A Sign of Change or More of the Same? *Wagner v. FEC* and Its Implications on the Changing Field of Corporate Campaign Contributions as Applied to Federal Contractors

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I. INTRODUCTION

Today, being able to effectively advocate to elected officials has become an issue of great importance to not only those individuals and corporations looking to secure favorable legislation and opportunities to bid on projects, but to those individuals and entities seeking to influence the ideology and other more specific positions of federal elected officials as well as those seeking federal office. In the way of this advocacy is a complex and often unclear thicket of federal regulatory and legal provisions that govern campaign finance. This thicket is especially dense for federal contractors, who face a complete ban on contributions. This Note aims to suggest the best course of action for an individual or corporate entity that seeks to influence federal elections through direct contributions.

Part II discusses the background of The Federal Election Campaign Act (FECA) and the corresponding legislative, regulatory, and judicial developments that have shaped the current campaign finance environment, including the most recent judicial decision, *Wagner v. Federal Election Commission*. Part III analyzes subsequent administrative and scholarly opinions regarding the interpretation of *Wagner* decision. Part IV makes recommendations of the avenues available to individual and corporate contractors, and more generally the course of action for corporations and individuals interested in influencing federal elections.

II. BACKGROUND

A. The Regulation of Campaign Finance

1. Early Federal Campaign Finance Regulation

The call for regulation of corporate involvement in federal campaigns began, at the

urging of Theodore Roosevelt, in the early 1900s.[1] Answering this call, Congress enacted several statutes between 1907 and 1966 which, "sought to: [l]imit the disproportionate influence of wealthy individuals and special interest groups on the outcome of federal elections; Regulate spending in campaigns for federal office; and Deter abuses by mandating public disclosure of campaign finances."[2]

2. The Federal Election Campaign Act

a. Early FECA Regulations

In 1971, Congress passed the Federal Election Campaign Act (FECA), which brought together past reforms into an omnibus law governing campaigns—including campaign finance.[3] FECA has been amended multiple times to reflect the regulatory needs and pressures associated with campaign finance.[4] The first of these reforms came in 1974, when FECA was amended to specifically set limits on individuals, parties, and political action committees (PAC).[5] The 1974 amendment also created the Federal Election Commission (FEC) and empowered it to enforce FECA.[6] Finally, FECA tasked the FEC with administering the disclosure system created by the act.[7]

b. Amendments and Challenges to FECA

In 1976, FECA survived its first challenge in *Buckley v. Valeo*.[8] In 1979, Congress again altered FECA by expanding the role of the parties and streamlining the disclosure process.[9] FECA was next overhauled in 2002 by the "Bipartisan Campaign Reform Act" (BCRA), which placed a ban on federal parties from raising or spending "soft money."[10] Soft money is defined as non-federal funds that are restricted to use on "issue ads."[11] The 2002 amendment also increased the contribution limits and indexed many of them for inflation.[12]

c. FECA Today

In FECA's current form, Congress addresses the financial involvement of corporations and federal contractors in federal campaigns in several sections.[13] FECA defines a contribution, in an exhaustive manner, to include: (i) any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of

1. *The FEC and the Federal Campaign Finance Law*, FEC (Feb. 2004), https://transition.fec.gov/pages/brochures/fecfeca.shtml#Introduction.
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. FEC, *supra* note 1.
7. *Id.*
8. *Id. See* Buckley v. Valeo, 424 U.S. 1, 1–6 (1976) (discussing the extent of FECA, the challenged provisions, and the disposition of the case).
9. FEC, *supra* note 1.
10. *Id.*
11. *Id.*
12. *Id.*
13. 52 U.S.C. § 30118 (2002); 52 U.S.C. § 30125(a) (2002).

influencing any election for Federal office; or (ii) the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose.[14] The Act also explicitly lists what does not qualify as a contribution to a political campaign.[15]

Section 30118 covers contributions or expenditures by national banks, corporations, or labor organizations.[16] The section makes it unlawful for any corporation to make contributions in connection to an election, either primary or general, to any political office, convention, or caucus.[17] It further defines contribution as including the standard FECA definition[18] and any applicable electioneering communication.[19] FECA assigns specific rules to these electioneering campaigns as the direct or indirect disbursement of any amount for the costs of communication.[20] The section does, however, create an exception for 501(C)(4) organizations making an expenditure out of segregated funds to which only individuals can contribute.[21]

Section 30119 deals directly with contributions by government contractors and the prohibition of their financial participation in federal campaigns.[22] FECA defines a government contractor as those who "enter[] . . . . into any contract with the United States or any department or agency thereof."[23] The act further specifically defines what qualifies as a contractor, including: providing or selling services, land, or materials to the United States or any department or agency "if payment for the performance of such contract or payment for such material, supplies, equipment, land, or building is to be made in whole or in part from funds appropriated by the Congress."[24] This prohibition is limited to "any time between the commencement of negotiations for the later of (A) the completion of performance under; or (B) the termination of negotiations for, such contract."[25]

Additionally under FECA, the FEC has promulgated an administrative procedure for settling complaints of infractions of FECA. The FEC "must attempt to resolve its enforcement cases or Matters Under Review (MURs)."[26] The FEC accomplishes this "through a confidential investigative process that culminates in a conciliation agreement with the respondent(s)."[27] There is also a provision that allows the FEC or the respondents to pursue the matter in court.[28]

B. Parallel State Development of Campaign Finance Regulation

States have largely not mirrored federal developments and many have a wide variety

14. 52 U.S.C. § 30101(8)(A)(i–ii) (2017).
15. *Id.*
16. 52 U.S.C. § 30118(a) (2002).
17. *Id.*
18. 52 U.S.C. § 30118 (2002) (defining contribution).
19. *Id.*
20. *Id.*
21. *Id.*
22. 52 U.S.C. § 30119 (1980).
23. *Id.* at § 30119(a)(1).
24. *Id.*
25. *Id.*
26. *Matters Under Review (MURs)*, FEC, http://classic.fec.gov/em/mur.shtml (last visited Nov. 7, 2017).
27. *Id.*
28. *Id.*

of campaign finance regulations.[29] While the majority of states have some type of contribution limit, twelve states do not.[30] The remaining thirty-eight states vary greatly in their restraints on political donations.[31] This is illustrated by the disparate limits on individual donations:[32]

	Governor	State Senate	State House
National Average	$5,619	$2,507.69	$2,375
National Median	$3,800	$1,000	$1,000
Highest Limit	$50,000 (New York)	$12,532 (Ohio)	$12,532 (Ohio)
Lowest Limit	$500 (Alaska)	$170 (Montana)	$170 (Montana)

This difference in state contribution limits presents the differing views of state-based campaign finance regulations.

States also have vastly different positions on the participation of corporations in state elections.[33] States are split 22 to 28, with 28 states allowing contributions from corporations, and 22 prohibiting their involvement.[34] In this way, many states have chosen to not follow the FEC and the Federal Government in disallowing corporate campaign contributions. In contrast, many states, including some that allow for unlimited corporate contributions, have proposed bills to call for a constitutional convention.[35] Many of these bills have either failed to pass, expired, or are still under consideration.[36]

C. The Political Question Doctrine and Questions of Judicial Review of Campaign Finance

An understanding of the limits of judicial power in political questions is fundamental to understanding judicial intervention and its implications into the FEC regulated sphere. Prior to *Baker v. Carr*, the Supreme Court held that questions concerning campaigns were non-justiciable political questions.[37] In *Baker*, the court held that "several formulations

29. *See Contribution Limits Overview*, NAT'L CONF. OF ST. LEGIS., http://www.ncsl.org/research/elections-and-campaigns/campaign-contribution-limits-overview.aspx (last visited Nov.7 , 2017) (detailing the contribution limits and particularities of state campaign finance law).

30. *See id.* (stating that Alabama, Indiana, Iowa, Mississippi, Missouri, Nebraska, North Dakota, Oregon, Pennsylvania, Texas, Utah, and Virginia do not have any limit on campaign contributions to state campaigns).

31. *Id.*

32. *Id.*

33. *State Limits on Contributions to Candidates 2015–2016 Election Cycle*, NAT'L CONF. OF ST. LEGIS., http://www.ncsl.org/Portals/1/documents/legismgt/elect/ContributionLimitstoCandidates2015-2016.pdf (last visited Nov. 7, 2017).

34. *Id.*

35. *Campaign Finance Legislation Database 2015 Onward*, NAT. CONF. OF ST. LEGIS., http://www.ncsl.org/research/elections-and-campaigns/campaign-finance-database-2015-onward.aspx (last visited Nov. 7, 2017).

36. *Id.*

37. EDWARD B. FOLEY ET AL., ELECTION LAW AND LITIGATION 2–4 (2014).

which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers."[38] The Court then detailed the types of political questions.[39] The Court stated that "[u]nless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence."[40]

Fundamentally, the Court held that "[t]he doctrine of which we treat is one of 'political questions,' not one of 'political cases.'"[41] It continued, "[t]he courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority."[42] Courts have held that questions of campaign finance and corporate speech are, for the most part, justiciable questions.[43]

D. Austin v. Michigan Chamber of Commerce *and Supporting FECA*

The Supreme Court's most recent upholding of the FECA prohibitions of corporate spending in federal elections came in *Austin v. Michigan Chamber of Commerce*. After finding for the state of Michigan that the state conferred corporate structure warranted limits on independent expenditures,[44] the Court held that the Act was narrowly tailored, and that FECA did not apply to not-for-profits or labor unions.[45] Finally, the Court held that because news corporations were exempted from the ban, there was no equal protection ground for suit.[46] Thus, the Court upheld the ban on corporate speech instituted and enforced under FECA. However, this would not last.

E. Citizens United *and the Opening of the Floodgates*

In 2010, the United States Supreme Court exercised its power to intervene in the landmark case, *Citizens United v. Federal Election Commission*.[47] *Citizens United* overturned *Austin* and held that corporate speech was protected under the First Amendment as applied to independent expenditures.[48] The implications of this decision were as wide

38. Baker v. Carr, 369 U.S. 186, 217 (1962).

39. A political question is "[a] question that a court will not consider because it involves the exercise of discretionary power by the executive or legislative branch of government." *Political Question*, BLACK'S LAW DICTIONARY (10th ed. 2014); *see Baker*, 369 U.S. at 216 (holding that a political question is one that has "a textually demonstrable constitutional commitment of the issue to a coordinate political department . . . or a lack of judicially discoverable and manageable standards . . . or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion . . . or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government . . . or an unusual need for unquestioning adherence to a political decision already made . . . or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.").

40. *Baker*, 369 U.S. at 217.

41. *Id.*

42. *Id.*

43. Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 654 (1990), *overruled by* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010); McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1436 (2014).

44. *Austin*, 494 U.S. at 666–67.

45. *Id.*

46. *Id.*

47. *Citizens United*, 558 U.S. at 347–48.

48. *Id.*

reaching as they were ground breaking.[49] First, *Citizens United* led to a massive boom in 'outside campaign' spending.[50] This has also led to significantly diminished disclosure of donor sources for these outside groups.[51] In this way, *Citizens United* has fundamentally changed the dynamic of campaign financing in the United States.

F. Where is the End? McCutcheon *and the Continued Deregulation of Political Corporate Speech*

Following *Citizens United*, the Supreme Court continued to erode the FEC and FECA's constraints on campaign contributions and independent expenditures. The first of these was *McCutcheon v. Federal Election Commission*, which sets limits on the total amount of money an individual can contribute during an election cycle violate the First Amendment, and are therefore unconstitutional.[52]

The effects of continued deregulation of political campaign speech did not stop with federal campaigns.[53] Following *McCutcheon*, "the ruling trickled down to state statutes dealing with aggregate contribution limits. Before the ruling, nine states imposed aggregate contribution limits on the overall amount individuals and groups could contribute to candidates."[54] This has led to states either voluntarily or, in the case of Wisconsin, court mandated dissolution of these limitations.[55]

G. The FEC Ruling in the Chevron MUR: More of the Same?

Following the developments of *Citizens United* and *McCutcheon*, there has been a fundamental shift in the enforcement of corporate speech in campaign communications.[56] In 2014, the FEC issued a decision in regard to an accusation that Chevron Corporation (Chevron) had violated FECA's prohibition of federal contributions from making campaign contributions.[57] The FEC stated that in the complaint alleging an FEC infraction by Chevron of multiple entities of Chevron including Chevron and Chevron U.S.A., Inc. (Chevron U.S.A.) "the Commission found, on the basis of the information in the complaint and information provided by [Chevron] . . . there is no reason to believe that Chevron or Chevron U.S.A. violated 2 U.S.C. § 441c(a) [FECA's prohibition on contractor

49. Chris Cillizza, *How Citizens United changed politics, in 7 charts*, WASH. POST (Jan. 22, 2014), http://www.washingtonpost.com/news/the-fix/wp/2014/01/21/how-citizens-united-changed-politics-in-6-charts/.

50. *Id.*

51. *Id.*

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

53. *Contribution Limits Overview*, *supra* note 29 (explaining how deregulation of political campaign speech extended past federal campaigns).

54. *Id.*

55. *Id.*

56. *See* Rick Hasen, *The Status of the Federal Contractor Ban as Applied to Super PACs*, ELECTION L. BLOG (July 7, 2015, 10:22AM), https://electionlawblog.org/?p=74113 (describing the fundamental shift in the enforcement of corporate speech in campaign communications).

57. *Notification with Factual and Legal Analysis to Chevron Corporation and Chevron U.S.A., Inc. Matter Under Review 6726*, FEC (Mar. 11, 2014), https://www.fec.gov/files/legal/murs/current/103670.pdf [hereinafter *Chevron MUR*]. For a more detailed look at the *Chevron MUR* and supporting documents, *see Chevron Corporation Chevron U.S.A., Inc., Matter Under Review 6726*, FEC, https://www.fec.gov/data/legal/matter-under-review/6726/ (last visited Nov. 7, 2017).

donations]."[58] At first glance, the Chevron MUR[59] appears to limit the prohibition of corporate speech as overturned in *McCutcheon* and *Citizens United*, as applied to the federal contractor ban.[60]

Scholars see the Chevron MUR as upholding the long-standing FEC tradition that FECA "permit[ed] a parent company with a federal contractor subsidiary to make a contribution as long as it has sufficient funds from sources other than the contractor subsidiary."[61] Scholars still argue that the FEC finding illustrated that "the federal contractor ban" is not "particularly stringent, permitting officers, shareholders, a corporate PAC, and subcontractors to contribute, even when the contractor cannot."[62]

Some scholars predicted "[e]very indication . . . is that the federal pay-to-play law applies to super PACs" however that "this question has yet to be litigated."[63] These same scholars suggest that a unique wrinkle in the First Amendment rights of the corporations may find possible limitations in "[t]he federal law explicitly prohibits federal contractors from making campaign contributions to federal candidates, parties and PACs, and super PACs."[64]

H. Wagner v. FEC

In 2015, The United States Court of Appeals for the District of Columbia considered, what seemed on its face, a narrow challenge to FECA's prohibition on donations by federal contractors.[65] At the heart of this challenge was an assertion that Section 30119—FECA's prohibition of federal contractor donations to candidates, PACs and party committees—violated the First Amendment and the Equal Protection Clause.[66]

1. FECA's Prohibition and the Parties' Challenge

FECA prohibits federal government contractors from making contributions, either directly or indirectly, in connection with federal elections.[67] In 2012, three individual contractors challenged § 30119's prohibition on their ability to donate to candidates, party organizations, and political action committees.[68] The grounds of this challenge were that the prohibition violated their First Amendment rights and the equal protection guarantees of the Fifth Amendment.[69]

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58. *See Chevron MUR*, *supra* note 57.

59. *See Matter Under Review Archive–1975 through 1998*, FEC, classic.fec.gov/MUR/ [hereinafter *Matter Under Review*] (last visited Nov. 7, 2017) (describing matter under review).

60. *See generally* McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1434 (2014); Citizens United v. Fed. Election Comm'n*,* 558 U.S. 310 (2010); *Matter Under Review*, *supra* note 59.

61. Hasen, *supra* note 56.

62. *Id.*

63. *Id.*

64. *Id.*

65. Wagner v. Fed. Election Comm'n, 793 F.3d 1, 3 (D.C. Cir. 2015), *cert. denied sub nom.* Miller v. Fed. Election Comm'n, 136 S. Ct. 895 (2016).

66. *Id.*

67. 52 U.S.C. § 30119 (1980); *see Wagner, et al. v. FEC (Miller v. FEC)* [hereinafter *Wagner, et al. v. FEC*], FEC, http://transition.fec.gov/law/litigation/Miller2015.shtml (last visited Nov. 10, 2017) (detailing Wagner v. Fed. Election Comm'n and relevant documents from each stage of litigation).

68. *Wagner*, 793 F.3d at 3.

69. *Id.* at 3–4.

2. Procedural Posture: The Lower Courts

In late 2012, the U.S. District Court for the District of Columbia upheld FECA's federal contractor ban, concluding that Congress had the authority to prohibit contributions from all federal contractors.[70] In mid 2013, a three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) held that under FECA, the district court and that appellate panel did not have jurisdiction to consider the constitutional questions in *Wagner v. FEC*.[71] The D.C. Circuit Court vacated the lower court's judgment, and remanded the case to comply with FECA's judicial review provision, 52 U.S.C. § 30110.[72] A month later, the district court certified the constitutional questions to the en banc D.C. Circuit Court.[73]

3. Return to the Circuit

Writing for a unanimous court, Judge, and former Supreme Court nominee, Merrick Garland identified the issue in *Wagner* as "the application of § 30119 to contributions by an individual contractor to a federal candidate or political party."[74] Judge Garland differentiated between the strict scrutiny applied to cases involving independent expenditures and those involving contributions.[75] The court stressed that while independent expenditures are subject to "strict scrutiny" as in *Citizens United*, contributions were dealt with under a "lesser but still 'rigorous standard of review.'"[76]

The court quickly dispatched with the claim that under *Citizens United*, the Court's holding in *Beaumont,* which banned corporate contributions, was still good law.[77] The Court differentiated between the holding of *Citizens United*[78] and the case at bar, holding that *Citizens United* had not eliminated entirely the sliding scale under which corporate speech is banned.[79]

a. The Closely Drawn Standard

The court asserted "the 'closely drawn' standard remains the appropriate one for review of a ban on campaign contributions."[80] In this way, the court explained "a significant interference with protected rights of political association may be sustained if the [s]tate demonstrates a sufficiently important interest and employs means closely drawn to avoid abridgement of associational freedoms."[81]

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70. *Id.* at 4. *See Wagner, et al. v. FEC*, *supra* note 67 (giving a concise series of lower court proceedings of Wagner v. Fed. Election Comm'n).

71. FEC, *supra* note 1.

72. *Id.* (formerly 2 U.S.C. § 437h).

73. *Id.*

74. Wagner v. Fed. Election Comm'n, 793 F.3d 1, 5 (D.C. Cir. 2015), *cert. denied sub nom.* Miller v. Fed. Election Comm'n, 136 S. Ct. 895 (2016).

75. *Id.*

76. *Id.* at 5 (quoting McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1443–44 (2014)).

77. *Id.* at 6; *see* Fed. Election Comm'n v. Beaumont, 539 U.S. 146, 161–62 (2003) (holding that the FEC properly restricted corporate contributions under a "narrowly tailored to serve a compelling governmental interest" test).

78. *Supra* note 47 and accompanying text (discussing the holding and limits of *Citizens United*).

79. *Wagner*, 793 F.3d at 5.

80. *Id.* at 6.

81. *Id.* at 5 (quoting *McCutcheon*, 134 S. Ct. at 1443).

b. Government Interests

Judge Garland identified two interests that were asserted by the government: "(1) protection against *quid pro quo* corruption and its appearance, and (2) protection against interference with merit-based public administration."[82] The court emphasized that "[t]he first interest is the most significant" because *quid pro quo* corruption or its appearance is a major threat to our system of representative democracy.[83] The burden of proof was on the FEC to show that § 30119 furthers an interest in combating either actual or the appearance of *quid pro quo* corruption, then it could meet the "closely drawn" standard.[84]

The second interest discussed by the court was whether the class to be controlled by § 30119 was sufficiently narrow and was "based on an interest in allowing governmental entities to perform their functions."[85] The court relied on past Supreme Court precedent in stating that there is a government interest in administering law "in accordance with the will of Congress, rather than in accordance with their own or the will of a political party."[86] Limitations to partisan political activities are the legitimate interest of government.[87]

c. The Government's Legitimate Interests

After recounting the substantive history of the *quid pro quo* corruption, its appearance, and the importance of merit-based administration, Judge Garland stated that "'[d]espite years of enforcement of the challenged' contractor contribution ban, 'substantial evidence demonstrates' that individuals and firms continue to 'test the limits of current law' . . . at both the federal and state levels."[88] As support, the court looked to the *quid pro quo* issues in Congress,[89] the executive branch,[90] and the states.[91] After considering all of these examples, the court held that there is sufficient evidence of *quid pro quo* corruption because "the risk of [both] quid pro quo corruption . . . and of interference with merit-based administration, has not dissipated . . . [t]aken together, the record offers every reason to believe that, if the dam barring contributions were broken, more money in exchange for contracts would flow through the same channels already on display."[92]

d. Dispatching the Claims of the Plaintiffs

The court dispatched the concerns of the Plaintiffs about the applicability of the state interests to the individual contractors in this situation, referring to the pervasive evidence

82. *Id.* at 8.
83. *Id.*
84. *Wagner*, 793 F.3d at 3.
85. *Id.* at 8.
86. *Id.* at 9.
87. *Id.*
88. *Id.* at 14.
89. See *Wagner*, 793 F.3d at 15 (discussing examples of direct *quid pro quo* corruption by members of Congress).
90. *See id.* at 15–16 (discussing Watergate, and specifically statements from the Watergate report as an example of *quid pro quo* corruption in the executive branch).
91. *Id.* at 16–18 (explaining that despite state prohibitions on contractors and licensees, *quid pro quo* corruption has persisted in those states, including the corrupt actions of former Illinois Governor Rod Blagojevich).
92. *Id.* at 18.

of corruption.[93] The court took additional issue with the assertion that the statute is both over-inclusive, a claim which the court dismissed because the statute was limited to the time of the performance of the contract, and that the nature of contracting posed a threat to the Government's interest in merit-based administration.[94]

In one of its most important passages, the court held as moot the claim that the provision barred contractors from contributing to ideological PACs.[95] In a footnote, the court mentioned that "[t]he Supreme Court has upheld restrictions on contributions to multicandidate committees as a necessary means to avoid the circumvention of other limits."[96] This seems to signal that there may be grounds for challenging a contribution to a PAC by a federal contractor.

In addressing the narrowness of the ban on contractor donations, the court emphasized: "we do not discount the possibility that Congress could have narrowed its aim further . . . [b]ut the [Supreme] Court has made clear" that "the First Amendment does not confine a [s]tate to addressing evils in their most acute form."[97] However, narrowness, the court emphasized, can make a provision under-inclusive.[98] In dispatching that the provision was under-inclusive, the court maintained that there are additional avenues for individual contractors, in this context, to pursue political activism.[99]

e. Appellate Court Holding

In upholding the provisions of FECA on a narrow basis, the Court of Appeals left more questions than answers. While the depth and breadth of the implications of this decision have yet to be fully realized, one aspect appears to be true: the era of consistent and across the board deregulation of campaign finance may be coming to the end. In the same breath, the court may also have signaled a new path for further regulation: a path that focuses on closely tailored and limited restrictions of campaign contributions where there are certain legitimate concerns of malfeasance.

4. The Denial of Writ of Certiorari

Adding to this future uncertainty is the Supreme Court of the United States denial of certiorari in this case.[100] Ms. Miller, the remaining plaintiff without a moot claim, filed a Petition for Writ of Certiorari with the Supreme Court asking if the federal government contractor ban from 52 U.S.C. § 30119 is sufficiently tailored to meet the constitutional requirements under the First and Fifth Amendments.[101] The Court denied the petition on

93. *Id.* at 19–20.

94. *Wagner*, 793 F.3d at 22.

95. *Id.* at 4.

96. *Id.* at 34 n.27 (citing Cal. Med. Ass'n v. Fed. Election Comm'n, 453 U.S. 182, 197–99 (1981)).

97. *Wagner*, 793 F.3d at 26 (quoting Williams-Yulee v. Fla. Bar, 135 S.Ct. 1656, 1671 (2015)).

98. *Id.* at 27.

99. *Id.* at 28–30 (including forming separate entities, like PACs and participating through independent expenditures).

100. Miller v. Fed. Election Comm'n, 136 S. Ct. 895 (2016) (denying *cert. sub nom.* in *Wagner*, 793 F.3d 1). The case name changed from *Wagner* to *Miller* because two of the claims were deemed moot by the court of appeals.

101. Petition for a Writ of Certiorari, Miller v. Fed. Election Comm'n, 793 F.3d 1 (2015) (No. 15-428), 2015 WL 5834182.

January 19, 2016.[102] By denying cert, the Supreme Court effectively punted with regard to the large substantive questions left unanswered by this narrow challenge.

Rick Hasen argues that the Court passed on this opportunity because "despite its general hostility to campaign finance limits. . . . [t]he Roberts Court is fundamentally conservative, but for jurisprudential, temperamental, or strategic reasons Justices holding the balance of power appear to prefer incrementalism to radical change."[103] Hansen argues that "[m]andatory appellate jurisdiction appears the best way to force the Roberts' Court's hand, and it often but not always leads to a conservative result."[104] Thus, Hansen posits that because this case was not under a mandatory appellate jurisdiction, the Court once again took a pass.[105]

I. The 2016 Election and Justice Gorsuch to the Supreme Court

The 2016 Election has likely produced a massive change in how the courts will view campaign finance regulations. Indeed, the importance of 2016 was apparent throughout the election cycle.[106] While at one point electoral momentum seemed to all but assure a Hillary Clinton presidency and a Merrick Garland appointment to the Supreme Court,[107] recent events have changed that. The Supreme Court seems poised to maintain the status quo or shift to the right.[108] However, now more than ever public opinion indicates support for restrictions on big money in politics.[109]

With the nomination and confirmation of Justice Gorsuch to the Supreme Court, President Trump appears to be staying the course.[110] With Gorsuch's confirmation there was push back by Democrats and some vulnerable Republican Senators.[111] However, the

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102. *Miller*, 136 S. Ct. at 895.

103. Rick Hasen, *Breaking: #SCOTUS Won't Hear Case on Government Contractor Campaign Contributions Ban*, ELECTION L. BLOG (Jan. 19, 2016), https://electionlawblog.org/?p=79111.

104. *Id.*

105. *Id.*

106. *See generally* Rick Hansen, *A supremely important choice: The court hangs in the balance, for Democrats, too*, N.Y. DAILY NEWS (Nov. 7, 2016), http://www.nydailynews.com/opinion/rick-hasen-supremely-important-choice-article-1.2858853 (discussing the importance of the 2016 election on the Supreme Court).

107. Wade Goodwyn & Nina Totenberg, *The Case For Republicans To Consider Merrick Garland's Nomination*, NAT'L PUB. RADIO (Oct. 27, 2016, 1:29 PM), http://www.npr.org/2016/10/27/499514065/the-case-for-republicans-to-reconsider-merrick-garlands-nomination (discussing the pros and cons of the GOP holding hearings regarding Merrick Garland's appointment to the Supreme Court).

108. *Infra* Part IV.A & B (discussing the status quo and possible shifts in the campaign finance regime).

109. In a recent poll, 77% of voters said that they supported restrictions on money in politics. *A New York Times/CBS News Poll on Money and Politics*, N.Y. TIMES (June 2, 2015), https://www.nytimes.com/interactive/2015/06/01/us/politics/document-poll-may-28-31.html (laying out the results of a survey conducted between May 28, 2015 and May 31, 2015 about Americans' attitudes regarding money in political campaigns).

110. *See* Ron Elving, *Gorsuch Pick For Top Court Fulfills Trump Campaign Pledge, Confirms Democrats' Fears*, NAT'L PUB. RADIO (Feb. 1, 2017), http://www.npr.org/2017/02/01/512761458/gorsuch-pick-for-top-court-fulfills-trump-campaign-pledge-confirms-democrats-fea (discussing the nomination of Justice Gorsuch).

111. *See* Nina Totenberg, *Senate Democrats In Political Quagmire Over Supreme Court Nomination,* NAT'L PUB. RADIO (Feb. 2, 2017), http://www.npr.org/2017/02/02/512927350/senate-democrats-in-political-quagmire-over-supreme-court-nomination (describing the likely fight for Gorsuch's Confirmation); *see also Supreme Court choice Neil Gorsuch draws Democrat opposition*, BBC (Feb. 1, 2017), http://www.bbc.com/news/world-us-canada-38827741 (further discussing the nomination of Justice Gorsuch).

vulnerability to certain red state and vulnerable Democrats ensured his confirmation.[112] While Gorsuch clerked for Justice Kennedy, many see his views as more closely mirroring former Justice Scalia.[113]

Justice Gorsuch has not specifically ruled on federal campaign finance law, but he has ruled on state restrictions.[114] While not in the realm of campaign contributions or expenditures, Justice Gorsuch has joined at least one opinion where the Court of Appeals has upheld limited incremental restrictions on First Amendment free speech rights.[115] Though Justice Gorsuch is indeed a conservative justice, the aforementioned cases make deciphering his stance on money in federal politics rather opaque.

III. ANALYSIS

A. The Possible Paths: The Implications of Wagner v. FEC

The Court of Appeals' opinion and the Supreme Court**'**s denial to take certiorari have left significant questions unanswered: where are the contours of both the narrow ban on contractor contributions, and more broadly, does Judge Garland's application of the narrowly tailored regulation application signal a major shift in jurisprudence surrounding the regulation of campaign finance? Likewise, where do state regulatory trends and the appointment of Justice Gorsuch to the Supreme Court fit in this?

1. The Narrow View of the Court of Appeals

At first blush, the implications of *Wagner* appear to be limited: the holding, as Judge Garland announced, is applicable to individual government contractors.[116] The court, by nature of the challenge, left open whether or not this ban on contributions affects contributions of PACs and corporations that are also government contractors.[117] By denying the writ of certiorari, the Supreme Court has chosen to leave the question of independent expenditures and separate campaign entities of contractors unanswered.[118]

By preserving the ban on individual contractors, the court's "narrowly tailored"

112. Jonathan Easley, *Red-state Democrats grapple with Gorsuch*, THE HILL (Feb. 1, 2017), http://thehill.com/homenews/campaign/317468-red-state-democrats-grapple-with-gorsuch; Audrey Carlsen & Wilson Andrews, *How Senators Voted on the Gorsuch Confirmation*, N.Y. TIMES (Apr. 7, 2017), https://www.nytimes.com/interactive/2017/04/07/us/politics/gorsuch-confirmation-vote.html.

113. *See* Elving, *supra* note 110 (discussing the Gorsuch Nomination and its implications).

114. *See Supreme Court Nominee Neil Gorsuch,* CAMPAIGN LEGAL CTR. (Jan. 31 2017) http://www.campaignlegalcenter.org/sites/default/files/Gorsuch%20Backgrounder_0.pdf (stating that "[i]n Riddle v. Hickenlooper, Judge Gorsuch joined a Tenth Circuit panel in striking down a[] . . . Colorado statute that imposed lower campaign contribution limits on minor party candidates than the limits applying to major party candidates.").

115. *See* David Keating, *Judge Neil Gorsuch Writes Sophisticated Concurring Opinion Striking Down Colorado Contribution Limit Disparity,* INST. FOR FREE SPEECH (Jan. 17, 2017), http://www.ifs.org/2017/01/17/judge-neil-gorsuch-writes-sophisticated-concurring-opinion-striking-down-colorado-contribution-limit-disparity/ (stating that Judge Gorsuch "rejected a First Amendment challenge but did so only after narrowing a law that required convicted sex offenders to take certain steps intended to assist investigations of sex crimes and kidnapping," discussing Doe v. Shurtleff, 628 F.3d 1217 (10th Cir. 2010)).

116. Wagner v. Fed. Election Comm'n, 793 F.3d 1, 34 (D.C. Cir. 2015) *cert. denied sub nom.* Miller v. Fed. Election Comm'n, 136 S. Ct. 895 (2016).

117. *Id.* at 24.

118. *See supra* note 103 and accompanying text.

holding signals a shift. Some scholars have seen the anti-corruption rationale of *Wagner* as bolstering the state pay-to-play rules.[119] This rationale thus appears to justify "state pay-to-play laws that have been enacted in more than 20 states and hundreds of localities."[120] *Wagner* further justifies the rationale for upholding such laws, which have in the past been sustained on similar "closely tailored" grounds. The National Law Review goes so far as to assert that "[t]he Wagner decision is sure to be used to fend off future legal challenges to pay-to-play contribution limitations."[121]

Equally important from a narrow reading of *Wagner* is what the court chose not to do—adopt a more stringent standard of review or to overturn *Beaumont's* limit on corporate contributions.[122] By not expressly overturning *Beaumont*, the court not only preserved the limit on direct corporate contributions, but appears to have ceased the advance, for now, of the current trend of deregulation of campaign finance.[123]

2. The Expansive View of Wagner*: What Could Be*

There is possibly a more expansive view of *Wagner*, the implications of which could be difficult for both individual and large contractors to navigate—the real possibility that *Wagner* is signaling a new path to the regulation of campaign finance, at least as far as contributions are concerned.[124] The *Wagner* decision left open the possibility of a challenge to donations, and possibly even independent expenditure support, from both individuals and corporations that are involved in federal government contracts.[125]

a. Dissonance Between Part IV.C and Part V of Wagner *and Its Implications on PACs*

One larger impact of *Wagner* may be that it appears to not speak with one voice. In Part IV of its opinion, the Court of Appeals clearly reserves for later the decision of whether or not the contractor rule applies to PACs.[126] In direct conflict with this is their discussion in Part V, as related to the statute's "tailored" nature, the court states that the ban does not apply to limited liability corporations or PACs.[127]

This dissonance is resolvable, if the nature of that LLC or PAC is more closely examined. Judge Garland appears to differentiate between contributions to PACs as pass-through conduits to get to candidates[128] and the formation of separate legal entities of LLCs

119. *Circuit Court Upholds Federal Contractor Contribution Ban*, NAT'L L. REV. (July 10, 2015), http://www.natlawreview.com/article/circuit-court-upholds-federal-contractor-contribution-ban.

120. *Id.*

121. *Id.*

122. Wagner v. Fed. Election Comm'n, 793 F.3d 1, 5 (D.C. Cir. 2015), *cert. denied sub nom.* Miller v. F.E.C., 136 S. Ct. 895 (2016); *see supra* note 77 and accompanying text discussing the holding in *Beaumont*.

123. *See generally* Part II (discussing the changes concerning campaign regulations including *Citizens United* and *McCutcheon*).

124. *See* Part II.H.3.e (discussing the implications of the Court of Appeals holding in the *Wagner* case).

125. *Id.*

126. *See Wagner*, 793 F.3d at 24 (explaining that the Supreme Court has prohibited PAC donations to serve as pass through donations when the original donation would have been illegal (citing Cal. Med. Ass'n v. Fed. Election Comm'n, 453 U.S. 182, 197–99 (1981)).

127. *Id.* at 26–32 (discussing the difference between PACs, LLCs, and Individuals, and their implications in regard to whether the standard was over expansive).

128. *See id*. at 4 (discussing the narrow scope of this review and the inapplicability of PAC donations).

and PACs from contracting corporations and individuals.[129]

This raises the larger more fundamental question—do PACs count as part of the contractor ban? The *Wagner* decision did not address whether federal contractors can use corporate funds to contribute to Super PACs and other groups that engage in independent political spending.[130] Therefore, "contractors would be wise to consult with counsel before considering the use of corporate dollars for contributions to independent groups."[131] However, the greater question of whether this prohibition applies to contractors remains.

b. PACs as Part and Parcel of the Corporation

If indeed the court left unanswered whether §30119 applies to political action committees of those contractors, then a future decision could look similar to *FEC MUR 6403 Re: Ahtna, Inc. NANA Regional Corporation, Inc.*[132] Under a similar contracting issue, the FEC considered whether corporations that contract with the federal government acted contrary to the corporate equivalent of the individual contractor ban when those groups gave to the super PAC Alaskans Standing Together during the 2010 Senate election.[133] There, the question was whether the government contractors knowingly and willfully violated 2 U.S.C. § 441 c(a)(1).[134]

The FEC first stated that "[a]s federal government contractors, Ahtna and NANA Regional are prohibited from making contributions toward any 'political party, committee or candidate for political office or to any person for any political purpose or use'."[135] In dismissing the complaint, the court stated that "even though Ahtna and NANA Regional appear to meet the definition of government contractors" because of the unique nature of the contractors[136] the commission decided to exercise its prosecutorial discretion under *Heckler v. Chaney*.[137] While this MUR rested on the prosecutorial discretion of the FEC, the foundational assertion that federal contractors are limited in their donations to PACs is in line with a broad interpretation of *Wagner* and therefore signals that the FEC or future courts may apply the *Wagner* logic to future matters under review.

c. PACs as Separate Entities

Others argue that the result of *Wagner* was absurd. Ken Weckstein and Andrew Crawford assert that, because of the seemingly illogical nature of preventing individual contractors from donating, "the ban applies unequally to government contractors" and

129. *Id*. at 26–29.

130. *Wagner*, 793 F.3d at 24.

131. *Supra* note 103 and accompanying text.

132. *Letter from Susan L. Lebeaux, Assistance General Council, FEC, to Scott E. Thomas, Dickstein Sharpiro LLP, regarding MUR 6403 Ahtna, Inc. NANA Regional Corporation, Inc.*, FEC (Nov. 10, 2011), http://eqs.fec.gov/eqsdocsMUR/11044304942.pdf [hereinafter *Letter from Susan L. Lebaux*]. *See supra* note 59 (discussing MURs).

133. *Letter from Susan L. Lebaux*, *supra* note 132, at 2.

134. *Id.*

135. *Id.* at 10 (quoting 52 U.S.C. §30119 (1980) (formerly 2 U.S.C. § 441c(a)(1)).

136. *Id.* at 10–11 (the mitigating factor was that the contractors were only involved in passively leasing land to the Federal Government).

137. *Id.* at 11 (referencing Heckler v. Chaney, 470 U.S. 821 849–50 (1985) which allows for prosecutorial discretion only for "an agency's decision to decline to seek penalties against an individual for past conduct, not to a decision to refuse to investigate or take action on a public health, safety, or welfare problem").

therefore leaves untouched "corporate PACs, officers, shareholders, employees, and not to the individual owners of contractors who establish limited liability companies that contract with the government."[138]

Echoing the plaintiffs, Weckstein and Crawford argue that *Wagner* "seems to suggest that if an individual forms and is the 100 percent owner of an LLC, the individual can make contributions while the LLC negotiates a government contract—something that the individual owner could not do if he or she were negotiating to receive the contract in her or his personal capacity."[139]

Under the logic of Weckstein and Crawford, *Wagner* is a departure from the correct trend of the deregulation of campaign finance. Further, because this creates a disparate result for individual and corporate contractors, the result should be overturned.

IV. RECOMMENDATION

The possibilities for change in the world of campaign finance seem vast. It is more important than ever that individual and corporate federal contractors understand the ways to navigate the federal campaign finance laws and regulations and effectively influence elections without running afoul of them.

A. The Status Quo: Following the Logic of Kennedy

In the near future, it seems as though individual and corporate federal contractors will need to navigate the status quo: that their direct contributions, and not their independent expenditures, will be outright prohibited under FECA.[140] In *Citizens United* and *McCutcheon*, Justice Kennedy emphasized that the true distinction to be considered is whether the given regulation either stopped or prevented the real possibility of *quid pro quo* corruption.[141] Even Judge Garland's restrictive reading of the contractor ban on campaign contributions in his *Wagner* opinion stated that there are legitimate paths open for federal contractors to participate in campaign finance.[142] The continued prohibition of direct contributions by contractors, while allowing them to engage in PACs and Super PACs, is therefore the status quo.

There is a new justice on the Supreme Court;[143] however, Justice Gorsuch is replacing Justice Antonin Scalia, a fervent opponent to the regulation of campaign finance.[144] This will mean that for at least the first portion of President Trump's term, the status quo will likely govern. While the status quo remains in place, and because the individual contractor ban still stands,[145] there are two paths for contractors to participate in campaign finance—

138. Ken Weckstein & Andrew Crawford, *The Illogical Ban On Contractor Political Contributions*, LAW360 (Apr. 13, 2016, 3:26 PM), http://www.law360.com/articles/784148/the-illogical-ban-on-contractor-political-contributions.

139. *Id.*

140. *See generally* Part II (discussing *Buckley* and *Citizens United)*; *see supra* Part III and IV (discussing *Wagner*).

141. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 313 (2010); McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1438 (2014).

142. *See generally supra* Part II.A and B (discussing Wagner v. Fed. Election Comm'n, the DC Circuits opinion, and the implications of the court's decision).

143. *See supra* Part III (discussing the confirmation of Justice Gorsuch).

144. *See supra* Part II.A (discussing the Buckley v. Valeo dissent).

145. *See supra* Part II.H (discussing the holding in Wagner v. Fed. Election Comm'n that the federal

through the formation of a political action committee or through an independent expenditure.[146]

1. Forming a Political Action Committee

Under *Wagner* and the full panoply of campaign finance judicial precedent, one clear path for federal contractors to contribute directly to political campaigns is through the formation of political action committees.[147] *Wagner* and the proceeding case law have signaled that the separate nature of a political action committee does not pose the same threat of *quid pro quo* corruption as the direct contribution to a candidate committee.[148]

In this way, an individual or corporation can use the traditional PAC as a means for directly contributing to the candidates of their choice. By segregating their funds through limited donations, and with the FEC's restrictions on who may give to a PAC, these entities serve as the least risky and least expensive way for individual and corporate contractors to participate in direct campaign contributions.

2. Exercising Free Speech—the Option of Super PACs

Another, more controversial, avenue to influence politics remains open to both individual and corporate contractors—independent expenditures.[149] It is incredibly unlikely that this avenue for expression will cease to exist in the near future. Contractors who choose to use the *Citizen United* independent expenditure loophole must tread carefully. Any errant communication between a campaign, party, or joint candidate committee and the independent expenditure would likely lead to liability.[150]

B. Navigating a Changing Field: The Implications of the Trump Presidency

There is also a possibility that Justice Kennedy may retire or that another justice on the Supreme Court will have to leave the Court in a Trump presidency, and the possible corresponding shift in the ideology of the justices could lead in any matter of directions.[151] A possible shift in the Court could take one of two paths, and contractors should be ready to cope with both.

1. The Shift Right and the Deregulation of Campaign Finance

There is a possibility that any future change to the Court could adopt a more expansive reading of the First Amendment and an equally more restrictive understanding of the presence of *quid pro quo* corruption. If this were to occur, the same avenues of the status quo view will remain open to individual and corporate contractors. The major shift will likely depend on whether the contractor ban will survive.

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contractor ban, as applied to individuals, still applies).

146. *See generally supra* Part I.A (discussing the current state and federal campaign contribution and independent expenditure regulations).

147. *See supra* Part III (discussing the implications of Wagner v. Fed. Election Comm'n).

148. *Id.*

149. *See supra* Parts II.C, D, E, and F (discussing the changes concerning campaign regulations including *Citizens United* and *McCutcheon* and the protection of independent expenditures in politics).

150. *See supra* Part II.A (discussing the history and inner workings of FECA).

151. Elving, s*upra* note 110.

a. Overturning Wagner *and FECA's Prohibition*

It is not outside the realm of possibility that under a more conservative Supreme Court, all or part of FECA's prohibition on contributions from federal contractors will be overturned. If this happens, the process becomes easy for any corporate or individual contractor. They will merely have to follow any contribution and disclosure requirements of FECA.

That would limit the contractors to the same individual limit, as indexed to inflation, as any other American. However, this would likely create an environment that the passage of FECA attempted to correct—the prevalent issue of express or implied *quid pro quo* corruption.[152]

On the corporate side, the question will be whether such a conservative Court would overturn FECA's prohibition of corporate expenditures.[153] This is unlikely to occur in the status quo; however if conservatives continue to not differentiate between individual and corporate citizenship,[154] then this could potentially occur.

2. A Different Approach: The Anti-Establishment Candidate

President Trump appears to not be a traditional Republican. He has espoused rhetoric about "draining the swamp" of Washington and has even proposed limitations on the "revolving door" of Congressional staff turning into lobbyists.[155] Is this merely rhetoric or could this present a potential quagmire for contractors looking to participate in campaigns through contributions? Only time will tell, but contractors and corporations need to be prepared for the very real possibility that restrictions to any perception of *quid pro quo* corruption from contractors could affect their ability to influence politics.

a. The Effect of Anti-Corruption—The Potential for Restriction

An anti-establishment, anti-corruption Justice could actually make the ban on federal contractor contributions more restrictive. A more restrictive ban could be as simple as leaving the direct contribution limits of the status quo in place, or could expand to contractor PACs.[156] It is unlikely that even the most thorough limitation could limit *Citizens United's* broad protection of First Amendment corporate speech. Unless President Trump were to truly shock the pundits,[157] it is likely that, for the time being, *Citizens United* will stand. Therefore, if there is a more restrictive approach taken by a Trump nominee to the Supreme Court, individual and corporate contractors will, at the least, be able to influence the political process through individual speech in the form of independent expenditures.

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152. *See generally supra* Part II (discussing FECA and other FEC regulations).

153. *See supra* Part II.A.2.c. (discussing modern FECA provisions).

154. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 360 (2010).

155. *See* Editorial Board, *Will Trump follow through and 'drain the swamp'?*, WASH. POST (Feb. 6, 2017), https://www.washingtonpost.com/opinions/will-trump-follow-through-and-drain-the-swamp/2017/02/06/0d9ea91c-e8b8-11e6-b82f-687d6e6a3e7c_story.html?utm_term=.c6a4881edcf4 (discussing President Trump's rhetoric about "draining the swamp" and other anti-corruption stances).

156. *See, e.g.*, *supra* Part II.B (discussing the varying State approaches to the limitations of both individual and corporate donors to campaign entities).

157. *See supra* Part II.I (discussing Judge Gorsuch's nomination). Until proven otherwise, it seems likely that any future nominee's will be in this mold.

C. Which Path is Best?

Outside of the immediate future, the contractor exception could go in many different directions. Its future is truly tied to the selection or selections that President Trump gets to make for the Supreme Court. Firms and individual contractors would be best served by not pushing the limits of the ban while the uncertain judicial environment is settled. In the meantime, the following are options for navigating campaign donations as a federal contractor.

1. Navigating the Narrow Interpretation of the Status Quo

Under the premise that the current Supreme Court will likely maintain their current ideological divide, individuals and corporations that seek to contribute or speak in the arena of federal elections would be well served to at least follow the holding in *Wagner*.[158] While *Wagner* does not expressly limit contributions by corporations, it is likely that a court applying even the narrow interpretation of Wagner would find that a corporation runs afoul of both *Beaumont*'s prohibition on corporate donations and FECA's Prohibition on direct contributions by federal contractors. Following this narrow approach will likely have a minimal impact on a federal contractor's ability to influence federal candidates. This is because an individual or corporation could easily form a PAC or independent expenditure that is able to influence federal campaigns.

2. Navigating the Expansive Interpretation of the Status Quo

Even within the status quo, if any courts accept a broad reading of *Wagner*, federal contractors should be wary of running afoul of that expansive reading to the text. At issue would largely be federal contractors attempting to influence federal elections through PACs and, to a lesser extent, independent expenditures made by individuals and corporations. An entity looking to plot the safest path through FECA's prohibition may find it prudent to not engage in PAC fundraising or independent expenditures. While the current judicial climate on the Supreme Court appears to be trending toward the conservative, the potential anti-corruption element to President Trump's candidacy may bleed over into his actions as President. While not likely, this could lead to a stricter government stance on corruption and therefore may encompass the actions of federal contractors.

3. Navigating a Conservative Judicial Environment Under the Narrow Interpretation of Wagner

Under a conservative approach to a narrow interpretation of *Wagner*, the potential threat of *quid pro quo* corruption may leave the narrow holding of *Wagner* intact. However, at a minimum, this will mean that federal contractors will have all of the options discussed under Part IV.C.1.[159] Unless there is a wholesale rejection of the individual contractor holding of *Wagner*, those contractors would be best served following *Wagner* for the time being.

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158. *See supra* Part III.A.1 & 2, (discussing the *Wagner* holding and its implications).

159. *See supra* Part IV.C.1 (discussing the options open to federal contractors under a narrow approach to *Wagner*).

4. The Dissonance of an Expansive Reading of FEC v. Wagner *and a Conservative Shift in the Court*

In all likelihood, the last two scenarios are the most improbable. The more conservative voices in the judiciary and on the Court have opined that restrictions on campaign contributions may impinge on the First Amendment rights of contributors. Though this may someday be the reality, the willingness of Judge Gorsuch to find a narrowly tailored First Amendment restriction in a Tenth Circuit opinion may signal that the narrowly tailored approach from *Wagner* may just survive.

D. The Best Path

For the time being, federal contractors, both individuals and corporations, should follow the narrow status quo approach.[160] By doing so, individual contractors will not run afoul of the holding in *Wagner*, and corporate contractors will be prepared to rebut any challenge from the FEC or other suit that may advocate the expansive reading of *Wagner* with the narrow view of FECA's prohibition on federal contractor contributions from *Wagner*. This will allow both individual and corporate federal contractors to both form PACs and engage in independent expenditures, and therefore gives the contractor the greatest choice to influence federal candidates and elected officials without running afoul of *Wagner*'s stance upholding the individual prohibition on federal contractor contributions.

V. CONCLUSION

This Note recommends that individual and corporate federal contractors follow the opinion of the D.C. Circuit as articulated by *Wagner*. By doing so, those contractors would be well served. The ban meshes with previously articulated standards and furthers the principle of campaign finance, that the goal of FECA and its progeny is to prevent *quid pro quo* corruption. A firm that pushes the limit may run afoul of the "actual corruption or the appearance of corruption" standard, even though it is not actually corrupting a candidate or federal elected official with its contribution. Firms that plan to engage in PAC fundraising and/or independent expenditures are likely still able to do so permissibly, but Garland's dicta in *Wagner* concerning the permissibility of PACs and possibly independent expenditures should lead to those firms and individuals watching the horizon of this evolving legal environment.

For the time being, the traditional contribution ban with an exception for PACs and independent expenditures under *Citizens United* will likely persist. Unlike the states,[161] the prospect of no limit corporate fundraising goes against too much jurisprudence that is concerned with *quid pro quo* corruption.[162] There is change coming, and whether that change is further de-regulation of FECA and the campaign finance regime as applied to federal contractors, or a tightening of the potential corrosive corruption of direct contractor contributions, is truly up to the next Supreme Court.

160. *Id.* (advocating the narrow, status quo approach to the *Wagner* decision).
161. *Supra* Part II.B.
162. *Supra* Part II.A.2.c.