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Free Speech or Fair Elections? A Call for Campaign Finance Reform and a New Definition of Corruption

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I. Introduction

The United States of America is a democratic republic—a system of government "of the people, by the people, for the people."[2] The grand American experiment designed almost 250 years ago imagined a government that was beholden to its people, in which the interests of all citizens would be protected and prioritized. Of course, the United States has seldom met this ideal. However, historically, citizens of the United States have a tradition of faith in the government to protect the interests of the people to whom it answers.[3] Unfortunately, this confidence in the federal government is steadily declining and is today at an all-time low.[4] Among other reasons for this declining faith, Americans cite concerns including the government's lack of intervention to address issues faced by specific groups, diminishing confidence in government employees,

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2 Abraham Lincoln, *The Gettysburg Address* (1863).

3 *Public Trust in Government: 1958-2023*, Pew Research Center (Sept. 19, 2023), https://www.pewresearch.org/politics/2023/09/19/public-trust-in-government-1958-2023/.

4 *Id*.

and concern that politicians are generally self-interested.[5] Such concerns are hallmarks of sinister corruption.

Corruption and money go hand-in-hand. Corrupt governments might intervene to protect groups with the money to make themselves heard at the expense of groups who do not have the funds to organize. Self-interested government employees and politicians might make deals wherein they provide some service in exchange for monetary incentives. And those with extreme wealth might be able to "buy" an election by spending exorbitant amounts in support of their preferred candidates.

The cost of running for office itself is preposterously high. Total federal spending during the 2020 election cycle was $14.4 billion.[6] That is more than double the cost of the 2016 election, which was already record-breaking. The presidential election race alone cost $5.7 billion. Some presidential hopefuls and other candidates for office have enough money to fund their own campaigns, and there are no limits on a candidate's contributions to their own campaign.[7] Certainly, for the handful of people who can afford to bankroll their own campaigns, their presence in the political sphere may not meaningfully represent their constituents, as their campaign success reflects their independent wealth rather than constituent support. However, the vast majority of candidates who cannot finance their own campaigns must accept donations in order to have a chance of winning an election race, making it difficult to avoid the influence of these donors once they are elected.

5 *Americans' Views of Government: Decades of Distrust, Enduring Support for Its Role,* Pew Research Center (June 6, 2022), https://www.pewresearch.org/politics/2022/06/06/americans-views-of-government-decades-of-distrust-enduring-support-for-its-role/.

6 Karl Evers-Hillstrom, *Most expensive ever: 2020 election cost $14.4 billion*, OpenSecrets (Feb. 11, 2021, 1:14 PM), https://www.opensecrets.org/news/2021/02/2020-cycle-cost-14p4-billion-doubling-16/.

7 *Using the personal funds of the candidate,* Federal Election Commission, https://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/using-personal-funds-candate/#:~:text=When%20candidates%20use%20their%20personal,must%2C%20however%2C%20be%20reported (last visited Feb. 27, 2024).

Justifiably, many Americans are concerned that "major political donors and special [interest groups] have too much influence on politics and that ordinary people have too little influence."[8] However, the more sinister campaign finance issue is not contributions given directly to a candidate but rather is the lack of limits on independent expenditures—which are expenditures "for a communication" that "expressly [advocate for] the election or defeat of a clearly identified candidate" without "consultation or cooperation with…any candidate"[9]—and on total aggregate contributions—which are the total amount of direct contributions that an individual can donate during an election cycle.[10]

The First Amendment says that "Congress shall make no law… abridging freedom of speech."[11] The Supreme Court has held that giving money directly to a candidate in the form of campaign contributions constitutes speech, as do independent expenditures. The Court has allowed limits to be placed on contributions directly to a single candidate or political action committee. However, they have not permitted limits on independent expenditures or aggregate contributions. This means that individuals or interest groups can spend as much as they want to create publicity in support of or against a candidate. Alternatively, they can spend as much money as they want donating small amounts to many interest groups, which in turn can spend on behalf of a candidate or donate directly to one candidate (in small amounts below the contribution limit threshold). The Court has held that the influence of independent expenditures and aggregate

8 *Money, power, and the influence of ordinary people in American politics,* Pew Research Center (Sept. 19, 2023), https://www.pewresearch.org/politics/2023/09/19/money-power-and-the-influence-of-ordinary-people-in-american-politics/.

9 *Making independent expenditures*, Federal Election Commission, https://www.fec.gov/help-candidates-and-committees/making-independent-expenditures/#:~:text=Individuals%2C%20groups%2C%20corporations%2C%20labor,are%20not%20subject%20to%20limits (last visited Feb. 12, 2024).

10 *McCutcheon v. Federal Election Commission*, 572 U.S. 185 (2014).

11 U.S. Const. amend. I.

contributions does not constitute corruption and that limiting campaign spending is an unwarrante restriction on free speech.[12]

The Supreme Court's definition of corruption has changed over time. As it is currently defined, only bribery is considered corruption. By ignoring the influential role of money in elections beyond the influence of bribery, the Supreme Court has prioritized a right to free speech for corporations at the expense of the right of ordinary citizens to have their voices heard in political discourse. To protect the right to free speech guaranteed by the Constitution, the Supreme Court must authorize stricter limits on both independent expenditures and aggregate contributions and expand the legal definition of corruption. Corruption must prevent political favors and undue influence by powerful actors, thereby limiting the leverage held by billionaires and massive corporations and promoting equality in political participation.

II. Background

In the current system, running for office in the United States is nearly impossible without considerable monetary power. Money impacts the kinds of candidates who can run for office and influences the policies of candidates both before and after they take office. Thus, ordinary Americans have almost no influence on policy when their opinions are contrary to those of the rich.[13] Additionally, research finds that independent expenditures on campaign messaging and advertising do impact voter support of candidates.[14] Independent expenditures are an effective means of changing "the composition

12 *Buckley v. Valeo*, 424 U.S. 1 (1976); *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010); *Wisconsin Right To Life, Inc. v. Federal Election Commission,* 551 U.S. 449 (2007); *McCutcheon*, 572 U.S.

13 Martin Gilens, *Affluence and Influence* (2012).

14 Richard N. Engstrom & Christopher Kenny, *The Effects of Independent Expenditures in Senate Elections,* Political Research Quarterly, Dec. 2002.

of voters,"[15] or in other words, the types of individuals who vote in an election. Independent expenditures are especially effective in changing the voting behavior of individuals who lack information or who identify strongly with a particular political party.[16] The correlation between money and votes is very strong, although admittedly, it is not clear whether it is an increase in spending that drives votes or an increase in votes that drives donations.[17] Election spending from non-party groups, like interest groups and Super PACs, has surpassed party spending, with non-party groups spending $4.5 billion dollars from 2010-2020 (compared to $750 million in the twenty previous years).[18] Concerningly, independent expenditures by powerful actors have begun to surpass spending by campaigns themselves.[19]

A. Origins of Campaign Finance in the United States

The idea of campaigning, like so many hallmarks of American politics, began with President Andrew Jackson. As the first grassroots campaigner, Jackson sought election by garnering widespread support from the American people. He was an early adopter of political patronage, in which he awarded his supporters with political positions. Jackson's 1824 electoral race set in motion the pattern of political campaigning that continues today, including the collection of financial donations to support a campaign. Campaigning requires money. Thus, in American election-

15 Steven Sprick Schuster, *Does Campaign Spending Affect Election Outcomes? New Evidence from Transaction-Level Disbursement Data*, The Journal of Politics, Oct. 2020.

16 *Id.*

17 Thomas Ferguson, Paul Jorgensen, & Jie Chen, *How money drives US congressional elections: Linear models of money and outcomes*, Structural Change and Economic Dynamics, June 2022.

18 Karl Evers-Hillstrom, *More money, less transparency: A decade under Citizens United*, OpenSecrets, Jan. 14, 2020.

19 *Id.*

eering, campaigning is supported—and funded—by the wealthy.[20] The first federal legislation regulating campaign finance, the 1867 Naval Appropriations Bill, stipulated that the federal government could not solicit funds from naval yard workers.[21] Over the next 100 years, Congress enacted a series of laws that attempted to regulate campaign spending with varying levels of success.[22] A lack of government infrastructure to carry out the requirements of the laws rendered the campaign finance elements of these laws largely unenforceable.

In 1971, Congress "consolidated its earlier reform efforts"[23] by passing the comprehensive Federal Election Campaign Act (FECA),[24] which remains an important piece of legislation. The FECA and its 1974 amendments permitted the creation of Political Action Committees, which allow corporations and unions to amass donations for particular candidates. The FECA also established the Federal

20 *Money-in-Politics Timeline,* OpenSecrets, https://www.opensecrets.org/resources/learn/timeline (last visited Feb. 23, 2024); David P. Callahan, *The Politics of Corruption: The Election of 1824 and the Making of Presidents in Jacksonian America* (2022).

21 *The Presidential Public Funding Program,* The Federal Election Commission (April 1993), https://www.fec.gov/resources/cms-content/documents/The_Presidential_Public_Funding_Program.pdf.

22 The Pendleton Civil Service Reform Act (1883) required that federal positions be awarded on the basis of merit and not via political patronage (Pendleton Civil Service Reform Act, 22 Stat. 403, 1883). The Tillman Act of 1907 banned corporations and national banks from contributing to candidates (Tillman Act, Pub. L. No. 59-36, 34 Stat. 864, 1907). The Federal Corrupt Practices Act of 1910, amended in 1910 and 1925, increased disclosure requirements (Federal Corrupt Practices Act, Pub. L. 61-274, 36 Stat. 822, 1910). The Hatch Act of 1939 placed some limits on contributions and expenditures in federal elections (Hatch Act, Pub. L. 76-252, 53 Stat. 1147, 1939). The Taft-Hartley Act of 1947 prevented labor unions and corporations from making contributions to Federal elections (Taft-Hartley Act, Pub. L. 80-101, 61 Stat. 136, 1947).

23 *Mission and history,* Federal Election Commission, https://www.fec.gov/about/mission-and-history/ (last visited Feb. 23, 2024).

24 Federal Election Campaign Act, Pub. L. 92-225, 86 Stat. 3, 1972, 52 U.S.C. § 30101.

Election Commission, the first regulatory body created to enforce campaign finance laws.

B. Supreme Court Definitions of Corruption

In the landmark Supreme Court case *Buckley v. Valeo (1976)*,[25] the Court affirmed the already-established standard that there must be sufficient governmental interest to limit free speech. It held that placing restrictions on campaign contributions does limit free speech. However, these limits are justified to prevent "quid pro quo" corruption. "Quid pro quo" is Latin for "this for that." It implies a direct exchange, and in the language of campaign finance, it refers to a donation of money in exchange for political favors, such as political appointments and explicit support or votes for certain policies. In addition to upholding limits on direct contributions to a specific candidate, the Court upheld provisions that limited the aggregate contributions an individual or corporation could make in a one-year period. Despite confirming restrictions on campaign contributions, the Court knocked down the provisions of the FECA that would have limited independent expenditures. The Court held that independent expenditures do not directly lead to quid pro quo corruption, and thus, placing limits on these expenditures would limit protected speech without due cause.

Subsequent cases expanded the definition of corruption to include undue influence by large corporations and the appearance of such influence. *Austin v. Michigan Chamber of Commerce (1990)*[26] upheld a Michigan law that prohibited corporations from using their general fund to make independent expenditures to support or oppose candidates. Additionally, the Court held that legislatures are justified in passing laws that protect against "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no relation to

25 *Buckley*, 424 U.S. In *Buckley*, the Court sought to address whether the Federal Election Campaign Act violated the First Amendment's free speech and association clauses.

26 *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

the public's support for the corporation's political ideas."[27] Therefore, under *Austin*, Congress was permitted to enact legislation to limit independent expenditures to mitigate distortion of the political process by powerful actors.

McConnell v. Federal Election Commission (2003)[28] upheld the Bipartisan Campaign Reform Act of 2002 (BRCA),[29] which banned unrestricted donations to political parties, limited the types of advertising that corporations could carry out up to sixty days before an election, and placed restrictions on parties' funds for advertising for particular candidates. It should be noted that all corporations were subject to the BRCA, including non-profit groups, unions, and large businesses. *McConnell* upheld the regulations of the BRCA on the basis that doing so prevented "both the actual corruption threatened by large financial contributions and…the appearance of corruption."[30] This case made it clear that the government is justified in limiting free speech to prevent the perception of possible corruption to protect the integrity of the political process. It also upheld Congress's right to regulate "express advocacy," or an entity's right to make independent expenditures to advocate on behalf of a political candidate.

However, the Court quickly began to reverse course, holding in *Wisconsin Right to Life, Inc. v. Federal Election Commission (2007)* that "issue ads" are not subject to the same scrutiny that "express advocacy" ads are, and that "an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."[31] By narrowing the definition of express advocacy ads, the Court decreased Congress's right to regulate independent

27 *Id.* at 660.

28 *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003).

29 Bipartisan Campaign Reform Act, Pub. L. 107-155, 116 Stat. 81, 2002.

30 *Id.* at 136 (citing *National Right to Work*, 459 U.S., at 208).

31 *WRTL*, 551 U.S. The Court ruled that *McConnell v. FEC* allows for Wisconsin Right to Life to proceed with its "as-applied" challenge to the BCRA, instructing the U.S. District Court for D.C. to consider whether the BCRA is constitutional as applied to WRTL's ad campaign.

expenditures and increased the amount of money allowed in campaigning, thereby increasing risks of corruption.

In the landmark case *Citizens United v. FEC (2010)*,[32] the Court overruled *Austin* and parts of *McConnell*. It struck down provisions of the Bipartisan Campaign Reform Act that had prevented corporations of all kinds from engaging in independent spending. The Court held that political speech cannot be limited just because the "speaker" is a corporation, and thus, independent expenditures by a corporation in support of or in opposition to a candidate cannot be limited. Under this decision, only quid pro quo corruption is sufficient to overcome the rights to free speech guaranteed by the First Amendment. The Court upheld existing disclosure requirements and limits on contributions directly to a political candidate. This decision has led to the rise of Super PACs, which are independent political action committees that can amass unlimited sums of money to support or oppose a candidate independently of their campaign. In a post-*Citizens United* political environment, corporations, unions, nonprofits, and Super PACs can spend as much money as they want to influence elections.

C. Specific Limits on Campaign Spending and Contributions

As noted, there are limits on the contributions an individual can make to one candidate or political entity. Contribution limits are indexed for inflation every two years. Currently, an individual may give $3,300 per election directly to a candidate and $5,000 to a PAC. A corporation or PAC can give $5,000 to a candidate committee or $5,000 to another PAC.[33] It is important to note that these limits are on individual contributions, not on the aggregate contributions an individual or group may make during an election cycle.

32 *Citizens United*, 558 U.S. Citizens United sought an injunction against the FEC to prevent application of the BCRA to a film it produced expressing political opinions. Citizens United argued that the BCRA violates the First Amendment and is unconstitutional.

33 *Contribution Limits for 2023-2024*, Federal Election Commission (February 2023), https://www.fec.gov/resources/cms-content/documents/contribution_limits_chart_2023-2024.pdf.

Importantly, the 1974 amendments to the Federal Election Campaign Act limited the amount of money that could be spent independently to influence federal elections and required the disclosure of independent expenditures over a specific amount. Specifically, individuals were limited to a total of $1,000 per year on independent expenditures, and political action committees were limited to $5,000 per year on independent expenditures.[34] These provisions were overturned by *Buckley v. Valeo*.[35] The Federal Election Campaign Act, and the later Bipartisan Campaign Reform Act of 2002,[36] also limited aggregate contributions that could be made by an individual during an election cycle (although there were never any limits imposed on aggregate spending by a corporation or other group). Until 2014, the aggregate limit that any individual could spend during a two-year election cycle was $123,200.[37]

However, in the Court's 2014 ruling in *McCutcheon v. Federal Election Commission,*[38] the Court held that although Congress is justified in placing limits on individual contributions, Congress cannot place limits on aggregate contributions. This means that although there are limits on how much money one donor can give to one candidate, there are no limits to how much money a donor can give collectively to all candidates. There are also no limits on the number of Political Action Committees that can operate. This means one donor can give money to many PACs who all support one candidate. Thus,

34 *Buckley v. Valeo,* Federal Election Commission, https://www.fec.gov/legal-resources/court-cases/buckley-v-valeo/#:~:text=The%20appellants%20had%20charged%20that,such%20candidate%22%20 (last visited March 12, 2024).

35 *Buckley*, 424 U.S.

36 Bipartisan Campaign Reform Act, Pub. L. 107-155, 116 Stat. 81, 2002.

37 *McCutcheon*, 572 U.S. at 194, 249. In the 2011-2012 election cycle, Alabama resident Shaun McCutcheon wanted to donate an amount of money that was allowed under the BCRA base limit but not permitted by the aggregate limit. McCutcheon sued the FEC, arguing that the aggregate limit violated the First Amendment, and the Court agreed, holding that the aggregate limit, while attempting to combat corruption, unnecessarily constrained free speech.

38 *McCutcheon*, 572 U.S.

although theoretical barriers prohibit spending unlimited funds to support one candidate, in practice there are no limits to the contributions that an individual or corporation can give to one candidate.

Under current Supreme Court holdings, there are no limits on the independent expenditures that can be made in support of or against a candidate.[39] Additionally, there are no limits on aggregate contributions. Therefore, there are virtually no limits to how much a corporation or individual can spend in support of or in opposition to a particular candidate. Those with money to spend on elections can have a hugely disproportionate effect on electioneering. Only a tiny fraction of wealthy Americans donate to campaigns,[40] but these donations have a significant influence both on elections and on the policies of elected officials once in office.

III. Proof of Claim

A. Corruption: A "Clear and Present Danger"

As mentioned, the First Amendment prohibits Congress from enacting legislation that limits freedom of speech,[41] and the Supreme Court has repeatedly held that the right to free speech includes the right to spend money to speak.[42] The Court has also held that the right to free speech is extended to corporations unless there is some compelling government interest in regulating said speech (the threshold for which is very high). Thus, opponents of campaign finance reform

39 This is true at both the federal and state levels, although every state except Indiana requires reporting and disclosure of independent expenditures to some degree. *See Independent Expenditure Disclosure Requirements,* National Conference of State Legislatures, https://www.ncsl.org/elections-and-campaigns/independent-expenditures (last updated July 21, 2017).

40 In 2022, only 0.395% of U.S. females and 0.646% of males donated more than $200 to political candidates, parties, or PACS. The proportion of people who gave larger contributions was even smaller. *See Donor Demographics,* OpenSecrets, https://www.opensecrets.org/elections-overview/donor-demographics (last visited March 11, 2024).

41 U.S. Const. amend. I.

42 *Buckley v. Valeo*, 424 U.S; *Citizens United*, 558 U.S; *WRTL,* 551 U.S.

point to the First Amendment as the principal reason why Congress should favor free speech over spending regulations.

In the 1919 case *Schenck v. United States,* the Supreme Court held that the government is justified in limiting an entity's First Amendment right to free speech to prevent a "clear and present danger" that could bring about "substantive evils."[43] From this case comes the oft-invoked and somewhat cliché precedent that one cannot "shout fire in a crowded theater." Later cases affirmed the right of the government to limit free speech in scenarios which present clear and present danger.[44] One such danger recognized by the Court is corruption: a concept both difficult to define and difficult to regulate that broadly implies an individual or organization uses their authority for personal gain.

Corruption has long been a concern in campaign finance. Court decisions indicate that free speech concerns are overshadowed by corruption concerns when it comes to contributions directly to a campaign, and there is thus sufficient "governmental interest" in regulating contributions. As previously outlined, in the first modern-era campaign finance case, *Buckley v. Valeo*, the Court held that the government is justified in placing limits on campaign donations when such donations lead to corrupt behavior[45] even though the donations qualify as speech under the First Amendment. This sort of quid pro quo corruption presents a "clear and present danger" to representative democracy, a fact which the Supreme Court has affirmed.

However, in *Buckley*, the Court failed to recognize the "clear and present danger" inherent in unregulated independent expenditures. The Court held that "contribution limits are subject to lower scrutiny because they primarily implicate the First Amendment rights of association, not expression, and contributors remain able to vindicate their associational interest in other ways."[46] In other words, campaign donations directly to a candidate are subject to more stringent

43 *Schenck v. United States*, 249 U.S. 47 (1919).

44 *See also Gitlow v. New York*, 268 U.S. 652 (1925); *Dennis v. United States*, 341 U.S. 494 (1951); *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

45 *Buckley*, 424 U.S.

46 *Id.*

regulations, both because they are less expressive of pure speech and because they can have, in the opinion of the Court, a more corruptive influence on the electoral process than independent expenditures. In the Court's view, the free speech concerns associated with limiting expenditures outweigh corruption concerns because it does not view corruption as a significant issue in these cases. However, the current Court has not conceptualized corruption correctly.

Scholars have characterized campaign finance corruption in several ways. Before the heated and salient debates surrounding campaign finance of the last twenty years, scholar Thomas Burke preemptively explained three types of corruption that are inherent in campaign finance. In addition to (1) quid pro quo corruption, he noted other avenues of corruption: (2) monetary influence and (3) distortion. Burke's conception of these corruptive processes, along with a fourth avenue of corruption, the appearance of corruption, mirror the kinds of corruption the Court has acknowledged—although ultimately failed to regulate—in the years since.

1. "Quid Pro Quo" Corruption

Imagine that a corporation or interest group does not donate directly to a candidate, but uses their platform and their wealth to run a series of television advertisements in favor of a particular candidate. Largely as a result of their advertising campaign, their preferred candidate is elected.[47] Certainly, this presents a potential issue of quid pro quo corruption. Despite provisions in the FECA and the BRCA[48] that prohibit corporations and candidates from colluding and ostensibly prevent any exchange of political support for political

47 *See* Michael M. Franz & Travis N. Ridout, *Does Political Advertising Persuade?*, Political Behavior (April 21, 2007), https://link.springer.com/article/10.1007/s11109-007-9032-y; Daniel Houser, Rebecca Morton, & Thomas Stratmann, *Turned on or turned out? Campaign advertising, information and voting,* European Journal of Political Economy (December 2011), https://www.sciencedirect.com/science/article/abs/pii/S0176268011000498?via%3Dihub.

48 Federal Election Campaign Act, Pub. L. 92-225, 86 Stat. 3, 1972, 52 U.S.C. § 30101; Bipartisan Campaign Reform Act, Pub. L. 107-155, 116 Stat. 81, 2002.

favors, it is conceivable that such favors would be given, because, as Justice John Paul Stevens wrote in an opinion joined by Justice Sandra Day O'Connor for *McConnell v. FEC* (2004), "money, like water, will always find an outlet."[49] In this scenario, perhaps both parties know what they will get out of the exchange: the corporation or interest group pays for advertisements that help a candidate win an election, and in exchange, the corporation receives favors, perhaps in the form of their preferred policies, after the candidate takes office. Certainly, in such a scenario, the Supreme Court would be justified in allowing limits on independent expenditures to prevent such an outcome.

2. Monetary Influence

Even if independent expenditures are not made in exchange for direct political favors, they still have a corruptive influence on the political process. Imagine instead that the corporation or interest group pays for the advertisement campaign with no promises of future political favors from the candidate. However, the candidate recognizes the aid that the corporation has provided to the success of the candidate's campaign and acts accordingly once in office. The newly-elected official may choose to prioritize the issues that they suspect the corporation would favor. Perhaps the candidate believes that acting on behalf of this corporation could incentivize said corporation to again run ads in their favor when the official runs for reelection. This avenue of corruption reflects what Burke explains is "monetary influence," or the idea that officeholders "perform their public duties with monetary considerations in mind."[50] It also reflects what the Supreme Court defined as "undue influence" in *Austin v. Michigan State Chamber of Commerce.*

49 *McConnell*, 540 U.S.

50 Thomas F. Burke, *The Concept of Corruption in Campaign Finance Law,* Constitutional Commentary (1997), https://scholarship.law.umn.edu/concomm/1089/.

3. Distortion

Now imagine a third scenario, in which the corporation does create advertisements on behalf of the candidate, but the candidate is not influenced by any advertising campaigns run in favor of their election. The candidate neither makes deals with donors, nor considers the donor's interest when making policy decisions. In such a case, the public would not need to be concerned about either quid pro quo corruption or monetary influence. However, even in the absence of such forms of corruption, corporations can still have a significant distorting influence on the political process. Perhaps the corporation is in a position to spend so much money on advertising in favor of one candidate or in opposition to another that they effectively drown out the voices of smaller groups, individuals, and candidates who lack the resources to advertise their merits and platforms on as large a scale. In this case, although the candidate does nothing to directly support the corporation or interest group that effectively won them the election, the kinds of policies that they choose to implement will reflect the ideologies of the corporation and may not accurately mirror the ideologies of the candidate's overall constituency.

Distortion, according to Burke, is the idea that the decisions made by democratically elected leaders do not reflect the opinions of the majority of their constituents. This definition mirrors the earlier Supreme Court holding also outlined in *Austin*, in which the Court held that anti-distortion is a rationale for limiting the influence of corporations.[51] Although previous Courts clearly recognized the dangers associated with these "lesser" forms of corruption, the current Court has chosen to limit corruption to quid pro quo. With little deference to precedents set by earlier Courts, the majority of the current Court has chosen to ignore the distorting influence and appearance of influence that independent expenditures and aggregate contributions have on the political process.

Distortion is perhaps the most egregious form of corruption because it is the most subtle and hardest to detect, and thus, the most difficult to regulate. Empirical evidence demonstrates that "express

51 *Austin*, 494 U.S.

advocacy"[52] in the form of advertisements has a significant effect on the kind of people that are elected to political office. In addition, evidence suggests that "the influx of money" in the political discourse surrounding elections "is correlated with the kinds of policy outputs that emerge from the legislative process."[53] The consequence of this type of "express advocacy" is that the corporation or interest group that spends the most money on advertising will be in the best position to have their preferred candidate elected. Such a candidate would be someone they can be sure will support their preferred ideology and policy goals without any direct "quid pro quo" political favors. What this means is that individuals and groups with deep pockets distort the electoral playing field by determining the kind of candidates who will be elected to office. As long as corporations can spend unlimited sums of money on independent expenditures in favor of or against a particular candidate or donate without regulation to a myriad of super PACs who funnel resources into campaigns of the same candidate, the equality of the political process and elections will always be distorted. Thus, corruption of the political voice of the average citizen will always be present.

4. The Appearance of Corruption

Of course, these situations are all hypotheticals, and while it is certainly plausible that all three avenues of corruption (quid pro quo, monetary influence, and distortion) are consistently affecting the political process, the nature of corruption makes it hard to detect, meaning that we cannot really know the true consequence of these corruptive forces. However, consider how you felt as you read the previous three scenarios. Did you believe them plausible? Did they raise concern about the fairness of the political process? Did they make you question your trust in your government to represent you? Groups and individuals who are in a position to make independent expenditures or to spend a large amount of money in aggregate over

52 *WRTL*, 551 U.S.

53 Yasmin Dawood, *Campaign Finance and American Democracy,* Annu. Rev. Polit. Sci. at 342 (2015), https://www.annualreviews.org/doi/pdf/10.1146/annurev-polisci-010814-104523.

a political election cycle have the appearance of political power. The money they spend leads to the appearance of corruption, which is almost as dangerous to the political process as the existence of true corruption itself. The appearance of corruption erodes public trust in the government. It leads to reduced civic engagement and increased cynicism and polarization. The appearance of corruption, whether or not it is present, creates distance between the public and the officials who are supposed to represent them.

Previous Supreme Courts recognized the dangers of the appearance of corruption. Under the now-overturned *McConnell v. Federal Election Commission*, the Court held that the government is justified in limiting free speech in the form of money (whether direct contributions or independent expenditures) when not doing so would result in "undue influence on an officeholder's judgment, and the appearance of such influence."[54] This caveat shows that the Court that decided *McConnell* knew minimizing the appearance of corruption is important, because even the perception of corruption is damaging to political participation and limits the types of candidates that can make it into office.

Quid pro quo corruption is regulated. However, undue influence, distortion of the political process, and the appearance of corruption are not. The difficulty associated with regulating these corruptive processes does not justify allowing them to be unregulated. Though perhaps less harmful than quid pro quo corruption, these lesser forms of corruption are also much more common, and present a "clear and present danger" to representative democracy. Because of the influence that corporations and wealthy individuals can have on the electoral process, the Court should return to the precedent that regulated these influences. If it does not, the officeholders and the policies they make will not reflect the wants and needs of the general public, and democracy will be jeopardized.

The Court's current definition of corruption as a donation of money in exchange for political favors is limited and short-sighted at best. Activities that were considered corruptive under earlier Supreme

54 *McConnell*, 540 U.S. at 95 (citing *Federal Election Comm'n v. Colorado Republican Federal Campaign Comm.*, 533 U. S. 431, 441).

Court holdings are now (since *Citizens United* and *McCutcheon*) considered "responsiveness" by politicians and "participation" by donors.[55] To promote broad political participation and to limit the distorting influence that wealth has on the kinds of candidates that are elected to political office, the Supreme Court must expand the definition of corruption in campaign finance in order to support broad political participation. Any incorporated group—including business corporations, interest groups, and unions—and any individual, that, by force of their significant wealth, has resources at their disposal to drown out other voices in the political process must be subject to more stringent regulations of the expenditures that they can make in support of or in opposition to a political candidate and the aggregate contributions they can spend during an election cycle.

B. Regulations as a Means of Protecting First Amendment Rights

That is not to say that we must entirely remove all such groups from the political playing field. If we were to entirely prevent these groups from making expenditures as a form of express advocacy, we could conceivably lose a lot of valuable information, especially when we consider that a large number of these groups are interest groups devoted to protecting the rights of overlooked individuals. However, these groups have an overwhelming influence on election cycles and subsequent policies.

Scholar John Rawls wrote, "The liberties protected by the principle of participation lose much of their value whenever those who have greater private means are permitted to use their advantages to control the course of public debate."[56] The influence of corporations and individuals who can spend money on campaigns without limits hurts the chances of people without such monetary power to have their voices heard. Doing so goes against the very principles of a

55 *McCutcheon*, 572 U.S. at 30, 39.

56 John Rawls, *A Theory of Justice* (1971). John Rawls was an American professor and political philosopher, who believed in the doctrine of "justice as fairness." *A Theory of Justice* set out this idea, which was later developed in subsequent books. Many consider Rawls to be one of the most important political philosophers of the 20th century.

democratic society, wherein elected officials are dependent on all of their constituents, not just those with disproportionate monetary power. Thus, contrary to the Court's recent holdings, prioritizing anticorruption over "free speech" will actually promote freedom of expression and political participation.

Imposing limits on independent expenditures and aggregate contributions will promote political participation in a myriad of ways. Limits will decrease the war chests of electoral candidates, allowing more people with less money to run. Thus, candidates who run for office will be more representative of the constituents whom they are vying to represent. Additionally, limits on independent expenditures and aggregate contributions may actually induce more people to donate because they will be more confident that their funds will have an impact on the types of candidates who are elected.

Limits on independent expenditures and aggregate contributions will also equalize advocacy via advertisements in elections. Some estimates conclude that running TV ads constitutes the largest percentage of money spent during an election campaign.[57] Ads are an extremely effective way of reaching a large audience and proposing an idea, platform, or candidate. Therefore, by holding that corporations have a right to speak via ads, and allowing corporations to spend unlimited funds to create ads, the Court has contributed to the decrease in political voice afforded to those without such funds. Imposing independent expenditure and aggregate contribution limits would not completely dispense with the practice of making political advertisements for or in opposition to a particular candidate, nor would it prevent groups from furnishing information that is necessary to the political process. In fact, it could make information more available, as more groups will be able to provide information at a lower cost.

Regulations on independent expenditures and especially on aggregate contributions may also encourage the development of a multiparty system. Currently, it is risky to spend funds on behalf of

57 Chavi Mehta, *US political ad spending to soar in 2024 with TV media the biggest winner – report,* Reuters (Jan. 11, 2024), https://www.reuters.com/world/us/us-political-ad-spending-soar-2024-with-tv-media-biggest-winner-report-2024-01-11/.

a third party because they are unlikely to receive as much support as the majority parties. Additionally, since there is a lack of aggregate contribution limits and an unlimited number of political action committees, individuals and interest groups with monetary power to influence elections can spend limitlessly to support the specific candidates or parties that they align themselves with, which prevents the growth of smaller parties. Placing limits on aggregate contributions and independent expenditures would encourage donations by those who support third-party candidates, thereby encouraging more people to exercise their First Amendment rights and allowing smaller parties to break into a political arena that currently keeps them out. Doing so would decrease polarization and encourage cooperation as elected officials focus on coalition building. It would allow people with views that do not align with either major party to have more representation in politics, thereby encouraging political participation and protecting political representation.

Thus, to equalize the political process, the Court should allow Congress to regulate independent expenditures and aggregate contributions just as it does for individual contributions. Doing so would promote and protect First Amendment rights to free speech, not limit them. By regulating independent expenditures and aggregate contributions, the government would level the playing field. Certainly, individuals with money would still have an influence on the kinds of people elected to office and the kinds of policies enacted. However, their influence would be less distorting to the political process and would not drown out the voices of those without substantial financial resources to donate to a political campaign.

C. Potential Solutions and Related Problems

The most obvious solution to mitigate the issues associated with campaign finance is a congressional statute. In fact, a bill to amend the Federal Election Campaign Act of 1971 was introduced during the current Congress, on October 31st, 2023, which would place more stringent regulations on independent expenditures and

contributions.[58] Clearly, at least some members of Congress (the very people who benefit most from maintaining the status quo) recognize that unchecked expenditures and contributions in campaigns are dangerous to a democratic society. However, this solution is dependent upon the Supreme Court's willingness to let such a statute stand. Over the last fifty years, the numerous laws that Congress has enacted to regulate expenditures and aggregate contributions over time have mostly been overturned by the Supreme Court.

Therefore, a solution to the corruption in campaign finance requires the cooperation of both Congress and the Supreme Court. The first step for lasting and meaningful change in campaign finance law to be enacted is for Congress to pass a bill that would limit independent expenditures and aggregate contributions. Congress should follow the model of earlier campaign statutes as it enacts such laws.

One way that Congress could limit independent expenditures is by setting a cap on such spending equal to the cap on contributions directly to political parties. As noted earlier, an individual may currently give $3,300 directly to a candidate per election and $5,000 to a PAC, and a corporation or PAC can give $5,000 to a candidate committee or $5,000 to another PAC.[59] Congress could simply set caps on independent expenditures at the same level. Alternatively, in recognition of the Court's holding that contributions should be subject to more stringent regulations than independent expenditures, Congress could allow slightly higher caps on independent expenditures. Congress could limit aggregate contributions for individuals by returning to the pre-2014 limit on contributions—which, as noted earlier, was $123,200 per individual per election-cycle[60]—and setting

58 In fact, the bill, known as the Ending Corporate Influence on Elections Act, would limit all expenditures and contributions by publicly traded corporations. *See* Ending Corporate Influence on Elections Act, 118th Cong. (2023).

59 *Contribution Limits for 2023-2024*, Federal Election Commission (February 2023), https://www.fec.gov/resources/cms-content/documents/contribution_limits_chart_2023-2024.pdf.

60 *McCutcheon*, 572 U.S. at 149, 249.

a high but reasonable limit on aggregate contributions for corporations as well.

In addition to placing caps on independent expenditures and aggregate contributions, there are potentially other solutions to limit the amount of money (and thus the amount of corruption and lack of political representation) in elections. Advertising on television is a huge expense for American candidates and the corporations and individuals who spend money to support them. In some other countries,[61] candidates are either forbidden from advertising on television, or they are given free airtime on T.V. Such a solution would level the playing field because it would give all candidates the right to have their voices heard, although it could be seen as limiting to individuals and corporations who wish to show their support for or opposition to a political candidate. Another solution utilized in other countries is shortening the campaigning period. Though this would certainly reduce the amount of money in elections and thus is a compelling idea, it is not a true solution, as it would not necessarily limit the relative influence of wealthy individuals and powerful corporations on the electoral process. Therefore, the most effective solution to limit the amount of money in elections, to mitigate the distorting effects of corruption in campaign finance, and to encourage political participation and representative democracy is a congressional limit on independent expenditures and aggregate contributions.

Ultimately, however, the decision to limit independent expenditures and aggregate contributions in campaign finance, or to allow any other laws that may impact campaign finance reform, rests with the Court. The Court has the power of judicial review, and thus can overturn any legislation passed by Congress. Given the Court's current makeup, it seems unlikely that the Court would be willing to entertain any challenges to campaign finance at the present time. Three of the nine justices currently on the Court joined the

61 *Media and Elections,* Administration and Cost of Elections Project, https://aceproject.org/main/english/me/mec04b01.htm (last visited March 11, 2024); Nisar Nikzad, *How Radio & Television Advertising Differs from Country to Country,* Translation Excellence Language Services (August 7, 2023), https://translationexcellence.com/how-radio-television-advertising-differs-from-country-to-country/.

majority in both *Citizen United* and *McCutcheon*. All six conservative justices on the Court, John Roberts, Samuel Alito, Clarence Thomas, Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett, joined the majority opinion in *Federal Election Commission v. Ted Cruz,* a recent Supreme Court case in which the Court further decreased campaign finance regulation in order to ostensibly protect free speech.[62] Although unfettered independent expenditures and aggregate contributions are a significant problem, it is unlikely that a feasible solution could be achieved given the reticence of the current Supreme Court to limit what they consider to be "freedom of speech." The Court would have to be convinced that independent expenditures and aggregate contributions have a more corruptive influence on American democracy than the proposed imposition on campaign spending.

IV. Conclusion

By and large, Americans support limits on campaign spending.[63] In our current climate, it has become nearly impossible for ordinary citizens who don't have corporate backing or independent wealth to run for office. That makes it less likely that elected officials will have similar characteristics to the people they represent, which is

62 *Federal Election Commission v. Ted Cruz for Senate,* 596 U.S. 289 (2022). In 2018, Ted Cruz loaned his senate campaign $260,000. Under the Bipartisan Campaign Reform Act of 2002, there is a $250,000 cap on post-election contributions that can be used to pay back a candidate's pre-election loans, meaning that $10,000 of Cruz's loan would instead be converted to a campaign contribution. In this case, the majority decided that placing a limit on the amount of contributions that can be used to pay back a candidate who had loaned money to his or her own campaign violates the candidate's right to free speech under the First Amendment. The minority, however, argued that these transactions make those who already hold positions of power richer, which can result in corruption.

63 Bradley Jones, *Most Americans want to limit campaign spending, say big donors have greater political influence,* Pew Research Center (May 8, 2018), https://www.pewresearch.org/short-reads/2018/05/08/most-americans-want-to-limit-campaign-spending-say-big-donors-have-greater-political-influence/.

detrimental to a democratic society. The policies that elected officials advocate for and the legislation that they propose will not reflect the types of positions that are important to the majority of their constituents. This distortion of the political playing field has a corruptive influence on the very ideals of a representative democracy.

Campaign finance reform will change the types of candidates that run for office. In doing so, it will promote political equality and participation for the average American. Therefore, the Supreme Court and Congress must work in tandem to promote change in campaign finance law. Congress must pass statutes, as they have done in the past, to limit independent expenditures in favor of or in opposition to a particular candidate. They must also place a limit on aggregate contributions during an election cycle by a corporation or individual. However, this solution will be useless without the support of the Supreme Court, which must recognize that corruption extends beyond "quid pro quo" and expand the definition accordingly. Only if this happens will we begin to see a change in campaign finance. Campaign finance reform will promote democratic governance in an era when our country desperately needs such change.