No. 19-1398

IN THE

Supreme Court of the United States

TED LIEU, UNITED STATES CONGRESSMAN, ET AL.,
Petitioners,

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

BRIEF OF *AMICUS CURIAE* FORMER FEC COMMISSIONER ANN M. RAVEL IN SUPPORT OF PETITIONERS

Emanuel Grillo
David M. Howard
BAKER BOTTS L.L.P.
30 Rockefeller Plaza
New York, NY 10112

Stephanie F. Cagniart
Counsel of Record
David B. Goode
BAKER BOTTS L.L.P.
98 San Jacinto Blvd.
Suite 1500
Austin, Texas 78701
(512) 322-2537
stephanie.cagniart@baker-botts.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

REGULATION

LEGISLATIVE MATERIALS

ADMINISTRATIVE MATERIALS

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*[1]

Ann M. Ravel ("Amicus") is a former commissioner of the Federal Election Commission ("FEC"), serving from 2013 until 2017. Amicus was Chair of the FEC in 2015 and Vice Chair in 2014. Prior to her service at the FEC, Amicus served as Chair of the California Fair Political Practices Commission. She has lectured at the University of California Berkley School of Law and published extensively on issues of campaign finance.

Petitioners ask this Court to review a fundamental aspect of campaign finance law: the constitutionality of contribution limits to political committees that make only independent expenditures, known as Super PACs, following the D.C. Circuit's decision in *SpeechNow.org* v. *FEC*, 599 F.3d 686 (D.C. Cir. 2010). As an FEC commissioner for five years after *SpeechNow* was decided, Amicus possesses firsthand experience regarding how that decision diminished the FEC's ability to ensure transparency in federal elections and to enforce and administer federal campaign finance laws. Amicus submits this brief to share these insights with the Court and supports petitioners' request that the Court grant the writ of certiorari to address the Question Presented. Resolving that issue of constitutional law is essential to restoring and preserving the integrity of fair elections in this country and cannot be avoided.

---

[1] All parties received notice and have consented to the filing of this brief. In accordance with Rule 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity, other than Amicus or their counsel, has made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The D.C. Circuit's decision in *SpeechNow.org* v. *FEC*, 599 F.3d 686 (D.C. Cir. 2010) opened the door to unlimited, and often anonymous, contributions of money into federal election cycles, thereby undermining the FEC's ability to monitor and enforce campaign finance laws, and by extension, our political system and voters' faith in it.

The focus on expenditures rather than on contributions in *SpeechNow* contravened both the finely-tuned Congressional system of campaign-finance laws and this Court's extensive precedents regarding contributions. See Pet. 13-24. Consequently, dark money has flooded the federal election system resulting in difficult-to-trace, multi-billion dollar increases that render monitoring and enforcement by the FEC—the sole agency tasked with civil enforcement of federal campaign-finance law—difficult, if not impossible. Under the Federal Election Campaign Act ("FECA"), Congress enacted a $5,000 limit on contributions to political committees, including Super PACs, as part of a comprehensive and carefully-designed statutory regime under FECA. But now, for more than a decade, the FEC has declined to enforce that statutory limitation as a result of the D.C. Circuit's opinion in *SpeechNow*.

The explosion of Super PAC contributions in the decade since *SpeechNow* has proven its premises and rationale to be incorrect. Dark money, in the form of largely untraceable and often substantial contributions to Super PACs, harms the FEC's ability to identify improper coordination. Entities such as LLCs and non-profits, who are not required to disclose their contributors, have funneled billions of dollars into Super PACs that are only required to report their immediate contributors. The true donors hide behind the contributing entity. The integrity of our electoral system suffers as a result.

Unless this Court takes up this issue and addresses the infirmities of *SpeechNow*, foreign powers will also continue to have the ability to exploit the federal electoral system despite the statutory FECA framework. Time and again, foreign nationals have tried to influence U.S. elections, including through contributions to Super PACs through dark money entities. And Americans have rapidly begun to lose faith in democracy since 2010 as the system succumbs to the "appearance of corruption" under the weight of these limitless donations by a small and unrepresentative portion of the population (in addition to foreign influence).

Disclosure cannot solve these problems. Therefore, to perform its essential duties in enforcing this nation's campaign finance laws, the FEC must be able to enforce the statutory contribution limits to Super PACs. Only this Court can restore the FEC's authority to properly enforce campaign finance laws by reconsidering and invalidating *SpeechNow*'s failure to address contributions rather than expenditures.

ARGUMENT

I. THE INCREASE IN DARK MONEY IN ELECTIONS FOLLOWING *SPEECHNOW* HAS SUBVERTED THE FEC'S ABILITY TO MONITOR AND ENFORCE COMPLIANCE WITH FECA

The D.C. Circuit reasoned in *SpeechNow* that contributions to political action committees ("PACs") that make only independent expenditures "cannot corrupt or create the appearance of corruption." 599 F.3d at 693-694. This conclusion rested, in part, on the assumptions that "who is speaking about a candidate and who is funding that speech" would be disclosed, and that this transparency would "deter[] and help[] expose violations of other campaign finance restrictions, such as those barring contributions from foreign corporations and individuals." *Id.* at

698. Based on this logic, the D.C. Circuit invalidated a contribution limit that had been in place since the Watergate scandal.

Yet the D.C. Circuit cited no empirical evidence in support of its assumptions, and a decade after *SpeechNow*, it is apparent that those assumptions were wrong. The FEC pointed this out in its brief to the D.C. Circuit in *SpeechNow*: "Real-world evidence about political fundraising confirms that unlimited contributions to groups for independent spending raise the danger of corruption and its appearance. A victory for appellants would undermine FECA's anti-corruption purpose and have far-reaching consequences." Br. for Appellee at 13, *SpeechNow.org* v. *FEC,* 599 F.3d 686 (D.C. Cir. 2010) (No. 08-5223).

Those consequences have become more "far-reaching" than previously imagined. Over the past decade, donors' ability to make unlimited contributions to Super PACs has resulted in the influx of largely-untraceable additional billions of dollars into federal elections. But because Super PACs are only required to disclose the identity of their immediate donors, true donors can mask their identities using intermediary entities. The FEC, which relies on disclosures, is largely unable to monitor and enforce compliance with federal campaign finance law against Super PACs that accept such donations. This contribution intermediation has led to enormous increase of "dark money" in federal elections and has created a vehicle for foreign nationals to make illicit contributions to support or oppose candidates for federal office.

Unless and until *SpeechNow* is overturned, the FEC will continue to be unable to monitor meaningfully these extraordinary monetary contributions and expenditures and ensure that Super PACs, their donors, and the candidates they support comply with federal campaign-finance law. Consequently, voters will not have the essential

information they need to make informed choices at the ballot box. The integrity of our electoral system will be subject to greater risk and the public's faith in our electoral process will continue to diminish.

A. As the agency charged with enforcing FECA, the FEC relies on disclosures to perform its essential functions.

"FECA * * * establishes a comprehensive regime of limitations on campaign contributions and expenditures and extensive disclosure requirements * * * ." *Galliano* v. *U.S. Postal Serv.*, 836 F.2d 1362, 1368 (D.C. Cir. 1988). FECA and its amendments represented a "careful legislative adjustment of the federal electoral laws, in a 'cautious advance, step by step,' to account for the particular legal and economic attributes of corporations and labor organizations." *FEC* v. *Nat'l Right to Work Comm.*, 459 U.S. 197, 209 (1982) (citation omitted). Since FECA's enactment, Congress has embarked on a "decades-long project to fine-tune FECA's balance between speech and associational rights, on the one hand, and the government's anticorruption interest, on the other." *Libertarian Nat'l Comm., Inc.* v. *FEC*, 924 F.3d 533, 552 (D.C. Cir.) (en banc), *judgment entered*, 771 F. App'x 8 (D.C. Cir.), *cert. denied*, 140 S. Ct. 569 (2019). And as part of this comprehensive "decades-long project," Congress maintained FECA's contribution limits since its enactment. *E.g.*, Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, 116 Stat. 81.

Congressionally created in 1975, the FEC is the independent regulatory agency charged by Congress with administering and enforcing federal campaign finance law. The agency's stated mission is "providing transparency and fairly enforcing and administering federal campaign finance laws." *Mission and History*, FEC, https://bit.ly/38cMBxt (last visited July 16, 2020). "When

Congress established the FEC [at a time when distrust in government was extremely high], its central mission was to be a disclosure entity. Disclosure was intended to be a way to encourage and ensure trust in government." Ann M. Ravel, *Disclosure and Public Confidence*, 34 Yale L. & Pol'y Rev. 493, 494 (2016) (footnote omitted).

The FEC has exclusive jurisdiction to enforce FECA civilly. 52 U.S.C. §§ 30106(b)(1), 30109. This includes the authority "to conduct investigations and hearings expeditiously, to encourage voluntary compliance, and to report apparent violations to the appropriate law enforcement authorities." 52 U.S.C. § 30107(a)(9). Among other things, the enforcement provisions of FECA include mandatory disclosure requirements, and limits on expenditures and contributions in federal elections. 52 U.S.C. § 30104.

FEC regulations require Super PACs, like other PACs, to report contributions along with the identities of their immediate contributors and the amounts contributed. 11 C.F.R. § 104.3. "The reporting requirements permit the Federal Election Commission to fulfill its statutory duties of providing the American public with accurate data about the financial activities of individuals and entities supporting federal candidates, and enforcing FECA's limits and prohibitions, including the ban on foreign expenditures." Indictment ¶ 25, *United States* v. *Internet Research Agency, LLC*, No. 1:18-cr-00032-DLF, 2018 WL 914777 (D.D.C. Feb. 16, 2018). As this Court explained in upholding the constitutionality of FECA and its limits on individual contributions to campaigns, such "recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations" of campaign finance law. *Buckley* v. *Valeo*, 424 U.S. 1, 67-68 (1976).

B. *SpeechNow* fueled an extraordinary rise in dark-money spending that overwhelms the FEC's monitoring and enforcement capabilities.

Congress enacted FECA as a comprehensive structure. FECA prohibits any person from making contributions to a PAC, including one that only makes independent expenditures, that exceed $5,000 per calendar year. 52 U.S.C. § 30116(a)(1)(C). An independent expenditure "expressly advocat[es] the election or defeat of a clearly identified candidate" and is not coordinated with that candidate or their committee or agents, or with a political committee, party committee, or those committees' agents. 52 U.S.C. § 30101(17). Since the D.C. Circuit held this contribution limitation unconstitutional in *SpeechNow*, however, the FEC has declined to enforce that provision of FECA. FEC, Advisory Op. 2010-11 (Commonsense Ten) (July 22, 2010), https://bit.ly/3j7L8xw. Because of this, it has become effectively impossible for the FEC to track contributions made through dark money groups.

i. *SpeechNow* led to an enormous increase in contributions to and thus expenditures by Super PACs.

The immediate consequence of *SpeechNow* and of the FEC's decision not to enforce the applicable FECA provisions was the emergence of so-called Super PACs that led to an enormous increase in contributions and then in independent expenditures by those organizations (e.g., political ads) over the past decade.

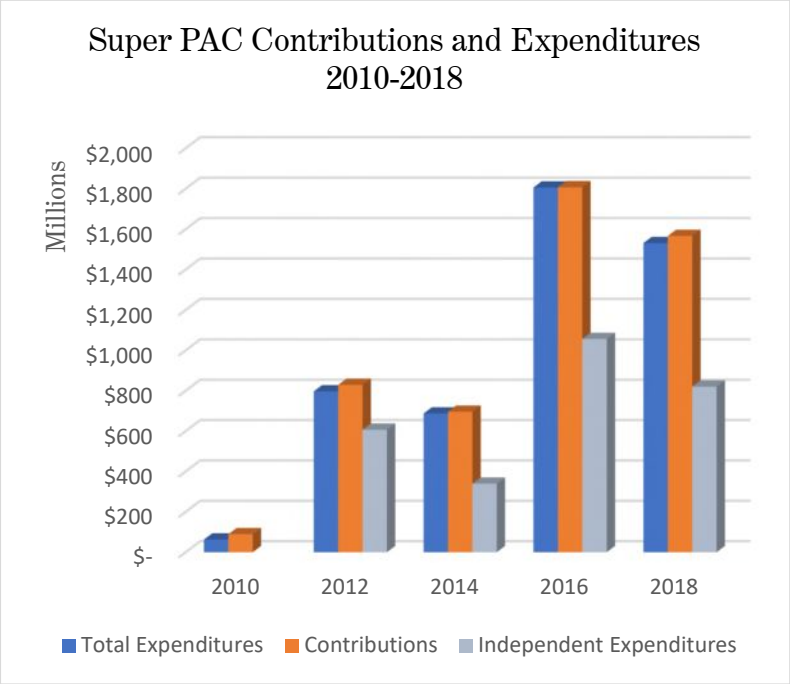

Figure 1: Super PAC Expenditures and Contributions 2010-2018[2]

---

[2] Information compiled from: *Campaign Finance Statistics*, FEC, https://bit.ly/3ie8IYQ (last visited July 16, 2020).

An "expenditure" (or disbursement) is "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" or an agreement to make an expenditure. 52 U.S.C. § 30101(9)(A).

An "independent expenditure" is a subset of total expenditures that is (1) "expressly advocating the election or defeat of a clearly identified candidate" and (2) is not coordinated with a candidate or campaign. 52 U.S.C. § 30101(17).

A "contribution" (also known as a "receipt") includes "anything of value made by any person for the purpose of influencing any election for Federal office." 52 U.S.C. § 30101(8)(A).

For this election year alone, as of March 31, 2020, with more than seven months left until the presidential election, Super PACs had already raised over $743 million and spent over $438 million in expenditures.[3]

In the decade since their creation, Super PACs have raised over $5.5 billion in reported contributions[4] and spent approximately $3 billion in reported independent expenditures alone.[5] By contrast, in 2008, the last presidential election cycle before *SpeechNow*, PACs in total received over $1.2 billion in reported contributions and spent almost the same amount.[6] Two presidential cycles later in 2016, that number nearly quadrupled to over $4 billion in contributions and over $3.9 billion in total expenditures.[7] Super PACs alone received $1.8 billion in reported contributions and $1.8 billion in reported total expenditures—over $600 million more than all PACs combined spent in the 2006 election cycle.[8]

Even these extraordinary numbers understate Super PACs' significant influence on elections. These entities largely focus their resources on highly-contested or highly-visible campaigns, often even outspending the

---

[3] *Campaign Finance Statistics – Summary of PAC Activity: January 1, 2019 Through March 31, 2020*, FEC (May 8, 2020), https://bit.ly/2Z8vo5f.

[4] See *Campaign Finance Statistics, supra* note 2.

[5] *Ibid.*

[6] *Campaign Finance Statistics – Summary of PAC Activity Through December 31, 2008*, FEC, https://bit.ly/2ZoVVdm (last visited July 16, 2020).

[7] *Campaign Finance Statistics – Summary of PAC Activity January 1, 2015 Through December 31, 2016*, FEC (Apr. 7, 2017), https://bit.ly/-2NG24fP.

[8] *Ibid.*

candidates.[9] For example, in the 2016 election cycle, PACs (including Super PACs) spent approximately $350 million more than all federal election candidates combined.[10] In that same cycle, outside spending (including Super PACs) outpaced the candidates in twenty-six races; in the 2018 cycle, candidates were outspent in twenty-eight races by outside spending.[11]

ii. Much of this massive increase in contributions comes from "dark money" and undermines the FEC's ability to enforce FECA.

Troublingly, it has become effectively impossible for the FEC to track dark money spending and ensure that Super PACs and their contributors are acting in accordance with FECA, and with *SpeechNow*'s assumption that contributors are not acting in coordination with candidates.

A substantial portion of funds contributed to Super PACs in the past decade has been so-called "dark money": contributions made by entities that do not disclose their donors. Like other PACs, Super PACs need only disclose *direct* contributors, but are not required to identify the original donor behind a contributing entity. See 52 U.S.C. § 30104 (listing identification requirements for PAC disclosures). Entities such as social welfare organizations, 501(c)(3) non-profits, LLCs or shell corporations are not legally required to disclose their sources of money to the public or the FEC. Richard Briffault, *Super PACs*, 96

---

[9] Ian Vandewalker, *Since* Citizens United*, a Decade of Super PACs*, Brennan Ctr. for Justice at N.Y.U. (Jan. 14, 2020), https://bit.ly/2Aix3vw.

[10] *Spending Data*, FEC, https://bit.ly/2BM77sC (last visited July 16, 2020).

[11] Ctr. for Responsive Politics, *Races in Which Outside Spending Exceeds Candidate Spending*, 2016 Election Cycle, OpenSecrets, https://bit.ly/31tckQA (last visited July 16, 2020).

Minn. L. Rev. 1644, 1648-1649 (2012) (citing FECA and IRS regulations). Because Super PACs would only need disclose the names of these immediate donor entities, and these donor entities need not disclose their own sources of money, it is often effectively impossible to trace contributions to the original source. Gian Gualco-Nelson, Note, *Putting Names to Money: Closing Disclosure Loopholes*, 71 Hastings L.J. 1181, 1200 (2020).

The result has been a massive surge of dark money into federal elections. In the 2006 election cycle, dark money spending was less than six figures in total. Anna Massoglia, Ctr. for Responsive Politics, *'Dark Money' in Politics Skyrocketed in the Wake of* Citizens United, OpenSecrets (Jan. 27, 2020, 12:56 PM), https://bit.ly/2Bl9Ysw. Between 2010 and 2019, groups contributing dark money gave ***over $1 billion***, and just ten groups (comprised of undisclosed individual donors) spent more than sixty percent of that amount. *Ibid.* (analyzing spending by non-disclosing groups reported to the FEC from 2010-2019). In the eleven most competitive senate races in 2014, a total of not less than $190 million—constituting fifty-eight percent of nonparty outside spending—consisted of dark money. Ian Vandewalker, Brennan Ctr. for Justice at N.Y.U., *Outside Spending and Dark Money in Toss-Up Senate Races* 2 (Oct. 9, 2014), https://bit.ly/-3eL20Yf. This huge increase in dark money and its growing share of contributions to candidates is troubling. "It has been said that the only ones in the dark are the American public, that the candidates all know who is providing the large campaign contributions to the committees." Ann Ravel, *A New Kind of Voter Suppression in Modern Elections*, 49 U. Memphis L. Rev. 1019, 1040-1041 (2019).

This dark money problem is an undeniable consequence of the backdoor elimination of contribution limits to Super PACs under *SpeechNow*. Enormous contributions attract public scrutiny; so large donors have

exploited *SpeechNow* and have hidden their identities behind corporate entities. See Andrea Seabrook, *Big Political Donors Shy Away From Public Scrutiny*, NPR (June 20, 2012, 3:04 AM), https://n.pr/38c2zaO. In contrast, when contributions limits were enforced, there was little reason for individuals to take the additional steps needed to hide dark money contributions. See Richard L. Hasen, *Super Pac Contributions, Corruption, and the Proxy War Over Coordination*, 9 Duke J. Const. L. & Pub. Pol'y 1, 3 (2014).

The hidden nature of these dark money contributions contravenes this Court's long-held principle that "[s]unlight is said to be the best of disinfectants." *Buckley*, 424 U.S. at 67 (citation omitted). "This dark money creates an even greater danger of corruption and conflict of interest. The public won't be able to see the connections between campaign money and a candidate." Richard Hasen, *Of Super PACs and Corruption*, Politico (March 22, 2012 6:13 AM), https://politi.co/2WAC1LV. If the premise on which *SpeechNow* rests—that contributions to Super PACs are not being used to coordinate the efforts of the committee and the candidates it supports—is being violated by these dark money contributions, the FEC cannot uncover that coordination. Likewise, it is "transparency [regarding the source of funds in elections that] enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Citizens United* v. *FEC*, 558 U.S. 310, 371 (2010). *SpeechNow* has enabled a veil of secrecy that the FEC is unable to pierce, and that is toxic to electoral integrity and voters' faith in the democratic process.

C. *SpeechNow* has exacerbated the danger of foreign nationals attempting to influence U.S. elections.

SpeechNow has also exacerbated the danger of foreign nationals attempting to influence U.S. elections. Federal

law prohibits foreign citizens from participating in or influencing U.S. elections. 52 U.S.C. § 30121(a); see also *Bluman* v. *FEC*, 800 F. Supp. 2d 281, 288 (D.D.C. 2011), *aff'd*, 565 U.S. 1104 (2012). Since our nation's earliest days, this "obsession with foreign influence derived from a fear that foreign powers and individuals had no basic investment in the well-being of the country." *Citizens United*, 558 U.S. at 424 n.51 (Stevens, J., concurring in part and dissenting in part) (citation omitted). This fear has proven all too true in recent election cycles.

The nature and volume of dark money that has been funneled into federal elections over the past decade makes it difficult, if not impossible, to identify with any certainty what proportion is attributable to illegal foreign contributions. "At the moment, we do not know how much foreign dark money makes its way into our political campaigns, but we do know that the doors are wide open for political money to be weaponized by well-funded hostile powers." *Securing U.S. Election Infrastructure and Protecting Political Discourse: Hearing Before the Subcomm. on Nat'l Sec. of the H. Comm. on Oversight & Reform*, 116th Cong. (2019) (written testimony of Ellen L. Weintraub, Chair, FEC), https://bit.ly/308bkzj.

Nonetheless, sufficient examples abound that make clear that the danger of foreign nationals using Super PACs to influence American elections is not merely theoretical. Last year, the Department of Justice indicted a foreign national for illegally contributing more than $1 million to a Super PAC by, in part, using a dark money LLC as a conduit. Indictment ¶¶ 25-35, *United States* v. *Michel*, No. 1:19-cr-00148-CKK (D.D.C. May 2, 2019). Two other foreign nationals were indicted for funneling hundreds of thousands of dollars in contributions to Super PACs that were falsely reported in the names of shell companies to gain access to and influence politicians. Indictment ¶¶ 13-14, *United States* v. *Parnas*, No. 1:19-cr-00725-

JPO (S.D.N.Y. Oct. 9, 2019). During the 2016 campaign cycle, a company owned by foreign nationals donated $1.3 million to a Super PAC supporting Jeb Bush's presidential campaign—four years later, that Super PAC and the company agreed to pay substantial fines pursuant to a conciliation agreement with the FEC. See FEC, MUR 7122 (Am. Pac. Int'l Capital, Inc.) (Mar. 8, 2019), https://bit.ly/31s9LhR.

Like with dark money, *SpeechNow* and the rise of Super PACs did not create the threat of foreign nationals seeking to influence elections. But Super PACs provide foreign nationals a ready vehicle through which they can make unlimited contributions through seemingly legitimate sources such as 501(c) entities or shell LLCs. The influence that such a contribution may have on a candidate or election, combined with the possibility of hiding its source, creates a risk that federal officials and commentators alike have warned against—and that, as illustrated above, has proven to be all too real in the first decade after *SpeechNow*. "The combination of corporate spending, foreign interest, and lack of disclosure presents too many opportunities for those who are not part of our political community to try to intervene in our democratic processes. I believe the threat is real and must be foreclosed." Remarks of Comm'r Ellen L. Weintraub, *How Our Broken Campaign Finance System Could Allow Foreign Governments to Buy Influence in Our Elections and What We Can Do About It* (July 19, 2017), https://bit.ly/2YGNUkQ.

* * *

Expanding FECA or FEC regulations to require greater disclosure cannot solve the problems caused by unlimited contributions to Super PACs. Those wishing to avoid scrutiny or improperly influence elections can circumvent disclosure requirements, such as by burying the

original donor behind additional entities. Former FEC Commissioner Bradley Smith explained:

> In short, the enforcement problems of 'original source' reporting are probably insurmountable. It may be that a law might initially disclose some donor sources that would not have been disclosed before the law took effect; but once the law is known and understood, it will not be difficult to work around through the creation or use of other intermediaries. The solution would appear to give voters bad information—hardly a government interest and hardly a way to combat corruption or help voters judge a message.

Bradley A. Smith, *Disclosure in a Post*-Citizens United *Real World*, 6 U. St. Thomas J.L. & Pub. Pol'y 257, 277 (2012).

Expanded disclosure would also not address the outsized and possibly improper influence Super PACs often exploit in elections:

> As [Senator Bayh] put it, the biggest fear an incumbent has now is that 30 days before an election, some Super PAC will drop a $1 million in attack ads on the other side. * * * [T]he incumbent must, in effect, buy (what we could call) 'Super PAC insurance': the assurance that if a Super PAC attacks, there will be another Super PAC on the incumbent's side to defend. But as with any insurance, premiums must be paid in advance—which in this case means the incumbent must behave in a way that gives Super PACs on his or her side a reason to defend the incumbent.

> * * * [T]he influence of that protection racket *could not be* captured by any disclosure scheme. Thus disclosure may be essential, but disclosure is not enough.

Taking Back Our Democracy: Responding to Citizens United *and the Rise of Super PACs, Hearing Before the Subcomm. on Const., Civil Rights & Human Rights of the S. Comm. on the Judiciary*, 112th Cong. 79 (2012) (testimony of Lawrence Lessig), https://bit.ly/32m8J7z.

Furthermore, despite likely having little practical effect, legislative enhancement of disclosure requirements for Super PACs may run afoul of the First Amendment and prove problematic. Disclosure is a vital part of FECA, but those requirements remain subject to the First Amendment. *Davis* v. *FEC*, 554 U.S. 724, 744 (2008). And while this Court has largely upheld disclosure requirements, it has also recognized their limits. *Ibid.* ("[W]e have repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment.") (quoting *Buckley*, 424 U.S. at 64).

Rather, to address the problems above, the comprehensive campaign finance regime enacted and refined by Congress over the past several decades—including limits on contributions to Super PACs—must be upheld. *SpeechNow* has caused a host of problems that undermine the integrity of the electoral process and voters' confidence in it. The FEC cannot monitor the billions in contributions hidden from the American public and the potential corruption they could cause. And, as a direct result of *SpeechNow*, foreign powers have tried and will continue to try to influence U.S. elections.

II. *SPEECHNOW* ENABLED ACTIVITIES WIDELY VIEWED AS CORRUPT THAT THE FEC CANNOT PREVENT

SpeechNow rested on a second premise, in addition to the assumption that contributions would be transparent. Without any rigorous analysis or reasoning, *SpeechNow* held that the government has no anti-corruption interest in limiting contributions to political committees making only independent expenditures. *SpeechNow*, 599 F.3d at 695. The D.C. Circuit explained its conclusion in two sentences, extending the holding of *Citizens United* by simple syllogism: "In light of the Court's holding as a matter of law [in *Citizens United*] 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." *Id.* at 694. According to the D.C. Circuit, "[t]he Court has effectively held that there is no corrupting 'quid' for which a candidate might in exchange offer a corrupt 'quo.'" *Id.* at 694-695.

This assumption that contributions to Super PACs do not lead to a risk of corruption has been proven wrong in the decade since *SpeechNow* was decided. In *SpeechNow*, the court even recognized the utility of contribution limits in preventing corruption: "Limits on direct contributions to candidates 'unlike limits on independent expenditures, have been an accepted means to prevent *quid pro quo* corruption.'" *Id.* at 695 (citation omitted). Without any similar contribution limits to organizations making independent expenditures, *SpeechNow* facilitated the rise of Super PACs and enabled a system that the American public widely views as corrupt. See Albert W. Alschuler et al., *Why Limits on Contributions to Super PACs Should Survive* Citizens United, 86 Fordham L. Rev. 2299, 2343-2344 (2018) ("The polling data reveal that unlimited super PAC contributions have played a significant part in intensifying public perceptions of corruption.").

This Court has given little guidance on what types of activity constitute *quid pro quo* corruption or the appearance of such corruption. See*, e.g.*, *Evans* v. *United States*, 504 U.S. 255, 274 (1992) (Kennedy, J., concurring in part and concurring in the judgment) ("The official and the payor need not state the *quid pro quo* in express terms, for otherwise the law's effect could be frustrated by knowing winks and nods."). For example, although *quid pro quo* corruption includes explicit and implicit agreement, but not "[i]ngratiation and access," *Citizens United*, 558 U.S. at 360, it is unclear whether the Court's concept of *quid pro quo* corruption includes conscious favoritism. See Albert W. Alschuler, *Limiting Political Contributions After* McCutcheon*,* Citizens United*, and* SpeechNow, 67 Fla. L. Rev. 389, 394 (2015). As a result, there is a significant ambiguity about the types of activities that create a risk of corruption such that regulators can address them consistent with the First Amendment.

Enabled by the removal of contribution limits, Super PACs have engaged in troubling activity by exploiting the gap in FECA left by *SpeechNow*. After *SpeechNow*, the line between donors, candidates, campaigns, and affiliated Super PACs has become increasingly blurred. It is difficult to determine where each begins and ends in campaigns and their interplay has encouraged a system of what Justice Kennedy referred to as "knowing winks and nods." *Evans*, 504 U.S. at 274 (Kennedy, J., concurring in part and concurring in the judgment).

For example:

- Although candidates may not solicit unlimited contributions for Super PACs, they often still attend, speak at, or feature as guests for Super PACs events where unlimited contributions are solicited so long as the candidate limits solicitations to FECA's individual contribution limits. See Beth

Reinhard & Christopher S. Stewart, *Some Candidates, Super PACs Draw Closer*, Wall St. J. (Oct. 25, 2015, 6:12 PM), https://on.wsj.com/2B4Iebq.

- Campaign operatives report referring donors to friendly Super PACs before discussing legislative actions contingent on the donor's contributions. See Daniel B. Tokaji & Renata E.B. Strause, *The New Soft Money* 68 (2014). One campaign operative explained that a candidate may call a donor, mention a Super PAC, and recommend that someone from the Super PAC call the donor before discussing legislative matters contingent on the donor's contribution to the Super PAC. See *id.*
- Candidates publicly endorse specific Super PACs run by allies and former colleagues of the candidate. See, *e.g.*, Michelle Ye Hee Lee, *Trump Slammed Opponents for Being in 'Cahoots' with Super PACs. Now, He's Endorsed a Group Supporting Him*, Wash. Post (May 8, 2019), https://wapo.st/38ctRhn (reporting that President Donald Trump endorsed American First Action, a Super PAC run by allies of the President); Dan Eggen, *Obama, in a Switch, Endorses Pro-Democratic Super PAC*, Wash. Post (Feb. 7, 2012), https://wapo.st/2CJs7jZ (reporting that President Barack Obama endorsed Priorities USA Action, a Super PAC founded by two former White House aides).

The increased use of unlimited contributions has heightened the risk of political corruption—allowing outside spending groups to exert their influence on candidates. The D.C. Circuit in *SpeechNow* did not consider the potential corrupting effects of unlimited contributions to Super PACs. The exploitation of unlimited contributions has enabled a campaign finance system that is inconsistent with

FECA, and the FEC is unable to prevent such *quid pro quo* corruption without raising concern it is running afoul of the First Amendment.

In light of *SpeechNow*, the FEC has acknowledged that it is unable to limit contributions to Super PACs from individuals, political committees, corporations and labor organizations. FEC, Advisory Op. 2010-11, at 3 (Commonsense Ten) (July 22, 2010), https://bit.ly/3j7L8xw. The inability to limit contributions, combined with the ambiguity about what activities pose a risk of corruption, leave the FEC unable to address activity widely perceived by the American public as corrupt. This disrupted Congress' interconnected statutory regime, as FEC Commissioner Weintraub explained: "We have no regulations specifically addressing super PACs. None. And our coordination regulations, passed in an earlier era, were simply not designed to bear the weight that Super PACs have placed on them." Citizens United *at 10: The Consequences for Democracy and Potential Responses by Congress: Hearing Before the Subcomm. on Const., Civil Rights & Civil Liberties of the H. Comm. on the Judiciary*, 116th Cong. (2020) (written testimony of Ellen L. Weintraub, Comm'r, FEC), https://bit.ly/38iumGL.

The vast majority of Americans believe that unlimited contributions to Super PACs create at least an appearance of corruption. See Jason M. Breslow, *Trevor Potter: The Political Reality Citizens*, Frontline (Oct. 30, 2012), https://to.pbs.org/2NFhHEm. Since *SpeechNow*, surveys consistently report that Americans perceive a connection between unlimited contributions and political favors. In 2012, sixty-nine percent of Americans believed that unlimited contributions to Super PAC spending will lead to corruption, and seventy-three percent agreed that contribution limits would lead to less corruption. Erik Ospal, *Poll: Super PACs Leave Americans Less Likely to Vote*, Brennan Ctr. for Justice at N.Y.U. (Apr. 24, 2012),

https://bit.ly/2YFURCK. In 2015, most Americans (sixty-six percent) believed that the wealthy have more influence in the election process, and that candidates who win office promote policies that benefit their donors most of the time. *Americans' Views on Money in Politics*, N.Y. Times (June 2, 2015), https://nyti.ms/3gdSPzB. And in 2017, sixty percent of likely voters agreed that most members of Congress were "willing to sell their vote for either cash or a campaign contribution." *For Sale: Congress*, Rasmussen Reports (June 26, 2017), https://bit.ly/2BjAfr2. More recently, Americans have been found to broadly perceive big donors to have more political influence, and donors are more likely to say that their representative would help them if they had a problem. Bradley Jones, *Most Americans Want to Limit Campaign Spending, Say Big Donors Have Greater Political Influence*, Pew Research Ctr. (May 8, 2018), https://pewrsr.ch/2AccY9Y.

One amicus brief before the D.C. Circuit in the case below reported the results of two studies that explored whether contributions to Super PACs give an appearance of *quid pro quo* corruption. Br. for Christopher T. Robertson et al. as Amici Curiae Supporting Appellants, *Lieu* v. *FEC*, No. 19-5072 (D.C. Cir. June 28, 2019). Mock jurors were asked whether campaign finance fact patterns met the *quid pro quo* corruption standard under federal bribery laws. *Id.* at 3-4.

In the first study, seventy-three percent of mock jurors determined that a contribution to an independent expenditure organization supporting a candidate who subsequently introduces legislation favorable to the donor could support federal bribery charges, even where defendants never met in person or made an explicit *quid pro quo* agreement. *Id.* at 6. The second study introduced factual variations to the initial fact pattern, such as where the donor and candidate had no contact, where a lobbyist engaged and persuaded both parties to act in accordance

with each other's interests, and where the parties met and discussed their mutual interests. *Id.* at 7-8. Importantly, "participants were nearly as likely to convict where the parties' relationship was through an intermediary * * * compared to where the relationship and contribution were both direct." *Id.* at 9. These studies demonstrate that American citizens would perceive the above examples—where a purportedly independent Super PAC acts as an intermediary for the interests of donors and campaigns—as corrupt.

* * *

The public's perceptions of the existence of *quid pro quo* corruption between candidates and donors stems from the ability to make *unlimited contributions* to the Super PACs that support those candidates or work diligently against their opponents. This is precisely what this Court has recognized can and should be regulated under federal campaign finance law. "[T]he avoidance of the appearance of improper influence 'is * * * critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.'" *Buckley*, 424 U.S. at 27 (citation omitted). Since voters cannot "examine the intentions behind suspiciously sizable contributions, * * * the corruptive potential of unregulated contributions * * * inflict[] almost as much harm on public faith in electoral integrity as corruption itself." *Libertarian Nat'l Comm., Inc.*, 924 F.3d at 542. Only this Court can enforce Congress' integrated campaign finance regime and affirm the FEC's ability to prevent corruption by overturning *SpeechNow*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

Stephanie F. Cagniart
Counsel of Record
David B. Goode
BAKER BOTTS L.L.P.
98 San Jacinto Blvd.
Suite 1500
Austin, Texas 78701
(512) 322-2537
stephanie.cagniart@baker-botts.com

Emanuel Grillo
David M. Howard
BAKER BOTTS L.L.P.
30 Rockefeller Plaza
New York, NY 10112

Counsel for Amicus Curiae

July 21, 2020