This document lists the primary and secondary sources included in the 2017 Write On Competition and summarizes the cases. Following the principal case (on which you should focus your case comment) are the remaining sources listed by type.

**PRINCIPAL CASE (12 PAGES)**
Alabama Democratic Conference v. Attorney General of Alabama
838 F. 3d 1057 (11th Cir. 2016) (12 pages)

**U.S. SUPREME COURT CASES (110 PAGES)**
Jack Davis v. Federal Election Commission

Citizens United v. Federal Election Commission

Shaun McCutcheon v. Federal Election Commission
134 S.Ct. 1434 (2014) (37 pages, edited and headnotes removed)

**U.S. CIRCUIT COURT CASES (157 PAGES)**
Hobart Ward Anderson v. Lloyd E. Spear
365 F. 3d 651 (6th Cir. 2004) (22 pages)

Emily's List v. Federal Election Commission
581 F. 3d 1 (D.C. Cir. 2009) (32 pages)

SpeechNow.org v. Federal Election Commission
599 F.3d 686 (D.C. Cir. 2010) (10 pages)

Republican Party of New Mexico v. Gary K. King
741 F. 3d 1089 (10th Cir. 2013) (13 pages)

Vermont Right to Life Committee, Inc. v. William H. Sorrell
758 F. 3d 118 (2d Cir. 2014) (23 pages)

Catholic Leadership Coalition of Texas v. David A. Reisman
764 F.3d 409 (5th Cir. 2014) (30 pages)
Wendy E. Wagner v. Federal Election Commission
793 F.3d 1 (D.C. Cir. 2015) (27 pages)

U.S. DISTRICT COURTS AND AGENCIES (47 PAGES)

Stop the Insanity, Inc. v. Federal Election Commission
902 F. Supp. 2d 23 (D. D.C. 2012) (23 pages)

Alabama Democratic Conference v. Luther Strange
2015 WL 4626906 (N.D. Ala. 2015) (12 pages)

Claire Ball v. Lisa M. Madigan
2017 WL 1105447 (N.D. Ill. 2017) (12 pages)

STATUTORY PROVISIONS (1 PAGE)

U.S. CONSTIT. amend I. (1 page)

SECONDARY SOURCES – LEGAL (27 PAGES)

Jacob N. Kipp, If It Looks Like a Super PAC, Acts Like a Super PAC, and is Restricted Like a Super PAC, Then Treat it Like a Super PAC: Why Contribution Limits on a Hybrid PAC’s Independent-Expenditure Arm Are Impermissible, 25 WM. & MARY BILL RTS. J. 373 (Oct. 2016) (27 pages)

SECONDARY SOURCES – POPULAR (8 PAGES)


Hybrid PACs and the Mere Conjecture of Corruption:

I. Introduction

The courts and the Federal Election Commission (FEC) have long struggled with how to best regulate campaign finance.\(^1\) Political speech is considered the “lifeblood of democracy”\(^2\) yet courts wrestle with the competing interests of freedom of speech as guaranteed by the First Amendment\(^3\) and the appearance of corruption that comes with allowing unlimited spending to support political candidates.\(^4\) Limits on political expenditures are subject to closer scrutiny than contributions directly to candidates or political groups.\(^5\) Laws limiting contributions must be closely drawn to further a compelling state interest.\(^6\) The Supreme Court has recognized only quid pro quo corruption or the appearance of corruption as legitimate state interests for limiting political contributions\(^7\) and has repudiated other potential justifications including the equalization of viewpoints or reducing the appearance of undue political access.\(^8\)

In Citizens United v. FEC, the Supreme Court attempted to clarify the limited definition of quid pro quo corruption and the rules for independent expenditures, or spending done without direct coordination with a candidate or campaign. The Court held that prohibiting independent corporate expenditures for electioneering communications violated the First Amendment.\(^9\) Further, as a matter of law independent expenditures do not give rise to quid pro quo corruption or the appearance of corruption, and so there is no governmental interest in independent-expenditure limits.\(^10\) Quid pro quo corruption is defined as exchanging dollars to a candidate or officeholder for political favors.\(^11\) By definition, money spent through independent expenditures is uncoordinated with a candidate and thus divorced from any aim to control an official’s duties or exchange benefits.\(^12\) The mere appearance of influence or access does not constitute corruption and will not lead voters to lose faith in democracy.\(^13\) While political action committees (PACs) existed previously, this ruling gave rise to PACs devoted solely to making
unlimited independent expenditures.\textsuperscript{14} The non-corrupting nature of independent expenditures was later extended to the contributions which fund independent expenditures.\textsuperscript{15}

In \textit{Alabama Democratic Conference v. Attorney General of Alabama}, the United States Court of Appeals for the Eleventh Circuit confronted the issue of what qualifies as corruption.\textsuperscript{16} The Alabama Democratic Conference (ADC) is a hybrid PAC devoted to educating and organizing black voters that both contributes to candidates and has a separate arm to make unlimited independent expenditures. The ADC operates two distinct bank accounts to keep these funds separate.\textsuperscript{17} An Alabama statute\textsuperscript{18} banned the transfer of money from a PAC to other PACs, which cut off half of the ADC funding.\textsuperscript{19} The ADC argued this ban was a violation of their First Amendment right to spend from the separate independent-expenditure account.\textsuperscript{20}

In affirming the District Court’s ruling on remand that the PAC-to-PAC transfer ban was constitutional,\textsuperscript{21} the \textit{Alabama Democratic Conference} Court relied on reasoning from both the Second and Fifth Circuits\textsuperscript{22} to hold that separate bank accounts are not sufficient to alleviate corruption concerns given the interconnectedness of a hybrid PAC.\textsuperscript{23} Aside from separate bank accounts, there must be additional measures in place to ensure the independent expenditure money will not aid candidate contributions. Such measures might include a separation of staff and resources for each account and preventing coordination or shared information.\textsuperscript{24} ADC’s two accounts were controlled by the same people and no evidence was presented of organizational safeguards to prevent money earmarked for independent expenditures from being funneled to a candidate.\textsuperscript{25} Further, the transfer ban was determined to be closely drawn to prevent corruption and shadowy campaign contributions while only marginally impacting political dialogue. While independent expenditures alone do not give rise to corruption, the state interest in preventing corruption or the appearance of corruption justifies regulating political contributions, including
related donations to hybrid PACs. Transparency promoted by the transfer ban furthers the state interest in preventing corruption by allowing the public to identify those making payments to determine if there has been a quid pro quo exchange.

The totality of the circumstances test as articulated in *Alabama Democratic Conference* for determining whether the independent expenditure arm of a PAC is wholly independent goes far beyond restricting expenditures for only the limited corruption interest as articulated in *Citizens United*. This creates a standard that is divorced from precedent, unwarranted given other measures to ensure PAC independence, and inviting for too much judicial discretion.

### II. Analysis

Alabama did not have a sufficient state interest in corruption to warrant the closely drawn PAC-to-PAC transfer ban restricting campaign finance. This comment will first argue that the Eleventh Circuit erred in interpreting quid pro quo corruption too broadly and ignoring precedent of *Citizens United*. Second, independent-expenditure groups should not be subject to restrictions merely due to tenuous connections with the contribution arm of a hybrid PAC. Last, other safeguards are sufficient to ensure PAC-to-PAC transfers lack corruption, so the court should not resort to an ambiguous standard for determining hybrid PAC independence.

#### A. Lack of transparency does not rise to the level of quid pro quo corruption.

The Eleventh Circuit should not have broadly defined corruption in a manner so inconsistent with *Citizens United*. While quid pro quo corruption is a sufficiently important state interest, the Eleventh Circuit erred because hybrid PACs such as the ADC do not give rise to corruption concerns when accepting money from other PACs regardless of concerns about the potential for coordination between the two separate accounts. There is no question that anti-corruption concerns are insufficient to impose contribution limits on independent expenditure only groups.
Without the potential for quid pro quo corruption, enacting a law to prevent apparent corruption or circumvention is not permissible, and numerous other state aims have been similarly ruled insufficient. The state cites a lack of transparency as leading to corruption, but a lack of transparency alone does not rise to the level of quid pro quo corruption to be targeted as a compelling state interest. Quid pro quo corruption of exchanging dollars for political favors does not result from a PAC transferring money to another PAC. The transfer of money between PACs is similar to the appearance of influence or access which does not alone constitute corruption nor lead voters to lose faith in democracy. There must still be coordination with the candidate or party to make the corruption real. Lack of prearrangement and coordination with a candidate undermines the value of the expenditure to a candidate and alleviates the danger of quid pro quo corruption because no promises are exchanged.

The state contends that donors “launder” their money by giving it to one PAC who transfers the money to multiple other PACs in a long chain so as to make tracing the money’s source very difficult. Yet mere conjecture has never been sufficient to allow First Amendment restrictions. While laundering is theoretically possible, neither party submitted proof that this occurred with the intent to evade disclosure. Even if public perception was that donors were laundering money through PACs so as to conceal their identities, such perception of laundering does not rise to the level of appearance of quid pro quo corruption. There is no evidence of public perception that officials were receiving money for political favors, but only that donors were trying to conceal their identities, which might be done for numerous innocuous reasons.

Any money laundering would further attenuate a hybrid PAC and its donors from candidates themselves and thus diminish chances of quid pro quo corruption. The nature of PACs as pools for money from a number of individuals means the money is less tied to a
particular individual’s interest. Coupled with contribution limits for individuals, PACs are unlikely to be dominated by one donor. While there may be efforts to circumvent contribution limits, large amounts of money are difficult to trace to any individual donor or interest, thus lessening any potential for corruption. By law, individuals surrender control over funds given to a PAC. The funds would only be rerouted to a candidate at the recipient’s discretion. The result is a long chain of attribution with shared credit between many actors. This attenuated link highlights why the risk of quid pro quo corruption is applicable only to money gifts directed to a candidate or elected official and should not apply to PAC-to-PAC hybrid transfers.

B. The formal distinction for independent-expenditure-only groups articulated in *Citizens United* must be upheld.

*Citizens United* created a formal distinction between contributions to candidates and independent-expenditure only groups. Oftentimes independent expenditures can give rise to the appearance of coordinating with a candidate by echoing the candidate’s message, slogan, or attacking an opponent on issues the candidate speaks publicly against. Yet *Citizens United* held that even such appearance of coordination which may result in seemingly similar corruption and ingratiation does not alter the independent nature of expenditures. This same logic should extend to hybrid PACs. Because the independent-expenditure arm of a hybrid PAC can fund unlimited speech without giving rise to corruption, contributions from other PACs that enter this fund cause no threat. A direct contribution from a PAC does nothing to change the nature of independent expenditures which remain uncoordinated by definition.

Independent-expenditure arms do not suddenly lose First Amendment rights or act unlawfully by being part of a hybrid PAC. Some courts have found a significant interest in preventing corruption by ensuring contributions intended to support independent expenditures go
solely to that purpose.\textsuperscript{46} While there may be an appearance of coordination in hybrid PACs, there must be an actual showing of coordination with a candidate to make the risk of corruption real.\textsuperscript{47} This risk for coordination does not approach the coordination levels of traditional PACs who are intricately coordinated with candidates.\textsuperscript{48} Even a public perception that independence within a hybrid PAC is a façade and that the two arms are coordinated should not rise to the level of quid pro quo corruption nor break the actual independence.\textsuperscript{49} So long as the accounts are segregated and any contributions to parties or candidates come from a separate account, there is no anticorruption interest.\textsuperscript{50} This interest would arise only if the accounts are no longer segregated, which would mean the independent-expenditure arm of the PAC is no longer independent by definition.

\textbf{C. A bright line rule is the best solution because other safeguards remain in place to promote transparency of a hybrid PAC’s separate arms.}

Being defined as a hybrid PAC does not mean an organization is free from existing restrictions. While Alabama’s hybrid PACs are not subject to capped candidate contributions,\textsuperscript{51} they are still subject to anti-coordination laws and disclosure of contributions to either arm of the PAC.\textsuperscript{52} PACs have to comply with numerous onerous regulations that minimize the potential for abuse, such as filing detailed monthly reports with the FEC.\textsuperscript{53} Given modern technology, this disclosure is an effective means of providing massive amounts of campaign finance information to the public at the click of a mouse. Numerous reports and databases are available on the FEC website, and many private entities supplement this information in easily-accessible formats.\textsuperscript{54} PAC-to-PAC transfers may be harder to trace, but they are by no means untraceable. The transfers of large sums of money from any source will likely garner public attention and result in
greater scrutiny. These measures are sufficient to satisfy the risk of corruption without acting on undue fear of potential corruption that has not materialized. 55

With these existing safeguards in place, courts should continue to treat independent-expenditure arms of a PAC as independent to ensure the law is evenly applied. Courts must strive to create a bright-line rule that can be easily applied rather than require “intricate case-by-case determinations” as the standard articulated by the Eleventh Circuit would require to determine the independence of each arm of a hybrid PAC. 56 The Court states there must be safeguards and account-management procedures in place to ensure the independence of each account, yet does not make a list of the factors and safeguards which will be considered. 57 This resulting standard gives little guidance for how hybrid PACs should be structured and allows for too much judicial discretion as courts must consider a number of facts to determine the independence of each branch of a hybrid PAC.

III. Conclusion

Campaign finance regulations require a delicate balance between First Amendment rights and advancing the state interest to prevent quid pro quo corruption in elections. Despite the aim of promoting transparency and discouraging corruption by banning PAC-to-PAC transfers of money, the Eleventh Circuit ignored the precedent of Citizens United designed to protect the rights of independent-expenditure groups to speak freely in elections. By impermissibly broadening the scope of quid pro quo corruption, ignoring the formal distinction created for independent-expenditure only groups, and failing to recognize numerous safeguards in place to prevent potential corruption, the Eleventh Circuit infringed upon the fundamental rights of hybrid PACs and created a problematic new standard based on intricate case-by-case determinations.

2 Republican Party of N.M. v. King, 741 F.3d 1089, 1092 (10th Cir. 2013).

3 U.S. CONST. amend I. (“Congress shall make no law… abridging the freedom of speech.”).


5 *Id.* at 1444 (citing Buckley v. Valeo, 424 U.S. 1, 21 (1976)).

6 Ala. Democratic Conference v. Att’y Gen. of Ala., 838 F.3d 1057, 1063 (11th Cir. 2016) (citing *Buckley*, 424 U.S. at 25); *see also McCutcheon*, 134 S. Ct. at 1444 (noting that strict scrutiny requires that the “regulation promote[ ] a compelling interest and is the least restrictive means to further the articulated interest”).

7 *McCutcheon*, 134 S. Ct. at 1450.

8 *See* Davis v. FEC, 128 S. Ct. 2759, 2773-74 (2008).


10 *Id.* at 314.

11 *McCutcheon*, 134 S. Ct. at 1452 (quoting McConnell v. FEC, 540 U.S. 93, 310 (2003)) (holding quid pro quo corruption applies only to the “narrow category of money gifts, that are directed, in some manner, to a candidate or officeholder”); *id.* at 359.

12 *Citizens United*, 558 U.S. at 359.

13 *Id.* at 360.

14 Jacob N. Kipp, *If It Looks Like a Super PAC, Acts Like a Super PAC, and is Restricted Like a Super PAC, Then Treat It Like a Super PAC: Why Contribution Limits on a Hybrid PAC’s Independent-Expenditure Arm Are Impermissible*, 25 WM. & MARY BILL RTS. J. 373, 374-378 (2016) (discussing the legal history of PACs and the creation of super PACs).

15 SpeechNow.org v. FEC, 599 F.3d 686, 694-95 (D.C. Cir. 2010).


17 *Id.* at 1060, 1064.

19 Ala. Democratic Conference, 838 F.3d at 1061.

20 Id. at 1060.


22 See Catholic Leadership Coal. of Tex. v. Reisman, 764 F.3d 409 (5th Cir. 2014); Vt. Right to Life Comm., Inc. v. Sorrell, 758 F.3d 118 (2d Cir. 2014).

23 Ala. Democratic Conference, 838 F.3d at 1068.

24 Id. at 1068-69.

25 Id.

26 Id. at 1065, 1070.

27 Id.

28 SpeechNow.org v. FEC, 599 F.3d 686, 694-95 (D.C. Cir. 2010); see also Republican Party of N.M. v. King, 741 F.3d 1089, 1097 (10th Cir. 2016) (“Because there is no corruption interest in limiting independent expenditures, there can also be no interest in limiting contributions to non-party entities that make independent expenditures.”).


31 King, 741 F.3d at 1102.

32 Citizens United, 558 U.S. at 357.


36 See id.

37 McCutcheon, 134 S. Ct. at 1452-54.

38 See 2 U.S.C. § 441a(a)(8); 11 CFR § 110.6.
39 *McCutcheon*, 134 S. Ct. at 1452.

40 See id. (citing *McConnell v. FEC*, 540 U.S. 93, 310 (2003)).


42 *Id.* at 360; see also id. at 457-458 (Stevens, J., dissenting) (stating even formally-independent expenditures can still be corrupting); Noah Feldman, *A Loss for Citizens United. And for Democrats*. BLOOMBERG (Sept. 29 2016, 3:30 PM), https://www.bloomberg.com/view/articles/2016-09-29/a-loss-for-citizens-united-and-for-democrats (noting the Court’s reliance on formal distinctions for “independent” PACs).

43 See *Republican Party of N.M. v. King*, 741 F.3d 1089, 1097 (10th Cir. 2016).

44 *King*, 741 F.3d at 1101.

45 *Emily’s List v. FEC*, 581 F.3d 1, 12 (D.C. Cir. 2009).

46 *Catholic Leadership Coal. of Tex. v. Reisman*, 764 F.3d 409, 443 (5th Cir. 2014).

47 See *Emily’s List*, 581 F.3d at 12.

48 *Kipp*, supra note 14, at 393-94.

49 See *King*, 741 F.3d at 1097; *Stop This Insanity, Inc. Emp. Leadership Fund v. FEC*, 902 F. Supp. 2d 23, 44 (D.D.C. 2012).

50 *Emily’s List* 581 F.3d at 12.

51 *Ala. Democratic Conference v. Att’y Gen. of Ala.*, 838 F.3d 1057, 1060 (11th Cir. 2016); *Blalock*, supra note 1.

52 *Kipp*, supra note 14, at 379-82.


54 *McCutcheon*, 134 S. Ct. at 1460.

55 See *Republican Party of N.M. v. King*, 741 F.3d 1089, 1101 (10th Cir. 2016).

56 See *Citizens United v. FEC*, 558 U.S. 310, 329 (2010) ("We decline to adopt an interpretation that requires intricate case-by-case determinations to verify whether political speech is banned").