

In the Supreme Court of the United States

REPRESENTATIVE TED LIEU ET AL.,

PETITIONERS,

v.

FEDERAL ELECTION COMMISSION,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMICI BRIEF OF THE STATES OF WASHINGTON,
COLORADO, CONNECTICUT, DELAWARE, DISTRICT OF
COLUMBIA, HAWAII, ILLINOIS, MAINE, MARYLAND,
MASSACHUSETTS, MICHIGAN, MINNESOTA, NEW
MEXICO, PENNSYLVANIA, RHODE ISLAND, VERMONT,
AND VIRGINIA IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST

The amici States have an interest in ensuring that State and local elections remain free of actual or apparent corruption and in safeguarding public confidence in elected officials. The D.C. Circuit's decision in *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (Pet. App. 45a-68a), reaffirmed in the decision below, undermines these State interests in at least two ways.

First, while the D.C. Circuit's decision dealt with Congress's ability to set contribution limits for Super PACs, at least four other circuits have since struck down state and local laws limiting contributions to independent expenditure groups based on *SpeechNow's* reasoning. Some States have further declined to enforce, or have repealed, State campaign finance laws limiting contributions to independent expenditure groups in the wake of *SpeechNow*. The D.C. Circuit's erroneous decision has thus directly interfered with States' ability to enact and enforce important laws.

Second, *SpeechNow* has ushered in a decade of unprecedented contributions to Super PACs from a small pool of ultra-wealthy donors. Super PACs have, in turn, spent billions of dollars in federal, state, and local elections. This torrent of undisclosed money has corroded public confidence in elected officials representing the States in Congress, the election process, and the very importance of voting, leading many Americans to believe that their individual votes cannot matter in the face of such massive contributions from a powerful few. The amici States have an interest in reestablishing and enforcing

reasonable contribution limits on Super PACs to eliminate corruption and the appearance of corruption, thereby restoring public confidence in government and encouraging civic engagement.

This Court should grant certiorari now and affirm the States' power to take steps to ensure the integrity of the democratic process.

SUMMARY OF ARGUMENT

The amici States respectfully request that the Court grant the petition and hold that the contribution limits in the Federal Election Campaign Act, 52 U.S.C. § 30116, are consistent with the First Amendment as applied to organizations engaged in independent expenditures.

The pervasive and pernicious impact of the *SpeechNow* decision presents a matter of great importance affecting many States. *SpeechNow* rested on the premise “that independent expenditures do not corrupt or give the appearance of corruption as a matter of law[.]” Pet. App. 62a. Based on this proposition, the D.C. Circuit assumed that the government cannot have an “anticorruption interest in limiting contributions to independent expenditure-only organizations.” Pet. App. 62a. This Court has not yet decided whether limits on contributions to Super PACs are constitutionally valid, but several circuit courts have since adopted the reasoning of the D.C. Circuit in striking down State and local campaign finance laws that cap such contributions. Some States have also concluded that their existing laws may be unconstitutional in light of this precedent.

In the decade since *SpeechNow* was decided, Super PACs have become a dominant force in electoral politics and have funneled billions of dollars from small pools of billionaire and millionaire donors into state and federal elections. Super PACs have a particularly pronounced impact on state and local elections, with Super PAC spending in such elections increasing exponentially over the last decade.

Combined with the lack of real-time transparency into the sources of contributions to Super-PACs, the magnitude of Super PAC spending has engendered a pervasive view in the public that elected officials and candidates for office are beholden to Super PAC donors. Americans have reached an overwhelming bipartisan consensus that donors' ability to contribute unlimited sums to Super PACs can and does corrupt elections and elected officials. The American experience over the last ten years also shows that express advocacy by Super PACs for particular candidates is not independent (in appearance or in reality), undercutting *SpeechNow's* justifications for removing limits on contributions to Super PACs.

A strong presumption also favors granting review of the Court of Appeals decision striking down a federal statute on First Amendment grounds. This Court consistently grants review of such decisions, even absent a circuit conflict, out of respect for Congress's role as a co-equal branch of government. This Court's review is necessary to permit reasonable limits on contributions to Super PACs and begin to reverse the harm wrought on the public's confidence in governmental integrity.

REASONS FOR GRANTING THE PETITION

I. **The Risk and Appearance of Corruption Created by Eliminating Contribution Limits to Super PACs Presents a Matter of Great Importance**

SpeechNow erroneously decided as a matter of law that the government does not have an “anti-corruption interest in limiting contributions to independent expenditure-only organizations.” Pet. App. 62a. The decision has caused a maelstrom of money to surge into Super PACs affecting elections at every level. But as explained below, removing limits to contributions invites corruption and the appearance of corruption, undermining *SpeechNow*’s reasoning.

A. **Unlimited Contributions to Super PACs Create a Pervasive Appearance of Corruption**

The overwhelming majority of the public believes that unlimited contributions to Super PACs lead to corruption, a perception confirmed by real world experience.

Direct surveys of the electorate show that allowing unlimited contributions to Super PACs creates an appearance of corruption that corrodes public confidence in the integrity of elections and public officials. The perception of corruption is bipartisan and widely held. In a survey conducted by the Brennan Center for Justice focusing on Super PACs, 74% of Republicans and 73% of Democrats agreed that “let[ting] corporations, unions and people give unlimited money to Super PACs will lead to

corruption.”¹ This view was specifically tied to the lack of contribution limits, with 73% of respondents (75% of Republicans and 78% of Democrats) agreeing that “there would be less corruption if there were limits on how much could be given to Super PACs.”²

This widespread concern about the lack of contribution limits harms civic engagement. An alarming 26% of Americans report that they are *less likely* to vote because large donors to Super PACs have such outsized influence over elected officials.³ This demoralizing effect was particularly strong among less wealthy or less educated voters and among voters of color.⁴

The perception of corruption arises, in part, from wealthy donors’ use of Super PACS to funnel billions of dollars into elections. Since *SpeechNow*, just 11 individual donors have given a combined \$1 billion to Super PACs, accounting for more than one-fifth of all contributions to Super PACs since 2010.⁵ While the top 0.01% of the voting age population accounted for between 9% and 15% of total contribution dollars during the 1980s, by 2016, the share of total contributions from these wealthiest few

¹ Brennan Center for Justice, *National Survey: Super PACs, Corruption, and Democracy* (Apr. 24, 2012), <https://bit.ly/3e9vcqs>.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ Michelle Ye Hee Lee, *Eleven donors have plowed \$1 billion into super PACs since they were created*, Wash. Post, Oct. 26, 2018, <https://wapo.st/3fV6sR>.

exceeded 40%.⁶ So far in the 2020 election cycle, the top 100 individuals contributing to Super PACs, representing just 0.1% of all donors, have contributed 70.2% of all contributions to Super PACs.⁷ These donors include hedge-fund billionaires, corporate executives, media magnates, and a casino mogul.⁸

The public’s perception that this onslaught of money buys undue influence is well-grounded. There have been several high-profile instances of admitted or perceived influence of donors to Super PACs over politicians. *See* Pet. at 21–23 (discussing the \$1.5 million Greg Lindberg funneled to a Super PAC and the alleged bribery scheme involving a sitting U.S. Senator).

Lev Parnas and Igor Fruman present a high-profile example of the “kink in the system.”⁹ Their indictment alleges that the two businessmen wanted to promote their personal financial interests and sought to advance the political interest of a Ukrainian government official seeking to oust the U.S. ambassador to Ukraine. *See* Dkt. 1, Sealed Indictment, *United States v. Parnas*, 19-cr-725

⁶ *Expert Report of Adam Bonica, Ph.D., Patrick v. Interior Voters for John Coghill*, Case No. 3AN-18-05726CI, <https://bit.ly/2BN7Qdi>.

⁷ OpenSecrets.org, *Super PACs: How Many Donors Give*, <https://bit.ly/38z8c34> (last visited July 20, 2020).

⁸ OpenSecrets.org, *Top Individual Contributors: All Federal Contributions*, <https://bit.ly/2DczEli>.

⁹ Rosalind S. Helderman & Paul Sonne, ‘Once this is over, we’ll be kings’: How Lev Parnas worked his way into Trump’s world—and now is rattling it, *Wash. Post*, Jan. 18, 2020, <https://wapo.st/3gEPiee>.

(S.D.N.Y.). Using shell entities, Parnas and Fruman contributed \$325,000 and \$15,000 to two Super PACs to “obtain access to exclusive political events and gain influence with politicians.” *Id.* Their efforts to buy access succeeded: they were quickly able to obtain direct access to the President. At one fundraising dinner, Parnas told the President that the U.S. ambassador to Ukraine disparaged him and advocated for her removal. The President ordered her dismissal at the dinner.¹⁰ Though this contribution received more attention than most, the core feature of their activity was sadly routine: To gain access to a politician, they made a large contribution to a purportedly independent Super PAC.

Other examples abound showing how the influence of Super PAC contributions promotes the appearance of corruption, including at the State and local level.¹¹ These real-world examples of individuals using high-dollar contributions to gain access to public officials show just how wrong the D.C. Circuit was to assume that contributions to independent expenditure organizations cannot either corrupt or create an appearance of corruption as a matter of law.

¹⁰ Rosalind S. Helderman et al., *Listen: Trump tells associates to ‘get rid of’ U.S. ambassador to Ukraine*, Wash. Post, Jan. 25, 2020, <https://wapo.st/3gwFi6o>.

¹¹ *See, e.g.*, Pet. 21-23; Editorial, *D.C. mayor’s allies wisely shut down FreshPAC*, Wash. Post, Nov. 10, 2015, <https://wapo.st/3e92S7J>.

B. The Elimination of Contribution Limits Has Predictably Resulted in a Deluge of Super PAC Money in State and Local Elections that Exacerbate the Risk and Appearance of Corruption

Super PACs have had a particularly outsized influence on state and local elections given the smaller dollars generally spent on such elections. Forward Majority, a pro-Democratic Super PAC, estimates that it takes \$500,000 to successfully flip a competitive seat in a state legislature.¹² As former FEC chairman Robert Lenhard said, “The ability to step in with a six- or seven-figure ad buy is going to be disproportionately effective on a local race.”¹³ Independent contributions and expenditures towards state races has increased every election cycle since the *SpeechNow* decision.¹⁴

This increase in Super PAC money is particularly pronounced in certain States. For example, independent expenditures in Colorado have increased over 1000 percent over the last decade, from

¹² Deniz Çam, *Ahead of 2020, Democratic Billionaire Donors Bet On A Young Super PAC To Win State Races*, Forbes, Nov. 4, 2019, <https://bit.ly/2ZPZVUD>.

¹³ Heather Haddon, *Super PACs Target Local Races*, Wall Street J., Oct. 18, 2015, <https://on.wsj.com/3iDiofD>.

¹⁴ See JT Stepleton, *Independent Spending Overview, 2015 and 2016*, FollowTheMoney.org, Feb. 14, 2018, <https://bit.ly/2Cjvi1x>.

just over \$11 million in total spending on statewide elections in the 2009-2010 cycle, to over \$136 million in the 2017-2018 election cycle.¹⁵ In this same time span, independent spending has increased in Alaska from \$1.2 million to over \$26 million; in Arizona, from just over \$4 million to over \$29 million; in Michigan, from approximately \$7.8 million to \$32.4 million; in Missouri, from \$3.3 million to \$15.2 million; in North Carolina, from \$2.6 million to \$18.7 million; in Oklahoma, from \$ 1.4 million to \$18.1 million; and in Washington, from \$5.8 million to \$ 24.2 million.¹⁶ Records for the most expensive races are broken regularly by Super PACs in state races, with over \$2.2 billion raised in campaign contributions for state offices.¹⁷ Super PACs have raised and spent enormously in state races for governor,¹⁸ attorney

¹⁵ Stacy Montemayor, *10 years after Citizens United: State races transformed by explosive growth in independent spending*, FollowTheMoney.org, Jan. 21, 2020, <https://bit.ly/3e3yuf2>.

¹⁶ *Id.*; see also Stepleton *supra* note 14.

¹⁷ Geoff Mulvihill, *AP: Political money in state-level campaigns exceeds \$2B*, Associated Press, Nov. 1, 2018, <https://bit.ly/2O8eayE>; see, e.g., Shannon Mullane, *Super PAC money floods into Colorado state races*, Colo. Indep., Aug. 18, 2018, <https://bit.ly/3efccXD>; Alex Kotch, *Wealthy Donors and Fossil Fuel Interests Pump Millions into Super PACs for 2020 Elections*, Ctr. For Media & Democracy's PR Watch, Feb. 28, 2020, <https://bit.ly/3iGmBiL>.

¹⁸ Sam Karlin, *Super PACs are pouring millions of dollars into Louisiana governor's race to unseat Gov. Edwards*, The Advocate, Aug. 3, 2019, <https://bit.ly/38C5MRr>.

general,¹⁹ judgeship,²⁰ legislature,²¹ and even school boards²² and state land commissioner.²³

Super PACs have also increasingly focused on mayoral elections. After *SpeechNow*, what Super PACs raise and spend has dramatically increased in big city mayors' campaigns in cities like Chicago, Newark, Boston, and Los Angeles.²⁴ For example, independent expenditures in Seattle mayoral races have quintupled since 2009 and almost doubled from 2013 to 2017.²⁵

¹⁹ Zaid Jilani, *Real Estate Tycoon Dumps Money Into Super PAC to Stop Zephyr Teachout's Bid for New York Attorney General*, *The Intercept*, Sept. 11, 2018, <https://bit.ly/2VYneKK>.

²⁰ Brady Dennis, *Super PACs, donors turn sights on judicial branch*, *Wash. Post*, Mar. 29, 2012, <https://wapo.st/2ZaVMLV>.

²¹ Mary Winter, *Super PACs at the State Level: A Different Story*, *Colum. Journalism Rev.*, Apr. 16, 2012, <https://bit.ly/3f6ylZA>.

²² Jack Healy, *School Board Recall Vote in Colorado Tests Conservative Policies*, *N.Y. Times*, Oct. 28, 2015, <https://nyti.ms/3gIO8ON>.

²³ Dan Boyd, *Out-of-state PACs pour money into New Mexico*, *Las Cruces Sun News*, Oct. 9, 2018, <https://bit.ly/3e5Locs>.

²⁴ Sandra Svoboda & Mike Wilkinson, *Donor database: Detroit mayoral race attracted big-time Super PAC money for Mike Duggan*, *Ctr. for Mich./Bridge Magazine*, July 22, 2014 (updated Jan. 20, 2019), <https://bit.ly/3gFhehT>.

²⁵ Polly Grow & Bob DeWeese, *Seattle Ethics & Election Comm'n, 2017 Election Report* 15 (Mar. 9, 2018), <https://bit.ly/38ARMYb>.

Super PAC donations have similarly exploded for other local offices. For example, while Super PACs made no expenditures in Seattle city council elections in 2013, such spending jumped to \$784,644 in 2015.²⁶ During Seattle's city council election in 2019, one candidate was the beneficiary of 465 times more support from Super PACs than his opponent, though he raised less in direct contributions.²⁷ State judicial offices are not immune from outsized Super PAC donations either. In 2016, billionaires Bill Gates, Paul Allen and Ken Fisher each poured hundreds of thousands of dollars to a Super PAC supporting a sitting Washington Supreme Court justice's opponent or a Super PAC seeking to unseat that justice.²⁸ Super PACs ended up spending over \$1 million on a single Washington Supreme Court race—with over 90% spent on that single candidate.²⁹

The upcoming 2020 elections are expected to see unprecedented levels of Super PAC contributions as small pools of billionaires prepare to fund hundreds

²⁶ *Id.* at 1.

²⁷ Lester Black, *Fact Check: Big Business Super PACs Are Outspending Labor 4-1 in City Elections*, *The Stranger*, Oct. 29, 2019, <https://bit.ly/3edkbEN>.

²⁸ Jim Brunner & Steve Miletich, *Bill Gates, others donate nearly \$1M to defeat Supreme Court Justice Wiggins*, *Seattle Times*, Oct. 16, 2016 (updated Nov. 14, 2016), <https://bit.ly/2O8O1zO>.

²⁹ See Pub. Disclosure Comm'n, *Public Disclosure Reporting Form: Citizens for Working Courts Enterprise Washington* (Oct. 26, 2016), <https://bit.ly/38AXbyr>; Pub. Disclosure Comm'n, *Public Disclosure Reporting Form: Judicial Integrity WA PAC* (Oct. 19, 2016), <https://bit.ly/2O7TRl2>.

of races across the country.³⁰ Such contributions dwarfs the amounts that can be raised directly by candidates, exacerbating perceptions that candidates are beholden to wealthy donors through unlimited contributions to ostensibly “independent” organizations.³¹ As Donald Trump’s former campaign manager, Corey Lewandowski, stated: “Candidate committees have almost become irrelevant.” “If you can write a larger, more substantial check, there’s no reason to give to candidates,” he continued. “Everything you want to do, you can do through a PAC or another entity. It makes the behind-the-scenes players much more influential than they ever were.”³²

The proportion of Super PAC money donated by a small number of super-wealthy donors is also more pronounced in state and local elections. For example, in 2018, only 11 donors accounted for 92% of all donations to Connecticut Super PACs, supporting candidates for Connecticut state and local offices.³³ In

³⁰ Karl Evers-Hillstrom & Tatyana Monnay, *Party-Tied super PACs amassing unprecedented sums for congressional elections*, OpenSecrets.org, Apr. 22, 2020, <https://bit.ly/2Z7Cbfo>.

³¹ See OpenSecrets.org, *Races in Which Outside Spending Exceeds Candidate Spending, 2020 Election Cycle*, <https://bit.ly/2Z8vJEU> (listing 114 electoral races in 2012 through 2018 in which Super PAC spending exceeding that of all candidates in the race).

³² Alan Suderman & Ben Wieder, ‘*Citizens United*’ *Ruling Helped Unions Win State Elections*, Ctr. For Public Integrity, Nov. 14, 2013 (updated May 19, 2014), <https://bit.ly/3fglSCI>.

³³ Cheri Quickmire, Tom Swan & Michael Sullivan, Common Cause Conn. & Conn. Citizen Action Group, *Who Is*

Minnesota, 78 individuals collectively contributed nearly 30 percent of the total \$61 million spent in 2018 state elections.³⁴

The proliferation of contributions to Super PACs substantially outpaces the rise of direct contributions to candidates.³⁵ Even a tenfold increase in contribution limits would hardly put a candidate on equal footing with a Super PAC that receives contributions of hundreds of thousands or even millions of dollars. Ultimately, the distorting effects of Super PAC money drowns out the voices of voters and candidates and damages public confidence in the integrity of our election system.

C. Lack of Transparency of Massive Contributions to Super PACs Exacerbates the Risk and Appearance of Corruption

The lack of real-time transparency into sources of Super PAC contributions increases the risk and appearance of corruption created by the lack of contribution limits. Super PACs increasingly report donations from “dark groups” that are not themselves

Buying Our Election? A Pre-Election Guide to Connecticut Super PACs (Oct. 19, 2018), <https://bit.ly/2ZeTnzX>.

³⁴ Robert Moilanen, *Mega-donor political cash swamps state elections*, Mpls. Star Trib., Sept. 29, 2019, <http://strib.mn/3e6ls0d>.

³⁵ Stepleton *supra* note 14; Idrees Kahloon, *Outside groups' influence on 2016 election grows, super PAC filings show*, Sunlight Found., Aug. 3, 2015, <https://bit.ly/38TD6U7>.

required to disclose their donors.³⁶ This concern is particularly acute in state elections, in which dark money funding of Super PACs is greater on average than in federal elections.³⁷

According to a study by the Brennan Center for Justice, in state and local elections only 29% of outside spending was fully transparent in 2014, sharply down from 76% in 2006.³⁸ Donations from dark groups to Super PACs increased by 49 times between 2006 and 2014, from less than \$190,000 to over \$9.2 million.³⁹ Eleven of the top 15 dark money groups spent heavily on state campaigns from 2010 through 2016, and dramatically increased their spending in the same timeframe.⁴⁰ As Chris Herstam, a former Republican majority whip in the Arizona House of Representatives, put it: “In my 33 years in Arizona politics and government, dark money is the most corrupting influence I have seen.”⁴¹

This increase in out-of-state dark money by Super PACs has been particularly dramatic in certain state and local elections. For example, Arizona saw a nearly three-hundred fold increase in Super PAC dark

³⁶ Chisun Lee et al., Brennan Center for Justice, *Secret Spending in the States* (2016), <https://bit.ly/3hpOiem>.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ JT Stepleton, *Darkness on the Edge of Town: National Dark Money Targets States*, FollowTheMoney.org, Nov. 2, 2018, <https://bit.ly/31YRAR8>.

⁴¹ Lee *supra* note 36.

money spending between 2006 and 2014.⁴² Similarly, in Oregon's 2012 elections, groups federally registered outside of Oregon accounted for 98.9% of all outside spending in Oregon House races.⁴³

Super PACs funded by out-of-state donors are likely to put their donors' priorities ahead of the needs of in-state residents, thus skewing the relationship between representatives and constituents.⁴⁴ In the 2012 Utah attorney general election, payday loan companies worked with a campaign to use a web of generically-named PACs and nonprofits to obscure approximately \$450,000 in donations for nominally independent election ads.⁴⁵ The lenders sought protection from newly toughened consumer rights rules.⁴⁶ In Wisconsin, an out-of-state mining company in 2012 secretly poured \$700,000 into ads attacking

⁴² *Id.*

⁴³ People for the American Way Found. & OSPIRG Found., *Outside Spending, Outsized Influence: Big and Secret Money in Oregon in the 2012 Elections*, <https://bit.ly/2CiKcVM>.

⁴⁴ Theodoric Meyer, *In Wisconsin, Dark Money Got a Mining Company What It Wanted*, ProPublica, Oct. 14, 2014, <https://bit.ly/3iI1I6C>; Nicholas Confessore, *A Campaign Inquiry in Utah Is the Watchdogs' Worst Case*, N.Y. Times, Mar. 18, 2014, <https://nyti.ms/2VXLmNJ>; Seattle Times Staff, *AG Says more campaign money hidden in I-522 food-label fight*, Seattle Times, Nov. 20, 2013, <https://bit.ly/2BRPZBR>.

⁴⁵ Utah House of Representatives, *Report of the Special Investigative Committee 2* (Mar. 11, 2014), <https://bit.ly/3eccD4Y>; Robert Gehrke, *More Swallow emails recovered, probe's price nears \$4M*, Salt Lake Trib., Mar. 8, 2014, <https://bit.ly/2AEdJZE>.

⁴⁶ *Report of the Special Investigative Committee* at 8-9, 69-70 *supra* note 45.

state legislators who opposed speeding up mine permits.⁴⁷

Contribution limits for independent expenditure groups are crucial to maintaining the integrity of, and public confidence, in our democratic process. As illustrated above, Super PACs can and do exacerbate corruption and the appearance of corruption.

II. The Question Presented Affects Many States

The *SpeechNow* decision impacts many, if not all, States because Super PAC contributions influence and impact federal elections to elect representatives of States in Congress. Turning to 2020, for example, Super PACs have raised significant sums with eyes towards Senate races in Arizona, Colorado, Iowa, Maine, and North Carolina. In this election cycle, the Senate Majority PAC has raised over \$118 million and the Senate Leadership Fund over \$71 million—signaling huge amounts that may be spent in Senate races.⁴⁸ Likewise, Super PACs focused on House races have raised tens of millions, targeting some three dozen congressional districts across the country.⁴⁹

SpeechNow has already had far-reaching impact beyond federal campaign finance law. To the detriment of States and municipalities seeking to

⁴⁷ Meyer *supra* note 44.

⁴⁸ OpenSecrets.org, *Super PACs*, <https://bit.ly/3gPCT6Y> (last visited July 20, 2020).

⁴⁹ Kenneth P. Doyle, *Super PACs, Party Committees Load Up for Congressional Campaigns*, Bloomberg Gov't, Apr. 22, 2020, <https://bit.ly/3gVMPw4>.

regulate contributions to Super PACs, several circuits have followed *SpeechNow* to strike down State and local laws capping contributions to independent expenditure groups. Other States have stopped enforcing election regulations they perceive to be in conflict with *SpeechNow*.

The Ninth Circuit, for example, cited *SpeechNow* in striking down a city ordinance that limited contributions to political action committees using funds for independent expenditures. See *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684, 698-99 (9th Cir. 2010) (“[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.” (quoting *SpeechNow.org*, 599 F.3d at 696 (alteration by *Long Beach*))).

One year later, the Seventh Circuit in *Wisconsin Right to Life* followed *SpeechNow*’s reasoning to hold that Wisconsin’s statute—limiting contributions to state and local candidates, political parties, and political committees to a “total of \$10,000 in any calendar year”—was unconstitutional. *Wisc. Right to Life State Political Action Comm. v. Barland*, 664 F.3d 139, 143 (7th Cir. 2011) (quoting Wis. Stat. § 11.26(4)). The Seventh Circuit agreed with *SpeechNow*’s “inexorabl[e]” conclusion that “contributions to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption.” *Id.* at 154 (quoting *SpeechNow.org*, 599 F.3d at 694).

SpeechNow's logic has proliferated in other circuits and courts as well. See, e.g., *Republican Party of N.M. v. King*, 741 F.3d 1089, 1096 (10th Cir. 2013) (affirming preliminary injunction that enjoined a state law prohibiting solicitation, acceptance, and making of contributions of greater than \$5,000 to political committees); *Texans for Free Enter. v. Tex. Ethics Comm'n*, 732 F.3d 535, 538 (5th Cir. 2013) (holding that a state law ban on corporate contributions cannot be applied to independent expenditure committees); Dkt. 23, *Fund for Jobs, Growth, & Security v. N.J. Election Law Enforcement Commission*, No. 13-2177 (D.N.J. July 11, 2013) (permanently enjoining enforcement of the contribution limit to political and continuing political committees under New Jersey law against the plaintiff).⁵⁰

SpeechNow has hampered enforcement of and innovation in State campaign finance regulations even where a court has not struck them down. For example, Massachusetts's Office of Campaign & Political Finance (OCPF) issued an interpretive bulletin providing guidance to independent expenditure groups shortly after *SpeechNow*. Explained OCPF, "[G]iven *Citizens United* and *SpeechNow*, independent expenditure-only committees may raise unlimited contributions from individuals, political committees, and

⁵⁰ A Fourth Circuit holding resembling *SpeechNow* came prior to the D.C. Circuit's decision. See *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 308 (4th Cir. 2008) (holding that North Carolina did not make a sufficient evidentiary showing to justify its limit on contributions to Super PACs).

corporations.” Massachusetts Office of Campaign & Political Fin., *Interpretive Bulletin OCPF-IB-10-03*, at 2 (Oct. 26, 2010), <https://bit.ly/3ebfhYX>.

In the same vein, the Alaska Public Offices Commission issued an advisory opinion regarding Alaska Statute § 15.13.070, which limits the amount of money individuals or groups can contribute to independent expenditure groups during an election cycle.⁵¹ Concerning the contribution limits, the Commission recommended allowing contribution activity that violated the statute, reasoning that other courts had “invalidated other states’ restrictions on amounts of contributions to organizations that make only independent campaign expenditures.” State of Alaska, Pub. Offices Comm’n, *Advisory Opinion Request AO 12-09-CD*, at 7-8 (May 24, 2012) (footnote omitted), <https://bit.ly/38KIYyT> (citing *inter alia* *Long Beach Area Chamber of Commerce*, 603 F.3d at 687; *Wisc. Right to Life State Political Action Comm.*, 664 F.3d at 154-55).

Likewise, New Hampshire’s Attorney General’s Office issued an opinion that outside groups could raise unlimited funds and use the proceeds to support or oppose a candidate. Previously, donations to the groups were capped at \$5,000. Acknowledging that *SpeechNow* was not controlling authority in a

⁵¹ The Court recently granted certiorari, vacated, and remanded *Thompson v. Hebdon*, 140 S. Ct. 348 (2019), for the Court of Appeals to consider whether Alaska’s campaign contribution limits to candidates and election-oriented groups were too restrictive and not consistent with the Court’s precedents. The Court did not address the legitimacy of a contribution limit in and of itself.

challenge to New Hampshire’s political contributions law, the opinion nonetheless concluded that “the United States District Court, District of New Hampshire would likely adopt the position expressed by the Court in *SpeechNow.org*,” and counseled against enforcing New Hampshire’s contribution limits for political committees making independent expenditures. *See* Advisory Letter to New Hampshire Secretary of State William M. Gardner, Re: Effect of *Citizens United* Decision on Enforcement of RSA 664:4 (Prohibited Political Contributions) Regarding Political Committees (Aug. 1, 2012).⁵²

States play a vital role as laboratories of democracy, including by trying different ideas for campaign finance regulation. *E.g.*, *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2673 (2015) (“This Court has long recognized the role of the States as laboratories for devising solutions to difficult legal problems.” (internal quotation marks omitted)); *see also United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) (“[T]he States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from

⁵² Following *SpeechNow*, State limitations on corporate contributions were either repealed or struck down by courts in fourteen states: Alaska, Arizona, Colorado, Connecticut, Iowa, Kentucky, Minnesota, Montana, North Carolina, South Dakota, Tennessee, Texas, West Virginia, and Wisconsin. *See* Nat’l Conference of State Legislatures, *Citizens United and the States* (July 21, 2016), <https://bit.ly/3gDYWNX>. State limitations on union contributions were struck down or repealed in at least seven states: Alaska, Arizona, Colorado, North Carolina, South Dakota, Texas, and Wisconsin. *Id.*

clear.”). But States cannot serve that role where lower courts have invalidated State limits on contributions to Super PACs.

In short, while the statute at issue here is federal, the question presented affects many, if not all, States through elections for federal offices representing States and State regulations for Super PAC contributions. On a question of such importance that affects our democracy so fundamentally, it should be this Court, not the D.C. Circuit, that has the final say.

III. A Strong Presumption Favors Review of the Court of Appeals Decision Invalidating a Federal Statute on First Amendment Grounds

As Petitioners have demonstrated, this Court employs a strong presumption favoring review of decisions invalidating federal statutes. Where a lower court has invalidated a federal statute on First Amendment grounds, the Court has “repeatedly” and consistently 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).” Pet. 10; see also *Iancu v. Brunetti*, 139 S. Ct. 2294, 2298 (2019) (observing that “when a lower court has invalidated a federal statute,” the Court “usual[ly]” grants certiorari). This standard approach is consistent with the Court’s presumption of constitutionality and the respect accorded to Congress. See *United States v. Morrison*, 529 U.S. 598, 607 (2000) (“Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional

enactment only upon a plain showing that Congress has exceeded its constitutional bounds.”); *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981) (describing review of the constitutionality of a federal statute as “the gravest and most delicate duty that this Court is called upon to perform” (quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927))). The Court should follow its “usual” practice here and grant certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED.

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