusive grounds for government regulation.").
[89] *Id.* at 246.

> Government does not claim that these expenditures have corrupted the political process in those States.[90]

Here, the Roberts Court strayed significantly from relatively recent precedent that had been incredibly deferential to the government, in which campaign finance regulations were upheld so long as the regulation(s) in question could conceivably limit corruption or the appearance of it.[91] By concluding that the government regulation in question was unconstitutional because it went further than the "Government's interest in preventing quid pro quo corruption," the Roberts Court provided a new framework to determine if a particular campaign finance regulation can overcome a First Amendment challenge: whether the particular regulation in question is *narrowly tailored* to prevent actual or apparent quid pro quo corruption.[92]

C. McCutcheon v. FEC *(2014)*

In *McCutcheon*,[93] the Supreme Court invalidated the congressional enactment of "biennial aggregate limits," which limited the total amount of money any citizen may contribute to PACs, federal candidates, or party committees (e.g. the

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[90] *See Citizens United*, 558 U.S. 310, 357; *see also* Kang, supra note 77, at 246.
[91] *See* Kang, *supra* note 77, at 246–47.
[92] *See id.* at 249 (asserting that Justice Kennedy's majority decision, which is "focused narrowly on the prevention of quid pro quo corruption" are "likely [to] direct the Court's campaign finance decisions going forward").
[93] McCutcheon v. FEC, 572 U.S. 185 (2014).

Republican National Committee and Democratic National Committee) over a two year period.[94] The conservative plurality consisting of Justices Roberts, Scalia, Kennedy, and Alito, affirmed what Justice Kennedy wrote in his majority opinion in *Citizen's United*: the government may only enact campaign finance regulations "that regulate against the threat of actual or apparent quid pro quo corruption."[95] Quid pro quo corruption, as defined by Chief Justice Roberts, "captures the notion of a direct exchange of an official act for money."[96] On the other hand, under the dissent's view, written by Justice Breyer, the definition of corruption should be much broader and include "efforts to obtain influence over or access to elected official[s] or political parties" in order to "maintain the integrity of our public governmental institutions."[97] If the definition were made broader, then, the government would be able to more strictly regulate campaign contributions.

Even though a plurality defined corruption much more narrowly than their diseenting colleagues,[98] the Court chose not to

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[94] Elias & Berkon, *supra* note 60, at 374.
[95] *Id.* at 373.
[96] *McCutcheon*, 572 U.S. at 192 (citing McCormick v. United States, 500 U.S. 257, 266 (1991)).
[97] *Id.* at 234, 236. (Breyer, J., dissenting) (quoting Citizens United v. FEC, 558 U.S. 310, 359 (2010)).
[98] Justice Thomas filed his own opinion concurring in judgement only. *McCutcheon*, 572 U.S. at 228. In his concurrence, Justice Thomas argued that

overturn the longstanding federal campaign regulations related to individual campaign contributions.[99] Originally upheld in *Buckley*, those regulations limit how much an individual citizen may donate to a particular candidate or PAC during an election cycle. Here, the plurality, led by Justice Scalia, reasserted that provisions limiting an individual's First Amendment right to freely associate through campaign contribution limits advanced the government's interest to prevent actual or apparent quid pro quo corruption and were thus constitutional.[100] This portion of the Court's holding is central[101] to this Note's discussion of the constitutionality of state

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although *Buckley* was properly applied in this case, it should be overturned completely. *Id.* at 232 ("I would overrule *Buckley* and subject the aggregate limits in BCRA to strict scrutiny, which they would surely fail"). Here, Justice Thomas continues to advocate that all campaign contribution limits are unconstitutional. *See id.* ("I am convinced that under traditional strict scrutiny, broad prophylactic caps on both spending and giving in the political process . . . are unconstitutional.") (quoting Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604, 640-41 (1996) (Thomas J., concurring).

[99] Today, a citizen may donate a maximum of $2600 to any candidate each year, $5000 to any PAC each year, $10,000 to any state party each year, and $32,400 to any national party each year. Elias & Berkon, *supra* note 59, at 377.

[100] *Id.* at 373.

[101] Because the Supreme Court deemed contribution limits to be constitutionally permissible, citizens who wish to donate more than what the federal contribution limits allow are unable to do so. In light of these limits, certain states, have become concerned that some citizens, particularly those with significant resources, may still nonetheless try to circumvent the federal contribution limits by funneling money through multiple PACs to their candidate of choice. Enacting prohibitions on PAC to PAC donations could prevent citizens from being able to exploit a loophole to spend beyond what is legally permissible.

prohibitions on PAC to PAC donations at issue in both *Alabama Democratic Conference. v. Attorney General of Alabama*[102] and *Free and Fair Elections Fund v. Missouri Ethics Commission*.[103] While the Court makes clear that certain campaign finance regulations can prevail over the Supreme Court's exacting scrutiny standard,[104] this standard has become difficult to overcome, particularly when a case comes before the Roberts Court that is properly applying longstanding precedent. Therefore, when Congress and state legislatures across the nation enact further campaign finance regulations, they should expect to face difficult legal challenges over whether the provision is narrowly tailored enough to prevent actual or apparent quid pro quo corruption. Of course, this is under the assumption that the Court continues to properly apply *Buckley* and *Citizens United* to the case before it.

III. STATE PROHIBITIONS ON PAC TO PAC DONATIONS

Every state in the United States has enacted its own regulations that govern the financing of candidates seeking statewide, local, and municipal office, regulating the conduct of party committees and PACs operating in their respective

[102] 838 F.3d 1057 (11th Cir. 2016).
[103] 903 F.3d 759 (8th Cir. 2018).
[104] Regulations that place limits on how much a citizen can spend to donate to a particular campaign, PAC, or party committee are almost certainly going to be upheld so long as the limits enacted are not extremely low.

jurisdictions.[105] In light of the fact that the federal government has enacted individual limits on campaign contributions,[106] state legislatures have subsequently passed legislation to try to close loopholes that could possibly be exploited by individuals or PACs trying to circumvent contribution limits or other aspects of campaign finance law. For instance, Alabama's state legislature identified possible problems with its campaign finance laws that undermined the public trust, [107] thereby inspiring the passage of its own "PAC to PAC transfer ban," described below, in hopes of quelling actual or apparent corruption.[108]

Similarly, the State of Missouri[109] astutely identified a potential loophole in which a wealthy citizen could feasibly

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[105] *See, e.g.*, DAVID E. POISSON, LOBBYING, PACS, & CAMPAIGN FINANCE: 50 STATE HANDBOOK, Ch. 1 (2018).

[106] *See supra* Sections II.A.–C.

[107] *See* Ala. Democratic Conf. v. Att'y Gen. of Ala., 838 F.3d 1057, 1070 (11th Cir. 2016) (acknowledging there was "ample evidence that, before the law's passage, PAC-to-PAC transfers were viewed by Alabama citizens as a tool for concealing donor identity, thus creating the appearance that PAC-to-PAC transfers hide corrupt behavior.").

[108] Alabama's campaign finance laws, which do "not limit the amount of money a person, business or PAC may contribute directly to a candidate's campaign," *Ala. Democratic Conf.*, 838 F.3d at 1060, does not make Alabama susceptible to Donor A's hypothetical scheme described above. If Donor A resided in Alabama, he or she could simply donate an unlimited amount of funds to a candidate for statewide office legally. They would not have to concoct a scheme by which he or she funnels money through multiple PACs in order to exceed contribution limits.

[109] The Missouri Ethics Commission, the government entity responsible for investigating "alleged violations of laws pertaining to campaign finance and enforces those laws," believed that a ban on PAC to PAC transfers were required in order to prevent a donor from being able to evade the individual

circumvent federal campaign contribution limits:[110] funneling money through various PACs that would then contribute all of the donated funds by the individual to a certain campaign, PAC, or party committee of the individual's choice. For example, a hypothetical donor ("Donor A") could donate $5,000 to ten PACs and then direct each of these organizations to then transfer $5,000 to a PAC or principal campaign committee of Donor A's choosing. Under this scheme, Donor A would effectively be donating $50,000 to an independent PAC or campaign committee of his or her choosing, well in excess of what is permitted by federal law and Missouri state law. Thus, in hopes of closing the loophole that would otherwise make Donor A's hypothetical behavior legal, Missouri adopted its own constitutional amendment, discussed below, to place a prohibition on PAC to PAC transfers. Even though Missouri's constitutional amendment and Alabama's statutory provision each had different aims, both barred the same activity. These

contribution limit. Free & Fair Election Fund v. Mo. Ethics Comm'n, 903 F.3d 759, 762 (8th Cir. 2018).

[110] The individual contribution limit in Missouri is $2600 per candidate. MO. CONST. art. VIII, § 23.3(1)(a).

state actions were challenged in federal court on constitutional grounds, as discussed in Part IV of this Note.

A. Alabama's Fair Campaign Practices Act

Alabama's Fair Campaign Practices Act ("FCPA") contains all of the campaign finance requirements for Alabama's state elections.[111] In 2010, Alabama's state legislature made changes to FCPA that made it "unlawful for any political action committee . . . to make a contribution, expenditure, or any other transfer of funds to any other political action committee."[112]

Under this statutory scheme, the Alabama legislature carved out a single exception to this prohibition on PAC to PAC monetary transfers, permitting PACs that are not principal campaign committees[113] to "make contributions, expenditures, or other transfers of funds to a principal campaign committee."[114] This, however, is a very narrow exception as it still prohibits the vast majority of PACs, "set up to give money to several candidates," from "mak[ing] a contribution or expenditure to another PAC that is doing the same thing."[115]

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[111] *See* ALA. CODE §§ 17–5–1 to –21 (2018).
[112] *Ala. Democratic Conf.*, 838 F.3d, at 1060 (citing to ALA. CODE § 17–5–15(b)).
[113] Principal campaign committees are PACs that are set up to support a single candidate. These PACs often make "independent expenditures" on behalf of a single candidate.
[114] *Id.*
[115] *Id.*

B. The Amendment to the Missouri State Constitution

On November 8, 2016, Missouri voters approved an amendment to the Missouri Constitution that added several new provisions related to campaign finance.[116] The clause that formally places a prohibition on PAC to PAC donations states: "Political action committees . . . shall be prohibited from receiving contributions from other political action committees."[117] The amendment also defines "political action committees" as "a committee of continuing existence which is not formed, controlled or directed by a candidate, and is a committee other than a candidate committee, political party committee, campaign committee . . . whose primary or incidental purpose is to receive contributions or make expenditures to influence or attempt to influence the action of voters."[118] Here, like the statute crafted by the Alabama legislature, Missouri's constitutional prohibition on PAC to PAC transfers of donations restricts the ability of PACs not controlled by candidates or created for the sole benefit of

[116] The provisions were formally added to the Missouri Constitution under Article VIII. MO. CONST. art. VIII, § 23. *See* Jason Rosenbaum, *Amendment 2 Could Bring Campaign Donation Limits Back to Missouri*, ST. LOUIS PUBLIC RADIO (Oct. 14, 2016) https://news.stlpublicradio.org/post/amendment-2-could-bring-campaign-donation-limits-back-missouri#stream/0; Benjamin Peters, *Co-ops Ask for Restraining Order in Campaign Finance Lawsuit,* MO. TIMES (Dec. 20, 2016), https://themissouritimes.com/36355/co-ops-ask-restraining-order-campaign-finance-lawsuit/.
[117] MO. CONST. art. VIII, § 23.3(12).
[118] *Id.* at § 23.7(20).

supporting one candidate from giving funds to other similar PACs. This prohibition, which ultimately impacts the vast majority of PACs, was a major point of contention in the lawsuit alleging this provision violates the First Amendment.

C. The Constitutionality of Prohibiting PAC to PAC Donations in Light of the Roberts Court's Rulings in Citizens United *and* McCutcheon

Closing the "Political Action Committee Loophole" that allows sophisticated donors to use PACs as a vehicle to evade campaign contribution limits is a sound policy initiative.[119] However, the Roberts Court would likely deem any state law that bans PAC to PAC donations to be unconstitutional, unless the state could show, with definitive proof, that the loophole has previously been exploited, thereby showing actual or apparent quid pro quo corruption.

As previously discussed, the Roberts Court is significantly less deferential to state campaign finance regulations, when compared to the Burger and Rehnquist Courts.[120] Although the Roberts Court has continued to uphold *Buckley*'s framework to determine the constitutionality of a provision that regulates

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[119] This loophole only applies in states that have campaign contribution limits, as most do, and at the federal level, which has had campaign contribution limits since 1974. Weeks, *supra* note 44, at 1104.

[120] *See* Kang, *supra* note 77*,* at 246–247, 249; Elias & Berkon, *supra* note 59, at 373.

campaign finance, the Court has effectively changed its test that determines whether a legitimate state interest is present—it will uphold only those laws that root out "actual or apparent quid pro quo corruption."[121] Therefore, under this strict application of the *Buckley* rule, a state must be able to show that a prohibition on PAC to PAC donations will serve to stop "actual or apparent quid pro quo corruption."[122] In order to do this, a state must be able to provide "real-world examples of circumvention of . . . [its] hypothetical."[123] In other words, a state must show that citizens in the state—or perhaps citizens in another similarly situated state—were previously exploiting this loophole *before* it enacted the regulation. Considering it is hard to prove whether a citizen has actually exploited this loophole to donate to a campaign more than what is permitted,[124] it is almost certain that the U.S. Supreme Court would find a law banning PAC to PAC donations to be

[121] *See* Kang, *supra* note 77*,* at 249.
[122] *See id.*
[123] McCutcheon v. FEC, 572 U.S. 185, 217 (2014).
[124] Once a donor donates money to several PACs, which then ultimately donate to a single candidate campaign, it becomes very difficult to prove that the donations to the candidate campaign were part of a coordinated effort concocted by the initial donor.

unconstitutional as a matter of law, as it could not meet the increasingly higher standard for a legitimate state interest.

IV. THE CIRCUIT SPLIT BETWEEN THE EIGHTH AND ELEVENTH CIRCUITS

The Supreme Court's foundational case law on campaign finance—*Buckley*, *Citizens United*, and *McCutcheon*—provides an analytical framework to determine whether a particular state's campaign finance regulation is constitutional.[125] In 2016 and 2018, the Eighth and Eleventh Circuit, respectively, addressed precisely the same question: whether a ban on PAC to PAC donations is constitutional under the First Amendment. Even though both cases were heard after the Supreme Court issued its most recent opinion on campaign finance in *McCutcheon*, the courts ruled differently, creating a circuit split, which has led to uncertainty in campaign finance law. The Eleventh Circuit Court of Appeals ruled that Alabama's statutory ban on PAC to PAC donations was constitutional. The Eighth Circuit Court of Appeals disagreed and determined that Missouri's amendment was unconstitutional under the First Amendment as a matter of law. Although both

[125] *See, e.g.*, Free & Fair Election Fund v. Mo. Ethics Comm'n, 903 F.3d 759, 763 (8th Cir. 2018) (applying the Supreme Court's exacting scrutiny test, as applied in *McCutcheon*, 572 U.S. at 197).

courts cited to the foundational case law,[126] neither the Eighth nor Eleventh Circuit properly applied the more recent case law that is significantly less deferential to governmental regulation of campaign finance—at least when compared to the foundations laid by the Burger and Rehnquist Courts. In comparing the two decisions, the Eighth Circuit most properly applied the exacting scrutiny standard from *McCutcheon*, thereby making it the most reflective of how the Supreme Court would likely rule on this matter.

A. Alabama Democratic Conference v. Attorney General of Alabama *(2016)*

After the Alabama legislature passed new provisions to the FCPA effectively banning PAC to PAC donations,[127] the Alabama Democratic Conference ("ADC"), a registered PAC in the State of Alabama,[128] brought forth a legal challenge to Alabama Code § 17–5–15(b).[129] At the time of this lawsuit, the ADC was "the largest grassroots political organization in Alabama" and it relied

[126] *See supra* Part II.
[127] Alabama's FCPA referred to PAC to PAC donations as "PAC-to-PAC transfers" but there is no distinction between the two names. ALA. CODE § 17-5-15(b) (2018).
[128] The ADC's mission is to "communicate with black voters in Alabama and [to] encourage[e] them to support candidates for public office that the organization believes would best represent their interest."
[128] Ala. Democratic Conf. v. Att'y Gen. of Ala., 838 F.3d 1057, 1059 (11th Cir. 2016).
[129] *See id.*

heavily upon other progressive PACs and the state Democratic Party apparatus to fund its involvement in state elections.[130] Therefore, the new, updated provisions of the FCPA banning PAC to PAC donations greatly threatened the ADC's ability to remain "actively involved in elections in Alabama."[131]

In response to the legislature's decision to pass a statute that restricted some of its major funding sources, the ADC decided to restructure its contribution system, creating two separate bank accounts: one account was created for the purpose of donating campaign contributions to candidates, per the statutory limits, and the other account was created for ADC's independent expenditures.[132] In July of 2011, ADC sued the State of Alabama in Federal District Court on the basis that the PAC to PAC transfer ban violated its right "to make independent expenditures."[133] Ultimately, the district court held that Alabama's prohibition on PAC to PAC donations was constitutional as applied to the ADC.[134]

In its ruling, which was ultimately upheld by the Eleventh Circuit Court of Appeals, the court reasoned that current Supreme

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[130] *Id.*
[131] *Id.*
[132] *See supra* Section II.B.
[133] *Ala. Democratic Conf.*, 838 F.3d at 1060–1061.
[134] *Id.* at 1061.

Court precedent aligned with the State of Alabama's interests.[135] However, the lower court seemed to apply the more permissive *Buckley* standard, stating that "the only sufficiently important interest that will support the PAC to PAC transfer ban is preventing quid pro quo corruption *or the appearance* thereof."[136] By applying the more permissive standard from *Buckley*, the court essentially disregarded the majority opinion in *Citizens United* that seemed to have considerably narrowed the permissible state interest to simply preventing actual or apparent quid pro quo corruption.[137] After identifying the improper rule, the district court ultimately reasoned that ADC's organizational structure,[138] which failed to have "any other internal controls to safeguard against the risk that contributions, even if formally earmarked for independent expenditures, could be funnelled [*sic*] to a candidate" gave rise to the appearance of corruption; thus, the state's statute was sufficiently tailored to stop corruption.[139]

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[135] *Id.* at 1062.
[136] *Id.* (emphasis added).
[137] Kang, *supra* note 77, at 249 (asserting that Justice Kennedy's majority decision in *Citizens United* "focused narrowly on the prevention of quid pro quo corruption," not the general appearance of corruption).
[138] Even though the ADC established two separate accounts for campaign activities it failed two separate groups operating these accounts. *Ala. Democratic Conf.,* 838 F.3d at 1061.
[139] *Id.* at 1062.

On appeal, the ADC made a narrow argument as it related to PAC to PAC donations and independent expenditures, arguing "the State [did] not have a sufficiently important interest in banning PAC to PAC transfers used only for independent expenditures."[140] It also argued that "the PAC-to-PAC transfer ban does not actually promote any state interest" and that "the law is not sufficiently closely drawn to protect the State's purported interests."[141] These arguments ultimately failed.

Like the district court in this matter, the Eleventh Circuit Court of Appeals did not properly apply the Court's recent precedent in *Citizens United*, which more narrowly defined the state's interest to restrict campaign finances to actual or apparent quid pro quo corruption.[142] Even though the court cited to *McCutcheon*, which stated that "Congress may regulate campaign contributions to protect against corruption or the appearance of corruption,"[143] the Eleventh Circuit did not take into account that the ultimate holding of the opinion: the government may only enact campaign finance regulations that "regulate against the threat of actual or apparent quid pro quo corruption."[144] Rather,

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[140] *Id.* at 1063.
[141] *Id.*
[142] *See* Kang, *supra* note 77, at 249.
[143] McCutcheon v. Fed. Election Comm'n, 572 U.S. 185,191 (2014).
[144] Elias & Berkon, *supra* note 59, at 373-74.

the Eleventh Circuit applied something resembling the Rehnquist Court's much more permissive standard to the state defendant, asserting that the state has a legitimate interest in regulating campaign finance even if there is merely the appearance of quid pro quo corruption.[145] This allowed the court to side with the state of Alabama when it asserted that its prohibition on PAC to PAC donations did serve the legitimate state interest of rooting out the appearance of corruption.[146]

Next, the Eleventh Circuit dismissed ADC's argument that Alabama's prohibition on PAC to PAC donations "[did] not sufficiently serve the State's interest in preventing quid pro quo corruption or the appearance of quid pro quo corruption."[147] On this point, the ADC argued that because *Citizens United* established that "the State no longer has a cognizable corruption-based interest

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[145] *Ala. Democratic Conf.*, 838 F.3d at 1064 (citing to FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 496-97 (1985), which held, like *Buckley*, that "preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances").

[146] *See id.* at 1065 n.1 ("The District Court noted a series of newspaper articles and testimony by the State highlighting that, before the PAC-to-PAC transfer ban, the appearance in Alabama was that donors were attempting to conceal donations to candidates and other groups by laundering said donations through multiple PACs. Donors were able to conceal these donations by making a contribution to one PAC, which in turn made a contribution to another PAC, which then made a contribution to yet another PAC and so on, such that by the time the money was delivered to a candidate there was no way to effectively trace the contribution from the original donor to the ultimate recipient . . . ." (internal quotations omitted)).

[147] *Id.* at 1065.

in restricting independent expenditures . . . that the State has no anti-corruption interest in regulating contributions into the account that the ADC uses only for independent expenditures."[148] In essence, ADC claimed that Alabama's statute was unconstitutional as applied to its organization, which had two separate bank accounts to delineate the funds being used for independent expenditures and funds being given directly to campaigns.

In response to this argument, the Eleventh Circuit claimed that a state's interest in preventing corruption "may no longer justify regulating independent expenditures when there is no other form of contribution to or coordination with a candidate involved."[149] However, ADC was actively coordinating with other candidate campaigns, albeit from a separate bank account. Based upon this fact, the court properly reasoned that case law from other circuits,[150] which "uniformly invalidated laws limiting

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[148] *Id.*

[149] *Id.* at 1066. Here, the court properly applied the rule from *Citizens United*, as it held that independent expenditures did not lead to, or create the appearance of, quid pro quo corruption. 558 U.S. at 360 ("By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate.").

[150] *See, e.g.*, Republican Party of N.M. v. King, 741 F.3d 1089, 1096–97 (10th Cir. 2013) ("If an entity can fund unlimited political speech on its own without raising the threat of corruption, no threat arises from contributions that create the fund."); N.Y. Progress & Prot. PAC v. Walsh, 733 F.3d 483, 487 (2nd Cir. 2013); SpeechNow.org v. FEC, 599 F.3d 686, 696 (D.C. Cir. 2010).

contributions to PACs that made only independent expenditures" did not apply to this particular situation.[151] Therefore, the court concluded,[152] that Alabama had a valid corruption interest to regulate in this matter due to the fact that the ADC did not "do more than merely establish separate bank accounts for candidate contributions and independent expenditures." In explaining its rationale, the court wrote:

> There must be safeguards to be sure that the funds raised for making independent expenditures are really used only for that purpose. There must be adequate account-management procedures to guarantee that no money contributed to the organization for the purpose of independent expenditures will ever be placed in the wrong account or used to contribute to a candidate.[153]

There is no issue with the court's reasoning that ADC did not put in place reasonable safeguards to shield it from Alabama's law. After all, the facts on the record were rather damning to

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[151] *Ala. Democratic Conf.*, 838 F.3d at 1066.

[152] Here, the Eleventh Circuit joined the Second and Fifth Circuits, which held that states had a legitimate interest in regulating hybrid PACs that possess separate bank accounts for independent expenditures and candidate campaigns when there are not adequate safeguards in place to ensure there is no comingling of funds. *See* Vt. Right to Life Comm., Inc. v. Sorrell, 758 F.3d 118, 143 (2d Cir. 2014) (concluding that having a separate bank account for independent expenditures does not alleviate anti-corruption concerns when the organization in question also maintained an "otherwise indistinguishable" account to spend money on candidate campaigns); *See* Catholic Leadership Coal. of Tex. v. Reisman, 764 F.3d 409, 443 (5th Cir. 2014) (holding that a state had a sufficient anti-corruption interest in ensuring that a contribution was used only for independent expenditures).

[153] *Ala. Democratic Conf.*, 838 F.3d at 1068.

ADC's case.[154] However, the Eleventh Circuit failed to properly apply the most recent Supreme Court precedent, *Citizens United* and *McCutcheon*. Thus, it should not have been sufficient that the Alabama legislature provided evidence on the record that the public simply believed PACs were being used as a vehicle to exploit the "Political Action Committee Loophole." Rather, Alabama should have been required to provide evidence of actual or apparent quid pro quo corruption to justify its regulation.

The Roberts Court has demonstrated that when a state seeks to regulate campaign finance, the Court must look for evidence of actual or apparent quid pro quo corruption in order to sufficiently meet the threshold for a legitimate state interest.[155] If this case proceeded to the Supreme Court, Alabama would have difficulty winning as it would be unable to show, based upon the facts currently on the record, that there was widespread actual or apparent quid pro quo corruption ongoing between PACs and sophisticated citizens in its state. Therefore, based upon the less deferential standard the Roberts Court had established in *Citizens*

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[154] *See id.* at 1069 (explaining that "ADC did not offer[] any evidence to indicate that it has implemented any other internal controls to safeguard" and that ADC's two accounts were "controlled by the same entity and people") (internal quotations omitted).

[155] *See* Kang, *supra* note 77*,* at 246–247, 249; *See* Elias & Berkon, *supra* note 59, at 373.

United and affirmed in *McCutcheon*, the Court would likely hold that Alabama did not have a legitimate state interest, as a matter of law, to enact a prohibition on PAC to PAC donations.[156]

B. *Free & Fair Election Fund v. Missouri Ethics Commission* (2018)

Soon after Missouri's constitutional amendment banning PAC to PAC donations went into effect, two PACs—Free and Fair Election Fund ("FFEF") and the Association of Missouri Election Cooperatives Political Action Committee ("AMEC-PAC")—sued to enjoin enforcement of the § 23.3(12) ban on PAC to PAC donations.[157] Similar to the ADC in Alabama, FFEF "receive[d] contributions and [made] independent expenditures to influence voters."[158] FFEF also alleged in its complaint "that it desired to accept contributions from other PACs and to contribute to those PACs that make only independent expenditures."[159] In other words, FFEF claimed that it had no interest it soliciting donations from other PACs and then using those funds to donate

[156] Although this Note contends that the policy of closing the potential Political Action Committee loophole by means of a prohibition on PAC to PAC donations is entirely reasonable, the Roberts Court has been increasingly less deferential to states seeking to regulate campaign finance without evidence suggesting of actual or apparent corruption. However, there is the possibility that there are five votes on the Court to revert back to the previous permissive standard, as the Court has two new members since *Citizens United* and *McCutcheon*.

[157] Free & Fair Elections Fund v. Mo. Ethics Comm'n., 903 F.3d 759, 762 (8th Cir. 2018).

[158] *Id.*

[159] *Id.*

to candidates. Like FFEF, AMEC-PAC also alleged in its complaint that it desired to accept contributions from other PACs and also donate to other PACs.[160] Both jointly sued the State of Missouri in federal court, seeking declaratory and injunctive relief, "alleging that the ban on PAC-to-PAC transfers was unconstitutional on its face under the First and Fourteenth Amendments, and unconstitutional as applied to each [of the PACs]."[161]

The district court concluded that Missouri's ban on PAC to PAC donations "was unconstitutional on its face under the First Amendment and unconstitutional as applied to FFEF."[162] When reviewing the district court's finding, the Eight Circuit Court of Appeals began its opinion by properly stating that *McCutcheon's* "exacting scrutiny" standard applies, because a ban on PAC to PAC donations regulates political contributions.[163] However, the Eighth Circuit went on to cite the Supreme Court's rule in *McCutcheon* that "preventing corruption or the *appearance of corruption*" is the only legitimate state interest to justify regulating campaign finance.[164] As previously discussed, even though the

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[160] *See id.*
[161] *Id.* at 763.
[162] *Id.*
[163] *Id.*
[164] *See id.* (emphasis added).

Roberts Court in *McCutcheon* initially phrased its standard in the same way as the more permissive Burger and Rehnquist Courts,[165] it effectively required a clear showing of actual or apparent quid pro quo corruption to justify its regulation.[166] Therefore, to determine whether the Eighth Circuit properly followed the Supreme Court's precedent, a further inquiry into the court's rationale is required.

The Eighth Circuit held that Missouri did not demonstrate "a substantial risk that unearmarked PAC to PAC contributions will give rise to quid pro quo corruption or its appearance."[167] Although the Missouri Commission reasonably asserted that "without the ban on PAC-to-PAC transfers, a donor could evade the [state's] individual contribution limits of $2600 per candidate" by "contribut[ing] large, unearmarked sums of money to a candidate by laundering it through a series of PACs that he

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[165] The Burger and Rehnquist Courts permitted states to regulate campaign contributions by merely citing to a showing that there was the general appearance of corruption. *See e.g.*, FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 496-97 (1985) ("[P]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances.").

[166] *See* Elias & Berkon, *supra* note 59, at 373 (explaining the conservative plurality consisting of Justices Roberts, Scalia, Kennedy, and Alito, affirmed what Justice Kennedy wrote in his majority opinion in *Citizen's United*: the government may only enact campaign finance regulations "that regulate against the threat of actual or apparent quid pro quo corruption.").

[167] *See* Free & Fair Elections Fund v. Mo. Ethics Comm'n, 903 F.3d 759, 764 (8th Cir. 2018) (emphasis omitted).

controls," the court still found that "the transfer ban . . . does little, if anything, to further the objective of preventing corruption or the appearance of corruption."[168] This was a strict ruling, especially considering the court defined a legitimate state interest as "further[ing] the objective of preventing corruption."[169] Under this seemingly permissive standard, it would have been reasonable for the court to find Missouri was fulfilling its legitimate state interest by trying to close a loophole in its election laws.

What ultimately doomed the Missouri constitutional amendment was that Missouri was neither able to "point to evidence of any occasions before the amendment where PAC to PAC transfers led to the circumvention of contribution limits" nor "identify any donors who have exceeded contribution limits by using transfers among a network of coordinated PACs."[170] In other words, because Missouri simply sought to close a loophole that had not been exploited yet, the court found that the regulation did not meet the standard of a legitimate state interest. This seems to suggest that the Eighth Circuit, like the Roberts Court, interpreted the seemingly deferential rule established in *Buckley*, and affirmed in *Citizens United* and *McCutcheon*, so narrowly as to effectively

[168] *Id.*
[169] *Id.*
[170] *Id.*

require a state to show actual or apparent quid pro quo corruption *before* enacting the restriction. Under this reading of the rule, which is likely the most reflective of how the Supreme Court would rule, smart, reasonable policies to close the "political action committee loophole" before it is exploited are likely to be deemed unconstitutional as a matter of law.

V. A BRIEF CRITICISM OF MODERN CAMPAIGN FINANCE CASE LAW

As previously discussed,[171] it is likely that the Roberts Court would strike down any state's prohibitions on PAC to PAC donations. Although these policies are reasonable and close the "Political Action Committee Loophole" that allows sophisticated donors to use PACs as a vehicle to circumvent campaign contribution limits, they would likely be unable to survive constitutional muster. Why?

The Roberts Court in *McCutcheon* made clear that the state must be able to "provide any real-world examples of circumvention" of its stated policy in order to show that it has a legitimate state interest in enacting the policy to begin with.[172] Therefore, as a matter of law, a state seeking to be proactive and

[171] *See supra* Part III.
[172] *McCutcheon*, 572 U.S. at 217.

close any loopholes in its existing campaign finance laws before citizens exploit said loopholes would be unlikely to ever show a legitimate state interest. This is a tremendous flaw in modern campaign finance case law.

While it is generally a sound policy for legislatures to enact legislation after recognizing a problem exists, it is tremendously difficult for a state to definitively show that a sophisticated donor is exploiting the law to evade contribution limits to justify prohibitions on PAC to PAC donations.[173] Therefore, even though wealthy individuals may circumvent state and Congressional regulations on contribution limits using PACs as their vehicles, the government would likely struggle to show that the regulation, albeit reasonable, serves a legitimate state interest.

In April 2019, the the U.S. Supreme Court denied certiorari in *Free and Fair Elections v. Missouri Ethics Commission.*[174] One could take this as a signal that the Supreme Court agrees with the Eigth Circuit's treatment of the Court's campaign finance law precedent. However, the High Court also denied certiorari in the Alabama case,[175] suggesting their unwillingness to reconsider or clarify their

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[173] *See supra* Part III.
[174] Free and Fair Elections v. Mo. Ethics Comm'n.,903 F.3d 759 (8th Cir. 2018), *cert. denied*, 139 S.Ct. 1601 (2019).
[175] Ala. Democratic Conference v. Att'y Gen. of Ala., 838 F.3d 1057 (11th Cir. 2016), *cert. denied*, 137 S.Ct. 1837 (2017).

previous contentious rulings. Accordingly, the "Political Action Committee Loophole" is likely to remain a topic of discussion during the 2020 election cycle, especially considering the growing influence of PACs on American democracy[176] and the growing debate around campaign finance reform. One thing seems clear, however: Regardless of how sound of a policy it may be to place prohibitions on PAC to PAC donations, should this question come before the Supreme Court, the Roberts Court will be unlikely hold that prohibitions on such activity to be constitutional under First Amendment case law.

[176] Alexander, *supra* note 2.