Congressional Research Service
Informing the legislative debate since 1914

Campaign Finance Law: An Analysis of Key Issues, Recent Developments, and Constitutional Considerations for Legislation

Updated May 17, 2023

Congressional Research Service
https://crsreports.congress.gov
R45320

CRS REPORT
Prepared for Members and
Committees of Congress

Congressional Research Service
Informing the legislative debate since 1914

SUMMARY

R45320

May 17, 2023

L. Paige Whitaker
Legislative Attorney

Campaign Finance Law: An Analysis of Key Issues, Recent Developments, and Constitutional Considerations for Legislation

Federal campaign finance law is composed of a complex set of limits, restrictions, and requirements on money and other things of value that are spent or contributed in the context of federal elections. While the Federal Election Campaign Act (FECA, or Act) sets forth the statutory provisions governing this area of law, several U.S. Supreme Court and lower court rulings have had a significant impact on the Act's regulatory scope. Notably, since 2003, a series of Supreme Court decisions has invalidated several FECA provisions that were enacted as part of the Bipartisan Campaign Reform Act of 2002 (BCRA), and in 2010, the Court invalidated a long-standing prohibition on independent expenditures funded from the treasuries of corporations and labor unions. Most recently, the Court in 2022 invalidated a BCRA provision establishing a cap on the repayment of candidate loans using post-election contributions. Generally, the Court has overturned such provisions as unconstitutional violations of First Amendment guarantees of free speech.

As a foundational matter, FECA distinguishes between a contribution and an expenditure: a contribution involves giving money to an entity, such as a candidate's campaign committee, while an expenditure involves spending money directly for advocacy of the election or defeat of a candidate. Generally, the Supreme Court has upheld limits on contributions, while invalidating limits on expenditures. As discussed below, FECA regulates campaigns in three primary ways: contribution limits; source restrictions, which are limits on who can make contributions; and disclosure and disclaimer requirements. In addition to civil penalties, FECA provides for criminal penalties under certain circumstances.

Contribution limits refer to how much a donor can contribute as well as how they can contribute. Contribution limits include specific limits on how much money a donor may contribute to a candidate, party, and political committee, which are known as base limits. FECA also provides for related restrictions, including the ban on contributions made through a conduit; the ban on converting campaign contributions for personal use; and the treatment of communications a donor makes in coordination with a candidate or party as contributions. While the Supreme Court has generally upheld base limits, the Court has struck down FECA's aggregate limits, which capped the *total* amount of money a donor could contribute to all candidates, parties, and political committees; limits on contributions to candidates whose opponents self-finance; and limits on contributions by minors. In addition, based on Supreme Court precedent, an appellate court ruling provided the legal underpinning for the establishment of super PACs.

FECA contains several bans, referred to as source restrictions, on who may make campaign contributions. Source restrictions include the ban on corporate and union campaign contributions directly from treasury funds—although the Supreme Court has held that limits on corporate and labor union independent spending are unconstitutional, the Court has upheld limits on contributions. Source restrictions also include the ban on federal contractor contributions—known as the "pay-to-play" prohibition—which the U.S. Court of Appeals for the D.C. Circuit upheld against a First Amendment challenge; the ban on foreign national contributions and expenditures; and the restrictions on foreign national involvement in U.S. campaigns.

FECA also sets forth disclaimer and disclosure requirements. FECA's disclaimer requirements mandate that statements of attribution appear directly on campaign-related communications. FECA's disclosure requirements mandate that political committees register with the Federal Election Commission (FEC) and comply with periodic reporting requirements. In addition, the law requires other entities—such as labor unions and corporations, including incorporated organizations that are tax-exempt under Section 501(c)(4) of the Internal Revenue Code—that make independent expenditures or electioneering communications to disclose information to the FEC. Generally, the Supreme Court has upheld the constitutionality of disclaimer and disclosure requirements against First Amendment challenges as substantially related to the governmental interest of safeguarding the integrity of the electoral process by promoting transparency and accountability.

Contents

Brief History of FECA 1
Constitutional Framework 4
Independent Expenditure and Electioneering Communication Limits 5
Ban on Corporate and Labor Union Independent Expenditures and Electioneering Communications 6
Ban on Political Party Independent Expenditures 8
Requirement That Political Parties Choose Between Coordinated and Independent Expenditures 9
Constitutional Considerations for Legislation 9
Contribution Limits 9
Specific Limits 10
Constitutionality of Base and Aggregate Limits 11
Additional Restrictions on Contributions 13
Ban on Contributions Made Through a Conduit 13
Ban on Conversion of Campaign Contributions for Personal Use 14
Treatment of Coordinated Communications as Contributions 14
Constitutionality of Other Contribution Limits 17
Limits on Contributions to Candidates Whose Opponents Self-Finance 17
Limits on Contributions Made by Minors 18
Limits on Contributions to Super PACs 19
Cap on Repayment of Candidate Loans Using Post-Election Contributions 20
Constitutional Considerations for Legislation 21
Source Restrictions 22
Ban on Corporate and Labor Union Contributions: PAC Required 23
Ban on Federal Contractor Contributions: "Pay-to-Play" Prohibition 23
Ban on Foreign National Contributions and Expenditures and Restrictions on Foreign National Involvement in U.S. Campaigns 25
Constitutional Considerations for Legislation 26
Disclaimer and Disclosure Requirements 27
Disclaimer 27
Disclaimer Requirements 27
Constitutionality of Disclaimer Requirements 28
Disclosure 29
Independent Expenditure Requirements 29
Electioneering Communication Requirements 30
Constitutionality of Disclosure Requirements 31
Constitutional Considerations for Legislation 34
Criminal Penalties 35

Figures

Figure 1. FECA Major Amendments and the U.S. Supreme Court: A Timeline 3

Tables

Table 1. Major Federal Contribution Limits, 2023-2024 10

Contacts

Author Information..... 36

Federal campaign finance law is composed of a complex set of limits, restrictions, and requirements on money and other things of value that are spent or contributed in the context of federal elections.[1] While the Federal Election Campaign Act[2] (FECA, or Act) sets forth the statutory provisions governing this area of law, several Supreme Court and lower court rulings have also had a significant impact on the Act's regulatory scope. Generally, the courts have overturned such provisions as unconstitutional violations of First Amendment guarantees of free speech.[3]

This report begins with a brief history of FECA and an overview of the constitutional framework for evaluating campaign finance law. It then examines Supreme Court decisions that have invalidated FECA provisions imposing limits on independent expenditures and electioneering communications. Next, organized by regulatory context and integrating governing court precedent, the report analyzes three primary areas of current FECA regulation: contribution limits; source restrictions; and disclaimer and disclosure requirements. In so doing, the report examines topics of recent interest to Congress, including the permissible uses of campaign funds; the scope of what constitutes a campaign contribution; the ban on foreign nationals making contributions and expenditures in connection with U.S. elections; and the restrictions on foreign nationals participating in campaigns.[4] As the Supreme Court's campaign finance jurisprudence informs the manner in which campaign financing may be constitutionally regulated, the report assesses pivotal rulings that may be instructive should Congress consider legislation in this area. The report also examines significant lower court rulings, including an appellate court decision that provides the legal underpinning for the establishment of super PACs. Finally, the report outlines the criminal penalties that may be imposed under the Act for violations of its provisions.

Brief History of FECA

In 1972, Congress first enacted FECA, requiring, among other things, campaign finance reporting by candidates and political committees.[5] In response to the Watergate scandal, Congress substantially amended the Act in 1974, generally implementing limits on contributions and expenditures, and creating the Federal Election Commission (FEC) to administer and provide civil enforcement of FECA.[6] As a result of a constitutional challenge to the 1974 Amendments, the Supreme Court issued its seminal Supreme Court ruling in *Buckley v. Valeo*, holding, among other things, mandatory spending limits unconstitutional, and invalidating the original

[1] For a discussion of campaign finance policy, see CRS Report R41542, *The State of Campaign Finance Policy: Recent Developments and Issues for Congress*, by R. Sam Garrett.

[2] Codified, as amended, at 52 U.S.C. §§ 30101-30146. FECA was first enacted in 1972 and amended in 1974, 1976, 1979, and most recently and significantly, in 2002 by the Bipartisan Campaign Reform Act (BCRA). *Id.*

[3] The First Amendment to the U.S. Constitution provides that "Congress shall make no law ... abridging the freedom of speech, or of the press." U.S. CONST. amend. I. This provision limits the government's power to restrict speech. *See id.; see also Overview of Campaign Finance*, Constitution Annotated, https://constitution.congress.gov/browse/essay/amdt1-7-11-1/ALDE_00013490/.

[4] *See, e.g., Policy Response to Russian Interference in the 2016 U. S. Elections Before the S. Select Comm. on Intelligence*, 115th Cong., (2018), https://www.intelligence.senate.gov/hearings/open-hearing-policy-response-russian-interference-2016-u-s-elections (last visited Feb. 6, 2023); *The Modus Operandi and Toolbox of Russia and Other Autocracies for Undermining Democracies Throughout the World Before the Subcomm. on Crime and Terrorism of the S. Comm. on the Judiciary*, 115th Cong. (2017), https://www.hsdl.org/c/abstract/?docid=801087 (last visited Feb. 23, 2023).

[5] *See* Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (codified at 52 U.S.C. §§ 30101-30146).

[6] *See* Federal Election Campaign Act Amendments of 1974, Pub .L. No 93-443, 88 Stat. 1263 (codified at 52 U.S.C. §§ 30101-30146).

appointment structure of the FEC.[7] Responding to the Court's ruling, in 1976, Congress amended FECA in order to, among other things, restructure the FEC and establish revised contribution limits[8] and amended it again in 1979, in order to revise certain reporting requirements.[9]

In 2002, Congress enacted the Bipartisan Campaign Reform Act (BCRA), which contains the most recent, comprehensive amendments to FECA.[10] Among other provisions, BCRA prohibited corporate and labor union spending on certain advertisements run prior to elections and restricted the raising and spending of unregulated funds—also known as "soft money"—in federal elections. Since 2003, a series of Supreme Court decisions has invalidated several BCRA provisions.[11] In addition, in 2010, the Court invalidated a long-standing prohibition on independent expenditures funded from the treasuries of corporations and labor unions.[12] Accordingly, the body of federal campaign finance law that remains was not originally enacted by Congress as a comprehensive regulatory policy.

A time line depicting major FECA amendments and relevant Supreme Court rulings evaluating those laws is shown in **Figure 1**.

[7] 424 U.S. 1 (1976) (per curiam).

[8] *See* Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (codified at 52 U.S.C. §§ 30101-30146).

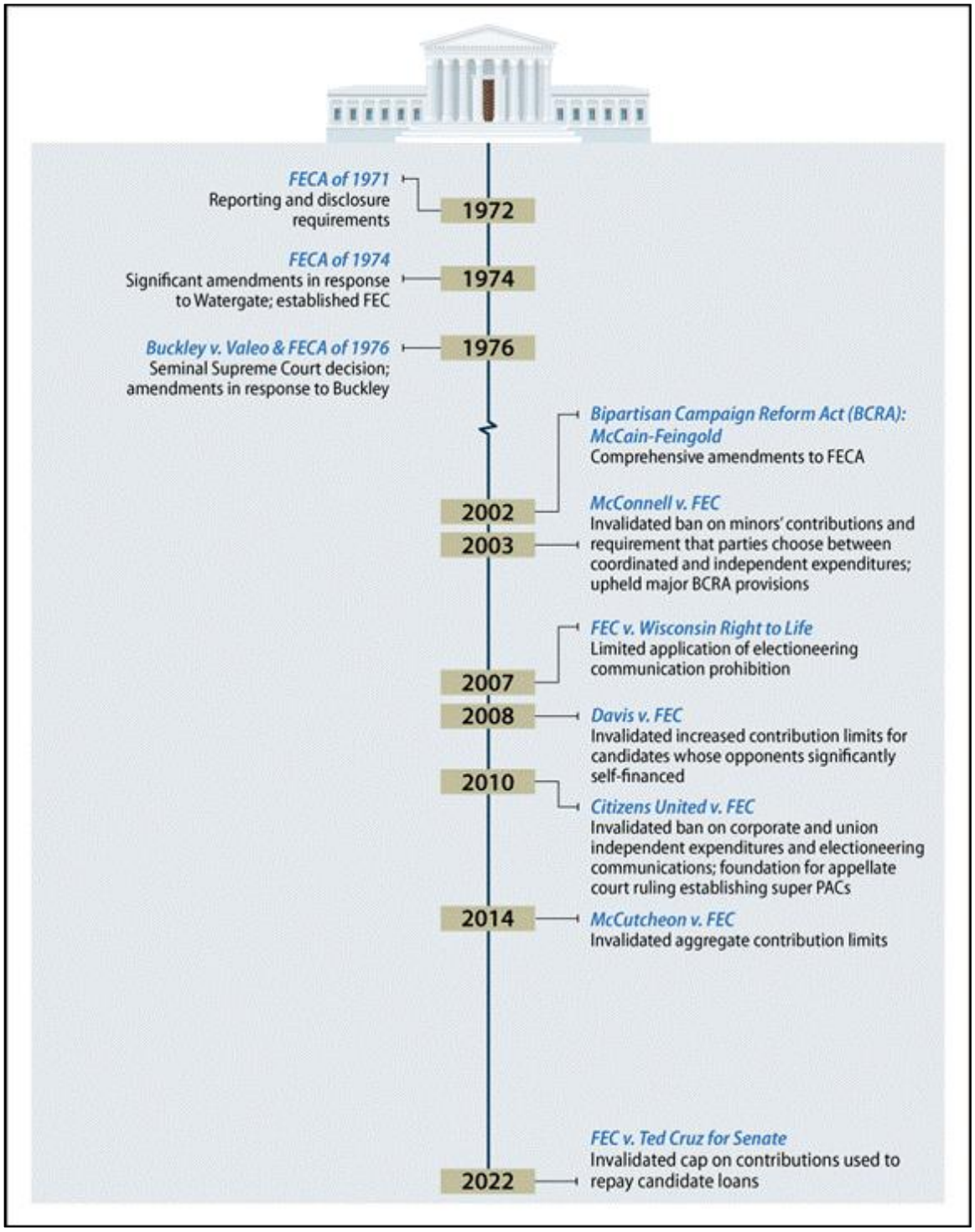
[9] *See* Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (codified at 52 U.S.C. §§ 30101-30146).

[10] Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified at 52 U.S.C. §§ 30101-30146). BCRA is also known as "McCain-Feingold," in reference to the principal Senate sponsors of the legislation.

[11] *See, e.g.*, McConnell v. FEC, 540 U.S. 93, 223 (2003), *overruled in part by* Citizens United v. FEC, 558 U.S. 310 (2010) (holding, *inter alia*, that a BCRA provision prohibiting contributions by minors age 17 or younger violates the First Amendment); Davis v. FEC, 554 U.S. 724, 740, 744 (2008) (holding that a BCRA provision establishing a series of staggered increases in contribution limits for candidates whose opponents significantly self-finance their campaigns violates the First Amendment); *Citizens United*, 558 U.S. at 310 (holding, *inter alia*, that a BCRA provision prohibiting corporate and labor union treasury funds for electioneering communications violates the First Amendment). *See* discussion *infra*, "Contribution Limits," "Source Restrictions."

[12] *See Citizens United*, 558 U.S. 310 (2010), discussed *infra*, pp. 6-8.

Figure 1. FECA Major Amendments and the U.S. Supreme Court: A Timeline



Source: Congressional Research Service, based on sources cited in this report.

Notes: FECA of 1971, Pub. L. No. 92-225, was enacted on February 7, 1972.

Constitutional Framework

In *Buckley*, the Supreme Court established the framework for evaluating the constitutionality of campaign finance regulation. According to the Court, limits on campaign contributions—which involve giving money to an entity—and limits on expenditures—which involve spending money directly for electoral advocacy—implicate rights of political expression and association under the First Amendment.[13] The Court, however, afforded different degrees of First Amendment protection and levels of scrutiny to contributions and expenditures.

Contribution limits are subject to a more lenient standard of review than expenditure limits, the Court held, because they impose only a marginal restriction on speech, and will be upheld if the government can demonstrate that they are a "closely drawn" means of achieving a "sufficiently important" governmental interest.[14] Unlike expenditure limits, which reduce the amount of expression, the Court opined, contribution limits involve "little direct restraint" on the speech of a contributor.[15] Although the Court acknowledged that a contribution limit restricts an aspect of a contributor's freedom of association, that is, his or her ability to support a candidate, nonetheless, the Court determined that a contribution limit still permits symbolic expressions of support, and does not infringe on a contributor's freedom to speak about candidates and issues.[16] Reasonable contribution limits, the Court announced, still permit people to engage in independent political expression, associate by volunteering on campaigns, and assist candidates by making limited contributions.[17] Regarding whether a contribution limit is closely drawn, the Court reasoned that it was relevant to examine the *amount* of the limit.[18] Limits that are too low could significantly impede a candidate or political committee from amassing the necessary resources for effective communication.[19] The Court concluded, however, that the FECA contribution limit at issue in *Buckley* would not negatively affect campaign funding.[20]

In contrast, the *Buckley* Court determined that because they impose a substantial restraint on speech and association, expenditure limits are subject to strict scrutiny, requiring that they be narrowly tailored to serve a compelling governmental interest.[21] Specifically, under the First Amendment, the Court determined, expenditure limits impose a restriction on the amount of money that a candidate can spend on communications, thereby reducing the number and depth of issues discussed and the size of the audience reached.[22] Such restrictions, the Court determined, are not justified by an overriding governmental interest. That is, because expenditures do not involve money flowing directly to the benefit of a candidate's campaign fund, the risk of quid pro quo corruption does not exist.[23] Essentially, quid pro quo corruption captures the notion of "a direct exchange of an official act for money."[24] Further, the Court in *Buckley* rejected the

[13] *See Buckley*, 424 U.S. at 23.

[14] *Id.* at 25.

[15] *Id.* at 21.

[16] *See id.* at 21, 24.

[17] *See id.* at 28-29.

[18] *See id.* at 21.

[19] *See id.*

[20] *See id*. (determining that there was no indication that the subject contribution limitations "would have any dramatic adverse effect on the funding of campaigns and political associations").

[21] *See id.* at 23.

[22] *See id.*

[23] *See id.*

[24] *See* McCutcheon v. FEC, 572 U.S. 185, 192 (2014).

government's asserted interest in equalizing the relative resources of candidates, and in reducing the overall costs of campaigns.[25] Upon a similar premise, the Court rejected the government's interest in limiting a wealthy candidate's ability to draw upon personal wealth to finance his or her campaign, and struck down a law limiting expenditures from personal funds. When a candidate self-finances, the Court pointed out, his or her dependence on outside contributions is reduced, thereby lessening the risk of corruption.[26]

Importantly, the Court's two most recent major campaign finance decisions, *McCutcheon v. FEC* and *FEC v. Ted Cruz for Senate*, have announced that only quid pro quo corruption or its appearance constitute a sufficiently important governmental interest to justify limits on contributions and expenditures.[27] In *McCutcheon*, the Court reasoned it has consistently rejected campaign finance regulation based on other governmental objectives, such as goals to "reduce the amount of money in politics," "level the playing field," "level electoral opportunities," or "equaliz[e] the financial resources of candidates."[28] While acknowledging that the Court's campaign finance jurisprudence has not always discussed the concept of corruption clearly and consistently, and that the line between quid pro quo corruption and general influence may sometimes seem vague, the Court in *McCutcheon* further reasoned that efforts to ameliorate "influence over or access to elected officials or political parties" do not constitute a permissible governmental interest.[29] More recently, in *FEC v. Ted Cruz for Senate*, discussed further below, the Court affirmed its holding in *McCutcheon*.[30] In *Ted Cruz for Senate*, the Court reiterated that the only acceptable government interest justifying restrictions on campaign speech under the First Amendment is the prevention of quid pro quo corruption or its appearance, regardless of how "well intentioned such proposals may be."[31]

Although the Supreme Court's campaign finance jurisprudence has shifted over the years, as this report illustrates, reviewing courts have applied the basic *Buckley* framework when evaluating whether a campaign finance regulation violates the First Amendment. Therefore, in *Buckley* and its progeny, with some exceptions, courts have generally upheld limits on contributions, concluding that they serve the governmental interest of protecting elections from corruption, while invalidating limits on independent expenditures, concluding that they do not pose a risk of corruption.

Independent Expenditure and Electioneering Communication Limits

The Supreme Court has invalidated FECA provisions that establish limits on certain types of independent expenditures and electioneering communications. FECA defines *independent expenditure* to mean an expenditure by a person that expressly advocates the election or defeat of a clearly identified candidate and "is not made in concert or cooperation with or at the request or suggestion of" the candidate or a party.[32] FECA defines *electioneering communication* to include

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

[26] *See id.*

[27] *See McCutcheon*, 572 U.S. at 192; FEC v. Ted Cruz for Senate, 142 S. Ct. 1638, 1652 (2022).

[28] *McCutcheon*, 572 U.S. at 191, 207 (alteration in original).

[29] *Id.* at 208.

[30] *See Ted Cruz for Senate*, 142 S. Ct. at 1652.

[31] *Id.*

[32] 52 U.S.C. § 30101(17).

"any broadcast, cable, or satellite" transmission that "refers to a clearly identified" federal office candidate and is transmitted within 60 days of a general election or 30 days of a primary.[33] As discussed below, in various rulings, the Court has invalidated those limits as violating the free speech guarantees of the First Amendment.

Ban on Corporate and Labor Union Independent Expenditures and Electioneering Communications

Relying on *Buckley*, in the 2010 decision of *Citizens United v. FEC*, the Court invalidated two FECA prohibitions on independent electoral spending by corporations and labor unions under a strict scrutiny standard of review.[34] The Court invalidated, first, the long-standing prohibition on corporations and labor unions[35] using their general treasury funds for independent expenditures, and second, a BCRA prohibition on the use of such funds for electioneering communications.[36] As a result of *Citizens United*, corporations and labor unions[37] are permitted to use their general treasury funds to make independent expenditures and electioneering communications and are not required to establish political action committees (PACs) for such spending.

According to the Court, independent expenditures and electioneering communications are protected speech, regardless of whether the speaker is a corporation.[38] Although the statute contained an exception that permitted the use of corporate treasury funds to establish, administer, and solicit contributions to a PAC for such spending,[39] the Court determined that merely permitting speech through a PAC does not equate to allowing a corporation to speak directly.[40] Corporations and PACs are separate associations, the Court emphasized.[41] The Court also

[33] 52 U.S.C. §§ 30118(b)(2), 30104(f)(3).

[34] 558 U.S. 310, 340 (2010). *See also* Am. Tradition P'ship, Inc. v. Bullock, 567 U.S. 516 (2014) (per curiam) (rejecting arguments attempting to distinguish a state law from the federal law invalidated by *Citizens United* and reiterating that "'political speech does not lose First Amendment protection simply because its source is a corporation.'") (quoting Citizens United, 558 U.S. at 342).

[35] Citizens United v. FEC, 558 U.S. 310, 376 (2010) ("The text and purpose of the First Amendment point in the same direction: Congress may not prohibit political speech, even if the speaker is a corporation or union."). Although the issue before the Court was limited to the application of the prohibition on independent expenditures and electioneering communications to Citizens United, a corporation, the reasoning of the opinion also appears to apply to labor unions.

[36] *See id*. at 372 (invalidating the FECA prohibitions currently codified at 52 U.S.C. §§ 30118(a), 30118(b)(2)); *see also* 52 U.S.C. § 30101(17) (defining an "independent expenditure" as a communication that "expressly advocat[es] the election or defeat of a clearly identified candidate" and is not coordinated with any candidate or party) and § 30104(f)(3) (defining an "electioneering communication" to include "any broadcast, cable, or satellite" transmission that "refers to a clearly identified" federal office candidate and is transmitted within 60 days of a general election or 30 days of a primary).

[37] Although the issue before the Court was limited to the application of the prohibition on independent expenditures and electioneering communications to Citizens United, a corporation, the reasoning of the opinion also appears likely to apply to labor unions. *Citizens United*, 558 U.S. at 376 ("The text and purpose of the First Amendment point in the same direction: Congress may not prohibit political speech, even if the speaker is a corporation or union.").

[38] *See id*. at 342-43.

[39] *See* 52 U.S.C. § 30118(b)(2)(c). The law also permits a corporation to establish a PAC in order to make contributions. *See id.* As a result of *Citizens United*, corporations are currently only required to use PAC funds to make contributions, not expenditures.

[40] *See Citizens United*, 558 U.S. at 337. Enumerating the "onerous" and "expensive" reporting requirements associated with PAC administration, the Court announced that even if a PAC could permit a corporation to speak, "the option to form a PAC does not alleviate the First Amendment problems" with the law. *Id.* at 335, 337. Further, the Court announced that such administrative requirements may even prevent a corporation from having enough time to create a PAC in order to communicate its views in a given campaign. *See id.* at 339.

[41] *See id.* at 337.

concluded that upholding the ban on corporate independent electoral spending would have the "dangerous, and unacceptable, consequence" of permitting Congress to prohibit the political speech of media corporations.[42]

In invalidating the FECA ban on corporate- and union-funded independent expenditures, the *Citizens United* ruling overturned a 1990 Supreme Court ruling, *Austin v. Michigan Chamber of Commerce*,[43] determining that it conflicted with a 1978 ruling, *First National Bank of Boston v. Bellotti*.[44] In *Bellotti*, the Court invalidated a state prohibition on corporate independent expenditures related to referenda, holding that the government cannot restrict political speech because the speaker is a corporation.[45] Criticizing the *Austin* decision for "bypass[ing] *Buckley* and *Bellotti*," the Court in *Citizens United* rejected the "antidistortion interest" that the Court in *Austin* "identified" to justify limits on political speech.[46] According to the Court in *Citizens United*, independent expenditures, including those made by corporations, do not cause corruption or the appearance of corruption.[47] The Court further denounced the *Austin* precedent for permitting "interfer[ence] with the 'open marketplace' of ideas protected by the First Amendment" through a ban on political speech by millions of associations of citizens—many of which are small corporations without large aggregations of wealth.[48]

Similarly, in invalidating the BCRA prohibition on corporate and union treasury-funded electioneering communications, the *Citizens United* ruling overruled a portion of its 2003 decision in *McConnell v. FEC* that upheld the facial validity of the prohibition.[49] The Court in *Citizens United* concluded that the *McConnell* decision had relied on the antidistortion interest recognized in *Austin* in reaching this conclusion.[50] The Court in *Citizens United* reached this conclusion despite a limiting principle imposed by a 2007 ruling, *FEC v. Wisconsin Right to Life, Inc. (WRTL)*.[51] In *WRTL*, the Court had narrowed the definition of *electioneering communication* to mitigate concerns that the law could prohibit First Amendment protected issue-related speech, known as issue advocacy. According to the Court in *WRTL*, the term *electioneering communication* could constitutionally encompass only express advocacy[52] (for example,

---

[42] *Id.* at 351.

[43] 494 U.S. 652 (1990), *overruled by* Citizens United v. FEC, 558 U.S. 310 (2010).

[44] *Citizens United*, 558 U.S. at 348. ("The Court is thus confronted with conflicting lines of precedent: a pre-*Austin* line that forbids restrictions on political speech based on the speaker's corporate identity and a post-*Austin* line that permits them.")

[45] 435 U.S. 765 (1978).

[46] *Citizens United*, 558 U.S. at 348 (rejecting the reasoning of the Court in *Austin* that "the corrosive and distorting" impact of large amounts of money that were acquired with the benefit of the corporate form, which the Court characterized as "an antidistortion interest" but were unrelated to the public's support for the corporation's political views, constituted a sufficiently compelling governmental interest to justify such a restriction).

[47] *See id.* at 357.

[48] *Id.* at 354.

[49] *See id*. at 365.

[50] *See id.* at 365–66. Referencing Justice Scalia's concurrence in *WRTL*, the Court agreed with the conclusion that "*Austin* was a significant departure from ancient First Amendment principles" and held "that stare decisis does not compel the continued acceptance of *Austin*." *Id.* at 319 (quoting FEC v. Wisconsin Right to Life, Inc., 551 U.S. 449, 490 (2007) (Scalia, J., concurring in part and concurring in judgment)).

[51] *See* 551 U.S. 449 (2007). *WRTL* was decided four years after the Supreme Court upheld the electioneering communication prohibition against a First Amendment facial challenge in *McConnell*. While not expressly overruling *McConnell*, the Court in *WRTL* limited the prohibition's application. *See id.* at 469-70.

[52] In *Buckley*, the Supreme Court provided the genesis for the concept of issue and express advocacy communications. In order to avoid invalidation of an earlier FECA expenditure limit on grounds of unconstitutional vagueness, the Court applied a limiting construction so that the provision applied only to non-candidate "expenditures for communications (continued...)

communications stating "vote for" or "vote against") or the "functional equivalent" of express advocacy.[53] That is, the Court advised that communications that could reasonably be interpreted as something "other than as an appeal to vote for or against a specific candidate" could not be considered electioneering communications.[54]

Ban on Political Party Independent Expenditures

The Supreme Court has held that limits on independent expenditures by political parties are unconstitutional under the First Amendment as applied to a Colorado political party. In *Colorado Republican Federal Campaign Committee v. FEC (Colorado I)*, although unable to reach agreement on an opinion, seven Justices of the Court ruled that the FECA provision limiting such independent expenditures, as applied to independent expenditures made by a party in connection with a U.S. Senate campaign, is unconstitutional.[55] The plurality opinion, written by Justice Breyer and joined by Justices O'Connor and Souter, announced that independent expenditures do not raise heightened governmental interests in regulation because the money is deployed to advance a political point of view separate from a candidate's viewpoint and, therefore, cannot be limited under the First Amendment.[56] The opinion emphasized that the "constitutionally significant fact" of an independent expenditure is the absence of coordination between the candidate and the source of the expenditure.[57] In conclusion, the opinion reasoned that, because the Constitution provides to individuals, candidate campaigns, and "ordinary political committees" a right to make independent expenditures without any limits, it therefore affords that same right to political parties.[58]

In contrast, the Court in *Colorado II* ruled that a political party's *coordinated* expenditures—that is, expenditures made in cooperation or consultation with a candidate—may be constitutionally limited in order to minimize circumvention of contribution limits.[59] In *Colorado II*, the Court overturned a lower court decision holding that the FECA coordinated party expenditure limits are unconstitutional.[60] According to the Court, unlike independent expenditures, coordinated party expenditures have no "significant functional difference" from direct party candidate contributions.[61]

---

that in express terms advocate the election or defeat of a clearly identified candidate for federal office" (i.e., express advocacy). 424 U.S. 1, 44 (1976) (per curiam). In a footnote, the Court explained that this limiting construction would restrict the application of the provision to communications containing express advocacy terms, such as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," and "reject." *Id.* at 44, n.52.

[53] Wisconsin Right to Life, Inc., 551 U.S. at 469-70.

[54] Id. at 470.

[55] 518 U.S. 604, 618 (1996).

[56] *See id.* at 614–615 (citing *FEC v. National Conservative Political Action Committee (NCPAC)*, 470 U.S. 480, 497 (1985)).

[57] *Id.* at 617 (citing *Buckley*, 424 U.S. at 45–46; *NCPAC*, 470 U.S. at 498).

[58] *Id.* at 618.

[59] FEC v. Colorado Republican Federal Campaign Committee (Colorado II), 533 U.S. 431, 465 (2001). For further discussion, see CRS Report RS22644, *Coordinated Party Expenditures in Federal Elections: An Overview*, by R. Sam Garrett and L. Paige Whitaker.

[60] *See id.*

[61] *Id.* at 464.

Requirement That Political Parties Choose Between Coordinated and Independent Expenditures

The Court has also determined that a requirement that political parties choose between making coordinated and independent expenditures is unconstitutional. In *McConnell v. FEC*, the Court held that a provision of BCRA[62] that required political parties to choose between coordinated and independent expenditures after nominating a candidate burdened the First Amendment right of parties to make unlimited independent expenditures.[63]

Constitutional Considerations for Legislation

Legislation that would limit independent expenditures or electioneering communications would likely be invalidated by the courts as unconstitutional. As discussed, the Supreme Court has held unconstitutional several provisions of FECA limiting independent expenditures or electioneering communications:

- a prohibition on corporations and labor unions using their general treasury funds to make independent expenditures and electioneering communications;[64]
- limits on independent expenditures in support of a U.S. candidate, as applied to a political party;[65] and
- a requirement that political parties, after nominating a candidate, choose between making coordinated and independent expenditures.[66]

Based upon existing precedent, the Court has made clear that such limits would be subject to a strict scrutiny standard of review, requiring that the limitations be narrowly tailored to serve the compelling governmental interest of avoiding quid pro quo corruption.

Contribution Limits

As discussed, FECA sets forth limits and restrictions on campaign contributions in federal elections. FECA broadly defines a "contribution" to include money or anything of value given for the purpose of influencing an election for federal office.[67] Specifically, FECA defines contributions to include "any gift, subscription, loan, advance, or deposit of money or anything of value" that is made "for the purpose of influencing any election for Federal office" or a payment that is made for compensation of personal services that are rendered to a political committee free of charge.[68]

As outlined above, FECA expressly defines contributions to include loans made to campaign committees; however, the Act exempts from such definition loans that are made from banks, so long as they are made in compliance with applicable law and "in the ordinary course of business."[69] Further, the Act specifies that a bank loan to a campaign committee must be

[62] Pub. L. No. 107-155, § 203, 116 Stat. 91 (codified at 52 U.S.C. § 30116(d)(4)).

[63] 540 U.S. 93, 213-14 (2003).

[64] *See* Citizens United v. FEC, 558 U.S. at 372.

[65] *See* Colorado I, 518 U.S. at 618.

[66] *See* McConnell, 540 U.S. at 213.

[67] 52 U.S.C. § 30101(8)(A).

[68] *Id.* § 30101(8)(A)(i), (ii).

[69] *Id.* § 30101(8)(B)(vii).

evidenced by a written instrument, ensuring repayment on a date certain or in accordance with an amortization schedule, and subject to the lending institution's "usual and customary interest rate."[70] However, in the case of other loans made to a campaign—for example, personal loans—the outstanding balance is considered a campaign contribution.[71] Therefore, the amount of an unpaid loan, coupled with other contributions made by an individual to a given candidate or committee, cannot exceed the applicable contribution limit.[72] Once a loan is repaid in full, the amount of the loan is no longer considered a contribution.[73]

The following sections of the report provide an overview of FECA's limits and restrictions on contributions, including a discussion of key constitutional rulings.

Specific Limits

FECA provides specific limits on how much individuals can contribute to a candidate, and these limits are periodically adjusted for inflation in odd-numbered years.[74] For the 2023-2024 federal election cycle, an individual can contribute up to $3,300 per election to a candidate.[75]

Table 1, below, outlines the major federal campaign contribution limits applicable to the 2023-2024 cycle.

Table 1. Major Federal Contribution Limits, 2023-2024

	Recipient			
Contributor	**Principal Campaign Committee**	**Multicandidate Committee (most PACs, including leadership PACs)**	**National Party Committee (DSCC; NRCC, etc.)**	**State, District, Local Party Committee**
Individual	$3,300 per election[a]	$5,000 per year	$41,300 per year[a] *Additional $123,900 limit for each special party account*[ab]	$10,000 per year (combined limit)
Principal Candidate Campaign Committee	$2,000 per election	$5,000 per year	Unlimited transfers to party committees	Unlimited transfers to party committees
Multicandidate Committee (most PACs, including leadership PACs)[c]	$5,000 per election	$5,000 per year	$15,000 per year *Additional $45,000 limit for each special party account*[b]	$5,000 per year (combined limit)
State, District, Local Party Committee	$5,000 per election (combined limit)	$5,000 per year (combined limit)	Unlimited transfers to party committees	Unlimited transfers to party committees

[70] *Id.* § 30101(8)(B)(vii)(II), (III).

[71] 11 C.F.R. § 100.52(b).

[72] *Id.* § 100.52(b)(2).

[73] *Id.*

[74] 52 U.S.C. § 30116(a).

[75] *See Contribution Limits for 2023–24*, FEC (Feb. 2023), https://www.fec.gov/resources/cms-content/documents/contribution_limits_chart_2023-2024.pdf.

	Recipient			
Contributor	**Principal Campaign Committee**	**Multicandidate Committee (most PACs, including leadership PACs)**	**National Party Committee (DSCC; NRCC, etc.)**	**State, District, Local Party Committee**
National Party Committee	$5,000 per election	$5,000 per year	Unlimited transfers to party committees	Unlimited transfers to party committees

Source: Table 1, CRS Report R41542, *The State of Campaign Finance Policy: Recent Developments and Issues for Congress*, by R. Sam Garrett, adapted from *Contribution Limits for 2023–24*, FEC (Feb. 2023), https://www.fec.gov/resources/cms-content/documents/contribution_limits_chart_2023-2024.pdf.

Notes: The table assumes that leadership PACs would qualify for multicandidate status. The FEC chart, noted above, includes additional information and addresses non-multicandidate PACs, which are relatively rare. The national party committee and the national party Senate committee (e.g., the DNC and DSCC, or RNC and NRSC) share a combined 2023-2024 per-candidate limit of $57,800 per six-year cycle. This limit is adjusted biennially for inflation.

a. These limits are adjusted biennially for inflation in odd-numbered years.

b. National party committees may accept these contributions for separate accounts for (1) presidential nominating conventions; (2) recounts and other legal compliance activities; and (3) party headquarters buildings. For additional discussion, see CRS Report R43825, *Increased Campaign Contribution Limits in the FY2015 Omnibus Appropriations Law: Frequently Asked Questions*, by R. Sam Garrett.

c. *Multicandidate committees* are those that have been registered with the FEC (or, for Senate committees, the Secretary of the Senate) for at least six months; have received federal contributions from more than 50 people; and (except for state parties) have made contributions to at least five federal candidates. *See* 11 C.F.R. § 100.5(e)(3). In practice, most PACs attain this status automatically over time.

Constitutionality of Base and Aggregate Limits

In *Buckley*, the Court upheld the constitutionality of FECA[76] base limits, which limit the amounts of money an individual can contribute to a candidate, party, or political committee.[77] In the years since, the Court has applied the principles articulated in *Buckley* to uphold what it considers reasonable contribution limits, while invalidating limits it determines are too low to allow a candidate to amass necessary resources for effective campaigning. For example, in *Nixon v. Shrink Missouri Government PAC*, the Court upheld a state law imposing limits on contributions made to candidates running for state office.[78] While observing that contribution limits must be closely drawn to a sufficiently important interest, the Court announced that the *amount* of the limitation "need not be 'fine tuned.'"[79] In contrast, in *Randall v. Sorell*, in a plurality opinion, the Court invalidated a Vermont law that provided that individuals, parties, and political committees were limited to contributing $400 to certain state candidates, per two-year election cycle, without

[76] FECA contribution limits are codified at 52 U.S.C. § 30116(a) and are adjusted biannually for inflation, 52 U.S.C. § 30116(c). In *Buckley*, the Supreme Court evaluated the constitutionality of certain provisions of federal campaign finance law, including the Federal Election Campaign Act (FECA) of 1971, as amended in 1974. Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam). In sum, the FECA provisions at issue included (1) a $1,000 contribution limit to any candidate by any individual; (2) a $25,000 limit on an individual's annual, aggregate contributions; (3) a $1,000 cap on a person's or group's independent expenditures "relative to a clearly identified candidate"; (4) spending limits on various candidates for various federal offices; and (5) spending limits on political parties' national conventions.

[77] 424 U.S. 1 (1976) (per curiam).

[78] 528 U.S. 377 (2000).

[79] *Id.* at 387–88 (quoting *Buckley*, 424 U.S. at 30, n. 3).

providing for inflation adjustment.[80] While unable to reach consensus on a single opinion, six Justices agreed that Vermont's contribution limits violated First Amendment free-speech guarantees. The plurality opinion, written by Justice Breyer and joined by two other Justices, determined that the contribution limits in *Randall* were substantially lower than limits the Court had previously upheld, as well as limits in effect in other states, and that they were not narrowly tailored.[81] The opinion also concluded that the limits substantially restricted candidates, particularly challengers, from being able to raise the funds necessary to run a competitive campaign; impeded parties from getting their candidates elected; and deterred individual citizens from volunteering on campaigns (because the law counted certain volunteer expenses toward a volunteer's individual contribution limit).[82]

In contrast to base contribution limits, FECA also provided for limits on the amount of money a donor could contribute in *total* to all candidates, parties, and political committees, which is referred to as aggregate contribution limits. In a 2014 ruling, *McCutcheon*, the Supreme Court held that a BCRA provision establishing aggregate contribution limits was unconstitutional under the First Amendment.[83] Characterizing them as an "outright ban" on further contributions once the aggregate amount has been reached, the Court determined that they violate the First Amendment by infringing on political expression and association rights, without furthering the governmental interest of preventing quid pro quo corruption or its appearance.[84]

In *Buckley v. Valeo*, the Court had upheld the constitutionality of a $25,000 federal aggregate contribution limit then in effect,[85] characterizing that limit as a "quite modest restraint" that served to prevent circumvention of base limits.[86] In other words, the Court determined that the aggregate limits constrained an individual from, for example, contributing large amounts to a particular candidate through "the use of unearmarked contributions to political committees likely to contribute to that candidate."[87] In *McCutcheon*, however, the Court invalidated a BCRA provision that imposed biennial limits on aggregate contributions, which were adjusted for inflation each election cycle.[88] For example, during the 2011-2012 election cycle, the Act prohibited individuals from making contributions to candidates totaling more than $46,200, and to parties and PACs (with the exception of "super PACs") totaling more than $70,800.[89] (The base limits on contributions established by BCRA were not at issue in this case and remain in effect.)

As a threshold matter, the plurality opinion in *McCutcheon* determined that, regardless of whether strict scrutiny or *Buckley*'s "closely drawn" standard applies, the analysis requires the Court to

[80] 548 U.S. 230, 262 (2006).

[81] *See id.* at 261.

[82] *See id.* at 253, 259-60. The opinion agreed with the district court "that the Act's contribution limits 'would reduce the voice of political parties' in Vermont to a 'whisper.'" *Id.* at 259 (quoting Landell v. Sorrell, 118 F. Supp. 2d 459, 487 (D. Vt. 2000), *aff'd in part and vacated in part*, 382 F.3d 91 (2d Cir. 2002)).

[83] 572 U.S. 185 (2014). For discussion of the policy impact of *McCutcheon*, see CRS Report R43334, *Campaign Contribution Limits: Selected Questions About McCutcheon and Policy Issues for Congress*, by R. Sam Garrett.

[84] *Id.* at 204.

[85] Buckley v. Valeo, 424 U.S. 1, 38 (1976) (per curiam).

[86] *Id.*

[87] *Id.*

[88] *See* McCutcheon, 572 U.S. at 227 (invalidating a FECA provision codified at 52 U.S.C. § 30116(a)(3)).

[89] Of that amount, no more than $46,200 could be contributed to state and local parties. In comparison, during the same election cycle, individuals were subject to individual base limits of $2,500 per candidate, per election; $30,800 per year to national parties; $10,000 per year to state, local and district party committees combined; and $5,000 per year to PACs. Contributions to super PACs are not subject to limits. *See infra* at pp. 19–20.

"assess the fit" between the government's stated objective and the means to achieve it.[90] Applying that analysis to FECA's aggregate contribution limits, the opinion observed a "substantial mismatch" between the two, and concluded that even under *Buckley*'s more lenient standard of review, the limits could not be upheld.[91] The plurality in *McCutcheon* further concluded that *Buckley*'s holdings on aggregate limits did not control[92] because the *Buckley* Court had engaged in minimal analysis of aggregate limits and that the limits at issue in *McCutcheon* established a different statutory regime and operated under a distinct legal backdrop.[93] The Court reasoned that, since *Buckley*, Congress had enacted other statutory and regulatory safeguards against circumvention of base limits.[94] The opinion also outlined additional safeguards that Congress could enact to prevent circumvention of base contribution limits, such as targeted restrictions on transfers among candidates and political committees or enhanced restrictions on earmarking, but cautioned that the opinion was not meant to evaluate the validity of any particular proposal.[95] Further distinguishing the holding in *Buckley*, the *McCutcheon* plurality emphasized that aggregate contribution limits restrict how many candidates and committees an individual can support,[96] which creates an "outright ban" on further contributions. This ban, the opinion concluded, unconstitutionally restricts both free speech and association rights.

Importantly, it was in *McCutcheon* that the Court announced that the prevention of quid pro quo corruption or its appearance is the only legitimate governmental interest for restricting campaign contributions.[97] According to the opinion, the spending of large sums of money in connection with elections, but absent an effort to control how an officeholder exercises his or her official duties, does not give rise to quid pro quo corruption.[98] Although *McCutcheon* did not expressly adopt a stricter standard of review for contribution limits, its announcement that only quid pro quo corruption or its appearance serve as a compelling governmental interest may affect the degree to which contribution limits are upheld in future rulings.

Additional Restrictions on Contributions

Ban on Contributions Made Through a Conduit

In addition to limiting the amount a donor may contribute to a campaign, FECA also places certain restrictions on the types of contributions that a donor can make. For example, FECA prohibits contributions made through a conduit—that is, by one person "in the name of another person"—and bans candidates from knowingly accepting such contributions.[99] This provision serves to prevent an individual, who has already contributed the maximum amount to a given candidate, from circumventing contribution limits by giving money to someone else to contribute

[90] *See* McCutcheon, 572 U.S. at 199.

[91] *Id.*

[92] *See id.* at 200.

[93] *See id.*

[94] *See id.* at 200-1.

[95] *See id.* at 221-23.

[96] *Id.* Once an individual contributed $5,200 each to nine candidates, the aggregate limits were triggered and, as the opinion calculates, the individual was then prohibited from making further contributions, up to the maximum permitted by the base limits, to other candidates.

[97] *See id.* at 192 (citing Citizens United v. FEC, 558 U.S. 310, 359 (2010)).

[98] The Court explained that "[t]he hallmark of corruption is the financial quid pro quo: dollars for political favors." *Id.* at 192 (quoting FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 497 (1985)).

[99] 52 U.S.C. § 30122.

to that same candidate. FEC regulations further specify that a corporation is prohibited from reimbursing employees for their campaign contributions through a bonus, expense account, or other form of compensation.[100] Notably, as discussed below in the section of the report entitled "Criminal Penalties," FECA provides for specific penalties for knowing and willful violations of this provision.[101]

Ban on Conversion of Campaign Contributions for Personal Use

FECA also expressly prohibits a candidate from converting campaign funds for personal use.[102] Specifically, the Act considers a contribution to be converted to personal use if it is used to fulfill any commitment, obligation, or expense that would exist "irrespective" of the candidate's campaign or duties as a federal officeholder. Examples of such expenses include home mortgage, rent, or utility payments; clothing purchases; non-campaign-related car expenses; country club memberships; vacations; household food; tuition payments; admission to sporting events, concerts, theater performances, or other entertainment not associated with a campaign; and health club fees.[103]

The FEC has issued advisory opinions in response to inquiries regarding whether certain expenses may be paid for with campaign funds. For example, in 2018, the FEC decided that a candidate may pay for child care expenses with campaign funds if they are incurred as a direct result of campaign activity.[104] According to the FEC, applying the irrespective test, if child care expenses are incurred as a direct result of campaign activity, "they would not exist irrespective" of the campaign.[105] In addition, the FEC has issued advisory opinions approving the use of campaign funds to pay for certain residential home security measures, reasoning that such security measures would not be necessary except for the requestors' roles as federal candidates or officeholders.[106]

Treatment of Coordinated Communications as Contributions

As discussed, FECA defines *independent expenditure* to mean an expenditure by a person that expressly advocates the election or defeat of a clearly identified candidate, and "is not made in concert or cooperation with or at the request or suggestion of" the candidate or a party.[107] In contrast, FECA provides that a communication will be considered "coordinated" if it is made "in cooperation, consultation or concert, with, or at the request or suggestion of" the candidate or a party.[108] In other words, if a communication—such as a political advertisement—is made in coordination with a candidate or political party, it is treated as an in-kind contribution to the corresponding candidate or party, or as a coordinated party expenditure, rather than as an

[100] 11 C.F.R. §114.5(b)(1).

[101] *See infra* p. 36.

[102] 52 U.S.C. § 30114(b). *See also* CRS Report R46878, *Permissible and Prohibited Uses of Campaign Funds: Frequently Asked Questions and Policy Overview*, by R. Sam Garrett.

[103] 52 U.S.C. § 30114(b)(2); 11 C.F.R. §113.1(g).

[104] FEC, Advisory Opinion (AO) 2018-06 (May 11, 2018) (Use of campaign funds for childcare expenses).

[105] *Id.* at 3.

[106] *See, e.g.*, FEC, AO 2022-02 (May 4, 2022); AO 2020-06 (Jan. 29, 2021); AO 2011-17 (Sept. 1, 2017); AO 2011-05 (May 1, 2011); and AO 2009-08 (May 7, 2009).

[107] 52 U.S.C. § 30101(17).

[108] *Id.* § 30116(a)(7)(B)(i),(ii).

independent expenditure.[109] Like other contributions, in-kind contributions and coordinated party expenditures are subject to FECA limits and source restrictions, as discussed below.[110]

The regulatory line between coordinated communications and independent expenditures is based on Supreme Court precedent. In various rulings, the Court has determined that the First Amendment does not allow any limits on expenditures that are made independently of a candidate or party because the money is deployed to advance a political point of view separate from a candidate's viewpoint. In other words, the Court has explained, without coordination or "prearrangement" with a candidate, not only is the value of an expenditure decreased, but so is "the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate."[111] Accordingly, the Court has reasoned that independent expenditures do not raise heightened governmental interests in regulation.[112] As the Court has emphasized, the "constitutionally significant fact" of an independent expenditure is the absence of coordination between the candidate and the source of the expenditure,[113] and the independence of such spending is easily distinguishable when it is made "without any candidate's approval (or wink or nod)."[114] Hence, individuals, political parties, political action committees (PACs), super PACs, and other organizations can engage in unlimited independent expenditures. Furthermore, as a result of the Court's ruling in *Citizens United v. FEC*, discussed above, corporations and labor unions have a constitutionally protected right to engage in unlimited independent expenditures directly from their revenue funds or "general treasuries" and are not required to establish a PAC in order to conduct such spending.[115]

As summarized below, regulations promulgated under FECA set forth specific criteria establishing when a communication by an organization will be considered coordinated with a candidate or a party and thereby treated as a contribution.[116] Specifically, the regulations set forth a three-prong test whereby if all prongs of the test are met—payment, content, and conduct—a communication will be deemed coordinated:

Payment. In general, the regulations provide that the "payment" standard is met if the communication is paid for, in whole or in part, by a person other than the candidate, a candidate committee, or party.[117]

Content. The "content" standard addresses the subject and timing of a communication. The content standard does not require that a communication contain express advocacy (i.e., expressly advocating the election or defeat of a clearly identified candidate, using terms such as "vote for,"

[109] 11 C.F.R. § 109.21(b). This portion of the report contains a summary discussion of what constitutes coordination under federal campaign finance law. For further information, consult the Federal Election Commission, FEC regulations, and the FEC webpage, *Coordinated Communications*, FEC, https://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/coordinated-communications/ (last visited Feb. 6, 2023). *See also*, CRS Report RS22644, *Coordinated Party Expenditures in Federal Elections: An Overview*, by R. Sam Garrett and L. Paige Whitaker.

[110] 52 U.S.C. § 30116(a)(7)(B)(i),(ii).

[111] Citizens United v. FEC, 558 U.S. 310, 357 (2010) (citing Buckley v. Valeo, 424 U.S. 1, 47 (1976) (per curiam)). *See infra* pp. 6–8.

[112] *See* Buckley, 424 U.S. at 47; FEC v. NCPAC, 470 U.S. 480 (1985); Colorado I, 518 U.S. 604, 617 (1996).

[113] *See Colorado I*, 518 U.S. at 617.

[114] Colorado II, 533 U.S. 431, 442 (2001).

[115] *See Citizens United*, 558 U.S. 310 (2010). *See infra* pp. 6–8.

[116] 11 C.F.R. § 109.21.

[117] *Id.* § 109.21(a).

"elect," or "vote against").[118] Generally, the regulations provide that the content standard is met if a communication is

- an electioneering communication, which is defined to include a broadcast, cable, or satellite communication that refers to a federal candidate, made within 60 days of a general election or 30 days of a primary;[119]
- a public communication that distributes or republishes, in whole or in part, candidate campaign materials, with certain exceptions;
- a public communication that expressly advocates election or defeat of a clearly identified candidate or is the "functional equivalent of express advocacy"; or
- a public communication that, in part, refers to a candidate or party and, for House or Senate elections, is disseminated within 90 days before a primary or general election or, for presidential and vice presidential elections, is disseminated within 120 days before a primary or nominating convention or caucus.[120]

Conduct. The "conduct" standard addresses interactions between the person paying for the communication and the relevant candidate or party. Generally, the regulations specify that the conduct standard is met if

- the communication is created at the "request or suggestion of" a candidate or party, or at the suggestion of the funder of the communication and the candidate or party assents to the suggestion;
- the candidate or party is "materially involved" in decisions regarding the communication;
- the communication is created after "substantial discussions" between the funder of the communication and the candidate or party;
- the funder of the communication employs a "common vendor" meeting certain criteria to create the communication; or
- a person who has previously been an employee or independent contractor of a candidate or party during the previous 120 days uses or conveys certain information to the funder of the communication.[121]

Exceptions or "Safe Harbors." FEC regulations also set forth several "safe harbors" exempting communications from being deemed coordinated. Below are a few examples, summarized.

- *Endorsements and Solicitations*. A public communication in which a federal candidate endorses or solicits funds for another federal or nonfederal candidate is not considered coordinated with respect to the endorsement or the solicitation, unless the public communication "promotes, supports, attacks, or opposes" the endorsing candidate or another candidate running for the same office.[122]
- *Firewalls*. The "conduct" standards are not met if the commercial vendor, former employee, or political committee established a firewall that meets certain requirements, including a prohibition on the flow of information between employees or consultants providing services for the funder of the

[118] 11 C.F.R. § 109.21(c).

[119] 52 U.S.C. § 30104(f)(3)); 11 C.F.R. §100.29.

[120] *Id.* §§ 109.21(c), 109.23.

[121] *Id.* § 109.21(d).

[122] *Id.* § 109.21 (g).

communication, and employees or consultants providing services to the candidate or the candidate's opponent or a party. The firewall must be described in a written policy that is distributed to all relevant employees, consultants, and clients.[123]

- *Publicly Available Information*. If information material to the creation of a communication was obtained from a publicly available source, the other "conduct" standards are not met, unless the communication was made at the "request or suggestion" of a candidate or party, or at the suggestion of the funder of the communication and the candidate or party assents to the suggestion.[124]
- *Legislative Inquiries*. If a candidate or party responds to an inquiry about its position on a legislative or policy issue—but not including campaign plans, projects, activities, or needs—the "conduct" standards are not met.[125]

Constitutionality of Other Contribution Limits

In addition to invalidating the BCRA provision setting forth aggregate contribution limits, discussed above, the Supreme Court has also invalidated the BCRA provisions establishing limits on contributions whose opponents significantly self-finance and the limits on contributions by minors. Furthermore, in a ruling that provided the legal underpinning for the establishment of super PACs, an appellate court has ruled that limits on contributions to groups that make only independent expenditures are unconstitutional. The following sections of the report briefly examine these rulings.

Limits on Contributions to Candidates Whose Opponents Self-Finance

In 2008, the Court held, in *Davis v. FEC*, that a statute establishing a series of staggered increases in contribution limits for candidates whose opponents significantly self-finance their campaigns violates the First Amendment, because the penalty imposed on expenditures of personal funds is not justified by the compelling governmental interest of lessening corruption or its appearance.[126] Enacted as part of BCRA, the invalidated provision of law is known as the "Millionaire's Amendment."[127] The Millionaire's Amendment provided a complex statutory formula (using limits that were in effect at the time the Court considered *Davis*) requiring that if a candidate for the House of Representatives spent more than $350,000 of personal funds during an election cycle, the individual contribution limits applicable to her opponent were increased from the then-current limit ($2,300 per election) to up to triple that amount (or $6,900 per election). Similarly, for Senate candidates, a separate provision generally raised individual contribution limits for a candidate whose opponent exceeded a designated threshold level of personal campaign funding that was based on the number of eligible voters in the state.[128] For both House and Senate candidates, the increased contribution limits were eliminated when parity in spending was reached between the two candidates.

[123] *Id.* § 109.21(h).

[124] *Id.* § 109.21(d).

[125] *Id.* § 109.21(f).

[126] *See* Davis v. FEC, 555 U.S. 724, 740, 744 (2008).

[127] Pub. L. No. 107-155, § 319(a), 116 Stat. 81 (2002) (codified at 52 U.S.C. § 30117(a)) (establishing increased contribution limits for House candidates whose opponents significantly self-finance their campaigns).

[128] *Id.* at § 304 (codified at 52 U.S.C. § 30116(i)) (establishing increased contribution limits for Senate candidates whose opponents significantly self-finance their campaigns).

While acknowledging the long history of jurisprudence upholding the constitutionality of individual contribution limits, the Court emphasized its definitive rejection of any limits on a candidate's expenditure of personal funds to finance campaign speech.[129] The Court reasoned that limits on a candidate's right to advocate for his or her own election are not justified by the compelling governmental interest of preventing corruption—instead, the use of personal funds actually lessens a candidate's reliance on outside contributions and thereby counteracts coercive pressures and risks of abuse that contribution limits seek to avoid.[130]

Although conceding that the Millionaire's Amendment did not directly impose a limit on a candidate's expenditure of personal funds, the Court concluded that it impermissibly required a candidate to make a choice between the right to free political expression and being subjected to discriminatory contribution limits, and that it created a fundraising advantage for his or her opponents.[131] In contrast, if the law had simply increased the contribution limits for all candidates—both the self-financed candidate as well as the opponent—the Court opined that it would have passed constitutional muster.[132] Intrinsically, candidates have different strengths based on factors such as personal wealth, fundraising ability, celebrity status, or a well-known family name, and by attempting to level electoral opportunities, the Court reasoned, Congress is deciding which candidate strengths should be allowed to affect an election.[133] The Court warned that using election law to influence voters' choices is a "dangerous business."[134]

Limits on Contributions Made by Minors

In 2003, the Court in *McConnell v. FEC* unanimously invalidated as unconstitutional under the First Amendment a BCRA provision[135] prohibiting individuals age 17 or younger from making contributions to candidates and political parties.[136] Reasoning that minors enjoy First Amendment protection and that contribution limits impinge on such rights, the Court determined that the prohibition was not closely drawn to serve a sufficiently important government interest.[137]

In response to the government's assertion that such a prohibition protects against corruption by conduit—that is, parents donating through their minor children to circumvent contribution limits—the Court saw little evidence to support the existence of this type of evasion.[138] Furthermore, the Court postulated that such circumvention of contribution limits may be deterred by the FECA provision prohibiting contributions in the name of another person, discussed above, and the knowing acceptance of contributions made in the name of another person.[139] Even assuming that a sufficiently important interest could be provided in support of the prohibition, the

[129] *Davis*, 554 U.S. at 738.

[130] *See id.* In response to the FEC's argument that the statute's "asymmetrical limits" are justified because they level the playing field for candidates of differing personal wealth, the Court explained that its campaign finance precedent offers no support for this rationale serving as a compelling governmental interest. *Id.* at 741.

[131] *See id.*

[132] *See id.* at 737.

[133] *See id.*

[134] *Id.*

[135] Pub. L. No. 107-155, § 318, (codified at 52 U.S.C. § 30126).

[136] 540 U.S. 93, 231 (2003), *overruled in part by* Citizens United v. FEC, 558 U.S. 310 (2010).

[137] *See id.* at 231–32 (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511–513 (1969); Buckley v. Valeo, 424 U.S. 1, 20–22 (1976) (per curiam)).

[138] *See id.*

[139] *See id.*

Court determined that the prohibition was overinclusive.[140] While observing that various states have adopted more tailored approaches to address this issue—for example, by counting contributions by minors toward the total permitted for a parent or family unit, imposing a lower cap on contributions by minors, and prohibiting contributions by very young children—the Court expressly declined to decide whether any such alternatives would pass muster.[141]

Limits on Contributions to Super PACs

Providing the legal underpinning for the creation of super PACs, in 2010, the U.S. Court of Appeals for the District of Columbia (D.C. Circuit) held that limits on contributions to groups making only independent expenditures are unconstitutional.[142] In view of the Supreme Court's decision in *Citizens United*[143]—decided only months before—holding that independent expenditures do not give rise to corruption, the D.C. Circuit, in *SpeechNow.org v. FEC*, concluded that campaign contributions to groups making only independent expenditures similarly do not give rise to corruption.[144]

In *Citizens United*, the Court relied, in part, on its ruling in *Buckley*[145] holding that expenditures made "totally independently"—in other words, not coordinated with any candidate or party—do not create a risk of corruption or its appearance, and therefore, cannot be constitutionally limited.[146] Accordingly, the D.C. Circuit in *SpeechNow.org* reasoned that the government does not have an anticorruption interest in limiting contributions to groups that make only independent expenditures.[147] The *SpeechNow.org* court further concluded that FECA contribution limits are unconstitutional as applied to such groups.[148] Such groups have come to be known as super PACs or Independent Expenditure-only Committees.[149]

Since *SpeechNow* was decided, the FEC has issued advisory opinions providing guidance regarding the establishment and administration of super PACs. For example, the FEC concluded that a corporation that is exempt from tax under Section 501(c)(4) of the Internal Revenue Code may establish and administer a political committee that makes only independent expenditures, and may accept unlimited contributions from individuals.[150] The FEC confirmed that such

---

[140] *See id.* at 232.

[141] *See id.*

[142] *See* SpeechNow.org v. FEC, 599 F.3d 686 (D.C. Cir. 2010), *cert. denied*, Keating v. FEC, 562 U.S. 1003 (2010).

[143] *See* Citizens United, 558 U.S. at 310. *See infra* pp. 6-8.

[144] *See SpeechNow.org*, 599 F.3d at 694–95.

[145] 424 U.S. 1 (1976) (per curiam).

[146] *See* Citizens United, 558 U.S. at 360 (observing that the Court in Buckley "reason[ed] that independent expenditures do not lead to, or create the appearance of, quid pro quo corruption. In fact, there is only scant evidence that independent expenditures even ingratiate." In *Buckley*, the Court determined that "[u]nlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate." Buckley, 424 U.S. at 47.

[147] *See SpeechNow.org*, 599 F.3d at 694–96.

[148] *See id.; see also*, Carey v. FEC, 791 F. Supp. 2d 121 (D.D.C. 2011) (enjoining the FEC from enforcing contribution limits against a non-connected PAC—*i.e.*, a PAC unaffiliated with a corporation or union—for its independent expenditures, as long as the PAC maintained a bank account for its unlimited contributions separate from its account subject to limits; proportionally paid related administrative costs; and complied with the applicable monetary limits of hard money contributions).

[149] *See Registering as a Super PAC*, FEC, https://www.fec.gov/help-candidates-and-committees/filing-pac-reports/registering-super-pac/ (last visited Feb. 21, 2023).

[150] FEC, AO 2010-09 (Aug. 2, 2010).

committees may also accept unlimited contributions from corporations, labor unions, and political committees, in addition to individuals.[151] The FEC also determined that when fundraising for super PACs, federal candidates, officeholders, and party officials are subject to FECA fundraising restrictions.[152] That is, they can solicit contributions only up to $5,000 per year from individuals and federal PACs.

Cap on Repayment of Candidate Loans Using Post-Election Contributions

While not addressing a contribution limit directly, the Supreme Court in *FEC v. Ted Cruz for Senate* invalidated a BCRA provision that established a $250,000 cap on the amount of post-election campaign contributions that can be used to repay candidates for personal loans made to their campaigns pre-election.[153] Holding that the cap violates the Free Speech Clause of the First Amendment, the Court reached its decision by first assessing the burden on free speech that resulted from the law and then examining whether that burden was justified.[154]

In assessing the burden on speech created by the loan-repayment limit, the Court reiterated a key holding from *Buckley v. Valeo*.[155] The *Buckley* decision, the Court observed, held that the First Amendment guarantees candidates the ability to spend unlimited amounts of personal funds for campaign-related speech on their own behalf.[156] In this case, the Court observed that the loan-repayment limit "by design and effect" burdened such candidate-financed speech by those candidates who chose to make personal loans.[157] By limiting the sources of financing that campaigns can use to repay candidate loans, the loan-repayment limit created "the significant risk" that such loans will not be repaid, according to the Court.[158]

With the burden on free speech established, the Court examined whether the government had sufficiently justified the burden.[159] As an initial matter, the Court declined to determine whether strict scrutiny or a more lenient "closely drawn" standard of review applied.[160] Instead, the Court announced that under either standard, the government bore the initial burden of proving that the law serves "a legitimate objective" and that it failed to do so in this case.[161]

The Court began its analysis by restating a determination from its prior campaign finance cases that the only permissible justification for restricting campaign speech is the prevention of quid pro quo corruption or its appearance.[162] In this case, the government argued that the loan-

[151] FEC, AO 2010-11 (Aug. 2, 2010).

[152] FEC, AO 2011-12 (Aug. 1, 2011).

[153] 142 S. Ct. 1638, 1656 (2022) (invalidating FECA's cap on the amount of post-election campaign contributions that can be used to repay candidates for personal loans made to their campaigns pre-election, codified at 52 U.S.C. § 30116(j)). *See also* CRS Legal Sidebar LSB10796, *Supreme Court Invalidates Cap on Repayment of Candidate Loans Under the First Amendment: Considerations for Congress*, by L. Paige Whitaker.

[154] *See Ted Cruz for Senate*, 142 S. Ct. at 1656.

[155] *See id.* at 1645 (citing Buckley v. Valeo, 424 U.S. 1, 52–54 (1976) (per curiam)).

[156] *See Ted Cruz for Senate*, 142 S. Ct. at 1645.

[157] *Id.* at 1650.

[158] *Id.* at 1651. The Court furthered reasoned that, in turn, that risk created "an unprecedented penalty" on candidates by deterring them from lending money to their own campaigns and, therefore, burdened core political speech. *Id*.

[159] *See id.* at 1652.

[160] *Id.*

[161] *Id.*

[162] *See id.*

repayment limit served to avoid quid pro quo corruption because with a post-election contribution, the campaign contributor is aware that the winning candidate recipient "will be in a position to do him some good."[163] Rejecting this argument, the Court characterized the law as yet another in a long line of campaign finance restrictions that unnecessarily serve as a "prophylaxis-upon-prophylaxis."[164] That is, according to the Court, because contributions to federal office candidates are already regulated through limits and disclosure requirements to avoid corruption or its appearance—including contributions made to winning candidates—the *additional* restriction imposed by the loan-repayment limit is unnecessary.[165] The Court also addressed the government's argument that the Court should defer to Congress when evaluating whether a campaign finance restriction serves an anticorruption goal.[166] Highlighting the lack of data and "scant" evidence in this case, the Court concluded that deferring to Congress here "would be especially inappropriate" because the loan-repayment limit "may have been an effort to insulate [] legislators from effective electoral challenge."[167]

Constitutional Considerations for Legislation

Should Congress decide to enact legislation that further restricts or regulates campaign contributions, the Supreme Court's campaign finance jurisprudence provides guidance as to the constitutional bounds reviewing courts may apply to such limits. As discussed, the Court has expressly held several provisions of FECA and a state law unconstitutional:

- individual, party, and political committee contribution limits that the Court deemed to be unreasonably low;[168]
- limits on how much money a donor may contribute in total to all candidates, parties, and political committees (i.e., "aggregate limits");[169]
- a series of staggered increases in contribution limits applicable to candidates whose opponents significantly self-finance their campaigns;[170] and
- a prohibition on campaign contributions by minors age 17 or younger;[171] and
- a cap on the amount of post-election campaign contributions that can be used to repay candidates for personal loans made to their campaigns pre-election.[172]

---

[163] *Id.*

[164] *Id.* at 1653 (observing that the government in this case was "unable to identify a single case of quid pro quo corruption in this context," despite the fact that most state campaign finance laws do not impose such a limit on using post-election contributions to repay candidates for personal loans).

[165] *See id.*

[166] *See id.* at 1656.

[167] *Id.*

[168] *See* Randall v. Sorrell, 548 U.S. 230, 262 (invalidating a Vermont law that included a limit of $400 on individual, party, and political committee contributions to certain state candidates, per two-year election cycle, without providing for inflation adjustment). *See supra* p. 12.

[169] *See* McCutcheon v. FEC, 572 U.S. 185, 218 (2014) (invalidating FECA's aggregate contribution limits, codified at 52 U.S.C. § 30116(a)(3)). *See supra* pp. 12-14.

[170] *See* Davis v. FEC, 555 U.S. 724, 740 (2008) (invalidating FECA's limits on contributions to candidates whose opponents significantly self-finance, codified at 52 U.S.C. § 30117(a)). *See supra* pp. 18-19.

[171] *See* McConnell v. FEC, 540 U.S. 93, 223 (2003), *overruled in part by* Citizens United v. FEC, 558 U.S. 310 (2010) 232 (invalidating FECA's prohibition on contributions by minors, codified at 52 U.S.C. § 30126). *See supra* p. 19.

[172] *See Ted Cruz for Senate*, 142 S. Ct. at 1656 (invalidating FECA's cap on the amount of post-election campaign contributions that can be used to repay candidates for personal loans made to their campaigns pre-election, codified at 52 U.S.C. § 30116(j)). *See supra* pp. 20-22.

More broadly, and relevant to Congress in evaluating legislative options, the Court has stated unequivocally in *McCutcheon*, and most recently in *Ted Cruz for Senate*, that the only legitimate justification for limiting campaign contributions is avoiding quid pro quo candidate corruption or its appearance.[173] Hence, the Court has signaled that the likelihood of contribution limits being upheld increases to the degree that Congress can demonstrate that the limits are narrowly tailored to serve this governmental interest. In contrast, while acknowledging that Congress may seek to accomplish other "well intentioned" policy goals—such as lessening influence over or access to elected officials, decreasing the costs of campaigns, and equalizing financial resources among candidates—the Court has announced that such interests will *not* serve to justify contribution limits.[174] As the Court reiterated in *McCutcheon*, when enacting laws that limit speech, the government bears the burden of proving the constitutionality of such restrictions.[175]

As discussed in earlier sections of this report, the Court has subjected contribution limits to less rigorous scrutiny under the First Amendment than expenditure limits, and therefore, with some significant exceptions, the Court has generally upheld such limits.[176] Some commentators have argued that the Supreme Court in *McCutcheon* may have signaled a willingness in future cases to evaluate contribution limits under a stricter standard of review than it has in the past.[177] Should the Court decide to apply a stricter level of scrutiny to contribution limits in future cases, legislation providing for enhanced contribution limits would be less likely to survive constitutional challenges. Furthermore, a stricter standard of review could likewise result in successful challenges to *existing* contribution limits, including the limits on individual contributions to candidates and parties.

Source Restrictions

In addition to limits on how much a donor may contribute to a campaign, federal campaign finance law contains several bans—referred to as "source restrictions"—on who may make campaign contributions. The following sections of the report discuss key aspects of source restrictions, beginning with the ban on campaign contributions by corporations and labor unions and the Supreme Court's invalidation of limits on corporate and union independent spending on campaigns. Next, the report discusses the bans on campaign contributions by federal contractors and on contributions and expenditures by foreign nationals. Finally, the report assesses key Supreme Court holdings that may be instructive in evaluating the constitutionality of policy options, should Congress consider legislation regulating the sources of campaign contributions.

[173] *See McCutcheon*, 572 U.S. at 192 (citing *Citizens United*, 558 U.S. at 359); FEC v. Ted Cruz for Senate, 142 S. Ct. at 1652.

[174] *McCutcheon*, 572 U.S. at 207–08.

[175] *See id.* at 210 (citing United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 816 (2000)).

[176] *See supra* pp. 4-5.

[177] *See* Richard Briffault, *The Uncertain Future of the Corporate Contribution Ban*, 49 VAL. U. L. REV. 397, 398 (2015) (stating that *McCutcheon* "subtly ratcheted up the Court's standard of review of contribution restrictions"); Robert Yablon, *Campaign Finance Reform Without Law*, 103 IOWA L. REV. 185, 201 (2017) (characterizing the Supreme Court in *McCutcheon* as "nudg[ing] the governing standard in the direction of strict scrutiny"); *see also* James Bopp, Jr., Randy Elf, & Anita Y. Milanovich, *Symposium: Money In Politics: The Good, the Bad, and the Ugly: Article and Speech: Contribution Limits After McCutcheon v. FEC*, 49 VAL. U. L. REV. 361, 389 (2015) (maintaining that "[b]ecause of *McCutcheon*, key circuit court decisions that previously upheld limits on direct contributions to candidates are no longer legally sound").

Ban on Corporate and Labor Union Contributions: PAC Required

FECA prohibits corporations and labor unions from making campaign contributions from their own funds or "general treasuries."[178] Candidates, however, are permitted to accept contributions from separate segregated funds or PACs that a corporation or labor union establishes for the purpose of making contributions.[179] Although the Supreme Court in 2010, in *Citizens United*, discussed above, invalidated the federal ban prohibiting corporations from funding independent expenditures out of their general treasuries, *Citizens United* did not appear to affect the ban on corporate *contributions* to candidates and parties.[180]

Providing the most recent precedent on this restriction, in *FEC v. Beaumont*, the Court in 2003 upheld the constitutionality of the prohibition on corporations making direct campaign contributions from their general treasuries in connection with federal elections.[181] According to the Court, its jurisprudence on campaign finance regulation—in addition to providing that limits on contributions are more clearly justified under the First Amendment than limits on expenditures—respects the judgment that the corporate structure requires careful regulation to counter the "misuse of corporate advantages."[182] The Court observed that large, unlimited contributions can threaten "political integrity," necessitating restrictions in order to counter corruption.[183]

Ban on Federal Contractor Contributions: "Pay-to-Play" Prohibition

Another type of source restriction—known as a "pay-to-play" prohibition—bans federal office candidates from accepting or soliciting contributions from federal government contractors.[184] Pay-to-play laws generally serve to restrict officials from conditioning government contracts or benefits on political support in the form of campaign contributions to the controlling political party or public officials. "Pay-to-play" can be viewed as a more subtle form of political corruption because it may involve anticipatory action, and potential future benefits, as opposed to any explicit, current quid pro quo agreement. This FECA prohibition applies at any time between the earlier of the commencement of contract negotiations or when the requests for proposals are sent out, and the termination of negotiations or completion of contract[185] performance, whichever is later.[186] FEC regulations further specify that the ban on contractor contributions applies to the assets of a partnership that is a federal contractor, but permits individual partners to make contributions from personal assets.[187] The ban also applies to the assets of individuals and sole proprietors who are federal contractors, which include their business, personal, or other funds under their control, although the spouses of individuals and sole proprietors who are federal contractors and their employees are permitted to make contributions from their personal funds.[188]

---

[178] 52 U.S.C. § 30118(a).

[179] 52 U.S.C. § 30118(b)(2)(C).

[180] 558 U.S. 310 (2010). For further discussion of *Citizens United*, see CRS Report R43719, *Campaign Finance: Constitutionality of Limits on Contributions and Expenditures*, by L. Paige Whitaker, at 12-15.

[181] *See* FEC v. Beaumont, 539 U.S. 146 (2003).

[182] *Id.* at 155.

[183] *Id.*

[184] 52 U.S.C. § 30119(a).

[185] The term "contract" includes "[a] sole source, negotiated, or advertised procurement." 11 C.F.R. § 115.1(c)(1).

[186] 11 C.F.R. § 115.1(b).

[187] *Id.* § 115.4.

[188] *Id.* § 115.5.

As with corporate direct or "treasury fund" contributions, FECA provides an exception to the ban on government contractor contributions, permitting candidates to accept contributions from PACs that are established and administered by corporations or labor unions contracting with the government.[189]

In 2015, a unanimous *en banc* D.C. Circuit upheld the ban on campaign contributions by federal government contractors, limiting the application of its ruling to the ban on contractors making contributions to candidates, parties, and traditional PACs that make contributions to candidates and parties.[190] The court held that the law comported with both the First Amendment and the equal protection component of the Fifth Amendment.[191] According to the D.C. Circuit, the federal ban serves "sufficiently important" government interests by guarding against quid pro quo corruption and its appearance, and protecting merit-based administration.[192] Further, the court held that the ban is closely drawn to the government's interests because it does not restrict contractors from engaging in other types of political engagement, including fundraising or campaigning.[193] The number of convictions for pay-to-play infractions, dating back to when the ban was first enacted in 1940,[194] justifies its continued existence, according to the D.C. Circuit, because the risk of quid pro quo corruption and its appearance has not dissipated. According to the D.C. Circuit, this suggests that if the ban were no longer in effect, "more money in exchange for contracts would flow through the same channels already on display."[195] In 2016, the Supreme Court declined to hear an appeal of the ruling.[196]

---

[189] 52 U.S.C. § 30119(b).

[190] *See* Wagner v. FEC, 793 F.3d 1 (D.C. Cir. 2015), *cert. denied sub nom.* Miller v. FEC, 577 U.S. 1102 (2016).

[191] *See Wagner*, 793 F.3d at 32–33.

[192] *Id.* at 21–26 (applying the same standard of review that the Supreme Court in *Buckley* applied to contribution limits, requiring that the government demonstrate that the limits are a "closely drawn" means of achieving a "sufficiently important" governmental interest). "The Supreme Court has repeatedly applied this 'closely drawn' standard to challenges to campaign contribution restrictions. And it has repeatedly (and recently) declined invitations 'to revisit *Buckley*'s distinction between contributions and expenditures and the corollary distinction in the applicable standards of review.'" *Id.* at 5–6 (quoting McCutcheon, 572 U.S. at 197).

[193] *See id.* at 25.

[194] Congress originally adopted the prohibition in the 1940 amendment to the Hatch Act, Pub. L. No. 76-753, § 5(a), 54 Stat. 772. For federal contracting requirements and regulations that generally stress competitive selection of vendors and attempt to protect the federal procurement and contracting process from political or partisan influences, see 48 C.F.R. § 13.104 (when using "simplified acquisition procedures," contract officers are instructed to "obtain supplies and services from the source whose offer is the most advantageous to the Government,"); *id.* § 14.408-1(a) (when using sealed bidding, the contract is to be made with a "responsible bidder whose bid ... will be most advantageous to the Government, considering only price and the price-related factors,"); *id.* §§ 15.101, 15.101–1, 15.101–2, 15.304 (when using contracting by negotiation "cost or price" plays a "dominant role" in source selection, but other "tradeoff" factors, such as "the risk of unsuccessful contract performance," may properly be weighed to determine "the best interest of the Government" in a contract). Contracts may not be awarded on the basis of personal or political favoritism, and all potential contractors should be treated "with complete impartiality and with preferential treatment for none." *Id.* §§ 1.102-2(c)(3), 3.101-1. General ethical standards in the executive branch similarly note that an executive official is to "act impartially and not give preferential treatment to any private organization or individual." Exec. Order No. 12647, 5 C.F.R. § 2635.101(b)(8) (1989).

[195] *See Wagner*, 793 F.3d at 18. "More recent evidence confirms that human nature has not changed since corrupt quid pro quos and other attacks on merit-based administration first spurred the development of the present legislative scheme. Of course, we would not expect to find—and we cannot demand—continuing evidence of large-scale quid pro quo corruption or coercion involving federal contractor contributions because such contributions have been banned since 1940." *Id.* at 14.

[196] *See* Miller v. FEC, 577 U.S. 1102 (2016).

Ban on Foreign National Contributions and Expenditures and Restrictions on Foreign National Involvement in U.S. Campaigns

FECA generally prohibits foreign nationals from donating or spending money in connection with any U.S. election.[197] For the purposes of this prohibition, a foreign national is defined to include a foreign government, a foreign political party, and a foreign citizen, excepting those holding dual U.S. citizenship and those admitted as lawful permanent residents of the United States (i.e., "green card" holders).[198] Specifically, the law prohibits foreign nationals from "directly or indirectly" making a contribution or donation of money "or other thing of value" in connection with any U.S. election, or making a promise to do so, either expressly or implied; or a contribution or donation to a political party.[199] Furthermore, as with other coordinated expenditures, this ban on contributions would include any communication that a foreign national makes in coordination with a candidate's campaign or political party, which would be treated as an in-kind contribution.[200] In addition, FECA expressly prohibits a candidate from soliciting, accepting, or receiving contributions from foreign nationals.[201]

The Act further prohibits foreign nationals from making expenditures; independent expenditures; or disbursements for electioneering communications.[202] FEC regulations specify that it is unlawful to knowingly provide "substantial assistance" in the solicitation, making, acceptance, or receipt of a prohibited contribution or donation, or in the making of a prohibited expenditure, independent expenditure, or disbursement.[203] Further, the regulations define "knowingly" to require that a person "have actual knowledge" that the source of the funds solicited, accepted, or received is a foreign national; have awareness "of facts that would lead a reasonable person to conclude that there is a substantial probability" that the source of the funds is a foreign national; or have awareness "of facts that would lead a reasonable person to inquire" whether the source of the funds is a foreign national, but fail to conduct a reasonable inquiry.[204]

In addition, FEC regulations further specify that foreign nationals are prohibited from directing or participating in the decision-making process of entities involved in U.S. elections, including decisions regarding the making of contributions, donations, expenditures, or disbursements in connection with any U.S. election or decisions concerning the administration of a political committee.[205] In a series of advisory opinions, the FEC has provided specific guidance for compliance with the restrictions on foreign nationals. For example, the FEC has determined that a U.S. corporation that is a subsidiary of a foreign corporation may establish a PAC that makes contributions to federal candidates as long as the foreign parent does not finance any contributions either directly or through a subsidiary, and no foreign national participates in PAC operations and decision-making, including regarding campaign contributions.[206]

---

[197] 52 U.S.C. § 30121(a).

[198] *Id.* § 30121(b)(2).

[199] *Id.* § 30121(a)(2).

[200] *See supra* p. 15.

[201] 52 U.S.C. § 30121(a)(1)(C).

[202] *Id.* § 30121.

[203] 11 C.F.R. § 110.20(h).

[204] *Id.* § 110.20(a)(4).

[205] *Id.* § 110.20(i).

[206] *See* FEC, AO 2009-14 (Oct. 2, 2009); AO 2006-15 (July 1, 2006); AO 2000-17 (July 28, 2000); AO 1995-15 (June 30, 1995); AO 1992-16 (June 26, 1992); AO 1990-08 (Apr. 30, 1990); and AO 1985-03 (Mar. 4, 1985).

In 2012, the Supreme Court summarily affirmed a three-judge federal district court panel ruling that upheld the constitutionality of the prohibition on foreign nationals making campaign contributions and independent expenditures.[207] In *Bluman v. FEC*, a federal district court held that for the purposes of First Amendment analysis, the United States has a compelling interest in limiting foreign citizen participation in American democratic self-government, thereby preventing foreign influence over the U.S. political process.[208] A key element of a national political community, the court observed, is that "foreign citizens do not have a constitutional right to participate in, and thus may be excluded from, activities of democratic self-government."[209] Similar to the Court's decision in *WRTL*, discussed above, the district court in *Bluman* interpreted the ban on independent expenditures to apply only to foreign nationals engaging in express advocacy and not issue advocacy.[210] In other words, under the court's interpretation, foreign nationals remain free to engage in "speaking out about issues or spending money to advocate their views about issues."[211] As to the parameters of express advocacy, the district court defined the term as an expenditure for "express campaign speech" or its "functional equivalent," meaning that it "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."[212]

Constitutional Considerations for Legislation

As discussed, some commentators have argued that the Supreme Court in 2014 in *McCutcheon* may have signaled a willingness in future cases to evaluate contribution limits under a stricter standard of review than it has in the past.[213] If this were to occur, it seems likely that a court could hold the ban on corporate contributions, and any related legislative proposals, unconstitutional. Moreover, one commentator has argued that, in *Citizens United*, the Court rejected the rationale behind the leading precedent upholding the ban on corporate contributions in *Beaumont*, thereby raising the prospect that in a future case, the Court could have another basis for overturning the ban on corporate contributions.[214] That is, in reaching its holding in *Beaumont*, the Court seemed to rely on the fact that in view of state-conferred advantages—including limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets—corporations can accumulate and deploy wealth in a manner that provides them with an unfair

[207] *See* Bluman v. FEC, 800 F. Supp. 2d 281 (D.D.C. 2011), *summ. aff'd*, 565 U.S. 1104 (2012).

[208] *Bluman*, 800 F. Supp. 2d at 288. The court in *Bluman* did not ultimately decide which type of scrutiny to apply because the statute in dispute involves both the First Amendment and national security, as well as limits on both contributions and expenditures. Therefore, the court assumed for the sake of argument that it should apply a "strict scrutiny" standard of review (which requires that a statute be narrowly tailored to serve a compelling governmental interest), and found that the prohibition at issue passed muster even under that level of scrutiny. *Id.* at 285-86.

[209] *Id*. at 288.

[210] *See id.* at 290.

[211] *Id.*

[212] *Id.* at 284–85 (citing Federal Election Comm'n v. Wisconsin Right to Life, Inc., 551 U.S. 449, 469–70 (2007)).

[213] *See infra* p. 22–23.

[214] *See* Richard Briffault, *The Uncertain Future of the Corporate Contribution Ban*, 49 VAL. U. L. REV. 397, 424 (2015) (arguing that *Citizens United* "completely disavowed" the rationale behind the Court's ruling in *Beaumont* determining that corporations present a particular threat to the integrity of politics and campaigns, thereby jeopardizing the constitutionality of the ban on corporate contributions).

advantage in the political marketplace.[215] In *Citizens United*, however, the Court rejected a similar argument in invalidating the prohibition on corporations engaging in independent spending.[216]

In contrast, as discussed above, the district court's ruling in *Bluman*, which the Supreme Court affirmed in 2012, seems to suggest that legislation to enhance the current ban on foreign nationals donating or spending money in connection with U.S. elections, so long as its scope was limited to the regulation of express advocacy or its functional equivalent, might withstand a First Amendment challenge to the extent that Congress could demonstrate that the restriction furthered the compelling governmental interest in preventing foreign influence over the U.S. political process. As *Bluman* upheld the ban on foreign nationals only to the extent that it applied to express advocacy or its functional equivalent, legislation that broadly regulates issue advocacy may be constitutionally vulnerable.[217] As one commentator has cautioned, should Congress enact a statute that broadly prohibits issue advocacy by foreign nationals, including the type of communications that Russians are accused of making during the 2016 election, "such a statute would likely run into First Amendment resistance."[218]

Disclaimer and Disclosure Requirements

FECA sets forth both disclaimer and disclosure requirements. The term *disclaimer* generally refers to statements of attribution that appear directly on a campaign-related communication, and the term *disclosure* generally refers to requirements for periodic reporting to the FEC, which are made available for public inspection. The following sections of the report provide an overview of FECA disclaimer and disclosure requirements, relevant Supreme Court rulings, and a discussion of constitutional considerations for legislation, should Congress consider legislation to enhance or modify such requirements.

Disclaimer

Disclaimer Requirements

Although FECA does not contain the term "disclaimer," the Act specifies the content of attribution statements to be included in certain communications, which are known as disclaimer requirements.[219] FECA requires that any public political advertising financed by a political committee—including candidate committees—include disclaimers.[220] In addition, regardless of the financing source, FECA requires a disclaimer on all public communications that expressly

[215] *See Beaumont*, 539 U.S. at 154.

[216] *See* Citizens United v. FEC, 558 U.S. 310, 314 (2010) ("It is irrelevant for First Amendment purposes that corporate funds may have little or no correlation to the public's support for the corporation's political ideas. All speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech, and the First Amendment protects the resulting speech." (internal citations and quotations omitted)).

[217] *See Bluman*, 800 F. Supp. 2d at 284–85 (citing *Wisconsin Right to Life, Inc*, 551 U.S. at 456, 469–70).

[218] Richard L. Hasen, *Essay: Cheap Speech and What It Has Done (To American Democracy)*, 16 FIRST AMEND. L. REV. 200, 218 (2017).

[219] *See Advertising and disclaimers*, FEC, https://www.fec.gov/help-candidates-and-committees/making-disbursements/advertising/ (last visited Feb. 6, 2023).

[220] 52 U.S.C. § 30120.

advocate for the election or defeat of a clearly identified candidate; electioneering communications;[221] and all public communications that solicit contributions.[222]

For radio and television advertisements by candidate committees, FECA generally requires that the communication state who paid for the ad, along with an audio statement by the candidate identifying the candidate and stating that the candidate "has approved" the message.[223] In the case of television ads, the candidate statement is required to be conveyed by an unobscured, full-screen view of the candidate making the statement, or if the candidate message is conveyed by voice-over, accompanied by a clearly identifiable image of the candidate, along with a written message of attribution at the end of the communication.[224]

Generally, for non-candidate-authorized communications—including ads financed by outside groups, corporations, and labor unions—FECA likewise requires a disclaimer to clearly state the name and permanent street address, telephone number, or website address of the person who paid for the communication and state that the communication was not authorized by any candidate or candidate committee.[225] In radio and television advertisements, such disclaimers are required to include in a clearly spoken manner the following audio statement: "_____ is responsible for the content of this advertising," with the blank to be filled in with the name of the entity paying for the ad. In addition, in television advertisements, the statement is required to be conveyed by an unobscured, full-screen view of a representative of the entity paying for the ad, in a voice-over, along with a written message of attribution at the end of the communication.

Effective March 1, 2023, the FEC promulgated new regulations that broaden the disclaimer requirements for public internet communications.[226] According to the FEC, the new requirements were designed "in light of technological advances since the Commission last revised its rules governing internet disclaimers in 2006."[227] Previously, the FEC regulations generally required disclaimers on public communications—defined to include ads that are "placed for a fee on another person's website"—that were made by political committees, contained express advocacy, or solicited campaign contributions.[228] Expanding the scope, the new regulations apply not only to such "communications placed for a fee on another person's website" but also to "communications placed for a fee on another person's ... digital device, application, or advertising platform."[229]

Constitutionality of Disclaimer Requirements

In *McConnell*, by an eight-to-one vote, the Supreme Court in 2003 upheld the facial validity of the disclaimer requirements in FECA, as amended by BCRA.[230] Specifically, the Court determined that FECA's disclaimer requirement "bears a sufficient relationship to the important

[221] *Id.* § 30104(f)(3).

[222] *Id.* § 30120(a).

[223] *Id.* § 30120(a)(1),(d)(1).

[224] *Id.* § 30120(d)(1).

[225] *Id.* § 30120(a)(3).

[226] Internet Communication Disclaimers and Definition of "Public Communication," 87 Fed. Reg. 77467–77480 (Dec. 19, 2022). The FEC published the final rule on December 19, 2022, which became effective on March 1, 2023.

[227] *Id.* at 77467.

[228] 11 CFR §§ 110.11(a), 100.26.

[229] *See* 87 Fed. Reg. at 77467.

[230] *See* McConnell v. FEC, 540 U.S. 93, 230–31 (2003), *overruled in part by* Citizens United v. FEC, 558 U.S. 310 (2010).

governmental interest of 'shedding the light of publicity on campaign financing.'"[231] Similarly, in *Citizens United*, by an eight-to-one vote, the Court in 2010 upheld the disclaimer requirement in BCRA as applied to a movie that an organization produced regarding a presidential candidate and the broadcast advertisements it planned to run promoting the movie.[232] According to the Court, while they may burden the ability to speak, disclaimer and disclosure requirements "impose no ceiling on campaign-related activities," and "do not prevent anyone from speaking."[233] According to the Court, the disclaimer requirements in BCRA "provid[e] the electorate with information," and "insure that the voters are fully informed" about who is speaking.[234] Moreover, they facilitate the ability of a listener or viewer to judge more effectively the arguments they are hearing, and at a minimum, according to the Court, they clarify that an ad was not financed by a candidate or party.[235]

Disclosure

Under FECA, political committees—including candidate committees and super PACs—must register with the FEC and comply with disclosure requirements.[236] Political committees are required to file periodic reports that disclose the total amount of all contributions they receive, and the identity, address, occupation, and employer of any person who contributes more than $200 during a calendar year.[237] In addition, entities other than political committees—such as labor unions and corporations, including incorporated tax-exempt Section 501(c)(4) organizations—making independent expenditures or electioneering communications have generally been required to disclose information to the FEC, including the identity of certain donors over specific dollar thresholds.[238] These requirements have been the subject of litigation, as discussed below. The FEC is required to make these reports publicly available on the internet within 48 hours of receipt or within 24 hours if the report is filed electronically. The FEC is also required to make the reports available for public inspection in their offices.[239]

Independent Expenditure Requirements

Generally, FECA requires organizations making independent expenditures that aggregate more than $250 in a calendar year to disclose (1) whether an independent expenditure supports or opposes a candidate, (2) whether it was made independently of a campaign, and (3) the identity of each person who contributed more than $200 to the organization specifically "for the purpose of furthering an independent expenditure."[240] FECA requires organizations to file these reports quarterly.[241] Up to 20 days before an election, an organization must file a report each time it

[231] *Id.* at 231.

[232] *See* Citizens United v. FEC, 558 U.S. 310, 367 (2010).

[233] *Id.* at 366.

[234] *Id.* at 368.

[235] *See id.*

[236] 52 U.S.C. § 30103.

[237] 52 U.S.C. § 30104.

[238] FECA requires any "person," except a political committee, making independent expenditures to file disclosure reports, and defines "person" to include an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons, but does not include the federal government. 52 U.S.C. §§ 30104(c)(1), 30101(11).

[239] 52 U.S.C. § 30104(a)(11).

[240] 52 U.S.C. § 30104(c).

[241] 52 U.S.C. § 30104(a)(4).

spends at least $10,000 on independent expenditures relating to the same election, within 48 hours of incurring the cost of the expenditure. Less than 20 days before an election, an organization must file a report each time it spends at least $1,000 on independent expenditures relating to the same election, within 24 hours of incurring the cost of the expenditure.[242] FEC regulations require organizations that spend or have reason to expect to spend more than $50,000 on independent expenditures to file reports electronically.[243]

Until a 2018 court ruling discussed below, the donor disclosure regulation promulgated under the Act generally applied only to those donors who contributed money specifically "for the purpose of furthering the reported independent expenditure."[244] As a result, unless a donation to an organization was made *specifically* for the purpose of funding a *particular* independent expenditure, the FEC did not require an organization to disclose the donor's identity. This purpose requirement for donor disclosure, however, was successfully challenged in court. In a 2018 ruling, *Citizens for Responsibility and Ethics in Washington (CREW) v. FEC*, a federal district court invalidated the regulation, holding that it required significantly less disclosure than the statute mandates.[245] In 2020, the D.C. Circuit affirmed the district court decision.[246] According to the D.C. Circuit, the regulation conflicted with the "plain terms" of FECA's disclosure requirement that groups making independent expenditures disclose contributors of over $200 "regardless of any connection to [independent expenditures] eventually made."[247] In response to this litigation, the FEC removed the invalidated regulation.[248] As a result, groups making independent expenditures are required to disclose more of their donors than was required under the invalidated regulation.

Electioneering Communication Requirements

With regard to electioneering communications, FECA requires organizations[249] making disbursements aggregating over $10,000 during a calendar year to disclose certain information, including the identity and principal place of business of the corporation making the disbursement, the amount of each disbursement over $200, and the names of candidates identified in the communication.[250] Additionally, FECA requires the organization to disclose its donors who contributed at least $1,000. The statute also provides an option for an organization seeking to avoid disclosure of all its donors. If an organization establishes a separate bank account, consisting only of donations from U.S. citizens and legal resident aliens made directly to the account for electioneering communications, then the organization is required to disclose only

[242] 52 U.S.C. § 30104(a)(4); 11 C.F.R. § 109.10.

[243] 52 U.S.C. § 30104(a)(11)(A); 11 C.F.R. § 104.18(a).

[244] 11 C.F.R. § 109.10(e)(1)(vi).

[245] Citizens for Responsibility and Ethics in Washington (CREW) v. FEC, 316 F. Supp. 3d 349, 409-11 (D.D.C. 2018), *aff'd,* 971 F.3d 340 (D.C. Cir. 2020) (invalidating 11 C.F.R. § 109.10(e)(1)(vi), which was promulgated under 52 U.S.C. § 30104(c)), in accordance with the first step of the *Chevron* analysis that inquires whether Congress has directly addressed the question at issue and, if congressional intent is clear, requires the agency to effect that intent) (citing Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837 (1984); SAS Inst. v. Iancu, 138 S. Ct. 1348, 1358 (2018); Pereira v. Sessions, 138 S. Ct. 2105, 2113 (2018)).

[246] CREW, 971 F.3d at 356.

[247] *Id.* at 343, 351.

[248] Reporting Independent Expenditures, 87 Fed. Reg. 35863–35864 (June 14, 2022).

[249] Specifically, FECA requires any "person" making a disbursement for an electioneering communication to independent expenditures to file disclosure reports, and defines "person" to include an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons, but does not include the federal government. 52 U.S.C. §§ 30104(f)(1), 30101(11).

[250] 52 U.S.C. § 30104(f).

those donors who contributed at least $1,000 to the account.[251] Generally, FECA requires that organizations file electioneering communication reports by the first date in a calendar year that an organization makes a disbursement aggregating more than $10,000 for the direct costs of producing or airing an electioneering communication. In addition, FECA requires an organization to file a report each time it makes such disbursements aggregating more than $10,000 since the last filing.[252]

An FEC regulation provides an exception to the donor disclosure requirement for electioneering communications. The regulation permits organizations making disbursements for electioneering communications to disclose only the identity of each person who made a donation of at least $1,000 specifically "for the purpose of furthering" electioneering communications.[253] This regulation—specifically, the purpose requirement contained therein—was challenged in court. In 2016, a three-judge panel of the D.C. Circuit upheld the regulation, determining, among other things, that the exception contained in the regulation protects the First Amendment.[254] In 2016, the D.C. Circuit denied an appeal for an en banc rehearing of the case.[255]

Constitutionality of Disclosure Requirements

In *Buckley*[256]—and, more recently, in *McConnell*,[257] *Citizens United*,[258] *Doe v. Reed*,[259] and a summary affirmance in *Independence Institute v. FEC*[260]—the Court has generally affirmed the constitutionality of disclosure requirements. While acknowledging that compelled disclosure can infringe on the right to privacy of association and belief as guaranteed under the First Amendment, the Court in these cases has identified overriding governmental interests—such as safeguarding the integrity of the electoral process by promoting transparency and accountability—that outweigh such infringement. In addition, as discussed below, the Court appears to have consistently determined that the First Amendment does not require limiting disclosure requirements to speech that is the functional equivalent of express advocacy.

In *Buckley*, the Court identified three governmental interests justifying FECA disclosure requirements.[261] First, the Court determined, disclosure provides the electorate with information

[251] 52 U.S.C. § 30104(f)(2)(E),(F).

[252] 52 U.S.C. § 30104(f)(4); 11 C.F.R. §104.20.

[253] 11 C.F.R. §104.20(c)(9). The FEC promulgated this regulation in response to the Supreme Court's ruling in FEC v. WRTL, 441 U.S. 449 (2007), and prior to its ruling in Citizens United v. FEC, 558 U.S. 310 (2010). For further discussion of these decisions, see CRS Report R43719, *Campaign Finance: Constitutionality of Limits on Contributions and Expenditures*, by L. Paige Whitaker at pp. 12-15.

[254] *See* Van Hollen v. FEC, 811 F.3d. 486, 495, 501 (D.C. Cir. 2016) *reh'g en banc denied* 2016 U.S. App. LEXIS 17528 (D.C. Cir. 2016) (holding that the lower court erred in concluding that the regulation—requiring that corporations and labor organizations disclose only those donations made for the purpose of furthering electioneering communications—failed both at *Chevron* "Step Two" and the arbitrary and capricious stages because the "purpose requirement" in the regulation comported with the text, history, and purposes of the underlying statute, 52 U.S.C.S. § 30104(f), and that in promulgating the regulation, the FEC exercised its discretion to protect the First Amendment.). "By affixing a purpose requirement to BCRA's disclosure provision, the FEC exercised its unique prerogative to safeguard the First Amendment when implementing its congressional directives." *Id.* at 501.

[255] *See Van Hollen*, 2016 U.S. App. LEXIS 17528.

[256] 424 U.S. 1 (1976) (per curiam).

[257] 540 U.S. 93 (2003), *overruled in part by* Citizens United v. FEC, 558 U.S. 310 (2010).

[258] 558 U.S. 310 (2010).

[259] 561 U.S. 186 (2010).

[260] Indep. Inst. v. FEC, 216 F. Supp. 3d 176 (D.D.C. 2016), *summ. aff'd*, 580 U.S. 1157 (2017).

[261] *See Buckley*, 424 U.S. at 66–68.

as to the source of campaign money, how it is spent, and "the interests to which a candidate is most likely to be responsive"—in other words, an informational interest.[262] Second, the Court stated that disclosure serves to deter corruption and its appearance by uncovering large contributions and expenditures "to the light of publicity," observing that voters with information regarding a candidate's highest donors are better able to detect "post-election special favors" by an officeholder in exchange for the contributions.[263] Third, the Court identified disclosure requirements as an essential method of detecting violations to refer to law enforcement.[264] In upholding the constitutionality of FECA's donor disclosure requirements for independent expenditures, the Court determined that so long as they encompass only funds used for express advocacy communications, the requirement is constitutional.[265] Such donor disclosure "increases the fund of information" regarding who supports a given candidate, and that informational interest can be equally strong for independent spending as it is for spending that is coordinated with a candidate or party.[266]

The Court in *McConnell* rejected a facial challenge to the enhanced disclosure requirements set forth in BCRA.[267] According to *McConnell*, the Court in *Buckley* distinguished between express advocacy and issue advocacy for the purposes of statutory construction, not constitutional command, and therefore, the First Amendment did not require creating "a rigid barrier" between the two in this case.[268] In other words, the Court determined, because electioneering communications are intended to influence an election, the absence of "magic words" of express advocacy does not obviate the government's interest in requiring disclosure of such ads in order to combat corruption or its appearance.[269] Furthermore, as in *Buckley*, the *McConnell* Court held that disclosure requirements in BCRA serve the "important state interests" of providing voters with information, deterring corruption and avoiding its appearance, and assisting with enforcement of the law.[270]

Expanding on its holding in *Buckley*, in *Citizens United*, the Court upheld FECA's disclosure requirements for electioneering communications as applied to a political movie and broadcast advertisements promoting the movie.[271] Citing *Buckley*, the Court determined that while they may burden the ability to speak, disclosure requirements "impose no ceiling on campaign-related activities," and "do not prevent anyone from speaking."[272] Accordingly, the Court evaluated the requirements under a standard of "exacting scrutiny," a less-rigorous standard than the "strict scrutiny" standard the Court has used to evaluate restrictions on campaign spending.[273] Exacting

---

[262] *Id.* at 66–67.

[263] *Id.* at 67.

[264] *See id.* at 66–68.

[265] *See id.* at 79–80. ("[W]hen the maker of the expenditure is ... an individual other than a candidate or a group other than a 'political committee,' the relation of the information sought to the purposes of the Act may be too remote. To insure that the reach ... is not impermissibly broad, we construe 'expenditure' ... to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate. This reading is directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate.").

[266] *Id.* at 81.

[267] *See* McConnell v. FEC, 540 U.S. 93, 201–02 (2003), *overruled in part by* Citizens United v. FEC, 558 U.S. 310 (2010).

[268] *McConnell*, 540 U.S. at 193.

[269] *Id.* at 193–94.

[270] *Id.* at 196.

[271] *See Citizens United*, 558 U.S. at 366–371.

[272] *Id.* at 366 (quoting Buckley v. Valeo, 424 U.S. 1, 64 (1976) (per curiam)).

[273] *See Citizens United*, 558 U.S. at 366–67.

scrutiny requires a "substantial relation" between the disclosure requirement and a "sufficiently important" government interest.[274] Notably, in *Citizens United*, the Court expressly rejected the argument that the scope of FECA's disclosure requirements for electioneering communications must be limited to speech that is express advocacy, or the "functional equivalent of express advocacy."[275] In support of its determination, the Court pointed out that in *Buckley* and other cases, it has simultaneously struck down limits on certain types of speech—such as independent expenditure communications—while upholding disclosure requirements for the same type of speech.[276] In response to the argument that disclosure requirements could deter donations to an organization because donors may fear retaliation once their identity becomes known, the Court stated that such requirements would be unconstitutional as applied to an organization where there was a reasonable probability that its donors would be subject to threats, harassment, or reprisals.[277]

Similarly, in a case upholding the constitutionality of a Washington State public records law, *Doe v. Reed*, the Court relied on and underscored its holdings in *Buckley* and *Citizens United* regarding compelled disclosure.[278] The Washington statute requires that all public records—including signatures on referendum petitions—be made available for public inspection and copying.[279] Categorizing the Washington statute as a disclosure law and therefore "not a prohibition of speech," the Court evaluated its constitutionality under the First Amendment using the standard of exacting scrutiny.[280] The Court upheld the law as substantially related to the governmental interest of safeguarding the integrity of the electoral process, and announced that public disclosure "promotes transparency and accountability in the electoral process to an extent other measures cannot."[281] Regarding the argument that the disclosure law would subject petition signatories to threats, harassment, and reprisals, the Court concluded that there was insufficient evidence to support the assertion.[282]

Later, in *Independence Institute v. FEC*, the Supreme Court summarily affirmed a three-judge federal district court ruling upholding the constitutionality of FECA's disclosure requirements for electioneering communications.[283] In this case, the challengers of the law argued, among other things, that an ad they sought to run was constitutionally protected issue advocacy and therefore was exempt from disclosure requirements.[284] Rejecting this argument, the district court observed that the Supreme Court has twice upheld the constitutionality of the FECA disclosure

---

[274] *Id.*

[275] *Id.* at 369–370 (rejecting the contention that because the Court in *WRTL*, *discussed supra* at pp. 7-8, had construed the FECA prohibition on corporate and labor union funded electioneering communications to reach only the functional equivalent of express advocacy, that the First Amendment similarly required a limited application of the FECA disclosure requirements for electioneering communications).

[276] *See id.* at 367. The Court noted that in *McConnell*, three Justices who would have struck down the FECA ban on corporate independent expenditures nonetheless voted to uphold its disclosure and disclaimer requirements. *See id.* (*citing* McConnell v. FEC, 540 U.S. 93, 231–32 (2003), *overruled in part by* Citizens United v. FEC, 558 U.S. 310 (2010) (opinion of Kennedy, J., joined by Rehnquist, C. J., and Scalia, J.). The Court also noted that it has upheld the constitutionality of lobbyist registration and disclosure requirements even though a ban on lobbying would be unconstitutional. *See id.* (citing United States v. Harriss, 347 U.S. 612, 625 (1954)).

[277] *See id.* at 370; NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 462–63 (1958).

[278] *See* Doe v. Reed, 561 U.S. 186 (2010).

[279] *See id.* at 192.

[280] *Id.* at 196.

[281] *Id.* at 199.

[282] *See id.* at 201.

[283] *See* Indep. Inst. v. FEC, 216 F. Supp. 3d 176 (D.D.C. 2016), *summ. aff'd*, 580 U.S. 1157 (2017).

[284] *See id.* at 185.

requirements for electioneering communications, first in *McConnell*, and once again in *Citizens United*, where the Court expressly held that the First Amendment does not require limiting disclosure requirements to speech that is the functional equivalent of express advocacy.[285] According to the district court, "the First Amendment is not so tight-fisted as to permit large-donor disclosure only when the speaker invokes magic words of explicit endorsement."[286]

While not a campaign finance case, in *Americans for Prosperity Foundation v. Bonta*, the Supreme Court held a state disclosure law unconstitutional.[287] In contrast with the exacting scrutiny standard applied in *Citizens United* and *Doe v. Reed*, the Court in *Bonta* evaluated the challenged law under a more rigorous standard of exacting scrutiny that requires a "narrow tailoring" to a sufficiently important governmental interest.[288] (The Court in *Citizens United* and *Doe v. Reed* applied a standard of exacting scrutiny requiring only a "substantial relation" between the disclosure requirement and the asserted sufficiently important governmental interest.) In view of the more rigorous standard of exacting scrutiny applied in this case, some legal scholars have suggested that the *Bonta* decision might affect the constitutionality of campaign finance disclosure requirements in future cases.[289]

Constitutional Considerations for Legislation

Should Congress consider legislation to increase FECA's disclaimer and disclosure requirements, the Supreme Court's relevant case law informs the constitutional bounds of such legislation. Regarding disclaimer requirements, as discussed above, the Court has upheld the constitutionality of current disclaimer requirements in FECA, by an eight-to-one vote in 2003 in *McConnell*,[290] and again by an eight-to-one vote in 2010 in *Citizens United*.[291] In upholding the current requirements, the Court has emphasized how disclaimers provide critical information about the source of advertisements so that the electorate can more effectively judge the arguments they hear.[292] Hence, the Court has signaled that should Congress enact additional disclaimer requirements, such requirements are likely to be upheld to the extent they further the

[285] *See id.* at 185–186.

[286] *Id.* at 189.

[287] 141 S. Ct. 2373, 2385 (2021). For further discussion of *Bonta*, see CRS Legal Sidebar LSB10621, *Supreme Court Invalidates California Donor Disclosure Rule on First Amendment Grounds*, by Victoria L. Killion; and CRS In Focus IF12388, *First Amendment Limitations on Disclosure Requirements*, by Valerie C. Brannon et al.

[288] *Id.* at 2384 ("While exacting scrutiny does not require that disclosure regimes be the least restrictive means of achieving their ends, it does require that they be narrowly tailored to the government's asserted interest.").

[289] *See, e.g.*, Lloyd Mayer, *Justices Open the Door Wider For Donor Info Law Challenges*, LAW360 (July 2, 2021), https://www.law360.com/articles/1400104 (predicting that *Bonta* will prompt more constitutional challenges to disclosure laws and increase the likelihood of their success); Richard L. Hasen, *The Supreme Court is Putting Democracy at Risk*, N.Y. TIMES (July 1, 2021), https://www.nytimes.com/2021/07/01/opinion/supreme-court-rulings-arizona-california.html (arguing that *Bonta* "calls into question a number of campaign finance disclosure laws"). *Compare* Gaspee Project v. Mederos, 13 F.4th 79, 95–96 (1st Cir. 2021), *cert. denied* 142 S. Ct. 2647 (2022) (affirming a district court's grant of a motion to dismiss a facial challenge to the constitutionality of a state disclosure and disclaimer law, applying the standard of exacting scrutiny set forth by the Supreme Court in *Bonta*), *with Wyo. Gun Owners v. Wyo. Sec. of State*, 592 F. Supp. 3d 1014, 1023 (D. Wyo. 2022) (holding that a state's disclosure requirement for donations "related to" electioneering communications was not narrowly tailored), *appeal filed*, No. 22-8021 (10th Cir. May 10, 2022).

[290] *See* McConnell v. FEC, 540 U.S. 93, 230–31 (2003), *overruled in part by* Citizens United v. FEC, 558 U.S. 310 (2010).

[291] *See Citizens United*, 558 U.S. at 366–371.

[292] *See id.* at 367.

informational interests of the electorate.[293] On the other hand, the Court in *Citizens United* emphasized and appeared to rely upon the fact that the disclaimer requirements being evaluated in that case did not prevent anyone from speaking.[294] Therefore, should a disclaimer requirement be so burdensome that it impedes the ability of a candidate or group to speak—for example, a requirement that a disclaimer comprise an unreasonable period of time in an ad—it could be invalidated as a violation of the guarantees of free speech under the First Amendment.

Similarly, regarding disclosure requirements, as discussed above, the Court has generally upheld their constitutionality, determining that they serve the governmental interests of providing voters with information, deterring corruption and avoiding its appearance, and facilitating enforcement of the law.[295] Should Congress decide to consider legislation providing for enhanced disclosure requirements, it is notable that the Court in *Citizens United* expressly held that the First Amendment does not require limiting disclosure requirements to speech that is the functional equivalent of express advocacy. Therefore, it appears that a court would likely uphold legislation providing for increased disclosure of funding sources for communications containing express advocacy, as well as issue advocacy, to the extent that such regulation can be shown to further the governmental interests identified by the Court.

Criminal Penalties

In addition to a series of civil penalties,[296] FECA sets forth criminal penalties for knowing and willful violations of the Act.[297] This section of the report outlines the criminal penalties applicable to persons who violate the Act.

Generally, FECA provides that any person who knowingly and willfully commits a violation of any provision of the Act that involves the making, receiving, or reporting of any contribution, donation, or expenditure of $25,000 or more per calendar year shall be fined under Title 18 of the *U.S. Code*, or imprisoned for not more than five years, or both.[298] If the amount involved is $2,000 or more per calendar year, but is less than $25,000, the Act provides for a fine under Title 18, or imprisonment for not more than one year, or both.[299]

Notably, FECA provides specific penalties for knowing and willful violations of the prohibition on contributions made by one person "in the name of another person,"[300] discussed above in the section of the report entitled "Ban on Contributions Made Through a Conduit."[301] In addition to the possibility of fines being imposed, for violations involving amounts over $10,000 but less

---

[293] *See, e.g.*, Daniel I. Weiner & Benjamin T. Brickner, *Electoral Integrity in Campaign Finance Law*, 20 N.Y.U. J. LEGIS. & PUB. POL'Y 101, 105–106 (2017) (arguing that only disclaimer and disclosure requirements "have escaped the new majority's narrow corruption paradigm," but maintaining that even under *Citizens United*, in addition to providing voters with information, disclaimers serve to avoid corruption).

[294] *See Citizens United*, 558 U.S. at 366.

[295] *But see* Deborah G. Johnson et al., *Symposium: Privacy, Democracy, and Elections: Campaign Disclosure, Privacy and Transparency*, 19 WM. & MARY BILL OF RTS. J. 959, 971–72 (2011) (cautioning that in the digital age, campaign finance disclosure requirements create heightened privacy interests because data is manipulated and selectively posted).

[296] 52 U.S.C. § 30109(a). For further discussion, see CRS Report R44319, *The Federal Election Commission: Enforcement Process and Selected Issues for Congress*, by R. Sam Garrett.

[297] *Id.* § 30109(d).

[298] *Id.* § 30109(d)(1)(A)(i).

[299] *Id.* § 30109(d)(1)(A)(ii).

[300] *Id.* § 30122.

[301] *See supra* p. 14.

than $25,000, violators could be subject to imprisonment for not more than two years, and for violations involving amounts over $25,000, imprisonment for not more than five years.[302]

In most instances, the U.S. Department of Justice initiates the prosecution of criminal violations of FECA, but the law also provides that the FEC may refer an apparent violation to the Justice Department for criminal prosecution under certain circumstances.[303] Specifically, if the FEC, by an affirmative vote of four, determines that there is probable cause to believe that a knowing and willful violation of FECA involving a contribution or expenditure aggregating over $2,000 during a calendar year, or a knowing and willful violation of the Presidential Election Campaign Fund Act[304] or the Presidential Primary Matching Payment Account Act[305] has or is about to occur, the FEC may refer the parent violation to the U.S. Attorney General.[306] In such instances, the FEC is not required to attempt to correct or prevent such violation.[307]

Author Information

L. Paige Whitaker
Legislative Attorney

Disclaimer

This document was prepared by the Congressional Research Service (CRS). CRS serves as nonpartisan shared staff to congressional committees and Members of Congress. It operates solely at the behest of and under the direction of Congress. Information in a CRS Report should not be relied upon for purposes other than public understanding of information that has been provided by CRS to Members of Congress in connection with CRS's institutional role. CRS Reports, as a work of the United States Government, are not subject to copyright protection in the United States. Any CRS Report may be reproduced and distributed in its entirety without permission from CRS. However, as a CRS Report may include copyrighted images or material from a third party, you may need to obtain the permission of the copyright holder if you wish to copy or otherwise use copyrighted material.

[302] 52 U.S.C. § 30109(d)(1)(D).

[303] 52 U.S.C. § 30109(a)(5)(C); *see also* Memorandum of Understanding Regarding the Enforcement of Federal Campaign Finance Laws, 88 Fed. Reg. 24986-24989 (Apr. 25, 2023). According to a media report, between 2008 and 2015, the FEC referred no campaign finance enforcement cases to the Department of Justice for criminal prosecution, and prior to that, such referrals were infrequent. *See* Kenneth P. Doyle, *FEC Rarely Votes to Refer Criminal Cases to Justice*, BL (July 29, 2015), https://news.bloomberglaw.com/white-collar-and-criminal-law/fec-rarely-votes-to-refer-criminal-cases-to-justice.

[304] Codified at 26 U.S.C. § 9001 *et seq.*

[305] Codified at 26 U.S.C. § 9031 *et seq.*

[306] 52 U.S.C. § 30109(a)(5)(C).

[307] *Id.*