PRESTON V. LEAKE: APPLYING THE APPROPRIATE STANDARD OF REVIEW TO NORTH CAROLINA'S CAMPAIGN CONTRIBUTIONS BAN

INTRODUCTION

Over the past decade, North Carolina's state government has been plagued by corruption and the appearance of corruption. Corruption allegations and the resulting investigations regarding corruption allegations even reached the campaigns of former governor Michael Easley and outgoing governor Beverly Perdue.[1] These North Carolina problems have been on trend with the nation's "conviction—widely shared in the media, by political figures in both major parties, and by the public—that 'special interests' have come to dominate and distort the processes of government."[2] Across the country, "[o]ne well-known problem is that of quid pro quo corruption. In the past few years . . . lobbyists, elected officials, and staffers have been arrested and convicted for violating various lobbying, reporting, and ethics laws."[3] The response to these problems, at both the federal and state levels, has been a broad wave of antilobbying proposals and statutes.[4] The North Carolina legislature addressed this "crisis of confidence in State government" by reforming its campaign finance system in 2006.[5]

One of these reforms, the Campaign Contributions Prohibition, prevents registered North Carolina lobbyists from contributing money to certain state campaigns.[6] North Carolina lobbyist Sarah Preston challenged the constitutionality of this statute, claiming that it infringed upon her First Amendment "rights to freedom of speech and freedom of association."[7] In order to determine whether the statute was constitutional, the circuit court had to resolve which

1. Michael Biesecker, *Election Board Fines Perdue Campaign $30,000*, NEWS & OBSERVER (Aug. 24, 2010, 12:43 PM), http://www.newsobserver.com/2010/08/24/645448/elections-board-fines-perdue-campaign.html; J. Andrew Curliss & Dan Kane, *Easley Convicted of Felony; State, Federal Probes End*, NEWS & OBSERVER (Nov. 24, 2010, 5:01 AM), http://www.newsobserver.com/2010/11/24/822886/easley-convicted-of-felony-state.html; *see also* Preston v. Leake, 660 F.3d 726, 729–30 (4th Cir. 2011).

2. Ronald M. Levin, *Lobbying Law in the Spotlight: Challenges and Proposed Improvements*, 63 ADMIN. L. REV. 419, 424 (2011).

3. Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 STAN. L. REV. 191, 196 (2012) (citations omitted).

4. Levin, *supra* note 2.

5. *Preston*, 660 F.3d at 729.

6. *Id.*

7. *Id.*

level of scrutiny was appropriate to apply in reviewing the prohibition—"strict scrutiny" or the less-searching, "closely drawn" scrutiny. Although Supreme Court precedent had established that campaign contribution limits were subject to closely drawn scrutiny, the Campaign Contributions Prohibition posed some novel issues for the Fourth Circuit in *Preston v. Leake*.

This Note will focus on the appropriate level of scrutiny to apply to North Carolina's Campaign Contributions Prohibition. Part I will discuss the factual background of *Preston v. Leake* and the Fourth Circuit's decision. Part II will provide relevant Supreme Court precedent. Part III will focus on some of the problems the Fourth Circuit faced. These issues include the inconsistent levels of scrutiny applied in two previous Fourth Circuit cases, the narrow construction of an ambiguous sentence in *Citizens United v. FEC*[8] calling for strict scrutiny to apply when laws burden political speech, and the effective difference between a contribution limit and a contribution ban. Finally, this Note will look at the potential impact of this decision upon future states' campaign finance statutes.

I. THE CASE

In 2006, the North Carolina legislature enacted section 163-278.13C of the North Carolina General Statutes, the Campaign Contributions Prohibition.[9] This provision bars any registered lobbyist from making campaign contributions to a candidate for the North Carolina General Assembly or the Council of State.[10] The statute states that "[n]o lobbyist may make a contribution as defined in G.S. 163-278.6 to a candidate or candidate campaign committee . . . when that candidate meets any of the following criteria: (1) Is a legislator . . . (2) Is a public servant."[11] A campaign contribution is defined expansively and effectively covers anything of any value.[12]

However, the North Carolina State Board of Elections ("Board") issued formal advisory opinions enumerating certain actions that lobbyists are not prohibited from taking under the Campaign Contributions Prohibition.[13] These opinions stated that a lobbyist may: contribute to political actions committees ("PACs"); make recommendations to PACs regarding campaign contribution candidates, so long as the lobbyist was not the decision maker; make recommendations to third parties regarding campaign contribution

8. 130 S. Ct. 876 (2010).
9. *Preston*, 660 F.3d at 729.
10. *Id.*
11. N.C. GEN. STAT. § 163-278.13C(a) (2011).
12. *See id.* § 163-278.6(6)(a).
13. Preston v. Leake, 743 F. Supp. 2d 501, 505 (E.D.N.C. 2010), *aff'd*, 660 F.3d 726 (4th Cir. 2011).

candidates; attend or host fundraising events, so long as the lobbyist neither paid for the event nor was reimbursed; volunteer, so long as the lobbyist incurred no expenses; and endorse a candidate by making telephone calls and exhibiting yard signs.[14] Furthermore, a registered lobbyist is allowed to pass out signs and literature, engage in door-to-door canvassing supporting a candidate, and deliver a speech at a candidate's rally.[15]

To enforce the Campaign Contributions Prohibition, the Board may investigate alleged violations of the statute.[16] Furthermore, the Board is responsible for "assessing and collecting civil penalties of up to three times the amount of an unlawful contribution" and then "reporting violations of the Campaign Contributions Prohibition to the district attorney for possible criminal prosecution."[17]

The express purpose of the North Carolina General Assembly in passing the Campaign Contributions Prohibition was "to ensure that elected and appointed state agency officials exercise their authority honestly and fairly, free from impropriety, threats, favoritism, and undue influence."[18] This statute was passed in reaction to a decade of corruption and the appearance of corruption in North Carolina's government.[19]

As discussed previously, Sarah Preston sued the Board under 42 U.S.C. § 1983 to challenge the facial and applied constitutionality of the Campaign Contributions Prohibition.[20] Preston wanted to show her support for state legislative candidates by making minimal, twenty-five dollar contributions to state campaigns.[21] However, she was unable to do so because the Campaign Contributions Prohibition completely bans contributions by lobbyists.[22] Thus, Preston argued that this statute violated her First Amendment rights to freedom of speech and freedom of

14. *Id.* at 505–06.
15. *Id.* at 506.
16. *Preston*, 660 F.3d at 731.
17. *Id.* (citation omitted).
18. *Id.* at 729 (citation omitted).
19. *Id.* at 729–30 (noting that some of these recent corruption scandals involved "[f]ormer North Carolina Commissioner of Agriculture, Meg Scott Phipps. Former Speaker of the North Carolina House of Representatives, Jim Black. Former North Carolina Representatives, Michael Decker and Thomas Wright. . . . Chiropractors, optometrists, high-profile registered lobbyist Don Beason, and others—including most recently the campaign committees of former governor Michael F. Easley and current governor Bev Perdue—have also been part of the corruption or appearance of corruption that has infected North Carolina's state government in the past decade." (quoting Brief of Appellee at 2, *Preston*, 660 F.3d 726 (2011) (No. 10-2294), 2011 WL 495924, at *2)).
20. *Id.* at 729.
21. *Id.* at 731.
22. *Id.*

association, as applied to the states by the Fourteenth Amendment.[23]

First, Preston contended that the court should review the Campaign Contributions Prohibition using strict scrutiny rather than closely drawn scrutiny.[24] Unlike the marginal restrictions imposed on citizens by contribution limits, the North Carolina statute imposes a complete ban on lobbyist contributions and, therefore, directly restricted her core political speech.[25] Preston believed that her case should be reviewed under strict scrutiny because this ban was upon political speech, and, in *Citizens United*, the Supreme Court stated that "[l]aws that burden political speech are 'subject to strict scrutiny.'"[26]

Furthermore, regardless of whether the court reviewed the Campaign Contributions Prohibition using strict scrutiny or closely drawn scrutiny, Preston argued that the ban was both facially unconstitutional and unconstitutional as applied to her.[27] She contended that the ban was unconstitutionally overbroad for several reasons.[28] First, the ban does not include a temporal limitation.[29] Second, the ban is not limited by the recipient's identity.[30] Third, this is a complete contribution ban rather than a contribution limit.[31] Finally, Preston noted that the ban does not leave open sufficient alternative ways in which lobbyists could support candidates.[32]

The District Court for the Eastern District of North Carolina upheld the Campaign Contributions Prohibition as constitutional.[33] The Court of Appeals for the Fourth Circuit affirmed the District Court's ruling, holding that "the statute is constitutional, both facially and as applied to Preston, as a valid exercise of North Carolina's legislative prerogative to address potential corruption and the appearance of corruption in the State."[34] First, the Fourth Circuit found that the Campaign Contributions Prohibition should be reviewed using closely drawn scrutiny rather than strict scrutiny even though the provision implements a complete ban on campaign

23. *Id.* at 728.
24. *Id.* at 732.
25. Brief of Appellant at 16, *Preston*, 660 F.3d 726 (2011) (No. 10-2294), 2011 WL 107626, at *16.
26. *Id.* at 20, 2011 WL 107626, at *20 (quoting Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 898 (2010)).
27. *Id.* at 23, 2011 WL 107626, at *23.
28. *Id.* at 23–36, 2011 WL 107626, at *23–36.
29. *Id.* at 26–27, 2011 WL 107626, at *26–27.
30. *Id.* at 27, 2011 WL 107626, at *27.
31. *Id.* at 29, 2011 WL 107626, at *29.
32. *Id.* at 30–34, 2011 WL 107626, at *30–34.
33. Preston v. Leake, 743 F. Supp. 2d 501, 511 (E.D.N.C. 2010), *aff'd*, 660 F.3d 726 (4th Cir. 2011).
34. Preston v. Leake, 660 F.3d 726, 729 (4th Cir. 2011).

contributions instead of simply a limitation on campaign contributions.[35] The Fourth Circuit reasoned that a contribution ban is only different from a contribution limitation in its scope, not the type of activity it concerns.[36] Additionally, the Fourth Circuit rejected Preston's contention that *Citizens United* demanded campaign contribution bans be reviewed using strict scrutiny.[37] Thus, the Fourth Circuit concluded that "the Supreme Court has not overruled *Buckley*, *Nixon*, *Beaumont*, or other cases applying 'closely drawn' scrutiny to contribution restrictions."[38]

Using this lower standard, the Fourth Circuit ruled that the Campaign Contributions Prohibition is closely drawn to a sufficiently important government interest. First, the Fourth Circuit looked at the government interest. The North Carolina legislature was responding to recent scandals regarding corruption and "made the rational judgment that a complete ban was necessary as a prophylactic to prevent not only actual corruption but also the appearance of corruption in future state political campaigns."[39] The state's interest is very important because it is necessary to protect a democratic government.[40] Additionally, the North Carolina ban is closely drawn to the interest of preventing political corruption because lobbyists have historically been susceptible to such corruption.[41] Thus, "*[a]ny payment* made by a lobbyist to a public official, whether a campaign contribution or simply a gift, calls into question the propriety of the relationship, and therefore North Carolina could rationally adjudge that it should ban *all* payments."[42]

The Fourth Circuit then concluded that the Campaign Contributions Prohibition is not overbroad. Although the statute creates a complete ban that does not include a temporal limit, include a *de minimis* exception, or depend on the identity of the recipient, the ban is restricted to lobbyists, a small class of people.[43] Additionally, "Preston freely chose to become a registered lobbyist, and in doing so agreed to abide by a high level of regulatory and ethical requirements focusing on the relationship of lobbyist and public official."[44] Furthermore, lobbyists are able to show their support for candidates in alternative ways.[45] Options that are not

35. *Id.* at 735.
36. *Id.* at 733 (citing Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 387 (2000)).
37. *Id.* at 735 (quoting Citizens United v. FEC, 130 S. Ct. 876, 898 (2010)).
38. *Id.* (citations omitted) (referencing several U.S. Supreme Court decisions).
39. *Id.* at 736.
40. *Id.*
41. *Id.* at 737.
42. *Id.*
43. *Id.* at 739–41.
44. *Id.* at 740.
45. *Id.*

prohibited by the Campaign Contributions Prohibition include volunteering, displaying signs, contributing to PACs, door-to-door canvassing, and attending or hosting fundraisers.[46] Thus, the Fourth Circuit concluded that the North Carolina Campaign Contributions Prohibition does not violate the First and Fourteenth Amendments.

II. BACKGROUND

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech."[47] The First Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment.[48] Because statutes that impose limits or bans on campaign contributions and expenditures "operate in an area of the most fundamental First Amendment activities," they invoke the protection of the First Amendment's guarantees of free speech and the right of association.[49] In fact, the Supreme Court stated that "there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates . . . ."[50] Thus, the Court noted that "it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office."[51]

The seminal Supreme Court case, decided in 1976, dealing with campaign finance was *Buckley v. Valeo*.[52] In that case, the plaintiffs challenged the constitutionality of certain provisions of the Federal Election Campaign Act of 1971 ("FECA").[53] These provisions made it so that "individual political contributions are limited to $1,000 to any single candidate per election, with an overall annual limitation of $25,000 by any contributor" and "independent expenditures by individuals and groups 'relative to a clearly identified candidate' are

46. *Id.*
47. U.S. CONST. amend. I.
48. *See* NAACP v. Alabama, 357 U.S. 449, 460 (1958) ("It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." (citations omitted)); Gitlow v. New York, 268 U.S. 652, 666 (1925) ("For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States.").
49. Buckley v. Valeo, 424 U.S. 1, 14 (1976) (per curium).
50. Mills v. Alabama, 384 U.S. 214, 218 (1966).
51. Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971).
52. 424 U.S. at 1.
53. *Id.* at 6.

limited to $1,000 a year."[54] In a *per curiam* opinion, the Court found that both the contribution limits and the expenditure limits implicated fundamental First Amendment rights.[55] The campaign finance restrictions inevitably involved constitutional concerns because money was necessary for "virtually every means of communicating ideas in today's mass society."[56] Thus, "[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."[57]

However, the *Buckley* decision created tension in the campaign finance scheme. This result was "unsurprising given that it was drafted by a committee of Justices who did not agree on the fundamental issue of how to balance First Amendment rights of free speech and association with state interests."[58] Therefore, the Supreme Court created an important compromise when it distinguished between the severity of the interests implicated by campaign contributions and campaign expenditures.[59] The Court found that "expenditure limitations contained in the Act represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech."[60] In fact, the primary effect of FECA's expenditure limits was to limit political expression by restricting the amount of political speech made by candidates.[61] Thus, because expenditure limits are at the core of First Amendment freedoms, courts should review such statutes using strict scrutiny.[62] Strict scrutiny requires that the statute "furthers a compelling interest and is narrowly tailored to achieve that interest."[63] Under this standard, the Court struck down the FECA's expenditure limit and held that it was unconstitutional.[64]

In contrast, the Court considered a limitation on campaign contributions only a marginal restriction on First Amendment rights.[65] The Court noted that a contribution limit still "permits the

54. *Id.* at 7.
55. *Id.* at 14.
56. *Id.* at 19.
57. *Id.*
58. Richard L. Hasen, Citizens United *and the Illusion of Coherence*, 109 MICH. L. REV. 581, 585–86 (2011) (citing Richard L. Hasen, *The Untold Drafting History of* Buckley v. Valeo, 2 ELECTION L.J. 241, 241 (2003)).
59. *Buckley*, 424 U.S. at 20; Hasen, supra note 58, at 586.
60. *Buckley*, 424 U.S. at 19.
61. *Id.* at 39 (quoting Williams v. Rhodes, 393 U.S. 23, 32 (1968)).
62. *Id.* at 28, 45–46.
63. FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 464 (2007) (citation omitted).
64. *Buckley*, 424 U.S. at 51.
65. *Id.* at 20.

symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues."[66] Expression is only marginally restricted because "[t]he quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing."[67] Essentially, because a contribution to a candidate does not detail the contributor's rationale behind supporting a candidate, it is merely a general expression of support.[68] Thus, the Court ruled that "[e]ven a 'significant interference with protected rights of political association' may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms."[69]

Using this closely drawn scrutiny, the Court held that FECA's contribution limit was constitutional under the First and Fourteenth Amendments.[70] The Court found that the government had three sufficiently important interests in creating the $1000 limit. First, the primary interest was the "prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office."[71] Second, the limits helped "equalize the relative ability of all citizens to affect the outcome of elections."[72] Finally, the limits acted "as a brake on the skyrocketing cost of political campaigns and thereby serve to open the political system more widely to candidates without access to sources of large amounts of money."[73] These government interests were also closely drawn because the statute dealt with the aspects of political association in which corruption and the potential for corruption were identified; people, however, were still free to engage in other political expressions such as volunteering.[74]

Since *Buckley*, "[t]his persistent distinction—with expenditures constituting express advocacy and contributions being subject to substantial regulation, and other expenditures being relatively free, has coexisted with substantial disagreements between the Court's regulatory proponents and regulatory skeptics regarding the nature of the State's interest in regulating campaign contributions and

66. *Id.* at 20–21.
67. *Id.* at 21.
68. *Id.*
69. *Id.* at 25 (citations omitted) (quoting Cousins v. Wigoda, 419 U.S. 477, 488 (1975)) (internal quotation marks omitted).
70. *Id.* at 29.
71. *Id.* at 25.
72. *Id.* at 25–26.
73. *Id.* at 26.
74. *Id.* at 28.

expenditures."[75] In 2000, the Supreme Court confirmed *Buckley's* dual-scrutiny framework in *Nixon v. Shrink Missouri Government PAC*.[76] First, the Court differentiated between expenditure limits and contribution limits because of their impact on the First Amendment's right to freedom of speech. The Court stated that it "drew a line between expenditures and contributions, treating expenditure restrictions as direct restraints on speech, which nonetheless suffered little direct effect from contribution limits . . . . We thus said, in effect, that limiting contributions left communication significantly unimpaired."[77] Second, the Court differentiated between expenditure limits and contribution limits because of their impact on the First Amendment's right to freedom of association.[78] The Court noted that, "[w]hile an expenditure limit 'precludes most associations from effectively amplifying the voice of their adherents,' the contribution limits 'leave the contributor free to become a member of any political association and to assist personally in the association's efforts on behalf of candidates.'"[79] Due to the different effects on First Amendment rights, the Court confirmed *Buckley's* use of strict scrutiny for campaign expenditure limits and closely drawn scrutiny for campaign contribution limits.

Three years later, in 2003, the Supreme Court ruled on a statute that made it unlawful for any corporation to make a campaign contribution or expenditure in connection with certain federal elections in *FEC v. Beaumont*.[80] The purpose of this ban was to prevent "corporate earnings from turning into political 'war chests'" and "preven[t] corruption or the appearance of corruption."[81] The Court upheld this contribution ban using *Buckley's* lower level of review, closely drawn scrutiny. The Court stated that "[g]oing back to *Buckley v. Valeo*, restrictions on political contributions have been treated as merely 'marginal' speech restrictions subject to relatively complaisant review under the First Amendment, because contributions lie closer to the edges than to the core of political expression."[82] Even though the statute at issue was a contribution ban, and not just a contribution limit of a type similar to that upheld in *Buckley*, the Court still found that "[i]t is not that the difference between a ban and a limit is to be ignored; it is just that the time to

75. Richard M. Esenberg, *The Lonely Death of Public Campaign Financing*, 33 HARV. J.L. & PUB. POL'Y 283, 297 (2010).

76. 528 U.S. 377, 381–82 (2000).

77. *Id.* at 386–87.

78. *Id.* at 387.

79. *Id.* (quoting *Buckley*, 424 U.S. at 22).

80. 539 U.S. 146, 149 (2003).

81. *Id.* at 146 (alteration in original) (citations omitted) (quoting FEC v. Nat'l Conservative PAC, 470 U.S. 480, 496–97 (1985)).

82. *Id.* at 161 (citation omitted).

consider it is when applying scrutiny at the level selected, not in selecting the standard of review itself."[83]

The Supreme Court decided a second campaign finance case in 2003, *McConnell v. FEC*.[84] There, the statute at issue prohibited individuals seventeen and younger from making contributions both to candidates and to political parties.[85] In determining the constitutionality of this statute, the Court first reiterated that contribution limits implicate the First Amendment freedoms of expression and association.[86] Then, the Court applied *Buckley's* closely drawn scrutiny because the provision was a campaign contribution ban.[87] The government, however, had only offered scant evidence to advance its interest in preventing corruption by conduit, and the Court found that other states had adopted more tailored approaches to fixing this problem of actual and potential corruption.[88] Instead of banning all contributions to candidates, other states prohibited contributions by very young children, considered all contributions from a family as a unit, or imposed a limit on contributions by minors.[89] Thus, the Court struck down the ban as unconstitutional under closely drawn scrutiny, holding that the provision was overbroad.[90]

In 2006, the Supreme Court struck down a Vermont campaign contribution limit in *Randall v. Sorrell*.[91] These contribution limits were very low—a person could not contribute more than $400 to a governor candidate, $300 to a state senator candidate, and $200 to a state representative candidate.[92] In finding these limitations unconstitutional, the Court enumerated multiple reasons. First, the "contribution limits will significantly restrict the amount of funding available for challengers to run competitive campaigns."[93] Such low contribution limits present a problem in elections because they magnify the incumbent's advantage and place the challenger at a significant disadvantage.[94] Second, the limits were not adjusted for inflation.[95] Finally, there were no special justifications to warrant these low contribution limits.[96] Thus, using *Buckley's* closely drawn

83. *Id.* at 162.
84. 540 U.S. 93 (2003), *overruled by* Citizens United v. FEC, 130 S. Ct. 876 (2010)).
85. *Id.* at 231.
86. *Id.* (citing Buckley v. Valeo, 424 U.S. 1 (1976) (per curium)).
87. *Id.* at 232.
88. *Id.*
89. *Id.*
90. *Id.*
91. 548 U.S. 230, 236 (2006).
92. *Id.* at 238.
93. *Id.* at 253.
94. *Id.* at 248 (quoting Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 403–04 (2000) (Breyer, J., concurring)).
95. *Id.* at 261.
96. *Id.*

scrutiny, the Court found that Vermont's contribution limits were unconstitutional under the First and Fourteenth Amendments.

The Court revisited the constitutionality of campaign finance laws in 2010 with one of the most recent controversial Supreme Court cases, *Citizens United v. FEC*.[97] In that case, the plaintiffs challenged "[2 U.S.C.] § 441b's ban on corporate-funded independent expenditures," which subjected the corporation to civil and criminal penalties.[98] The Court struck down this statute as violating corporations' First Amendment rights. As a general statement, the Court noted that "laws that burden political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'"[99] However, even though the Court made this broad statement about laws that burden political speech, it still found that "Citizens United has not made direct contributions to candidates, and it has not suggested that the Court should reconsider whether contribution limits should be subjected to rigorous First Amendment scrutiny."[100] In light of these two opposing statements, lower courts began to question whether the Court had blurred or destroyed *Buckley's* dual-scrutiny framework of using strict scrutiny for campaign expenditure limits and closely drawn scrutiny for campaign contribution limits.

In 2011, one year after its controversial decision in *Citizens United*, the Supreme Court again ruled on campaign finance in *Arizona Free Enterprise Club's Freedom PAC v. Bennett*.[101] In that case, the plaintiffs challenged the constitutionality of a state campaign finance law that matched funds.[102] Although the general statement in *Citizens United* might have suggested that all types of campaign finance laws should be reviewed using strict scrutiny, instead of using *Buckley's* dual-scrutiny framework, the Court rejected this view.[103] The Court again recognized the two separate levels of scrutiny, saying:

> [W]e have subjected strictures on campaign-related speech that we have found less onerous to a lower level of scrutiny and upheld those restrictions. For example, after finding that the restriction at issue was "closely drawn" to serve a "sufficiently important interest," we have upheld government-imposed limits on contributions to candidates . . . .[104]

97. 130 S. Ct. 876 (2010).
98. *Id.* at 888.
99. *Id.* at 898 (citation omitted).
100. *Id.* at 909.
101. 131 S. Ct. 2806 (2011).
102. *Id.* at 2816.
103. *Id.* at 2817.
104. *Id.* (citations omitted).

III. ANALYSIS

In *Preston v. Leake*, the Fourth Circuit dealt with an issue of first impression regarding the constitutionality of North Carolina's campaign finance laws. The Campaign Contributions Prohibition bans lobbyists from contributing any amount of money to candidates for certain state offices. Thus, when Preston challenged the prohibition under the First and Fourteenth Amendments, the initial issue the Fourth Circuit decided was what level of scrutiny to use when reviewing this statute—strict scrutiny or closely drawn scrutiny.

A. The Inconsistency of Fourth Circuit Precedent

Between 1999 and the 2011 *Preston* decision, the Fourth Circuit ruled on two other cases involving the constitutionality of North Carolina campaign finance statutes. However, in these cases, decided approximately ten years apart, the Fourth Circuit used different language to describe the level of scrutiny it used to review each statute's constitutionality. Thus, in *Preston v. Leake*, the Fourth Circuit was challenged with interpreting this precedent and determining the appropriate level of scrutiny to apply to North Carolina's Campaign Contributions Prohibition.

The first case, decided by the Fourth Circuit in 1999, was *North Carolina Right to Life, Inc. v. Bartlett*.[105] There, North Carolina Right to Life challenged a North Carolina campaign finance provision that prohibits lobbyists from contributing to candidates and members of the General Assembly and Council of State while the General Assembly is in session.[106] The Fourth Circuit upheld this restriction using the language of strict scrutiny review.[107] The Fourth Circuit noted that the state had a "compelling interest" in preventing actual corruption and the appearance of corruption.[108] Additionally, the court found that the government's means were "narrowly tailored" to that compelling governmental interest because the statute was limited to a certain group of people, lobbyists, and had a temporal limitation that restricted the ban to only a few months during an election year.[109]

In contrast, the Fourth Circuit used different scrutiny language to strike down provisions of North Carolina's campaign finance laws in *North Carolina Right to Life, Inc. v. Leake*.[110] At issue in that 2008 case was a statute creating a contribution limit of $4000 from independent expenditure committees.[111] The Fourth Circuit held

105. 168 F.3d 705 (4th Cir. 1999).
106. *Id.* at 709.
107. *Id.* at 715.
108. *Id.*
109. *Id.* at 716.
110. 525 F.3d 274, 277 (4th Cir. 2008).
111. *Id.* at 291 (citing N.C. GEN. STAT. § 163-278.13 (2007)).

that this statute was essentially a contribution limit and should be reviewed under *Buckley's* closely drawn standard, noting that "a state may limit campaign contributions if the limits are 'closely drawn' and the state demonstrates that the limits support its interest in preventing corruption and the appearance thereof."[112] Because the Fourth Circuit concluded it was implausible that these contributions actually had a corrupting influence on the state, the Fourth Circuit struck down this law as unconstitutional using closely drawn scrutiny.[113]

This Fourth Circuit precedent provided little guidance in deciding what level of scrutiny should be applied to the Campaign Contributions Prohibition in *Preston v. Leake*. Although *Bartlett* was decided after the Supreme Court's decision in *Buckley*, it did not use *Buckley's* dual-scrutiny framework. The statute at issue was clearly a contribution limit and therefore should have been reviewed under closely drawn scrutiny. The Fourth Circuit, however, explicitly used the language of strict scrutiny by saying that the statute would be upheld if the government had a compelling end and narrowly tailored means. Therefore, the *Bartlett* decision appears to support Preston's argument that campaign contribution statutes should be reviewed using strict scrutiny. Still, under strict scrutiny review, statutes are usually categorically struck down as unconstitutional.[114] And notably, the Fourth Circuit upheld the statute in *Bartlett* as constitutional, even though it used strict scrutiny language. Thus, while the Fourth Circuit did not use the correct language denoted in *Buckley*, in actuality, the court appropriately applied the correct, less-searching level of scrutiny. Furthermore, about ten years later, the Fourth Circuit followed *Buckley's* dual-scrutiny framework to decide *Leake*. In that case, the circuit court expressly used the language of closely drawn scrutiny to strike down a North Carolina campaign contribution statute.

The important difference between these two Fourth Circuit cases was the Supreme Court precedent during the nearly ten years in between *Bartlett* (1999) and *Leake* (2008). Although, in 1976, the Supreme Court held that contribution limits should be reviewed using closely drawn scrutiny and expenditure limits should be reviewed using strict scrutiny, the Fourth Circuit did not apply this dual-scrutiny framework as late as 1999. Instead, *Buckley's* framework became the obvious standard in the early 2000s when the Supreme Court ruled on cases that reaffirmed *Buckley*. Some of the Court's cases that clearly delineated the two different levels of scrutiny used to review campaign finance provisions included *Nixon*

112. *Id.* (citing Buckley v. Valeo, 424 U.S. 1, 24–29 (1976)).

113. *Id.* at 293.

114. Jessica A. Levinson, *Timing is Everything: A New Model for Countering Corruption Without Silencing Speech in Elections*, 55 ST. LOUIS U. L.J. 853, 865 (2011).

v. Shrink Missouri Government PAC,[115] *FEC v. Beaumont*,[116] and *McConnell v. FEC*.[117]

Another reason why the Fourth Circuit might have mistakenly used the language of strict scrutiny in *Bartlett* is because it focused too heavily on the fact that the statute contained a legislative session ban. Generally courts apply strict scrutiny to legislative session bans and categorically strike them down as unconstitutional.[118] However, these legislative session bans are usually found constitutional if they apply only to a small group, such as lobbyists.[119] At their essence, these are campaign contribution limits and should be reviewed under closely drawn scrutiny.[120] Thus, although the Fourth Circuit precedent in *Bartlett* and *Leake* confused which level of scrutiny to apply to campaign contributions, the Campaign Contributions Prohibition should be reviewed using closely drawn scrutiny in accordance with Supreme Court precedent.

B. A Narrow Interpretation of Citizens United

One of the main questions posed by commentators regarding the Fourth Circuit's decision in *Preston v. Leake* is how the Supreme

115. 528 U.S. 377, 387 (2000) ("While we did not then say in so many words that different standards might govern expenditure and contribution limits affecting associational rights, we have since then said so explicitly in *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*: 'We have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending.' It has, in any event, been plain ever since *Buckley* that contribution limits would more readily clear the hurdles before them.").

116. 539 U.S. 146, 161–62 (2003) ("Going back to *Buckley v. Valeo*, restrictions on political contributions have been treated as merely 'marginal' speech restrictions subject to relatively complaisant review under the First Amendment, because contributions lie closer to the edges than to the core of political expression. 'While contributions may result in political expression if spent by a candidate or an association . . . , the transformation of contributions into political debate involves speech by someone other than the contributor.' This is the reason that instead of requiring contribution regulations to be narrowly tailored to serve a compelling governmental interest, 'a contribution limit involving significant interference with associational rights' passes muster if it satisfies the lesser demand of being 'closely drawn to match a sufficiently important interest.'" (citations omitted) (quoting *Nixon*, 528 U.S. at 378; *Buckley*, 424 U.S. at 21) (internal quotation marks omitted)).

117. 540 U.S. 93, 231–32 (2003) ("When the Government burdens the right to contribute, we apply heightened scrutiny. We ask whether there is a 'sufficiently important interest' and whether the statute is 'closely drawn' to avoid unnecessary abridgment of First Amendment freedoms." (citations omitted)), *overruled by* Citizens United v. FEC, 130 S. Ct. 876 (2010).

118. Levinson, *supra* note 114.

119. *Id.*

120. *See, e.g.*, Kimbell v. Hooper, 665 A.2d 44, 50–51 (Vt. 1995) (holding that the ban on soliciting and making contributions to individuals' political campaigns while the General Assembly is in session is constitutional under *Buckley's* closely drawn scrutiny).

Court would react to the Fourth Circuit upholding North Carolina's Campaign Contributions Prohibition under closely drawn scrutiny.[121] Since the 2010 *Citizens United* decision, courts have outwardly struggled to interpret the Supreme Court's phrase that "[l]aws that burden political speech are 'subject to strict scrutiny.'"[122] The issue is whether *Citizens United* abolished *Buckley's* dual-scrutiny framework or whether *Buckley's* framework remains good law. If *Buckley* is still applicable, campaign contribution statutes should continue to be reviewed using the less-exacting closely drawn scrutiny standard. However, if the phrase in *Citizens United* is read according to its plain meaning, campaign contribution statutes should be reviewed using strict scrutiny. And under strict scrutiny, courts almost universally strike down such statutes as unconstitutional.[123] If courts were to broadly interpret this phrase in *Citizens United*, it would have a vast impact on the constitutionality of campaign finance regulations. Therefore, "cases testing the boundaries of the Supreme Court's ruling [in *Citizens United*] began winding their way through the courts shortly after the decision was announced in January 2010."[124]

Circuit courts took notice of the Supreme Court's broad generalization in *Citizens United* and struggled to interpret its effect upon *Buckley's* framework. For example, the Second Circuit noted that the "Court's campaign-finance jurisprudence may be in a state of flux."[125] Additionally, the Ninth Circuit questioned the effect of the *Citizens United* decision by saying that "[i]t is unclear whether this unqualified statement is the death knell for closely drawn scrutiny or whether it was intended only to reaffirm the long standing principle that expenditure limitations, like those at issue

121. Robyn Hagan Cain, *Contribution Prohibition Is Lawful Limit on Free Speech Rights*, FINDLAW: U.S. FOURTH CIRCUIT (Nov. 9, 2011, 3:07 PM), http://blogs.findlaw.com/fourth_circuit/2011/11/contribution-prohibition-is-lawful-limit-on-free-speech-rights.html ("How would SCOTUS feel about the [*sic*] North Carolina's closely drawn restriction on free speech rights?"); *Fourth Circuit Upholds N.C.'s Restrictions Against Lobbyists' Political Contributions*, BEAUFORT OBSERVER (Nov. 8, 2011), http://www.beaufortobserver.net/Articles-NEWS-and-COMMENTARY-c-2011-11-08-256848.112112-Fourth-Circuit-upholds-N-Cs-restrictions-against-lobbyists-political-contributions.html (noting that "[f]or the legal academic [*Preston v. Leake*] becomes an interesting question of how the Supreme Court will deal with a decision of the Fourth Circuit that has become decidedly more liberal than the Supreme Court has been in recent years").

122. *Citizens United*, 130 S. Ct. at 898 (citation omitted).

123. Levinson, *supra* note 114, at 859 (quoting Buckley v. Valeo, 424 U.S. 1, 25 (1976)).

124. Christine N. Walz, *Campaigns Turn to Courts over Political Advertising*, 28 COMM. LAW. 3, 3 (2011) (citations omitted).

125. Green Party of Conn. v. Garfield, 616 F.3d 189, 199 (2d Cir. 2010).

in *Citizens United*, are subject to strict scrutiny."[126] Also recognizing this problem, the Seventh Circuit explicitly applied closely drawn scrutiny to a similar statute.[127] The court, however, covered both of its bases by saying that "we believe [the statute] survives under either standard."[128]

Although the Supreme Court's overbroad phrase in *Citizens United* implied that all campaign finance provisions should be reviewed under strict scrutiny, this generalized statement was a miscalculation by the Court. First, further into the *Citizens United* opinion, when speaking directly to the decision's impact on campaign contribution limits, the Court backtracked on its broad generalization. There, the Court noted that "Citizens United has not made direct contributions to candidates, and it has not suggested that the Court should reconsider whether contribution limits should be subjected to rigorous First Amendment scrutiny."[129] Thus, in that same opinion, the Court indicated that *Buckley's* dual-scrutiny framework was not under review and should remain in place.

Second, in *Bennett*, a Supreme Court case decided one year after *Citizens United*, the Court reiterated *Buckley's* dual-scrutiny framework.[130] In this way, the Supreme Court itself indicated that *Citizens United* was not intended to alter *Buckley's* framework. Thus, the general proposition announced by the Court in *Citizens United* should not be read broadly. Instead, it should be narrowly interpreted so as to keep *Buckley's* dual-scrutiny framework in place.

Although courts have questioned which level of scrutiny to use in campaign contribution cases after *Citizens United*, the Second, Fifth, Seventh, and Ninth Circuits have held that *Buckley's* dual-scrutiny framework remains good law. For example, in *Green Party of Connecticut v. Garfield*,[131] the Second Circuit acknowledged *Citizens United's* generalized statement.[132] However, the Second Circuit ruled that the closely drawn scrutiny of *Buckley* remained applicable. It reasoned that "in the recent *Citizens United* case, the Court overruled two of its precedents and struck down a federal law banning independent campaign *expenditures* by corporations, but it explicitly declined to reconsider its precedents involving campaign

126. Long Beach Area Chamber of Commerce v. City of Long Beach, 603 F.3d 684, 691–92 n.4 (9th Cir. 2010) (noting that the court did not even reach the issue saying, "[w]e need not read tea leaves to decide this appeal, however, because, as shown below, the LBCRA is unconstitutional as applied to the Chamber PACs under either 'closely drawn' or 'strict' scrutiny").

127. Siefert v. Alexander, 608 F.3d 974, 988–89 (7th Cir. 2010).

128. *Id.* at 989.

129. Citizens United v. FEC, 130 S. Ct. 876, 909 (2010).

130. *See supra* notes 101–04 and accompanying text.

131. 616 F.3d 189 (2d Cir. 2010).

132. *Id.* at 199 (citing *Citizens United*, 130 S. Ct. at 909).

contributions by corporations to candidates for elected office."[133] Thus, the court reviewed a ban on contractors making contributions to candidates for state office and a ban on lobbyists making contributions to state office under closely drawn scrutiny.[134]

Additionally, in a 2011 decision, *Ognibene v. Parkes*,[135] the Second Circuit reviewed campaign finance statutes that contained "doing business" contribution limits, nonmatching provisions, and entity bans.[136] The circuit court upheld all of these statutes as constitutional using *Buckley's* closely drawn scrutiny.[137] Regarding *Citizens United*, the court concluded that "[s]ince the Supreme Court preserved the distinction between expenditures and contributions, there is no basis for Appellants' attempt to broaden *Citizens United*. Appellants' selective and misleading quotes carefully skip over the Court's clear distinction between limits on expenditures and limits on contributions."[138]

The Fifth Circuit, in a 2010 decision, also held that the court should review a statute that imposed contribution limits under closely drawn scrutiny in *In re Cao v. FEC*.[139] In that case, the statute imposed a contribution limit of $5000 on political parties.[140] The court rejected the plaintiff's argument that *Citizens United* should change the analysis of contribution limits on political parties.[141] Instead, the court found that "the Supreme Court's decision in *Citizens United*—regarding a corporation's right to make independent expenditures—provides no reason to change our analysis of the validity of the contribution limits FECA places on political parties and PACs."[142] Thus, under closely drawn scrutiny, the court upheld these contribution limits.[143]

Furthermore, in 2010, the Seventh Circuit decided to use *Buckley's* closely drawn scrutiny in *Siefert v. Alexander*.[144] In that case, the Wisconsin Judicial Code of Conduct banned personal solicitation of campaign contributions made by judges or judicial candidates.[145] The court found that this solicitation ban was essentially regulating campaign finance and should be reviewed

133. *Id.* (citing *Citizens United*, 130 S. Ct. at 909).
134. *Id.*
135. 671 F.3d 174 (2d Cir. 2011), *cert. denied*, No. 11-1153, 2012 WL 950086 (U.S. June 25, 2012).
136. *Id.* at 177–78, 185–96.
137. *Id.* at 185–96.
138. *Id.* at 184.
139. 619 F.3d 410, 422–23 (5th Cir. 2010), *cert. denied*, 131 S. Ct. 1718 (2011).
140. *Id.* at 421.
141. *Id.* at 422.
142. *Id.* at 423.
143. *Id.*
144. 608 F.3d 974, 988 (7th Cir. 2010).
145. *Id.*

using *Buckley's* dual-scrutiny framework because "*Citizens United*, rather than overruling *Buckley*, noted and reinforced the distinction between independent expenditures on behalf of candidates and direct contributions to candidates."[146] The circuit court, however, did hedge its decision by noting that even if strict scrutiny should be applied, the provision was still constitutional.[147]

In 2011, the Ninth Circuit dealt with this same issue in *Thalheimer v. City of San Diego*.[148] There, the court concluded:

> [T]he *Citizens United* Court's disapproval of *Austin* came in the context of regulating political expenditures, not contributions. The Court made clear that it was not revisiting the long line of cases finding anti-corruption rationales sufficient to support such limitations. Therefore, there is nothing in the explicit holdings or broad reasoning of *Citizens United* that invalidates the anti-circumvention interest in the context of limitations on direct candidate contributions.[149]

Like the circuit court decisions, the Colorado Supreme Court interpreted the general phrase in *Citizens United* to maintain *Buckley's* dual-scrutiny framework. In *Dallman v. Ritter*,[150] government contract holders had to contractually agree to not make campaign contributions to a candidate for a state elected office for two years.[151] The court upheld *Buckley's* closely drawn scrutiny and noted that "[t]he Supreme Court decision in *Citizens United* addressed only expenditure limits and disclosure requirements; thus, it does not control our analysis of Amendment 54's contribution limits."[152]

Before the Fourth Circuit decided *Preston*, four circuit courts had reviewed the language contained in *Citizens United's* generalized statement and determined that it did not discard *Buckley's* dual-scrutiny framework. These courts noted that the Supreme Court in *Citizens United* did not rule on contribution limits or expressly overrule the *Buckley* framework, and portions of the Court's opinion could not be read selectively. Thus, the Fourth Circuit correctly found that the Campaign Contributions Prohibition should be reviewed under closely drawn scrutiny. The decision in *Preston* interpreted the *Citizens United* decision so that it did not have a broad impact upon campaign finance adjudication. Instead, the Supreme Court, circuit courts, and state courts have all held that *Citizens United* should be narrowly interpreted so that it does

146. *Id.* (citations omitted).
147. *Id.* at 989.
148. 645 F.3d 1109 (9th Cir. 2011).
149. *Id.* at 1124–25 (citations omitted).
150. 225 P.3d 610 (Colo. 2010).
151. *Id.* at 616.
152. *Id.* at 622 (citing Citizens United v. FEC, 130 S. Ct. 876, 909 (2010)).

not affect the status quo established by *Buckley* regarding closely drawn scrutiny.

C. The Difference Between a Contribution Limit and a Contribution Ban

Additionally, even though the North Carolina Campaign Contributions Prohibition is a contribution ban, instead of a contribution limit, it should be reviewed under closely drawn scrutiny. In *Buckley*, the Supreme Court held that a contribution limitation was subject to closely drawn scrutiny. However, the North Carolina statute enforces a contribution ban on lobbyists, not just a contribution dollar limit. Thus, Preston argued that a "*complete ban* on campaign contributions 'restricts direct speech rights of would-be contributors that lie at the core of political expression' and thus 'demand[s] strict scrutiny.'"[153] A contribution ban does not allow the contributor to retain any means of symbolic expression.[154] Therefore, the ban "disallows 'the symbolic and expressive act of contributing in the first place,' so that the ban is a 'direct restraint on political communication,' which is therefore subject to strict scrutiny."[155]

Still, the Supreme Court has upheld a complete ban using *Buckley's* closely drawn standard of review. In *Beaumont*, the challenged statute made it unlawful for a corporation to make a contribution from some federal elections.[156] Thus, it was essentially a contribution ban on corporations. In addressing the question of which standard of review to use, the Court noted that a contribution ban was distinct from a contribution limit. However, "it is not that the difference between a ban and a limit is to be ignored; it is just that the time to consider it is when applying scrutiny at the level selected, not in selecting the standard of review itself."[157] Therefore, the Fourth Circuit followed Supreme Court precedent that contribution limits and contribution bans should be reviewed using less-searching scrutiny.

Still, North Carolina's Campaign Contributions Prohibition can be distinguished from the ban in *Beaumont*. North Carolina's statute directly forbids individuals from making contributions, while the statute in *Beaumont* only forbade the corporation from making contributions and left individual members of the corporation free to make contributions. Other courts, however, have followed *Beaumont's* lead and ruled that even a contribution ban that applies to individuals should be reviewed using closely drawn scrutiny. For example, in *Garfield*, the statute imposed a ban on contractors and

153. Preston v. Leake, 660 F.3d 726, 732 (4th Cir. 2011).
154. *Id.*
155. *Id.*
156. FEC v. Beaumont, 539 U.S. 146, 149 (2003).
157. *Id.* at 162.

lobbyists making contributions to candidates for state office in Connecticut.[158] In that case, the Second Circuit used closely drawn scrutiny to uphold the ban for contractors but strike down the ban for lobbyists.[159] The Second Circuit rejected applying "strict scrutiny because the provisions at issue here are bans, as opposed to mere limits. Such an argument was explicitly rejected in *Beaumont*."[160] Instead, the Second Circuit followed *Beaumont's* lead by reviewing the ban in connection with whether the statute was closely drawn to an important government interest. Thus, in striking down the ban against lobbyists, the Second Circuit emphasized how a ban was too restrictive and thus did not meet the closely drawn standard.

The Supreme Court of Louisiana ruled on the same issue when the state passed a statute that prohibited riverboat and land-based casino industries from making campaign contributions in *Casino Ass'n of Louisiana v. State ex rel. Foster*.[161] There, the court upheld these bans using closely drawn scrutiny and noted that "there is no indication in *Buckley* that a contribution limit of zero, as opposed to a contribution limit of $1,000.00, would be unconstitutional."[162] Thus, "the fact that the campaign contribution ban found in [the statute] is a *prohibition* on contributions, rather than a *limitation*, does not render it per se unconstitutional under *Buckley*. Instead, the restriction is to [be] analyzed under the burden of proof enunciated in *Buckley*."[163]

Therefore, although the North Carolina Campaign Contributions Prohibition imposes a ban on lobbyist contributions instead of a limit on lobbyist contributions, it should still be reviewed under closely drawn scrutiny. The Supreme Court laid this foundation in *Beaumont* when it considered a ban on corporations using closely drawn scrutiny. And although *Beaumont* dealt with a corporate ban, neither the Second Circuit nor the Supreme Court of Louisiana distinguished between the corporate ban in *Beaumont* and the individual bans in *Garfield* and *Casino Ass'n of Louisiana*.

D. The Impact of the Constitutionality of the Campaign Contributions Prohibition

One of the biggest impacts of the Fourth Circuit's decision in *Preston v. Leake* is that it provides a constitutionally sound model for other states to impose contribution bans on lobbyists or other

158. Green Party of Conn. v. Garfield, 616 F.3d 189, 194 (2d Cir. 2010).
159. *Id.* at 212.
160. *Id.* at 199 (citing *Beaumont*, 539 U.S. at 162).
161. 820 So. 2d 494, 496 (La. 2002).
162. *Id.* at 502.
163. *Id.* at 504.

groups.[164] However, looking forward, if North Carolina's Campaign Contributions Prohibition is used as a model, additional constitutional questions will be raised. One issue with this prototype is whether a similar ban on lobbyists or another group would be constitutional if the state did not have a history of corruption.

For example, in *Garfield*, Connecticut implemented the Campaign Finance Reform Act ("CFRA"), which banned individual contractors and lobbyists from making contributions to candidates for state office.[165] The Second Circuit upheld the ban on contractors but struck down the ban on lobbyists.[166] Regarding the ban on contractors, the court found:

> [T]he Connecticut General Assembly enacted the CFRA's ban on contractor contributions in response to a series of scandals in which contractors illegally offered bribes, "kick-backs," and campaign contributions to state officials in exchange for contracts with the state. The ban was designed to combat both actual corruption and the appearance of corruption caused by contractor contributions.[167]

Thus, the ban on contractors was sufficiently closely drawn to the state's interest in preventing corruption and the appearance of corruption.

In contrast, the court noted that none of Connecticut's recent corruption scandals involved lobbyists.[168] Therefore, the state did not need to use a complete ban on lobbyist contributions; instead, the statute should have had a limiting exception in the form of a contribution limit. The court emphasized:

> Accordingly, there is insufficient evidence to demonstrate that all lobbyist contributions give rise to an appearance of corruption, and the evidence demonstrating that lobbyist contributions give rise to an appearance of "influence" has no bearing on whether the CFRA's ban on lobbyist contributions is closely drawn to the state's anticorruption interest. We conclude, as a result, that on this record, a *limit* on lobbyist contributions would adequately address the state's interest in

164. *Lobbyists Beware: Political Contribution Ban a Model for Federal Elections?*, BRACEWELL & GIULIANI (Nov. 14, 2011), http://www.bracewellgiuliani.com/news-publications/updates/lobbyists-beware-political-contribution-ban-model-federal-elections ("While this North Carolina state ban has no direct effect on federal elections, or other state elections, it is a model that many regulators and commentators have expressed support for. One can expect both state and federal efforts to enact new regulations further limiting a lobbyist's opportunity to fully participate in the electoral process.").

165. *Garfield*, 616 F.3d at 194.

166. *Id.* at 212.

167. *Id.* at 199–200 (citation omitted).

168. *Id.* at 205.

> combating corruption and the appearance of corruption on the part of lobbyists.[169]

Whether or not there was actual corruption in the state regarding lobbyists is how the Fourth Circuit distinguished the North Carolina statute in *Preston* from the court's holding in *Garfield*.[170] Thus, for a state to use *Preston* as a model of a constitutional campaign contribution ban, the state might have to have a history of corruption. If not, then to pass closely drawn scrutiny, the statute might have to have limiting exceptions.

States generally use two types of limiting exceptions in campaign contribution statutes. First, the state may create a limiting exception by only enforcing a contribution limit or a ban during a certain time period. The purpose of such limits is to "prevent the flow of money to candidates during time periods when contributions pose a unique threat of actual or apparent corruption."[171] These temporal limits can be during pre-election, legislative-session, off-year, or postelection periods.[172] Commonly, these statutes are limited to when the legislature is in session. There is a greater issue regarding corruption or the appearance of corruption during legislative sessions because legislators are making decisions that may affect their campaign contributors.[173] For example, in *Bartlett*, the Fourth Circuit noted that the state's campaign finance reform scheme only prohibited lobbyists from contributing to candidates for the North Carolina General Assembly and Council of State while the General Assembly was in session.[174] Thus, the restriction was not overbroad because the North Carolina General Assembly was usually only in session for one or two months out of the year.[175]

Vermont had a similar statute that banned lobbyists from contributing to campaigns of members of the Vermont General Assembly when the legislature was in session.[176] The Vermont Supreme Court upheld this ban, noting that the statute "functions solely as a timing measure, banning contributions to individual members only while the General Assembly is in session."[177] Thus, "the limited prohibition focuses on a narrow period during which legislators could be, or could appear to be, pressured, coerced, or

169. *Id.* at 207.
170. Preston v. Leake, 660 F.3d 726, 737 (4th Cir. 2011) (citing *Garfield*, 616 F.3d at 195–96, 207).
171. Levinson, *supra* note 114, at 855 (citing State v. Alaska Civil Liberties Union, 978 P.2d 597, 619 (Alaska 1999)).
172. *Id.* (citing *Alaska Civil Liberties Union*, 978 P.2d at 628–30).
173. *Id.* at 865.
174. N.C. Right to Life, Inc. v. Bartlett, 168 F.3d 705, 714 (4th Cir. 1999).
175. *Id.*
176. Kimbell v. Hooper, 665 A.2d 44, 46 (Vt. 1995).
177. *Id.* at 91.

tempted into voting on the basis of cash contributions rather than on consideration of the public weal."[178]

A second method of imposing a limiting exception on a campaign contribution law is to restrict the limit or the ban based on the identity of the recipient. For example, in California, a district court upheld a campaign finance regulation that only prohibited "a direct contribution by a lobbyist to an elected state officer or candidate for elected state office, if the lobbyist is registered to lobby the governmental agency for which the officeholder works or for which the candidate seeks election."[179] Thus, this provision was narrowly tailored because it did "not prohibit contributions by all lobbyists to all candidates. Rather, [it] only prohibited contributions by lobbyists, if the lobbyist was *registered* to lobby the office for which the candidate sought election; that is, to those persons the lobbyist *would be* paid to lobby."[180] Similarly, an Alaskan campaign contribution statute prohibited lobbyists from contributing to candidates in districts that were outside the district in which the lobbyist was eligible to vote.[181] The Supreme Court of Alaska upheld this statute as constitutional because the lobbyists' "professional purpose, coupled with their proximity to legislators during the legislative session, makes them particularly susceptible to the perception that they are *buying* access when they make contributions. Based on this evidence, we conclude that the State had a compelling interest justifying some restraint on speech."[182]

In total, the North Carolina Campaign Contributions Prohibition may serve as a prototype for other states of a constitutional campaign finance reform statute. However, the constitutionality of such a reform statute might depend on whether there is a history of corruption within the state. Therefore, for other states' statutes to be constitutional, limiting exceptions on the time and identity of the recipient may be necessary.

CONCLUSION

In *Preston v. Leake*, the Fourth Circuit upheld the constitutionality of the North Carolina Campaign Contributions Prohibition, which bans lobbyists from making any type of monetary donations to certain state officials' campaigns. One of the main issues the court grappled with was what level of scrutiny was appropriate to apply to the statute. If the court applied strict scrutiny, the ban would be categorically struck down. However, if the court applied the less-searching, closely drawn scrutiny, the ban

178. *Id.*
179. Inst. of Gov't Advocates v. Fair Political Practices Comm'n, 164 F. Supp. 2d 1183, 1186 (E.D. Cal. 2001).
180. *Id.* at 1190.
181. State v. Alaska Civil Liberties Union, 978 P.2d 597, 617 (Alaska 1999).
182. *Id.* at 619.

would likely be upheld. In determining which level of scrutiny to use, the Fourth Circuit had to properly interpret its own precedent, a broad generalization by the Supreme Court in *Citizens United*, and whether there was a difference between a total ban as opposed to a limit. Because the Campaign Contributions Prohibition was upheld as constitutional under closely drawn scrutiny, other states will probably use it as a model for creating their own contribution bans. However, this could prove problematic depending on whether or not the state has an actual history of corruption. Thus, in order for other states' contribution limits or bans to be upheld as constitutional, they might have to impose some sort of limiting exceptions.

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