State Session Freeze Laws—Potential Solution or Unconstitutional Restriction?

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I. INTRODUCTION

Since the *Citizens United*[1] decision in 2010 reduced Congress's ability to constitutionally regulate money in elections, proponents of campaign finance reform have looked for alternative ways to achieve the goals of greater transparency and reduce the amount of money spent in federal elections. In the three years since *Citizens United*, the amount of money spent in federal campaigns has increased exponentially. Although the total money spent for the 2012 election has yet to be finalized, virtually all publicly available estimates have the total spending at over $6 billion.[2] This total is more than $700 million higher than the amount spent in the 2008 election.[3] In fact, the total amount of money spent in federal elections has nearly doubled since 2000.[4] In the four years between 2008 and 2012, the money spent on congressional races alone has increased by over $1 billion.[5]

Beyond the direct impact that *Citizens United* had on the amount of money spent in political races, many media commentators and law professors have since suggested that traditional mechanisms for controlling money in politics, specifically restrictions on campaign contributions and

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

2. *See, e.g.*, John Hudson, *The Most Expensive Election in History by the Numbers*, ATLANTIC WIRE (Nov. 6, 2012), http://www.theatlanticwire.com/politics/2012/11/most-expensive-election-history-numbers/58745/.

3. *Id.*

4. Ctr. for Responsive Politics, *The Money Behind the Elections*, OPENSECRETS, http://www.opensecrets.org/bigpicture/index.php (last visited Aug. 31, 2013).

5. *Id.*

expenditures, are now impossible as a result of this case.[6] It is undeniable that *Citizens United* drastically altered the landscape of campaign finance reform, allowing for massive increases in the amount of money spent on political campaigns.[7] Furthermore, when the Supreme Court had a chance to revisit the precedents set in *Citizens United* in 2012, it refused to hear the case, signaling that reform advocates will have to work within the restrictions enshrined by *Citizens United*.[8]

Citizens United represents a serious blow to the traditional methods used to restrict the amount of money in politics: limitations on the amounts campaigns can accept and spend. [9] Moreover, despite the difficulties facing federal reform laws, public distrust of Congress continues to grow,[10] demonstrating the need to take steps to help restore faith in the political process. Although some would argue that meaningful campaign finance reform is impossible in the wake of *Citizens United*, this belief is shortsighted and ignores other potential methods to control the flow of money into politics. The federal government should look to state governments to find new ways to regulate campaign finance. Specifically, the federal government should adopt a specific temporal limitation on when incumbent members of Congress can accept campaign contributions.

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6. *See, e.g.*, Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1, 2 (2013); Senator Tom Udall, *Amend the Constitution to Restore Public Trust in the Political System: A Practitioner's Perspective on Campaign Finance Reform*, 29 YALE L. & POL'Y REV. 235 (2010); Russ Feingold, *The Money Crisis: How Citizens United Undermines Our Elections and the Supreme Court*, 64 STAN. L. REV. ONLINE 145 (June 14, 2012), http://www.stanfordlawreview.org/online/money-crisis; Richard L. Hasen, *Worse Than Watergate*, SLATE (July 19, 2012, 2:55 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2012/07/campaign_finance_after_citizens_united_is_worse_than_watergate.html; Bradley A. Smith, *The Myth of Campaign Finance Reform*, NATIONALAFFAIRS (Winter 2010), http://www.nationalaffairs.com/publications/detail/the-myth-of-campaign-finance-reform.

7. *See, e.g.*, James Bopp, Jr. et al., *The Game Changer: Citizens United's Impact on Campaign Finance Law in General and Corporate Political Speech in Particular*, 9 FIRST AMEND. L. REV. 251 (2010); Richard Briffault, *Corporations, Corruption, and Complexity: Campaign Finance After* Citizens United, 20 CORNELL J.L. & PUB. POL'Y 643 (2011).

8. *See* Am. Tradition P'ship, Inc. v. Bullock, 132 S. Ct. 2490 (2012) (rejecting Montana's ban on independent expenditures without hearing oral argument, signaling the Court's unwillingness to reconsider the holding in *Citizens United*).

9. Although *Citizens United* is the best known case, another case, *Speech Now v. FEC* was responsible for creating the much derided "SuperPACs." *See* SpeechNow.org v. Fed. Election Comm'n, 599 F.3d 686, 689 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 553 (2010).

10. *See* PEW RESEARCH CTR., THE PEOPLE AND THEIR GOVERNMENT: DISTRUST, DISCONTENT, ANGER AND PARTISAN RANCOR (2010), *available at* http://www.people-press.org/files/legacy-pdf/606.pdf.

While it is true that "session freeze"[11] statutes are unlikely to reduce the overall amount of money spent in elections, they do create a bright-line delineation between the two roles of an elected official: campaigning and governing. State legislatures have found session freezes to be an effective way to combat corruption and the appearance of corruption in state legislatures.[12] With the traditional methods of regulating campaign finance becoming harder to utilize, the federal government should consider emulating these state laws to help restore faith in government.[13] Different forms of session freeze statutes have been utilized by different states, and an examination of these statutes and the cases interpreting them demonstrates that there is a clear way to formulate a federal law that would function within the bounds of the precedent set by *Citizens United*. Accordingly, Congress should implement a law that would prevent currently sitting federal elected officials from accepting campaign contributions from lobbyists and lobbyists' employers while Congress is in session.

Part II of this Comment provides a brief background of the law underpinning all campaign finance restrictions, and examines the structure of state session freeze statutes and the outcomes of challenges to these statutes. Part III suggests a specific proposal for a federal version of a session freeze. Part IV addresses critiques of the proposal and examines the issues it would face if challenged in court, but still argues that the proposal would be constitutional and effective in addressing campaign finance reform. Part V concludes.

II. FEDERAL CAMPAIGN FINANCE LAW AND STATE SESSION FREEZE STATUTES

Campaign finance law is regulated at both the federal and state level. Although federal races are regulated through federal law and state races are regulated through state law, both laws must still meet the stand-

11. A "session freeze" statute is one that places temporal restrictions on when a campaign for state office can accept contributions. These laws restrict the acceptance of contributions during the legislative session, hence the term session freeze. *See, e.g.*, WASH. STATE PUBLIC DISCLOSURE COMMISSION, REGULAR SESSION FREEZE STARTS ON DECEMBER 15, 2012 (2012), *available at* http://web.pdc.wa.gov/archive/guide/brochures/pdf/2012/Freeze.2013.pdf.

12. *See, e.g.*, N.C. Right to Life, Inc. v. Bartlett, 168 F.3d 705, 715 (4th Cir. 1999).

13. Congress's approval rating tied the all-time low in August 2012. *See* Frank Newport, *Congress Approval Ties All-Time Low at 10%*, GALLUP POLITICS (Aug. 14, 2012), http://www.gallup.com/poll/156662/Congress-Approval-Ties-Time-Low.aspx. Although Congress's approval rating rebounded slightly in early 2013, it is still only at 15%. *See* Frank Newport, *Congress Approval Holding Steady at 15%*, GALLUP POLITICS (Feb. 19, 2013), http://www.gallup.com/poll/160625/congress-approval-holding-steady.aspx.

ards set by the First Amendment of the United States Constitution.[14] Additionally, the United States Supreme Court has concluded that for the purposes of free speech in the political arena, money and actual speech are functionally identical,[15] and as such, spending money on political campaigns is protected under the First Amendment.

A. An Overview of Federal Campaign Finance Law

A brief glimpse of the development of modern campaign law is necessary to understand why *Citizens United* represents such a departure from past campaign finance jurisprudence. In 1971, Congress enacted the Federal Elections Campaign Act of 1971 (FECA).[16] Following reports of serious financial abuses in the 1972 Presidential election,[17] Congress made substantial amendments to FECA in 1974, including limiting campaign contributions for federal office,[18] limiting expenditures by candidates and their committees,[19] limiting independent expenditures,[20] requiring disclosure of political contributions,[21] and providing for the public financing of presidential campaigns.[22] A lawsuit was filed challenging these amendments, and the Supreme Court decided the landmark campaign finance case *Buckley v. Valeo* in 1976.[23] The Court in *Buckley* made a number of groundbreaking decisions. First, it upheld public financing for presidential campaigns.[24] Second, the decision held that both campaign contributions and expenditures are protected under the First Amendment.[25] Finally, it created different levels of scrutiny for contribution limitations and expenditure limitations on the grounds that restrictions on expenditures "necessarily reduces the quantity of expression"[26] while contribution limits entail "only a marginal restriction"[27] on

14. "Congress shall make no law . . . abridging the freedom of speech . . . . " U.S. CONST. amend. I.

15. *See* Citizens United v. Fed. Election Comm'n 558 U.S. 310, 316 (2010); Buckley v. Valeo, 424 U.S. 1(1976).

16. Formerly 18 U.S.C. § 608 (1974).

17. *The FEC and the Federal Campaign Finance Law*, FED. ELECTION COMMITTEE, http://www.fec.gov/pages/brochures/fecfeca.shtml (last updated Jan. 2013).

18. 2 U.S.C § 441a (2002).

19. Formerly 18 U.S.C. § 608(c) (1974).

20. Formerly 18 U.S.C. § 608(e) (1974).

21. 2 U.S.C. § 434 (2007).

22. 26 U.S.C. Subt. H (2013).

23. Buckley v. Valeo, 424 U.S. 1 (1976). Although campaign finance law has undergone many changes since *Buckley*, the case remains good law and is applied in virtually every campaign finance case.

24. *Id*. at 85.

25. *Id*. at 14.

26. *Id*. at 19.

the contributor's ability to speak. In other words, limitations on someone's ability to spend money to share their opinions is too close to a limitation on an individual's actual right to speak, while limitations on someone's right to contribute money does not unduly restrict a person's ability to engage in the symbolic act of contributing to a campaign.[28] Limitations on expenditures were subject to strict scrutiny, while limitations on contributions were subjected to the lesser but still demanding "exacting scrutiny" standard.[29]

This is not to say, however, that the Supreme Court has always been as hostile to the regulation of campaign finance as it is today. The Supreme Court has upheld restrictions on campaign spending in two key cases in the last twenty years. *Austin v. Michigan Chamber of Commerce* was the first key case, decided in 1990.[30] At issue in *Austin* was a Michigan law that banned the use of corporate treasury funds in independent expenditures.[31] The Court applied strict scrutiny and created a new compelling government interest in preventing the distorting effect of general treasury dollars on political campaigns.[32] The second case, *McConnell v. FEC*,[33] decided in 2003, upheld a federal law banning political parties from soliciting or accepting[34] so-called "soft money"—money donated to political parties used to influence elections.[35]

However, this period of greater acceptance of regulation on campaign finance law was short-lived: both *Austin* and *McConnell* were expressly overruled in 2010 by *Citizens United v. FEC*.[36] In *Citizens United*, the Supreme Court overturned a federal law barring the use of corpo-

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27. *Id*. at 20.

28. A later United States Supreme Court case, *Randall v. Sorrell*, held that campaign contribution limits can be unconstitutional if they are so low that they serve to stifle speech. *See* Randall v. Sorrell, 548 U.S. 230, 261 (2006).

29. Although Buckley is credited with creating the "exacting scrutiny" standard of review, the "exacting scrutiny" standard of review is better explained in *Nixon v. Shrink Missouri Government PAC*: "Thus, under Buckley's standard of scrutiny, a contribution limit involving 'significant interference' with associational rights, could survive if the Government demonstrated that contribution regulation was 'closely drawn' to match a 'sufficiently important interest.'" 528 U.S. 377, 387–88 (2000).

30. 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).

31. *Id.* at 654.

32. *Id.* at 666.

33. McConnell v. Fed. Election Comm'n, 540 U.S. 93, 108 (2003), *overruled by* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

34. The *McConnell* Court reviewed the law under exacting scrutiny, noting that the law in question is a contribution limitation. *See McConnell*, 540 U.S. at 108.

35. *Id*. at 95.

36. *Citizens United*, 558 U.S. 310.

rate treasury money for political campaigns.[37] *Citizens United* further held that the only sufficient government interest in regulating contributions or expenditures was to combat quid pro quo corruption,[38] or the appearance of quid pro quo corruption.[39] Moreover, shortly after the Supreme Court's decision in *Citizens United*, the United States Court of Appeals for the District of Columbia struck down all contribution limitations on independent expenditures and independent expenditure committees in the case *Speechnow.org v. FEC*.[40] The decision—premised on *Citizens United*— held that any contribution limitations on independent expenditure committees is unconstitutional because there is no risk of quid pro quo corruption in these situations since independent expenditure committees cannot donate directly to candidates.[41] Prior to *Speechnow.org*, independent expenditure committees had strict limitations on the amount of money they could accept from a single donor.[42] The decision in *Speechnow.org* gave rise to what are now known as Super PACs,[43] which can raise and spend unlimited amounts of money provided that they do not donate or directly coordinate with candidate committees.[44] These recent decisions by the Supreme Court have led some legal commentators to conclude that disclosure may be the only restriction favored by the current Supreme Court.[45]

Thus, current case law holds that any restrictions on expenditures are unconstitutional unless they are narrowly tailored to serve the compelling purpose of removing quid pro quo corruption or the appearance

37. *Id*. at 365.

38. "Quid-pro-quo corruption" occurs when a politician accepts a contribution from a donor for the express purpose of changing his position on an issue. This is a much narrower construction of corruption previously accepted by the Court in *McConnell*, which held that corruption could include the use of money to buy access to elected officials. *See McConnell*, 540 U.S. at 96.

39. *Citizens United*, 558 U.S. 310. For a more in-depth look at the holding and possible effects of *Citizens United* see Michael S. Kang, *After Citizens United*, 44 IND. L. REV. 243 (2010). Additionally, "leveling the playing field" has been rejected as a legitimate government interest since the Court's decision in *Buckley*. This was reaffirmed in 2008 in Davis v. Fed. Election Comm'n, 554 U.S. 724, 741–42 (2008).

40. SpeechNow.org v. Fed. Election Comm'n, 599 F.3d 686, 689 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 553 (U.S. 2010).

41. *Id*. at 695.

42. *Id.*

43. For a more in-depth discussion of Super PACs, see Richard Briffault, *Super Pacs*, 96 MINN. L. REV. 1644 (2012).

44. Super PACs spent over $609 million in the 2012 election cycle. Ctr. for Responsive Politics, *Super PACs*, OPENSECRETS, http://www.opensecrets.org/pacs/superpacs.php (last updated June 12, 2013).

45. *See* Ciara Torres-Spelliscy, *Has the Tide Turned in Favor of Disclosure? Revealing Money in Politics After* Citizens United *and* Doe v. Reed, 27 GA. ST. U. L. REV. 1057 (2011).

of quid pro quo corruption.[46] Furthermore, restrictions on contributions are upheld only when they serve a sufficiently important government interest and are closely drawn to serve that interest.[47] Although campaign finance disclosure also must meet the exacting scrutiny standard, most disclosure laws have met this bar when challenged.[48] The current state of the law raises the question: What options are left to those who wish for greater regulation of campaign finance?

B. Structure of State Session Freeze Statutes

A total of twenty-five states have some sort of ban on contributions to elected officials while the state legislatures are in session.[49] Twelve different session freeze statutes have been challenged in various courts, with mixed results. Session freeze statutes have been upheld in four cases,[50] and overturned in eight.[51] Additionally, session freeze statutes appear to be popular given that in all but one of the states where the law was struck down the legislature later enacted an additional statute or regulation to restrict contributions during the legislative session.[52] Although courts have agreed—in all cases considering session freeze laws—that the purpose of these statutes is to fight corruption or the appearance of corruption, the holdings in these cases diverge drastically on whether the

46. Thus far, the Supreme Court has struck down almost all expenditure limits. For candidates, see Buckley v. Valeo, 424 U.S. 1, 52 (1976); for campaigns, see *Buckley*, 424 U.S. at 51; and for corporations, see Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 364 (2010).

47. *Buckley*, 424 U.S. at 25.

48. Torres-Spelliscy, *supra* note 45.

49. Fifteen states (Alabama, Alaska, Florida, Georgia, Indiana, Louisiana, Maryland, Nevada, New Mexico, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin) have total bans on contributions to sitting elected officials during the legislative session. Ten states (Arizona, Colorado, Connecticut, Iowa, Kansas, Maine, Minnesota, North Carolina, Oklahoma, and Vermont) have partial bans that are limited to lobbyists and/or PACs. *Limits on Campaign Contributions During the Legislative Session*, NAT'L CONF. OF ST. LEGISLATURES, http://www.ncsl.org/legislatures-elections/elections/limits-on-contributions-during-session.aspx (last visited Aug. 30, 2013)..

50. *See* N.C. Right to Life, Inc. v. Bartlett, 168 F.3d 705, 708 (4th Cir. 1999); Yamada v. Weaver, 872 F. Supp. 2d 1023 (D. Haw. 2012); Inst. of Governmental Advocates v. Fair Political Practices Comm'n, 164 F. Supp. 2d 1183, 1190 (E.D. Cal. 2001); Kimbell v. Hooper, 665 A.2d 44, 45 (Vt. 1995).

51. *See* Green Party of Conn. v. Garfield, 616 F.3d 189, 192 (2d Cir. 2010); Ark. Right to Life State Political Action Comm. v. Butler, 29 F. Supp. 2d 540, 550 (W.D. Ark. 1998); Emison v. Catalano, 951 F. Supp. 714, 716 (E.D. Tenn. 1996); Shrink Mo. Gov't PAC v. Maupin, 922 F. Supp. 1413, 1414 (E.D. Mo. 1996); Dallman v. Ritter, 225 P.3d 610, 615 (Colo. 2010); Casino Ass'n of La. v. State 820 So. 2d 494, 495 (La. 2002), *cert. denied*, 537 U.S. 1226 (2003); State v. Alaska Civil Liberties Union, 978 P.2d 597, 600 (Alaska 1999); State v. Dodd, 561 So. 2d 263 (Fla. 1990).

52. For example, Missouri enacted another session freeze statute that was subsequently struck down. *See* Trout v. State, 231 S.W.3d 140, 148 (Mo. 2007).

statutes are properly constructed to achieve this aim.[53] Furthermore, although more of these statutes have been struck down than upheld,[54] a close examination of the cases demonstrates that there is a constitutional way to construct a session freeze statute. Of the twenty-five states with session freeze statutes, fifteen have a total ban on the acceptance of contributions during the legislative session.[55] The remaining ten states have slightly different regulations that only ban contributions given by certain individuals, like lobbyists.[56]

Session freeze statutes are comprised of four basic components and can generally be separated into two broad categories. These statutes are comprised of four basic components: first, a delineation of what offices are affected by the freeze; second, whether the law applies to incumbents alone or includes challengers; third, an express timeframe for the restriction; and finally, whether *any* contributions are permissible or if all are banned. In addition, session freeze laws can be separated into two broad categories: those laws that restrict all contributions during the legislative session and those that only restrict contributions by certain individuals. The next two sections of this Comment will examine each of these categories, starting with states that have a blanket ban on contributions to legislators during the legislative session.

1. Blanket Restrictions on Contributions During Session.

Fifteen states restrict all contributions during the legislative session, regardless of the identity of the giver.[57] However, these states are divided on whom the session freeze affects. Six states have bans that affect all state elected officials, including those whose duties are not predominantly legislative, for example, the comptroller and the attorney general.[58] Nevada is alone in having its session freeze law apply to the legislature, governor, and lieutenant governor,[59] perhaps reflecting the role of the

53. *See, e.g.*, *Green Party of Conn.*, 616 F.3d at 192; Teper v. Miller, 82 F.3d 989 (11th Cir. 1996); *Inst. of Governmental Advocates*, 164 F. Supp. 2d 1183; *Emison*, 951 F. Supp. at 716; Winborne v. Easley, 523 S.E.2d 149 (N.C. Ct. App. 1999); *Kimbell*, 665 A.2d at 44.

54. A total of seven cases have directly challenged session freeze statutes. Of those seven, the statutes were upheld in two and overturned in five. For an in-depth discussion of these cases, see *infra* Part II.

55. See the fifteen state list, s*upra* note 49.

56. See the fifteen state list, s*upra* note 49.

57. *See supra* note 49.

58. Alabama, ALA. CODE § 17-5-7(b)(2) (2013); Maryland, MD. CODE ANN. ELEC. LAW § 13-235 (West 2013); Texas, TEX. ELEC. CODE ANN. § 253.034 (West 2013); Texas Ethics Commission Rule § 22.11; Virginia, VA. CODE ANN. § 24.2-954 (2013); Washington, WASH. REV. CODE § 42.17A.560 (2013); Wisconsin, WIS. STAT. § 13.625 (2013).

59. NEV. REV. STAT. § 294A.300 (2011).

lieutenant governor as the president of the senate.[60] Three states apply their session freeze laws to only the legislature and the governor,[61] and some of these statutes name a different freeze period for the governor, which is directly linked to the veto period for bills.[62] The session freeze laws in the remaining five states only affect the legislature.[63]

However, there is less variation in whether the laws affect both incumbents and challengers. Only three of the fifteen states have laws that affect challengers and incumbents equally.[64] Of the remaining twelve states, eleven restrict donations to incumbents,[65] and one state—New Mexico—restricts contributions to both challenger and incumbent candidates for state legislature, but only the incumbent in the race for governor.[66]

In general, most session freeze laws only apply during the legislative session.[67] Three states have bans that begin before the legislative session starts and end after the legislative session ends.[68] Two states have bans that begin before the session starts, but end as soon as session closes.[69] Finally, Wisconsin is an outlier in that it does not just ban contributions during the legislative session, but it bans all contributions at all times except for the period between June 1st to election day during election years.[70]

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60. NEV. CONST. ART. V, § 17.

61. N.M. STAT. ANN. § 1-19-34.1 (WEST 2013); TENN. CODE ANN. § 2-10-310 (2013); UTAH CODE ANN. § 36-11-305 (2012).

62. N.M. STAT. ANN. § 1-19-34.1 (WEST 2013); UTAH CODE § 36-11-305 (2012).

63. ALASKA STAT. § 24.60.031 (2013); Florida House Rule 15.3(b); Florida Senate Rule 1.361; GA. CODE ANN. § 21-5-35 (2013); IND. CODE § 3-9-2-12 (2013); LA. REV. STAT. ANN. § 18:1505.2(Q) (2012).

64. ALA. CODE § 17-5-7(b)(2) (2013); IND. CODE § 3-9-2-12 (2013); WIS. STAT. § 13.625 (2013).

65. ALASKA STAT. § 24.60.031 (2013); Florida House Rule 15.3(b); Florida Senate Rule 1.361; GA. CODE ANN § 21-5-35 (2013); LA. REV. STAT. ANN. § 18:1505.2(Q) (2012); MD. CODE ANN. ELEC. LAW § 13-235 (WEST 2013); NEV. REV. STAT. § 294A.300 (2011); TENN. CODE ANN. § 2-10-310 (2013); TEXAS ELEC. CODE ANN. § 253.034 (2013); Texas Ethics Commission Rule § 22.11; UTAH CODE ANN. § 36-11-305 (2012); VA. CODE ANN. § 24.2-954 (2013); WASH. REV. CODE § 42.17A.560 (2013).

66. N.M. STAT. ANN. § 1-19-34.1 (WEST 2013).

67. ALA. CODE § 17-5-7(b)(2)(2013); ALASKA STAT. § 24.60.031 (2013); Florida House Rule 15.3(b); Florida Senate Rule 1.361; GA. CODE ANN § 21-5-35 (2013); LA. REV. STAT. ANN. § 18:1505.2(Q) (2012); MD. CODE ANN. ELEC. LAW § 13-235 (WEST 2013); VA. CODE ANN. § 24.2-954 (2013); UTAH CODE ANN. § 36-11-305 (2012).

68. NEV. REV. STAT. § 294A.300 (2011); TEX. ELEC. CODE ANN. § 253.034 (West 2013); Texas Ethics Commission Rule § 22.11; WASH. REV. CODE § 42.17A.560 (2013).

69. N.M. STAT. ANN. § 1-19-34.1 (West 2013); TENN. CODE ANN. § 2-10-310 (2013).

70. WIS. STAT. § 13.625 (2013).

Thus, the most blanket restriction session freeze laws affect both the legislature and the governor, affect only currently sitting elected officials, and apply only during the duration of the legislative session.

2. Identity-Based Restrictions on Contributions During Session

Identity-based[71] session freeze laws share a great deal in common with total contribution bans.[72] Like the session freeze laws discussed above, identity-based bans vary depending on which elected officials are affected, whether the law affects only incumbents or includes challengers, and the duration that the bans are in effect. The only major difference is that identity-based bans only bar certain individuals from donating *during the prohibited time period*.

States are split as to which elected officials are affected by identity-based session freeze laws. Four states have their session freeze affect all elected state officials.[73] Two states restrict contributions to the governor and the legislature,[74] and the remaining four states only restrict contributions to the legislature.[75] The majority of identity-based restrictions apply to both incumbents and challengers,[76] with just three states restricting their session freeze to incumbent officials.[77] Additionally, most identity-based session freeze laws apply during the legislative session, with an extended application for the governor during the veto period after the legislative session ends.[78] Only Kansas has a blackout period that starts before the legislative session begins.[79]

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71. It is worth noting here that a number of states and the federal government have identity-based blanket bans on contributions for some groups, most commonly lobbyists or government contractors. *See, e.g.*, 2 U.S.C. § 441c(a)(1)-(2) (2013); CONN. GEN. STAT. § 9-610(e) (2013); CAL. GOV'T CODE § 85702 (West 2013); KY. REV. STAT. ANN. § 6.767 (West 2012); S.C. CODE ANN. § 2-17-80 (2012).

72. *See supra* note 49.

73. COLO. REV. STAT. § 1-45-105.5 (2012); CONN. GEN. STAT. § 9-610(e) (2013); IOWA CODE § 68A.504 (2013); KAN. STAT. ANN. § 25-4153a (2012).

74. ARIZ. REV. STAT. ANN. § 41-1234.01 (2013); ME. REV. STAT. 1 § 1015(3) (2013).

75. MINN. STAT. § 10A.273 (2013); OKLA. STAT. 21 § 187.1 (2013); Oklahoma Ethics Commission Rules § 257:10-1-6; VT. STAT. ANN. 2 § 266(3) (2013).

76. COLO. REV. STAT. § 1-45-105.5 (2012); CONN. GEN. STAT. § 9-610(e) (2013); IOWA CODE § 68A.504 (2013); KAN. STAT. ANN. § 25-4153a (2012); MINN. STAT. § 10A.273 (2013); OKLA. STAT. 21 § 187.1 (2013); Oklahoma Ethics Commission Rules § 257:10-1-6.

77. ARIZ. REV. STAT. ANN. § 41-1234.01 (2013); ME. REV. STAT. 1 § 1015(3) (2013); VT. STAT. ANN. 2 § 266(3) (2013); N.C. GEN. STAT. § 163-278.13b (WEST 2013).

78. ARIZ. REV. STAT. ANN. § 41-1234.01 (2013); CONN. GEN. STAT. § 9-610 (2013); COLO. REV. STAT. § 1-45-105.5 (2012); IOWA CODE § 68A.504 (2013); ME. REV. STAT. 1 § 1015(3) (2013); MINN. STAT. § 10A.273 (2013); VT. STAT. ANN. 2 § 266(3) (2013); OKLA. STAT. 21 § 187.1 (2013); Oklahoma Ethics Commission Rules § 257:10-1-6.

79. KAN. STAT. ANN. § 25-4153a (2012).

The hallmark of an identity-based ban is when specific individuals are prohibited from donating during session. The identities of those prohibited from contributing to campaigns during session range from the most prohibitive, which bar any non-individual person from contributing during the freeze,[80] to less expansive bans, such as bans on lobbyists and Political Action Committees (PACs),[81] and bans on lobbyists and their employers.[82] Additionally, Wisconsin, which has a total ban during the legislative session on all contributions, also bars contributions from registered lobbyists at any time.[83]

Indeed, based on the aggregate of all these states' statutes, the standard identity-based session freeze law would affect all state elected officials, apply to both incumbents and challengers, only apply during the exact duration of the legislative session, and only apply to registered lobbyists and those who employ them.

C. Challenges to State Session Freeze Laws

While a total of twenty-four[84] states have some form of a session freeze law currently on the books, these laws have been challenged a whopping total of seven times. Furthermore, although these challenges have been generally successful, a close reading of the cases demonstrates that there are certain characteristics that courts find problematic, particularly how tailored the law is to the accepted government interest of fighting corruption.

First, it is important to note that every case that has interpreted a session freeze statute has reiterated the long-held concept that combating corruption or the appearance of corruption is a compelling state interest.[85] The strength of this government interest has been long recognized[86]

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80. *Id.* Kansas also has an express ban on lobbyists and Political Action Committees from contributing at any time, not just during the legislative session. *Id.*

81. CONN. GEN. STAT. § 9-610(e) (2013); IOWA CODE § 68A.504 (2013); MINN. STAT. § 10A.273 (2013).

82. ARIZ. REV. STAT. ANN. § 41-1234.01 (2013); COLO. REV. STAT. § 1-45-105.5 (2012); ME. REV. STAT. 1 § 1015(3) (2013); OKLA. STAT. 21 § 187.1 (2013); Oklahoma Ethics Commission Rules § 257:10-1-6; VT. STAT. ANN. 2 § 266(3) (2013).

83. WIS. STAT. § 13.625 (2013).

84. Four other states, California, Illinois, Kentucky, and South Carolina, have total bans on lobbyist contributions, regardless of time of year. *See* CAL. GOV'T CODE § 85702 (West 2013); 5 ILL. COMP. STAT. 430 / 5-40 (West 2013); KY. REV. STAT. ANN. § 6.767 (West 2012); S.C. CODE ANN. § 2-17-80 (2012).

85. N.C. Right to Life, Inc. v. Bartlett, 168 F.3d 705, 715–16 (4th Cir. 1999); Emison v. Catalano, 951 F. Supp. 714, 723 (E.D. Tenn. 1996); Shrink Mo. Gov't PAC v. Maupin, 922 F. Supp. 1413, 1420 (E.D. Mo. 1996); State v. Alaska Civil Liberties Union, 978 P.2d 597, 630 (Alaska 1999); Kimbell v. Hooper, 665 A.2d 44, 51 (Vt. 1995); State v. Dodd, 561 So. 2d 263, 265 (Fla. 1990).

and was affirmed in *Citizens United*.[87] Second, it is also important to note the courts' divergence on which standard of review should be applied to session freeze statutes. Although *Buckley* established that contribution limits are to be governed by the slightly less-deferential exacting scrutiny standard,[88] most courts have actually chosen to apply strict scrutiny.[89] These courts appear to be applying strict scrutiny because they believe that the kind of restriction on associational or speech freedoms represented by a ban on contributions, even one that is temporary in nature, must meet that higher bar.[90] To date, six of the seven courts to examine session freeze laws have applied strict scrutiny.[91] The remaining court appropriately applied exacting scrutiny, noting that *Buckley* expressly held that contribution limits are a lesser restriction on speech and associational freedoms than expenditure limits.[92]

The standard of review question is critical in campaign finance cases, as it is in most cases that analyze constitutional rights. Of the six cases that have examined session freeze laws under strict scrutiny, only one[93] has upheld the statute at issue. Conversely, the only court to apply the exacting scrutiny analysis upheld the session freeze law.[94] That being said, the court's choice of a standard of review cannot be regarded as wholly dispositive of the outcome in these cases; other factors, such as whether the laws affected both challengers and incumbents, must also be considered. The following subsections of this Comment will focus on the aforementioned seven cases, their outcomes, and which factors appear to have controlled the courts' analysis.

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86. This interest was cited with strong approval in *Buckley*. Buckley v. Valeo, 424 U.S. 1, 26 (1976).

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

88. *See supra* note 29.

89. *See, e.g.*, *N.C. Right to Life*, 168 F.3d at 715; Ark. Right to Life State Political Action Comm. v. Butler, 29 F. Supp. 2d 540, 553 (W.D. Ark. 1998); *Emison*, 951 F. Supp. at 723; *Dodd*, 561 So. 2d 263.

90. *See, e.g.*, *Dodd*, 561 So. 2d at 264 ("As a result, we believe the present case involves weighty free speech and associational rights protected both by federal and Florida constitutional law. Any restrictions the state imposes on the conduct in question must be narrowly tailored to serve a compelling state interest.") (internal citations omitted).

91. *N.C. Right to Life*, 168 F.3d at 715; *Emison*, 951 F. Supp. at 723; Shrink Mo. Gov't PAC v. Maupin, 922 F. Supp. 1413, 1420 (E.D. Mo. 1996); State v. Alaska Civil Liberties Union, 978 P.2d 597, 630 (Alaska 1999); *Dodd*, 561 So. 2d at 264.

92. Kimbell v. Hooper, 665 A.2d 44, 51 (Vt. 1995).

93. *N.C. Right to Life*, 168 F.3d at 717.

94. *Kimbell*, 665 A.2d at 51.

1. Overturned Session Freeze Laws

All six of the session freeze laws that were overturned were deemed unconstitutional because they were overinclusive, underinclusive, or both.[95] Additionally, these cases shared two other key similarities: first, the courts applied strict scrutiny,[96] and second, each court agreed that the government had a legitimate state interest in the prevention of corruption or the appearance of corruption with a session freeze statute.[97] The courts' approval of the use of session freeze laws to combat corruption and the appearance of corruption is critical because this is the only legitimate government interest sanctioned by *Citizens United*.[98]

It is necessary to look at the construction of the specific session freeze statutes in order to understand what distinguishes those that were upheld from those that were overturned. Four of the five challenged statutes encompassed both incumbents and challengers seeking office.[99] *Arkansas Right to Life State Political Action Committee v. Butler* (*ARTL*), the only case that struck down a statute that applied to only incumbents, relied heavily on one of the cases that struck down a law that applied to both challengers and incumbents.[100] This distinction is critical because each of the courts focused on the overbroad nature of the statute when discussing why the statute was unconstitutional.[101]

For example, in *Emison v. Catalano*, the Tennessee Supreme Court focused heavily on the argument that the inclusion of non-incumbents drastically reduced the government's anti-corruption interest.[102] The court held that the session freeze law, "although inspired by the commendable impulse to eliminate corruption and the appearance of corruption in political life, cannot constitutionally be applied to contributions to non-incumbent candidates for seats in the legislature."[103] Furthermore, when discussing whether the law was narrowly tailored, the court held that black-out provisions, like the one challenged, did not provide the

95. Ark. Right to Life State Political Action Comm. v. Butler, 29 F. Supp. 2d 540, 552 (W.D. Ark. 1998); *Emison*, 951 F. Supp. at 723; *Shrink Mo. Gov't PAC*, 922 F. Supp. at 1421–22; *Alaska Civil Liberties Union*, 978 P.2d at 631; *Dodd*, 561 So. 2d at 265–66.

96. *Ark. Right to Life State Political Action Comm.*, 29 F. Supp. 2d at 551; *Emison*, 951 F. Supp. at 723; *Shrink Mo. Gov't PAC*, 922 F. Supp. at 1420; *Alaska Civil Liberties Union*, 978 P.2d at 631; *Dodd*, 561 So. 2d at 264.

97. *See* cases cited *supra* note 85.

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

99. *Emison*, 951 F. Supp. at 716–17; *Shrink Mo. Gov't PAC*, 922 F. Supp. at 1414; *Alaska Civil Liberties Union*, 978 P.2d at 630; *Dodd*, 561 So. 2d at 263–64.

100. *Ark. Right to Life State Political Action Comm.*, 29 F. Supp. 2d at 550–52.

101. *See* cases cited *supra* note 95.

102. *Emison*, 951 F. Supp. at 723.

103. *Id.*

least intrusive means of achieving the elimination of political corruption. The court held that this method deprived non-incumbents, who are not subject to corrupting quid pro quo arrangements in the same way as are sitting legislators, of any means to counterbalance incumbents' advantage of "virtually unlimited access to the press and free publicity merely by virtue of the public forum they are privileged to occupy."[104] The Alaska Supreme Court overturned its state's session freeze law for similar reasons.[105]

Other courts emphasized the underinclusive nature of the session freeze laws in their decisions to overturn the statutes while still agreeing that the inclusion of challengers was a serious problem. For example, the court in *State v. Dodd* was concerned with other factors it felt rendered the law as both over and underinclusive.[106] Like the courts in Tennessee and Alaska, the *Dodd* court agreed that the inclusion of non-incumbent challengers weakened the state's anti-corruption interest.[107] The court further held that the statute's inclusion of special sessions of the legislature in the ban, which could occur at any time and last an unknown duration, represented a serious constraint on fundraising.[108] Moreover, the court felt that the name recognition and contacts within the community enjoyed by incumbents rendered them able to handle a session freeze better than challengers, placing challengers at a serious disadvantage.[109] Finally, the *Dodd* court found the statute to be underinclusive because the statute ignored the fact that potentially corrupting contributions could be made when the legislature was not in session.[110]

Similarly, the courts in *ARTL* and *Shrink Missouri Gov't PAC v. Maupin* (*Shrink Mo.*) were also concerned about the underinclusive nature of the statutes because a corrupting contribution could happen at any time.[111] The *ARTL* and *Shrink Mo.* courts differ from the courts in *Dodd*, *Alaska Civil Liberties Union*, and *Emison*, however, because they expressly found their respective session freeze laws overbroad on the grounds that small contributions have no corrupting effect.[112] The court in *Shrink Mo.* further determined that while combating corruption and

104. *Id.*

105. State v. Alaska Civil Liberties Union, 978 P.2d 597, 631 (Alaska 1999).

106. State v. Dodd, 561 So. 2d 263, 265–66 (Fla. 1990).

107. *Id*. at 265.

108. *Id.*

109. *Id.*

110. *Id*. at 265–66.

111. Ark. Right to Life State Political Action Comm. v. Butler, 29 F. Supp. 2d 540, 552 (W.D. Ark. 1998); Shrink Mo. Gov't PAC v. Maupin, 922 F. Supp. 1413, 1422 (E.D. Mo. 1996).

112. *Ark. Right to Life State Political Action Comm*., 29 F. Supp. 2d at 552; *Shrink Mo. Gov't PAC*, 922 F. Supp. at 1421.

the appearance of corruption is a compelling government interest, the state had not demonstrated enough concrete proof that any corruption or appearance of corruption had occurred.[113]

Although an important decision, *ARTL* is an outlier because the statute in this case only applied to incumbents.[114] Although the court in *ARTL* relied on many of the same arguments advanced in *Shrink Mo.*,[115] the court failed to distinguish the key characteristic that the law only applied to incumbents. Furthermore, the court in *ARTL* also relied heavily on the district court's opinion in *North Carolina Right to Life, Inc. v. Bartlett*, which was later reversed by the Fourth Circuit.[116] Accordingly, the outcome in *ARTL* is questionable.

Consequently, courts tend to overturn session freeze statutes when the laws are insufficiently tailored to meet the compelling government interest of combating corruption. Statutes are overinclusive when they include challengers who have no ability to directly affect legislation while they are campaigning.[117] Additionally, a few courts found that these statutes were underinclusive because a corrupting contribution could occur at any time, not just during the legislative session.[118] Finally, the fact that each of these courts utilized strict scrutiny review[119] must be considered in the overall analysis.[120]

2. Upheld Session Freeze Laws

Because only two courts have found session freeze laws to be constitutional, it is harder to draw any broad-based conclusions. However, these two cases do share a few key characteristics. First, like the cases in Part II.C.1,[121] both courts agreed that the state had a compelling interest in combating corruption and the appearance of corruption.[122] Second,

113. *Shrink Mo. Gov't PAC*, 922 F. Supp. at 1421.

114. *Ark. Right to Life State Political Action Comm.*, 29 F. Supp. 2d at 552.

115. In fact, large portions of the case are direct quotes to *Shrink Mo. Gov't PAC*.

116. N.C. Right to Life, Inc. v. Bartlett, 168 F.3d 705, 716–17 (4th Cir. 1999).

117. *See* cases cited *supra* note 95.

118. State v. Dodd, 561 So. 2d 263, 265–66 (Fla. 1990).

119. *See* cases cited *supra* note 96.

120. The problems with applying strict scrutiny review to session freeze laws will be discussed in more detail *infra* Part IV.A.

121. Ark. Right to Life State Political Action Comm. v. Butler, 29 F. Supp. 2d 540, 552 (W.D. Ark. 1998); Emison v. Catalano, 951 F. Supp. 714, 723 (E.D. Tenn. 1996); Shrink Mo. Gov't PAC v. Maupin, 922 F. Supp. 1413, 1421–22 (E.D. Mo. 1996); State v. Alaska Civil Liberties Union, 978 P.2d 597, 631 (Alaska 1999); *Dodd*, 561 So. 2d at 265–66.

122. N.C. Right to Life, Inc. v. Bartlett, 168 F.3d 705, 716–17 (4th Cir. 1999); Kimbell v. Hooper, 665 A.2d 44, 51 (Vt. 1995).

unlike the cases in Part II.C.1,[123] both courts found the session freeze laws in question to be suitably tailored to achieve this compelling interest.[124] However, unlike session freeze laws that have been overturned, there is a split on which standard of review is used by the courts. One of the two cases applied strict scrutiny[125] while the other applied exacting scrutiny.[126]

The first case, *North Carolina Right to Life, Inc. v. Bartlett* (*NCRTL*),[127] is the only case to apply strict scrutiny to a session freeze law and find the statute constitutional.[128] This in and of itself is not remarkable because the statute has a key attribute that renders it far more narrowly tailored than the statutes discussed above. The statute at issue in *NCRTL* was an identity-based ban,[129] unlike the total bans discussed above. North Carolina's statute established an absolute ban during session on the acceptance and solicitation of contributions to both incumbents and challengers for legislative office by lobbyists and any PAC that employs a lobbyist.[130]

North Carolina's statute has a number of factors that render the law narrower than the total bans discussed above. It applies only to members of the legislature and the lobbyists who have day-to-day interactions with them during the legislative session.[131] The court in *NCRTL* held that this factor demonstrated the compelling nature of the government's anti-corruption interest.[132] Furthermore, the court stated that "[i]f lobbyists are free to contribute to legislators while pet projects sit before them, the temptation to exchange 'dollars for political favors' can be powerful."[133] Additionally, the court cited evidence of actual corruption through pay-

123. *Ark. Right to Life State Political Action Comm*., 29 F. Supp. 2d at 552; *Emison*, 951 F. Supp. at 723; *Shrink Mo. Gov't PAC*, 922 F. Supp. at 1421–22; *Alaska Civil Liberties Union*, 978 P.2d at 631; *Dodd*, 561 So. 2d at 265–66.

124. *N.C. Right to Life*, 168 F.3d at 716; *Kimbell*, 665 A.2d at 51.

125. *N.C. Right to Life*, 168 F.3d at 715.

126. *Kimbell*, 665 A.2d at 50.

127. The case cited here is the Fourth Circuit opinion that found the statute to be constitutional, reversing the district court opinion mentioned above.

128. *N.C. Right to Life*, 168 F.3d at 715.

129. N.C. GEN. STAT. ANN. § 163-278.13B(c) (West 2013).

130. *Id.*; *N.C. Right to Life*, 168 F.3d at 714.

131. "While the General Assembly is in regular session, no limited contributee or the real or purported agent of a limited contributee shall: (1) Solicit a contribution from a limited contributor to be made to that limited contributee or to be made to any other candidate, officeholder, or political committee; or (2) Solicit a third party, requesting or directing that the third party directly or indirectly solicit a contribution from a limited contributor or relay to the limited contributor the limited contributee's solicitation of a contribution." N.C. GEN.STAT. ANN. § 163-278.13B(c) (West 2013).

132. *N.C. Right to Life*, 168 F.3d at 715–16.

133. *Id.*

to-play scandals in other states[134] and noted that there did not need to be any proof of actual corruption in North Carolina because "[t]he First Amendment does not prevent states . . . from recognizing these dangers and taking reasonable steps to ensure that the appearance of corruption does not undermine public confidence in the integrity of representative democracy."[135]

The court in *NCRTL* found the statute to be narrowly tailored because the statute only restricted contributions by lobbyists and PACs and the law was limited to the time when corruption issues were most likely to occur.[136] First, the court found a direct link with the anti-corruption interest because the restrictions were focused on only lobbyists and the political committees that employed them, noting that these were the "two most ubiquitous and powerful players in the political arena."[137] Second, the court found that the statute was narrowly tailored to combating corruption because the limitations did not prohibit all contributions and focused only on the "period during which the risk of an actual quid pro quo or the appearance of one runs highest."[138] The court also rejected arguments by the plaintiffs that the statute was overbroad due to its inclusion of challengers because challengers cannot vote for legislation and therefore could not be corrupted by a donation. However, the court noted that a contribution to a challenger could serve as a "powerful [] incentive" to an incumbent politician to vote against those who donated to their opponents, and thus could still lead to corruption.[139]

Although the *NCRTL* court employed a similar rationale as did the court in *Kimbell v. Hooper*,[140] the second case in which a session freeze law was upheld, the two statutes involved had important differences. The courts also used different standards of review. In *Kimbell*, the Vermont Supreme Court examined a similar statute and reached many of the same conclusions as the *NCRTL* court. The statute in question was even narrower than the North Carolina statue in *NCRTL*. Like the North Carolina statute, the statute in Vermont was an identity-based restriction that banned lobbyists and employers of lobbyists from making contributions during session.[141] However, the Vermont statute only affected incumbent legislators, allowing contributions to challengers to continue during the

134. *Id*. at 716.
135. *Id.*
136. *Id.* at 715–16.
137. *Id.*
138. *Id.*
139. *Id.*
140. Kimbell v. Hooper, 665 A.2d 44, 51 (Vt. 1995).
141. VT. STAT. ANN. 2 § 266(3) (2013).

legislative session.[142] Another key difference was that the court in *Kimbell* properly applied exacting scrutiny, noting that *Buckley* expressly created this standard of review for contribution limitations.[143] The court in *Kimbell* further held that because the limitations were only temporary in nature, the temporal restrictions in the statute were a lesser constraint than the dollar values limited in *Buckley*.[144]

Beyond the narrower construction of the statute and the different standard of review, the court in *Kimbell* did much of the same analysis and reached a similar conclusion as the court in *NCRTL*. First, the court found that the state had a sufficiently important interest in preventing corruption or the appearance of corruption.[145] Second, the court found the statute to be closely drawn because "the limited prohibition focuses on a narrow period during which legislators could be, or could appear to be, pressured, coerced, or tempted into voting on the basis of cash contributions rather than on consideration of the public weal."[146]

Although only two courts have considered this issue, both courts upheld their state's session freeze statute for similar reasons. Therefore, it appears that courts will uphold session freeze statutes when they are based on both the identity of the contributor and restricted to only members of the legislature because these limitations render the statutes properly tailored to the government interest of preventing corruption.[147] While there is a split as to the applicable standard of review, it is clear that session freeze laws can meet both the lower exacting scrutiny as well as the higher strict scrutiny.

III. A FEDERAL SESSION FREEZE PROPOSAL

Whether it is true that *Citizens United* made it impossible to reduce the amount of money flowing into political campaigns, it is still critical that the government take steps to reduce the appearance of corruption. States enacted session freeze laws in part to help create a bright line between the two roles a politician must occupy: candidate and elected official. The need for some kind of line between campaigning and governing is nothing new,[148] and this Comment suggests that the introduction of a

142. *Id.*

143. *Kimbell*, 665 A.2d at 50.

144. *Id.*

145. *Id.*

146. *Id.*

147. N.C. Right to Life, Inc. v. Bartlett, 168 F.3d 705, 716–17 (4th Cir. 1999); *Kimbell*, 665 A.2d at 51.

148. *See, e.g.*, BRENDAN DOHERTY, THE POLITICS OF THE PERMANENT CAMPAIGN: PRESIDENTIAL TRAVEL, FUNDRAISING, AND THE ELECTORAL COLLEGE, 1977–2004 (2007), *availa-*

session freeze at the federal level would help restore citizens' faith in government and help ease the perception that an elected official's vote is for sale.

A. Congress Should Enact an Identity-Based Session Freeze During Congress's Official Session

Congress should enact a law to prohibit contributions by lobbyists and the employers of lobbyists while Congress is in official session. This proposal incorporates the factors cited with approval by state courts and avoids the issues that resulted in other state statutes being overturned. The proposal would only impact incumbent members of Congress. Additionally, the law would only regulate contributions by lobbyists and the employers of lobbyists.[149] Furthermore, the ban would take place only while the chamber that the member belongs to is in session. This last element, however, is the most problematic as neither chamber of Congress meets full-time when they are called into session by leadership.[150] Conversely, most state legislatures—including all state legislatures with session freeze statutes—are part-time in nature and only meet full-time during certain parts of the year.[151] For example, the Washington State Legislature meets ninety days in odd numbered years and sixty days in even numbered years, with the first day of session beginning the second Monday in January.[152]

Although the lack of a statutorily defined session appears to be an issue, the level of control the majority caucus leaders have renders this issue moot. At first glance, the lack of a definitive calendar might make it more difficult to easily pinpoint the times at which corruption, or the appearance of corruption, are most likely to take place. With further consideration, however, it becomes clear that a session freeze law could still

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ble at http://citation.allacademic.com/meta/p196697index.html (paper presented at the annual meeting of the Midwest Political Science Association at the Palmer House Hotel in Chicago, Illinois).

149. It is important to note that there is already precedent for an identity-based restriction on donations to federal elected officials. 2 U.S.C. § 441c(a)(1)–(2) currently prohibits current or prospective government contractors from making any contributions to federal elected officials at any time. An injunction against the enforcement of this ban was recently rejected by the U.S. District Court in Washington, D.C. *See* Wagner v. Fed. Election Comm'n, 854 F. Supp. 2d 83, 99 (D.D.C. 2012).

150. In fact, Congress must only meet once a year to satisfy the Constitution's requirements. *See* U.S. CONST. art. I § 4, cl. 2; U.S. CONST. amend. XX, § 2. The actual schedules of the House and Senate are set by leadership, rather than statute. *See* Eric Cantor, *House Calendar*, MAJORITYLEADER, http://majorityleader.gov/Calendar/ (last visited Aug. 31, 2013).

151. *See, e.g.*, *Full and Part-time Legislatures*, NAT'L CONF. OF ST. LEGISLATURES, http://www.ncsl.org/legislatures-elections/legislatures/full-and-part-time-legislatures.aspx (last updated June 2009).

152. Wash. Const. art. II, § 12.

follow the same template as a state session freeze law. A federal session freeze law should begin on the first day of the regular session for both chambers of Congress and last until the final day. Both chambers already take recesses to allow for district visits and campaigning,[153] and it would be simple to turn those recesses into full adjournments and adjust the rest of the congressional calendar accordingly.

While one can argue that elected officials might ignore the issue by continuing to use recesses rather than adjournments to allowed continual fundraising, this problem would be addressed at the ballot box. If members of Congress do not appear to be spending enough time legislating, this problem can become a campaign issue that can, and likely will, be taken back to the electorate. Even members of Congress admit that they spend an inordinate amount of time fundraising.[154] This issue is partially caused by the lack of a fixed session; citizens simply do not know when Congress is going about their work. This proposal would create an incentive for politicians to partition their time and make it easier for the electorate to see exactly how much time is spent legislating compared to fundraising. If the citizens did not agree, they would then be armed with sufficient information to take to the ballot box.

Structurally, the proposal is substantively identical to the Vermont law upheld in *Kimbell*. The proposal would apply only to incumbent members of the legislature, affect only contributions from lobbyists and their employers, and last only while Congress is officially in session.[155] Additionally, this formula could easily be enacted in each of the twenty-five states that do not currently have a session freeze law, which, as this Comment argues, makes it an effective tool to limit corruption or the appearance of corruption in national politics.[156]

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153. *See* Cantor, *supra* note 150.

154. *See, e.g.*, Ryan Grim & Sabrina Siddiqui, *Call Time for Congress Shows How Fundraising Dominates Bleak Work Life*, HUFFINGTON POST (Jan. 08, 2013, 7:30 AM), http://www.huffington post.com/2013/01/08/call-time-congressional-fundraising_n_2427291.html ; Andy Kroll, *Retiring Senator: Congress Doesn't Work Because We Fundraise Way Too Much*, MOTHER JONES (Jan. 28, 2013, 7:48 AM), http://www.motherjones.com /mojo/2013/01/tom-harkin-retire-senator-fundraise-money.

155. *See* VT. STAT. ANN. 2 § 266(3) (2013).

156. Although twenty-five states do not have session freeze laws, three states (California, Kentucky, and South Carolina) have blanket identity-based bans against fundraising for lobbyists at any time. *See* CAL. GOV'T CODE § 85702 (West 2013); KY. REV. STAT. ANN. § 6.767 (West 2012); S.C. CODE ANN. § 2-17-80 (2012). Illinois also has a blanket ban against fundraising in the county that holds the capitol during session. *See* 5 ILL. COMP. STAT. 430 / 5-40 (West 2009).

IV. A FEDERAL SESSION FREEZE WOULD BE CONSTITUTIONAL

Inevitably, any new federal campaign law will be challenged in court, particularly in this climate of deregulating the campaign industry.[157] The proposal in Part III is likely to survive such a challenge because it supports an accepted government interest—the prevention of corruption and the appearance of corruption—and is tailored in a way that has survived similar constitutional challenges. From a policy perspective, this proposal balances the need to allow elected officials to raise the funds necessary to compete in an election with the need to create a bright-line delineation between governing and campaigning. Furthermore, this proposal does not create an undue hardship—a potential constitutional challenge—on incumbent elected officials because state elected officials, while not elected at quite the staggering[158] rate as federal elected officials, are still reelected over 80% of the time.[159] For example in Washington state, which has a blanket restriction on contributions during session, only three incumbent elected officials out of one hundred forty-seven lost in 2012.[160] In twelve of the fourteen states with blanket restrictions on contributions during session, only four incumbents on average lost their races per state.[161] Furthermore, the creation of a bright line between governing and campaigning will help reduce citizen frustrations about moneyed interests having too much influence. Although the 2012 election was the most expensive election in history,[162] it appears that money alone is not enough to buy an election.[163] Accordingly, regulating the amount of money raised and spent in a campaign alone is not enough to help restore citizens' faith in government. While frustrations about campaign spending and accountability do not comprise the total

157. In the last three years, a number of long-standing campaign finance restrictions have been successfully overturned. For cases striking down corporate campaign contributions, independent expenditure limits, and public financing see *supra* note 46.

158. Ctr. for Responsive Politics, *Reelection Rates Over the Years*, OPENSECRETS, http://www.opensecrets.org/bigpicture/reelect.php (last visited Aug. 31, 2013).

159. Geoff Pallay, *Ballotpedia Study: More Incumbent State Legislators Losing in Primaries Than Prior Election Cycles*, BALLOTPEDIA, http://107.6.13.241/wiki/index.php/Ballotpedia_study:_More_incumbent_state_legislators_losing_in_primaries_than_prior_election_cycles.

160. Ballotopedia's State Legislative Team, *Incumbents Defeated in 2012's State Legislative Elections*, BALLOTPEDIA, http://ballotpedia.org/wiki/index.php/Incumbents_defeated_in_2012%27s_state_legislative_elections#tab=General_Election (last modified May 29, 2013, 3:31 PM).

161. *Id*.

162. Hudson, *supra* note 2.

163. Of the over $1 billion in independent expenditures made in the 2012 cycle, nearly $730 million was spent by conservative groups compared to $305 million by liberal groups. CTR. FOR RESPONSIVE POLITICS, *Total Outside Spending by Election Cycle, Excluding Party Committee*s, OPENSECRETS, http://www.opensecrets.org/outsidespending/cycle_tots.php?cycle=2012&view=Y&chart=N (last visited Aug. 31, 2013).

reason why citizens do not trust their government, it is a component, and one this proposal helps address.

The next two subsections will evaluate the proposal suggested in Part III. As a threshold matter, subpart A will discuss the confusion around the standard of review for session freeze laws and demonstrate that exacting scrutiny is the proper standard of review. Subpart B will apply both standards of review to the proposal and demonstrate why it should be found constitutional if challenged.

A. Exacting Scrutiny Is the Proper Standard of Review

Because the proposal would likely be challenged, it is necessary to elaborate on the proper standard of review for session freeze laws. The proper standard of review for session freeze laws is exacting scrutiny. Unfortunately, the standard of review question has been muddled because lower courts have mistakenly applied strict scrutiny over the last thirty years. The decision some courts have made to apply strict scrutiny to session freeze laws appears to be based on the erroneous conclusion that a temporary ban on contributions is such a large constraint on speech that it should be considered more akin to an expenditure limit than a contribution limit.[164] However, this argument contradicts the plain language of *Buckley*.[165]

Buckley clearly provided that contribution limitations required a lesser standard of review than expenditure limitations because a limitation on the amount of money a person can give to a candidate or campaign organization "involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues."[166] Since *Buckley*, many cases have cited this rule with approval and applied the lower exacting scrutiny standard to contribution limitations.[167] Conversely, the Supreme Court has rarely applied strict scrutiny to contribution limitations.[168] Many lower courts thus appear to apply the more rigorous standard of review to

164. *See, e.g.*, State v. Dodd, 561 So. 2d 263, 264 (Fla. 1990).

165. Buckley v. Valeo, 424 U.S. 1 (1976).

166. *Id.*

167. *See, e.g.*, Federal Election Comm'n v. Mass. Citizens for Life, 479 U.S. 238, 259–60 (1986); Cal. Medical Ass'n v. Federal Election Comm'n, 453 U.S. 182, 196 (1981) (Marshall, J., plurality); Citizens Against Rent Control v. Berkeley, 454 U.S. 290, 301 (1981).

168. *See, e.g.*, *Cal. Medical Ass'n*, 453 U.S. at 201–02 (Blackmun, J., concurring in part and in judgment); *Citizens Against Rent Control*, 454 U.S. at 302 (Blackmun & O'Connor, JJ., concurring in judgment).

either ensure that they grant sufficient deference to the First Amendment or out of fear of being reversed by a higher court.

The decision to apply strict scrutiny by the lower courts is often backed by illogical arguments and mischaracterizations of the exacting scrutiny standard. For example, the Eighth Circuit in *Carver v. Nixon*[169] chose to apply strict scrutiny after noting that *Buckley* and the subsequent United States Supreme Court cases chose to apply exacting scrutiny because "[t]he Court has not ruled that anything other than strict scrutiny applies in cases involving contribution limits."[170] This conclusion comes after a fairly exhaustive examination of opinions applying exacting scrutiny to contribution limits, which noted that exacting scrutiny is the standard applied in most majority and plurality opinions.[171] Furthermore, the decisions by a few courts to apply strict scrutiny to contribution limitation cases are then compounded because other courts will use those cases as a basis to apply strict scrutiny in their own decisions. For example, the decision of the Fourth Circuit to use strict scrutiny in *NCRTL* was premised completely on the Eighth Circuit's decision to do so in *Carver*.[172]

Additionally, courts in Alaska,[173] Missouri,[174] and Tennessee[175] either partially or wholly premised their decision to apply strict scrutiny on the Florida Supreme Court's holding in *State v. Dodd*. The *Dodd* court dealt with the standard of review in a cursory manner, noting only that "[a]ny restrictions the state imposes on the conduct [protected by the First Amendment] must be narrowly tailored to serve a compelling state interest."[176] What is more, the *Dodd* court cites *Austin v. Michigan Chamber of Commerce* for its authority of the use of the strict scrutiny standard.[177]

Reliance on *Austin* for the standard of review for contribution limitation cases is erroneous for a number of reasons. First, the Supreme

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169. The law in question in *Carver* would have limited contributions by an individual to a candidate to $100 per election cycle in low-population legislative districts, $200 per cycle in high-population legislative districts, and $300 per cycle for state-wide elected office. Carver v. Nixon, 72 F.3d 633, 635 (8th Cir. 1995).

170. *Id.* at 637.

171. *Id.*

172. N.C. Right to Life, Inc. v. Bartlett, 168 F.3d 705, 715 (4th Cir. 1999).

173. State v. Alaska Civil Liberties Union, 978 P.2d 597, 630 n.195 (Alaska 1999); Shrink Mo. Gov't PAC v. Maupin, 922 F. Supp. 1413, 1421–22 (E.D. Mo. 1996).

174. *Shrink Mo. Gov't PAC*, 922 F. Supp. at 1420.

175. Emison v. Catalano, 951 F. Supp. 714, 723 (E.D. Tenn. 1996).

176. State v. Dodd, 561 So. 2d 263, 264 (Fla. 1990).

177. Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 666 (1990), *overruled by* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

Court held in *Austin* that the law in question did not violate the First Amendment, and it was utilizing strict scrutiny as part of an equal protection analysis under the Fourteenth Amendment.[178] Second, the law in question in *Austin* prevented corporations from using general treasury funds for independent expenditures, to which *Buckley* clearly stated the proper standard of review was strict scrutiny.[179] Finally, although this critique does not apply to the Florida Supreme Court in 1995 when *Dodd* was decided, it is important to note going forward that *Austin* is no longer good law because *Citizens United* overruled the case in 2010.[180]

Similarly, the court in *ARTL* erroneously based its decision to apply strict scrutiny on a misstatement in *McIntyre v. Ohio*.[181] In *McIntyre*, the Supreme Court claimed to subject the statute to exacting scrutiny review; however, the standard the Court articulated was actually strict scrutiny.[182] The court in *ARTL* took this to mean that strict scrutiny was the proper standard because the actual standard articulated by Supreme Court was closer to strict scrutiny.[183] In contrast, the Vermont Supreme Court properly applied the exacting scrutiny standard in *Kimbell*, noting that the *Buckley* court expressly held that contribution limitations are held to a lower standard than expenditure limits.[184]

Exacting scrutiny is the proper standard of review in session freeze cases because it is a bright-line rule that was expressly laid down by the Supreme Court in *Buckley*.[185] Furthermore, as noted in *Kimbell*, exacting scrutiny is "less burdensome than the dollar limits upheld in *Buckley*"[186] because it sets "no overall limits" on contributions and functions "solely as a timing measure, banning contributions to individual members only while the General Assembly is in session."[187] Furthermore, session freeze laws do not prohibit contributions to political parties, PACs, or any other political entity during session—only those made to individual legislators. This allows other outlets for individuals who wish to make political contributions during session and do not want to wait until after the session freeze has ended. The ability to donate to other political causes, like po-

178. *Id.*

179. *Id.*

180. *Citizens United*, 558 U.S. at 364.

181. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 347 (1995).

182. In *McIntyre*, the Court said it would uphold the statute "only if it is narrowly tailored to serve an overriding state interest." *Id.* This is clearly strict scrutiny.

183. Ark. Right to Life State Political Action Comm. v. Butler, 29 F. Supp. 2d 540, 547 (W.D. Ark. 1998).

184. Kimbell v. Hooper, 665 A.2d 44 (Vt. 1995).

185. *See supra* note 29.

186. *Kimbell*, 665 A.2d at 51.

187. *Id.*

litical parties and PACs, lessens the overall restriction a session freeze law places on freedom of speech.

B. Proposal Meets Both Strict and Exacting Scrutiny

Although exacting scrutiny[188] is the proper standard of review—as noted above—the proposal will also likely meet strict scrutiny review. There is little doubt that combating corruption or the appearance of corruption is a compelling government interest.[189] The weakest part of the analysis for strict scrutiny is the narrowly tailored element, as strict scrutiny requires there to be no less-restrictive alternatives. Although a difficult standard to meet, this proposal is narrowly crafted and would most likely survive both closely drawn and narrowly tailored review.

1. Preventing Corruption and the Appearance of Corruption Are Compelling and Sufficiently Important Government Interests

There is little doubt that combating corruption and the appearance of corruption are sufficient government interests to survive both strict and exacting scrutiny. First, every court that has considered a session freeze statute has agreed that the anti-corruption interest is compelling.[190] The universal acceptance of the prevention of corruption as a government interest in campaign finance demonstrates that this interest is sufficient to meet the first prong of either exacting or strict scrutiny review. Preventing corruption by barring lobbyists from directly donating to legislators while their projects are being considered will help ensure that the public's trust in the political process is not further harmed. Additionally, as noted in *NCRTL*, "[l]egislative action which is procured directly through gifts, or even campaign contributions, too often fails to reflect what is in the public interest, what enjoys public support, or what represents a legislator's own conscientious assessment of the merits of a proposal."[191]

Second, the anti-corruption interest demonstrated by preventing contributions from lobbyists while legislators are voting satisfies even the narrowest reading of *Citizens United*. The *Citizens United* Court adopted a very narrow construction of what constitutes corruption or the appearance of corruption. In the minds of the majority in *Citizens United*, only the danger of quid pro quo corruption is enough to constitute a

188. Law must be "closely drawn" to satisfy a "sufficiently important" government interest. *See* Buckley v. Valeo, 424 U.S. 1, 25 (1976).

189. *See supra* note 86.

190. *Id.*

191. N.C. Right to Life, Inc. v. Bartlett, 168 F.3d 705, 715 (4th Cir. 1999).

compelling government interest.[192] This proposal directly aligns with this interest by only barring contributions to currently sitting members of Congress who are presently considering legislation and, furthermore, only limits contributions by lobbyists and their employers who necessarily have a direct stake in that legislation. Although the court in *ARTL* claimed that only large contributions represented a danger of corruption,[193] this sentiment was rejected by *Buckley*.

The Court in *Buckley* squarely disavowed the idea that a court should supplant the decision of the legislature about what level of contribution limits were acceptable.[194] Furthermore, the Court further clarified this conclusion when it held that only contribution limits that prevent a candidate from amassing enough funds to compete violated the First Amendment.[195] This proposal does not institute any limitation on the amount or method by which a candidate can raise funds or a donor can contribute them. Rather, as noted in *NCRTL*, session freeze laws only create a temporary bar on when these funds may be raised.[196] Moreover, the court in *NCRTL* dealt with the argument that only large contributions corrupt directly, noting that "[c]orruption, either petty or massive, is a compelling state interest because it distorts both the concept of popular sovereignty and the theory of representative government."[197]

Finally, virtually every case that has interpreted any kind of campaign finance regulation—be it a contribution limit, expenditure limit, disclosure, or public financing—has noted that the anti-corruption interest is compelling.[198] In fact, the Supreme Court has noted that limitations on contributions are the "primary means" by which the Court has allowed the government to limit corruption.[199]

Therefore, the proposal would be found to meet exacting scrutiny because it serves the compelling interest of preventing corruption and the appearance of corruption, which has been recognized as the only "inter-

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

193. Ark. Right to Life State Political Action Comm. v. Butler, 29 F. Supp. 2d 540, 552 (W.D. Ark. 1998).

194. Buckley v. Valeo, 424 U.S. 1, 30 (1976)

195. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 396 (2000).

196. *N.C. Right to Life*, 168 F.3d at 716.

197. *Id.* at 715.

198. *See, e.g.*, Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2825 (2011); Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 357 (2010); *Nixon*, 528 U.S. at 395; Davis v. Fed. Election Comm'n, 554 U.S. 724, 726 (2008); *Buckley*, 424 U.S. at 28; SpeechNow.org v. Fed. Election Comm'n, 599 F.3d 686, 692 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 553 (U.S. 2010).

199. *Ariz. Free Enter. Club's Freedom Club PAC*, 131 S. Ct. at 2825.

est sufficiently important to outweigh the First Amendment interests implicated by contributions for political speech."[200]

2. The Proposal Is Both Narrowly Tailored and Closely Drawn

It is less certain if the proposal is sufficiently tailored to meet the anti-corruption interest required by strict scrutiny. Each of the state session freeze statutes that have been found unconstitutional was struck down because it failed the tailoring prong of the analysis.[201] That being said, this proposal is constructed in such a way to avoid the pitfalls that caused most other session freeze laws to be struck down.

First, the proposal only applies to incumbents, who are sitting members of Congress. This construction avoids the over and underinclusive tailoring issues caused by including non-sitting candidates. The anti-corruption interest is strongest when it is most closely linked to those who are most likely to be corrupted. Because challengers themselves cannot directly vote for or against legislative proposals, several courts found laws that included them to be overbroad.[202] Furthermore, by excluding challengers, this proposal avoids being an incumbency protection measure because it burdens sitting members only and does not place any restriction on challengers. By only affecting incumbents, this proposal answers one of the major concerns of the *Dodd* court [203] as well as a frequent critique of other campaign finance reform efforts.[204]

Second, the proposal only affects lobbyists and those that employ them. Lobbyists are an everyday part of life in Washington, D.C., just as they are in state legislatures. Lobbyists meet with members day in and day out to attempt to persuade them to support or oppose certain projects. Because of this close working relationship, lobbyists have increased access to legislators, and thus an increased ability to influence their actions.[205] Furthermore, the same lobbyists who work with legislators to craft and pass proposals are typically the same individuals who hand out

200. *SpeechNow.org*, 599 F.3d at 692.

201. Ark. Right to Life State Political Action Comm. v. Butler, 29 F. Supp. 2d 540, 552 (W.D. Ark. 1998); Emison v. Catalano, 951 F. Supp. 714, 723 (E.D. Tenn. 1996); Shrink Mo. Gov't PAC v. Maupin, 922 F. Supp. 1413, 1422 (E.D. Mo. 1996); State v. Alaska Civil Liberties Union, 978 P.2d 597, 631(Alaska 1999); State v. Dodd, 561 So. 2d 263, 265–66 (Fla. 1990).

202. *Shrink Mo. Gov't PAC*, 922 F. Supp. at 1422; *Alaska Civil Liberties Union*, 978 P.2d at 631; *Dodd*, 561 So. 2d at 266.

203. *Dodd*, 561 So. 2d at 266.

204. *See, e.g.*, Randall v. Sorrell, 548 U.S. 230, 255 (2006); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 402 (2000).

205. For a more in-depth look at how lobbying works in state capitols, see Trevor D. Dryer, *Gaining Access: A State Lobbying Case Study*, 23 J.L. & POL. 283 (2007).

contribution checks during campaign season.[206] The fact that lobbyists exist in these dual roles creates a problematic issue for campaign finance regulation. Even if lobbyists are not intending to, or actually engaging in, pay-to-play politics with elected officials, there will always be the appearance that this is occurring. This is why the anti-corruption interest allows for the appearance of corruption to be a compelling interest. As noted in *NCRTL*, "[e]ven if lobbyists have no intention of directly 'purchasing' favorable treatment, appearances may be otherwise."[207] Thus, by restricting the timing of contributions by those who have the highest incentive to engage in quid pro quo corruption, the proposal is closely drawn to only capture the most troublesome contacts. Moreover, this limitation addresses the very real appearance of corruption that worries many citizens.

Finally, the proposal is only in effect during regular sessions of Congress, which is the time during which quid pro quo corruption is most likely to take place. By focusing only on the time when actual votes on laws are taking place, the proposal focuses on the time at which the most pressure could be brought to bear on elected officials. As noted by the *Kimbell* court, a limited prohibition that focuses on the "narrow period during which legislators could be, or could appear to be, pressured, coerced, or tempted into voting on the basis of cash contributions rather than on consideration of the public weal"[208] is closely drawn to address that specific concern. Although some courts were concerned that the exclusion of contributions at other points in the year are underinclusive because those contributions could corrupt,[209] this argument ignores the basic workings of a legislature. It is common for bills to be amended as part of the legislative process and for amendments to cause a legislator who once authored a bill to oppose it.[210] Claiming that an elected official could be corrupted by a contribution made when a bill is in its infancy ignores this basic reality. Additionally, limiting the law to only regular sessions removes the concern that fundraising would become impossible

206. For an in-depth look at the interaction between regulation of lobbyists in their roles as lobbyists and campaign contributors, see Richard Briffault, *Lobbying and Campaign Finance: Separate and Together*, 19 STAN. L. & POL'Y REV. 105 (2008).

207. N.C. Right to Life, Inc. v. Bartlett, 168 F.3d 705, 716 (4th Cir. 1999).

208. Kimbell v. Hooper, 665 A.2d 44, 51 (Vt. 1995).

209. *See, e.g.*, Ark. Right to Life State Political Action Comm. v. Butler, 29 F. Supp. 2d 540, 553 (W.D. Ark. 1998).

210. *See, e.g.*, Aaron Blake, *Rubio Currently Opposes Own Immigration Bill*, WASH. POST (June 5, 2013, 8:39 AM), http://www.washingtonpost.com/blogs/post-politics/wp/ 2013/06/05/rubio-currently-opposes-own-immigration-bill/.

due to infinite special sessions.[211] Furthermore, because the U.S. House and Senate create their own schedules,[212] they are not vulnerable to a special session called by a governor, as are state legislatures. Moreover, this fact means the leadership in Congress can evaluate—with input from their members—how much time is needed to campaign versus legislate and ensure that Congress is not in session when members would need time to fundraise. Finally, this flexibility has a backstop in the political process; if the voters feel that Congress is spending too much time fundraising and not enough campaigning, they can choose to elect a challenger. Thus, the proposal clearly meets the closely drawn requirement of the strict scrutiny standard because it only affects the parties most likely to be corrupted during the most likely time for corruption to occur.

However, it is much less certain that the proposal can meet the narrowly tailored prong of strict scrutiny. Although it can be argued that this proposal does not meet the narrowly tailored standard because there are less restrictive alternatives, this argument is not compelling. Federal criminal laws that bar legislators from taking money for votes do nothing to address the fact that this requires actual corruption to have already occurred. As noted in *NCRTL*, the First Amendment does not prevent governments from recognizing the potential for corruption and "taking reasonable steps to ensure that the appearance of corruption does not undermine public confidence in the integrity of representative democracy."[213] The appearance of corruption is no less compelling than actual corruption,[214] and criminal laws do nothing to prevent the appearance of undue influence that exist in the interwoven nature of lobbying and campaigning.

V. CONCLUSION

Post-*Citizens United*, many professionals are concerned about the appearance of our campaigns, and the potential influence of unlimited money on candidates.[215] That being said, the current Supreme Court appears to strongly favor deregulation and a policy of non-legislative inter-

211. *See* State v. Dodd, 561 So. 2d 263, 265 (Fla. 1990) (holding a session freeze law overbroad because it included special sessions that could be called at any time and last any duration).

212. *See supra* text accompanying note 150.

213. N.C. Right to Life, Inc. v. Bartlett, 168 F.3d 705, 716 (4th Cir. 1999) (citing Buckley v. Valeo, 424 U.S. 1, 26–27 (1976)).

214. *See Buckley*, 424 U.S. at 26.

215. *See, e.g.*, Senator Tom Udall, *Amend the Constitution to Restore Public Trust in the Political System: A Practitioner's Perspective on Campaign Finance Reform*, 29 YALE L. & POL'Y REV. 235 (2010).

ference into the political speech arena.[216] To deal with these two contradictory realities, it is important for reformers to think outside of the box and have a clear idea of the outcome they are trying to produce.

In the current climate of the Supreme Court, it is probably impossible to take any real steps to remove or reduce the role of money in politics. The inertia on the Court is simply too strong against regulating money as speech. Even should some of the more conservative members retire in the next few years, the Court would still have to grapple with stare decisis and overruling one of its biggest recent decisions. Perhaps rather than trying to reduce the amount of money in politics, the real focus should be on trying to figure out why citizens do not feel well represented in their government or trust the campaign process. It is with this concept in mind that this Comment suggests a proposal that creates a more bright-line difference between the time elected officials spend campaigning and the time they spend governing.

Although it can be argued that the proposal does not make any major changes in how campaign contributions are gathered, perhaps that is why it is likely to succeed. Because it is not taking any major steps to undermine the precedent the Court has already articulated, it has a chance to be one part of combating the distrust by which regular citizens view the political system. If we refuse to take small steps for fear that they are akin to rearranging the deck chairs on the Titanic, we are missing the point of our legislative process and missing a chance to take a chance to improve citizens' relationship with their government.

216. Carson Griffis, Comment, *Ending A Peculiar Evil: The Constitution, Campaign Finance Reform, and the Need for A Change in Focus After* Citizens United v. FEC, 44 J. MARSHALL L. REV. 773 (2011).