

Appearance Is Everything: Why Imposing Expenditure Limits on Hybrid PACs Without Functional Separation Is Essential to Democracy

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ABSTRACT: Navigating campaign finance law is crucial to successful political campaigns. Political candidates and donors have incentives to engage in quid pro quo corruption and will get as close to corruption as possible under the law. Therefore, it is important that the law discourages such corruption. Even where there is no actual corruption, the appearance of corruption alone can have devastating effects on the democratic system. Hybrid PACs have an arm that makes contributions and an arm that makes expenditures. The sharing of staff, resources, and information between the arms can make hybrid PACs suspect to the average person by potentially creating an appearance of corruption. There is a circuit split about how separate the arms of a hybrid PAC must be to prevent the application of limits to the expenditure arm of a hybrid PAC. This Note argues that judges should resolve the circuit split by requiring hybrid PACs to be separate under a totality of the circumstances test that focuses on the appearance of corruption to avoid the application of contribution limits to their expenditures. Under this standard, courts would analyze the appearance of corruption factor assessing how corrupt a hybrid PAC appears to an objective reasonable person. Courts should look to surveys, testimony, and their own intuition to apply the reasonable person test. The proposed test will reduce the appearance of corruption in American elections and preserve the democratic process by maintaining faith in democracy, maintaining democratic participation, slowing political fractionalization, and preventing authoritarian policies.

I.	INTRODUCTION.....	342
II.	BACKGROUND	344
	A. DEFINITIONS OF PAC, SUPER PAC, AND HYBRID PAC	345

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B.	<i>THE EARLY HISTORY OF UNITED STATES CAMPAIGN FINANCE LAW</i>	345
C.	<i>BASIC FIRST AMENDMENT SPEECH DOCTRINE AND RATIONALES</i>	347
D.	<i>FRAMEWORK FOR JUDICIAL REVIEW OF CAMPAIGN FINANCE LAWS LIMITING SPENDING</i>	348
E.	<i>THE RISE OF HYBRID PACS</i>	351
F.	<i>JURISDICTION ONLY REQUIRING SEPARATE BANK ACCOUNTS</i>	352
G.	<i>JURISDICTIONS REQUIRING MORE SUBSTANTIAL SAFEGUARDS</i>	353
III.	THE IMPLICATIONS OF THE APPEARANCE OF CORRUPTION IN HYBRID PACS	354
A.	<i>THE PROBLEMS WITH BOTH CIRCUIT SPLIT APPROACHES</i>	355
B.	<i>HYBRID PACS WITHOUT SUFFICIENT SEPARATION GIVE THE APPEARANCE OF CORRUPTION AND DECREASE PUBLIC FAITH IN DEMOCRACY</i>	356
C.	<i>THE APPEARANCE OF CORRUPTION AND DECREASED PUBLIC FAITH IN DEMOCRACY DECREASES DEMOCRATIC PARTICIPATION</i>	357
D.	<i>DECREASED DEMOCRATIC PARTICIPATION LEADS TO POLITICAL FRACTIONALIZATION AND POLARIZATION</i>	359
E.	<i>POLITICAL EXTREMISM LEADS TO MORE AUTHORITARIAN POLICIES AND LESS FREEDOM</i>	359
IV.	COURTS SHOULD REQUIRE MORE SUBSTANTIAL SAFEGUARDS THAN SEPARATE BANK ACCOUNTS AND DOCUMENTATION WITH EMPHASIS ON THE APPEARANCE OF CORRUPTION FACTOR	363
A.	<i>HOW COURTS SHOULD ANALYZE WHETHER HYBRID PAC ARMS ARE SEPARATE ENOUGH TO AVOID APPLICATION OF CONTRIBUTION LIMITS TO EXPENDITURE ARMS</i>	364
B.	<i>THE SECOND CIRCUIT'S APPROACH WITH AN EMPHASIS ON APPEARANCE OF CORRUPTION WOULD HAVE AN INCONSEQUENTIAL SPEECH RESTRICTION, DECREASE THE APPEARANCE OF CORRUPTION, AND HELP PRESERVE DEMOCRACY</i>	365
V.	CONCLUSION	366

I. INTRODUCTION

Campaign finance law shapes which candidates have a chance of getting elected and has significant influence on public policy that affects the lives of

all United States citizens. Despite what young children are told, not anyone can be president; only candidates that have a network of political connections and the support of large corporations, special interest groups, and political parties have a real shot at elected office. Even without actual quid pro quo corruption, candidates are very limited in what positions they may take, fearing loss of corporate, special interest, and party funding, and such considerations substantially influence their policy decisions once elected. Although the government no longer prohibits women, racial minorities, and the poor from voting or functionally prohibits them from voting through literacy tests, purposely poor-quality polling facilities, poll taxes, or property-ownership requirements, modern campaign finance law gives a disproportionate voice to the wealthy at the expense of such disadvantaged groups.

Campaign finance was an important issue in the 2016 presidential election cycle. Populist candidates Donald Trump and Bernie Sanders spoke out against political action committees (“PAC(s)”), specifically super PACs, and the *Citizens United* decision.¹ Jeb Bush, who had substantial super PAC support, dropped out of the race.² Hillary Clinton’s super PAC support and corporate supporters gave her an advantage and helped her secure the Democratic party nomination, but many individual Democrats supported Bernie Sanders instead because of his stance against the influence of the wealthy on political elections.³

Special interest groups influence campaign financing through PACs, super PACs, and hybrid PACs. Standard PACs make contributions to political campaigns or spend in coordination with campaigns and are generally subject to limits.⁴ Super PACs make uncoordinated independent expenditures and are generally not subject to limits.⁵ Hybrid PACs combine these two types of PACs, with an arm making contributions and an arm making expenditures.⁶ A circuit split has arisen about how separate the arms of a hybrid PAC must

1. Jacob N. Kipp, Note, *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, 375 (2016); Peter Overby, *Presidential Candidates Pledge to Undo ‘Citizens United.’ But Can They?*, NPR (Feb. 14, 2016, 6:00 AM), <https://www.npr.org/2016/02/14/466668949/presidential-candidates-pledge-to-undo-citizens-united-but-can-they> [<https://perma.cc/Y2F9-QU49>].

2. Kipp, *supra* note 1, at 375 n.6; see also David S. Bernstein, *How Dynasties Sank the GOP and the Democrats*, POLITICO (Feb. 28, 2016, 3:29 PM), <https://www.politico.eu/article/dynasties-sank-the-gop-and-democrats-bush-clinton-family-politics> [<https://perma.cc/R2A9-BHZQ>]; Jack Shafer, *Three Cheers for Citizens United!*, POLITICO (Aug. 25, 2015), <https://www.politico.com/magazine/story/2015/08/citizens-united-2016-121739> [<https://perma.cc/EQ5A-A34J>].

3. Bernstein, *supra* note 2; Kipp, *supra* note 1, at 375; Shafer, *supra* note 2.

4. *Political Action Committees (PACs)*, FEC, <https://www.fec.gov/press/resources-journalists/political-action-committees-pacs> [<https://perma.cc/K5AR-B2j7>] [hereinafter *Political Action Committees*].

5. *Id.*

6. *Id.*

be to prevent the application of contribution limits to the expenditure arm of a hybrid PAC.⁷

This Note argues that judges should resolve the circuit split by requiring the arms of hybrid PACs to be sufficiently separate under a totality of the circumstances test that focuses on the appearance of corruption to avoid the application of contribution limits to their expenditures. This will reduce the appearance of corruption in American elections and preserve the democratic process. Part II discusses the early history of United States campaign finance regulation, basic First Amendment speech doctrine, the background framework for judicial review of campaign finance laws that limit spending, the rise of hybrid PACs within this framework, and the different approaches of the circuit courts in analyzing the constitutionality of statutes applying limits to the expenditure arms of hybrid PACs. Part III explains the implications of the appearance of corruption in hybrid PACs. Part IV argues that laws limiting expenditures of hybrid PACs are constitutional when hybrid PACs fail to pass a totality of the circumstances test that emphasizes the appearance of corruption regarding the separation of their contribution and expenditure arms. It proposes analyzing the appearance of corruption factor through a reasonable person test by looking at surveys, testimony, and a court's own intuition. It argues that reducing the appearance of corruption will help maintain democracy by slowing the decline in political participation, reducing political fractionalization, and preventing the rise of authoritarian regimes.

II. BACKGROUND

Congress began regulating campaign finance over a century ago, but it was not until the 1970s that it became a contentious issue that received judicial review of its constitutionality. Courts apply First Amendment doctrine to campaign finance issues, balancing speech interests against government interests in regulating speech. Hybrid PACs arose around 2010, leading to the circuit split since then.

Section II.A will define PAC, Super PAC, and Hybrid PAC. Section II.B will explain the early history of campaign finance law in the United States. Section II.C will explain basic First Amendment speech doctrine and rationale. Section II.D will explain the background framework for judicial review of laws limiting political spending as laid out by the United States Supreme Court, balancing First Amendment speech protections against government interests in preventing corruption and the appearance of

7. See generally *Ala. Democratic Conference v. Attorney Gen. of Ala.*, 838 F.3d 1057 (11th Cir. 2016) (analyzing what amount of separateness is required for hybrid PACs to avoid limits on expenditures); *Catholic Leadership Coal. of Tex. v. Reisman*, 764 F.3d 409 (5th Cir. 2014) (same); *Stop This Insanity Inc. Emp. Leadership Fund v. FEC*, 761 F.3d 10 (D.C. Cir. 2014) (same); *Vt. Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118 (2d Cir. 2014) (same); *Republican Party of N.M. v. King*, 741 F.3d 1089 (10th Cir. 2013) (same).

corruption. Section II.E will explain the development of hybrid PACs within this framework through the analysis of the D.C. Circuit Court and the Federal Election Commission (“FEC”). Sections II.F and II.G will explain the holdings and rationales of the circuit courts that have considered the question of how to analyze the constitutionality of statutes applying limits to the expenditure arms of hybrid PACs. The courts have diverged on whether expenditure limits can be avoided through separate bank accounts or whether more separation measures are necessary.

A. DEFINITIONS OF PAC, SUPER PAC, AND HYBRID PAC

Political action committees are organizations that take campaign contributions from donors, which may be individuals, corporations, labor unions, and other PACs, and donate the funds directly to political campaigns or for independent use in support of candidates.⁸ An organization is a PAC when it receives or spends over \$1,000 for the purpose of influencing a federal election and registers with the FEC.⁹ Standard PACs make direct contributions to political campaigns or spend in coordination with campaigns and are generally subject to limits.¹⁰ Super PACs may receive unlimited contributions from donors.¹¹ They make uncoordinated independent expenditures, meaning the funds are not contributed directly to a political campaign and are spent without consultation with a campaign.¹² Super PACs are generally not subject to limits.¹³ Hybrid PACs combine these two types of PACs, with an arm making contributions and an arm making expenditures.¹⁴ They accept unlimited contributions to a segregated bank account for financing independent expenditures and have a separate bank account subject to statutory amount limitations and source prohibitions that can make contributions directly to political campaigns.¹⁵

B. THE EARLY HISTORY OF UNITED STATES CAMPAIGN FINANCE LAW

Campaign finance was not regulated in the early United States and elections were often corrupted by quid pro quo arrangements.¹⁶

Nineteenth century industrialists such as Jay Gould, Andrew Carnegie, and John Rockefeller and their corporations donated to political campaigns

8. *Political Action Committees*, *supra* note 4.

9. 52 U.S.C. § 30101 (4) (A), (8) (2012).

10. *See generally id.* (discussing the limits of contributions that a political committee can make).

11. *Political Action Committees*, *supra* note 4.

12. 52 U.S.C. § 30101 (17).

13. *See id.*

14. *Id.*; *Registering as a Hybrid PAC*, FEC, <https://www.fec.gov/help-candidates-and-committees/filing-pac-reports/registering-hybrid-pac> [<https://perma.cc/SL3Y-JKKL>].

15. *See id.*

16. JACK BEATTY, *AGE OF BETRAYAL: THE TRIUMPH OF MONEY IN AMERICA, 1865–1900*, at 192–94 (2007).

to elect politicians who would favor the wealthy.¹⁷ Jay Gould, a railroad tycoon, used his money to place 48 men in cabinet posts between 1868 and 1896 who either served railroad clients, lobbied for railroads, sat on railroad boards, or had railroad-connected relatives.¹⁸

Campaign finance regulation began at the turn of the twentieth century under President Theodore Roosevelt as part of the Square Deal, alongside new progressivist regulation in antitrust, living and working conditions, and ecosystem conservation to curb the excesses and hardships of the Gilded Age.¹⁹ In response to criticism for having taken campaign contributions from corporate donors, President Roosevelt saw the need for campaign finance reform and called for legislation to ban corporate contributions for political purposes in 1905.²⁰ Congress subsequently passed the Tillman Act of 1907, which prohibited corporate contributions connected with political elections, and imposed fines and imprisonment for violators.²¹

Congress enacted a series of statutes over the subsequent decades to “[l]imit the disproportionate influence of wealthy individuals and special interest groups on the outcome of federal elections; [r]egulate spending in campaigns for federal office; and [d]eter abuses by mandating public disclosure of campaign finances.”²² Congress consolidated these goals in the Federal Election Campaign Act of 1971 (“FECA”), which imposed more stringent disclosure requirements for federal candidates, political parties, and PACs.²³ Financial abuses in the 1972 presidential campaign prompted 1974 amendments to FECA that “set limits on contributions by individuals, political parties, and PACs” and established the FEC.²⁴ The FEC’s purposes were to enforce FECA, facilitate disclosure, administer the public funding program, and to clarify the law through public outreach, regulations, and advisory opinions.²⁵

17. *Id.*

18. *Id.* (“Jay Gould was president. He never ran for office, he never lost office—he ruled. He wrote the laws. He interpreted the Constitution. He commanded the army. He staffed the government. He rented politicians, fattening his purse off their favor.”).

19. *The FEC and the Federal Campaign Finance Law*, FEC, <https://transition.fec.gov/pages/brochures/fecfeca.shtml> [<https://perma.cc/SEJ5-B3LA>] [hereinafter *Federal Campaign Finance Law*]; John Milton Cooper, *Theodore Roosevelt: President of the United States*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/biography/Theodore-Roosevelt> [<https://perma.cc/N2W2-QACY>] (last updated July 11, 2019).

20. Jack Beatty, *A Sisyphian History of Campaign Finance Reform*, ATLANTIC (July 2007), <https://www.theatlantic.com/magazine/archive/2007/07/a-sisyphian-history-of-campaign-finance-reform/306066> [<https://perma.cc/G4KL-B3UB>]; see Cooper, *supra* note 19.

21. Beatty, *supra* note 20.

22. *Federal Campaign Finance Law*, *supra* note 19.

23. *Id.*

24. *Id.*

25. *Id.*

C. BASIC FIRST AMENDMENT SPEECH DOCTRINE AND RATIONALES

The First Amendment prohibits Congress from “abridging the freedom of speech.”²⁶ The same prohibition applies to the states through the Due Process Clause of the Fourteenth Amendment.²⁷ The United States Supreme Court has articulated three rationales for the First Amendment: the marketplace of ideas rationale, the citizen participant rationale, and the individual liberty rationale. The marketplace of ideas rationale argues that free expression will lead to the acceptance of the best ideas and the defeat of lesser ideas.²⁸ The citizen participant rationale argues that free discussion of political issues and public officials allows people to participate in governing and choosing the best candidates for office.²⁹ The individual liberty rationale argues that free expression promotes individual autonomy and self-determination.³⁰

The First Amendment does not absolutely prohibit any law aiming to regulate speech.³¹ Different categories of speech get different levels of First Amendment protection and judicial standards of review.³² In most cases, courts presume the constitutionality of a law limiting speech, and the burden is on the challenger to prove that the law is unconstitutional.³³ However, if strict scrutiny applies to a law limiting certain categories of speech, courts presume the law is invalid, and the burden is on the government to prove that the law is constitutional.³⁴ Laws that regulate speech content get a higher level of scrutiny than laws that are content-neutral.³⁵ Courts determine constitutionality by balancing burdens on freedom of speech against

26. U.S. CONST. amend. I.

27. *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

28. *Abrams v. United States*, 250 U.S. 616, 630–31 (1919) (Holmes, J., dissenting) (discussing the marketplace of ideas rationale); JEROME A. BARRON & THOMAS C. DIENES, *BLACK LETTER OUTLINE ON CONSTITUTIONAL LAW* 372 (9th ed. 2013).

29. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269–70 (1964) (discussing the citizen participant rationale); see BARRON & DIENES, *supra* note 28, at 372.

30. *Citizens United v. FEC*, 558 U.S. 310, 466 (2010) (Stevens, J., concurring and dissenting in part) (discussing the individual liberty rationale); see BARRON & DIENES, *supra* note 28, at 373.

31. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

32. BARRON & DIENES, *supra* note 28, at 373; see also *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 387–88, 415 n.3 (2000) (explaining the different standards of review for laws limiting campaign contributions and independent expenditures).

33. BARRON & DIENES, *supra* note 28, at 373–74; see also *Nixon*, 528 U.S. at 387–88, 415 n.3 (suggesting that laws limiting contributions are presumed valid and that the burden is on the challenger to prove otherwise).

34. BARRON & DIENES, *supra* note 28, at 373–74; see also *Nixon*, 528 U.S. at 387–88, 415 n.3 (suggesting that laws limiting expenditures are presumed invalid and that the burden is on the government to prove otherwise).

35. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641–42 (1994); BARRON & DIENES, *supra* note 28, at 374–81.

government interests in regulating speech.³⁶ Vagueness and overbreadth of a law can render it facially invalid.³⁷

*D. FRAMEWORK FOR JUDICIAL REVIEW OF CAMPAIGN FINANCE LAWS
LIMITING SPENDING*

The Supreme Court created the framework for judicial review of laws limiting campaign spending in *Buckley v. Valeo* and the same framework largely remains intact today.³⁸ The Court struck down parts of FECA³⁹ as violating the First Amendment.⁴⁰ It rejected the argument that campaign spending limits should be treated as conduct and instead treated them as speech.⁴¹ It struck down the limit on independent expenditures spent to support an identified candidate, the limit on candidates' expenditures of personal or family resources, and the limit on total expenditures by candidates.⁴²

The Court used several technical terms to differentiate types of spending. Contributions, or hard money, are funds donated to a candidate's campaign, funds spent in coordination with a candidate's campaign, or funds donated to a PAC.⁴³ Expenditures, or soft money, are funds spent independently.⁴⁴ Advocacy ads advocate for a specific candidate and/or use at least one of eight "magic words."⁴⁵ The Court held that FECA banned all contributions, but only banned expenditures that advocated using magic words.⁴⁶ It upheld the contribution bans and struck down all expenditure bans.⁴⁷ The Court held

36. BARRON & DIENES, *supra* note 28, at 374; *see, e.g.*, *Texas v. Johnson*, 491 U.S. 397, 407–20 (1989); *Buckley v. Valeo*, 424 U.S. 1, 25–30, 44–49 (1976); *Gitlow v. New York*, 268 U.S. 652, 666–70 (1925) (balancing government interest in limiting speech against individual interest in freedom of speech).

37. *Johnson*, 491 U.S. at 435 n.2 (Rehnquist, C.J., dissenting); BARRON & DIENES, *supra* note 28, at 385–86.

38. DANIEL P. TOKAJI, *ELECTION LAW IN A NUTSHELL* 283 (2d ed. 2017).

39. Federal Election Campaign Act, 2 U.S.C. §§ 431–457 (1971).

40. *Buckley*, 424 U.S. at 51, 54, 58–59.

41. *Id.* at 15–17. Noncommunicative elements of conduct do not receive First Amendment protection and communicative elements of conduct generally do not receive as much First Amendment protection as direct speech. *See United States v. O'Brien*, 391 U.S. 367, 376–82 (1968). In *O'Brien*, the Court approved of the application of a federal statute prohibiting the knowing destruction or mutilation of Selective Service registration certificates to O'Brien, who burned his certificate with the intent to protest the Vietnam War. *Id.* The Court held that conduct does not receive full speech protection whenever the person engaging in the conduct intends to express an idea and that the Government's interest in identification and fraud prevention outweighed O'Brien's minimal First Amendment interest. *Id.*

42. *Buckley*, 424 U.S. at 51, 54, 58–59.

43. *Id.* at 20, 43–44, 46–47.

44. *Id.* at 43–44, 46–47.

45. *Id.* at 43–44, 44 n.52. The eight magic words are "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," and "reject." *Id.*

46. *Id.*

47. *Id.* at 13–14, 43–44, 44 n.52 (explaining FECA's restrictions on contributions and expenditures and how the First Amendment applies to them).

that expenditures receive more constitutional protection than contributions because contributions are a general expression of support without a specific message while expenditures express a specific message.⁴⁸ *Buckley* did not specify what standards to apply when scrutinizing spending limits, but in *Nixon v. Shrink Missouri Gov't PAC*, the Court analyzed expenditure limits under a strict scrutiny standard, requiring the Government's law to be narrowly tailored to a compelling governmental interest, and analyzed contribution limits under an intermediate scrutiny standard, requiring contribution limits to be closely drawn to a sufficiently important interest.⁴⁹ The Court in *Buckley* held that the Government has an interest in preventing corruption and the appearance of corruption, but rejected the argument that the Government has an interest in the promotion of equality of speech among individuals.⁵⁰ Therefore, contributions may be limited, since they pose a risk of real or apparent quid pro quo corruption, while independent expenditures cannot be limited, since they cannot give rise to an exchange of money for political favors.⁵¹

In *Citizens United v. FEC*, the Court adopted the *Buckley* framework as applied to corporations. The Court struck down the portions of the Bipartisan Campaign Reform Act of 2002 ("BCRA")⁵² that imposed expenditure limits upon corporations.⁵³ The Court held that corporations have the same First Amendment speech rights as individuals, so the constitutional rules on limits to contributions and expenditures apply equally to corporate and individual spending.⁵⁴ Therefore, the Government cannot limit corporate-funded independent expenditures.⁵⁵ The Government argued that it was furthering anti-distortion and dissenting shareholder protection interests, but the Court disagreed.⁵⁶ The Government additionally argued that corporate expenditures distort the public's voice through corporate aggregations and expending of wealth that are unrelated to which candidates the public supports. The Court stated the anti-distortion argument is just a variant of the equality argument advanced and rejected in *Buckley*.⁵⁷ The Government also argued that limits on corporate expenditures protect dissenting shareholders from having a view expressed that they disagree with, but the Court was unpersuaded and stated that dissenting shareholders could be protected by

48. *Id.* at 19–23.

49. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 387–88, 415 n.3 (2000) (citations omitted).

50. *Buckley*, 424 U.S. at 25–29, 48–49.

51. *See id.* at 25–29, 44–48.

52. Bipartisan Campaign Reform Act, 2 U.S.C. §§ 431–457 (2002). BCRA, also known as the McCain–Feingold Act, was a federal statute that amended FECA.

53. *Citizens United v. FEC*, 558 U.S. 310, 365–66 (2010).

54. *Id.* at 349–50.

55. *Id.* at 365–66.

56. *Id.* at 348–62.

57. *Id.* at 349–56.

changing the rules of corporate governance and that the limits are overinclusive since corporations can have a single shareholder.⁵⁸ The Court equated any attempt to limit corporate expenditures with the Government simply restricting speech based solely on the speaker's identity, which is forbidden under the First Amendment.⁵⁹ The result was the increased use of Super PACs, to which individuals can make unlimited donations, and which can make unlimited expenditures.⁶⁰

Justice Stevens wrote an opinion concurring in part and dissenting in part in *Citizens United*. He would have held that BCRA's limit on corporate expenditures was constitutional.⁶¹ Stevens believed that the Bill of Rights does not apply to corporations but only applies to individuals included in "We the People."⁶² He argued that since Congress had prohibited corporate contributions to federal election campaigns since 1907, the Court should have been more hesitant to strike down such a prohibition.⁶³ Stevens justified the prohibition based on the anti-corruption rationale, arguing that undue influence by corporations on the political process was a form of corruption.⁶⁴ He also argued for the dissenting shareholders protection rationale.⁶⁵ In addition to the justifications for limiting domestic corporations, Stevens was concerned that foreign corporations would be able to influence the American democratic process.⁶⁶

Citizens United was one of the most politically controversial cases in recent years, "becom[ing] the Democratic left's *Roe v. Wade*, the case that drove them screaming into the streets."⁶⁷ However, the public outcry against *Citizens United* was not limited to Democrats.⁶⁸ Before *Citizens United*, polls indicated that citizens were concerned about government corruption but not about campaign spending.⁶⁹ After *Citizens United*, polls indicated a shift in public

58. *Id.* at 361–62.

59. *Id.* at 365.

60. See *SpeechNow.org v. FEC*, 599 F.3d 686, 694–97 (D.C. Cir. 2010); Douglas M. Spencer & Abby K. Wood, *Citizens United, States Divided: An Empirical Analysis of Independent Political Spending*, 89 IND. L.J. 315, 330 (2014).

61. *Citizens United*, 558 U.S. at 396 (Stevens, J., concurring and dissenting in part).

62. *Id.* at 466.

63. *Id.* at 394–95.

64. *Id.* at 447–60.

65. *Id.* at 475–78.

66. *Id.* at 424, 465.

67. Daniel Henninger, *The Rage Against Citizens United*, WALL ST. J. (Oct. 28, 2010, 12:01 AM), <https://www.wsj.com/articles/SB10001424052702304173704575578461221742460> [<https://perma.cc/LJ3V-HHG7>].

68. See generally Molly J. Walker Wilson, *Financing Elections and "Appearance of Corruption": Citizen Attitudes and Behavior in 2012*, 63 CATH. U. L. REV. 953 (2014) (discussing increased citizen dissatisfaction with campaign financing across parties after *Citizens United* and the accompanying low voter turnout in the 2012 election).

69. BRENNAN CTR. FOR JUSTICE, NATIONAL SURVEY: SUPER PACS, CORRUPTION, AND DEMOCRACY 3 (2012), available at <https://www.brennancenter.org/sites/default/files/legacy/>

perception: Citizens feared the influence of Super PACs and corporate interests on elected officials.⁷⁰

Polls showed that citizens largely favored spending limits.⁷¹ This sentiment manifested in a political movement with the goal to overturn *Citizens United* through a constitutional amendment.⁷² *Buckley* and *Citizens United* set the background that led to the development of hybrid PACs.

E. THE RISE OF HYBRID PACS

Following *Citizens United* and the increased use of Super PACs, some organizations chose to combine PACs and Super PACs into a single entity for administrative ease.⁷³ These “hybrid PACs” had two bank accounts, one to take and spend contributions and the other to take and spend independent expenditures.⁷⁴ Each arm of the organization complied with the respective regulations corresponding with the type of spending.⁷⁵

Hybrid PACs were first recognized in 2009, a year before *Citizens United*, in *Emily’s List v. FEC*.⁷⁶ The D.C. Circuit held that a single entity could make both contributions and expenditures if it had separate bank accounts and did not commingle funds.⁷⁷ However, because *Emily’s List* was pre-*Citizens United*, the expenditure arm of hybrid PACs could only take limited corporate funding under BCRA.

Democracy/CFR/SuperPACs_Corruption_Democracy.pdf [https://perma.cc/Y22K-APRS]; Walker Wilson, *supra* note 68, at 979–80; *see also* Lydia Saad, *Iraq and the Economy Are Top Issues to Voters*, GALLUP (Feb. 13, 2008), <http://www.gallup.com/poll/104320/Iraq-Economy-Top-Issues-Voters.aspx> [https://perma.cc/98WG-N6Y8] [hereinafter Saad, *Top Issues to Voters*]; Lydia Saad, *One in Three Cite “American People” as Key U.S. Asset*, GALLUP (Feb. 17, 2010), <http://www.gallup.com/poll/126032/One-Three-Cite-American-People-Key-Asset.aspx> [https://perma.cc/885G-6JSP] [hereinafter Saad, *Key U.S. Asset*].

70. Walker Wilson, *supra* note 68, at 980–82; *see also* Chris Cillizza & Aaron Blake, *Poll: Voters Want Super PACs to Be Illegal*, WASH. POST (Mar. 13, 2012), https://www.washingtonpost.com/blogs/the-fix/post/poll-voters-wants-super-pacs-to-be-illegal/2012/03/12/g1QA6skT8R_blog.html [https://perma.cc/WFR4-78M9]; Ron Faucheux, *U.S. Voters: Congress Is Selfish About Campaign Finance*, ATLANTIC (July 16, 2012), <https://www.theatlantic.com/politics/archive/2012/07/us-voters-congress-is-selfish-about-campaign-finance/259812> [https://perma.cc/C3AC-654C]; Liz Kennedy, *Citizens Actually United: The Overwhelming, Bi-Partisan Opposition to Corporate Political Spending and Support for Achievable Reforms*, DEMOS 1 (Oct. 25, 2012), <https://www.demos.org/policy-briefs/citizens-actually-united-bi-partisan-opposition-corporate-political-spending-and> [https://perma.cc/R57S-WZNG]; *Politics*, POLLINGREPORT, <http://www.pollingreport.com/politics.htm> [https://perma.cc/SN6R-NN97].

71. Walker Wilson, *supra* note 68, at 980–82; *see also* Cillizza & Blake, *supra* note 70; Faucheux, *supra* note 70; Kennedy, *supra* note 70; *Politics*, *supra* note 70.

72. WOLF-PAC, https://www.wolf-pac.com/the_solution [https://perma.cc/T24L-9V9R].

73. *See Emily’s List v. FEC*, 581 F.3d 1, 12 (D.C. Cir. 2009) (establishing constitutional analysis to apply to hybrid PACs when hybrid PACs were first promulgating).

74. *See id.*

75. *See id.*

76. *Id.* at 4–5, 12.

77. *Id.*

Hybrid PACs were further recognized post-*Citizens United* in *Carey v. FEC*.⁷⁸ The D.C. District Court granted a preliminary injunction stating that the FEC could not enforce contribution limits against a hybrid PAC with regard to independent expenditures if the hybrid PAC maintained separate bank accounts for its hard money and soft money, proportionally paid related administrative costs, and complied with the limits of hard money contributions.⁷⁹ After *Citizens United* and *Carey*, hybrid PACs had unlimited independent expenditure funding and spending. The FEC then formally recognized hybrid PACs.⁸⁰

The D.C. Circuit in *Stop This Insanity Inc. Emp. Leadership Fund v. FEC* did not follow the district court's rule from *Carey*.⁸¹ It affirmed the holding of the district court, which held that a single organization may not make contributions and unlimited advocacy expenditures, but instead must form two legally distinct entities.⁸² This led to the need for "enmeshed entities" in the District of Columbia—organizations with separate documentation and legal status that were run by the same people and were substantially the same as a hybrid PAC.⁸³

The establishment of hybrid PACs and the D.C. Circuit's treatment of them set a basis for analyzing how separate the arms of a hybrid PAC must be for the expenditure arm to avoid contribution limits. A circuit split has arisen on this issue: The Tenth Circuit requires only separate bank accounts whereas the Second, Fifth, Eleventh, and D.C. Circuits impose greater separation requirements upon hybrid PACs.⁸⁴

F. JURISDICTION ONLY REQUIRING SEPARATE BANK ACCOUNTS

The Tenth Circuit considered the circuit split question in *Republican Party of New Mexico v. King*.⁸⁵ It affirmed the issuance of a preliminary injunction

78. *Carey v. FEC*, 791 F. Supp. 2d 121, 135–36 (D.D.C. 2011).

79. *Id.*

80. FEC, FEC STATEMENT ON *CAREY V. FEC* (2011), available at <https://www.fec.gov/updates/fec-statement-on-carey-v-fec> [<https://perma.cc/7J3A-EDW8>].

81. See *Stop This Insanity Inc. Emp. Leadership Fund v. FEC*, 761 F.3d 10, 11–12, 14–15 (D.C. Cir. 2014); Brian Greivenkamp, Note, *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*, 83 U. CIN. L. REV. 1445, 1452–54 (2015).

82. *Stop This Insanity Inc. Emp. Leadership Fund*, 761 F.3d at 11–12, 14–15; Greivenkamp, *supra* note 81, at 1452–54.

83. See *Vt. Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 121 (2d Cir. 2014) (analyzing when to apply limits to expenditures of enmeshed entities); Kipp, *supra* note 1, at 381 (defining enmeshed entities).

84. See generally *Ala. Democratic Conference v. Attorney Gen. of Ala.*, 838 F.3d 1057 (11th Cir. 2016); *Catholic Leadership Coal. of Tex. v. Reisman*, 764 F.3d 409 (5th Cir. 2014); *Stop This Insanity Inc. Emp. Leadership Fund*, 761 F.3d 10; *Vt. Right to Life Comm., Inc.*, 758 F.3d 118; *Republican Party of N.M. v. King*, 741 F.3d 1089 (10th Cir. 2013) (analyzing what is required for hybrid PACs to avoid limits on expenditures).

85. *King*, 741 F.3d at 1090–91.

against the Government's enforcement of a New Mexico statute that limited independent expenditures of hybrid PACs.⁸⁶ Citing *Emily's List*, the court held that maintaining separate bank accounts for contribution funds and expenditure funds was sufficient to prevent the application of limits to the expenditure arm of a hybrid PAC.⁸⁷ It reasoned that there was no chance of quid pro quo corruption or the appearance of corruption where the funds were not commingled.⁸⁸ The court dispensed with the state's argument that pre-*Citizens United* case law supported the statute and that the state's interest in preventing circumvention of contribution limits was a compelling interest.⁸⁹

G. JURISDICTIONS REQUIRING MORE SUBSTANTIAL SAFEGUARDS

The Second Circuit considered the issue of sufficient separation in hybrid PACs in *Vermont Right to Life Comm., Inc. v. Sorrell*.⁹⁰ The plaintiffs were enmeshed entities, one involved in making contributions and the other involved in making expenditures.⁹¹ The court upheld a Vermont statute that applied contribution limits to the plaintiff organization that made expenditures.⁹² It held that separate bank accounts and separate organizational documents were not enough to prevent coordination with a candidate, and since coordinated expenditures are subject to contribution limits, such limits applied.⁹³ The court required more substantial organizational separation to avoid limits on expenditures.⁹⁴ It applied a totality of the circumstances test, considering shared bank accounts, shared organizational documents, "the overlap of staff and resources, the lack of financial independence, [direct] coordination of activities, and the flow of information between entities."⁹⁵

The Fifth Circuit considered the issue in *Catholic Leadership Coal. of Texas v. Reisman*.⁹⁶ The court upheld a Texas statute prohibiting corporate contributions to hybrid PACs.⁹⁷ It held that the state had a compelling anticorruption interest in preventing circumvention of contribution limits

86. N.M. STAT. ANN. § 1-19-34.7 (2015); *King*, 741 F.3d at 1090-91.

87. *King*, 741 F.3d at 1097.

88. *Id.*

89. *Id.* at 1098-1103.

90. *Vt. Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 139-45 (2d Cir. 2014).

91. *Id.* at 121.

92. VT. STAT. ANN. tit. 17, § 2805(a) (repealed 2014); *Vt. Right to Life Comm., Inc.*, 758 F.3d at 145.

93. *Vt. Right to Life Comm., Inc.*, 758 F.3d at 141-42.

94. *Id.*

95. *Id.* at 142.

96. *Catholic Leadership Coal. of Tex. v. Reisman*, 764 F.3d 409, 444-45 (5th Cir. 2014).

97. TEX. ELEC. CODE ANN. § 253.094(a) (West 2011); *Catholic Leadership Coal. of Tex.*, 764 F.3d at 444-45.

and that the corporate contribution limit was narrowly tailored.⁹⁸ The court declined to name the precise safeguards that must be present before a state lacks a sufficient interest to regulate contributions to a hybrid PAC marked for expenditures, but held that some safeguard beyond separate bank accounts is required.⁹⁹

The Eleventh Circuit considered the issue in *Alabama Democratic Conference v. Attorney General of Alabama*.¹⁰⁰ An Alabama statute imposed a “PAC-to-PAC transfer ban,” which prohibited PACs from transferring funds to other PACs, subject to an exception.¹⁰¹ The court approved the transfer ban as applied to the transfer of funds marked for expenditures to hybrid PACs that had no more than separate bank accounts.¹⁰² It held that the state had a compelling interest in transparency, which is connected to the anticorruption interest, and that the transfer ban was narrowly tailored to that interest because the ban prevents using transfers as a way to conceal donor identity and corrupt behavior.¹⁰³ To avoid application of the transfer ban to the expenditure arms of hybrid PACs, the court required “adequate account-management procedures to guarantee that no money contributed to the organization for the purpose of independent expenditures will ever be placed in the wrong account or used to contribute to a candidate,” separate people functionally controlling how contributions and expenditures are spent.¹⁰⁴ It also adopted the Second Circuit’s considerations of “the overlap of staff and resources, the lack of financial independence, the coordination of activities, and the flow of information between the entities.”¹⁰⁵

III. THE IMPLICATIONS OF THE APPEARANCE OF CORRUPTION IN HYBRID PACS

While each circuit court purported to analyze both government interests in prevention of corruption and prevention of the appearance of corruption under the Supreme Court’s framework, they failed to give proper weight to the appearance of corruption interest independently of the corruption interest. Failure to give enough weight to the appearance of corruption will contribute to a decrease in public faith in democracy with far-reaching effects on American democracy. “A democracy cannot function effectively when its

98. *Catholic Leadership Coal. of Tex.*, 764 F.3d at 444–45.

99. *Id.*

100. *Ala. Democratic Conference v. Attorney Gen. of Ala.*, 838 F.3d 1057, 1059–60 (11th Cir. 2016).

101. ALA. CODE § 17-5-15(b) (2019); *Ala. Democratic Conference*, 838 F.3d at 1060.

102. *Ala. Democratic Conference*, 838 F.3d at 1070.

103. *Id.* at 1065, 1070.

104. *Id.* at 1068.

105. *Id.* (citing *Vt. Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 142 (2d Cir. 2014)).

constituent members believe laws are being bought and sold.”¹⁰⁶ Section III.A will explain why both circuit split approaches are incorrect or incomplete. Section III.B will argue that hybrid PACs without sufficient separation give the appearance of corruption and decrease public faith in democracy. Section III.C will argue that the appearance of corruption and decreased public faith in democracy decreases democratic participation. Section III.D will argue that decreased democratic participation in turn leads to political fractionalization and polarization. Section III.E will argue that political extremism leads to more authoritarian policies and less freedom.

A. *THE PROBLEMS WITH BOTH CIRCUIT SPLIT APPROACHES*

Neither the Tenth Circuit nor the Second Circuit’s approach to the circuit split gives proper weight to the appearance of corruption interest when balancing government interests against freedom of speech. Both approaches give equal weight to the freedom of speech, giving expenditure limits strict scrutiny and respecting the historical rationales for the freedom of speech. Where the approaches differ is how they characterize the risk that hybrid PACs will lead to corruption or the appearance of corruption through coordinating expenditures. The Tenth Circuit believed there was low risk where hybrid PACs maintain separate bank accounts, but the Second Circuit believed there was high risk unless hybrid PACs took stronger precautions. Still, both approaches go wrong in conflating corruption and the appearance of corruption, without giving the appearance of corruption its own analysis. The circuit courts misinterpreted the Supreme Court’s guidance as saying that where there is no actual corruption, there cannot be the appearance of corruption. However, the Court’s cases have only dealt with laws where that premise was true. The Court has not dealt with a situation that may arise with hybrid PACs, where the high potential for corruption causes a high potential for the appearance of corruption, even where there is not actual corruption. The Court has held “that independent expenditures . . . do not give rise to corruption or the appearance of corruption”¹⁰⁷ “as a matter of law”¹⁰⁸ but has not held that expenditures with a high chance of becoming coordinated are immune from limits. Therefore, expenditures made by hybrid PACs that do not sufficiently separate arms could be open to limits under the First Amendment, since those expenditures would present an appearance of corruption separate from actual corruption.

106. *Citizens United v. FEC*, 558 U.S. 310, 453 (2010) (Stevens, J., concurring and dissenting in part).

107. *Id.* at 357 (majority opinion).

108. *SpeechNow.org v. FEC*, 599 F.3d 686, 694 (D.C. Cir. 2010).

B. *HYBRID PACS WITHOUT SUFFICIENT SEPARATION GIVE THE APPEARANCE OF CORRUPTION AND DECREASE PUBLIC FAITH IN DEMOCRACY*

Hybrid PACs likely look corrupt to the average person. If the same people under the same entity name are spending contributions in coordination with political campaigns and are spending expenditures with the same political goals, the average person would think it looks like contribution limits are being circumvented by allowing expenditures to be coordinated with campaigns incident to contribution spending. Even if contribution limits are not circumvented, hybrid PACs that do not demonstrate some higher degree of separation apart from separate bank accounts and legal documents will look suspicious to the public, who will suspect that such entities are “in cahoots with the candidates and parties that it coordinates with and supports.”¹⁰⁹ “[F]rom the perspective of any citizen who does not scrutinize [such entities’] bank statements, all of the [entities’] spending . . . is coming from the same place.”¹¹⁰ “[A] donor, approached by the same fundraiser on behalf of both [arms of a hybrid PAC], [would likely] believe that his or her contributions to each would be linked.”¹¹¹ When donors and general citizens believe hybrid PACs are corrupt, the effects on democracy are as real as if there was actual corruption.

The loss of public faith in democracy resulting from the appearance of influence or access following *Citizens United* supports that the appearance of corruption also decreases public faith. While the Court in *Citizens United* stated that “[t]he appearance of influence or access . . . will not cause the electorate to lose faith in our democracy,”¹¹² statistical evidence shows otherwise. Polls indicated a shift in public perception following *Citizens United* where Americans became more aware of the connection between campaign finance and corruption and were more likely to think that politicians “would put the interests of groups that spent millions on their campaigns before the public’s interests.”¹¹³ After *Citizens United*, “[fifty-seven] percent of Americans voters [thought] the current system of financing political campaigns [did not] work” and “eighty percent of [American voters believed] members of Congress [were] more interested in re-election than improving the campaign finance system.”¹¹⁴ Because the Court did not believe that unlimited corporate expenditures could lead to the appearance of corruption, this Note assumes that the shift in public opinion was premised on the appearance of influence

109. *Stop This Insanity, Inc. Emp. Leadership Fund v. FEC*, 902 F. Supp. 2d 23, 43 (D.D.C. 2012).

110. *Id.*

111. *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 336 (4th Cir. 2008) (Michael, J., dissenting).

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

113. Walker Wilson, *supra* note 68, at 979–81; *see also* BRENNAN CTR. FOR JUSTICE, *supra* note 69, at 3; Saad, *Top Issues to Voters*, *supra* note 69; Saad, *Key U.S. Asset*, *supra* note 69.

114. Walker Wilson, *supra* note 68, at 981 (first alteration in original) (quoting Faucheux, *supra* note 70); *see also* Faucheux, *supra* note 70.

or access, not the appearance of corruption. The statistical evidence showing loss of faith resulting from the appearance of influence or access following *Citizens United* demonstrates that the appearance of corruption will have a similar or intensified effect, since the appearance of corruption is a factor the Court recognizes in its analysis of campaign finance regulation, meaning that it should have a greater effect on public opinion.

Appearance of corruption decreases public faith in democracy. The Court has recognized that “Congress could legitimately conclude that the avoidance of the appearance of improper influence ‘is . . . critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.’”¹¹⁵ Professor Mark Warren¹¹⁶ wrote that “[w]hen people lose confidence that public decisions are taken for reasons that are publicly available and justifiable, they often become cynical about public speech and deliberation,” which “undermines the culture of democracy.”¹¹⁷ Loss of public faith in democracy is reflected in two ways: decreased trust in government and decreased political efficacy. A study found that increased exposure to allegations of political corruption and scandals eroded public trust in government with respect to Congress with statistical significance and to the President without statistical significance.¹¹⁸ Political efficacy is “an individual’s ability to understand political issues in order to participate in politics, and an individual’s beliefs about government responsiveness to citizen input.”¹¹⁹ A study found a connection between corruption and democracy globally, indicating that citizens of democracies with higher levels of corruption reported lower political efficacy.¹²⁰ Studies showing decreased trust in government and decreased political efficacy in response to increased perceptions of corruption show that the appearance of corruption shakes public faith in democracy.

C. THE APPEARANCE OF CORRUPTION AND DECREASED PUBLIC FAITH IN
DEMOCRACY DECREASES DEMOCRATIC PARTICIPATION

The significance of public faith in democracy is its effect on democratic participation through voting, political spending, and political discourse.

115. *Buckley v. Valeo*, 424 U.S. 1, 27 (1976) (second alteration in original) (quoting U.S. Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers, 413 U.S. 548, 565 (1973)).

116. Warren is a professor in political science at The University of British Columbia. *Mark Warren*, U. BRITISH COLUM.: DEP’T POL. SCI., <https://politics.ubc.ca/persons/mark-warren> [<https://perma.cc/HFE7-RAVL>]. He researches democratic theory with “interest[] in new forms of citizen participation, new forms of democratic representation, the relationship between civil society and democratic governance, and the corruption of democratic relationships.” *Id.*

117. Mark E. Warren, *What Does Corruption Mean in a Democracy?*, 48 AM. J. POL. SCI. 328, 328 (2004).

118. Virginia A. Chanley et al., *The Origins and Consequences of Public Trust in Government: A Time Series Analysis*, 64 PUB. OPINION Q. 239, 251 (2000).

119. Walker Wilson, *supra* note 68, at 985.

120. *Id.* at 986; Christopher J. Anderson & Yuliya V. Tverdova, *Corruption, Political Allegiances, and Attitudes Toward Government in Contemporary Democracies*, 47 AM. J. POL. SCI. 91, 104 (2003).

Professor Albert Bandura¹²¹ wrote that “[u]nless people believe they can produce desired effects by their actions they have little incentive to act. Efficacy belief is, therefore, the foundation of action.”¹²² Following the decrease in public faith in government after *Citizens United*, voter turnout in the 2012 election was down to 57.5 percent of eligible voters (from 62.3 percent in 2008 and 60.4 percent in 2004)¹²³ despite increases in campaign spending by outside groups to \$652.8 million (from \$301.6 million in 2008) resulting from the development of Super PACs.¹²⁴ Bandura puts people into three classes depending on their political efficacy and corresponding democratic participation.¹²⁵ The three classes are: people who believe they can accomplish change through collective action and trust the democratic process and so are active participants in conventional political activities;¹²⁶ people who believe they can accomplish change through collective action but do not trust the democratic process and so favor untraditional confrontive and coercive tactics;¹²⁷ and people who do not believe either collective action or the democratic process can accomplish change and so become politically apathetic and withdraw from the political sphere.¹²⁸ A healthy democracy should keep people in the first category. People in the latter two categories resort to potentially illegal or disruptive action or allow the most vocal minority take the lead.

121. Bandura is a psychologist and originator of social cognitive theory, which holds that a person's environment, cognition, and behavior all interact to determine how that person functions. Jeannette L. Nolen, *Albert Bandura*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/biography/Albert-Bandura> [<https://perma.cc/Z6QT-389N>]. This work involved showing how efficacy has an effect on what individuals choose to do, the amount of effort they put into doing it, and the way they feel as they are doing it. *Id.*

122. Albert Bandura, *Personal and Collective Efficacy in Human Adaptation and Change*, 1 *ADVANCES PSYCHOL. SCI.* 51, 52 (1998).

123. CURTIS GANS, BIPARTISAN POLICY CTR., 2012 ELECTION TURNOUT DIPS BELOW 2008 AND 2004 LEVELS: NUMBER OF ELIGIBLE VOTERS INCREASES BY EIGHT MILLION, FIVE MILLION FEWER VOTES CAST 1 (2012), available at <https://bipartisanpolicy.org/wp-content/uploads/sites/default/files/2012%20Voter%20Turnout%20Full%20Report.pdf> [<https://perma.cc/F9LP-3SXU>].

124. Walker Wilson, *supra* note 68, at 970; see also Evan Mackinder, *Ten Weeks Out From Election Day, Outside Spending Exceeds 2008 Total*, OPENSECRETS.ORG (Sept. 6, 2012), <https://www.opensecrets.org/news/2012/09/ten-weeks-out-from-election-day-out> [<https://perma.cc/Q9D2-PBXA>]; *Outside Spending*, OPENSECRETS.ORG, <https://www.opensecrets.org/outsidespending> [<https://perma.cc/F4U7-Z24H>].

125. Albert Bandura, *Exercise of Human Agency Through Collective Efficacy*, 9 *CURRENT DIRECTIONS PSYCHOL. SCI.* 75, 78 (2000).

126. *Id.*

127. *Id.*

128. *Id.*

D. DECREASED DEMOCRATIC PARTICIPATION LEADS TO POLITICAL
FRACTIONALIZATION AND POLARIZATION

The result of reduced voting, political spending, and political discourse is increased political fractionalization and polarization. The vocal minority, who have the most extreme views and who are the most motivated to participate in democracy, will have their views heard the most and represented the most in government.¹²⁹ People will be less likely to find common ground on political issues since they will tend to associate with the extreme political views that are represented in the media and the government.¹³⁰ A Pew poll reported that only 21 percent of voting-age Americans are consistently liberal or conservative and 39 percent have mixed views, meaning that the majority of Americans are politically moderate.¹³¹ However, citizens with the most polarized views vote more than moderate citizens, especially in primaries.¹³² Politically active citizens have ideological scores that are much further from the center of the political spectrum than the average citizen.¹³³ A smaller voter pool causes each vote to carry more weight, which gives a further advantage to polarized partisan candidates.¹³⁴ In this way, the most extreme politicians end up representing a moderate constituency, and enacting policies that are not representative of the general population's values and beliefs.¹³⁵

E. POLITICAL EXTREMISM LEADS TO MORE AUTHORITARIAN POLICIES AND
LESS FREEDOM

The prominence of extreme political views in the media and the government will result in consolidated power that imposes more authoritarian

129. Elaine C. Kamarck, *Increasing Turnout in Congressional Primaries*, BROOKINGS: CTR. FOR EFFECTIVE PUB. MGMT. 1, 17 (2014), <https://www.brookings.edu/wp-content/uploads/2016/06/KamarckIncreasing-Turnout-in-Congressional-Primaries72614.pdf> [<https://perma.cc/45NY-KBPH>]; Pietro S. Nivola, *Thinking About Political Polarization*, BROOKINGS (Jan. 1, 2005), <https://www.brookings.edu/research/thinking-about-political-polarization> [<https://perma.cc/2994-EGFW>]; Paul Steenkiste, *The Effect of Voter Turnout on Political Polarization*, U.S. COMMON SENSE (Sept. 5, 2014), <http://uscommonsense.org/research/effect-voter-turnout-political-polarization> [<https://perma.cc/L92G-R643>].

130. Michael Barber & Nolan McCarty, *Causes and Consequences of Polarization*, in 19 TASK FORCE ON NEGOTIATING AGREEMENT IN POLITICS 32–33 (Jane Mansbridge & Cathie Jo Martin eds., 2013); Nivola, *supra* note 129.

131. *Political Polarization in the American Public: How Increasing Ideological Uniformity and Partisan Antipathy Affect Politics, Compromise and Everyday Life*, PEW RES. CTR.: U.S. POL. & POL'Y (June 12, 2014), <https://www.people-press.org/2014/06/12/political-polarization-in-the-american-public> [<https://perma.cc/EUR7-A8PJ>] [hereinafter PEW RES. CTR.: U.S. POL. & POL'Y]; Steenkiste, *supra* note 129.

132. Kamarck, *supra* note 129, at 17; PEW RES. CTR.: U.S. POL. & POL'Y, *supra* note 131; Steenkiste, *supra* note 129.

133. PEW RES. CTR.: U.S. POL. & POL'Y, *supra* note 131; Steenkiste, *supra* note 129.

134. Steenkiste, *supra* note 129.

135. *Id.*

policies, which are dangerous to freedom. President George Washington cautioned in his farewell address that factionalism representing only extreme minorities would cause authoritarian policies and eventually the collapse of democracy into tyranny:

[Parties] serve to organize faction, to give it an artificial and extraordinary force—to put in the place of the delegated will of the nation the will of a party; often a small but artful and enterprising minority of the community . . . likely, in the course of time and things, to become potent engines by which cunning, ambitious, and unprincipled men will be enabled to subvert the power of the people and to usurp for themselves the reins of government, destroying afterwards the very engines which have lifted them to unjust dominion. . . . The alternate domination of one faction over another, sharpened by the spirit of revenge natural to party dissension, which in different ages and countries has perpetrated the most horrid enormities, is itself a frightful despotism. But this leads at length to a more formal and permanent despotism. The disorders and miseries which result gradually incline the minds of men to seek security and repose in the absolute power of an individual; and sooner or later the chief of some prevailing faction, more able or more fortunate than his competitors, turns this disposition to the purposes of his own elevation on the ruins of public liberty.¹³⁶

Washington's contentions find support in history.

Throughout its history the United States has experienced Washington's predicted alternate domination of one faction over another with vengeful policies that impede individual liberty. Disagreements between Federalists and Democratic-Republicans after the Washington presidency resulted in a Federalist dominated Congress passing the Alien and Sedition Acts of 1798.¹³⁷ The Acts made the citizenship process more difficult for immigrants, permitted the detention of subjects of an enemy nation, and authorized the President to expel any alien he considered dangerous.¹³⁸ Congress banned the publication of writings that opposed the federal government, resulting in the prosecutions of Jeffersonian newspapers.¹³⁹ Tensions between northern Republicans and southern Democrats in the mid-nineteenth century led to

136. GEORGE WASHINGTON, WASHINGTON'S FAREWELL ADDRESS: TO THE PEOPLE OF THE UNITED STATES 11-14 (1796), https://www.senate.gov/artandhistory/history/resources/pdf/Washingtons_Farewell_Address.pdf [<https://perma.cc/P5KR-M6GW>].

137. Peter McNamara, *Sedition Act of 1798 (1798)*, FIRST AMENDMENT ENCYCLOPEDIA, <https://mtsu.edu/first-amendment/article/1238/sedition-act-of-1798> [<https://perma.cc/78XS-WPXY>].

138. *Id.*

139. *Id.*

the Civil War, the bloodiest conflict in American history.¹⁴⁰ During the conflict, President Abraham Lincoln suspended the writ of *habeas corpus* and declared martial law to try civilians in military tribunals.¹⁴¹ In the following Reconstruction Era, Republicans instituted military districts in the South and coerced the passage of the Reconstruction Amendments to the Constitution by conditioning southern states' re-entry into the union on their approval of the amendments, while Democrats resisted with the racist Jim Crow segregation laws.¹⁴² Government shutdowns due to the inability of polarized parties to agree on yearly budgets in recent decades have cost the economy billions, with the 2013 shutdown costing the economy \$20 billion.¹⁴³ Judicial appointments have become a political affair, with Senate confirmation voting splitting along party lines.¹⁴⁴ The result of political judicial appointments was shown in *Bush v. Gore*, the low point in the Court's legitimacy, where the justices voted along party lines using legal arguments that were the antitheses of their known views.¹⁴⁵ Political polarization has led to tensions between minorities and the police, with both sides becoming violent at times.¹⁴⁶ The

140. Guy Gugliotta, *New Estimate Raises Civil War Death Toll*, N.Y. TIMES (Apr. 2, 2012), <https://www.nytimes.com/2012/04/03/science/civil-war-toll-up-by-20-percent-in-new-estimate.html> [<https://perma.cc/WD8N-ANMD>].

141. Frank Williams, *Abraham Lincoln and Civil Liberties in Wartime*, HERITAGE FOUND. (May 5, 2004), <https://www.heritage.org/defense/report/abraham-lincoln-and-civil-liberties-wartime> [<https://perma.cc/7NDL-MRHJ>]. See generally *Ex parte* Milligan, 71 U.S. 2 (1866) (reviewing the Lincoln administration's use of military tribunals to try civilians); *Ex parte* Merryman, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487) (reviewing the Lincoln administration's suspension of the writ of *habeas corpus*).

142. Eric Foner, *Reconstruction*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/event/Reconstruction-United-States-history> [<https://perma.cc/N5LY-2EAN>]; Melvin I. Urofsky, *Jim Crow Law*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/event/Jim-Crow-law> [<https://perma.cc/F4R6-B43L>]. See generally John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375 (2001) (discussing whether the Reconstruction Amendments were unlawful because the temporary governments in the South were not legally competent or because the ratifications were extorted from the states through unlawful federal threats).

143. Chris Isidore, *Here's What the Last Government Shutdown Looked Like*, CNN BUS. (Jan. 20, 2018, 8:14 AM), <https://money.cnn.com/2018/01/19/news/economy/government-shutdown-cost/index.html> [<https://perma.cc/PqYW-32AD>].

144. See *Supreme Court Nominations: Present–1789*, U.S. SENATE, available at <https://www.senate.gov/pagelayout/reference/nominations/Nominations.htm> [<https://perma.cc/3XUD-XHW3>]; Sheryl Gay Stolberg, *Kavanaugh Is Sworn In After Close Confirmation Vote in Senate*, N.Y. TIMES (Oct. 6, 2018), <https://www.nytimes.com/2018/10/06/us/politics/brett-kavanaugh-supreme-court.html> [<https://perma.cc/T5ZP-2BME>] (reporting that Justice Kavanaugh was confirmed to the Supreme Court by one of the slimmest margins in American history and explaining the “rancorous battle” that included a debate over judicial ideology and accusations of sexual misconduct).

145. See *Bush v. Gore*, 531 U.S. 98, 111 (2000). See generally Laurence H. Tribe, *Bush v. Gore and Its Disguises: Freeing Bush v. Gore from Its Hall of Mirrors*, 115 HARV. L. REV. 170 (2001) (discussing different accounts of what happened with the Florida recount and proposing a realistic explanation of the events including the Court's failure to uphold constitutional principles).

146. Monica Davey & Julie Bosman, *Protests Flare After Ferguson Police Officer Is Not Indicted*, N.Y. TIMES (Nov. 24, 2014), <https://www.nytimes.com/2014/11/25/us/ferguson-darren-wilson>

United States has avoided further consequences of polarized political parties through separation of powers and the system of checks and balances, but enough polarization has the potential to overcome systematic safeguards.

There is scholarship arguing that strong political parties prevent the collapse of democracy, but this Note argues that democracy is most stable without polarized factions and with sufficient checks and balances. Such scholarship argues that nonexistent or weak and diverse parties result in the election of politicians through the tyranny of the majority and populism, which causes politicians to fixate on the short-term due to their uncertainty at reelection, so they are incentivized to change the fundamental nature of the government and seize power permanently.¹⁴⁷ While this may be true, strong political parties do not solve the problem. Instead of a tyranny of the majority, strong political parties result in a tyranny of the minorities, with only the most politically active and polarized citizens getting representation, and with one side ultimately seizing permanent power. Even if strong political parties manage to resist this result and provide some stability, strong parties are not necessary and are not worth the risk, since the Constitution has built-in mechanisms to prevent the tyranny of the majority other than political parties.

The Framers' objective was "[t]o secure the public good and private rights against the danger of such a [majority] faction, and at the same time to preserve the spirit and the form of popular government."¹⁴⁸ They recognized "that a pure democracy . . . can admit of no cure for the mischiefs of faction."¹⁴⁹ They did not advocate for strong political parties as a solution, since parties give a voice to factions and do not solve the problem. The Framers instituted a separation of powers and a system of checks and balances to protect the republic from factions, either majority or minority. The aim of the "distributions of power . . . is to divide and arrange the several offices in such a manner as that each may be a check on the other."¹⁵⁰ Congress cannot push through factional legislation without the approval of both houses and

shooting-michael-brown-grand-jury.html [https://perma.cc/5PJA-7F6H]; Emanuella Grinberg & Thom Patterson, *Tensions High After Milwaukee Police Shooting*, CNN, <https://www.cnn.com/2016/08/14/us/milwaukee-violence-police-shooting/index.html> [https://perma.cc/ER3C-RRZU] (last updated Aug. 16, 2016, 7:23 PM); Holly Yan & Dana Ford, *Baltimore Riots: Looting, Fires Engulf City After Freddie Gray's Funeral*, CNN, <https://www.cnn.com/2015/04/27/us/baltimore-unrest/index.html> [https://perma.cc/G64A-EXSD] (last updated Apr. 28, 2015, 10:30 AM).

147. José Luis Sardón, *Democracy Without Political Parties*, YALE L. SCH. SELA PAPERS 1, 1–2, 4 (2012) (arguing that strong political parties prevent the collapse of democracy by analyzing the history of Latin American countries compared to the United States and providing suggestions to Latin American countries going forward to form a few strong political parties to maintain democratic stability like the United States).

148. THE FEDERALIST NO. 10 (James Madison) (arguing that the republican form of government is a safeguard against domestic faction and insurrection).

149. *Id.*

150. THE FEDERALIST NO. 51 (James Madison or Alexander Hamilton) (arguing for the proper checks and balances between the different branches of the government).

the approval of the President,¹⁵¹ the President cannot exercise war powers on a factional basis without the approval of Congress,¹⁵² the President cannot enforce the laws on a factional basis without funding from Congress,¹⁵³ the Judiciary is insulated from factional pressure by appointment by the President and confirmation by the Senate,¹⁵⁴ and factional legislation by Congress receives judicial review by the Judiciary.¹⁵⁵ The Bill of Rights protects individual liberty from whichever faction is in power. Because the separation of powers and checks and balances protect against majoritarian takeover, strong political parties are not necessary to do so and the risk that polarization centered in strong parties will enact authoritarian policies and usurp democracy is not worth the marginal stability strong parties could provide.

In sum, courts' failure to give enough weight to the appearance of corruption factor in analyzing the separateness of hybrid PACs and whether expenditure limits may constitutionally be imposed will have far reaching effects on American democracy. Such flawed analysis will give the appearance of corruption in hybrid PACs, which will decrease public faith in the democratic process, which will decrease political participation, which will polarize politics, which will cause more authoritarian policies and less liberty. Going forward, courts facing this circuit split can prevent this cascade and preserve democracy by using a totality of the circumstances test including full analysis of the appearance of corruption factor.

IV. COURTS SHOULD REQUIRE MORE SUBSTANTIAL SAFEGUARDS THAN SEPARATE BANK ACCOUNTS AND DOCUMENTATION WITH EMPHASIS ON THE APPEARANCE OF CORRUPTION FACTOR

To solve the problems stemming from hybrid PACs without sufficient separation, this Note proposes that courts require hybrid PACs to

151. U.S. CONST. art. I, § 7, cl. 2 ("Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it . . .").

152. *Id.* art. I, § 8, cl. 11 (granting Congress the power to declare war); *id.* art. I, § 8, cl. 12 (granting Congress the power to raise and support armies); *id.* art. I, § 8, cl. 13 (granting Congress the power to provide and maintain a navy); *id.* art. I, § 8, cl. 14 (granting Congress the power to make rules for the government and regulation of the land and naval forces); *id.* art. I, § 8, cl. 15 (granting Congress the power to call forth the militia); *id.* art. I, § 8, cl. 16 (granting Congress the power to organize, arm, and discipline the militia); *id.* art. II, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States . . .").

153. *Id.* art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . .").

154. *Id.* art. II, § 2, cl. 2 ("[H]e shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court . . .").

155. *Marbury v. Madison*, 5 U.S. 137, 176–80 (1803) In *Marbury*, the Court held that the judiciary has the power of judicial review of legislative acts. *Id.* The Court reasoned that it is the judicial duty to say what the law is and where the Constitution and a statute are in conflict, the Court must uphold the Constitution, as it is the paramount law. *Id.* This is supported by the Framers' contemplation of judicial review and that judges take oaths to uphold the Constitution. *Id.*

demonstrate sufficient separation through the Second Circuit's totality of the circumstances approach with additional emphasis placed on the appearance of corruption factor through a reasonable person test. Section IV.A will explain the proposed analysis and how it would be implemented. Section IV.B will argue that the proposed analysis would only impose an inconsequential speech restriction, would decrease the appearance of corruption, and would help preserve American democracy.

A. *HOW COURTS SHOULD ANALYZE WHETHER HYBRID PAC ARMS ARE SEPARATE ENOUGH TO AVOID APPLICATION OF CONTRIBUTION LIMITS TO EXPENDITURE ARMS*

Courts should apply the Second Circuit's totality of the circumstances test and should give extra weight to the appearance of corruption factor. Courts should analyze expenditure limits under a strict scrutiny standard, requiring the government's law to be narrowly tailored to a compelling government interest.¹⁵⁶ Because strict scrutiny applies, courts presume the law is invalid and the burden is on the government to prove that the law is constitutional.¹⁵⁷ The compelling government interests in regulating expenditures are to prevent corruption and the appearance of corruption.¹⁵⁸ The government must show that the law is narrowly tailored to compelling government interests in preventing corruption and the appearance of corruption, which would be the case where the law at issue limits expenditure spending in hybrid PACs that do not pass a totality of the circumstances test.¹⁵⁹ Laws limiting expenditures impose a great burden on the freedom of speech because expenditures express a specific message.¹⁶⁰

The expenditure arm of a hybrid PAC must be sufficiently separate from the contribution arm such that expenditure funds are not coordinated to avoid corruption and that expenditure funds do not appear to be coordinated to avoid the appearance of corruption. The separateness of the arms should be analyzed under a totality of the circumstances test that considers shared bank accounts, shared organizational documents, the overlap of staff and resources, lack of financial independence, direct coordination of activities, and flow of information between entities.¹⁶¹ This analysis should take into account and give great weight to how the public will perceive the entity should it avoid limits on the expenditure arm and whether the entity will have the appearance of corruption. The court should use a reasonable person test to

156. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 387–88, 388 n.3 (2000).

157. *BARRON & DIENES*, *supra* note 28, at 373–74; *see also Nixon*, 528 U.S. at 387–88, 388 n.3 (suggesting that laws limiting expenditures are presumed invalid and that the burden is on the government to prove otherwise).

158. *Buckley v. Valeo*, 424 U.S. 1, 25–29, 48–49 (1976).

159. *Nixon*, 528 U.S. at 387–88, 388 n.3.

160. *Buckley*, 424 U.S. at 19–23.

161. *Vt. Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 141–42 (2d Cir. 2014).

determine whether the average reasonable person would think the hybrid PAC in question appears corrupt. Where the arms are sufficiently separate, a law that would apply expenditure limits is not narrowly tailored to compelling government interests in preventing corruption and the appearance of corruption and the limits are inapplicable to the expenditure arm.

In using the reasonable person test to assess the appearance of corruption factor, courts should look to surveys, psychological studies, testimony, and their own intuition. Party briefs and amici briefs should provide surveys and psychological studies about how people perceive the corruptness of different hybrid PACs based on their organizational structures. When briefs fail to provide this information, courts should attempt to locate studies on their own, although this may be ineffective due to time and resource constraints. Lay person testimony could provide insight into how the average person perceives hybrid PACs by witnesses explaining how they perceive the hybrid PAC in question, although lack of personal knowledge could present evidentiary issues with witness competency.¹⁶² Expert testimony could provide insight on psychological information about how people perceive corruption in campaign finance. If data and testimony are not helpful, courts must rely on their own intuition to determine how corrupt the hybrid PAC in question appears to the average person. Although this is not entirely accurate, since judges could substitute their own judgment under the guise of the reasonable person, courts have experience making similar reasonable person inquiries in many areas of law, including duty of care in negligence, apparent authority in agency, and reasonable expectation of privacy for a Fourth Amendment search,¹⁶³ so courts are generally trusted to use reasonable person tests and should not hesitate to do so.

B. THE SECOND CIRCUIT'S APPROACH WITH AN EMPHASIS ON APPEARANCE OF CORRUPTION WOULD HAVE AN INCONSEQUENTIAL SPEECH RESTRICTION, DECREASE THE APPEARANCE OF CORRUPTION, AND HELP PRESERVE DEMOCRACY

The proposed analysis does not change how courts would analyze the significance of the speech interest in expenditures. The freedom of speech would be adequately protected by using strict scrutiny and by recognizing that limiting expenditures imposes a great burden on the freedom of speech.

162. FED. R. EVID. 602 (“A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.”).

163. *Smith v. Maryland*, 442 U.S. 735, 740 (1979) (“[T]he application of the Fourth Amendment depends on whether the person invoking its protection can claim a ‘justifiable,’ a ‘reasonable,’ or a ‘legitimate expectation of privacy.’”); RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 7 (AM. LAW INST. 2010) (stating that for negligence, “[a]n actor ordinarily has a duty to exercise reasonable care when the actor’s conduct creates a risk of physical harm”); RESTATEMENT (THIRD) OF AGENCY § 2.03 (AM. LAW INST. 2006) (“Apparent authority is the power held by an agent or other actor to affect a principal’s legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal’s manifestations.”).

Rather than change the weight given to speech through expenditures, the proposed analysis gives more weight to the appearance of corruption factor when looking at hybrid PACs, an approach that is in line with Supreme Court precedent. While imposing restrictions on the expenditure arm of a hybrid PAC would impose a great burden on the ability of the entity to speak freely, the burden is easily removed. A hybrid PAC could comply with the totality of the circumstances factors by sufficiently separating its arms to entirely avoid any expenditure limits. Where the test is concerned not with the content of the speech or who is doing the speaking but with avoiding potential corruption or appearance of corruption, and a simple organizational adjustment can prevent any speech restriction, the test is in line with constitutional principles.

Resolving the circuit split by using the proposed analysis would decrease the appearance of corruption through the public seeing courts transparently and separately considering the appearance of corruption and seeing hybrid PACs as organizations with functionally separate arms that do not commingle funds or coordinate independent expenditures. Decreasing the appearance of corruption would help prevent the cascading effects described in Part III. Citizens would more likely maintain faith in the democratic process, participate in the democratic process, not diverge into polarized politics, and avoid authoritarian policies that threaten freedom.

While resolving this circuit split will not preserve democracy on its own, it is a step in the right direction. Courts, agencies, and legislatures “do not generally resolve massive problems in one fell . . . swoop.”¹⁶⁴ Instead, “reform may take one step at a time.”¹⁶⁵ Small incremental steps add up to large effects, and it is only by working toward each step that our nation will realize the Framers’ vision.

V. CONCLUSION

Courts should require hybrid PACs to demonstrate sufficient separation through the Second Circuit’s totality of the circumstances approach with additional emphasis placed on the appearance of corruption factor assessed by a reasonable person test to avoid the application of expenditure limits. This approach would impose minimal speech restrictions and would best preserve American values and the Framers’ concept of the republic by maintaining faith in democracy and the Constitution. In a post-*Citizens United* world, where campaign finance and potential for corruption have come to the forefront of

164. *Massachusetts v. EPA*, 549 U.S. 497, 524 (2007) (holding that Massachusetts has standing to force the EPA to regulate motor-vehicle emissions pursuant to the Clean Air Act even though motor-vehicle emissions in the United States only contribute a very small amount to Massachusetts’ injury from global warming and regulation of such emissions would only redress Massachusetts’ injury a very small amount).

165. *Id.* (quoting *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955)).

political discussion in the 2016 presidential election, it is essential that elections remain transparent and politicians accountable to the people.