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## If I Go Crazy, Then Will You Still Call Me a Super PAC? How Enmeshment with Political Action Committees Makes Contribution Limits Enforceable on Independent Expenditure-Only Committees

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IF I GO CRAZY, THEN WILL YOU STILL CALL ME A SUPER  
PAC? HOW ENMESHMENT WITH POLITICAL ACTION  
COMMITTEES MAKES CONTRIBUTION LIMITS ENFORCEABLE  
ON INDEPENDENT EXPENDITURE-ONLY COMMITTEES

*Brian Greivenkamp\**

I. INTRODUCTION

Campaign finance is a confusing and often intimidating area of the law. Even attempting to discuss the subject with the uninitiated requires a fair deal of knowledge of complicated acronyms and technical terms of art. Despite the difficulty of discussing campaign finance without this background, the subject's importance is becoming increasingly evident. In the 2012 presidential election, the playing field faced radically different parameters than those faced a mere four years before. As the 2016 election begins to loom large on the horizon, it is important for those participating in political elections, as well as socially-conscious citizens, to understand how political campaigns are financed and what restrictions campaigns face.

The difference between political action committees (PACs) and independent expenditure-only committees (commonly known as Super PACs) is one of the most confusing aspects of campaign finance law. A PAC is generally an organization that coordinates with a candidate regarding his or her election, possibly in conjunction with a specific political issue. These committees are highly regulated in terms of what they may accept as contributions and what sort of expenditures they may make on behalf of candidates.<sup>1</sup> Super PACs, in contrast, are generally neither limited by what contributions they may accept, nor what expenditures they may make.<sup>2</sup> One of the major distinctions that differentiate a Super PAC from an ordinary PAC is that a Super PAC may neither coordinate with a candidate nor make contributions directly to a candidate's campaign.<sup>3</sup> Therefore, the general function of a Super PAC is to purchase advertisements which promote a candidate, attack an opposing candidate, or address the validity of a candidate's messages.

Most candidates in a major election have a Super PAC that is closely associated with the candidate's campaign.<sup>4</sup> As long as the Super PAC

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1. 2 U.S.C.A. § 431 (1971) (current version at 52 U.S.C.A. § 30101 (2014)).

2. See generally *Buckley v. Valeo*, 424 U.S. 1 (1976).

3. *Id.* at 47.

4. See Garrick B. Pursley, *The Campaign Finance Safeguards of Federalism*, 63 *EMORY L.J.* 781, 786 (2014).

does not coordinate with the candidate or an agent of the candidate, this relationship is legal.<sup>5</sup> Occasionally, however, Super PACs develop as a branch of an already existing PAC, ostensibly for the purpose of working toward a mutual goal.<sup>6</sup> These related organizations have been known to share directors, bank accounts, and fundraising ventures.<sup>7</sup> Recent jurisprudence on the issue has posited that this closely enmeshed relationship is also legal.<sup>8</sup> In the summer of 2014, a decision by the United States Court of Appeals in the Second Circuit, *Vermont Right to Life Committee, Inc. v. Sorrell*, created a circuit split on this issue, holding that contribution limits to PACs also apply to Super PACs if the latter is functionally indistinguishable from the former.<sup>9</sup>

This Casenote examines whether the Second Circuit's holding in *Vermont Right to Life Committee, Inc. v. Sorrell* was correct, and whether other circuits should adopt its holding. Part II discusses the background surrounding the jurisprudence of contribution limits imposed on Super PACs. Part III discusses *Vermont Right to Life Committee, Inc. v. Sorrell*, and why the Second Circuit decided to break away from persuasive authority on the issue of contribution limits. Part IV examines the major arguments in favor of the Second Circuit's opinion. In Part V, this Casenote outlines potential drawbacks to the Second Circuit's findings and analyzes whether or not considerations made by other circuits may outweigh the Second Circuit's rationale. Finally, this Casenote will conclude by stating that the Second Circuit's holding is the correct one and should be adopted by other circuits in the future.

## II. BACKGROUND

### A. *The Federal Election Campaign Act*

The 1971 Federal Election Campaign Act (FECA) imposed the first regulations on PACs.<sup>10</sup> FECA established the principle that persons, whether they are individuals or corporations, can contribute only a certain predetermined amount to a political action committee over the course of a calendar year.<sup>11</sup> This same statute sets out important

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5. *Buckley*, 424 U.S. at 47; *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 314 (2010).

6. *See Vermont Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118 (2d Cir. 2014).

7. *Id.*

8. *See N. Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274 (4th Cir. 2008).

9. *Sorrell*, 758 F.3d at 141.

10. 2 U.S.C.A. § 431 (1971) (current version at 52 U.S.C.A. § 30101 (2014)).

11. *Id.* Part 11 of this statute clarifies that "person" refers to committees and corporations as well

definitions for the terms “contribution,” “expenditure,” and “independent expenditure”. The statute defines a contribution as, “any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office.”<sup>12</sup> For the purposes of this Casenote, the term “contribution” refers to a gift of money either by an individual or corporation to a PAC committee.

FECA defines an “expenditure” as “any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office; and a written contract, promise, or agreement to make an expenditure.”<sup>13</sup> These sorts of expenditures can be anything given out by a political committee, including direct financial gifts to campaigns. An “independent expenditure,” on the other hand, is defined as an expenditure “expressly advocating the election or defeat of a clearly identified candidate; and that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents.”<sup>14</sup> Independent expenditures are almost always advertisements or pamphlets produced by a political committee.

### B. *United States Supreme Court Cases*

The Supreme Court’s Super PAC jurisprudence dates back to 1976. In *Buckley v. Valeo*, the United States Supreme Court invalidated a ceiling on independent expenditures, stating that the absence of coordination with the candidate “alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.”<sup>15</sup> *California Medical Association v. FEC (Cal-Med)* also emphasized that same point.<sup>16</sup> In *Cal-Med*, Justice Blackmun, concurring with the plurality’s opinion, in part, and concurring in the judgment, articulated that political corruption is the only constitutional motivation for limiting political contributions and that the limitations must be “no broader than necessary to achieve that interest.”<sup>17</sup>

As recently as April of 2014, the United States Supreme Court has continued to hold that the motivation to reduce *quid pro quo*

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as individuals.

12. *Id.* at 30101(8)(A)(i).

13. *Id.* at 30101(9)(A)(i–ii).

14. *Id.* at 30101(17)(A–B).

15. *Buckley v. Valeo*, 424 U.S. 1, 47 (1976).

16. *California Med. Ass’n v. Fed. Elec. Comm’n*, 453 U.S. 182 (1981).

17. *Id.* at 203 (opinion of Blackmun, J.).

arrangements, or the appearance of such arrangements, is the only constitutionally permissible motivation by which the federal government may restrict campaign contributions.<sup>18</sup> However, no United States Supreme Court case has held that the possibility of *quid pro quo* arrangements is sufficient rationale to limit the amount that an individual or a corporation may contribute to a Super PAC.<sup>19</sup>

In *Citizens United v. Federal Election Commission*, the Supreme Court reasoned that the fact that an individual or organization has “influence over or access to” a candidate does not mean that the candidate is presumed corrupt.<sup>20</sup> Furthermore, the Court stated that any possibility of corruption is outweighed by the chilling effect a contribution limit would impose on the free speech of the contributor.<sup>21</sup> In a subsequent case, The United States Court of Appeals for the District of Columbia Circuit summarized *Citizens United* by stating that, since expenditures by independent expenditure-only groups do not create the appearance of corruption, “there is no corrupting ‘quid’ for which a candidate might in exchange offer a corrupt ‘quo.’”<sup>22</sup> Therefore, because there is no reason to believe that such expenditures would create even the appearance of corruption, it is not constitutionally permissible to limit contributions to groups that only make independent expenditures.<sup>23</sup>

Many of these Supreme Court cases discuss the balancing act that campaign finance regulations must maintain between limiting the presence or appearance of corruption and the First Amendment rights of committees. In one such case, *Buckley v. Valeo*, the Court regarded campaign contributions as political expression, a type of speech which is “integral to the operation of the system of government established by our Constitution.”<sup>24</sup> As such, it deemed that any regulations over the subject “operate in an area of the most fundamental First Amendment activities.”<sup>25</sup> As a general rule, courts have erred on the side of protecting First Amendment rights, stating that the chilling effect produced by regulations outweighs the interest in preventing corruption.<sup>26</sup> The interest in preventing corruption is especially small if the regulations are imposed on a committee that makes independent

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18. *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1441 (2014).

19. *Buckley*, 424 U.S. at 47; *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 357 (2010).

20. *Citizens United*, 558 U.S. at 314.

21. *Id.* at 357.

22. *SpeechNow.org v. Fed. Election Comm'n*, 599 F.3d 686, 694–95 (D.C. Cir. 2010).

23. *Id.* at 695.

24. *Buckley*, 424 U.S. at 14.

25. *Id.*

26. *Citizens United*, 558 U.S. at 357.

expenditures which, by definition, cannot be coordinated with a candidate.<sup>27</sup> As such, the Supreme Court has held that independent expenditures do not give rise to the existence or the appearance of corruption, even if the independent expenditures are made by a for-profit corporation.<sup>28</sup>

*C. The Fourth Circuit: North Carolina Right to Life, Inc. v. Leake*

In 2008, North Carolina Right to Life, Inc. (NCRL) challenged the constitutionality of certain aspects of North Carolina campaign finance law in *North Carolina Right to Life, Inc. v. Leake*.<sup>29</sup> NCRL was formed in 1973 for the purposes of educating the public about abortion, euthanasia, and protecting the sanctity of human life.<sup>30</sup> NCRL has two affiliate organizations, each of which were also plaintiffs in this case. The first of these affiliates was the North Carolina Right to Life Political Action Committee (NCRL-PAC). The second affiliate was the North Carolina Right to Life Committee Fund for Independent Political Expenditures (NCRL-FIPE). While these organizations were admittedly affiliated with NCRL, they were each their own distinct legal entities, set up to function as a PAC and a Super PAC, respectively.<sup>31</sup>

This case came to the United States Court of Appeals for the Fourth Circuit on appeal from a string of earlier decisions. Among other claims, the plaintiffs challenged attempts by the state of North Carolina to enforce a provision of North Carolina's General Statute §163-278 against NCRL-FIPE.<sup>32</sup> The statute in question establishes the limits on contributions made by, or accepted by, political committees.<sup>33</sup> The plaintiffs claimed that NCRL-FIPE was an independent expenditure-only committee and was, therefore, exempt from the statute's limitations.<sup>34</sup>

The state of North Carolina challenged the district court's decision that enforcing contribution limits against NCRL-FIPE was

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27. *Id.*

28. *Id.*

29. *N. Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274, 277 (4th Cir. 2008).

30. *About Us*, N. CAROLINA RIGHT TO LIFE, INC., <http://ncrtl.org/the-organization/> (last visited, Sep. 25, 2014).

31. *Leake*, 525 F.3d at 278.

32. *Id.* at 278–79 (referencing N.C. GEN. STAT. ANN. § 163–278.13 (West)). Plaintiffs' other claims were that North Carolina was unconstitutionally regulating issue advocacy by attempting to determine whether communications supported or opposed a particular candidate and that North Carolina was attempting to enforce an unconstitutional definition of "political committee" by threatening to impose certain obligations on groups which were not focused on nominating or electing political candidates.

33. N.C. GEN. STAT. ANN. § 163-278.13 (West).

34. *Leake* 525 F.3d at 279.

unconstitutional.<sup>35</sup> The state asserted that NCRL-FIPE had an “interwoven relationship” with NCRL and NCRL-PAC, and that it defied common sense to believe that expenditures made by NCRL-FIPE would be independent of contributions made by the other two groups.<sup>36</sup> As a result, the state claimed that it was necessary to enforce contribution limits against NCRL-FIPE to avoid circumvention of those contribution limits by NCRL and NCRL-PAC, and to prevent corruption or the appearance of corruption.<sup>37</sup>

In its decision, the Fourth Circuit acknowledged that the Supreme Court had never held that contribution limits could apply to an independent expenditure-only committee.<sup>38</sup> The court went on to say that, although NCRL-FIPE shared staff and facilities with the other plaintiffs in this suit, NCRL-FIPE’s independence from these other groups, as a matter of law, was sufficient to qualify it for the privileges afforded to independent expenditure-only committees.<sup>39</sup> The Court contended that, absent evidence of abuse of its legal status, the Court had no intention of piercing NCRL-FIPE’s corporate veil.<sup>40</sup> Since there was no such evidence, the Court declined to impose any contribution limitations on NCRL-FIPE but maintained that it would approve of such limitations if it were proven that an organization was abusing its corporate form.<sup>41</sup>

In a lengthy dissent, Judge Michael disagreed with the idea that the groups should be allowed to enjoy their legal distinctness until evidence of corruption arose. He pointed out that NCRL-FIPE shared some of its most important resources with its sister groups, including facilities, directors, and staff.<sup>42</sup> The groups were so interrelated, he observed, that their executive meetings and board meetings addressed the needs of all three groups, simultaneously.<sup>43</sup> He reasoned that it would be difficult to imagine that an executive could coordinate with a candidate in her role as a PAC board member and then operate in her role as a Super PAC board member without that coordination somehow leaking through.<sup>44</sup> The court’s holding, he stated, gave organizations an “explicit green

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35. *Id.* at 280 (referencing *N. Carolina Right to Life, Inc. v. Leake*, 482 F. Supp. 2d 686, 692 (E.D.N.C. 2007) *aff’d in part, rev’d in part*, 525 F.3d 274 (4th Cir. 2008)).

36. Defendants-Appellees Opening and Answering Brief, at 52, *North Carolina Right to Life v. Leake*, 525 F.3d 274 (4th Cir. 2008) (No. 07-1438) 2007 WL 2406591 (C.A.4).

37. *Leake*, 525 F.3d at 280.

38. *Id.* at 292 (citing *Buckley v. Valeo*, 424 U.S. 1, 47 (1976)).

39. *Id.* at 294 n.8.

40. *Id.* at 306.

41. *Id.* at 306.

42. *Id.* at 336 (dissenting opinion).

43. *Id.*

44. *Id.*

light” to exploit a “legal loophole.”<sup>45</sup> The entire process, therefore, undermined the idea that campaign finance laws should prevent the “appearance and reality of corruption.”<sup>46</sup>

#### D. *The D.C. Circuit: Emily’s List and Stop this Insanity*

##### 1. Emily’s List v. Federal Election Commission

In a 2009 case, *Emily’s List v. Federal Election Commission*, the D.C. Circuit Court of Appeals determined whether an organization is able to make both direct, coordinated expenditures and also independent expenditures, thus fulfilling the roles of both a PAC and a Super PAC without creating two distinct legal entities.<sup>47</sup> Emily’s List is a progressive organization that attempts to help women get elected to public office if it believes the individual “can make significant contributions to education, health care, voting rights, and economic equality.”<sup>48</sup> Emily’s List considers itself a “hybrid non-profit.”<sup>49</sup> As such, Emily’s List would make both direct contributions to candidates, as well as expenditures “for advertisements, get-out-the-vote efforts, and voter registration drives.”<sup>50</sup> On the one hand, it could only accept limited contributions to fund its activities as a PAC.<sup>51</sup> On the other hand, it would not limit contributions made by parties for the purpose of funding its activities as a Super PAC.<sup>52</sup>

The D.C. Circuit ruled that an entity which makes expenditures as a PAC does not forfeit its rights to make separate expenditures as a Super PAC.<sup>53</sup> The court cited First Amendment concerns, noting that the First Amendment rights of Emily’s List were not lost when it made a direct coordinated expenditure to a candidate’s campaign.<sup>54</sup> Rather, the court stated that Emily’s List, and organizations like it, may be required to set up separate bank accounts for their activities as PACs and their activities as Super PACs.<sup>55</sup> The court’s reasoning was that separate bank accounts would make it easier for Emily’s List to keep funding for its dual

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45. *Id.*

46. *Id.* at 337.

47. *Emily’s List v. Fed. Election Comm’n*, 581 F.3d 1 (D.C. Cir. 2009).

48. *What We Do*, EMILY’S LIST, <http://www.emilyslist.org/pages/entry/what-we-do> (last visited, Oct. 13, 2014).

49. *Emily’s List*, 581 F.3d at 12.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*



purposes separate, thus ensuring that donor contributions would be subject to the appropriate contribution limits.<sup>56</sup> However, the court also stated that any laws requiring hybrid groups to direct contributions to separate bank accounts must be tailored to ensure that the hybrid group is not disadvantaged as compared to a pure expenditures-only non-profit.<sup>57</sup> The court noted that the desire to create a bright-line rule would not justify an infringement of the group's First Amendment rights.<sup>58</sup>

## 2. Stop This Insanity, Inc. Employee Leadership Fund v. Federal Election Commission

Despite the holding in *Emily's List*, the question of whether separate bank accounts sufficiently separate indistinguishable groups has not been resolved in the D.C. Circuit. In a 2012 case, *Stop This Insanity, Inc. Employee Leadership Fund v. Federal Election Commission*, a District of Columbia district court disagreed with the holding in *Emily's List*.<sup>59</sup> Stop This Insanity, Inc. (Stop This Insanity) is a corporation created by the "Tea Party" for the purpose of taking power away from elected officials and returning it to the people.<sup>60</sup> Stop This Insanity attempted to set up a "connected" political action committee called Stop This Insanity, Inc. Employee Leadership Fund (the Leadership Fund), which would function as a hybrid political action committee and independent expenditure committee, much like the committee discussed in *Emily's List*.<sup>61</sup> Stop This Insanity wanted their group to be treated like the hybrid group in *Emily's List* so that it could be exempt from contribution limitations when acting as a Super PAC. To this effect, the Leadership Fund sought declaratory and injunctive relief that would allow it to accept unlimited contributions in their capacity as an independent expenditures-only committee.<sup>62</sup>

In order to prepare the Leadership Fund for its utilization as a Super PAC, Stop This Insanity wanted to set up separate bank accounts in the belief that it was following the guidelines set out by the D.C. Circuit Court of Appeals.<sup>63</sup> Stop This Insanity contended that *Emily's List* was

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56. *Id.*

57. *Id.* at 17.

58. *Id.* (citing Fed. Election Comm'n v. Wisconsin Right To Life, Inc., 551 U.S. 449 (2007)).

59. *Stop This Insanity, Inc. Employee Leadership Fund v. Fed. Election Comm'n*, 902 F. Supp. 2d 23 (D.D.C. 2012), *aff'd*, 761 F.3d 10 (D.C. Cir. 2014).

60. *About TheTeaParty.net*, THE TEAPARTY.NET, <http://www.theteaparty.net/about-the-tea-party/> (last visited, Oct. 13, 2014).

61. *Stop This Insanity*, 902 F. Supp. 2d at 26.

62. *Id.* at 26–27.

63. *Id.* at 28.

controlling precedent in the case at hand, at least insofar as it applied to contribution limits.<sup>64</sup>

The district court declined to adopt any of the holdings of *Emily's List* as they applied to contribution limits, referring to the D.C. Circuit's discussion of the topic as "pure dicta."<sup>65</sup> The court also found this case to be distinguishable from *Emily's List*, because the hybrid group in *Emily's List* never attempted to take any actions that amounted to express advocacy of an individual federal candidate.<sup>66</sup> The court expressed concerns regarding the appearance of corruption, stating that such concerns are at their "zenith"<sup>67</sup> when organizations contribute directly to candidates or their campaigns because there is an "inherently stronger nexus to particular candidates"<sup>68</sup> when express advocacy is involved. The court also noted that *Citizens United* allowed corporations to have significantly more liberties in the field of campaign finance, which placed even more emphasis on the prevention of corruption in campaign finance cases.<sup>69</sup>

As a result, unlike *Emily's List*, the court held in *Stop This Insanity* that the existence of separate bank accounts was "simply insufficient to overcome the appearance that the entity is in cahoots with the candidates and parties that it coordinates with and supports."<sup>70</sup> The court cited the average American's current disillusionment with the area of campaign finance, stating that any holding indicating that the mere presence of separate bank accounts precluded a hybrid organization from participating in improper behavior was "naïve and simply out of touch."<sup>71</sup> However, this decision did not limit what *Stop This Insanity* could do by creating a legally distinct Super PAC, stating explicitly that the organization could easily do so and receive contributions in "unlimited amounts."<sup>72</sup> The fact that this proposed hypothetical Super PAC would still be enmeshed financially and organizationally with *Stop This Insanity* was not discussed by the Court.

In summary, no bright line rule emerges from the D.C. Circuit based on these two cases. The Court of Appeals for the D.C. Circuit subsequently affirmed *Stop This Insanity*, but made no mention of the application of contribution limits to functionally indistinguishable

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64. *Id.* at 41.

65. *Id.*

66. *Id.*

67. *Id.* at 43.

68. *Id.* at 41.

69. *Id.* at 42.

70. *Id.* at 43.

71. *Id.* at 44.

72. *Id.*

groups.<sup>73</sup> It is clear that, even by the D.C. Circuit's most restrictive standards, an organization need only create two legally distinct committees, one of which is a Super PAC, to ensure that their committee be allowed to accept unlimited contributions and make unlimited independent expenditures. Under this standard, the committees set up by North Carolina Right to Life, Inc. would unquestionably be permitted.

### III. NOT INDEPENDENT ENOUGH: THE SECOND CIRCUIT'S DECISION IN *VERMONT RIGHT TO LIFE COMMITTEE V. SORRELL*

The Vermont Right to Life Committee (VRLC) was formed in 1971 to represent the interests of individuals opposed to abortion and euthanasia.<sup>74</sup> In 1999, the VRLC formed the Vermont Right to Life-Fund for Independent Political Expenditures (VRLC-FIPE) for the purpose of making unlimited political expenditures that were not coordinated with any specific candidates.<sup>75</sup> Later, the VRLC formed another entity called the Vermont Right to Life, Inc. Political Committee (VRLC-PC) which was formed with the purpose of donating direct expenditures to candidates and their campaigns.<sup>76</sup> The two committees function as a Super PAC and a PAC, respectively, of VRLC. Though VRLC-FIPE and VRLC-PC are legally distinct, they share much of the same leadership.<sup>77</sup> The suit was brought against the Vermont Attorney General to contest, amongst other things, the enforcement of contribution limits as applied to VRLC-FIPE.<sup>78</sup> VRLC and VRLC-FIPE contended that, since VRLC-FIPE was a Super PAC, it was exempt from contribution limits. The organizations also argued that the application of contribution limits infringed upon VRLC-FIPE's freedom of speech.<sup>79</sup>

The Second Circuit observed that, while VRLC-PC and VRLC-FIPE were legally distinct entities, they were significantly enmeshed with each other.<sup>80</sup> To reach this conclusion, the court looked to the specific circumstances surrounding the two entities. First, it analyzed the evidence that VRLC-FIPE presented to distinguish itself from VRCL-

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73. *Stop This Insanity Inc. Employee Leadership Fund v. Fed. Election Comm'n*, 761 F.3d 10 (D.C. Cir. 2014).

74. *About Us*, VERMONT RIGHT TO LIVE COMM., <http://www.vrlc.net/about/> (last visited, Sep. 25, 2014).

75. *Vermont Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 122 (2d Cir. 2014).

76. *Id.*

77. *Id.* at 143–44.

78. *Id.* at 121.

79. *Id.*

80. *Id.* at 144.

PC: organizational documents distinguishing the two committees as separate creations of VRLC and the existence of separate bank accounts.<sup>81</sup> The court held that these two facts, alone, were not enough to overcome substantial evidence that the two organizations were enmeshed.

The court stated that, in order to find that two groups were enmeshed financially, a number of factors ought to be considered, including “the overlap of staff and resources, the lack of financial independence, the coordination of activities, and the flow of information between the entities.”<sup>82</sup> The State submitted numerous depositions, financial reports, emails, meeting minutes, and expert reports to support the accusation that the two entities were significantly enmeshed.<sup>83</sup> In these materials, the State established that there was a “fluidity of funds” between VRLC-PC and VRLC-FIPE, meaning that funds would be transferred from VRLC-PC to VRLC-FIPE when necessary.<sup>84</sup> Additionally, on at least one occasion in 2008, the two groups shared a joint fundraising venture.<sup>85</sup>

As well as finding evidence that the organizations were enmeshed financially, the court also held that the evidence illustrated that VRLC-PC and VRLC-FIPE were enmeshed organizationally. While it would not be improper for the two groups to exist as sister subsidiaries of VRLC, an accountant for the state established that VRLC held “complete control” over the groups’ structures and finances.<sup>86</sup> Furthermore, the court found that the leadership of the two committees contained substantial overlap in terms of both personnel and communication.<sup>87</sup> Additionally, there was evidence that the groups participated in specific activities, such as the production of voter guides, in total concert with each other.<sup>88</sup> Finally, the court found it telling that VRLC-FIPE never made any effort to break the lines of communication “between the candidate, VRLC, and VRLC-PC.”<sup>89</sup> Based on these facts, each of which went undisputed by the plaintiffs, the court determined that VRLC-FIPE and VRLC-PC were enmeshed financially and organizationally.<sup>90</sup>

Accordingly, the Second Circuit reasoned that, because contribution

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81. *Id.* at 143.

82. *Id.* at 142.

83. *Id.* at 143.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 143–44.

88. *Id.* at 144.

89. *Id.*

90. *Id.*

limits were constitutionally applied to VRLC-PC, those same contribution limits must be applied to VRLC-FIPE.<sup>91</sup> The court noted that the traditional reason that Super PACs were deemed unlikely to give rise to *quid pro quo* corruption was a lack of “prearrangement and coordination” with candidates or their campaigns.<sup>92</sup> The court concluded that, in order to ensure that such prearrangement and coordination did not exist, there must be, at a minimum, some “organizational separation” between the PAC and the corresponding Super PAC.<sup>93</sup> Based on the factors considered above, the court concluded that VRLC-FIPE was “functionally indistinguishable” from VRLC-PC and that this organizational separation was not present.<sup>94</sup> As a result of this enmeshment, the court stated that concerns about favors exchanged *quid pro quo* for expenditures could apply to both groups equally.<sup>95</sup> Therefore, the court concluded that any contribution limits to which VRLC-PC was subject also applied to VRLC-FIPE.<sup>96</sup>

IV. THE SECOND CIRCUIT’S HOLDING IN *VERMONT RIGHT TO LIFE COMMITTEE V. SORRELL* IS NARROWLY TAILORED, AVOIDS INFRINGEMENT ON FIRST AMENDMENT RIGHTS, AND IS EASILY APPLICABLE TO FUTURE CASES

This Casenote advocates the adoption of the Second Circuit’s holding in *Vermont Right to Life Committee v. Sorrell*. This recommendation is based mainly on four observations drawn from the case holding. First, it is significant that the court narrowed its holding to address concerns of *quid pro quo* corruption. Second, the court’s holding does not raise significant First Amendment concerns. Third, the standard of functional indistinguishableness is well-defined and easily applied. Finally, the court’s holding has strong common sense appeal which comes full circle to reducing the appearance of general political corruption.

A. *Narrow Focus on Preventing Quid Pro Quo Corruption*

Other circuits should adopt the position of the Second Circuit because it is properly focused on the goal of preventing the existence or appearance of *quid pro quo* corruption. Since VRLC-FIPE makes only independent expenditures, it is the type of committee which courts have

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91. *Id.* at 141.

92. *Id.* (citing *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 345, 357–61 (2010)).

93. *Id.* at 142.

94. *Id.* at 145.

95. *Id.*

96. *Id.*

traditionally held unlikely to create the appearance of corruption.<sup>97</sup> However, the Second Circuit was very careful to emphasize the special circumstances of this case which made it more likely than usual that corruption could either exist or be perceived to exist. Emphasizing the specific facts of the case at hand, the Second Circuit demonstrated that VRLC-FIPE should not be afforded the same benefit of the doubt normally afforded to Super PACs.

The Court makes clear that VRLC-FIPE only cultivates the air of corruption through its connections to VRLC and VRLC-PC. The “fluidity of funds” between the three groups suggested circumvention of the regulations governing the different organizations in their individual capacities.<sup>98</sup> Examination of the groups’ meeting minutes revealed that they did not regard their streams of funding as separate, resulting in at least one incident where VRLC-FIPE and VRLC-PC held a joint fundraising event.<sup>99</sup> These connections support the holding that the organizations were enmeshed financially.

Furthermore, the groups were enmeshed organizationally. The court noted that VRLC held complete control over leadership positions of both groups.<sup>100</sup> Members of either committee were chosen by the president of VRLC and approved by VRLC’s board. VRLC-PC and VRLC-FIPE met at the same place at the same time and were known to discuss campaign issues together.<sup>101</sup> The groups contained substantial overlap in membership, with at least two examples of members attending both meetings.<sup>102</sup> Perhaps most tellingly was the nexus of communication that existed throughout the groups. VRLC and VRLC-PC were each known to coordinate with candidates, as was their right. However, there is no point at which VRLC-FIPE separated itself from these lines of communication, calling into serious question whether VRLC-FIPE was actually able to function without having coordinated with candidates.<sup>103</sup> This set of facts led the Court to make a determination that the various groups were enmeshed organizationally.

Based on these two sets of facts, the Court determined that VRLC-FIPE’s connections with VRLC and VRLC-PC distinguished VRLC-FIPE from typical groups which make only independent expenditures. In fact, VRLC-FIPE’s financial organizational enmeshment with the other groups created a situation where the three groups were

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97. *Citizens United*, 558 U.S. at 357.

98. *Sorrell*, 758 F.3d at 143.

99. *Id.*

100. *Id.*

101. *Id.* at 144.

102. *Id.*

103. *Id.*

“functionally indistinguishable.”<sup>104</sup> In such a case, the likelihood of corruption or the appearance of corruption is significantly greater than in a scenario where Super PAC exists outside of such a connection. The court reasoned that Super PACs were typically held to be less likely to give rise to corruption because of their mandated lack of communication with candidates.<sup>105</sup> When groups are so significantly connected, the assurance of a lack of communication vanishes and concerns of corruption reemerge. Were VRLC-FIPE to disconnect from the other two groups, it would no longer be an organization that made likely the existence or the perceived existence of corruption.

This analysis is one of the key strengths of the Second Circuit’s holding. If the court had based its holding on another motivation for enforcing contribution limits on a Super PAC, the limits would not have been, nor should they have been, enforceable. For example, if the court had held that they were enforcing contribution limits as a way of punishing VRLC for attempting to circumvent legal restrictions or as a way of reducing the amount of money in politics, those motivations would be arguably unconstitutional, resulting in an unenforceable holding.<sup>106</sup> Instead, the court properly aligned its holding with the only constitutionally valid motivation for enforcing contribution limits upon Super PACs, thus providing a compelling reason for other circuits to follow in its footsteps.

### *B. First Amendment Concerns*

While the interest in preventing corruption is heightened in cases involving indistinguishable groups, the corresponding limitation on First Amendment rights is comparatively low. First Amendment rights in the field of campaign finance concern the abilities of committees to express themselves politically.<sup>107</sup> Normally, courts enforce contribution limitations on organizations like VRLC-FIPE in the interest of preventing possible corruption. These limitations, however, prevent parties from expressing as much financial support for an issue or candidate as they are constitutionally permitted to express. Accordingly, courts are generally reluctant to limit a Super PAC’s ability to express financial support through the use of contribution limits.<sup>108</sup>

However, in the case at hand, the only concerns that exist regarding

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104. *Id.* at 145.

105. *Id.*

106. *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434, 1441 (2014).

107. *Buckley v. Valeo*, 424 U.S. 1, 14 (1976).

108. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 357 (2010).

corruption are directly tied to VRLC-FIPE's attachments to VRLC and VRLC-PC. If VRLC-FIPE were to remove itself from the financial and organizational enmeshments that entangled it with the other two groups, its ability to receive unlimited contributions would remain uninhibited by the court. Although requiring this sort of separation does impose some hardship on committees that operate with "low funding levels, small staff, and few resources,"<sup>109</sup> the court held that preventing potential *quid pro quo* corruption outweighed these hardships.<sup>110</sup>

### C. *The Functionally Indistinguishable Standard*

In order for other courts to follow the holding of the Second Circuit, there must be a clear standard for them to apply. In short, The Second Circuit held that a Super PAC that is "functionally indistinguishable" from a group subject to contribution limits may itself have to abide by those contribution limits.<sup>111</sup> This holding, however, did not instruct other circuits on the means of determining whether a committee is "functionally indistinguishable" from another entity. If other circuits are to be expected conform to this holding, then the term "functionally indistinguishable" ought to be clearly defined.

As discussed previously, there are two types of enmeshment that the Second Circuit discussed in finding that VRLC-FIPE is functionally indistinguishable from VRLC-PC: financial enmeshment and organizational enmeshment.<sup>112</sup> When the Court discussed VRLC-FIPE's financial enmeshment, it considered factors such as the fluidity of funds between the groups and the committees' joint fundraising goals.<sup>113</sup> Therefore, it is clear from the court's discussion what constitutes financial enmeshment. When the court discusses organizational enmeshment, it considered factors such as the overlap in staff and oversight, as well as the unbroken lines of communication.<sup>114</sup> Therefore, the court clearly laid out what facts lead to a finding of organizational enmeshment. Because both terms are arguably defined within the Second Circuit's opinion, it seems as though "functionally indistinguishable" is merely the sum of these two types of enmeshment. However, the arithmetic may not be quite that simple.

At no point in the court's opinion did it make any explicit statement that functional indistinguishableness is the sum of financial and

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109. Vermont Right to Life Comm., Inc. v. Sorrell, 758 F.3d 118, 145 (2d Cir. 2014).

110. *Id.*

111. *Id.*

112. *Id.* at 141.

113. *Id.* at 143.

114. *Id.* at 143–44.



organizational enmeshment. From its previous discussions, this equation may feel implied and even intuitive, but the court's failure to expressly define the elements of the equation may be the largest and most important ambiguity in its holding. For example, the court never says whether both types of enmeshment are essential for a group to be functionally indistinguishable. It seems logical that two groups could be functionally indistinguishable if the boards were entirely different, yet there existed a fluidity of funds and joint fundraising goals. Likewise, two groups that kept entirely separate funds but were composed of the same board members and had unbroken lines of communication could just as easily be believed to be functionally indistinguishable.

To further complicate matters, all of the elements of this hypothetical exercise seem to exist on the extreme edge of impermissibility. The court makes no mention of how much connection constitutes enmeshment. In other words, though the equation appears to be fairly simple, better definitions of its elements would be preferable, especially if the holding is to be adopted by other circuits. Nevertheless, the individual factors of the equation are sufficiently well-defined enough to allow other circuits to replicate the Second Circuit's holding.

#### *D. Common Sense Element*

The Second Circuit's common sense approach to campaign finance is a deceptively simple argument in favor of the holding. In an area of the law where one of the only constitutional rationales for enforcing a law is to prevent the appearance of corruption, a holding's common sense appeal is actually a fairly compelling argument in its favor. Furthermore, in an era where courts have explicitly cited Americans' disillusionment with campaign finance, it is essential that holdings which rule on the appearance of corruption make intuitive sense to the average observer.<sup>115</sup> A holding which allowed a committee to reap the benefits of being a Super PAC while simultaneously retaining all the benefits of a PAC would strike observing citizens as just another instance of the game being rigged. Forcing legislatures to close this potential loophole is something that would appeal to this sort of observant citizen and is an action that represents a significant step toward reducing the appearance of corruption in the field of campaign finance.

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115. *Stop This Insanity, Inc. Employee Leadership Fund v. Fed. Election Comm'n*, 902 F. Supp. 2d 23, 26 (D.D.C. 2012), *aff'd*, 761 F.3d 10 (D.C. Cir. 2014).

V. COUNTER-ARGUMENTS TO THE POSITION TAKEN BY THE SECOND  
CIRCUIT

There are several logical counter-arguments that oppose the Second Circuit's holding. While these counter-arguments are important and must be addressed, this Casenote asserts that the Second Circuit's holding in *Vermont Right to Life Committee v. Sorrell* provides the best solution to the issue of whether courts can limit contributions made to Super PACs that are deemed functionally indistinguishable from other PACs. The first of these counter-arguments is that the Second Circuit interferes with VRLC-FIPE's ability to exercise its Freedom of Expression. The second counter-argument is that the Second Circuit did not create a circuit split, but instead merely agreed with the holding of the Fourth Circuit in *Leake*. The final counter-argument is that the Second Circuit's holding will reduce neither the existence of nor the appearance of corruption.

A. *The Second Circuit's Holding Infringes of VRLC-FIPE's Ability to Exercise its Freedom of Expression*

One argument against the Second Circuit's holding is that it infringes on the freedom of speech of independent expenditures-only committees. As the Supreme Court stated in *McCutcheon v. Federal Election Commission*, a party's right to participate in elections is protected by the First Amendment.<sup>116</sup> However, this right may be abridged when it becomes necessary to avoid the appearance of *quid pro quo* corruption.<sup>117</sup> In *Citizens United*, the Supreme Court expressed concern that placing expenditure limits upon groups that made independent expenditures would have a chilling effect on the groups' exercise of freedom of speech.<sup>118</sup> The Court determined that such concerns outweighed any concern regarding the appearance of *quid pro quo* corruption.<sup>119</sup> Likewise, the court in *Emily's List* expressed concern over the application of contribution limits to hybrid groups, holding that a group that made independent expenditures "does not suddenly forfeit its First Amendment rights when it decides also to make direct contributions to parties or candidates."<sup>120</sup>

These opinions demonstrate that placing contribution limits on Super PACs raises significant First Amendment concerns. One could argue

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116. *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1441 (2014).

117. *Id.*

118. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 357 (2010).

119. *Id.*

120. *Emily's List v. Fed. Election Comm'n*, 581 F.3d 1, 12 (D.C. Cir. 2009).

that these concerns may continue to outweigh concerns over the appearance of *quid pro quo* corruption, even after a group has been deemed functionally indistinguishable from a group on which contribution limitations apply. However, when groups are so closely enmeshed as to be functionally indistinguishable, it ought to raise an especially high level of concern about the appearance of *quid pro quo* corruption.

Super PACs that are functionally indistinguishable from regular PACs have a line of communication to the candidate which is highly suggestive of coordination. In *Sorrell*, the Court observed that there was no point where VRFC-FIPE distanced itself from the lines of communication between the VRFC and VRFC-PC, and the candidates with which those committees coordinated their expenditures.<sup>121</sup> This nexus of communication makes it increasingly improbable in the eyes of the general public that VRFC-FIPE was not coordinating with political candidates. As stated by Judge Michael's dissent in *Leake*, holding that a group may be exempt from contribution limits and simultaneously enmeshed with a group allowed to make direct contributions to political campaigns is a "complete rejection" of the government's interest in "limiting the influence of money in politics to prevent the appearance and reality of corruption."<sup>122</sup> Therefore, because the appearance of *quid pro quo* corruption is abnormally high in situations of functionally indistinguishable committees, the possibility that limiting contributions to independent expenditure-only committees might produce a chilling effect of the exercise of freedom of speech should not outweigh the importance of limiting the appearance of *quid pro quo* corruption.

#### *B. No Circuit Split was Created by the Second Circuit's Holding*

Another argument against the *Sorrell* holding is that no circuit split was created by the Second Circuit, but rather the Second Circuit is following wording found in the dicta of the Fourth Circuit's opinion in *Leake*. In *Leake*, the state argued that NCRL-FIPE was "closely entwined" with the NCRL and the NCRL-PAC.<sup>123</sup> The Fourth Circuit declined to address this argument, stating that the state was asking the court to pierce the organization's corporate veil. The court did state, however, that it may have elected to conduct such an inquiry had the state been able to introduce into its arguments "any evidence that the plaintiffs are abusing their legal forms or 'any legal authority that

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121. Vermont Right to Life Comm., Inc. v. Sorrell, 758 F.3d 118, 144 (2d Cir. 2014).

122. N. Carolina Right to Life, Inc. v. Leake, 525 F.3d 274, 337 (4th Cir. 2008) (dissenting opinion).

123. *Id.* at 294, n.8.

considers [political committees] and their sponsoring corporation as identical entities.”<sup>124</sup>

It can be argued that this language from the Fourth Circuit does not run contrary to the holdings of the Second Circuit but, rather, serves as an introduction to the Second Circuit’s analysis of an organization that abused its legal form. A close reading of the Second Circuit’s breakdown of VRLC-FIPE’s interactions with VRLC-PC reveals several instances that could be interpreted as the two organizations abusing their legal forms. Of particular interest is the stated “fluidity of funds” that existed between the groups’ bank accounts.<sup>125</sup> The argument might therefore be made that, had the Fourth Circuit been presented with the facts from *Sorrell*, they may have reached the same outcome as the Second Circuit.

Even so, it would be a mistake to interpret the courts’ holdings as being congruent. The crux of the Second Circuit’s holding is not that VRLC-FIPE abused its legal status, but that it had become so enmeshed with VRLC-PC and VRLC that it could no longer be trusted to enjoy its status as an independent expenditure-only committee for fear of the appearance of *quid pro quo* corruption.<sup>126</sup> A legitimate question exists as to whether the Second Circuit’s idea of enmeshment can occur without abuse of a legal form. The Second Circuit mentioned two types of enmeshment: financial enmeshment and organizational enmeshment.<sup>127</sup> In his dissenting opinion in *Leake*, Judge Michael observed that NCRL-FIPE shared many important resources with NCRL and NCRL-PAC, some of which were facilities, directors, and staff.<sup>128</sup> These sorts of non-financial resources are the types of resources that the Second Circuit referred to when it discussed organizational enmeshment.

Because it would seem that organizational enmeshment was present in *Leake* and the arrangement in *Leake* was not held to be improper, it should follow that organizational enmeshment does not equal abuse of legal forms. Therefore, it would seem that the Fourth Circuit considered abuse of legal forms as something more akin to financial enmeshment. Though it is unclear whether the Second Circuit’s holding would have been different had the two organizations were found to be only organizationally enmeshed, there is nothing in the opinion to suggest that financial enmeshment is a necessary element of finding that the

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124. *Id.* (citing *North Carolina Right to Life, Inc. v. Leake*, 482 F.Supp.2d 686, 699 (E.D.N.C.2007)).

125. *Sorrell*, 758 F.3d at 143.

126. *Id.* at 145.

127. *Id.* at 141.

128. *Leake*, 525 F.3d at 336 (dissenting opinion).

organizations were “functionally indistinguishable.”<sup>129</sup> By contrast, the court seems view “fluidity of funds” as a contributing factor rather than a necessary factor.<sup>130</sup> Therefore, a circuit split was created regarding whether contribution limits could be enforced against a Super PAC which was functionally indistinguishable from a corresponding PAC, because the standards of enmeshment and abuse of legal forms are distinct.

*C. The Second Circuit’s Holding will not Prevent the Existence or Appearance of Corruption*

It could also be argued that the removal of financial and organizational enmeshment will not prevent the potential for corruption which occurs when a PAC and a Super PAC exist under a common parent organization, as was the case in *Sorrell*. Indeed, one could reasonably believe that future organizations aware of the Second Circuit’s holding would merely take the necessary steps toward ensuring that their organizations are not functionally indistinguishable and then continue to use the others’ legal status for mutual benefit.

Such a viewpoint raises many issues. First and foremost, it is difficult to imagine a position which more strictly enforces contribution limits, yet does not run contrary to the Supreme Court’s campaign finance jurisprudence or raise fundamental First Amendment concerns. In the case of VRLC, once VRLC-FIPE and VRLC-PC were no longer enmeshed financially or organizationally, they had no tangible connection other than their connection under VRLC. To that extent, their connection is simply that they are organizations sharing a core belief and working toward a common goal. One of the major strengths of the Second Circuit’s holding is that it creates a clear judicial preference for separation within the corporate structures of the two groups without creating any serious impediments of their rights to pursue their common goals. Absent future Supreme Court decisions on the subject, it is doubtful that the Second Circuit could or should have gone any further in limiting contribution limits to Super PACs.

Though Super PACs are often painted in a corrupt light, they are constitutional institutions so long as they do not coordinate with candidates that they support.<sup>131</sup> As a result, the Second Circuit was not, and could not, attempt to outlaw independent expenditure-only committees or chip away at their ability to perform their duties. The court’s holding is narrow in the sense that it only attempts to close a

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129. *Sorrell*, 758 F.3d at 145.

130. *Id.* at 143.

131. *Buckley v. Valeo*, 424 U.S. 1, 47 (1976).

loophole that raised the “danger that expenditures will be spent as *quid pro quo* for improper commitments from the candidate.”<sup>132</sup> No court would raise the argument that all Super PACs are or appear to be thinly veiled attempts to bypass judicial limitations on committee spending. Unless courts were to hold that another motivation existed for limiting contributions to Super PACs besides limiting the reality or appearance of corruption, future courts should not place any more limits upon Super PAC contributions than those imposed by the Second Circuit.

## VI. CONCLUSION

The fact that courts cite the disillusionment of average citizens with the campaign finance process suggests that courts are losing the battle to reduce the appearance of *quid pro quo* corruption. It is distasteful to think that power and influence can be purchased but it is also clear that, in an era where \$3.7 billion is spent in a year without a presidential election, there are campaign contributors who believe that they are buying something.<sup>133</sup> Although this high level of spending may create the impression that elections are bought and paid for, the normal process of purchasing political advertisements through a Super PAC is not illegal. Short of serious reform of current Supreme Court jurisprudence on the subject, courts should at least be vigilant to ensure that there is compliance with the already established limitations. To forward this goal, courts can focus on preventing parties from circumventing contribution limitations to PACs by making contributions to functionally indistinguishable Super PACs.

The Second Circuit’s holding in *Vermont Right to Life Committee v. Sorrell* represents a step forward in the field of campaign finance. It prevents the appearance of corruption while imposing a minimal restriction of committees’ First Amendment rights of political expression. Furthermore, it contains a good deal of common sense. The only caveat to the holding’s overall success is that it fails to set down a fully articulated test regarding what constitutes functional indistinguishableness. Even so, the court does provide examples of what sorts of enmeshment constitute functional indistinguishableness as well as examples of what sorts of activities constitute each type of enmeshment. Therefore, short of a definitive test, the Second Circuit at least set down repeatable guidelines for future courts to follow and reproduce. For these reasons, the Second Circuit’s holding regarding

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132. *Sorrell*, 758 F.3d at 145.

133. Peter Overby, *What Can \$3.7 Billion Buy? How About 2,969,370 Campaign Ads*, NAT’L PUB. RADIO (Oct. 29, 2014), <http://www.npr.org/blogs/itsallpolitics/2014/10/29/359895496/what-can-3-7-billion-buy-how-about-2-969-370-campaign-ads>.

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contribution limits to Super PACs that are functionally indistinguishable from traditional PACs is the correct holding and should be adopted by other circuits.