No. 19-___

IN THE

Supreme Court of the United States

REPRESENTATIVE TED LIEU ET AL.,

Petitioner,

v.

FEDERAL ELECTION COMMISSION,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the federal statutory limit on contributions to political committees, 52 U.S.C. § 30116(a)(1)(C), comports with the First Amendment as applied to committees that make only independent expenditures.

PARTIES TO THE PROCEEDING

Petitioners are plaintiffs in this case and were appellants in the court of appeals. They are Representative Ted Lieu, Senator Jeff Merkley, John Howe, Zephyr Teachout, and Michael Wager. Representative Walter Jones was originally a plaintiff but passed away while the case was pending in the district court.

Respondent is the defendant and was the appellee in the court of appeals: the Federal Election Commission.

RELATED PROCEEDINGS

Representative Ted Lieu v. FEC, No. 1:16-cv-02201-EGS (D.D.C. Feb. 28, 2019)

Representative Ted Lieu v. FEC, No. 19-5072 (D.C. Cir. Oct. 3, 2019)

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Ted Lieu, Jeff Merkley, John Howe, Zephyr Teachout, and Michael Wager respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The order of the United States Court of Appeals for the District of Columbia Circuit (Pet. App. 1a) is unpublished but is available at 2019 WL 5394632. The opinion of the United States District Court for the District of Columbia (Pet. App. 3a) is published at 370 F. Supp. 3d 175.

JURISDICTION

The order of the court of appeals was entered on October 3, 2019. Pet. App. 1a. The court of appeals denied a timely petition for rehearing en banc on January 24, 2020. Pet. App. 23a. On March 19, 2020, this Court entered a standing order that had the effect of extending the time within which to file a petition in this case to June 22, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech."

The Appendix to this brief reproduces the relevant provisions of the Federal Election Campaign Act, 52 U.S.C. § 30101 *et seq.* *See* Pet. App. 69a-95a.

INTRODUCTION

The past decade has witnessed the emergence of a new kind of electioneering organization: the Super PAC. Like other political committees, these organizations expressly advocate the election or defeat of candidates for public office. They also fund a variety of other vital campaign activities. But unlike other political committees, Super PACs accept *unlimited* contributions from donors. As a result, a small cadre of extremely wealthy donors now make multi-million-dollar contributions that, for all intents and purposes, bankroll candidates' campaigns for office.

A longstanding provision of the Federal Election Campaign Act prohibits such massive contributions: 52 U.S.C. § 30116(a)(1)(C). Enacting this statute almost a half-century ago, Congress determined that donations to political committees above its specified limit pose an unacceptable risk of corruption. But in *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc), the D.C. Circuit held that Section 30116(a)(1)(C) violates the First Amendment as applied to political committees that make only "independent expenditures"—that is, expenditures that "expressly advocat[e] the election or defeat of a clearly identified candidate" but are not coordinated with candidates or their parties, 52 U.S.C. § 30101(17). According to the D.C. Circuit, this Court's decision in *Citizens United v. FEC*, 558 U.S. 310 (2010), dictates this dramatic conclusion.

Citizens United, however, demands no such thing. *Citizens United* invalidated a ban on campaign *expenditures*, and this Court has long subjected limits on campaign *contributions* to a different—and much more deferential—form of scrutiny. What is more, the

statutory limit on contributions to Super PACs is functionally equivalent to other contribution limits this Court has upheld as recently as 2017 as legitimate means of curbing corruption.

This Court's intervention is sorely needed. An Act of Congress should not be nullified without this Court ever considering the issue—all the more so when the lower court's reasoning is so clearly flawed. Yet the Government declined to seek review in *SpeechNow*, predicting the decision would prove inconsequential. Although that prediction has proven wildly inaccurate, no other case has presented the question of Section 30116(a)(1)(C)'s constitutionality to this Court. This petition does, and it should be granted.

STATEMENT OF THE CASE

A. The Federal Election Campaign Act

1. In a series of statutory reforms in the 1970s, Congress enacted the Federal Election Campaign Act (FECA) to regulate the financing of campaigns for federal office. *See* 52 U.S.C. § 30101 *et seq.* (formerly codified at 2 U.S.C. § 431 *et seq.*). Among other things, the Act responded to "deeply disturbing examples [of corruption] surfacing after the 1972 election" and was designed to prevent such corruption in the future. *Buckley v. Valeo*, 424 U.S. 1, 27 (1976). In broad strokes, the Act imposed disclosure requirements, restricted expenditures that could be made for media advertising and the like, and—most relevant here—limited contributions to candidates and political organizations. *See id.* at 23. By restricting "large financial contributions" to candidates and closely affiliated groups, Congress sought "to limit the

actuality and appearance of corruption resulting from" such contributions. *Id.* at 26.

Today, FECA limits financial contributions to candidates for federal office to $2,800 per contributor in each election. 52 U.S.C. §§ 30116(a)(1)(A) & (c); 84 Fed. Reg. 2504, 2506 (Feb. 7, 2019). FECA also caps annual contributions to national political parties at $35,500 and contributions to state and local parties at $10,000. *See* 52 U.S.C. §§ 30116(a)(1)(B) & (D); 84 Fed. Reg. at 2506. Contributions to independent "political committees"—that is, groups that take in or spend money to influence federal elections—are limited to $5,000 each year. 52 U.S.C. § 30116(a)(1)(C); *see also id.* §§ 30101(4)(A), (8)(A), (9)(A).

2. In *Buckley*, this Court considered First Amendment challenges to the Act's expenditure and contribution limits. It distinguished between these two kinds of provisions, subjecting only expenditure limits to the "exacting scrutiny" that governs restrictions on "political expression." 424 U.S. at 44-45. The Court reasoned that an *expenditure* limit directly restricts election-related communications and thus "heavily burdens core First Amendment expression." *Id.* at 48. By contrast, the Court explained that a *contribution* limit "entails only a marginal restriction upon the contributor's ability to engage in free communication." *Id.* at 20-21.

Applying that two-tiered approach, the *Buckley* Court held that the government's interest in preventing corruption was insufficient to justify FECA's expenditure limits. 424 U.S. at 47-48. At the same time, the Court upheld FECA's limits on contributions to individual candidates, finding the interest of "limit[ing] the actuality and appearance of

corruption" a "constitutionally sufficient justification" for those restrictions. *Id.* at 26.

3. In subsequent decisions, the Court upheld related limits on the amount of money donors may contribute to various political entities. The Court upheld provisions restricting contributions to multicandidate political committees and limiting coordinated party expenditures that function like contributions. *See Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 184-85 (1981); *FEC v. Colo. Republican Fed. Campaign Comm. ("Colorado II")*, 533 U.S. 431, 464-65 (2001). It also upheld limits on contribution of "soft money" to political parties—that is, contributions the parties use to engage in issue advertising and other activities that may benefit candidates without expressly advocating their election. *See McConnell v. FEC*, 540 U.S. 93, 122-26 (2003). The Court reasoned that such limits not only block contributions that can corrupt and create the appearance of corruption; the limits also prevent candidates and donors from "circumvent[ing] FECA's limitations" on direct contributions to federal candidates. *Id.* at 126; *see also Republican Party of La. v. FEC*, 137 S. Ct. 2178 (2017) (summarily reaffirming this holding); *Republican Nat'l Comm. v. FEC*, 561 U.S. 1040 (2010) (same).

B. The D.C. Circuit's decision in *SpeechNow*

1. In *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc), a political committee challenged the limit that 52 U.S.C. § 30116(a)(1)(C) imposed on contributions it could receive. Relying on *Citizens United v. FEC*, 558 U.S. 310 (2010), the organization argued that the monetary limit violated the First Amendment as applied to its activities because it engaged only in independent electoral advocacy.

The D.C. Circuit agreed. The court of appeals recognized that *Citizens United* dealt only with a ban on campaign *expenditures*, not any contribution limit. But it reasoned that "because *Citizens United* holds that independent expenditures do not corrupt or give the appearance of corruption as a matter of law, then the government can have no anti-corruption interest in limiting *contributions* to independent expenditure-only organizations." Pet. App. 62a (emphasis added).[1]

The Government defended the constitutionality of Section 30116(a)(1)(C) in the D.C. Circuit, "insist[ing] that *Citizens United* does not disrupt *Buckley*'s longstanding decision upholding contribution limits." Pet. App. 60a. Yet, departing from its usual practice when a federal statute has been invalidated, the Government declined to seek review of *SpeechNow* in this Court. The Government did not express agreement with the D.C. Circuit's holding. But, in a letter explaining its decision, the Attorney General predicted that the court's ruling would "affect only a small subset of federally regulated contributions." Letter from Eric Holder, Attorney Gen., to Harry Reid, Senate Majority Leader (June 16, 2010), perma.cc/G9KL-MHMS.[2]

2. In July 2010, one month after *SpeechNow* became final, the FEC issued an advisory opinion announcing that, in light of the D.C. Circuit decision, it would no longer enforce Section 30116(a)(1)(C)

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[1] For this Court's convenience, the D.C. Circuit's opinion in *SpeechNow* is reproduced at Pet. App. 45a-68a.

[2] The plaintiffs in *SpeechNow* asked this Court to review a distinct portion of the D.C. Circuit's decision upholding certain disclosure requirements. The Court denied certiorari. *Keating v. FEC*, 562 U.S. 1003 (2010).

against "independent expenditure-only political committee[s]." Pet. App. 8a. Shortly thereafter, Super PACs appeared.

Super PACs are independent-expenditure-only political committees that "receive unlimited amounts of money" and that expressly advocate the election or defeat of specific candidates. Pet. App. 3a (citation omitted). Many Super PACs exist solely to support a single identified candidate, while others back multiple candidates. In either case, the organizations can maintain close connections with candidates and their campaigns. Although Super PACs and candidates are prohibited from coordinating their activities directly, candidates "often openly support and associate with [Super PACs], appearing at their fundraising events." Bipartisan Policy Center, *Campaign Finance in the United States: Assessing an Era of Fundamental Change* 33 (Jan. 2018), perma.cc/VT43-QJSW; *see also* FEC Advisory Op. 2011-12, 2011 WL 2662413 (June 30, 2011) (confirming this is permissible). Super PACs also have undertaken a "wide array of activities typically the province of candidates," including managing events and amassing data about voters. Bipartisan Policy Center, *supra* at 39.

Super PACs have quickly become dominant political forces. Since 2010, they have spent nearly $3 billion on federal elections. Ian Vandewalker, *Since* Citizens United*, a Decade of Super PACs*, Brennan Center for Justice (Jan. 14, 2020), perma.cc/J5VM-4KPL. Furthermore, according to the Congressional Research Service, "relatively few donors provide Super PAC funding." R. Sam Garrett, Cong. Research Serv., *Super PACs in Federal Elections: Overview and Issues for Congress* 15 (2016). In the run-up to the 2016

election, just fifty mega-donors and their relatives contributed about 41% of the over $700 million donated to Super PACs. Admin. Compl. ¶ 38. Since 2016, two-thirds of all Super PAC funding has come from donors who each gave more than $1 million. *See* Vandewalker, *supra*.

C. Proceedings below

1. Petitioners are a bipartisan group of current and former candidates and federal officeholders, some of whom intend to run again in 2020 and beyond. In 2016, they filed an administrative complaint with the FEC against ten Super PACs that had accepted contributions exceeding Section 30116(a)(1)(C)'s contribution limit and that opposed, or threatened to oppose, their candidacies. Pet. App. 9a-10a, 29a. Some of the Super PACs spent all of their money advocating the election or defeat of a single candidate, while others supported multiple candidates. Admin. Compl. ¶¶ 24-33. Relying on *SpeechNow*, the FEC dismissed the complaint. Pet. App. 27a-44a.

2. Petitioners then filed suit in the U.S. District Court for the District of Columbia, invoking FECA's provision allowing judicial review of FEC action that is "contrary to law." 52 U.S.C. § 30109(a)(8)(C). Petitioners argued that the contribution limit the FEC declined to enforce here is valid and sought declaratory relief. Am. Compl. ¶ 5; *see also, e.g.*, *Citizens for Responsibility & Ethics in Washington v. FEC*, 209 F. Supp. 3d 77, 81 (D.D.C. 2016) (holding that the FEC acted "contrary to law" when it declined to take action based on "an erroneous interpretation of Supreme Court precedent and the First Amendment").

The district court dismissed the complaint. The court acknowledged "some tension" between the D.C.

Circuit's *SpeechNow* holding and "Supreme Court decisions" involving campaign finance regulation. Pet. App. 21a. But because *SpeechNow*'s holding that "limits on contributions to Super PACs are unconstitutional" was "binding" within the D.C. Circuit, the district court had no choice but to reject petitioners' claim. *Id.*

3. The D.C. Circuit summarily affirmed, stating that *SpeechNow* controlled. Pet. App. 1a-2a. Both before and after the panel issued its decision, petitioners sought en banc review. The court of appeals denied both requests. *Id.* 23a-26a.

REASONS FOR GRANTING THE WRIT

I. The court of appeals has held a longstanding federal statute unconstitutional.

This Court employs "a strong presumption in favor of granting writs of certiorari to review decisions of lower courts holding federal statutes unconstitutional." *Maricopa Cty. v. Lopez-Valenzuela*, 574 U.S. 1006, 1007 (2014) (Thomas, J., respecting denial of stay); *see also, e.g.*, *Iancu v. Brunetti*, 139 S. Ct. 2294, 2298 (2019) ("As usual when a lower court has invalidated a federal statute, we granted certiorari.").

The Court's presumption reflects this Court's "[d]ue respect for the decisions of a coordinate branch of Government." *United States v. Morrison*, 529 U.S. 598, 607 (2000). Indeed, "judging the constitutionality of an Act of Congress is 'the gravest and most delicate duty that this Court is called on to perform.'" *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 204 (2009) (quoting *Blodgett v. Holden*, 275 U.S. 142, 147-48 (1927) (Holmes, J., concurring)); *see also*

United States v. Gainey, 380 U.S. 63, 65 (1965). When an inferior court has nullified an Act of Congress, its decision should not be the last word. In such weighty matters, the Judicial Branch should speak through this Court.

The Solicitor General has not yet taken a position on whether the D.C. Circuit is correct that 52 U.S.C. § 30116(a)(1)(C) is unconstitutional as applied to Super PACs. But the strong presumption in favor of review applies even where, as here, a governmental agency has declined to enforce the federal statute at issue. *See, e.g.*, *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2082 (2015); U.S. Br. at 7, *Seila Law LLC v. Consumer Fin. Prot. Bureau,* No. 19-7 (filed Sept. 17, 2019) (urging review partly because agency had taken the position that the statute was unconstitutional). And if the Government declines to defend the statute, that would not change things either. The Court regularly grants certiorari at the behest of private parties who have been injured by a lower court's invalidation of a federal statute. *See, e.g.*, *Allen v. Cooper*, 140 S. Ct. 994, 999-1000 (2020); *Zivotofsky*, 135 S. Ct. at 2083; *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670-72 (1999).

In fact, this Court's involvement is especially warranted in light of the particular constitutional provision involved. As the Government recently recognized, where a lower court has invalidated a federal statute on First Amendment grounds, the Court has "repeatedly" granted review—"even in the absence of a circuit conflict." Pet. for Cert. 15, *Barr v. Am. Assoc. of Political Consultants, Inc.*, No. 19-631 (Nov. 14, 2019), *cert. granted*, 140 S. Ct. 812 (2020). We are not aware of a single exception during at least

the past two decades. *See*, *e.g.*, *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019); *Matal v. Tam*, 137 S. Ct. 1744 (2017); *United States v. Alvarez*, 567 U.S. 709 (2012); *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010); *United States v. Stevens*, 559 U.S. 460 (2010); *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656 (2004). There is no basis for one here.

II. The question of Section 30116(a)(1)(C)'s constitutionality is highly consequential.

1. Before the D.C. Circuit's decision in *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc), Super PACs did not exist. Even the president of SpeechNow.org, David Keating, acknowledged that using an independent-expenditure organization to promote a particular candidate "just never entered my mind." Alex Altman, *Meet the Man Who Invented the Super PAC*, Time (May 13, 2015).

But *SpeechNow* has triggered a "shift to Super PACs as a dominant form of political activity." Bipartisan Policy Center, *Campaign Finance in the United States: Assessing an Era of Fundamental Change* 38 (2018), perma.cc/VT43-QJSW. This "is perhaps the most dramatic development in the campaign finance system in recent election cycles." *Id.* From 2010 to 2018, the number of active Super PACs increased from 83 to 2,395, with contributions rising twenty-five-fold, from $63 million to $1.6 billion. *Super PACs*, OpenSecrets.org, bit.ly/3fpuRBQ (2010 numbers); *Super PACs*, OpenSecrets.org, bit.ly/3foVl6P (2018 numbers).

This change has wreaked havoc on Congress's comprehensive campaign-finance regulatory regime. Contribution limits are designed to "safeguard[] the integrity of the electoral process." *Buckley v. Valeo*,

424 U.S. 1, 58 (1976). And Congress enacted the specific limits at issue here to "restrict the opportunity to circumvent" limits on contributions to candidates and to "minimize the adverse impact on the statutory scheme caused by political committees that appear to be separate entities pursuing their own ends, but are actually a means for advancing a candidate's campaign." H.R. Rep. No. 94-1057, at 57-58 (1976) (Conf. Rep.).

Many condemn the advent of Super PACs; others welcome it. But their emergence unmistakably marks a dramatic divergence from Congress's design. Consequently, this Court, and not the D.C. Circuit, should have the last word on whether the First Amendment compels disrupting FECA's operation by enabling donors to make unlimited contributions to independent-expenditure-only organizations. In recent years, this Court has granted certiorari to review lower court decisions holding that Congress lacked authority to abrogate state sovereign immunity in copyright cases, *Allen v. Cooper*, 140 S. Ct. 994, 998-99 (2020); to deny registration to scandalous trademarks, *Iancu v. Brunetti*, 139 S. Ct. 2294, 2297-98 (2019); and to ban videos depicting cruelty to animals, *United States v. Stevens*, 559 U.S. 460, 464 (2010). All of those questions surely warranted this Court's review. But their significance pales in comparison to the question presented by this case.

2. The effects of *SpeechNow* have not been confined to federal elections. Several courts outside the D.C. Circuit have regarded *SpeechNow* as authority for striking down state and local campaign

finance laws.[3] Insofar as the shadow cast by *SpeechNow* is inhibiting state and local governments from enacting or enforcing regulations they believe necessary to safeguard the integrity of their elections, this Court's intervention is all the more imperative. *Cf. Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000) (reviewing and reversing lower court decision invalidating state contribution limit).

III. Section 30116(a)(1)(C) is constitutional as applied to Super PACs.

The D.C. Circuit's invalidation of Section 30116(a)(1)(C) warrants review regardless of whether the court of appeals has correctly interpreted the First Amendment. But certiorari is all the more necessary because the D.C. Circuit's analysis is deeply mistaken. FECA's limit on contributions to Super PACs comports with the First Amendment for the same reasons this Court has held Congress may limit contributions to candidates and other closely affiliated actors. And contrary to the D.C. Circuit's view, *Citizens United v.*

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[3] *See Vt. Right to Life Comm. v. Sorrell*, 758 F.3d 118 (2d Cir. 2014); *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483 (2d Cir. 2013); *Texans for Free Enter. v. Tex. Ethics Comm'n*, 732 F.3d 535 (5th Cir. 2013); *Republican Party of N.M. v. King*, 741 F.3d 1089 (10th Cir. 2013); *Wis. Right to Life State PAC v. Barland*, 664 F.3d 139 (7th Cir. 2011); *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684 (9th Cir.), *cert. denied*, 562 U.S. 896 (2010). The petition for certiorari in *Long Beach* asked this Court to consider only the specific municipal ordinance involved there. See Pet. for Cert. at i, *City of Long Beach v. Long Beach Area Chamber of Commerce*, No. 10-155 (July 28, 2010). It did not discuss FECA's limit on contributions to political committees or the *SpeechNow* decision.

FEC, 558 U.S. 310 (2010), is entirely consistent with that straightforward application of precedent.

A. Congress may limit contributions to candidates and closely affiliated political actors to prevent corruption.

1. Limits on political expenditures and contributions both implicate the First Amendment. But this Court has long held that restrictions on contributions are different in kind from expenditure limits and accordingly are subject to a more deferential form of constitutional scrutiny.

Expenditure limits "heavily burden core First Amendment expression" because they directly restrict communication. *Buckley v. Valeo*, 424 U.S. 1, 19, 48 (1976). In particular, "a restriction on the amount of money a person or group can spend on political communication 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." *Id.* at 19; *see also Citizens United*, 558 U.S. at 372 (Roberts, C.J., concurring) (calling an expenditure limit "a direct prohibition on political speech"). From *Buckley* to the present day, therefore, the Court has subjected expenditure limits to "exacting scrutiny." *Buckley*, 424 U.S. at 44-45.

Contribution limits, by contrast, are "merely marginal speech restrictions" that "lie closer to the edges than to the core of political expression." *FEC v. Beaumont*, 539 U.S. 146, 161 (2003) (internal quotation marks and citation omitted). A contribution serves only "as a general expression of support for the candidate and his views." *Buckley*, 424 U.S. at 21. It "does not communicate the underlying basis for the support." *Id.* "[T]he transformation of contributions

into political debate involves speech by someone other than the contributor." *Id.* An individual contribution limit thus moderates only "the symbolic expression of support evidenced by [a] contribution." *McCutcheon v. FEC*, 572 U.S. 185, 197 (2014) (plurality opinion) (quoting *Buckley*, 424 U.S. at 21).[4] It does "not in any way infringe the contributor's freedom to discuss candidates and issues." *Id.*

In light of these realities, contribution limits are subject to less rigorous scrutiny than expenditure limits. *McCutcheon*, 572 U.S. at 196-97. Contribution limits are valid when "closely drawn" to prevent quid pro quo corruption or the appearance thereof. *See id.* at 197-98, 207-08; *Buckley*, 424 U.S. at 26-29. This "relatively complaisant" test, *Beaumont*, 539 U.S. at 161, does not mean that Congress may seek to limit "mere influence or access" to political officials, *McCutcheon*, 572 U.S. at 208. But "Congress may permissibly limit 'the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions' to particular candidates." *Id.* at 207 (quoting *Buckley*, 424 U.S. at 27).

2. The doctrinal dichotomy between expenditures and contributions has generated a pattern in this Court's decisions: The Court has "routinely struck down limitations on independent expenditures by candidates, other individuals, and groups, while repeatedly upholding contribution limits." *FEC v. Colo. Republican Fed. Campaign Comm. ("Colorado II")*, 533 U.S. 431, 441-42 (2001) (citation omitted); *see*

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[4] All subsequent citations to *McCutcheon* are to the plurality opinion unless otherwise noted.

also Colorado Republican Fed. Campaign Comm. v. FEC ("Colorado I"), 518 U.S. 604, 610 (1996) (opinion of Breyer, J.) ("Most of the provisions this Court found unconstitutional imposed *expenditure* limits. . . . The provisions that the Court found constitutional mostly imposed *contribution* limits. . . ."). Especially relevant here, the Court has repeatedly upheld federal statutes limiting the amount of money people may contribute to candidates or third parties with close ties to particular candidates.

First, in *Buckley*, the Court upheld FECA's limits on contributions directly to candidates. 424 U.S. at 28-29. Candidates, this Court explained, "depend on financial contributions from others to provide the resources necessary to conduct a successful campaign." *Id.* at 26. Absent regulation, therefore, large contributions might be given "to secure a political *quid pro quo* from current and potential office holders." *Id.* "[T]he opportunities for abuse inherent in a regime of large individual financial contributions" would also create an "appearance of corruption" that could erode "confidence in the system of representative Government." *Id.* at 27 (quoting *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973)).

The Court applied *Buckley*'s rationale to a different contribution limit in *California Medical Association v. FEC*, 453 U.S. 182 (1981) (*"CalMed"*). There the Court upheld a limit on contributions to multicandidate political committees that, among other things, made independent expenditures. *Id.* at 184-85. Without these limits, the restrictions on contributions to candidates themselves "could be easily evaded" simply "by channeling funds through a multicandidate

political committee." *Id.* at 198 (plurality opinion). In light of that possibility, the plurality reasoned that capping contributions to outside groups is "an appropriate means by which Congress could seek to protect the integrity of the contribution restrictions upheld by this Court in *Buckley*." *Id.* at 199.[5]

In *McConnell v. FEC*, 540 U.S. 93 (2003), the Court similarly applied *Buckley*'s rationale to uphold limits on donations of "soft money"—contributions to national, state, and local political parties for activities that included issue advertising. *Id.* at 122-24, 131, 168. Even assuming that money was not spent in coordination with particular candidates, *see id.* at 152 & n.48, the Court recognized that soft-money contributions "create[d] a significant risk of actual and apparent corruption," *id.* at 168. "[F]ederal officeholders were well aware of the identities of the donors" who contributed large amounts of soft money to parties. *Id.* at 147. And given the "close ties" between parties and the parties' candidates, *id.* at 161, the activities funded by soft money "confer[red] substantial benefits on federal candidates," *id.* at 168. Parties, therefore, could serve as "intermediaries" between big donors seeking "to create debt on the part of officeholders" and candidates seeking "to increase their prospects of election." *Id.* at 146.

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[5] Justice Blackmun suggested in a separate opinion that he would not have applied this holding to committees that made *only* independent expenditures. *CalMed*, 453 U.S. at 203 (opinion concurring in part and concurring in the judgment). But this assertion was based on the postulate, which the Court has consistently refused to embrace, that contribution limits are subject to same exacting scrutiny as expenditure limits. *Id.* at 201-02.

3. The Court's cases over the past decade are in accord. In *Citizens United v. FEC*, 558 U.S. 310 (2010), the Court invalidated a federal statute that forbade corporations from making political *expenditures* close to elections. *Id.* at 318-19. Reiterating that expenditures are "political speech," and that "the First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office," the Court reasoned that "[t]he anticorruption interest is not sufficient" to restrict such expenditures. *Id.* at 329, 357. "[I]ndependent expenditures," the Court further stated, "do not give rise to corruption or the appearance of corruption." *Id.* at 357 (quotation marks and citations omitted). At the same time, the Court distinguished the case law governing political *contributions*, noting that it had "sustained limits on direct contributions in order to ensure against the reality or appearance of corruption." 558 U.S. at 357; *see also id.* at 345, 361 (stressing that expenditures are different from contributions and that *Citizens United* dealt only with expenditures).

After *Citizens United*, this Court again recognized that "Congress may regulate campaign contributions to protect against corruption or the appearance of corruption." *McCutcheon*, 572 U.S. at 191. In *McCutcheon*, the Court invalidated a statute that limited the aggregate amount an individual could contribute to multiple candidates, explaining that the statute—an additional "preventative" measure, layered on top of FECA's base limits—did "little, if anything" to curb corruption. *Id.* at 193, 221. But the Court reiterated *Buckley*'s holding that FECA's "base" limits themselves "serv[e] the permissible objective of combatting corruption." *McCutcheon*, 572 U.S. at 192-

93. The Court also stressed that "*McConnell*'s holding about 'soft money'" was unaffected by its ruling. *Id.* at 209 n.6; *see also id.* at 197-98.

Finally, the Court in recent years has twice summarily reaffirmed FECA's restrictions on soft money contributions, even where the recipients of the prospective donations sought to spend the money—as here—without coordinating with a candidate or campaign. *See Republican Party of La. v. FEC*, 219 F. Supp. 3d 86, 96-97 (D.D.C. 2016), *aff'd*, 137 S. Ct. 2178 (2017); *Republican Nat'l Comm. v. FEC*, 698 F. Supp. 2d 150, 157 (D.D.C. 2010), *aff'd*, 561 U.S. 1040 (2010). In the second of those cases, the Solicitor General's 2017 filing stressed "the distinction between expenditure limits and contribution limits" and agreed that Congress may limit soft-money contributions that political parties intend to use exclusively for independent expenditures. Mot. to Dismiss or Affirm at 19, *Republican Party of La. v. FEC*, 137 S. Ct. 2178 (2017) (No. 16-865), 2017 WL 1352870, at *18, *22. Only two Justices noted they would have set the case for argument. 137 S. Ct. at 2178.

B. Contrary to the D.C. Circuit's view, *Citizens United* does not affect the law governing contributions.

In *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc), the D.C. Circuit recognized that assessing Section 30116(a)(1)(C)'s constitutionality involves considering the validity of a limit on contributions, not expenditures. Pet. App. 60a. After all, donations to Super PACs, like other contributions, "result in political expression" only when someone other than the contributor "transform[s them] into political debate." *Buckley*, 424 U.S. at 21. The D.C.

Circuit also recognized that "*Citizens United* does not disrupt" *Buckley*'s distinction between contributions and expenditures. Pet. App. 60a. The court of appeals nevertheless asserted that *Citizens United* dictates, "as a matter of law," that Congress may not limit contributions to committees that make only independent expenditures. *Id.* 59a. The court of appeals reasoned: "[B]ecause *Citizens United* holds that independent expenditures do not corrupt or give the appearance of corruption as a matter of law, then the government can have no anti-corruption interest in limiting contributions to independent expenditure-only organizations." *Id.* 62a.

This reasoning is fallacious. Even when an organization's spending does not corrupt, a contribution to the organization can still corrupt.

1. Federal bribery law—both in general and in the specific context of campaign contributions—makes clear that donations to actors other than candidates or organizations under their control can give rise to quid pro quo corruption. Even when the recipient of a donation is independent and incorruptible, the donation can corrupt an actor who is interested in seeing the organization funded and successful—and who may be willing to grant favors in return.

For instance, a senator "who agreed to vote in favor of widget subsidies in exchange for a widget maker's donation to the Red Cross" would be guilty of bribery even if he had no connection to the Red Cross or role in determining how the organization spent the funds. Albert W. Alschuler et al., *Why Limits on Contributions to Super PACs Should Survive* Citizens United, 86 Fordham L. Rev. 2299, 2310 (2018). Even though the Red Cross's expenditures would be

virtuous, the widget maker's contribution would be corrupt. *Id.*

Federal bribery laws have long incorporated that commonsense insight. Precisely because a payment can corrupt even when it is directed to an entity the bribed official does not control, the federal bribery statute forbids a public official from corruptly seeking "anything of value personally *or for any other person or entity*" in exchange for official action. 18 U.S.C. § 201(b)(2) (emphasis added); *see, e.g.*, *United States v. Brewster*, 506 F.2d 62, 68-69 (D.C. Cir. 1974) (emphasizing the import of the "any other person or entity" coverage).

Bribery through donations to autonomous third-party entities is not merely a hypothetical concern. Affirming the conviction of a former governor, the Eleventh Circuit has recognized that soliciting a donation to an issue-advocacy foundation can violate the bribery statute, even though donations to such organizations "do not financially benefit the individual politician in the same way that a candidate-election campaign contribution does." *United States v. Siegelman*, 640 F.3d 1159, 1169 n.13 (11th Cir. 2011); *see also, e.g.*, *United States v. Gross*, No. 15-cr-769, 2017 WL 4685111, at *42 (S.D.N.Y. Oct. 18, 2017) (bribery under related statute through donation to a church).

What is more, the Government has repeatedly charged individuals with bribery arising from donations to Super PACs themselves. Earlier this year, the Government convicted insurance magnate Greg Lindberg of "orchestrating a bribery scheme involving independent expenditure accounts and improper campaign contributions." Press Release,

U.S. Dep't of Justice, *Federal Jury Convicts Founder and Chairman of a Multinational Investment Company and a Company Consultant of Public Corruption and Bribery Charges* (Mar. 5, 2020), perma.cc/38BH-JD4V. Lindberg funneled $1.5 million to an independent-expenditure committee he created for the purpose of bribing a North Carolina insurance commissioner to replace an official investigating Lindberg's company. Ian Vandewalker, *10 Years of Super PACs Show Courts Were Wrong on Corruption Risks*, Brennan Center for Justice (Mar. 25, 2020), perma.cc/4DJN-DSKT.[6]

In 2015, the Government prosecuted a sitting U.S. Senator and a donor for an alleged bribery scheme involving a $300,000 contribution to a Super PAC supporting the Senator's reelection. *See United States v. Menendez*, 132 F. Supp. 3d 635, 640 (D.N.J. 2015). The case resulted in a hung jury, but the court did not question the validity of the Government's theory that contributions to Super PACs can corrupt.

If the D.C. Circuit were right that "contributions to groups that make only independent expenditures . . . cannot corrupt or create the appearance of corruption," Pet. App. 59a, these

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[6] Lindberg was caught on tape telling the commissioner, "I think the play here is to create an independent-expenditure committee for your reelection specifically, with the goal of raising $2 million or something." Ames Alexander, *Watch Secretly Recorded Videos from the Bribery Sting that Targeted Durham Billionaire*, Charlotte Observer 00:16-30 (Mar. 10, 2020), bit.ly/35aPKvV (quotation transcribed from first video posted in article). Lindberg emphasized that "the beauty of" such a committee is that it can receive "unlimited" donations. *Id.* 00:35-45. He also suggested that the commissioner get someone he trusted to run the committee, such as his brother. *Id.* 00:58-01:18.

prosecutions would all have been illegitimate. The quid pro quo corruption the Government alleged would be legally impossible. Yet it is plainly the D.C. Circuit, not the Government, that has taken a wrong turn.

2. This Court's campaign finance precedents underscore the impropriety of the D.C. Circuit's leap from the proposition that independent *expenditures* do not corrupt to the conclusion that *contributions* to independent-expenditure-only organizations cannot corrupt. In *Colorado I*, the Court invalidated limits on independent expenditures by political parties. The principal opinion reasoned that those limits were not "necessary to combat a substantial danger of corruption of the electoral system." 518 U.S. at 617-18 (opinion of Breyer, J.). Even so, the opinion recognized that Congress retained a valid interest in limiting *contributions* to the same organizations to fight the "danger of corruption" that would inhere in allowing "large financial contributions [to those organizations] for political favors." *Id.* at 615-17.

In *McConnell*, this Court likewise explained that, because of the "close connection and alignment of interests" between officeholders and parties, "large soft-money contributions to national parties are likely to create actual or apparent indebtedness on the part of federal officeholders, *regardless of how those funds are ultimately used*," 540 U.S. at 155 (emphasis added). And in *Republican Party of Louisiana*, which this Court summarily affirmed in 2017, a three-judge U.S. District Court for the District of Columbia recognized that contributions to political parties can corrupt even when the parties' expenditures do not, 219 F. Supp. 3d at 97. Writing for the panel, Judge Srinivasan reasoned that "the inducement occasioning

the prospect of indebtedness on the part of a federal officeholder is not the *spending* of soft money by the political party. The inducement instead comes from the *contribution* of soft money to the party in the first place." *Id.*

Exactly the same logic applies here. It does not matter whether Super PACs' *expenditures* give rise to a risk of corruption. The question instead is whether mega-*contributions* to these organizations give rise to corruption or the appearance of corruption. *See McCutcheon*, 572 U.S. at 191 (citing *Buckley*, 424 U.S. at 26-27). We now turn to that question and show that of course they do.

C. FECA's limit on contributions to Super PACs is a valid means of preventing corruption.

Just like the limits on contributions to candidates and parties this Court upheld in *Buckley* and subsequent cases, FECA's limit on contributions to Super PACs "protect[s] against corruption or the appearance of corruption." *McCutcheon*, 572 U.S. at 191.

1. Many Super PACs have become alter egos of candidates' campaigns themselves—raising the same prospects of indebtedness and corruption that direct contributions present. This is most obviously true for Super PACs that spend the money they receive to promote a single candidate. Many of these Super PACs are run by "former staff of candidates who understand what will help the candidate and make expenditures intended to help the candidate, such as funding events about more general issues that feature the candidate." U.S. Gov't Accountability Office, GAO-20-66R *Campaign Finance: Federal Framework, Agency Roles and Responsibilities, and Perspectives* 52 (2020).

Indeed, such Super PACs conduct "a wide array of activities typically the province of the candidates"—including "provid[ing] rapid response to charges against their candidate" and "build[ing] lists of persuadable voters." Bipartisan Policy Center, *supra*, at 39. Candidates also "often openly support and associate with" such organizations, appearing at their fundraising events and the like. *Id.* at 33.

Super PACs that promote multiple candidates of the same party similarly function as alter egos for parties. Take, for instance, the Senate Leadership Fund. Headed by a former chief-of-staff to Senate Majority Leader Mitch McConnell, the goal of this Super PAC is "to protect and expand the Republican Senate Majority." Admin. Compl. ¶ 27. Multi-million dollar contributions to such an organization plainly benefit the candidates the Super PAC supports. The same is true with respect to the Senate Leadership Fund's Democratic counterpart, the Senate Majority PAC. *Id.* ¶ 26. Indeed, such Super PACs "perform many of the functions that parties did in the heyday of 'soft money,'" Bipartisan Policy Center, *supra*, at 33—before Congress acted and this Court held in *McConnell* that soft-money contributions were subject to regulation, *see* 540 U.S. at 154-56.

Donor activity with respect to Super PACs confirms that FECA's limit on contributions to such organizations—like the contribution limits this Court upheld in *CalMed* and *McConnell*—is necessary to prevent the limits on contributions to candidates that the Court upheld in *Buckley* from being "functionally meaningless." Richard Briffault, *Super PACs*, 96 Minn. L. Rev. 1644, 1684 (2012). A small handful of exceptionally wealthy people not only contribute the

maximum permissible amount to candidates; they donate huge amounts of money to Super PACs supporting those same candidates. *See* Am. Compl. ¶ 20; *see also* Pet. App. 35a-36a. Since *SpeechNow*, eleven donors have given a total of $1 billion to Super PACs. Michelle Ye Hee Lee, *Eleven Donors Have Plowed $1 Billion into Super PACs Since They Were Created*, Wash. Post (Oct. 26, 2018). Those donors have each given between $38 million and $287 million. *Id.* And donations like these often play a "central" role in candidates' ability to run for office. Zeke J. Miller, *Republicans Vie for 2016 Support from Casino Magnate*, Time (Mar. 24, 2014); *see also, e.g.*, Nicholas Confessore & Jim Rutenberg, *PACs' Aid Allows Romney's Rivals to Extend Race*, N.Y. Times (Jan. 12, 2012) (describing how candidates rely on Super PAC donations from "wealthy individuals" to "prop up" their campaigns).

To bring the analysis full circle: The Court has held that Congress may prohibit a donor from contributing more than $2,800 to candidate Jane Smith because larger contributions would risk actual or apparent corruption. But the D.C. Circuit's invalidation of Section 30116(a)(1)(C) allows the same donor to give $28 million to a Super PAC that is dedicated exclusively to Jane Smith's election, that is run by Jane Smith's former campaign manager, and that solicits the check at a fundraiser headlined by Jane Smith herself. According to the D.C. Circuit, Congress cannot restrict such a massive contribution because it does not raise any risk of corruption *at all*. That cannot be right.

2. Lest there be any doubt, the corruptive force of Super PAC donations has been widely acknowledged

by public officials and candidates and documented in actual criminal prosecutions.

In the course of the 2016 campaign, then-candidate Donald Trump decried Super PACs as "[v]ery corrupt." Alschuler et al., *supra*, at 2339. Candidate Trump continued: "There is total control of the candidates . . . . I know it so well because I was on both sides of it . . . ." *Id.* Senator Lindsey Graham made a similar observation in 2015, stating that "basically 50 people are running the whole show." *Id.* at 2341. As Senator John McCain put it, Super PACs have "made a contribution limit a joke." *Id.*; *see also id.* (Senator Angus King: "[W]e can look around the world where oligarchs control the government, and we're allowing that to happen here.").[7]

Actual bribery prosecutions involving Super PAC contributions illustrate what these government officials openly admit: Super PAC contributions can—and do—facilitate quid pro quo arrangements. *See supra* at 21-22 (discussing examples). Of course, such bribery prosecutions capture "only the most blatant and specific attempts" to corrupt candidates and public officials. *Buckley*, 424 U.S. at 28. But the very fact that they have occurred underscores the

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[7] Consistent with these comments from elected officials, surveys show that the general public overwhelmingly perceives that unlimited contributions to Super PACs "lead to corruption." Am. Compl. ¶ 19 (noting that 69% of respondents in a public opinion survey endorsed this proposition). In the same survey, 73% of respondents agreed specifically that "there would be less corruption if there were limits on how much could be given to Super PACs." *Id.* In another survey, 59% of voters in 54 competitive congressional districts agreed that "[w]hen someone gives 1 million dollars to a super PAC, they want something big in return from the candidates they are trying to elect." *Id.*

legitimacy of Congress's determination that contributions to all political committees should be limited to safeguard the integrity of our electoral system. That determination is more than enough to justify the "marginal restriction," *id.* at 20, that Section 30116(a)(1)(C) imposes on the ability of donors to express their electoral views.

IV. This case is the right vehicle for resolving the question presented.

This case is an excellent vehicle to resolve whether Section 30116(a)(1)(C) comports with the First Amendment. The district court dismissed petitioners' claim based on *SpeechNow*'s holding that "FECA limits on contributions [can]not be constitutionally applied to independent expenditure-only political action committees." Pet. App. 17a-22a. The FEC then asked for summary affirmance, and the D.C. Circuit granted it, relying solely on *SpeechNow*. FEC's Mot. for Summ. Aff. at 1-3, ECF No. 1787446; Pet. App. 1a-2a. If *SpeechNow* is wrong, that summary affirmance must be reversed.

The time to resolve the question presented is now. In 2010, the ramifications of *SpeechNow* were unforeseen, leading the Government to predict that the nullification of Section 30116(a)(1)(C) would have a minimal impact. *See* Letter from Eric Holder, Attorney Gen., to Harry Reid, Senate Majority Leader (June 16, 2010), perma.cc/G9KL-MHMS. A decade later, however, the D.C. Circuit's decision is unmistakably transforming American politics. Super PACs have become funnels for massive political contributions that federal law otherwise prohibits, and even politicians whom such organizations benefit denounce them as threats to our electoral system.

No legislature gave America a system of campaign finance that prohibits contributing more than $2,800 to a candidate because it is likely to corrupt or create an appearance of corruption, but allows contributing $28 million (or even $280 million) to a Super PAC dedicated to electing the same candidate. Nor has this Court given America this illogical regime. The D.C. Circuit created this system, and its debilitation of FECA requires this Court's attention before it becomes any further entrenched in our political landscape.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-5072 **September Term, 2019**
1:16-cv-02201-EGS
Filed On: October 3, 2019

Ted Lieu, Representative, et al.,
Appellants,
v.
Federal Election Commission,
Appellee.

BEFORE: Rogers, Tatel, and Srinivasan, Circuit Judges.

ORDER

Upon consideration of the motion for summary affirmance, the response thereto, and the reply; and the motion to hold in abeyance, the response thereto, and the reply, it is

ORDERED that the motion to hold in abeyance be dismissed as moot. It is

FURTHER ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. *See Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). The Federal Election Commission's decision to dismiss the administrative complaint was not contrary to law as the challenged contributions to independent-

expenditure-only political committees cannot constitutionally be prohibited under *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc), *cert. denied*, 562 U.S. 1003 (2010). *See* 52 U.S.C. § 30109(a)(8)(C); *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPRESENTATIVE TED LIEU, et al.,

Plaintiffs,

v.

FEDERAL ELECTION COMMISSION,

Defendant.

Civ. No. 16-2201 (EGS)

MEMORANDUM OPINION

This case involves the constitutionality of the Federal Election Campaign Act's ("FECA") limits on contributions to political action committees that make only independent expenditures. The Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") has held that contributions to such independent expenditure-only political action committees "cannot corrupt or create the appearance of corruption" and therefore limits on contributions to these groups are unconstitutional. *SpeechNow.org v. FEC*, 599 F.3d 686, 694 (D.C. Cir. 2010)(en banc). The upshot of this holding is that certain political action committees, commonly known as "Super PACs" can "receive unlimited amounts of money from both individuals and corporations" and "engage in unlimited electioneering communications, so long as their activities are not made 'in cooperation, consultation, or concert, with, or at the request or suggestion of' a candidate, his or her authorized

political committee, or a national, State, or local committee of a political party." *Stop This Insanity, Inc. Employee Leadership Fund v. FEC*, 902 F. Supp. 2d 23, 37 (D.D.C. 2012)(citation omitted). It is undisputed that this is the law of the Circuit.

Notwithstanding the D.C. Circuit's ruling in *SpeechNow*, Plaintiffs Representative Ted Lieu; Representative Walter Jones; Senator Jeff Merkley, State Senator (ret.); John Howe; Zephyr Teachout; and Michael Wager (collectively, "Plaintiffs") brought an administrative complaint against several Super PACs alleging violations of FECA when the Super PACs knowingly accepted contributions in excess of monetary limits set by FECA. The Federal Election Commission ("FEC" or "Commission") disagreed explaining that under *SpeechNow* the Super PACs actions were lawful. Accordingly, the FEC dismissed the administrative complaint.

Plaintiffs bring this action alleging the FEC acted "contrary to law" when it dismissed the administrative complaint against the Super PACs because the FEC relied on *SpeechNow*—an allegedly unlawful judicial ruling. Pending before the Court is FEC's motion to dismiss plaintiffs' complaint for failure to state a claim. Plaintiffs have the daunting task of persuading this Court to rule inconsistently with the D.C. Circuit's *en banc* opinion in *SpeechNow*. This Court cannot do so, therefore defendant's motion to dismiss is **GRANTED**.

I. Background

Because the claims in this case involve several provisions of FECA, and the D.C. Circuit's interpretation of those provisions, the Court begins

with an explanation of the statute and relevant case law.

A. FECA and *SpeechNow*

FECA was enacted to "limit spending in federal election campaigns and to eliminate the actual or perceived pernicious influence over candidates for elective office that wealthy individuals or corporations could achieve by financing the 'political warchests' of those candidates." *Orloski v. FEC*, 795 F.2d 156, 163 (D.C. Cir. 1986)(*citing Buckley v. Valeo*, 424 U.S. 1, 25–26 (1976)). To that end, there are several provisions in FECA that limit the amount of money a person can contribute to a federal campaign. These limits often depend on who or where the contribution is coming from, and the amount of the contribution.

Relevant to this case are the limits on contributions made to political action committees.[1] FECA defines a "political committee" as "any committee, club, association, or other group of persons" that receives "contributions" or makes "expenditures" "for the purpose of influencing any election for Federal Office" "aggregating in excess of $1,000 during a calendar year." 52 U.S.C. § 30101(4)(A), (8)(A)(i),(9)(A)(i). This definition has been further tailored by the Supreme Court to "only encompass organizations that are under the control

[1] The term "political action committee or 'PAC' . . . normally refers to organizations that corporations or trade unions might establish for the purpose of making contributions or expenditures that [FECA] would otherwise prohibit." *FEC v. Atkins*, 524 U.S. 11, 15 (1998)(citing 2 U.S.C. §§ 431(4)(B), 411b).

of a candidate or the major purpose of which is the nomination or election of a candidate." *Buckley v. Valeo*, 424 U.S. 1, 79 (1976). Political action committees fall within the category of political committees as defined by the Act.

FECA sets several limitations on the contributions political committees may receive depending on the type of entity that receives the contribution. A political committee that is not authorized by a candidate or established by a national or state political party may not knowingly accept any contribution in excess of $5,000 per year from an individual. 52 U.S.C. § 30116(f). And, of course, an individual shall not contribute more than $5,000 per year to this type of political committee. *Id.* § 30116(a)(1)(C).

The $5,000 limit on contributions to political committees does not apply, however, to political committees that solely engage in independent expenditures. *See SpeechNow*, 599 F.3d at 694–95. Independent expenditures are defined by FECA as expenditures "that expressly advocate[] the election or defeat of a clearly identified candidate" and are "not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents." 52 U.S.C. § 30101(17).

The inability to put limitations on contributions to independent expenditure-only political committees has led to "the genesis of so-called 'Super PACs.'" *Stop this Insanity*, 902 F. Supp. 2d at 37. Super PACS were born from the union of the rulings in two

First Amendment campaign finance cases. In the first case, *Citizens United v. FEC*, the Supreme Court "conclude[d] that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption." 558 U.S. 310, 357 (2010). Therefore, the Court held, the government did not have a sufficient anticorruption interest in restricting corporations from engaging in political speech funded from the corporation's general treasury if that speech was in the form of an independent expenditure. *Id.* at 358.

In the second case, *SpeechNow*, the D.C. Circuit held that if under *Citizens United* there was no anti-corruption interest in limiting independent expenditures then there could not be an anti-corruption interest in regulating contributions to independent expenditure-only political action committees. 599 F.3d at 694–95. The D.C. Circuit acknowledged that the only interest recognized by the Supreme Court as sufficiently important to outweigh First Amendment interests implicated by contributions for political speech was the interest of "preventing corruption or the appearance of corruption." *SpeechNow*, 599 F.3d at 692 (citations omitted). Applying the then-new precedent of *Citizens United*, the D.C. Circuit reasoned that if the Supreme Court ruled that limits on independent expenditures were unconstitutional, it necessarily follows that limits on contributions to political committees that engaged solely in independent expenditures are also unconstitutional. *Id.* This is because, like the independent expenditures in *Citizens United*, "contributions to groups that make only independent expenditures also cannot corrupt or

create the appearance of corruption." *Id.* at 694. In other words, the government "has no anti-corruption interest in limiting contributions to an independent expenditure group" and therefore, the D.C. Circuit held, any limits on such contributions are unconstitutional. *Id.* at 695.

Enter Super PACs. Because these political action committees make solely independent expenditures, they are "permitted to receive unlimited amounts of money from both individuals and corporations." *Stop This Insanity*, 902 F. Supp. 2d at 37. This allows for an "unlimited [amount of] money to flow into the electoral process for express advocacy" for particular candidates so long as the expenditures are not coordinated with that candidate. *Id.* at 38.

In light of *Citizens United* and *SpeechNow*, the FEC issued an advisory opinion explaining the *SpeechNow* ruling and its effects on the regulation of political action committees. FEC Advisory Op. 2010-11 (Commonsense Ten), 2010 WL 3184269 (July 22, 2010). The advisory opinion explained that the FEC's understanding was that it "necessarily follows" from *Citizens United* and *SpeechNow* "that there is no basis to limit the amount of contributions to" an independent expenditure-only political committee "from individuals, political committees, corporations and labor organizations," which are covered by 52 U.S.C. § 30116(a)(1)(C). *Id.* at *2. The advisory opinion also triggered FECA's safe harbor for "any person involved in any specific transaction or activity which is indistinguishable in all its material aspects" from the activity described in the opinion. 52 U.S.C. § 30108(c)(1)(B). Additionally, anyone who relies on a finding in an advisory opinion and does so in good

faith "shall not, as a result of any such act, be subject to any sanction provided" by FECA. *Id.* § 30108(c)(2). Since issuing the advisory opinion, the Commission has not enforced the limits in 52 U.S.C. § 30116(a)(1)(C) when contributions are given to groups that make only independent expenditures. Def.'s Mot. to Dismiss, ECF No. 39 at 11.[2]

FECA allows any person to file an administrative complaint with the FEC alleging a violation of the statute. 52 U.S.C. § 30109(a)(1); *see also* 11 C.F.R. § 111.4. After reviewing the complaint, and relevant submissions made by the administrative respondents, the FEC must determine whether there is "reason to believe" that FECA has been violated. 52 U.S.C. § 30109(a)(2). If the Commission dismisses the complaint, FECA allows "[a]ny party aggrieved" by the dismissal to file suit to obtain judicial review.[3] 52 U.S.C. § 30109(a)(8)(A). If the reviewing court concludes that the Commission's dismissal is "contrary to law," the court can "direct the Commission to conform with [that] declaration within 30 days." *Id.* § 30109(a)(8)(C).

B. Procedural History

Plaintiffs filed an administrative complaint against ten political action committees, all Super PACs, alleging that they knowingly accepted contributions in excess of the $5,000 per person per

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[2] When citing electronic filings throughout this opinion, the Court cites to the ECF header page number, not the page number of the filed document.

[3] All such lawsuits must be filed in this district. *Id.* (providing that aggrieved parties "may file a petition with the United States District Court for the District of Columbia").

year limit set by FECA. *See* Am. Compl. ECF No. 36 ¶ 79 (citing 52 U.S.C. § 30116(a)(1)(C) and (f); 11 C.F.R. §§ 110.1(d) and (n)). The complaint also cited over 39 specific contributions to the Super PACs from over two-dozen contributors that were alleged to violate FECA's contribution limits.[4] Joint Appendix (J.A.), ECF No. 45 at 23–30; *Id.* ¶¶ 41–78.

In their administrative complaint, Plaintiffs recognized that the FEC in its Advisory Opinion had declared its intent to follow *SpeechNow's* holding that contribution limits as applied to contributions to independent expenditure-only political committees are unconstitutional. J.A. at 9. Plaintiffs, however, reminded the FEC that they were not bound to the *SpeechNow* decision and could "still enforce FECA's contribution limits in cases brought by or against other parties outside the D.C. Circuit." J.A. at 10. Another way around *SpeechNow*, argued plaintiffs, was for the FEC to refuse to acquiesce to the *SpeechNow* ruling even in the D.C. Circuit "as long as the agency is 'embarked on a rational litigation program designed to secure a reasonably prompt national resolution of the question in dispute.'" *Id.* (citing Samuel Estreicher & Richard L. Revesz, *The Uneasy Case Against Intracircuit Nonacquiescence*, 99 Yale L.J. 831, 832 (1990)). Therefore, plaintiffs invited the FEC "to reconsider, in light of later experience, its decision to acquiesce to *SpeechNow*." *Id.*

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[4] For example, the Freedom Partners Action Fund, Inc. was alleged to have received contributions from four individuals, the Charles G. Koch 1997 trust, and the Mountaire Corporation of Little Rock, of over $13,000,000,000 total.

The FEC declined the invitation. The Commission voted unanimously to find no reason to believe that the administrative respondents, (*i.e.*, the Super PACs), had violated FECA. J.A. at 213–14. The Commission acknowledged plaintiffs' factual allegations and plaintiffs' arguments that *SpeechNow* was wrongly decided, but found that "the D.C. Circuit's decision in *SpeechNow* and the Commission's [advisory opinion] plainly permit the contributions described in the [c]omplaint, and [plaintiffs] do not suggest otherwise." *Id.* at 208. In light of plaintiffs' concession that "*SpeechNow* and [the advisory opinion] permit the conduct described in the [c]omplaint" the Commission ruled that it would be inconsistent to find that there was a "reason to believe that respondents violated the law." *Id.* at 210.

The Commission also noted that Super PACs were entitled to rely on the advisory opinion in which the Commission adopted the holding in *SpeechNow*. J.A. at 208. The Commission explained that individuals may rely on an advisory opinion as long as the person is "involved in the specific transaction or activity with respect to which such advisory opinion is rendered" or if the person is involved in a specific transaction or activity "which is indistinguishable in all its material aspects from the transaction or activity with respect to which such advisory opinion is rendered." *Id.* (citing 52 U.S.C. § 30108(c)(1)(A),(B)). The Commission further noted that FECA and the Commission's regulation prohibit the Commission from sanctioning any person who acts in good-faith reliance on an advisory opinion. *Id.* (citing 52 U.S.C. § 30108(c)(2)).

The Commission also explicitly addressed its decision to acquiesce to *SpeechNow*. The Commission began by explaining that the doctrine of nonacquiesence "refers to an agency's conscious decision to disregard the law of one or more circuits to generate a circuit split that will result in judicial finality through Supreme Court review." *Id.* at 210 (citation omitted). The Commission reasoned that acquiescence therefore "assumes that the law forming the basis for the obligation to acquiesce remains in flux." *Id.* (citing *Johnson v. U.S.R.R. Ret. Bd.*, 969 F.2d 1082, 1092 (D.C. Cir. 1992)). The Commission explained that because "seven federal courts of appeals" have addressed the constitutionality of imposing limits on contributions to Super PACs and have all ruled that such limits are unconstitutional, "there is simply no basis to conclude that the law remains unsettled in a way that would begin to justify Commission nonacquiescence . . . even if the Commission had not already adopted the holding of *SpeechNow* in [the advisory opinion]." *Id.* at 210–11. Accordingly, the Commission dismissed the complaint.

Plaintiffs sought review of the Commission's decision by filing this law suit. In their amended complaint, plaintiffs allege that because the FEC's dismissal of the administrative complaint "rested on legally erroneous conclusions about the constitutionality of [FECA]" the dismissal was "'contrary to law' under 52 U.S.C. § 3019(a)(8)(C)." *See* Am. Compl., ECF No. 36 ¶¶ 85–88.[5] Defendant's

[5] Plaintiffs also alleged a violation of the Administrative Procedure Act, 5 U.S.C. § 706(2), in Count II of their Amended Complaint, but have since dropped that claim. *See* Pls.' Opp'n.,

[sic] moved to dismiss the complaint for failure to state a claim. *See* Def.'s Mot. to Dismiss, ECF No. 39. Plaintiffs filed their opposition to the motion to dismiss and defendants have filed a reply. This case is now ripe for adjudication.

II. Legal Standard

The FEC has moved to dismiss plaintiffs' amended complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). However, because this case requires the Court to review an agency's final action, the traditional Rule 12(b)(6) standard of review does not apply. *Marshall Cnty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226 (D.C. Cir. 1993). Rather, when agency action is challenged, "[t]he entire case on review is a question of law, and only a question of law. And because a court can fully resolve any purely legal question on a motion to dismiss, there is no inherent barrier to reaching the merits at the 12(b)(6) stage." *Id.* Accordingly, in reviewing agency action, "the district judge sits as an appellate tribunal." *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001).

A party challenging an FEC dismissal decision under FECA's judicial review provision, 52 U.S.C. § 30109(a)(8)(A), is entitled to relief if the dismissal decision is "contrary to law." *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986). "The FEC's decision is 'contrary to law' if (1) the FEC dismissed the

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ECF No. 42 at 13 n.1 ("Plaintiffs do not oppose dismissal of Count II, alleging that the FEC'S dismissal of plaintiffs' complaint violated the Administrative Procedure Act."). Accordingly, Count II of the complaint is **DISMISSED.**

complaint as a result of an impermissible interpretation of the Act, . . . or (2) if the FEC's dismissal of the complaint, under a permissible interpretation of the statute, was arbitrary or capricious, or an abuse of discretion." *Id.* (citations omitted).

III. Analysis

The Court begins by addressing the threshold issue of the appropriate standard of review for the FEC's decision to dismiss a plaintiffs' administrative complaint when that dismissal is based on an interpretation of judicial precedent. The Court then turns to the merits and discusses whether the FEC's decision was "contrary to law" under FECA.

A. Proper Standard of Review under FECA

The parties agree that the standard of review for a Commission's dismissal of an administrative complaint is whether the dismissal is "contrary to law" under FECA. 52 U.S.C. § 30109(a)(8)(C); *see* Def.'s Mot. to Dismiss, ECF No. 39 at 17; Pls.' Opp'n, ECF No. 42 at 14. The parties similarly agree that courts need not give binding deference to an administrative agency's interpretation of judicial precedent or the Constitution. Def.'s Mot. to Dismiss, ECF No. 39 at 17; Pls.' Opp'n, ECF No. 42 at 14. Where the parties part ways, however, is on the question of whether the "contrary to law" standard under FECA requires the Court to give any deference to the Commission's enforcement decisions, even if the deference is not conclusive.

Plaintiffs argue that review in this case should be *de novo*. Pls.' Opp'n., ECF No. 42 at 15. Plaintiffs

acknowledge that in the typical case in which the FEC is interpreting a statute that it administers the Court is required to defer to the agency's interpretation. *Id.* at 14 (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 843-44 (1984)). Plaintiffs further acknowledge that a Court must defer to an agency's dismissal which rests on a factual determination as long as that determination is supported by substantial evidence. *Id.* (*citing Hagelin v. FEC*, 411 F.3d 237, 242-43 (D.C. Cir. 2005)). Plaintiffs argue, however, that neither circumstance applies to this case because the FEC's dismissal was based on its interpretation of *SpeechNow*, and courts need not defer to an agency's interpretation of judicial precedent. *Id.*

The FEC argues that the Court should defer to the dismissal decision. Def.'s Mot. to Dismiss, ECF No. 39 at 18. The FEC recognizes that "courts are not obligated to give binding deference to an agency's interpretation of judicial precedent or the Constitution." *Id.* at 18 (citing *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1341 (D.C. Cir. 2002)). The FEC argues, however, that in the context of a decision to not enforce FECA, an agency engages in a complicated balance of factors particularly in the agency's expertise including whether the agency is likely to succeed if it acts and whether the enforcement action best fits the agency's overall policy goals. *Id.* (citing *Heckler v. Cheney*, 470 U.S. 821, 831 (1985)). Defendants argue that because there are discretionary factors involved in a decision about whether to bring an enforcement action, the Court should defer to the agency's decision

notwithstanding the fact that the decision turned on the interpretation of judicial precedent. *Id.*

The Court is persuaded that plaintiffs have the better argument. This is not the typical case of administrative review: the FEC's decision to dismiss the complaint was based exclusively on its interpretation of the D.C. Circuit's opinion in *SpeechNow*. The precedent in this Circuit is clear that "courts need not, and should not, defer to agency interpretations of opinions written by courts." *Citizens for Responsible Ethics in Washington v. FEC*, 209 F. Supp. 3d 77, 87 (D.D.C. 2016) (collecting cases). This principle is "especially true where, as here, . . . the . . . precedent is based on constitutional concerns, which is an area of presumed judicial competence.'" *Akins v. FEC*, 101 F.3d 731, 740 (D.C. Cir. 1996), *vacated on other grounds*, 524 U.S. 11 (1998).

The FEC invokes *Heckler v. Cheney*, but that case is inapposite. 470 U.S. 821, 831 (1985). Although *Heckler* does stand for the proposition that there is a presumption that agency decisions not to enforce are unreviewable, FECA's express provision for the judicial review of FEC dismissal decisions rebuts that presumption. *See FEC v. Akins*, 524 U.S. 11, 26 (1998) ("In *Heckler,* this Court noted that agency enforcement decisions have traditionally been committed to agency discretion, and concluded that Congress did not intend to alter that tradition in enacting the APA . . . We deal here with a statute [FECA] that explicitly indicates the contrary.") (internal quotation marks omitted). Moreover, here, the dismissal decision was not rooted in a judgment call such as exercising prosecutorial discretion or

policy-based justifications, but rather an interpretation of judicial precedent. In other words, the decision was not based on discretionary factors that would require the Court to defer to the judgment and expertise of the agency. Accordingly, the Court will not afford deference to the FEC's interpretation of judicial precedent defining the protections of the First Amendment as it relates to the issues in this case.

B. Review of the FEC's Dismissal Decision

Plaintiffs argue that the FEC acted contrary to law in its interpretation of *SpeechNow* because its decision to dismiss the administrative complaint rested on a judicial ruling that was contrary to law. Pls.' Opp'n., ECF No. 42 at 17. Plaintiffs concede that the D.C. Circuit's ruling in *SpeechNow* "voided the long-established statutory limits for *contributions* to any political committee that restricts its spending to independent expenditures." Am. Compl., ECF No. 36 ¶ 2 (emphasis in original). However, plaintiffs argue that *SpeechNow* does not stop the FEC from declaring the Super PACs' actions as unlawful. Pls.' Opp'n., ECF No. 42 at 19.

In *SpeechNow*, the D.C. Circuit sitting *en banc* determined that FECA limits on contributions could not be constitutionally applied to independent expenditure-only political action committees. 599 F.3d at 694–96. The D.C. Circuit began by recognizing that "although contribution limits do encroach upon First Amendment interests, they do not encroach upon First Amendment interests to as great a degree as expenditure limits." *Id.* at 692. The Court explained that expenditures and contributions

are treated differently because, "in 'contrast with a limitation upon expenditures for political expression, a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication.'" *Id.* (quoting *Buckley*, 424 U.S. at 20–21).

The D.C. Circuit held that although the standard for restrictions on *contributions* is less stringent than the standard for *expenditures*, the Act's contribution limit was unconstitutional under either standard because the government has no valid "interest in limiting contributions to independent expenditure-only organizations." *Id.* at 696. The Court explained that the only interest recognized by the Supreme Court as sufficiently important to outweigh the First Amendment interests implicated by contributions for political speech is the interest in "preventing corruption or the appearance of corruption." *Id.* (citations omitted). However, in light of the Supreme Court's ruling in *Citizens United* that independent expenditures could not corrupt or create the appearance of corruption, the D.C. Circuit held that it "must conclude" that "the government has no anti-corruption interest in limiting contributions to an independent expenditure group." *Id.* at 695. Since the government had zero interest in limiting contributions to groups that make only independent expenditures, the D.C. Circuit reasoned that the implicated First Amendment interests outweighed the government's non-existent interests. *Id.* As the D.C. Circuit put it, "something . . . outweighs nothing every time." *Id.* (citation omitted).

Plaintiffs point out several alleged flaws in the D.C. Circuit's decision. Plaintiffs argue that *SpeechNow*: (1) failed to appreciate the distinction between contributions and expenditures; (2) rested on a logical fallacy that if expenditures cannot corrupt then contributions cannot corrupt either; (3) failed to appreciate a regulatory interest in limiting contributions; (4) misinterpreted the holding in *Citizens United*; and (5) developments since *SpeechNow* require its reconsideration. Pls.' Opp'n, ECF No. 42 at 23–38; *see also id.* at 26 ("The bottom line of the *SpeechNow* opinion–that contributions to super PACs cannot corrupt–is plainly wrong.").

Plaintiffs' acknowledge that the D.C. Circuit's interpretation of *Citizens United* in *SpeechNow* binds this Court unless *SpeechNow* has been overruled by either the D.C. Circuit sitting *en banc*, or the Supreme Court. Pls.' Opp'n, ECF No. 42 at 23. There is no D.C. Circuit case that purports to overrule *SpeechNow*. The only Supreme Court case the Plaintiffs cite that postdates *SpeechNow* and therefore could have possibly overruled it is *McCutcheon v. FEC*, 572 U.S. 185 (2014) (plurality opinion). In *McCutcheon*, a Supreme Court plurality held that an aggregate limit on the amount an individual can contribute to a candidate or national party was unconstitutional.[6] *McCutcheon*, 572 U.S. at 194. The Court held that the aggregate limit on contributions was more than a "modest restraint upon protected political activity" because the limit

[6] The base limit, which restricted how much money a donor may contribute to any particular candidate or committee, was not challenged.

functionally prohibited an individual from fully contributing to primary and general elections campaigns of ten or more candidates.[7] *Id.* at 204. In balancing the First Amendment interest with the government's burden of showing that the aggregate limits further the permissible objective of preventing *quid pro quo* corruption, the Court stated "there is not the same risk of *quid pro quo* corruption or its appearance when money flows through independent actors to a candidate, as when a donor contributes to a candidate directly." *Id.* at 210. The Court also noted "[t]he absence of prearrangement and coordination of an expenditure with the candidate or his agent . . . undermines the value of the expenditure to the candidate[,] but probably not by 95 percent." *Id.* at 214.

Plaintiffs point to the *McCutcheon* decision and argue that the Court recognized that "the lack of coordination may make an expenditure worth less but not worthless." Pls.' Opp'n., ECF No. 42 at 33. And therefore, plaintiffs argue, independent expenditures cannot be wholly non-corrupting since they retain some value. *Id. McCutcheon*, however was not about independent expenditures but rather contributions directed to a particular candidate or party committee. *Id.* at 193–94. In any event, *McCutcheon* did not purport to overturn *SpeechNow* or *Citizens United*.

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[7] The base limits were such that an individual would reach the aggregate limit after contributing the max base amount, $5,200 each, to nine candidates. Therefore, the aggregate limit functioned as an outright ban on further contributions to any more candidates. *McCutcheon*, 572 U.S. at 204.

The Court recognizes that there is some tension between *SpeechNow* and other Supreme Court decisions. But that tension flows from inconsistencies between *Citizens United* and prior Supreme Court campaign finance decisions. *See McCutcheon*, 572 U.S. at 240–45 (Breyer, J., dissenting)(explaining statements in *Citizens United* about proper contours of corruption "conflict not just with the language of [prior precedent] but with . . .the very holding[s]" of prior Supreme Court cases). Nevertheless, the D.C. Circuit has spoken on the issue–limits on contributions to Super PACs are unconstitutional– and the D.C. Circuit's reasoning is binding on this Court. Plaintiffs point to no Supreme Court cases which show that *SpeechNow* has been overruled.

Plaintiff's allegations about the violations of the Super PACs fall squarely within the holding of *SpeechNow*. It cannot be said that the FEC's determination, which was based on *SpeechNow*, was contrary to law. To do so would be tantamount to a declaration that binding precedent of the D.C. Circuit was unlawful. And that is not something this Court is prepared to say.[8]

IV. Conclusion

This case centers on the balance of two competing interests. On one hand, "[t]here is no right more basic in our democracy than the right to participate in electing our political leaders . . . [which includes]

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[8] Because the FEC correctly applied *SpeechNow* in dismissing the administrative complaint, the Court need not decide whether the Commission erroneously acquiesced to *SpeechNow* or whether the FEC'S reliance on its advisory opinion was contrary to law.

contribut[ing] to a candidate's campaign." *McCutcheon*, 572 U.S. at 191. On the other hand, "[t]o say that Congress is without power to pass appropriate legislation to safeguard an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self protection." *McConnell v. FEC*, 540 U.S. 93, 223–24 (2003) (alterations and citation omitted). In *SpeechNow*, the D.C. Circuit struck that balance and ruled that any contribution limits to independent expenditure-only groups (*i.e.*, Super PACs) were unconstitutional because the government has absolutely no anti-corruption interest in stopping contributions to such groups. 599 F.3d at 695. The FEC followed that opinion in deciding to dismiss the administrative complaint against the Super PACs in this case. Accordingly, the FEC did not act contrary to law, and defendant's motion to dismiss is **GRANTED.**

SO ORDERED.

Signed: Emmet G. Sullivan
United States District Judge
February 28, 2019

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-5072 **September Term, 2019**
1:16-cv-02201-EGS
Filed On: January 24, 2020

Ted Lieu, Representative, et al.,
Appellants

v.

Federal Election Commission,
Appellee

BEFORE: Garland, Chief Judge, and Henderson, Rogers, Tatel, Griffith, Srinivasan, Millett, Pillard, Wilkins, Katsas, and Rao, Circuit Judges

ORDER

Upon consideration of the petition for rehearing en banc, and the absence of a request by any member of the court for a vote; the motion of Citizens for Responsibility and Ethics in Washington to participate as amicus curiae in support of rehearing en banc and the lodged brief; the motion of Christopher T. Robertson, Kelly Bergstrand, and D. Alexander Winkelman to file amici curiae brief in support of rehearing en banc and the lodged brief; and the motion of Senators Sheldon Whitehouse, Richard Blumenthal, and Mazie Hirono to file brief

as amici curiae in support of rehearing en banc and the lodged brief, it is

ORDERED that the motions to participate as amicus curiae and file briefs on rehearing be granted. The Clerk is directed to file the lodged briefs. It is

FURTHER ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/
Daniel J. Reidy
Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-5072 **September Term, 2019**
1:16-cv-02201-EGS
Filed On: August 20, 2019

Ted Lieu, Representative, et al.,
Appellants

v.

Federal Election Commission,
Appellee

BEFORE: Garland, Chief Judge; Henderson, Rogers, Tatel, Griffith, Srinivasan, Millett, Pillard, Wilkins, Katsas, and Rao, Circuit Judges

ORDER

Upon consideration of appellants' initial hearing en banc, the response thereto, and the absence of a request by any member of the court for a vote; the assented-to motion of Christopher T. Robertson, Kelly Bergstrand, and D. Alexander Winkelman to file brief as amici curiae in support of initial hearing en banc and the lodged brief; the consent motion of Citizens for Responsibility and Ethics in Washington for invitation to participate as amicus curiae in support of petition for initial hearing en banc and the lodged brief; and the lodged brief of Senators Sheldon

Whitehouse, Richard Blumenthal, and Mazie Hirono, it is

ORDERED that the motions to file brief amici curiae and for invitation to participate as amicus curiae be granted, and the lodged brief of the Senators be accepted for filing. The Clerk is directed to file the lodged documents. It is

FURTHER ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

APPENDIX E

FEDERAL ELECTION COMMISSION
FACTUAL AND LEGAL ANALYSIS

MUR: 7101

Respondents: ***Respondent Committees***
House Majority PAG and Alixandria Lapp in her official capacity as treasurer
American Alliance and Chris Marston in his official capacity as treasurer
Congressional Leadership Fund and Caleb Crosby in his official capacity as treasurer
Bold Agenda PAC and Candace Hermsmeyer in her official capacity as treasurer
Defending Main Street SuperPAC Inc. and Sarah Chamberlain in her official capacity as treasurer
ESAFund and Nancy H. Watkins in her official capacity as treasurer
Freedom Partners Action Fund, Inc. and Thomas F. Maxwell III in his official capacity treasurer
New York Wins PAC and Keith A. Davis in his official capacity as treasurer
Senate Majority PAC and Rebecca Lambe in her

official capacity as treasurer
Senate Leadership Fund and
Caleb Crosby in his official
capacity as treasurer

Respondent Contributors

Access Industries, Inc.
Americans for Shared
Prosperity
Bernard H. Schwartz
Bernard Marcus
Charles G. Koch
Charles G. Koch 1997 Trust
Chevron Corporation
Diane Hendricks
S. Donald Sussmaii
Fred Eychaner
George M. Marcus
James H. Simons
John Jordan
Kenneth Griffin.
LIUNA Building America
Marlene Ricketts
Mountaire Corporation
Paul Singer
Petrodome Energy
Richard B. Gilliam
Robert C. McNair
Robert L. Mercer
Robert Ziff
Sean Parker
Sheldon Adelson
Vitreo-Retinal Consultants of
the Palm Beaches
Warren Stephens

I. INTRODUCTION

This matter was generated by a complaint filed with the Federal Election Commission alleging that respondent independent-expenditure-only political committees ("IEOPCs" or "super PACs") have violated the Federal Election Campaign Act of 1971, as amended (the "Act") by knowingly accepting contributions in excess of the $5,000 annual limit applicable to political committees that are not authorized committees or political party committees.[1] The Complaint enumerates dozens of allegedly excessive contributions and, by implication, alleges that the Respondent Contributors violated the Act by making those contributions.[2] Further, the Complaint alleges that, without prospective relief, the Respondent Committees will continue to knowingly accept contributions in excess of the $5,000 limit.[3]

Following *SpeechNow.org v. FEC*,[4] in which the Court of Appeals for the District of Columbia held that contribution limits are unconstitutional as applied to IEOPCs, the Commission concluded that IEOPCs are permitted to accept unlimited contributions in Advisory Op. 2010-11 (Commonsense Ten) ("AO 2010-11"). However, the Complaint asks the Commission to "reconsider, in light of later experience, its previous decision to acquiesce to

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[1] Compl. ¶¶ 1-3, 84-95 (July 7, 2016); *see* 52 U.S.C. § 30116(a)(1)(C), (f).

[2] Compl. ¶¶ 44-83.

[3] *Id.* ¶ 96.

[4] 599 F.3d 686, 689 (D.C. Cir. 2010) (*en banc*) ("*SpeechNow*").

SpeechNow," find that Respondent Committees violated the Act, and "seek . . . declaratory and/or injunctive relief against future acceptance of excessive contributions."[5] The Complaint asserts that "the D.C. Circuit's pronouncement that contributions to independent expenditure groups 'cannot corrupt or create the appearance of corruption' has proven empirically wrong."[6] In support, it states that super PAC contributions: (1) provide an opportunity for *quid pro quo* transactions to arise because super PACs effectively spend money on behalf of candidates and political parties; and (2) create an appearance of such corruption that is confirmed by public opinion polls.[7]

The Respondents argue that the Complaint has alleged no violation of law. They contend that *SpeechNow* was correctly decided under the principles enunciated by the Supreme Court in *Citizens United v. FEC*,[8] and that the Commission must acquiesce to the D.C. Circuit, especially given the number of circuit courts that have ruled in accordance. They also state that, in light of AO 2010-11, the contributions at issue fall within the Act's protection for persons entitled to rely on an advisory opinion. Further, the Respondents assert that, even if the Commission has a legal basis to declare its

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[5] Compl. ¶¶ 7-8; *see also id.* ¶ 7 ("In light of [AO 2010-11 and the Act's protection for persons entitled to rely on an advisory opinion] . . . complainants do not ask the FEC to seek civil penalties or other sanctions for past conduct . . . ").

[6] *Id.* ¶ 37.

[7] *Id.* ¶¶ 6, 40-43.

[8] 558 U.S. 310 (2010).

nonacquiescence to *SpeechNow*, it would be inappropriate for that to occur in the context of an enforcement action, and the Complaint's request for a change in Commission policy should be treated as a petition for rulemaking or advisory opinion request.

As explained below, under AO 2010-11, the Complaint fails to show that the Respondents violated the Act. Therefore, the Commission finds no reason to believe that the Respondent Committees violated 52 U.S.C. § 30116(f) by knowingly accepting excessive contributions and finds no reason to believe that the Respondent Contributors violated 52 U.S.C. § 30116(a)(1)(C) by making excessive contributions.

II. FACTUAL BACKGROUND

A. The Respondents

The Respondent Committees are registered with the Commission as independent-expenditure-only political committees.[9] The Complaint cites to

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[9] *See* Compl. ¶¶ 24-33; House Majority PAC Statement of Organization ("SOO") (Apr. 8, 2011), Cover Letter; American Alliance SOO at 5 (Aug. 13, 2014) (Misc. Text Form); Congressional Leadership Fund SOO (Oct. 24, 2011), Cover Letter; Bold Agenda PAC SOO, Cover Letter (Oct. 10, 2014); Defending Main Street SuperPAC Inc. SOO (Dec. 26, 2012), Cover Letter; ESAFund (then Ending Spending Fund) SOO (Oct. 5, 2010), Cover Letter; Freedom Partners Action Fund, Inc. SOO (Jun. 13, 2014), Cover Letter; New York Wins PAC SOO at 5 (Jan. 12, 2016) (Misc. Text Form); Senate Majority PAC (then Commonsense Ten) Misc. Report to FEC (July 27, 2010); Senate Leadership Fund SOO (Jan. 20, 2015), Cover Letter. The cited cover letters, miscellaneous text forms, and miscellaneous reports are based on the template that the Commission attached to AO 2010-11. *See* AO 2010-11 at 3 n.4 (providing that "the Committee may include a letter with its Form 1 Statement of Organization clarifying that it intends to accept unlimited

statistics showing that the Respondent Committees have spent or publicly stated their intent to spend large amounts to influence federal elections. For example, by May 2016, House Majority PAC (formed to help Democrats win seats in the House) had reserved nearly $19 million of advertising time for the 2016 election cycle.[10] Senate Leadership Fund (formed to help Republicans win seats in the Senate) had reserved $38.6 million in advertising time by June 2016.[11] The Complaint also describes how, during the 2014 election cycle, Senate Majority PAC (formed to help Democrats win seats in the Senate) apparently funded one out of every 20 television ads in senate races across the country.[12]

The Complaint states that the Respondent Committees are among over 2,400 super PACs registered with the Commission, and that, as of July 2016, such groups as a whole reported $755 million in total receipts and $405 million in total independent expenditures during the 2016 election cycle.[13] After the 2016 election cycle ended, super PACs reported $1.8 billion in total receipts and $1.1 billion in total

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contributions for the purpose of making independent expenditures"); *see id.*, Attach. A (template). Respondent Bold Agenda PAC terminated months before the Complaint was filed. Bold Agenda PAC Termination Approval (Jan. 28, 2016).

[10] Compl. ¶ 24.

[11] *Id.* ¶ 27.

[12] *Id.* ¶ 26.

[13] *Id.* ¶ 38.

independent expenditures.[14] The Complaint asserts that "the number of super PACs has exploded, as has the size of contributions to them and their influence in federal races."[15] Further, the Complaint contends that a large portion of their receipts are attributed to a small number of wealthy individuals.[16]

The Respondent Contributors are a group of individuals and corporations that made allegedly excessive contributions to the Respondent Committees.[17] The Complaint explains that it "recites only select very large contributions."[18]

B. Other Factual Allegations in the Complaint

According to the Complaint, factual developments since the D.C. Circuit's ruling in *SpeechNow* have proven the court's rationale wrong and demonstrated that contributions to super PACs can give rise to corruption or the appearance thereof.[19] First, the Complaint asserts that Attorney General Eric Holder's prediction that *SpeechNow* would "affect only a small subset of federally regulated contributions" was wrong given that the number of super PACs have exploded and that these committees

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[14] *Super PACs | OpenSecrets*, https://www.opensecrets.org/pacs/superpacs.php (last visited Mar. 10, 2017); *see* Compl. ¶ 38.

[15] Compl. 38.

[16] *Id.* ¶¶ 38-39 (citing Matea Gold & Anu Narayanswamy, *The New Gilded Age: Close to Half of All Super-PAC Money Comes from 50 Donors*, WASH. POST, Apr. 15, 2016).

[17] *Id.* ¶¶ 45-83.

[18] *Id.* ¶ 44.

[19] *See id.* ¶¶ 37-38, 43.

have raised and spent over a billion dollars, collectively.[20] The Complaint argues that the unlimited nature of super PAC contributions enables wealthy individuals to evade contribution limits applicable to candidate committees and political party committees by contributing funds to super PACs that "spend . . . money on behalf of candidates and parties."[21]

Second, the Complaint, relying on the results of several public opinion surveys, asserts that super PAC contributions create the appearance of *quid pro quo* corruption. The Complaint cites to surveys that "reveal widespread perceptions of corruption in the federal government."[22] For instance, "61% of likely voters agreed that most members of Congress were 'willing to sell their vote for either cash or a campaign contribution,' with the same percentage believing it likely that their own representative had done the same," according to a 2016 Rasmussen Reports survey.[23]

Additionally, the Complaint cites to surveys that "demonstrate[] an appearance of corruption specifically attributable to large super PAC contributions."[24] For example, "59% of voters in 54

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[20] *Id.* ¶¶ 6, 38.

[21] *Id.* ¶ 6.

[22] *Id.* ¶ 40.

[23] *Id.* (citing Rasmussen Reports, *Congressional Performance: Voters Still Say Congress is For Sale* (Feb. 22, 2016), http: //web.archive.org /web/20160624111643/http:// www.rasmussenreports.com/public_content/poiitics/ mood of america/congressional performance (archived version).

[24] *Id.* ¶ 41.

competitive congressional districts agreed that '[when someone gives 1 million dollars to a super PAC, they want something big in return from the candidates they are trying to elect,'" according to a 2012 Democracy Corps/Public Campaign Action Fund survey.[25] In addition, "68% of respondents (71 % of Democrats, 71 % of Republicans) agreed that 'a company that spent $100,000 to help elect a member of Congress could successfully pressure him or her to change a vote on a proposed law,'" according to a 2012 Brennan Center for Justice survey that focused on the role of super PACs in federal elections.[26]

Third, the Complaint relies upon an in-depth study on the effects of independent spending on congressional campaigns to allege that even absent coordination, a *quid pro quo* arrangement can result between a candidate and a contributor to a super PAC.[27] In particular, the Complaint describes one interview with a campaign operative who explained: "So the Member calls and says 'Hey, I know you're maxed out — and I can't take any more money from

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[25] *Id.* (citing Stan Greenberg *et al.*, *In Congressional Battleground, Voters Intensely Concerned About Money in Politics* at 4, Democracy Corps (Oct. 1, 2012), https.//www.democracycorps.com/attachments/article/910/dcor.pcaf.memo.093012.v4.pdf).

[26] *Id.* (citing Brennan Center for Justice, *National Survey: Super PACs, Corruption, and Democracy* (Apr. 24, 2012), https: // www.brennancenter.org/analysis/national-survey-super-pacs-corruption-and-democracy).

[27] *Id.* ¶ 42 (citing Daniel B. Tokaji & Renata E.B. Strause, *The New Soft Money* (2014), *available at* http:// moritzlaw.osu.edu/ thenewsoftmoney/wp-content/uploads/sites / 57/2014/06/the-new-soft-money-WEB.pdf).

you — but there's this other group. I'm not allowed to coordinate with them, but can I have someone call you?"[28] The Complaint then posits that "[t]he same conversation could then proceed to discuss legislative matters, including an agreement to take some official action in exchange for the donor's contributions to the 'other group,' *i.e.* the super PAC."[29]

III. ANALYSIS

A. Legal Background

The Act provides that no person shall make contributions to any political committee that is not an authorized committee or a political party committee in any calendar year which, in the aggregate, exceed $5,000.[30] Further, the Act prohibits any political committee from knowingly accepting contributions that exceed the limit.[31]

An "independent expenditure" is defined as an expenditure made by a person "that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents."[32] If an expenditure is coordinated with a candidate or an authorized committee, such expenditure is treated as an in-kind contribution and is subject to the

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[28] *Id.*

[29] *Id.*

[30] 52 U.S.C. § 30116(a)(1)(C).

[31] *Id.* § 30116(f).

[32] *Id.* § 30101(17).

applicable contribution limit and source prohibitions.[33]

In *Citizens United*, the Supreme Court held that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption."[34] Therefore, the Court determined that the government has no sufficient interest in prohibiting certain entities from making independent expenditures because, "'[[t]he absence of prearrangement and coordination . . . alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.'"[35]

In *SpeechNow*, the D.C. Circuit extended the legal principles enunciated in *Citizens United* and held that the Act's contribution limits as applied to contributions made to an IEOPC were unconstitutional.[36] The court reasoned that, "contributions to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption," and therefore "the government has no anti-corruption interest in limiting contributions to an independent group such as SpeechNow."[37] Further, like the D.C. Circuit, every

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[33] *See id.* § 30125(e)(1).

[34] 558 U.S. at 314. The Court invalidated as unconstitutional the Act's ban on corporate independent expenditures. *Id.* at 372.

[35] *Id.* at 357 (quoting *Buckley v. Valeo*, 424 U.S. 1, 47, (1976)).

[36] *SpeechNow*, 599 F.3d at 689.

[37] *Id.* at 694-95.

circuit court that has considered this issue has ruled that IEOPCs may accept unlimited contributions.[38]

After the D.C. Circuit issued its opinion in *SpeechNow*, one of the Respondent Committees, Senate Majority PAC (formerly known as Commonsense Ten), submitted an advisory opinion request to solicit and accept unlimited contributions from individuals, political committees, corporations, and labor organizations on the condition that it would make only independent expenditures, and the Commission granted the request.[39] In concluding that an independent expenditure-only political committee could accept unlimited contributions, the Commission relied upon *Citizens United* and *SpeechNow*, stating:

> Following *Citizens United* and *SpeechNow*, . . . corporations, labor organizations, and political committees . . . may make unlimited contributions to organizations such as the Committee that make only independent expenditures. Given the holdings in *Citizens*

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[38] *See Republican Party of N.M. v. King*, 741 F.3d 1089 (10th Cir. 2013); *N.Y. Progress and Protection PAC v. Walsh*, 733 F.3d 483 (2d Cir. 2013); *Texans for Free Enterprise v. Tex. Ethics Comm.*, 732 F.3d 535 (5th Cir. 2013); *Farris v. Seabrook*, 677 F.3d 858 (9th Cir. 2012); *Wis. Right to Life State PAC v. Borland*, 664 F.3d 139 (7th Cir. 2011); *Thalheimer v. City of San Diego*, 645 F.3d 1109 (9th Cir. 2011); *Long Beach Area Chamber of Com. v. City of Long Beach*, 603 F.3d 684 (9th Cir. 2010); *see also N.C. Right to Life. Inc. v. Leake*, 525 F.3d 274 (4th Cir. 2008) (pre-*Citizens United*).

[39] AO 2010-11 at 2. *see also* Advisory Op. 2010-09 (Club for Growth) (concluding that a corporation may establish and administer a political committee that makes only independent expenditures and that such committee is not subject to contribution limits).

> *United* and *SpeechNow*, that "independent expenditures do not lead to, or create the appearance of, *quid pro quo* corruption," . . . the Commission concludes that there is no basis to limit the amount of contributions to the Committee . . . .[40]

The Commission further provided guidance regarding how the Committee should register as an IEOPC with the Commission by submitting a letter expressing its intent to accept unlimited contributions for the purpose of making only independent expenditures. Since this advisory opinion, more than 2,400 have registered as IEOPCs.[41]

B. There is No Reason to Believe That the Respondents Made or Accepted Excessive Contributions

The D.C. Circuit's decision in *SpeechNow* and the Commission's AO 2010-11 plainly permit the contributions described in the Complaint, and the Complainants do not suggest otherwise. Instead, the Complainants' primary contention is that the Commission should reconsider AO 2010-11, engage in strategic nonacquiescence to the D.C. Circuit's binding decision in *SpeechNow*, and resume enforcement of limits on contributions to super PACs.

As the Complainants acknowledge, the Commission adopted the holding in *SpeechNow* by issuing AO 2010-11, and the Respondents are entitled to rely on it unless they acted contrary to

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[40] AO 2010-11 at 3 (citing *Citizens United*, 558 U.S. at 360).

[41] Compl. ¶ 38.

Commission guidance. Under the Act and Commission regulations, an advisory opinion may be relied upon by the person "involved in the specific transaction or activity with respect to which such advisory opinion is rendered," and by any person involved in any specific transaction or activity "which is indistinguishable in all its material aspects from the transaction or activity with respect to which such advisory opinion is rendered."[42] Further, the Act and Commission regulations prohibit the Commission from imposing any sanction under the Act on any person who acts in good faith reliance on an advisory opinion.[43]

Here, consistent with AO 2010-11, the Respondent Committees registered with the Commission by submitting documentation, included with their Statements of Organization, stating their intent to accept unlimited contributions for the purpose of making only independent expenditures. And none of the Respondent Committees have reported contributions to authorized committee or political party committee, nor does the Complaint allege that any of the committees coordinated their spending with a candidate, authorized committees, or political party committees. The contributions described in the Complaint, therefore, clearly fall within the Act's protection for persons entitled to rely on an advisory opinion. Further, the protection also would apply to any future contributions involving the Respondents, so long as the Commission does not

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[42] 52 U.S.C. § 30108(c)(1)(A), (B); *see* 11 C.F.R. § 112.5(a)(1), (2).

[43] 52 U.S.C. § 30108(c)(2); *see* 11 C.F.R. § 112.5(b).

supersede AO 2010-11 through an advisory opinion, rulemaking, or other administrative action. Indeed, the Complaint acknowledges that the Respondent Committees complied with Commission guidance and "do not ask the FEC to seek civil penalties or other sanctions for past conduct."[44] Rather, the Complaint requests that the Commission conduct an investigation, determine the Respondents violated the law, and seek only "declaratory and/or injunctive relief against future acceptance of excessive contributions."[45]

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[44] Compl. ¶ 7.

[45] *Id.* ¶ 96. Though we are aware of no directly applicable precedent construing the term "sanction" under 52 U.S.C. § 30108(c)(2), in other contexts, courts have construed the term "sanction" to include injunctive and declaratory relief. For example, courts have concluded that the term is expansive enough to cover nonmonetary limits on future activities. *See*, *e.g.*, *Alabama v. North Carolina*, 560 U.S. 330, 340-41 (2010) (citation omitted) (noting, in the course of construing an interstate compact, that "the imposition of a nonmonetary obligation" can be "one kind of 'sanction'"); *United States v. Alabama*, 691 F.3d 1269, 1289 (11th Cir. 2012) ("A sanction is commonly understood to be 'a restrictive measure used to punish a specific action or to prevent some future activity.'") (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2009 (1976)). Such a construction would also be consistent with the relatively broad definition found in the Administrative Procedure Act. *See* 5 U.S.C. § 551(10) (defining "sanction" to include an agency "prohibition, requirement, limitation, or other condition affecting the freedom of a person" and other "compulsory or restrictive action"). Further, accepting the Complainants' argument that the Commission remains free to seek judicial remedies, notwithstanding a clear and on-point advisory opinion, would mean that persons who have relied in good faith on that opinion can nonetheless be subjected to Commission enforcement proceedings and potential litigation.

The Act does not permit the Commission to investigate an allegation before making a finding that there is reason to believe that a respondent has violated or is about to violate the law.[46] The Complainants concede that and AO 2010-11 permit the conduct described in the Complaint, which is inconsistent with a finding of reason to believe that respondents violated the law.

Furthermore, the Commission chooses not to accept the Complainants' invitation not to acquiesce to the binding *SpeechNow* decision. Generally, nonacquiescence refers to an agency's conscious decision to disregard the law of one or more circuits to generate a circuit split that will result in judicial finality through Supreme Court review.[47] The propriety of nonacquiescence, therefore, "assume[s] that the law forming the basis for the obligation to acquiesce" remains "in flux."[48]

Such a conclusion upends the purpose of the advisory opinion process which is intended to provide the regulated community with an assurance that they can carry out activity deemed permissible by the Commission without the possibility of some form of regulatory enforcement action.

[46] *See* 52 U.S.C. § 30109(a)(2) (providing that the Commission shall conduct an investigation if it finds reason to believe that a person has violated or is about to violate the Act).

[47] *See generally* Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L. J. 679 (1989) (seminal law review article on the subject still routinely cited by courts).

[48] *Johnson v. U.S. R.R. Ret. Bd*, 969 F.2d 1082, 1092 (D.C. Cir. 1992) (quoting Estreicher & Revesz, *supra* note 47) (internal quotations deleted). In *Johnson*, the D.C. Circuit suggested that once "three circuits have rejected" an agency's position, "and not one has accepted it, further resistance would

Here, seven federal courts of appeals have addressed the constitutionality of limiting contributions to IEOPCs; each has ruled that such limits are unconstitutional.[49] One court went so far as to conclude that "[f]ew contested legal questions are answered so consistently by so many courts and judges."[50] With these decisions, there is simply no basis to conclude that the law remains unsettled in a way that would begin to justify Commission nonacquiescence, as the Complainants contend, even if the Commission had not already adopted the holding of *SpeechNow* in AO 2010-11.[51]

D. Conclusion

The Complaint raises a number of policy arguments as to why the Commission should reconsider its regulation of super PACs. However, the

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show contempt for the rule of law." *Id.* at 1093; *see also Heartland Plymouth Corp. v. NLRB*, 838 F.3d 16. 24-25. 29 (D.C. Cir. 2016) (granting fees against agency for bad faith in continuing nonacquiescence to D.C. Circuit precedent).

[49] *See supra* note 38.

[50] *N.Y. Progress and Protection PAC*, 733 F.3d at 488.

[51] Attempting to enforce contribution limits against independent expenditure groups might expose the Commission to awards of legal fees under the Equal Access to Justice Act. because its position was not "substantially Justified." 28 U.S.C. § 2412. One district court has already ordered the Commission to pay nearly $125,000 in legal fees for arguing that it could restrict political committees that make direct contributions to candidates from also raising unlimited contributions for independent expenditures. *See Carey v. FEC*, 864 P. Supp. 2d 57 (D.D.C. 2012). That court criticized the FEC for "'failing to appreciate binding precedent," including *Citizens United* and *SpeechNow*. *Id.* at 61.

Commission has adopted the holding of *SpeechNow* in AO2010-11, and cannot now pursue sanctions against the Respondents so long as they act consistently with the Commission's guidance. The Complaint therefore fails to show that a violation of the Act has occurred or is about to occur. Accordingly, the Commission finds no reason to believe that the Respondents have violated or will violate the Act.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued January 27, 2010 Decided March 26, 2010

No. 08-5223

SPEECHNOW.ORG, ET AL.,

APPELLANTS

v.

FEDERAL ELECTION COMMITTEE,

APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 1:08-cv-00248-JR)

No. 09-5342

DAVID KEATING, ET AL.,

APPELLANTS

v.

FEDERAL ELECTION COMMISSION,

APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 1:08-cv-00248-JR)

Steven M. Simpson argued the cause for appellants. With him on the brief were *William H. Mellor*, *Robert W. Gall*, *Robert P. Frommer*, *Paul M. Sherman*, and *Stephen M. Hoersting*.

Heidi K. Abegg and *Alan P. Dye* were on the briefs for *amici curiae* Alliance for Justice, et al. in support of appellants.

David B. Kolker, Associate General Counsel, Federal Election Commission, argued the cause for appellee. With him on the briefs was *Vivien Clair*, Attorney.

Joseph G. Hebert, *Donald J. Simon*, *Scott L. Nelson*, *Fred Wertheimer* were on the briefs for *amici curiae* Campaign Legal Center and Democracy 21.

Howard R. Rubin was on the briefs for *amici curiae* The Brennan Center for Justice and Professor Richard Briffault in support of appellee.

Before: SENTELLE, *Chief Judge*, GINSBURG, HENDERSON, ROGERS, TATEL, GARLAND, BROWN, GRIFFITH, and KAVANAUGH, *Circuit Judges*.

Opinion for the Court filed by *Chief Judge* SENTELLE.

SENTELLE, *Chief Judge*: David Keating is president of an unincorporated nonprofit association, SpeechNow.org (SpeechNow), that intends to engage in express advocacy[1] supporting candidates for

[1] "Express advocacy" is regulated more strictly by the FEC than so-called "issue ads" or other political advocacy that is not related to a specific campaign. In order to preserve the FEC's regulations from invalidation for being too vague, the Supreme Court has defined express advocacy as "communications containing express words of advocacy of election or defeat, such

federal office who share his views on First Amendment rights of free speech and freedom to assemble. In January 2008, the Federal Election Committee (FEC) issued a draft advisory opinion concluding that under the Federal Election Campaign Act (FECA), SpeechNow would be required to organize as a "political committee" as defined by 2 U.S.C. § 431(4) and would be subject to all the requirements and restrictions concomitant with that designation. Keating and four other individuals availed themselves of 2 U.S.C. § 437h, under which an individual may seek declaratory judgment to construe the constitutionality of any provision of FECA. As required by that provision, the district court certified the constitutional questions directly to this court for en banc determination. Thereafter, the Supreme Court decided *Citizens United v. FEC*, 130 S. Ct. 876 (2010), which resolves this appeal. In accordance with that decision, we hold that the contribution limits of 2 U.S.C. § 441a(a)(1)(C) and 441a(a)(3) are unconstitutional as applied to individuals' contributions to SpeechNow. However, we also hold that the reporting requirements of 2 U.S.C. §§ 432, 433, and 434(a) and the organizational requirements of 2 U.S.C. § 431(4) and 431(8) can constitutionally be applied to SpeechNow. In this action the district court also denied the plaintiffs' motion to enjoin FEC enforcement of FECA's contribution limits against SpeechNow. Because we hold that those provisions cannot be constitutionally applied, we vacate the order denying

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as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976).

that injunction and remand the matter to the district court for further proceedings consistent with our decision.

I. Background

SpeechNow is an unincorporated nonprofit association registered as a "political organization" under § 527 of the Internal Revenue Code. Its purpose is to promote the First Amendment rights of free speech and freedom to assemble by expressly advocating for federal candidates whom it views as supporting those rights and against those whom it sees as insufficiently committed to those rights. It intends to acquire funds solely through donations by individuals. SpeechNow further intends to operate exclusively through "independent expenditures." FECA defines "independent expenditures" as expenditures "expressly advocating the election or defeat of a clearly identified candidate" that are "not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents." 2 U.S.C. § 431(17). SpeechNow has five members, two of whom are plaintiffs in this case: David Keating, who is also SpeechNow's president and treasurer, and Edward Crane. Keating makes the operational decisions for SpeechNow, including in which election campaigns to run advertisements, which candidates to support or oppose, and all administrative decisions.

Though it has not yet begun operations, SpeechNow has made plans both for fundraising and for making independent expenditures. All five of the

individual plaintiffs – Keating, Crane, Fred Young, Brad Russo, and Scott Burkhardt – are prepared to donate to SpeechNow. Keating proposes to donate $5500. Crane proposes to donate $6000. Young, who is otherwise unaffiliated with SpeechNow, proposes to donate $110,000. Russo and Burkhardt want to make donations of $100 each. In addition, as of August 2008, seventy-five other individuals had indicated on SpeechNow's website that they were interested in making donations. As for expenditures, SpeechNow planned ads for the 2008 election cycle against two incumbent candidates for federal office who, in the opinion of SpeechNow, did not sufficiently support First Amendment rights. These ads would have cost around $12,000 to produce. Keating intended to place the ads so that the target audience would view the ads at least ten times, which would have cost around $400,000. As SpeechNow never accepted any donations, it never produced or ran these ads. However, SpeechNow intends to run similar ads for the 2010 election cycle if it is not subject to the contribution limits of § 441a(a) at issue in this case.

On November 19, 2007, SpeechNow filed with the FEC a request for an advisory opinion, asking whether it must register as a political committee and if donations to SpeechNow qualify as "contributions" limited by § 441a(a)(1)(C) and 441a(a)(3). At the time, the FEC did not have enough commissioners to issue an opinion, but it did issue a draft advisory opinion stating that SpeechNow would be a political committee and contributions to it would be subject to the political committee contribution limits. Believing that subjecting SpeechNow to all the restrictions

imposed on political committees would be unconstitutional, SpeechNow and the five individual plaintiffs filed a complaint in the district court requesting declaratory relief against the FEC under 2 U.S.C. § 437h. Because § 437h allows only the FEC, political parties, or individuals the right to bring such actions, this court removed SpeechNow from the § 437h proceedings. SpeechNow remains in the caption for this case because it, along with the individual plaintiffs, also sought a preliminary injunction prohibiting the FEC from enforcing the political committee contribution limits with respect to contributions to SpeechNow, and the denial of that injunction is also on appeal before this court. Because this court was already scheduled to hear the constitutional issues en banc, we consolidated the appeal with the en banc proceeding.

Section 437h provides that a "district court immediately shall certify all questions of constitutionality of this Act [FECA] to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc." The district court made findings of fact, and certified to this court five questions:

> 1. Whether the contribution limits contained in 2 U.S.C. §§ 441a(a)(1)(C) and 441a(a)(3) violate the First Amendment by preventing David Keating, SpeechNow.org's president and treasurer, from accepting contributions to SpeechNow.org in excess of the limits contained in §§ 441a(a)(1)(C) and 441a(a)(3).
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> 2. Whether the contribution limit mandated by 2 U.S.C. § 441a(a)(1)(C) violates the First

Amendment by preventing the individual plaintiffs from making contributions to SpeechNow.org in excess of $5000 per calendar year.

3. Whether the biennial aggregate contribution limit mandated by 2 U.S.C. § 441a(a)(3) violates the First Amendment by preventing Fred Young from making contributions to SpeechNow.org that would exceed his individual biennial aggregate limit.

4. Whether the organizational, administrative, and continuous reporting requirements set forth in 2 U.S.C. §§ 432, 433, and 434(a) violate the First Amendment by requiring David Keating, SpeechNow.org's president and treasurer, to register SpeechNow.org as a political committee, to adopt the organizational structure of a political committee, and to comply with the continuous reporting requirements that apply to political committees.

5. Whether 2 U.S.C. §§ 431(4) and 431(8) violate the First Amendment by requiring David Keating, SpeechNow.org's president and treasurer, to register SpeechNow.org as a political committee and comply with the organizational and continuous reporting requirements for political committees before SpeechNow.org has made any expenditures or broadcast any advertisements.

SpeechNow.org v. FEC, No. 08-0248 (D.D.C. Sept. 28, 2009).

Under FECA, a political committee is "any committee, club, association, or other group of persons" that receives contributions of more than $1000 in a year or makes expenditures of more than $1000 in a year. 2 U.S.C. § 431(4). Once a group is so designated, contributions to the committee are restricted by 2 U.S.C. § 441a(a)(1)(C) and 441a(a)(3). The first provision limits an individual's contribution to a political committee to $5000 per calendar year; the second limits an individual's total contributions to all political committees to $69,900 biennially.[2] *See* Price Index Increases for Contribution and Expenditure Limitations, 74 Fed. Reg. 7437 (Feb. 17, 2009) (increasing § 441a(a)(3)(B)'s limit from $57,500 to $69,900). A political committee also must comply with all applicable recordkeeping and reporting requirements of 2 U.S.C. §§ 432, 433, and 434(a). Under those sections, if the FEC regulates SpeechNow as a political committee, SpeechNow would be required to, among other things: appoint a treasurer, § 432(a); maintain a separately designated bank account, § 432(b), 432(h); keep records for three years that include the name and address of any person who makes a contribution in excess of $50, § 432(c)(1)-(2), 432(d); keep records for three years

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[2] Subject to exceptions not here relevant, FECA defines "contributions" as "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i). Again subject to exceptions, the Act defines "expenditure" as "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office; and [ ] a written contract, promise, or agreement to make an expenditure." 2 U.S.C. § 431(9)(A)(i)-(ii).

that include the date, amount, and purpose of any disbursement and the name and address of the recipient, § 432(c)(5), 432(d); register with the FEC within ten days of becoming a political committee, § 433(a); file with the FEC quarterly or monthly reports during the calendar year of a general election detailing cash on hand, total contributions, the identification of each person who contributes an annual aggregate amount of more than $200, independent expenditures, donations to other political committees, any other disbursements, and any outstanding debts or obligations, § 434(a)(4), 434(b); file a pre-election report and a post-election report detailing the same, *id.*; file semiannual or monthly reports with the same information during years without a general election, *id.*; and file a written statement in order to terminate the committee, § 433(d).

II. Analysis

A. *Contribution Limits (Certified Questions 1-3)*

The First Amendment mandates that "Congress shall make no law . . . abridging the freedom of speech." In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court held that, although contribution limits do encroach upon First Amendment interests, they do not encroach upon First Amendment interests to as great a degree as expenditure limits. In *Buckley*, the Supreme Court first delineated the differing treatments afforded contribution and expenditure limits. In that case, the Court struck down limits on an individual's expenditures for political advocacy, but upheld limits on contributions to political candidates and campaigns. In making the

distinction, the Court emphasized that in "contrast with a limitation upon expenditures for political expression, a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication." *Id.* at 20-21. However, contribution limits still do implicate fundamental First Amendment interests. *Id.* at 23.

When the government attempts to regulate the financing of political campaigns and express advocacy through contribution limits, therefore, it must have a countervailing interest that outweighs the limit's burden on the exercise of First Amendment rights. Thus a "contribution limit involving significant interference with associational rights must be closely drawn to serve a sufficiently important interest." *Davis v. FEC*, 128 S. Ct. 2759, 2772 n.7 (2008) (quoting *McConnell v. FEC*, 540 U.S. 93, 136 (2003)) (internal quotation marks omitted). The Supreme Court has recognized only one interest sufficiently important to outweigh the First Amendment interests implicated by contributions for political speech: preventing corruption or the appearance of corruption. *Id.* at 2773; *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985) ("*NCPAC*"). The Court has rejected each of the few other interests the government has, at one point or another, suggested as a justification for contribution or expenditure limits. Equalization of differing viewpoints is not a legitimate government objective. *Davis*, 128 S. Ct. at 2773. An informational interest in "identifying the sources of support for and opposition to" a political position or candidate is not

enough to justify the First Amendment burden. *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 298 (1981). And, though this rationale would not affect an unincorporated association such as SpeechNow, the Court has also refused to find a sufficiently compelling governmental interest in preventing "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form." *Citizens United v. FEC*, 130 S. Ct. 876, 902, 905 (2010) (quoting *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990), and rejecting *Austin*'s and subsequent cases' reliance on that interest).

Given this precedent, the only interest we may evaluate to determine whether the government can justify contribution limits as applied to SpeechNow is the government's anticorruption interest. Because of the Supreme Court's recent decision in *Citizens United v. FEC*, the analysis is straightforward. There, the Court held that the government has *no* anti-corruption interest in limiting independent expenditures.[3]

Citizens United involved a nonprofit corporation that in January 2008 produced a film that was highly critical of then-Senator Hillary Clinton, a candidate in the Democratic Party's 2008 Presidential primary elections. The film was, "in essence, . . . a feature-length negative advertisement that urges viewers to

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[3] Of course, the government still has an interest in preventing *quid pro quo* corruption. However, after *Citizens United*, independent expenditures do not implicate that interest.

vote against Senator Clinton for President." *Citizens United*, 130 S. Ct. at 890. As such, the film was subject to the restrictions of 2 U.S.C. § 441b. That provision made it unlawful for any corporation or union to use general treasury funds to make independent expenditures as defined by 2 U.S.C. § 431(17) or expenditures for speech defined as "electioneering communications," which are certain types of political ads aired shortly before an election or primary, 2 U.S.C. § 434(f)(3). The Supreme Court declared this expenditure ban unconstitutional, holding that corporations may not be prohibited from spending money for express political advocacy when those expenditures are independent from candidates and uncoordinated with their campaigns. 130 S. Ct. at 913.

The independence of independent expenditures was a central consideration in the Court's decision. By definition, independent expenditures are "not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents." 2 U.S.C. § 431(17). As the *Buckley* Court explained when it struck down a limit on independent expenditures, "[t]he absence of prearrangement and coordination of an expenditure with the candidate or his agent . . . alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Citizens United*, 130 S. Ct. at 908 (quoting *Buckley*, 424 U.S. at 47). However, the *Buckley* Court left open the possibility that the future might bring data linking independent expenditures to corruption or the appearance of

corruption. The Court merely concluded that independent expenditures "do[] not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions." 424 U.S. at 46.

Over the next several decades, Congress and the Court gave little further guidance respecting *Buckley*'s reasoning that a lack of coordination diminishes the possibility of corruption. Just a few months after *Buckley*, Congress codified a ban on corporations' independent expenditures at 2 U.S.C. § 441b. In 1978, in *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), the Court "struck down a state-law prohibition on corporate independent expenditures related to referenda," but did not "address the constitutionality of the State's ban on corporate independent expenditures to support candidates." *Citizens United*, 130 S. Ct. at 902, 903. Though the *Bellotti* Court sweepingly rejected "the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation," 435 U.S. at 784, it limited the implications of that rejection by opining in a footnote that "Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections," 435 U.S. at 788 n.26. Then, in *Austin*, the Court expressly upheld a Michigan law that prohibited corporate independent expenditures. 494 U.S. at 654-55. And in *McConnell*, the Court relied on *Austin* to uphold the Bipartisan Campaign Reform Act of 2002's (BCRA's) extension of

§ 441b's ban on corporate expenditures to electioneering communications. 540 U.S. at 203-09.

The *Citizens United* Court reevaluated this line of cases and found them to be incompatible with *Buckley*'s original reasoning. The Court overruled *Austin* and the part of *McConnell* that upheld BCRA's amendments to § 441b. More important for this case, the Court did so by expressly deciding the question left open by the footnoted caveat in *Bellotti*. The Court stated, "[W]e now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption." *Citizens United*, 130 S. Ct. at 909.

The Court came to this conclusion by looking to the definition of corruption and the appearance of corruption. For several decades after *Buckley*, the Court's analysis of the government's anti-corruption interest revolved largely around the "hallmark of corruption," "financial *quid pro quo*: dollars for political favors," *NCPAC*, 470 U.S. at 497. However, in a series of cases culminating in *McConnell*, the Court expanded the definition to include "the appearance of undue influence" created by large donations given for the purpose of "buying access," 540 U.S. at 144, 148. *See also FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 441 (2001); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 389 (2000). The *McConnell* Court concluded that limiting the government's anticorruption interest to preventing *quid pro quo* was a "crabbed view of corruption, and particularly of the appearance of corruption" that "ignores precedent, common sense, and the realities of political fundraising." 540 U.S. at

152. The *Citizens United* Court retracted this view of the government's interest, saying that "[t]he fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt." 130 S. Ct. at 910. The Court returned to its older definition of corruption that focused on *quid pro quo*, saying that "[i]ngratiation and access . . . are not corruption." *Id.* Therefore, without any evidence that independent expenditures "lead to, or create the appearance of, *quid pro quo* corruption," and only "scant evidence" that they even ingratiate, *id.*, the Court concluded that independent expenditures do not corrupt or create the appearance of corruption.

In its briefs in this case, the FEC relied heavily on *McConnell*, arguing that independent expenditures by groups like SpeechNow benefit candidates and that those candidates are accordingly grateful to the groups and to their donors. The FEC's argument was that large contributions to independent expenditure groups "lead to preferential access for donors and undue influence over officeholders." Appellee's Br. in *Keating v. FEC*, at 16. Whatever the merits of those arguments before *Citizens United*, they plainly have no merit after *Citizens United*.

In light of the Court's holding as a matter of law that independent expenditures do not corrupt or create the appearance of *quid pro quo* corruption, contributions to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption. The Court has effectively held that there is no corrupting "quid" for which a candidate might in exchange offer a corrupt "quo."

Given this analysis from *Citizens United*, we must conclude that the government has no anti-corruption interest in limiting contributions to an independent expenditure group such as SpeechNow. This simplifies the task of weighing the First Amendment interests implicated by contributions to SpeechNow against the government's interest in limiting such contributions. As we have observed in other contexts, "something . . . outweighs nothing every time." *Nat'l Ass'n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989). Thus, we do not need to quantify to what extent contributions to SpeechNow are an expression of core political speech. We do not need to answer whether giving money is speech per se, or if contributions are merely symbolic expressions of general support, or if it matters in this case that just one person, David Keating, decides what the group will say. All that matters is that the First Amendment cannot be encroached upon for naught.

At oral argument, the FEC insisted that *Citizens United* does not disrupt *Buckley*'s longstanding decision upholding contribution limits. This is literally true. But, as *Citizens United* emphasized, the limits upheld in *Buckley* were limits on contributions made *directly to candidates*. Limits on direct contributions to candidates, "unlike limits on independent expenditures, have been an accepted means to prevent *quid pro quo* corruption." *Citizens United*, 130 S. Ct. at 909 (citing *McConnell*, 540 U.S. at 136-38 & n.40).

The FEC also argues that we must look to the discussion about the potential for independent expenditures to corrupt in *Colorado Republican*

Federal Campaign Committee v. FEC, 518 U.S. 604 (1996). This, too, is unavailing. In *Colorado Republican*, the Court considered the constitutionality of FECA provisions that exempted political party committees from the general political committee contribution limits, but imposed limitations on political party committees' independent expenditures. *Id.* at 611-13. A majority of the Court agreed that the independent expenditure limitations were unconstitutional, but no more than three Justices joined any single opinion. It is true that the opinion of Justice Breyer did discuss the potential for corruption or the appearance of corruption potentially arising from independent expenditures, saying that "[t]he greatest danger of corruption . . . appears to be from the ability of donors to give sums up to $20,000 to a party which may be used for independent party expenditures for the benefit of a particular candidate," thus evading the limits on direct contributions to candidates. *Id.* at 617 (opinion of Breyer, J.). But *Colorado Republican* concerned expenditures by political parties, which are wholly distinct from "independent expenditures" as defined by 2 U.S.C. § 431(17). Moreover, a discussion in a 1996 opinion joined by only three Justices cannot control our analysis when the more recent opinion of the Court in *Citizens United* clearly states as a matter of law that independent expenditures do not pose a danger of corruption or the appearance of corruption.

The FEC argues that the analysis of *Citizens United* does not apply because that case involved an expenditure limit while this case involves a contribution limit. [Oral Tr. at 30, 31.] Alluding to

the divide between expenditure limits and contribution limits established by *Buckley*, the FEC insists that contribution limits are subject to a lower standard of review than expenditure limits, so that "what may be insufficient to justify an expenditure limit may be sufficient to justify a contribution limit." Oral Arg. Tr. at 39. Plaintiffs, on the other hand, argue that *Citizens United* stands for the proposition that "burdensome laws trigger strict scrutiny." Oral Arg. Tr. at 58. We do not find it necessary to decide whether the logic of *Citizens United* has any effect on the standard of review generally afforded contribution limits. The *Citizens United* Court avoided "reconsider[ing] whether contribution limits should be subjected to rigorous First Amendment scrutiny," 130 S. Ct. at 909, and so do we. Instead, we return to what we have said before: because *Citizens United* holds that independent expenditures do not corrupt or give the appearance of corruption as a matter of law, then the government can have no anti-corruption interest in limiting contributions to independent expenditure–only organizations. No matter which standard of review governs contribution limits, the limits on contributions to SpeechNow cannot stand.

We therefore answer in the affirmative each of the first three questions certified to this Court. The contribution limits of 2 U.S.C. § 441a(a)(1)(C) and 441a(a)(3) violate the First Amendment by preventing plaintiffs from donating to SpeechNow in excess of the limits and by prohibiting SpeechNow from accepting donations in excess of the limits. We should be clear, however, that we only decide these questions as applied to contributions to SpeechNow,

an independent expenditure–only group. Our holding does not affect, for example, § 441a(a)(3)'s limits on direct contributions to candidates.

B. *Organizational and Reporting Requirements (Certified Questions 4 & 5)*

Disclosure requirements also burden First Amendment interests because "compelled disclosure, in itself, can seriously infringe on privacy of association and belief." *Buckley*, 424 U.S. at 64. However, in contrast with limiting a person's ability to spend money on political speech, disclosure requirements "impose no ceiling on campaign-related activities," *id.*, and "do not prevent anyone from speaking," *McConnell*, 540 U.S. at 201 (internal quotation marks and alteration omitted). Because disclosure requirements inhibit speech less than do contribution and expenditure limits, the Supreme Court has not limited the government's acceptable interests to anti-corruption alone. Instead, the government may point to any "sufficiently important" governmental interest that bears a "substantial relation" to the disclosure requirement. *Citizens United*, 130 S. Ct. at 914 (quoting *Buckley*, 424 U.S. at 64, 66, and citing *McConnell*, 540 U.S. at 231-32). Indeed, the Court has approvingly noted that "disclosure is a less restrictive alternative to more comprehensive regulations of speech." *Citizens United*, 130 S. Ct. at 915 (citing *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986)).

The Supreme Court has consistently upheld organizational and reporting requirements against facial challenges. In *Buckley*, the Court upheld FECA's disclosure requirements, including the

requirements of §§ 432, 433, and 434(a) at issue here, based on a governmental interest in "provid[ing] the electorate with information" about the sources of political campaign funds, not just the interest in deterring corruption and enforcing anti-corruption measures. 424 U.S. at 66. In *McConnell*, the Court upheld similar requirements for organizations engaging in electioneering communications for the same reasons. 540 U.S. at 196. *Citizens United* upheld disclaimer and disclosure requirements for electioneering communications as applied to Citizens United, again citing the government's interest in providing the electorate with information. 130 S. Ct. at 913-14. And while the Court in *Davis v. FEC* found that a certain disclosure requirement violated the First Amendment, it only did so because that disclosure triggered the application of an unconstitutional provision which imposed asymmetrical contribution limits on candidates based on how much of their personal funds they planned to spend. Because the asymmetrical limits were unconstitutional, there was no justification for the disclosure requirement. 128 S. Ct. at 2775.

Plaintiffs do not disagree that the government may constitutionally impose reporting requirements, and SpeechNow intends to comply with the disclosure requirements that would apply even if it were not a political committee. *See* 2 U.S.C. § 434(c) (reporting requirements for individuals or groups that are not political committees that make independent expenditures); § 441d (disclaimer requirements for independent expenditures and electioneering communications). Instead, plaintiffs argue that the additional burden that would be imposed on

SpeechNow if it were required to comply with the organizational and reporting requirements applicable to political committees is too much for the First Amendment to bear. We disagree.

SpeechNow, as we have said, intends to comply with the disclosure requirements applicable to those who make independent expenditures but are not organized as political committees. Those disclosure requirements include, for example, reporting much of the same data on contributors that is required of political committees, 2 U.S.C. § 434(c); information about each independent expenditure, such as which candidate the expenditure supports or opposes, *id.*; reporting within 24 hours expenditures of $1000 or more made in the twenty days before an election, § 434(g)(1); and reporting within 48 hours any expenditures or contracts for expenditures of $10,000 or more made at any other time, § 434(g)(2).

Because SpeechNow intends only to make independent expenditures, the additional reporting requirements that the FEC would impose on SpeechNow if it were a political committee are minimal. Indeed, at oral argument, plaintiffs conceded that "the reporting is not really going to impose an additional burden" on SpeechNow. Oral Arg. Tr. at 14 ("Judge Sentelle: So, just calling you a [PAC] and not making you do anything except the reporting is not really going to impose an additional burden on you right? . . . Mr. Simpson: I think that's true. Yes."). Nor do the organizational requirements that SpeechNow protests, such as designating a treasurer and retaining records, impose much of an additional burden upon SpeechNow, especially given

the relative simplicity with which SpeechNow intends to operate.

Neither can SpeechNow claim to be burdened by the requirement to organize as a political committee as soon as it receives $1000, as required by the definition of "political committee," 2 U.S.C. § 431(4), 431(8), rather than waiting until it expends $1000. Plaintiffs argue that such a requirement forces SpeechNow to comply with the burdens of political committees without knowing if it is going to have enough money to make its independent expenditures. This is a specious interpretation of the facts before us. As the district court found, SpeechNow already has $121,700 in planned contributions from plaintiffs alone, with dozens more individuals claiming to want to donate. SpeechNow can hardly compare itself to "ad hoc groups that want to create themselves on the spur of the moment," as plaintiffs attempted at oral argument. Oral Arg. Tr. at 17. In addition, plaintiffs concede that in practice the burden is substantially the same to *any* group whether the FEC imposes reporting requirements at the point of the money's receipt or at the point of its expenditure. Oral Arg. Tr. at 15-16. A group raising money for political speech will, we presume, always hope to raise enough to make it worthwhile to spend it. Therefore, groups would need to collect and keep the necessary data on contributions even before an expenditure is made; it makes little difference to the burden of compliance *when* the group must comply as long as it anticipates complying at some point.

We cannot hold that the organizational and reporting requirements are unconstitutional. If SpeechNow were not a political committee, it would

not have to report contributions made exclusively for administrative expenses. *See* 2 U.S.C. § 434(c)(2)(C) (requiring only the reporting of contributions "made for the purpose of furthering an independent expenditure"). But the public has an interest in knowing who is speaking about a candidate and who is funding that speech, no matter whether the contributions were made towards administrative expenses or independent expenditures. Further, requiring disclosure of such information deters and helps expose violations of other campaign finance restrictions, such as those barring contributions from foreign corporations or individuals. These are sufficiently important governmental interests to justify requiring SpeechNow to organize and report to the FEC as a political committee.

We therefore answer the last two certified questions in the negative. The FEC may constitutionally require SpeechNow to comply with 2 U.S.C. §§ 432, 433, and 434(a), and it may require SpeechNow to start complying with those requirements as soon as it becomes a political committee under the current definition of § 431(4).

Conclusion

We conclude that the contribution limits set forth in certified questions 1, 2, and 3 cannot be constitutionally applied against SpeechNow and the individual plaintiffs. We further conclude that there is no constitutional infirmity in the application of the organizational, administrative, and reporting requirements set forth in certified questions 4 and 5. We further conclude that because of our decision today, as guided by *Citizens United*, which

intervened since the entry of the district court's denial of plaintiffs' petition for injunctive relief, the district court's order denying injunctive relief is vacated and remanded for further proceedings consistent with our decision.

So ordered.

APPENDIX G

RELEVANT PROVISIONS OF THE FEDERAL ELECTION CAMPAIGN ACT OF 1971, 52 U.S.C. § 30101 ET SEQ.

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52 U.S.C.A. § 30101

§ 30101. Definitions

When used in this Act:

(1) The term "election" means--

(A) a general, special, primary, or runoff election;

(B) a convention or caucus of a political party which has authority to nominate a candidate;

(C) a primary election held for the selection of delegates to a national nominating convention of a political party; and

(D) a primary election held for the expression of a preference for the nomination of individuals for election to the office of President.

(2) The term "candidate" means an individual who seeks nomination for election, or election, to Federal office, and for purposes of this paragraph, an individual shall be deemed to seek nomination for election, or election--

(A) if such individual has received contributions aggregating in excess of $5,000 or has made expenditures aggregating in excess of $5,000; or

(B) if such individual has given his or her consent to another person to receive contributions or make expenditures on behalf of such individual

and if such person has received such contributions aggregating in excess of $5,000 or has made such expenditures aggregating in excess of $5,000.

(3) The term "Federal office" means the office of President or Vice President, or of Senator or Representative in, or Delegate or Resident Commissioner to, the Congress.

(4) The term "political committee" means--

(A) any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year; or

(B) any separate segregated fund established under the provisions of section 30118(b) of this title; or

(C) any local committee of a political party which receives contributions aggregating in excess of $5,000 during a calendar year, or makes payments exempted from the definition of contribution or expenditure as defined in paragraphs (8) and (9) aggregating in excess of $5,000 during a calendar year, or makes contributions aggregating in excess of $1,000 during a calendar year or makes expenditures aggregating in excess of $1,000 during a calendar year.

(5) The term "principal campaign committee" means a political committee designated and authorized by a candidate under section 30102(e)(1) of this title.

(6) The term "authorized committee" means the principal campaign committee or any other political committee authorized by a candidate under section 30102(e)(1) of this title to receive contributions or make expenditures on behalf of such candidate.

(7) The term "connected organization" means any organization which is not a political committee but which directly or indirectly establishes, administers or financially supports a political committee.

(8)(A) The term "contribution" includes--

(i) any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office; or

(ii) the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose.

(B) The term "contribution" does not include--

(i) the value of services provided without compensation by any individual who volunteers on behalf of a candidate or political committee;

(ii) the use of real or personal property, including a church or community room used on a regular basis by members of a community for noncommercial purposes, and the cost of invitations, food, and beverages, voluntarily provided by an individual to any candidate or any political committee of a political party in rendering voluntary personal services on the individual's residential premises or in the

church or community room for candidate-related or political party-related activities, to the extent that the cumulative value of such invitations, food, and beverages provided by such individual on behalf of any single candidate does not exceed $1,000 with respect to any single election, and on behalf of all political committees of a political party does not exceed $2,000 in any calendar year;

(iii) the sale of any food or beverage by a vendor for use in any candidate's campaign or for use by or on behalf of any political committee of a political party at a charge less than the normal comparable charge, if such charge is at least equal to the cost of such food or beverage to the vendor, to the extent that the cumulative value of such activity by such vendor on behalf of any single candidate does not exceed $1,000 with respect to any single election, and on behalf of all political committees of a political party does not exceed $2,000 in any calendar year;

(iv) any unreimbursed payment for travel expenses made by any individual on behalf of any candidate or any political committee of a political party, to the extent that the cumulative value of such activity by such individual on behalf of any single candidate does not exceed $1,000 with respect to any single election, and on behalf of all political committees of a political party does not exceed $2,000 in any calendar year;

(v) the payment by a State or local committee of a political party of the costs of preparation, display, or mailing or other distribution incurred by such committee with respect to a printed slate card or sample ballot, or other printed listing, of 3 or more candidates for any public office for which an election is held in the State in which such committee is organized, except that this clause shall not apply to any cost incurred by such committee with respect to a display of any such listing made on broadcasting stations, or in newspapers, magazines, or similar types of general public political advertising;

(vi) any payment made or obligation incurred by a corporation or a labor organization which, under section 30118(b) of this title, would not constitute an expenditure by such corporation or labor organization;

(vii) any loan of money by a State bank, a federally chartered depository institution, or a depository institution the deposits or accounts of which are insured by the Federal Deposit Insurance Corporation, Federal Savings and Loan Insurance Corporation, or the National Credit Union Administration, other than any overdraft made with respect to a checking or savings account, made in accordance with applicable law and in the ordinary course of business, but such loan--

(I) shall be considered a loan by each endorser or guarantor, in that proportion of the unpaid balance that each endorser or

guarantor bears to the total number of endorsers or guarantors;

(II) shall be made on a basis which assures repayment, evidenced by a written instrument, and subject to a due date or amortization schedule; and

(III) shall bear the usual and customary interest rate of the lending institution;

(viii) any legal or accounting services rendered to or on behalf of--

(I) any political committee of a political party if the person paying for such services is the regular employer of the person rendering such services and if such services are not attributable to activities which directly further the election of any designated candidate to Federal office; or

(II) an authorized committee of a candidate or any other political committee, if the person paying for such services is the regular employer of the individual rendering such services and if such services are solely for the purpose of ensuring compliance with this Act or chapter 95 or chapter 96 of Title 26, but amounts paid or incurred by the regular employer for such legal or accounting services shall be reported in accordance with section 30104(b) of this title by the committee receiving such services;

(ix) the payment by a State or local committee of a political party of the costs of campaign materials (such as pins, bumper stickers,

handbills, brochures, posters, party tabloids, and yard signs) used by such committee in connection with volunteer activities on behalf of nominees of such party: Provided, That--

(1) such payments are not for the costs of campaign materials or activities used in connection with any broadcasting, newspaper, magazine, billboard, direct mail, or similar type of general public communication or political advertising;

(2) such payments are made from contributions subject to the limitations and prohibitions of this Act; and

(3) such payments are not made from contributions designated to be spent on behalf of a particular candidate or particular candidates;

(x) the payment by a candidate, for nomination or election to any public office (including State or local office), or authorized committee of a candidate, of the costs of campaign materials which include information on or referenced to any other candidate and which are used in connection with volunteer activities (including pins, bumper stickers, handbills, brochures, posters, and yard signs, but not including the use of broadcasting, newspapers, magazines, billboards, direct mail, or similar types of general public communication or political advertising): Provided, That such payments are made from contributions subject to the limitations and prohibitions of this Act;

(xi) the payment by a State or local committee of a political party of the costs of voter registration and get-out-the-vote activities conducted by such committee on behalf of nominees of such party for President and Vice President: Provided, That--

(1) such payments are not for the costs of campaign materials or activities used in connection with any broadcasting, newspaper, magazine, billboard, direct mail, or similar type of general public communication or political advertising;

(2) such payments are made from contributions subject to the limitations and prohibitions of this Act; and

(3) such payments are not made from contributions designated to be spent on behalf of a particular candidate or candidates;

(xii) payments made by a candidate or the authorized committee of a candidate as a condition of ballot access and payments received by any political party committee as a condition of ballot access;

(xiii) any honorarium (within the meaning of section 30125 of this title); and

(xiv) any loan of money derived from an advance on a candidate's brokerage account, credit card, home equity line of credit, or other line of credit available to the candidate, if such loan is made in accordance with applicable law and under commercially reasonable terms and

if the person making such loan makes loans derived from an advance on the candidate's brokerage account, credit card, home equity line of credit, or other line of credit in the normal course of the person's business.

(9)(A) The term "expenditure" includes--

(i) any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office; and

(ii) a written contract, promise, or agreement to make an expenditure.

(B) The term "expenditure" does not include--

(i) any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate;

(ii) nonpartisan activity designed to encourage individuals to vote or to register to vote;

(iii) any communication by any membership organization or corporation to its members, stockholders, or executive or administrative personnel, if such membership organization or corporation is not organized primarily for the purpose of influencing the nomination for election, or election, of any individual to Federal office, except that the costs incurred by a membership organization (including a labor organization) or by a corporation directly

attributable to a communication expressly advocating the election or defeat of a clearly identified candidate (other than a communication primarily devoted to subjects other than the express advocacy of the election or defeat of a clearly identified candidate), shall, if such costs exceed $2,000 for any election, be reported to the Commission in accordance with section 30104(a)(4)(A)(i) of this title, and in accordance with section 30104(a)(4)(A)(ii) of this title with respect to any general election;

(iv) the payment by a State or local committee of a political party of the costs of preparation, display, or mailing or other distribution incurred by such committee with respect to a printed slate card or sample ballot, or other printed listing, of 3 or more candidates for any public office for which an election is held in the State in which such committee is organized, except that this clause shall not apply to costs incurred by such committee with respect to a display of any such listing made on broadcasting stations, or in newspapers, magazines, or similar types of general public political advertising;

(v) any payment made or obligation incurred by a corporation or a labor organization which, under section 30118(b) of this title, would not constitute an expenditure by such corporation or labor organization;

(vi) any costs incurred by an authorized committee or candidate in connection with the

solicitation of contributions on behalf of such candidate, except that this clause shall not apply with respect to costs incurred by an authorized committee of a candidate in excess of an amount equal to 20 percent of the expenditure limitation applicable to such candidate under section 30116(b) of this title, but all such costs shall be reported in accordance with section 30104(b) of this title;

(vii) the payment of compensation for legal or accounting services--

(I) rendered to or on behalf of any political committee of a political party if the person paying for such services is the regular employer of the individual rendering such services, and if such services are not attributable to activities which directly further the election of any designated candidate to Federal office; or

(II) rendered to or on behalf of a candidate or political committee if the person paying for such services is the regular employer of the individual rendering such services, and if such services are solely for the purpose of ensuring compliance with this Act or chapter 95 or chapter 96 of Title 26, but amounts paid or incurred by the regular employer for such legal or accounting services shall be reported in accordance with section 30104(b) of this title by the committee receiving such services;

(viii) the payment by a State or local committee of a political party of the costs of

campaign materials (such as pins, bumper stickers, handbills, brochures, posters, party tabloids, and yard signs) used by such committee in connection with volunteer activities on behalf of nominees of such party: Provided, That--

(1) such payments are not for the costs of campaign materials or activities used in connection with any broadcasting, newspaper, magazine, billboard, direct mail, or similar type of general public communication or political advertising;

(2) such payments are made from contributions subject to the limitations and prohibitions of this Act; and

(3) such payments are not made from contributions designated to be spent on behalf of a particular candidate or particular candidates;

(ix) the payment by a State or local committee of a political party of the costs of voter registration and get-out-the-vote activities conducted by such committee on behalf of nominees of such party for President and Vice President: Provided, That--

(1) such payments are not for the costs of campaign materials or activities used in connection with any broadcasting, newspaper, magazine, billboard, direct mail, or similar type of general public communication or political advertising;

(2) such payments are made from contributions subject to the limitations and prohibitions of this Act; and

(3) such payments are not made from contributions designated to be spent on behalf of a particular candidate or candidates; and

(x) payments received by a political party committee as a condition of ballot access which are transferred to another political party committee or the appropriate State official.

(10) The term "Commission" means the Federal Election Commission.

(11) The term "person" includes an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons, but such term does not include the Federal Government or any authority of the Federal Government.

(12) The term "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States.

(13) The term "identification" means--

(A) in the case of any individual, the name, the mailing address, and the occupation of such individual, as well as the name of his or her employer; and

(B) in the case of any other person, the full name and address of such person.

(14) The term "national committee" means the organization which, by virtue of the bylaws of a

political party, is responsible for the day-to-day operation of such political party at the national level, as determined by the Commission.

(15) The term "State committee" means the organization which, by virtue of the bylaws of a political party, is responsible for the day-to-day operation of such political party at the State level, as determined by the Commission.

(16) The term "political party" means an association, committee, or organization which nominates a candidate for election to any Federal office whose name appears on the election ballot as the candidate of such association, committee, or organization.

(17) Independent expenditure

The term "independent expenditure" means an expenditure by a person--

(A) expressly advocating the election or defeat of a clearly identified candidate; and

(B) that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents.

(18) The term "clearly identified" means that--

(A) the name of the candidate involved appears;

(B) a photograph or drawing of the candidate appears; or

(C) the identity of the candidate is apparent by unambiguous reference.

(19) The term "Act" means the Federal Election Campaign Act of 1971 as amended.

(20) Federal election activity

(A) In general

The term "Federal election activity" means--

(i) voter registration activity during the period that begins on the date that is 120 days before the date a regularly scheduled Federal election is held and ends on the date of the election;

(ii) voter identification, get-out-the-vote activity, or generic campaign activity conducted in connection with an election in which a candidate for Federal office appears on the ballot (regardless of whether a candidate for State or local office also appears on the ballot);

(iii) a public communication that refers to a clearly identified candidate for Federal office (regardless of whether a candidate for State or local office is also mentioned or identified) and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate); or

(iv) services provided during any month by an employee of a State, district, or local committee of a political party who spends more than 25 percent of that individual's compensated time during that month on activities in connection with a Federal election.

(B) Excluded activity

The term "Federal election activity" does not include an amount expended or disbursed by a State, district, or local committee of a political party for--

(i) a public communication that refers solely to a clearly identified candidate for State or local office, if the communication is not a Federal election activity described in subparagraph (A)(i) or (ii);

(ii) a contribution to a candidate for State or local office, provided the contribution is not designated to pay for a Federal election activity described in subparagraph (A);

(iii) the costs of a State, district, or local political convention; and

(iv) the costs of grassroots campaign materials, including buttons, bumper stickers, and yard signs, that name or depict only a candidate for State or local office.

(21) Generic campaign activity

The term "generic campaign activity" means a campaign activity that promotes a political party and does not promote a candidate or non-Federal candidate.

(22) Public communication

The term "public communication" means a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or

telephone bank to the general public, or any other form of general public political advertising.

(23) Mass mailing

The term "mass mailing" means a mailing by United States mail or facsimile of more than 500 pieces of mail matter of an identical or substantially similar nature within any 30-day period.

(24) Telephone bank

The term "telephone bank" means more than 500 telephone calls of an identical or substantially similar nature within any 30-day period.

(25) Election cycle

For purposes of sections 30116(i) and 30117 of this title and paragraph (26), the term "election cycle" means the period beginning on the day after the date of the most recent election for the specific office or seat that a candidate is seeking and ending on the date of the next election for that office or seat. For purposes of the preceding sentence, a primary election and a general election shall be considered to be separate elections.

(26) Personal funds

The term "personal funds" means an amount that is derived from--

(A) any asset that, under applicable State law, at the time the individual became a candidate, the candidate had legal right of access to or control over, and with respect to which the candidate had--

(i) legal and rightful title; or

(ii) an equitable interest;

(B) income received during the current election cycle of the candidate, including--

(i) a salary and other earned income from bona fide employment;

(ii) dividends and proceeds from the sale of the candidate's stocks or other investments;

(iii) bequests to the candidate;

(iv) income from trusts established before the beginning of the election cycle;

(v) income from trusts established by bequest after the beginning of the election cycle of which the candidate is the beneficiary;

(vi) gifts of a personal nature that had been customarily received by the candidate prior to the beginning of the election cycle; and

(vii) proceeds from lotteries and similar legal games of chance; and

(C) a portion of assets that are jointly owned by the candidate and the candidate's spouse equal to the candidate's share of the asset under the instrument of conveyance or ownership, but if no specific share is indicated by an instrument of conveyance or ownership, the value of ½ of the property.

* * *

52 U.S.C.A. § 30116

§ 30116. Limitations on contributions and expenditures

(a) Dollar limits on contributions

(1) Except as provided in subsection (i) and section 30117 of this title, no person shall make contributions--

(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $2,000;

(B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year which, in the aggregate, exceed $25,000, or, in the case of contributions made to any of the accounts described in paragraph (9), exceed 300 percent of the amount otherwise applicable under this subparagraph with respect to such calendar year;

(C) to any other political committee (other than a committee described in subparagraph (D)) in any calendar year which, in the aggregate, exceed $5,000; or

(D) to a political committee established and maintained by a State committee of a political party in any calendar year which, in the aggregate, exceed $10,000.

(2) No multicandidate political committee shall make contributions--

(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $5,000;

(B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year, which, in the aggregate, exceed $15,000, or, in the case of contributions made to any of the accounts described in paragraph (9), exceed 300 percent of the amount otherwise applicable under this subparagraph with respect to such calendar year; or

(C) to any other political committee in any calendar year which, in the aggregate, exceed $5,000.

(3) During the period which begins on January 1 of an odd-numbered year and ends on December 31 of the next even-numbered year, no individual may make contributions aggregating more than--

(A) $37,500, in the case of contributions to candidates and the authorized committees of candidates;

(B) $57,500, in the case of any other contributions, of which not more than $37,500 may be attributable to contributions to political committees which are not political committees of national political parties.

(4) The limitations on contributions contained in paragraphs (1) and (2) do not apply to transfers between and among political committees which are

national, State, district, or local committees (including any subordinate committee thereof) of the same political party. For purposes of paragraph (2), the term "multicandidate political committee" means a political committee which has been registered under section 30103 of this title for a period of not less than 6 months, which has received contributions from more than 50 persons, and, except for any State political party organization, has made contributions to 5 or more candidates for Federal office.

(5) For purposes of the limitations provided by paragraph (1) and paragraph (2), all contributions made by political committees established or financed or maintained or controlled by any corporation, labor organization, or any other person, including any parent, subsidiary, branch, division, department, or local unit of such corporation, labor organization, or any other person, or by any group of such persons, shall be considered to have been made by a single political committee, except that (A) nothing in this sentence shall limit transfers between political committees of funds raised through joint fund raising efforts; (B) for purposes of the limitations provided by paragraph (1) and paragraph (2) all contributions made by a single political committee established or financed or maintained or controlled by a national committee of a political party and by a single political committee established or financed or maintained or controlled by the State committee of a political party shall not be considered to have been made by a single political committee; and (C) nothing in this section shall limit the transfer of funds between the

principal campaign committee of a candidate seeking nomination or election to a Federal office and the principal campaign committee of that candidate for nomination or election to another Federal office if (i) such transfer is not made when the candidate is actively seeking nomination or election to both such offices; (ii) the limitations contained in this Act on contributions by persons are not exceeded by such transfer; and (iii) the candidate has not elected to receive any funds under chapter 95 or chapter 96 of Title 26. In any case in which a corporation and any of its subsidiaries, branches, divisions, departments, or local units, or a labor organization and any of its subsidiaries, branches, divisions, departments, or local units establish or finance or maintain or control more than one separate segregated fund, all such separate segregated funds shall be treated as a single separate segregated fund for purposes of the limitations provided by paragraph (1) and paragraph (2).

(6) The limitations on contributions to a candidate imposed by paragraphs (1) and (2) of this subsection shall apply separately with respect to each election, except that all elections held in any calendar year for the office of President of the United States (except a general election for such office) shall be considered to be one election.

(7) For purposes of this subsection--

(A) contributions to a named candidate made to any political committee authorized by such candidate to accept contributions on his behalf

shall be considered to be contributions made to such candidate;

(B)(i) expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate;

(ii) expenditures made by any person (other than a candidate or candidate's authorized committee) in cooperation, consultation, or concert with, or at the request or suggestion of, a national, State, or local committee of a political party, shall be considered to be contributions made to such party committee; and

(iii) the financing by any person of the dissemination, distribution, or republication, in whole or in part, of any broadcast or any written, graphic, or other form of campaign materials prepared by the candidate, his campaign committees, or their authorized agents shall be considered to be an expenditure for purposes of this paragraph; and

(C) if--

(i) any person makes, or contracts to make, any disbursement for any electioneering communication (within the meaning of section 30104(f)(3) of this title); and

(ii) such disbursement is coordinated with a candidate or an authorized committee of such

candidate, a Federal, State, or local political party or committee thereof, or an agent or official of any such candidate, party, or committee;

such disbursement or contracting shall be treated as a contribution to the candidate supported by the electioneering communication or that candidate's party and as an expenditure by that candidate or that candidate's party; and

(D) contributions made to or for the benefit of any candidate nominated by a political party for election to the office of Vice President of the United States shall be considered to be contributions made to or for the benefit of the candidate of such party for election to the office of President of the United States.

(8) For purposes of the limitations imposed by this section, all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate, shall be treated as contributions from such person to such candidate. The intermediary or conduit shall report the original source and the intended recipient of such contribution to the Commission and to the intended recipient.

(9) An account described in this paragraph is any of the following accounts:

(A) A separate, segregated account of a national committee of a political party (other than a national congressional campaign committee of a

political party) which is used solely to defray expenses incurred with respect to a presidential nominating convention (including the payment of deposits) or to repay loans the proceeds of which were used to defray such expenses, or otherwise to restore funds used to defray such expenses, except that the aggregate amount of expenditures the national committee of a political party may make from such account may not exceed $20,000,000 with respect to any single convention.

(B) A separate, segregated account of a national committee of a political party (including a national congressional campaign committee of a political party) which is used solely to defray expenses incurred with respect to the construction, purchase, renovation, operation, and furnishing of one or more headquarters buildings of the party or to repay loans the proceeds of which were used to defray such expenses, or otherwise to restore funds used to defray such expenses (including expenses for obligations incurred during the 2-year period which ends on December 16, 2014).

(C) A separate, segregated account of a national committee of a political party (including a national congressional campaign committee of a political party) which is used to defray expenses incurred with respect to the preparation for and the conduct of election recounts and contests and other legal proceedings.

* * *

(c) Increases on limits based on increases in price index

(1)(A) At the beginning of each calendar year (commencing in 1976), as there become available necessary data from the Bureau of Labor Statistics of the Department of Labor, the Secretary of Labor shall certify to the Commission and publish in the Federal Register the percent difference between the price index for the 12 months preceding the beginning of such calendar year and the price index for the base period.

(B) Except as provided in subparagraph (C), in any calendar year after 2002--

(i) a limitation established by subsections (a)(1)(A), (a)(1)(B), (a)(3), (b), (d), or (h) shall be increased by the percent difference determined under subparagraph (A);

(ii) each amount so increased shall remain in effect for the calendar year; and

(iii) if any amount after adjustment under clause (i) is not a multiple of $100, such amount shall be rounded to the nearest multiple of $100.

(C) In the case of limitations under subsections (a)(1)(A), (a)(1)(B), (a)(3), and (h), increases shall only be made in odd-numbered years and such increases shall remain in effect for the 2-year period beginning on the first day following the date of the last general election in the year preceding the year in which the amount is increased and ending on the date of the next general election.

(2) For purposes of paragraph (1)--

(A) the term "price index" means the average over a calendar year of the Consumer Price Index (all items--United States city average) published monthly by the Bureau of Labor Statistics; and

(B) the term "base period" means--

(i) for purposes of subsections (b) and (d), calendar year 1974; and

(ii) for purposes of subsections (a)(1)(A), (a)(1)(B), (a)(3), and (h), calendar year 2001.

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