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# When Are Independent Expenditures Not Independent? Regulation of Campaign Finance Entities After *Citizens United*

Francis Straub IV*

**ABSTRACT**

The recent growth in campaign spending has been accompanied by rapid growth in the number and size of independent-expenditure organizations, especially in the wake of the U.S. Supreme Court's decision in *Citizens United v. FEC*. Whereas political committees coordinate their actions with candidates, independent-expenditure organizations, by definition, must carry on their activities without such coordination. With its ruling that independent expenditures do not give rise to concerns of quid pro quo corruption, the Court has placed these expenditures almost entirely outside the realm of campaign finance regulation that applies to political committees. Following *Citizens United*, federal courts have made various attempts at applying this principle to the organizations that make independent expenditures, with inconsistent results.

This Comment reviews the modern history of campaign finance jurisprudence to discern the rationale behind the *Citizens United* decision. Recent Courts of Appeals' decisions are also examined to determine how this rationale is and should be applied to independent-expenditure organizations. Next, this Comment considers which standard the courts should apply to determine whether independent-expenditure organizations that are closely tied to political committees should be outside the application of campaign finance laws, despite the possibility of coordination with political candidates. To resolve this question, this Comment proposes that the courts make use of a modified application of the alter ego doctrine to decide such questions, as federal courts already use this doctrine to determine when to treat two

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purportedly separate organizations as a single entity when applying federal law.

**Table of Contents**



## I. INTRODUCTION

As the amount of money has increased in national election campaigns, so too have the number and complexity of organizations involved in campaign fundraising. There are two main types of non-party political organizations: political committees, which may coordinate expenditures with candidates for public office, and independent expenditure organizations, which by definition act without direction from any candidate.[1] Although these campaign finance entities are subject to

1. *See* Richard Briffault, *Updating Disclosure for the New Era of Independent Spending*, 27 J.L. & POL. 683, 684 (2012); *Cf.* Stop This Insanity v. FEC, 902 F. Supp. 2d 23, 37 (D.D.C. 2012)(discussing differences between committees that make independent expenditures and those that do not); SpeechNow.org v. FEC, 389 U.S. App. D.C. 424, 435, 599 F.3d 686, 697 (2010)(noting differing regulations applied to political committees and those making independent expenditures).

different regulations, an increasing number of organizations are now operating committees of both types concurrently.[2] This concurrent operation raises concerns about the autonomy of independent expenditure organizations that work side-by-side with political committees.[3]

In Part II, this Comment will examine modern judicial decisions regarding campaign finance entities preceding, including, and following the U.S. Supreme Court's decision in *Citizens United v. FEC*.[4] Through this examination, a clear rift becomes apparent between federal circuit courts in their treatment of related political committees and independent expenditure organizations. This Comment will also examine federal courts' treatment of closely-related entities to discern the relevant standard that should be applied to closely-related campaign finance organizations.

Part III of this Comment will discuss and weigh the divergent approaches to this problem. This Comment will propose modifications to existing federal doctrine for campaign finance entities, factors for applying this doctrine, and presumptions to assist in courts' factual analysis.

## II. MODERN TRENDS IN THE TREATMENT OF INDEPENDENT EXPENDITURES AND FEDERAL DOCTRINE REGARDING CLOSELY-RELATED ENTITIES

Although this Comment focuses on the regulation of closely-related campaign finance entities, a wide range of material must be examined to provide the proper context for the discussion. Any analysis of campaign finance, under either statutory or case law, requires that group contributions and expenditures be considered when determining the applicable standard for permissible conduct.[5] A political committee engaging in independent expenditures is largely free from the strictures

2. *Cf.* David Schultz, *Revisiting Buckley v. Valeo: Eviscerating the Line Between Candidate Contributions and Independent Expenditures*, 14 J.L. & POL. 33, 89 (1998)(examining growth in independent expenditures by political committees); *Leading Case*, 115 HARV. L. REV. 416, 424 (2001)(discussing shift from direct contributions to independent expenditures).

3. *Cf.* Catholic Leadership Coal. of Tex. v. Reisman, 764 F.3d 409, 444 (5th Cir. 2014)(discussing difficulty in preventing quid pro quo corruption in hybrid organizations which make both political contributions and independent expenditures).

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

5. *Cf.* Vt. Right to Life Comm., Inc. v. Sorrell (*VRLC*), 758 F.3d 118, 123 (2d Cir. 2014), *cert. denied*, 190 L. Ed. 2d 830 (U.S. 2015)(stating that contributions and expenditures are relevant to the definition of a political committee); Shays v. FEC, 337 F. Supp. 2d 28, 62–63 (D.D.C. 2004)(discussing concerns of candidate coordination that may arise with both contributions and expenditures).

imposed upon total contributions from a single source; a political committee that donates to or coordinates with a political candidate or campaign is bound to adhere to the restrictions.[6] Therefore, one must look at an expenditure's character when made by an organization to determine what limitations, if any, apply to contributions received by the same.[7]

### *A. Beginning of the Modern Era of Campaign Finance Law*

The U.S. Supreme Court's first major foray into the modern campaign finance realm came shortly after implementing the first modern campaign finance law. The prompt challenge highlighted the ever-present tension between efforts to limit the influence of money in politics and individuals' and groups' desire to influence election outcomes via financial expenditures. The Federal Election Campaign Act of 1971 ("FECA"),[8] which was extensively amended in 1974,[9] was quickly challenged by several individuals and organizations that sought to enjoin enforcement of the limitations on donations and expenditures set forth in the amendments to FECA.[10] This issue came before the Court in *Buckley v. Valeo*,[11] and the Court's decision in *Buckley* continues to have a substantial influence on decisions involving campaign finance.[12]

In *Buckley*, the Court made a substantial effort to distinguish between the extent of state interest necessary to uphold restrictions on contributions and independent expenditures.[13] Contributions are usually made merely to show support for a candidate, but they may also be made in exchange for political favors — a situation referred to as quid pro quo corruption.[14] Large contributions may be solicitations for quid pro quo

6. *See generally Citizens United*, 558 U.S. 310.

7. *Cf. id.* at 345 (noting that uncoordinated expenditures do not give rise to quid pro quo corruption concerns that would be a legitimate state interest in regulation); Wis. Right to Life State PAC v. Barland (*WRTL*), 664 F.3d 139, 155 (7th Cir. 2011)(stating that coordinated expenditures would disqualify committee for independent expenditure safe-harbor).

8. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C. §§ 431–55 (2012)).

9. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified as amended at 2 U.S.C. §§ 431–55 (2012)).

10. Buckley v. Valeo, 387 F. Supp. 135, 137 (D.D.C. 1975).

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

12. *See generally Citizens United*, 558 U.S. 310; FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238 (1986); *WRTL*, 664 F.3d 139; *VRLC*, 758 F.3d 118.

13. *See generally Buckley*, 424 U.S. 1.

14. Quid pro quo corruption arises when a candidate or officeholder obtains contributions, usually substantial in nature, from a donor, in order to secure for the donor a quid pro quo consideration from the candidate or officeholder while acting as a public

considerations from political office holders or candidates; even the potential for such arrangements gives rise to a legitimate state interest in forestalling any such action.[15]

Nonetheless, the *Buckley* court determined that limits on independent expenditures "fail to serve any substantial government interest" due to "the absence of prearrangement and coordination of an expenditure with the candidate or his agent . . . ."[16] From this decision came the fundamental distinction that has been a common theme of subsequent jurisprudence:[17] while both implicate First Amendment concerns, "expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do . . . limitations on financial contributions."[18]

Contribution limit analysis involves weighing interests involved in both contributions and expenditures. The basic expression served by a contribution, a show of financial support, can be communicated through contributions of varying amounts. Small or large contributions can serve to provide a general indication of support for a candidate, but a donor can indicate support regardless of a donation's size.[19] Conversely, a limitation on expenditures may completely exclude certain forms of expression, such as costly television advertising campaigns, thereby creating a restraint on the types of expression in which a person or organization can legally engage.[20] As the majority in *Buckley* wryly noted, "[b]eing free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline."[21]

The *Buckley* Court also attempted to clearly define the term "political committee" in campaign finance laws such as FECA.[22] Attempting to limit the organizations that would be subject to such laws, the Court embraced the concept that only organizations "that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate" are properly considered political committees.[23] This test was adopted by later courts, which gave

representative. *See Buckley*, 424 U.S. at 26. In order to implicate quid pro quo corruption concerns, the questioned donation must be "a direct exchange of an official act for money." McCutcheon v. FEC, 134 S. Ct. 1434, 1489 (2014).

15. *Buckley*, 424 U.S. at 26–27.

16. *Id.* at 47.

17. *See* Thalheimer v. City of San Diego, 645 F.3d 1109, 1113 (9th Cir. 2011).

18. *Buckley*, 424 U.S. at 23.

19. *Id.* at 20–21.

20. *Id.* at 19–20.

21. *Id.* at 19 n.18.

22. *Id.* at 79.

23. *Buckley*, 424 U.S. at 79.

considerable weight to the article "the" preceding the phrase "major purpose" when determining whether to treat an organization as a political committee.[24]

The Court further clarified its position regarding limitations on corporate speech in *First National Bank v. Bellotti*.[25] In a challenge to a Massachusetts statute that forbade expenditures by corporate actors to influence voting on referendums,[26] the Court maintained that speech otherwise protected under the First Amendment could not be limited due to the speaker's corporate identity.[27] The Court noted that, although preventing corruption, or the risk thereof, was a significant concern in other cases involving restrictions on expenditures, it was not at issue in a referendum.[28] This affirmed the principle the Court established in *Buckley*: quid pro quo corruption, or the appearance of such, would be the most sustainable ground for the Court to uphold government restrictions on political contributions.[29]

Later courts' jurisprudence generally hewed to the principles established in *Buckley*, and courts continue to apply these principles today.[30] One such case, *North Carolina Right to Life, Inc. v. Leake ("NCRL III")*,[31] involved applying a North Carolina statute that imposed contribution limits on certain donations made to a political organization.[32] The organization engaged in direct candidate contributions and also operated two subsidiary committees, one of which engaged in only independent expenditures.[33] The court relied on precise *Buckley* language, finding that only an organization with "'*the* major purpose' of supporting or opposing a candidate [is] to be considered a political committee."[34] By narrowly construing the language of *Buckley*,

24. *See* FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 252 n.6 (1986); N.C. Right to Life, Inc. v. Leake (*NCRL III*), 525 F.3d 274, 288 (4th Cir. 2008).

25. First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978).

26. MASS. GEN. LAWS ANN. ch. 55, § 8 (West 1977).

27. *Bellotti*, 435 U.S. at 784.

28. *Id.* at 790.

29. *See* Buckley v. Valeo, 424 U.S. 1, 26–27 (1976).

30. *See* Wis. Right to Life State PAC v. Barland (*WRTL*), 664 F.3d 139, 152 (7th Cir. 2011)(discussing *Buckley*'s use of quid pro quo corruption as a legitimate state interest in regulating political contributions); Vt. Right to Life Comm., Inc. v. Sorrell (*VRLC*), 758 F.3d 118, 133 (2d Cir. 2014), *cert. denied*, 190 L. Ed. 2d 830 (U.S. 2015)(noting the appropriate standard of review as established in *Buckley*); *See generally* Citizens United v. FEC, 558 U.S. 310 (2010)(applying rationale and holdings from *Buckley* extensively).

31. N.C. Right to Life, Inc. v. Leake (*NCRL III*), 525 F.3d 274 (4th Cir. 2008).

32. *Id.* at 277–78.

33. *Id.*

34. *Id.* at 288.

the court concluded that *Buckley* principles did not apply where an organization had candidate support as one of several major purposes.[35]

The Fourth Circuit also relied on *Buckley* in determining that preventing quid pro quo corruption is the only sufficiently important state interest to support restrictions on political contributions.[36] Relying on this foundation, the *NCRL III* court concluded that independent expenditures, which are made separate from and without the intervention of a candidate or campaign, were unlikely to implicate concerns over quid pro quo corruption due to the lack of candidate involvement in the transaction.[37] The rationale employed by the Fourth Circuit to exempt independent expenditures and the relevant organizations from campaign finance restrictions presaged the U.S. Supreme Court's similar reasoning in a case taken up just a few years later.

### *B.* Citizens United — *Reaffirming the* Buckley *Standard of Corruption*

In 2010, the U.S. Supreme Court squarely addressed the independent expenditure issue in *Citizens United v. FEC*.[38] In *Citizens United*, a nonprofit corporation challenged a federal statute that barred it from airing a video to urge viewers not to vote for then-Senator Hillary Clinton in the upcoming presidential primary election.[39] Relying on its ruling in *Bellotti*, the Court "rejected the argument that political speech of corporations or other associations should be treated differently" from the speech of individuals or other speakers in analyzing First Amendment challenges to speech restrictions.[40]

In its holding, the Court relied substantially on the *Buckley* ruling in distinguishing actions that could give rise to quid pro quo corruption, or the appearance thereof, from independent expenditures, which lacked the "prearrangement and coordination" necessary to implicate quid pro quo corruption concerns.[41] Although the *Buckley* court stated that only independent expenditures "alleviate[] the danger" of quid pro quo corruption,[42] here the Court determined that, on the facts as applied to the

35. *Id.*
36. *NCRL III*, 525 F.3d at 291–92.
37. *Id.* at 292.
38. Citizens United v. FEC, 558 U.S. 310 (2010).
39. *Id.* at 319–21.
40. *Id.* at 343.
41. *Id.* at 345 (noting that contributions were distinguishable from independent expenditures in that independent expenditures lacked the coordination with a candidate that would be necessary to give rise to *quid pro quo* corruption); *id.* at 357 (quoting language from *Buckley* that the lack of coordination with candidates and campaigns reduces the danger that independent expenditures would give rise to *quid pro quo* corruption).
42. Buckley v. Valeo, 424 U.S. 1, 47 (1976).

statute in question, "[l]imits on expenditures . . . 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."[43] In addition, the Court extended the *Bellotti* court's logic to strike a ban on independent expenditures made by corporations to support candidates.[44]

Nonetheless, the Court in *Citizens United* distinguished between contribution limits, "which . . . have been an accepted means to prevent *quid pro quo* corruption," and limits on independent expenditures.[45] The majority also noted that the government interest in preventing quid pro quo corruption was sufficient when limiting direct contributions to political committees.[46] The Court further noted that Citizens United had not directly contributed money to candidates and that contribution limits were not within the case's scope.[47]

Nonetheless, other courts have extended the *Citizens United* ruling to strike down contribution limits on donations made to independent expenditure organizations.[48] Such courts support their decisions with language from *Citizens United*, stating that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption."[49] However, this oft-quoted excerpt omits the sentence's beginning— "[f]or the reasons explained above" — which makes it clear that the Court relies on "the absence of prearrangement and coordination" in making this determination.[50] This omission has resulted in subsequent jurisprudence that applies the language of *Citizens United* too broadly in some cases and is likely the primary source of courts' divergent views on campaign contribution limits' application to allegedly independent expenditure organizations.

### C. *The Split in Authority Over Applying Contribution Limits to Independent expenditure Organizations*

Following the Court's ruling in *Citizens United*, a seemingly endless procession of challenges to campaign finance laws continues

43. *Citizens United*, 558 U.S. at 357.
44. *Id.* at 347.
45. *Id.* at 359 (italics in original).
46. *Id.* at 345.
47. *Id.* at 359.
48. *See generally* Wis. Right to Life State PAC v. Barland (*WRTL*), 664 F.3d 139 (7th Cir. 2011); Thalheimer v. City of San Diego, 645 F.3d 1109 (9th Cir. 2011); SpeechNow.org v. FEC, 599 F.3d 686 (D.C. Cir. 2010).
49. *Citizens United*, 558 U.S. at 357.
50. *Id.*

with a predictable regularity. One such challenge, *Wisconsin Right to Life State PAC v. Barland* ("*WRTL*"),[51] arose in the Seventh Circuit over a state statute limiting yearly aggregate contributions to political committees and independent expenditure organizations.[52] The Seventh Circuit acknowledged that federal courts have long distinguished between contributions and expenditures when determining the appropriate level of scrutiny to apply to constitutional challenges of campaign finance laws.[53] The court considered the recent decision in *Citizens United* and determined that there was no state interest sufficient to uphold a restriction on independent expenditures.[54] From this, the court held that contributions to independent expenditure organizations must be free from statutorily-defined contribution limits based on the principle that independent expenditures could not be subject to limitation.[55]

This finding was not, however, made without restriction. Although the argument that the mere possibility of the appearance of corruption could serve as grounds for expenditure regulation was firmly settled by the decision in *Citizens United*, the Seventh Circuit allowed for a situation where otherwise independent expenditures could fall within the scope of regulated activity.[56] The court in *WRTL* noted that, where an allegedly independent committee coordinates its activities with a candidate, such activities would not be considered independent and, therefore, would not be exempted from regulations applicable to political committees.[57]

The Ninth Circuit weighed similar considerations in *Thalheimer v. City of San Diego*.[58] The Ninth Circuit reasoned that *Citizens United*, by limiting the permissible justification for regulating campaign finance entities to the existence or appearance of quid pro quo corruption, had excluded previous considerations of access to or influence over elected officials as grounds for permitted regulation.[59] Also stopping short of exempting all purportedly independent organizations from regulation, the court noted that, where "regulated entities had unusually close relationships with the candidates they supported," the interest in

51. Wis. Right to Life State PAC v. Barland (*WRTL*), 664 F.3d 139 (7th Cir. 2011).

52. *Id.* at 144.

53. *Id.* at 152–53 (discussing distinction between intermediate scrutiny as applied to contributions and strict scrutiny as applied to expenditures).

54. *Id.* at 153.

55. *Id.* at 154.

56. *WRTL*, 664 F.3d at 155.

57. *Id.*

58. Thalheimer v. City of San Diego, 645 F.3d 1109 (9th Cir. 2011).

59. *Id.* at 1119 (stating that *Citizens United* stands for the proposition that independent expenditures do not give rise to quid pro quo corruption as a matter of law).

preventing corruption could be sufficient to justify regulation regardless of the entity's designation.[60]

At least one other court has confronted this issue and concluded that the actions of independent expenditure organizations can never give rise to the possibility of quid pro quo corruption.[61] However, this position is not a universally held view. The Second Circuit's recent decision in *Vermont Right to Life Committee, Inc. v. Sorrell* ("*VRLC*")[62] takes a closer look at independence in purportedly-independent expenditure organizations.

The controversy in *VRLC* concerned applying reporting requirements and contribution limits under Vermont law to the Vermont Right to Life Committee—Fund for Independent Expenditures ("VRLC-FIPE").[63] VRLC-FIPE was wholly controlled by Vermont Right to Life Committee, Inc., which also controlled Vermont Right to Life Committee, Inc. Political Committee ("VRLC-PC").[64] The Second Circuit acknowledged that other jurisdictions do not subject independent expenditure organizations to contribution limits, due to the lack of quid pro quo corruption or the possibility thereof in such organizations.[65] Nonetheless, the court affirmed the ruling of the trial court, stating that "VRLC-FIPE is enmeshed financially and organizationally with VRLC-PC, a PAC that makes direct contributions to candidates."[66] Given VRLC-FIPE's close ties to an organization that implicates quid pro quo corruption concerns, the court reasoned that VRLC-FIPE's independence could not be determined by the bare declaration that it was an independent expenditure organization.[67]

In reaching this conclusion, the Second Circuit considered two factors that courts in other jurisdictions analyzed to determine that independent expenditure organizations could not be subject to contribution limitations.[68] First, the court examined the practice of

60. *Id.* at 1121.

61. SpeechNow.org v. FEC, 599 F.3d 686 (D.C. Cir. 2010). The D.C. Circuit stated:

> In light of the Court's holding as a matter of law that independent expenditures do not corrupt or create the appearance of *quid pro quo* corruption, contributions to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption. The Court has effectively held that there is no corrupting 'quid' for which a candidate might in exchange offer a corrupt 'quo.'

*Id.* at 694–95.

62. Vt. Right to Life Comm., Inc. v. Sorrell (*VRLC*), 758 F.3d 118 (2d Cir. 2014), *cert. denied*, 190 L. Ed. 2d 830 (U.S. 2015).

63. *Id.* at 121.

64. *Id.* at 143.

65. *Id.* at 140.

66. *Id.* at 141.

67. *VRLC*, 758 F.3d at 145.

68. *Id.* at 141–42.

maintaining separate bank accounts to show the existence of an independent organization, which was sufficient for the D.C. Circuit to characterize certain funds as independent expenditure accounts free from the taint of quid pro quo corruption.[69] However, the court reasoned that maintaining separate bank accounts alone was not sufficient factual evidence to demonstrate that the alleged independent expenditure organization did not coordinate its expenditures with a candidate or organization.[70]

Second, the court looked to the committee separation set forth by the groups' organizational documents, which the Fourth Circuit used to determine that two organizations were separate as a matter of law.[71] Here, the Second Circuit flatly disagreed with the notion that a separation by paperwork was sufficient to alleviate potential concerns of quid pro quo corruption.[72]

Determining "whether a group is functionally distinct from a non-independent-expenditure-only entity" is dependent "on factors such as the overlap of staff and resources, the lack of financial independence, the coordination of activities, and the flow of information between the entities."[73] The court considered the availability and flow of information between independent and non-independent expenditure organizations as a factor in determining the actual independence of a purported independent expenditure organization.[74] In finding that VRLC-FIPE and VRLC-PC had transferred funds between organizations, shared substantial personnel between the two groups, and acted in concert in publishing voter guides, the court held that Vermont's contribution limits could properly be applied to VRLC-FIPE.[75]

Although a majority of the circuit courts that have considered the issue granted independent expenditure organizations broad exclusions from contribution limits,[76] the Second Circuit's analysis appears to more closely hew to the U.S. Supreme Court's stated rationale in *Citizens United*.[77] Rather than looking only to the description of an entity's expenditures as independent, the Second Circuit properly examined the

69. *See generally* Emily's List v. FEC, 581 F.3d 1 (D.C. Cir. 2009).

70. *VRLC*, 758 F.3d at 141; *accord* Ala. Democratic Conf. v. Ala. Att'y Gen., 541 F. App'x 931, 936 (11th Cir. 2013).

71. *See* N.C. Right to Life, Inc. v. Leake (*NCRL III*), 525 F.3d 274, 294 n.8 (4th Cir. 2008).

72. *VRLC*, 758 F.3d at 141–42.

73. *Id.*

74. *Id.* at 142.

75. *Id.* at 143–45.

76. *See generally* Emily's List v. FEC, 581 F.3d 1 (D.C. Cir. 2009); Wis. Right to Life State PAC v. Barland (*WRTL*), 664 F.3d 139 (7th Cir. 2011); *NCRL III*, 525 F.3d 274; Thalheimer v. City of San Diego, 645 F.3d 1109, 1121 (9th Cir. 2011).

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

organization's nature to determine whether its contributions and expenditures were truly made absent "prearrangement and coordination" with a candidate.[78] In order to accurately characterize an organization's nature, courts will need to determine whether the organization is independent from the control of both candidates and organizations that operate in tandem with candidates.

### *D. The Alter Ego Doctrine in Federal Common Law*

Although the distinction between political committees and independent expenditure organizations is an issue that courts have addressed, it has been approached with varying analyses and differing outcomes.[79] Even courts that have ruled that independent expenditure organizations cannot give rise to even the possibility of quid pro quo corruption have largely qualified their positions regarding situations where some degree of coordination occurred between a candidate and an avowed independent expenditure organization.[80] Given the disparate approaches to analyzing issues of separation between political committees and independent expenditure organizations, it likely will be helpful for courts to look to existing jurisprudence for guidance in determining how to distinguish between arrangements involving two independent entities and those involving multiple actors working in concert.

Federal common law already possesses such a test to determine when two entities, while apparently separate, should be treated as a single entity in matters before the courts. Federal courts have utilized the alter ego doctrine to resolve not only the imposition of financial liability among a corporation and its owners,[81] but also to determine when multiple corporations should be treated as a single indistinct entity when applying federal law.[82] The alter ego doctrine is an equitable doctrine, applied by courts to promote justice based on particular factual circumstances.[83] The U.S. Supreme Court has recognized that otherwise-

78. *VRLC*, 758 F.3d at 141–42.

79. *See generally WRTL*, 664 F.3d 139; *VRTL*, 758 F.3d 118; *Thalheimer*, 645 F.3d at 1121.

80. *See WRTL*, 664 F.3d at 155; *Thalheimer*, 645 F.3d at 1121.

81. *See generally* Trs. of the Nat'l Elevator Indus. Pension, Health Benefit & Educ. Funds v. Lutyk, 332 F.3d 188 (3d Cir. 2003); Talen's Landing, Inc. v. M/V Venture, II, 656 F.2d 1157 (5th Cir. 1981).

82. *See* NLRB v. Allcoast Transfer, Inc., 780 F.2d 576, 579 (6th Cir. 1986)(discussing the application of alter ego liability under the National Labor Relations Act).

83. *See, e.g.*, Alkire v. NLRB, 716 F.2d 1019, 1021 n.5 (4th Cir. 1983)(noting that "[i]n corporate law, as in the labor field, the alter ego doctrine is an equitable principle

respected legal forms may be disregarded where "to do so would work fraud or injustice."[84] The alter ego doctrine is a method by which courts can ensure that the legal forms of organization are not subverted to accomplish a goal incompatible with established law.[85]

Determining whether one organization operates functionally as "the alter ego of [a company] is a question of fact."[86] As such, a court must engage in a factual inquiry to determine if an alter ego situation exists between multiple entities.[87] Some courts include intent to evade the proper application of law as a part of their alter ego analysis,[88] but nearly all alter ego considerations look to factors such as "substantially identical management, business purpose, operation, equipment, customers, supervision, and ownership."[89] Although not all of these factors are directly transferrable to the association between political committees and independent expenditure organizations, analogous relationships can be made to the existing factors for alter ego treatment.

The alter ego doctrine's framework originally evolved from state common law and has become a part of federal common law as courts have interpreted the proper federal statutory law application.[90] Federal courts have applied the doctrine in various factual situations as required to ensure equity where recognition of legal formalities would defeat the intent of the public policy driving the law.[91] One such example can be found in *Goodman Piping Products, Inc. v. National Labor Relations Board.*[92] In *Goodman*, the Second Circuit Court of Appeals noted that the test for alter ego consideration was "flexible" and relied on the "substantially identical management, supervision, customers, ownership, and business purpose" of the corporations to determine that the alter ego doctrine was properly applied by the lower court.[93] Demonstrating the

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designed to prevent an entity from doing injury and then escaping responsibility")(emphasis omitted).

84. *See* Taylor v. Standard Gas & Elec. Co., 306 U.S. 307, 324 (1939).

85. *Cf.* Eichleay Corp. v. Int'l Ass'n of Bridge, Structural, & Ornamental Workers, 944 F.2d 1047, 1059 (3d Cir. 1991); Bd. of Trs. v. Universal Enters., Inc., 751 F.2d 1177, 1184 (11th Cir. 1985); CMSH Co. v. Carpenters Trust Fund, 963 F.2d 238, 241 (9th Cir. 1992).

86. Goodman Piping Products, Inc. v. NLRB, 741 F.2d 10, 11 (2d Cir. 1984).

87. *See* Flynn v. R.C. Tile, 353 F.3d 953, 962 (D.C. Cir. 2004).

88. *See, e.g.*, NLRB v. Allcoast Transfer, Inc., 780 F.2d 576, 579–82 (6th Cir. 1986)(discussing whether unlawful intent was a necessary factor in the application of the alter ego doctrine).

89. *Goodman Piping*, 741 F.2d at 12.

90. *See, e.g.*, NLRB v. Fullerton Transfer & Storage, Ltd., 910 F.2d 331, 336–37 (6th Cir. 1990)(discussing the application of the alter ego doctrine under various standards).

91. *See* Intergen N.V. v. Grina, 344 F.3d 134, 150 (1st Cir. 2003).

92. Goodman Piping Products, Inc. v. NLRB, 741 F.2d 10 (2d Cir. 1984).

93. *See id.* at 12.

alter ego doctrine's utility in multiple areas of law, this case resolved an appeal from an administrative law judge's decision involving the National Labor Relations Board's imposition of liability on a successor corporation under a collective bargaining agreement.[94]

Additionally, the D.C. Circuit relied on the alter ego doctrine in *Flynn v. R.C. Tile*[95] to resolve a pension contribution matter under a collective bargaining agreement.[96] The court determined that several successor corporations were subject to the same obligations that had bound the initial corporation because the businesses were operated within the same area, under the same management, and for the same purpose.[97] The D.C. Circuit further noted that the corporations did not observe the necessary formalities in transactions between the entities, additionally supporting the conclusion that the corporations were not distinct and separate entities.[98]

It is important to note that the alter ego doctrine may be applied differently depending on the particular case's circumstances. In federal labor law issues, the alter ego doctrine concerns businesses that attempt to avoid their collective bargaining obligations or disguise their continued operations.[99] Comparatively, in corporate law issues, the alter ego doctrine concerns one corporation dominating another or an attempt to effectuate a fraud or other wrong.[100] This Comment, however, is primarily concerned with the alter ego doctrine as evolved from its use in federal labor law, as the related entities in question may attempt to avoid obligations under both federal and state law.[101] It should also be noted that either the control exercised over an independent expenditure organization by a closely-related political committee or the attempt to circumvent the intent of campaign finance laws that may be present between the campaign finance entities addressed herein would likely satisfy the alter ego test as applied in the corporate law context.[102]

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94. *See id.* at 11.

95. Flynn v. R.C. Tile, 353 F.3d 953 (D.C. Cir 2004).

96. *See generally id.*

97. *See id.* at 958–60.

98. *See id.* at 960.

99. *See* Greater Kansas City Laborers Pension Fund v. Superior Gen. Contractors, 104 F.3d 1050, 1055 (8th Cir. 1997).

100. *See id.*

101. *See, e.g.*, Mass. Carpenters Cent. Collection Agency v. Belmont Concrete Corp., 139 F.3d 304, 307 (1st Cir. 1998)(discussing that the alter ego doctrine is used "to prevent employers from evading their obligations under" federal law and "applies to situations where the companies are parallel companies").

102. *See, e.g.*, Wolfe v. United States, 798 F.2d 1241, 1244 (9th Cir. 1986)(discussing factors of corporate alter ego doctrine in application of Montana law where an individual controlled all aspects of corporation and was treated as the alter ego of the corporation).

## III. THE PROBLEM OF CLOSELY-RELATED CAMPAIGN FINANCE ENTITIES AND A PROPOSED FRAMEWORK FOR ANALYSIS

The line of demarcation between political committees and independent expenditure organizations is sometimes difficult to draw precisely. When entities grow and expand, their power over the political process increases steadily.[103] It is therefore important not only for the federal legislature to draft necessary laws to ensure that these actors play fairly in the political sandbox, but also for the federal judiciary to have and apply these laws in a predictable and consistent manner. The divergent approaches currently used by various circuit courts[104] are clearly insufficient to ensure that all political organizations will be treated equally under federal law.

Applying the alter ego doctrine to cases where actual separation between political committees and independent expenditure organizations comes into question will create the predictability necessary in future jurisprudence involving campaign finance laws. This test is already widely used by federal courts,[105] and its extension into the campaign finance realm would require little adjustment to current analytical standards. Using this test would provide courts with a consistent and familiar standard to apply in situations involving these entities.

With the high level of sophistication now present in many campaign finance entities, a thorough inquiry into the facts and circumstances of each case could become overwhelming for the courts if a significant amount of challenges to the application of campaign finance laws were filed by these entities. In order to aid the courts in their analyses and to provide reasonable predictability to campaign finance entities, some presumptions regarding interactions between political committees and independent expenditure organizations should be established. Where the courts' administrative efficiency will be improved, it is acceptable to establish guidelines that provide courts with a framework of assumptions from which to begin their analysis.[106]

To provide clarity for political organizations, several presumptions regarding activity between political committees and independent

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103. *See* Cromer v. South Carolina, 917 F.2d 819, 833 (4th Cir. 1990).

104. *See supra* Part II.C. For additional discussion of the varying approaches taken by courts addressing contribution limits in the modern era, *see* James Bopp, Jr., Randy Elf, & Anita Y. Milanovich, *Contribution Limits After* McCutcheon v. FEC, 49 VAL. U. L. REV. 361 (2015).

105. *See* Goodman Piping Products, Inc. v. NLRB, 741 F.2d 10, 11–12 (2d Cir. 1984); Flynn v. R.C. Tile, 353 F.3d 953, 958–60 (D.C. Cir 2004); NLRB v. Allcoast Transfer, Inc., 780 F.2d 576, 581–83 (6th Cir. 1986).

106. *Cf.* FEC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 430 (1990)(discussing the use of *per se* rules in antitrust regulation).

expenditure organizations would be useful in order to allow these organizations to avoid creating an inappropriate nexus of activity that may create unwanted liability. By using the alter ego doctrine as the basis for these considerations, the presumptions can be modeled in such a way as to delineate those circumstances in which campaign finance entities should proceed with caution and evaluate alternative methods of operation. In this, independent expenditure organizations would less likely raise the quid pro quo corruption specter and avoid any questions about the propriety of their operations.

### *A. Difficulties With Current Approaches to the Treatment of Related Political Committees and Independent Expenditure Organizations*

Some circuit courts' current treatment of independent expenditure organizations after *Citizens United* is fairly straightforward. Several circuits have approached the issue in the same manner as the D.C. Circuit in *SpeechNow.org v. FEC*.[107] In *SpeechNow*, the D.C. Circuit considered contributions to an independent expenditure organization.[108] Following minimal consideration, the court concluded that "[i]n light of the Court's holding as a matter of law that independent expenditures do not corrupt or create the appearance of *quid pro quo* corruption, contributions to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption."[109]

Similarly, the Seventh Circuit noted that "as a categorical matter," independent expenditures cannot be tied to quid pro quo corruption.[110] From this, the court quickly concluded that contributions to an independent expenditure organization were entitled to the same deference.[111] Although the Seventh Circuit noted that where an "independent committee is not truly independent" it would not be entitled to exclusion from contribution limits, the court did not inquire into whether the expenditures in question were "truly independent."[112]

The Second Circuit in *Vermont Right to Life Committee, Inc. v. Sorrell* took a more nuanced approach to the question, looking to the interrelated activities of a political committee and an allegedly-independent expenditure organization.[113] After noting that the entities

107. SpeechNow.org v. FEC, 599 F.3d 686 (D.C. Cir. 2010).

108. *Id.* at 690.

109. *Id.* at 694 (relying on the U.S. Supreme Court's holding in *Citizens United*).

110. Wis. Right to Life State PAC v. Barland (*WRTL*), 664 F.3d 139, 155 (7th Cir. 2011).

111. *See id.*

112. *Id.*

113. *See generally* Vt. Right to Life Comm., Inc. v. Sorrell (*VRLC*), 758 F.3d 118 (2d Cir. 2014), *cert. denied*, 190 L. Ed. 2d 830 (U.S. 2015).

shared organization, advocacy, and fundraising activities, the court concluded that the independent expenditure organization was not acting truly independently, and there, was subject to the contribution limits that applied to political committees.[114] Although the Second Circuit reasonably considered the particularized facts in its analysis, its conclusion is clearly at odds with the weight of authority, which views the language of *Citizens United* in a more simplified manner.[115]

Despite the obvious administrative efficiency, it seems disingenuous to exempt all political organizations that label themselves as independent expenditure organizations from the campaign finance laws applicable to other entities. Such a practice is also not in line with *Citizens United*'s plain language, which noted that truly independent expenditures did not give rise to quid pro quo corruption due to a lack of coordination with a candidate.[116] Where facts suggest a potential for candidate coordination exists, *Citizens United*'s rationale appears to indicate that such coordinated activity may be within the campaign finance regulation's scope. It falls to the courts to determine the nature of the inquiry into any such situation.

### B. *Application of the Alter Ego Doctrine to Political Committees and Independent Expenditure Organizations*

Although there is currently no bright-line test to distinguish when a political committee and an independent expenditure organization are functionally indistinct, courts often engage in analysis where two purportedly separate entities may be treated as a single actor. The "alter ego" doctrine provides that two entities may be treated as a single unit where there is substantial overlap in their "management, business purpose, operation, equipment, customers, supervision, and ownership."[117] Where one entity's actions serve to avoid another related entity's obligations, courts may treat the two entities as a single actor in order to determine where the obligations should properly lie.[118] The same logic would apply to a situation where donations are directed to an independent expenditure organization as a means of circumventing the contribution limits that would apply to a situation where donations were made to a political committee.[119]

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114. *Id.* at 145.

115. *Compare id.* at 20, *with* SpeechNow.org v. FEC, 599 F.3d 686 (D.C. Cir. 2010); *WRTL*, 664 F.3d 139; Thalheimer v. City of San Diego, 645 F.3d 1109, 1121 (9th Cir. 2011).

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

117. Goodman Piping Products, Inc. v. NLRB, 741 F.2d 10, 11 (2d Cir. 1984).

118. *See* Flynn v. R.C. Tile, 353 F.3d 953, 958 (D.C. Cir. 2004).

119. *See VRLC*, 758 F.3d at 145.

Although plainly applying the alter ego doctrine to all political organizations would likely be unhelpful, the doctrine can serve as a framework for establishing how to determine when two organizations are functionally distinct. Several factors used in the alter ego doctrine are directly relevant to political organizations, including management, operation, supervision, and ownership.[120] However, courts would need to look to donors, contributions, and candidates supported, rather than customers and equipment, as factors to consider when determining whether political organizations acted as a single entity.[121] Consideration of these factors can be accomplished via several methods—this Comment presents one possible framework to aid courts in their analysis.

1. Analyzing Financial Separation Among Multiple Organizations

Separation of funds between a political committee and an independent expenditure organization is a vital factor in determining whether the two organizations are truly independent.[122] As the *sine qua non* of an independent expenditure organization is the dissociation of its expenditures from coordination with a candidate, it is clear that commingling funds between a political committee, which interacts and coordinates expenditures with a candidate, and an independent expenditure organization raises a legitimate concern that the commingled funds will be used for coordinated expenditures or direct contributions to candidates.[123] To assure that political funds are used for legitimate purposes, "strict segregation of its monies" must be observed where an independent expenditure organization deals with a political committee in a substantial capacity.[124]

Where two organizations jointly engage in fundraising activities, the possibility arises that contributions may be solicited on behalf of the independent expenditure organization as a method of circumventing contribution limits applicable to political committees.[125] The U.S. Supreme Court has noted that circumventing the contribution limits imposed on political committees raises the same quid pro quo corruption concerns as direct contributions to the same committees.[126] As the D.C. Circuit stated, "it is hard to understand how a donor, approached by the

120. See *supra* Part II.D at 24–25.

121. *See supra* Part II.D at 25.

122. Stop This Insanity v. FEC, 902 F. Supp. 2d 23, 43 (D.D.C. 2012).

123. *See VRLC*, 758 F.3d at 145.

124. *See* Pipefitters Local Union v. United States, 407 U.S. 385, 414 (1972).

125. *See* McConnell v FEC, 540 U.S. 93, 125 (2003), *rev'd on other grounds*, Citizens United v. FEC, 558 U.S. 310 (2010).

126. *See generally* FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431 (2001); Buckley v. Valeo, 424 U.S. 1 (1976).

same fundraiser on behalf of both [PACs], could not believe that his or her contributions would be linked."[127]

In order to prevent fund intermingling, two presumptions should apply to fundraising activities conducted by independent expenditure organizations. First, a presumption of fund intermingling should be made where political committee fundraisers solicit donations for an independent expenditure organization. This would alleviate the concern that donations may be funneled to an independent expenditure organization as a means of circumventing campaign contribution limits by directing donations exceeding these limits to organizations known to support the same candidates or causes that are advanced by the political committee.[128]

Second, a political committee presumably intermingles funds with an independent expenditure organization where donors to the political committee are encouraged to make contributions to an independent expenditure organization for the clear purpose of supporting the same cause or candidate supported by the political committee. While not as pernicious as directly soliciting contributions for the independent expenditure organization, such actions by a political committee may also raise quid pro quo corruption concerns by creating an association between a donor's support of a certain candidate and the donor's contribution to an independent expenditure organization.[129] Although this presumption might implicate situations where no actual link exists between the political committee and the independent expenditure organization, any action brought against a political committee could be swiftly dismissed on a showing that the two organizations share no accounts, personnel, or other common elements.

### 2. Analyzing Separation of Personnel Between Multiple Organizations

A separation of personnel between similar political committees and independent expenditure organizations is desirable, but may not always be practical due to some organizations' limited resources.[130] Nonetheless, a significant personnel overlap between the two

127. *Stop This Insanity*, 902 F. Supp. 2d at 43.

128. *See generally McConnell*, 540 U.S. 93; Regan v. Taxation with Representation, 461 U.S. 540, 544 (1983).

129. *Cf. Buckley*, 424 U.S. at 26–27 (stating concerns of apparent quid pro quo corruption where opportunities for abuse existed); *Colo. Republican Fed. Campaign Comm.*, 533 U.S. at 454–55 (noting that candidate can coordinate with donor to direct donations to certain organizations).

130. *See* Vt. Right to Life Comm., Inc. v. Sorrell (*VRLC*), 758 F.3d 118, 145 (2d Cir. 2014), *cert. denied*, 190 L. Ed. 2d 830 (U.S. 2015).

organizations creates difficulties for a court to determine the extent to which the actual operations of the two organizations are enmeshed with one another.[131] In order to provide clarity to both courts and political organizations, clear guidelines should be established as to the duties and responsibilities that one or more persons may hold in related political committees and independent expenditure organizations.

A vital factor in determining a purportedly independent expenditure organization's actual degree of independence is the separation of its expenditure decisions from any "prearrange[ment] or coordinat[ion] with the candidate."[132] An organization's expenditure decisions must be completely dissociated from a candidate to properly be considered "political speech that is not coordinated with a candidate."[133] Where the expenditures of an independent expenditure organization are coordinated with those of a political committee, it is clear that the two organizations' activities are not functionally distinct.[134] The U.S. Supreme Court has recognized that "coordinated expenditures are treated as contributions"[135] and that coordinated expenditures can be limited when necessary to ensure that contribution limits are respected.[136]

To alleviate the quid pro quo corruption concerns that arise with coordinated expenditures,[137] it would be desirable to have separate individuals or entities in charge of expenditure decisions for closely associated political committees and independent expenditure organizations. Without such separation, it is eminently possible that the two entities' shared management will not show proper respect to the necessary separation between the organizations.[138] Given this potential for quid pro quo corruption, courts should presume that a political committee and an independent expenditure organization operate as a single entity subject to the contribution limits applicable to political committees where one or more persons or entities occupies a position responsible for making expenditure decisions for both organizations.

Although the U.S. Supreme Court has determined that the quid pro quo corruption risk is attenuated when money passes from a donor to a candidate by way of a third party, such as a political committee, the Court also notes that the risk still exists where such donations are

131. *See id.*
132. *Id.*
133. Citizens United v. FEC, 558 U.S. 310, 485 (2010).
134. *VRLC*, 758 F.3d at 144.
135. Buckley v. Valeo, 424 U.S. 1, 46 (1976).
136. FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 465 (2001).
137. *See id.* at 446.
138. *See VRLC*, 758 F.3d at 143–44.

"directed, in some manner, to a candidate or officeholder."[139] Absent other considerations, the burden of proof should rest with "the party with easier access to relevant information."[140] Where one person or entity controls both candidate-connected funds and independent expenditures, the burden should rest on that party to show sufficient facts to demonstrate that there is no quid pro quo corruption in the arrangement.

## IV. CONCLUSION

Campaign finance law is an issue hotly contested by all parties affected. Courts have attempted to balance the public's interest in preventing corruption with the interests of those who wish to engage in political speech. While courts have generally been able to navigate these often-competing interests fairly, recent trends following *Citizens United* are troubling. If courts exempt organizations from campaign finance laws by an analysis no deeper than looking at the organization's designation, there will likely be an increasing amount of abuse by groups labeling themselves as independent expenditure organizations.

In order to limit potential abuse, it is both reasonable and advantageous for courts to adopt clear guidelines for permissible behavior by independent expenditure organizations, especially where they are closely related to political committees. This will benefit actors wishing to engage in political speech by allowing them to determine what activities raise quid pro quo corruption concerns without a costly court battle. Although no solution will mollify all parties, the guidelines suggested by this Comment are one example of reasonable boundaries that keep entities from coordinating with candidates either intentionally or accidentally. By avoiding such coordination, independent expenditure organizations, even those closely affiliated with a political committee, may remain firmly within safe-harbor protections for independent speech.

139. McCutcheon v. FEC, 134 S. Ct. 1434, 1452 (2014)(quoting *McConnell v. FEC*, 540 U.S. 93, 310 (2003)).

140. *See, e.g.*, Nat'l Commc'ns Ass'n v. AT&T Corp., 238 F.3d 124, 130 (2d Cir. 2001).

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