

No. 19-1398

---

---

IN THE  
**Supreme Court of the United States**

---

REPRESENTATIVE TED LIEU *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 *AMICI CURIAE* FROM  
LEGAL SCHOLARS OF CAMPAIGN FINANCE  
IN SUPPORT OF PETITIONERS**

---

ABBY K. WOOD  
GOULD SCHOOL OF LAW  
UNIVERSITY OF  
SOUTHERN CALIFORNIA\*  
Los Angeles, CA 90089

\* *University affiliation  
noted for identification  
purposes only.*

NICOLAS L. MARTINEZ  
*Counsel of Record*  
BARTLIT BECK LLP  
54 W. Hubbard Street  
Chicago, IL 60654  
(312) 494-4401  
nicolas.martinez@  
bartlitbeck.com

*Counsel for Amici Curiae*

July 29, 2020

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	iii
INTEREST OF <i>AMICI CURIAE</i> .....	1
SUMMARY OF THE ARGUMENT .....	1
ARGUMENT.....	3
I. The D.C. Circuit in <i>SpeechNow</i> Misapplied This Court’s Rulings in a Vast Expansion of First Amendment Jurisprudence That This Court Should Review .....	3
A. This Court Applies Different Levels of Scrutiny to Expenditures and Contributions.....	3
B. Even Assuming That Independent <i>Expenditures</i> Cannot Corrupt, <i>Contri-</i> <i>butions</i> to Groups Making Independent Expenditures Can.....	6
C. Campaigns and Outside Groups Coor- dinate in a Way That Can Circumvent Contribution Limits, Increasing the Risk of <i>Quid Pro Quo</i> Corruption .....	13
II. This Case Can Be Decided in Favor of Petitioners While Leaving <i>Citizens</i> <i>United</i> Undisturbed.....	17
III. This Matter Is of Urgent Public Importance .....	18
CONCLUSION .....	20

TABLE OF CONTENTS—Continued

APPENDIX	Page
APPENDIX A: LIST OF <i>AMICI CURIAE</i> .....	1a
APPENDIX B: SUPER PAC DATA.....	4a

## TABLE OF AUTHORITIES

CASES	Page(s)
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976).....	<i>passim</i>
<i>Cal. Med. Ass'n v. FEC</i> , 453 U.S. 182 (1981).....	5, 6, 14
<i>Caperton v. A.T. Massey Coal Co.</i> , 556 U.S. 868 (2009).....	19
<i>Citizens United v. FEC</i> , 558 U.S. 310 (2010).....	<i>passim</i>
<i>Colo. Republican Fed. Campaign Comm. v. FEC</i> , 518 U.S. 604 (1996).....	6, 7
<i>FEC v. Beaumont</i> , 539 U.S. 146 (2003).....	4
<i>FEC v. Colo. Republican Fed. Campaign Comm.</i> , 533 U.S. 431 (2001).....	14
<i>FEC v. Mass. Citizens for Life, Inc.</i> , 479 U.S. 238 (1986).....	4
<i>FEC v. Nat'l Conservative Political Action Comm.</i> , 470 U.S. 480 (1985).....	6
<i>McConnell v. FEC</i> , 540 U.S. 93 (2003).....	<i>passim</i>
<i>McCutcheon v. FEC</i> , 572 U.S. 185 (2014).....	5, 8, 12, 17
<i>Nixon v. Shrink Mo. Gov't PAC</i> , 528 U.S. 377 (2000).....	4, 6, 7

## TABLE OF AUTHORITIES—Continued

	Page(s)
<i>Republican Nat’l Comm. v. FEC</i> , 698 F. Supp. 2d 150 (D.D.C. 2010), <i>aff’d</i> , 561 U.S. 1040 (2010).....	6, 7, 9
<i>Republican Party of La. v. FEC</i> , 219 F. Supp. 3d 86 (D.D.C. 2016) <i>aff’d</i> , 137 S. Ct. 2178 (2017).....	6, 7, 9
<i>SpeechNow.org v. FEC</i> , 599 F.3d 686 (D.C. Cir. 2010).....	<i>passim</i>
 CONSTITUTION	
U.S. Const. amend. I .....	3, 4, 15, 18
 STATUTES AND REGULATIONS	
52 U.S.C. § 30116 .....	1, 20
11 C.F.R. § 109.21 .....	14
 OTHER AUTHORITIES	
Albert Alschuler et al., <i>Why Limits on Contributions to Super PACs Should Survive</i> <i>Citizens United</i> , 86 FORDHAM L. REV. 2299 (2018).....	5
Richard Briffault, <i>Coordination Reconsidered</i> , 113 COLUM. L. REV. SIDEBAR 88 (2013) ....	16
Richard Briffault, <i>Super PACs</i> , 96 MINN. L. REV. 1644 (2012) .....	15
Rebecca L. Brown & Andrew D. Martin, <i>Rhetoric and Reality: Testing the Harm of Campaign Spending</i> , 90 N.Y.U. L. REV. 1066 (2015).....	20

## TABLE OF AUTHORITIES—Continued

	Page(s)
Coordinated Communications, 71 Fed. Reg. 33190 (June 8, 2006).....	15
Yasmin Dawood, <i>Campaign Finance and American Democracy</i> , 18 ANN. REV. POL. SCI. 329 (2015).....	15
Joseph Fishkin & Heather K. Gerken, <i>The Party’s Over: McCutcheon, Shadow Parties, and the Future of the Party System</i> , 2014 SUPREME CT. L. REV. 175 (2014).....	8
Matt Friedman, <i>Lesniak Super PAC Sued by Elizabeth Board of Education Candidates</i> , THE STAR-LEDGER (Oct. 29, 2014).....	19
Michael D. Gilbert, <i>Transparency and Corruption: A General Analysis</i> , 6 U. OF CHI. LEGAL FORUM 117 (2018).....	11
Michael D. Gilbert & Brian Barnes, <i>The Coordination Fallacy</i> , 43 FLA. ST. U. L. REV. 399 (2016).....	15
Maggie Haberman & Nicholas Confessore, <i>Hillary Clinton Embraces a ‘Super PAC,’ Trying to Erode a Republican Edge</i> , N.Y. TIMES (May 6, 2015).....	17
Paul S. Herrnson, Jennifer A. Heerwig & Douglas M. Spencer, <i>The Impact of Organizational Characteristics on Super PAC Financing</i> , in THE STATE OF THE PARTIES (John C. Green et al. eds., 8th ed. 2018).....	5, 9

## TABLE OF AUTHORITIES—Continued

	Page(s)
Michael S. Kang, <i>The Year of the Super PAC</i> , 81 GEO. WASH. L. REV. 1902 (2013)	8
Raymond J. La Raja & Brian F. Schaffner, CAMPAIGN FINANCE AND POLITICAL POLARIZATION: WHEN PURISTS PREVAIL (2015).....	8
Liset Marquez, <i>How a Westminster Super PAC Connected to the City Attorney Got Involved in the Pomona Elections</i> , INLAND VALLEY DAILY BULLETIN (Oct. 30, 2018).....	19
Farzad Mashhood, <i>Super PAC Spends Tens of Thousands on Travis County Constable Race</i> , AUSTIN AMERICAN-STATESMAN (Sept. 24, 2012) .....	19
Holly Otterbein, <i>This One Super PAC Raised More Than All the Mayoral Candidates Combined</i> , PHILADELPHIA MAGAZINE (May 8, 2015).....	19
Christopher Robertson et al., <i>The Appearance and the Reality of Quid Pro Quo Corruption: An Empirical Investigation</i> , 8 J. OF LEGAL ANALYSIS 375 (2016) .....	12
Hendrik M. Schatzinger & Steven E. Martin, GAME CHANGERS: HOW DARK MONEY AND SUPER PACS ARE TRANSFORMING U.S. CAMPAIGNS (Traci Crowell ed., 2020) .....	13

TABLE OF AUTHORITIES—Continued

	Page(s)
Daniel P. Tokaji & Renata E.B. Strause, THE NEW SOFT MONEY, OUTSIDE SPENDING IN CONGRESSIONAL ELECTIONS (2014).....	11, 13, 15, 16



## **INTEREST OF *AMICI CURIAE***

*Amici* are professors Abby K. Wood, of the University of Southern California Gould School of Law; Richard Briffault, of Columbia Law School; Rebecca L. Brown, of the University of Southern California Gould School of Law; Yasmin Dawood, of the University of Toronto Faculty of Law; Michael D. Gilbert, of the University of Virginia School of Law; Michael S. Kang of Northwestern Pritzker School of Law; Bert Neuborne, of NYU Law School; Bertrall Ross, of the University of California, Berkeley School of Law; Douglas M. Spencer, of the University of Connecticut School of Law; and Franita Tolson, of the University of Southern California Gould School of Law.

*Amici* are legal scholars whose research and academic interests focus on campaign finance, election law, and the First Amendment.<sup>1</sup>

## **SUMMARY OF THE ARGUMENT**

The D.C. Circuit in *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc), erred in ruling 52 U.S.C. § 30116(a)(1)(C) unconstitutional. In *SpeechNow*, the court of appeals incorrectly combined threads from prior cases about independent expenditures to deregulate contributions to independent expenditure groups. The court wrongly concluded that because independent *expenditures* cannot corrupt, *contributions* to groups

---

<sup>1</sup> Pursuant to Rule 37.2(a), counsel of record for *amici curiae* provided timely notice of *amici's* intention to file this brief to counsel of record for all parties. Counsel of record for petitioners and respondent have both consented to the filing of this brief. Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution to this brief's preparation or submission.

making independent expenditures cannot either. This Court should grant review to rectify the D.C. Circuit's error.

Even if independent expenditures cannot corrupt, it does not follow that contributions to groups making independent expenditures also cannot corrupt. Contributions to groups making independent expenditures can raise the appearance of corruption, as our data show. Contributions to super PACs are often made by, or at the behest of, a candidate or campaign and have even been the subject of criminal prosecution. Contributions to super PACs can circumvent the contribution limits to candidate campaigns, raising downstream concerns about corruption or its appearance. We detail examples that raise concerns of circumvention, corruption, or the appearance of corruption in Appendix B.

This Court, moreover, can rule in petitioners' favor without disturbing *Citizens United v. FEC*, 558 U.S. 310 (2010). The *SpeechNow* court incorrectly extended dicta from *Citizens United* about the *action* of making an independent expenditure to cover the *actor* – super PACs – making the independent expenditures. *Citizens United* compels no such conclusion.

Super PACs and their wealthy donors have become outsized players in our politics. This Court has never weighed in on the *SpeechNow* decision, which unleashed these groups by allowing limitless contributions to them. We believe that this Court should do so and uphold contribution limits to super PACs.

**ARGUMENT****I. The D.C. Circuit in *SpeechNow* Misapplied This Court’s Rulings in a Vast Expansion of First Amendment Jurisprudence That This Court Should Review.**

This Court has long treated political expenditures as analogous to speech and political contributions as more analogous to association. It has also acknowledged that contributions pose a higher risk of corruption or its appearance than do expenditures, and unlimited contributions to groups like parties or multicandidate PACs risk circumvention of campaign contribution limits. The *SpeechNow* court’s ruling disregards or misinterprets these holdings and rationales. Its decision should not be the last word on contributions to groups making independent expenditures.

**A. This Court Applies Different Levels of Scrutiny to Expenditures and Contributions.**

For decades, this Court’s jurisprudence has distinguished between contributions and expenditures for purposes of First Amendment scrutiny of campaign finance regulations. This Court has ruled that due to their different functions, expenditures and contributions should receive different tiers of scrutiny. It has also ruled that expenditures and contributions present different risks of corruption or its appearance. The *SpeechNow* court acknowledged, but ultimately dismissed these distinctions. Our democracy is the poorer for it.

In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court recognized that expenditures are closer to “speech” and therefore receive the highest level of constitutional protection. Restrictions on contributions, by contrast, bear “more heavily on the associational right

than on freedom to speak.” *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 388 (2000). Restrictions on association are reviewed with a more lenient standard than restrictions on speech. As the *Buckley* Court explained, “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.” *Buckley*, 424 U.S. at 20-21. While contributors deserve protection, a “contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support.” *Id.* at 21. That “expression rests solely on the undifferentiated, symbolic act of contributing.” *Id.* Accordingly, First Amendment scrutiny of contribution limits has been less strict than it has for expenditures.

This Court has since “consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending,” *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 259-60 (1986), drawing “a line between expenditures and contributions, treating expenditure restrictions as direct restraints on speech, which nonetheless suffered little direct effect from contribution limits,” *Nixon*, 528 U.S. at 386. Even a “contribution limit involving ‘significant interference’ with associational rights, could survive if the Government demonstrated that contribution regulation was ‘closely drawn’ to match a ‘sufficiently important interest.’” *Id.* at 387-88 (quoting *Buckley*, 424 U.S. at 25, 30). Subsequent cases have either followed this line of precedent, *see, e.g., McConnell v. FEC*, 540 U.S. 93 (2003); *FEC v.*

*Beaumont*, 539 U.S. 146 (2003), or refused to disturb it, *Citizens United*, 558 U.S. at 357.<sup>2</sup>

The *SpeechNow* court departed from this Court's precedent by framing contributions as "contributions for political speech." 599 F.3d at 692. Previously, litigants before this Court had tried unsuccessfully to elevate the level of scrutiny contributions receive using such "speech by proxy" arguments. *See, e.g., Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 193-97 (1981); *see also* Albert Alschuler et al., *Why Limits on Contributions to Super PACs Should Survive Citizens United*, 86 *FORDHAM L. REV.* 2299, 2320-22 (2018). They succeeded in *SpeechNow*.

In practice, however, contributions to super PACs are not "speech by proxy." A majority of all super PACs registered with the FEC between 2010 and 2016 raised no money, and approximately 70% of super PACs spend less than \$1,000. *See* Paul S. Herrnson, Jennifer A. Heerwig & Douglas M. Spencer, *The Impact of Organizational Characteristics on Super PAC Financing*, in 17 *THE STATE OF THE PARTIES* 248, 250 (John C. Green et al. eds., 8th ed. 2018). Approximately 60% of contributions to super PACs are spent on television ads and other communications aimed at affecting the outcome of elections. The remaining dollars are either spent to fund political research, mobilize voters, pay for overhead, or are never spent. *Id.* at 249-50.

---

<sup>2</sup> The plurality opinion in *McCutcheon v. FEC*, 572 U.S. 185, 196-99 (2014), summarized the way *Buckley* distinguished between contributions and expenditures but declined to revisit that distinction.

**B. Even Assuming That Independent Expenditures Cannot Corrupt, Contributions to Groups Making Independent Expenditures Can.**

1. In case after case, this Court has explained that the risk of corruption presented by contributions is higher than that presented by expenditures. It has upheld contribution limits repeatedly, from direct campaign contributions, *Buckley*, 424 U.S. 1; *Nixon*, 528 U.S. 377, to party contributions, *McConnell*, 540 U.S. 93; *Republican Party of La.*, 219 F. Supp. 3d 86 (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); *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604 (1996) (“*Colorado I*”), and multicandidate PACs, *Cal. Med.*, 453 U.S. 182. Contribution limits serve “the important governmental interests in preventing the corruption or appearance of corruption of the political process that might result if such contributions were not restrained.” *Cal. Med.*, 453 U.S. at 195. This Court has for years shown “deference to a congressional determination of the need for a prophylactic rule where the evil of potential corruption had long been recognized.” *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 500 (1985). “*Buckley*’s holding seems to leave the political branches broad authority to enact laws regulating contributions that take the form of ‘soft money.’” *Nixon*, 528 U.S. at 404 (Breyer, J. and Ginsburg, J., concurring); *see also McConnell*, 540 U.S. at 137.

Furthermore, this Court has clearly and unequivocally upheld contribution limits for independent expenditures and non-coordinated electoral activities. It has recognized that “soft money” when not coordinated still “creates a significant risk of actual and

apparent corruption.” *McConnell*, 540 U.S. at 168; *Republican Party of La.*, 219 F. Supp. 3d at 91; *Republican Nat’l Comm.*, 698 F. Supp. 2d at 161-62. It has also acknowledged the “danger of corruption [] 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.” *Colorado I*, 518 U.S. at 617 (opinion of Breyer, J.). Crucially, this Court has never decided that contributions cannot corrupt, even where independent expenditures are involved. It has instead explained that “limitations on independent expenditures are less directly related to preventing corruption” than contribution restrictions are. *Id.* at 615.

This Court’s concern about corruption has included both *quid pro quo* bribery as well as “the broader threat from politicians too compliant with the wishes of large contributors.” *Nixon*, 528 U.S. at 389 (describing *Buckley*’s concern with the power of money “‘to influence governmental action’ in ways less ‘blatant and specific’ than bribery”). Unlimited contributions to super PACs raise the risk and appearance of corruption, no matter how narrowly defined.

The *Citizens United* majority wrote that as a matter of law, independent *expenditures* do not corrupt. 558 U.S. at 357. The *SpeechNow* court misread *Citizens United* as compelling its outcome, asserting “[i]n 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.’” *SpeechNow*, 599 F.3d

at 694-95 (emphasis added). It stretched this Court’s language in *Citizens United* to cover not only the activity of making independent expenditures, but the actor itself – the super PAC. The D.C. Circuit said, in effect, if this one activity conducted by super PACs cannot corrupt, another activity related to super PACs – contributions – cannot corrupt either. But that conclusion is misplaced. This Court has decided no such thing, “effectively” or otherwise.

The Court’s concern about the corruption potential from contributions to non-campaign entities stems from the “close connection and alignment of interests” between officeholders and the groups. *McConnell*, 540 U.S. at 155. The risk of corruption is tied to the gratitude candidates feel toward donors. The *McCutcheon* plurality distinguished between direct candidate contributions and party contributions, “for which the candidate, like all other members of the party, feels grateful.” *McCutcheon*, 572 U.S. at 225-26.

As political science and law professors have explained, the emergence of super PACs with unlimited contributions has weakened traditional political parties, creating so-called “Shadow Parties.” Shadow parties are groups that are closely linked to the parties but organize as super PACs in order to circumvent party contribution limits. They are small, exclusive, funded by immense wealth, and tend to contribute to the polarization of politics. See Raymond J. La Raja & Brian F. Schaffner, CAMPAIGN FINANCE AND POLITICAL POLARIZATION: WHEN PURISTS PREVAIL 60-61 (2015); Joseph Fishkin & Heather K. Gerken, *The Party’s Over: McCutcheon, Shadow Parties, and the Future of the Party System*, 2014 SUPREME CT. REV. 175, 186-92, 196-97, 208-11 (2014); Michael S. Kang, *The Year of the Super PAC*, 81 GEO. WASH. L. REV. 1902, 1919-22



(2013). Rather than having to rely on support from a broad party, candidates can now rely on these shadow parties.

The danger of *quid pro quo* corruption is especially acute when a super PAC supports a single candidate. Thirty-five percent of all super PACs are formed with this aim, and a majority of super PACs that support presidential candidates are single-candidate groups. Herrnson, Heerwig & Spencer, *supra*, at 250. Gratitude towards donors is concentrated, and concerns about corruption are heightened, with the shift in resources from parties to super PACs.

This Court recently upheld the limit on soft money contributions to parties – where the gratitude for contributions is distributed among candidates – via summary affirmance. *Republican Party of La.*, 219 F. Supp. 3d at 96-97; *Republican Nat’l Comm.*, 698 F. Supp. 2d at 157. Because super PACs have closer connections to candidates and can accept unlimited contributions, they present an even higher risk of corruption than party soft money does. By failing to recognize this contribution-side risk of corruption, the *SpeechNow* court erred.

2. Super PACs can also corrupt by enriching friends and family of the candidate, by facilitating circumvention of contribution limits, and by serving as escrow accounts for bribery and extortion.

Only 37% of super PACs make any independent expenditures. Herrnson, Heerwig & Spencer, *supra*, at 250. Contributions that do not go to independent expenditures go to other activities and overhead or are held in reserve. Nothing prevents super PACs from being managed by people who are close to the candidates they support, who can in turn use the

contributions to enrich themselves or their candidates. We detail several examples that raise this possibility in Appendix B to this brief. For example, Rebuilding America, a super PAC supporting President Trump's 2016 campaign, was headed by one of Paul Manafort's close friends, Laurance Gay. The super PAC paid Gay \$385,000 from January to June 2017, despite being "mostly dormant" after the election. Unite the Country, the pro-Biden super PAC, is chaired by Mark Joseph Doyle, a former Biden aide and close family friend. Former Arkansas governor Mike Huckabee paid around \$400,000 to extended family members while making very few independent expenditures from his super PAC between 2012 and 2015. One of President Trump's super PACs, America First Action, has spent over half a million dollars hosting events at the Trump International Hotel. And Tyler Harber pled guilty in 2015 to fraudulently taking "commissions" from the funds he had raised for a Republican super PAC in Virginia. Of the contributions raised by the super PAC, 23%, or \$256,000, went to side payments to Harber, his wife, and his mother.<sup>3</sup> The point is not that Congress intended to protect donors from being scammed, but rather that money can achieve its corrupting effect without having any real speech value.

Contribution coordination can also aid corruption. As examples in Appendix B show, candidates fundraise unlimited contributions for super PACs before declaring their candidacy or appear at fundraisers for their supporting super PACs. Even assuming the candidate is not in the room when the contribution "ask" is made, the candidate often knows who the

---

<sup>3</sup> See Appendix B items 1-5 for more on these events.

contributors are. This can facilitate corruption.<sup>4</sup> Michael D. Gilbert, *Transparency and Corruption: A General Analysis*, 6 U. OF CHI. LEGAL FORUM 117, 117 (2018). Contribution coordination may also be more direct than a candidate's appearing at fundraisers. As one campaign operative told researchers, candidates dial for dollars for their super PACs, saying "[h]ey, I know you're maxed out – and I can't take any more money from you – but there's this other group. I'm not allowed to coordinate with them, but can I have someone call you?" Daniel P. Tokaji & Renata E.B. Strause, *THE NEW SOFT MONEY, OUTSIDE SPENDING IN CONGRESSIONAL ELECTIONS* 68 (2014). At a minimum, these requests circumvent the contribution limits, violating the spirit (and depending on the circumstances, the letter) of campaign finance law.

Would-be donors stand ready to contribute in exchange for favorable policy. North Carolina businessmen were recently convicted for making a \$1.5 million donation to a single-candidate super PAC to induce a state insurance commissioner to remove a deputy responsible for overseeing their company's regulation. A few years prior, Senator Robert Menendez and donor Salomon Melgen were indicted over a \$600,000 contribution from Melgen to Senate Majority PAC, earmarked to support Senator Menendez, in exchange for a visa for Melgen's girlfriend and some helpful policies for his business. Melgen was attempting to avoid a Medicare audit, which eventually

---

<sup>4</sup> See Appendix B items 6-12 for more on these events. Items 13-14 show that super PACs can also act as "advance staff" for campaign events.

revealed that he had stolen tens of millions of dollars from the Medicare system.<sup>5</sup>

Our purpose here is not to catalog *quid pro quo* corruption that would result in a conviction in court. However, we note that when this Court upheld contribution limits for “soft money” in *McConnell*, it did so in the absence of even one example of *quid pro quo* corruption. See *McCutcheon*, 572 U.S. at 240-41 (Breyer, J., dissenting). These recent examples, therefore, provide more evidence of the risk of *quid pro quo* corruption in a context of unlimited contributions to groups making independent expenditures than the *McConnell* Court had before it in upholding contribution limits for a similar purpose.

These impressions are evident in laboratory and survey research, too. Scholars have shown that mock grand juries and online survey respondents perceive large contributions to super PACs as sufficiently corrupting to indict under bribery statutes. Christopher Robertson et al., *The Appearance and the Reality of Quid Pro Quo Corruption: An Empirical Investigation*, 8 J. OF LEGAL ANALYSIS 375, 380 (2016).

Finally, rather than a *quid pro quo* of a contribution or expenditure in exchange for policy, super PAC involvement in campaigns sometimes looks more like extortion. The threat of a massive amount of outside spending can push an elected official into a policy stance. “The most significant takes the form of threats – mostly implicit but occasionally explicit – of retaliatory independent spending for legislative acts of which the spender disapproves. Members of Congress today, it seems, are quite cognizant of the threat of

---

<sup>5</sup> See Appendix B items 15-19 for more on these and similar events.

such spending, particularly in primary elections.” Tokaji & Strause, *supra*, at 94. Another threat may be of a dreaded “ad bomb” late in the campaign. Hendrik M. Schatzinger & Steven E. Martin, *GAME CHANGERS: HOW DARK MONEY AND SUPER PACS ARE TRANSFORMING U.S. CAMPAIGNS* 123 (Traci Crowell ed., 2020). When super PACs hold money in reserve, they protect their ability to make these threats. That money also has no real speech value: once the threat has been made and the politician has agreed to conform, the money can go to lavish salaries or be held for future threats.

In sum, unlimited super PAC contributions increase the risk of corruption and its appearance.

**C. Campaigns and Outside Groups Coordinate in a Way That Can Circumvent Contribution Limits, Increasing the Risk of *Quid Pro Quo* Corruption.**

Aside from the real risk of direct *quid pro quo* corruption channeled through super PACs, contributions to super PACs may help a campaign circumvent contribution limits. Circumvention is problematic on its own, and it also carries with it a downstream risk of corruption. Coordination between outside groups and campaigns creates the circumvention problem and increases the risk of corruption. This is a problem that would not go away under stricter coordination rules or a more aggressive enforcement regime, because eliminating the main coordination “safe harbor” for communications in public would raise significant constitutional concerns. Coordination will therefore continue. Contribution limits to super PACs would be the most effective way to prevent coordination from becoming circumvention.

This Court has already upheld contribution limits where risk of circumvention is high. For example, it has recognized that without contribution limits on multicandidate PACs, candidate “contribution limitations [can] be easily evaded” simply by “channeling funds” through an outside group that makes independent expenditures. *Cal. Med.*, 453 U.S. at 198 (upholding contribution limits to multicandidate PACs). Now, the Court faces the same question with super PACs, which cannot be kept from coordinating in public.

This Court has also upheld limits on party-coordinated expenditures because the money was often raised by the very candidates that later benefited from the expenditures, in a process known as “tallying.” These unofficial earmarks circumvented contribution limits. *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 459-60 (2001) (“*Colorado II*”). Candidates do plenty of fundraising for super PACs, and with single-candidate groups, no “tallying” is needed. Even a small amount of coordination between the super PAC and campaign can circumvent campaign contribution limits.

Coordination makes circumvention possible.<sup>6</sup> Groups making independent expenditures must avoid coordination under FEC regulations. But the FEC has carved out “safe harbors” for some publicly available information under its coordination regulations<sup>7</sup> and

---

<sup>6</sup> Some circumvention is fairly obvious. Consider, for example, how common it is for candidates’ friends and family to give large amounts to super PACs. *See* Appendix B items 20-25 for examples of friends and family donating large amounts to super PACs in a way that raises concerns about circumvention. Indeed, they are sometimes the sole donors to those groups.

<sup>7</sup> 11 C.F.R. § 109.21(d)(2) (safe harbor for the “material involvement” conduct standard); *id.* § 109.21(d)(3) (safe harbor

has consistently deadlocked on enforcement matters related to coordination in public.<sup>8</sup> Deadlock aside, it is difficult to imagine a rule that prohibits public speech by campaigns or outside groups without violating the First Amendment. Because of these safe harbors, super PACs are not actually required to be totally independent from campaigns, and in fact they coordinate messaging and targeting regularly. This coordination gives rise to the threat or appearance of corruption – a threat with no regulatory fix. Michael D. Gilbert & Brian Barnes, *The Coordination Fallacy*, 43 FLA. ST. U. L. REV. 399, 400-02, 418-19 (2016).

When coordination occurs, it renders the contribution limits “functionally meaningless.” Richard Briffault, *Super PACs*, 96 MINN. L. REV. 1644, 1684 (2012); Yasmin Dawood, *Campaign Finance and American Democracy*, 18 ANN. REV. POL. SCI. 329, 339 (2015). As former U.S. Senator Kent Conrad told researchers, “So this whole idea well, oh, they don’t coordinate, therefore it’s really independent is just nonsense. If you look at who makes up these organizations, on all sides, they’re loaded with political operatives. They know the way these campaigns are run, modern campaigns. They can see for themselves what’s up on the air. They can see the polling, a lot of it’s public. Some of it’s, you know not public but pretty much the same thing as what’s public. So they don’t need to talk to anybody in the campaign in order to know what to do.” Tokaji & Strause, *supra*, at 65. Campaign operatives expressed a similar view: “[T]here’s always coordination – the media is the coordination,” and

---

for the substantial discussion” conduct standard); Coordinated Communications, 71 Fed. Reg. 33190, 33205 (June 8, 2006).

<sup>8</sup> See, e.g., FEC, Matters Under Review (MUR) 6908, 7142, and 7138.

campaigns and outside groups send “smoke signals’ . . . through press releases and the media to indicate their needs and strategies.” *Id.* The bottom line, for the operatives, is that “at the end of the day, it’s all just kind of a fiction – it’s just kind of a farce, the whole campaign finance non-coordination thing.” *Id.* We include additional examples in Appendix B to this brief.<sup>9</sup> The “independence” of the money that flows into super PACs is a fiction. And if super PACs are not reliably independent, then the risk of corruption they present is even higher.

The regulatory safe harbors are exploited every campaign. Here is how it works. Candidates and super PACs send vital information that helps their counterparts economize on resources like polling, ad targeting, email campaigns, and general messaging strategy. They do it via Twitter, press releases (“even on items the campaign does not expect to have written about in the media,” Tokaji & Strause, *supra*, at 66), videos posted to YouTube, Facebook ads with unique (and therefore informative) links, candidate websites with “red boxes” or hidden links, before the candidate declares, and in other contexts. Examples are legion. We report only a sample in Appendix B.<sup>10</sup> As Professor Briffault put it, “Why do they have to meet when they can tweet?” Richard Briffault, *Coordination Reconsidered*, 113 COLUM. L. REV. SIDEBAR 88, 94 (2013).

---

<sup>9</sup> See Appendix B items 26-30 for examples of former aides and other close associates working with Super PACs.

<sup>10</sup> See Appendix B items 6 and 31-39 for just a few examples of this public coordination. See also Issue One, *Coordination Watch*, <https://www.coordinationwatch.org>. Public pronouncements by the candidate can also “endorse” a particular super PAC. See Appendix B items 40-41.



Assumptions in *McCutcheon* do not control the outcome here. In *McCutcheon*, the plurality rejected the notion that a “candidate today could receive a ‘massive amount of money’ that could be traced back to a particular contributor uninhibited by the aggregate limits” as either “illegal under current campaign finance laws or divorced from reality.” 572 U.S. at 211, 216. In the super PAC context, candidates *do* receive a massive subsidy in the form of nominally “independent” (but *de facto* coordinated) expenditures. The expenditures can be traced back to particular contributors, and those contributors are uninhibited by contribution limits because of *SpeechNow*. This is both legal and common, rather than “illegal” and “divorced from reality.”

Donors know coordination allows circumvention of contribution limits, and they are waiting on this Court to act. One donor to Priorities USA, which supported Hillary Clinton’s 2016 candidacy, said “I think everyone is resigned to the reality that every campaign of sufficient magnitude can and will have its own super PAC (or more than one) to get around campaign contribution limits . . . And they will just operate as an extension of the campaign itself, at least until the Supreme Court or Congress or F.E.C. says no.” Maggie Haberman & Nicholas Confessore, *Hillary Clinton Embraces a ‘Super PAC,’ Trying to Erode a Republican Edge*, N.Y. TIMES (May 6, 2015).

## **II. This Case Can Be Decided in Favor of Petitioners While Leaving *Citizens United* Undisturbed.**

*Citizens United*, on which the *SpeechNow* court so heavily relies, concerns a statutory *ban* (not a limit) on a particular type of spender from making independent expenditures. Limits on independent expenditures

were ruled unconstitutional three decades earlier. *Citizens United* allowed corporations to make independent expenditures directly from their treasuries. The case has nothing to do with contributions to independent-expenditure-only groups (like super PACs).

This Court can continue to affirm that independent *expenditures* by their nature cannot corrupt (despite the circumvention-related possibilities raised above) while also continuing to interpret the First Amendment to allow the government to limit contributions to super PACs. The *SpeechNow* court created a strange pocket of campaign finance where all big money now flows. The First Amendment does not compel that outcome, nor does this Court's opinion in *Citizens United*.

### **III. This Matter Is of Urgent Public Importance.**

The *SpeechNow* decision has transformed campaign finance in this country. Given the amount of coordination that occurs, the decision to lift the lid on super PAC contributions has increased the risk of *quid pro quo* corruption and its appearance.

In 2010, super PAC receipts represented less than 4% of the total contributions given directly to candidates. By 2018, super PAC receipts comprised more than half (57%) the amount raised by federal candidates. Overall, between 2010 and 2018 super PACs raised \$4.9 billion from approximately 250,000 donors. The vast majority of donors (96%) are individuals. The top 1% of these individual donors contributed 88% of all super PAC funds with 204 donors contributing at least \$1 million, raising both the risk of corruption and the likelihood that donors are using super PACs to circumvent campaign finance limits.

Super PACs have also emerged at the state and local level, where elections are less expensive and the groups can have more impact. Super PACs have flooded races with money at all levels of government. Examples abound, from large independent expenditures for seats in state capitols to the three-million-dollar super PAC contribution at issue in the state judicial election in *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009). Massive super PAC expenditures are regularly part of elections in big cities like Philadelphia and in smaller ones like Pomona, California.<sup>11</sup> Super PAC spending even outstrips candidate spending in local down-ballot races, having dominated elections from school board to constable.<sup>12</sup>

The D.C. Circuit's decision in *SpeechNow* permitting unlimited super PAC contributions has facilitated massive super PAC expenditures at every level of government. These expenditures harm the public's faith in our democracy. Research shows that voters experience a decrease in their faith in democracy when

---

<sup>11</sup> Holly Otterbein, *This One Super PAC Raised More Than All the Mayoral Candidates Combined*, PHILADELPHIA MAGAZINE (May 8, 2015), <https://www.phillymag.com/citifed/2015/05/08/super-pac-philadelphia-mayoral-race/>; Liset Marquez, *How a Westminster Super PAC Connected to the City Attorney Got Involved in the Pomona Elections*, INLAND VALLEY DAILY BULLETIN (Oct. 30, 2018), <https://www.dailybulletin.com/2018/10/30/how-a-westminster-super-political-action-committee-got-involved-in-the-pomona-city-council-races/>.

<sup>12</sup> Matt Friedman, *Lesniak Super PAC Sued by Elizabeth Board of Education Candidates*, THE STAR-LEDGER (Oct. 29, 2014), [https://www.nj.com/politics/2014/10/lesniak\\_super\\_pac\\_sued\\_by\\_elizabeth\\_board\\_of\\_education\\_candidates.html](https://www.nj.com/politics/2014/10/lesniak_super_pac_sued_by_elizabeth_board_of_education_candidates.html); Farzad Mashhood, *Super PAC Spends Tens of Thousands on Travis County Constable Race*, AUSTIN AMERICAN-STATESMAN (Sept. 24, 2012), <https://www.statesman.com/article/20120924/NEWS/309248543>.

they view information about independent expenditures from outside groups, and the loss of faith is highest where expenditures are coordinated with the campaign, as they so often are in the super PAC context. Rebecca L. Brown & Andrew D. Martin, *Rhetoric and Reality: Testing the Harm of Campaign Spending*, 90 N.Y.U. L. REV. 1066, 1085-89 (2015).

### CONCLUSION

We have described at least three reasons this Court should grant the petition for a writ of certiorari and uphold Section 30116(a)(1)(C). First, massive contributions to super PACs create the risk and appearance of corruption. Second, the unavoidable regulatory safe harbor for communication in public has facilitated fundraising and expenditure coordination between campaigns and super PACs, making circumvention of contribution limits inevitable. Finally, the circumvention itself leads to downstream risks of corruption.

Respectfully submitted,

ABBY K. WOOD  
GOULD SCHOOL OF LAW  
UNIVERSITY OF  
SOUTHERN CALIFORNIA\*  
Los Angeles, CA 90089

\* *University affiliation  
noted for identification  
purposes only.*

NICOLAS L. MARTINEZ  
*Counsel of Record*  
BARTLIT BECK LLP  
54 W. Hubbard Street  
Chicago, IL 60654  
(312) 494-4401  
nicolas.martinez@  
bartlitbeck.com

*Counsel for Amici Curiae*

July 29, 2020

## **APPENDIX**

**APPENDIX A****LIST OF *AMICI CURIAE***

The *amici* listed below are distinguished campaign finance and election law professors and scholars. University affiliations are listed only for purposes of identification. Listed professors are acting only in their individual capacities and do not purport to represent the views of their universities.

- **Richard Briffault** is the Joseph P. Chamberlain Professor of Legislation at Columbia Law School. During his tenure at Columbia, he has served as a member of, or consultant to, an array of New York state and city commissions, including the New York State Moreland Act Commission to Investigate Public Corruption. He served as chair of the New York City Conflicts of Interest Board from 2014 to 2020. He is also the reporter for the American Law Institute’s Project on Principles of Government Ethics.
- **Rebecca L. Brown** is the Rader Family Trustee Chair in Law at the University of Southern California Gould School of Law. She is a constitutional law scholar who has written on campaign finance and the First Amendment.
- **Yasmin Dawood** is Associate Professor of Law and Political Science, and Canada Research Chair in Democracy, Constitutionalism, and Electoral Law, at the University of Toronto. Her research focuses on comparative election law, and she has published extensively on U.S. campaign finance law.

- **Michael D. Gilbert** is the Martha Lubin Karsh and Bruce A. Karsh Bicentennial Professor of Law at the University of Virginia. He served as a law clerk to the Hon. William A. Fletcher on the Ninth Circuit Court of Appeals. In addition to researching and teaching campaign finance, he co-directs UVA's Corruption Lab for Ethics, Accountability, and the Rule of Law.
- **Michael S. Kang** is the William & Virginia Karnes Research Professor at Northwestern Pritzker School of Law.
- **Burt Neuborne** is the Norman Dorsen Professor of Civil Liberties at NYU Law School, and he was the founding Legal Director of the Brennan Center for Justice at NYU Law School from 1995 to 2008.
- **Bertrall Ross** is the Chancellor's Professor of Law at the University of California, Berkeley School of Law.
- **Douglas M. Spencer** is Professor of Law and Public Policy at the University of Connecticut and Distinguished Faculty Fellow at the Byron R. White Center for the Study of American Constitutional Law at the University of Colorado. In addition to his research, teaching, and expert testimony on campaign finance, he worked as Treasurer for a Connecticut statewide campaign during the 2018 election cycle.
- **Franita Tolson** is Vice Dean for Faculty and Academic Affairs, and Professor of Law, at the University of Southern California Gould School of Law.

- **Abby K. Wood** is Associate Professor of Law, Political Science, and Public Policy at the University of Southern California Gould School of Law. She served as a law clerk to the Hon. John T. Noonan, Jr. on the Ninth Circuit Court of Appeals. In addition to her research and teaching about campaign finance, she has served on the Bipartisan Campaign Finance Task Force and the California Fair Political Practices Commission's Digital Transparency Task Force.



**APPENDIX B****Recent Super PAC Activity Related to Concerns Raised in This Brief**

These 41 examples are merely a sample of the issues we have observed. They are not intended to be exhaustive.

**Examples Primarily Raising the Risk That Super PACs Enrich the Candidate or the Candidate's Friends and Family**

1. John McCormick & Bill Allison, *Paul Manafort's Friend Is Still Making a Ton of Money on a Mostly Dormant Trump Super PAC*, TIME (Dec. 11, 2017).

2. Arlette Saenz, *Ex-Biden aides lead newly launched super PAC*, CNN (Oct. 30, 2019).

3. Max Brantley, *Mike Huckabee pays family \$400,000 from his PAC*, ARK. TIMES (Jan. 20, 2015).

4. Peter Stone, *How Trump's business empire is cashing in on the 2020 campaign*, THE GUARDIAN (Mar. 9, 2020).

5. Press Release, U.S. Dep't of Just., Off. of Pub. Aff., *Campaign Manager Pleads Guilty to Coordinated Campaign Contributions and False Statements* (Feb. 12, 2015); Matt Zapposky & Matea Gold, *Republican operative sentenced to 2 years in landmark election case*, WASH. POST (June 12, 2015).

**Examples Primarily Raising the Risk of Corruption Through Candidate-Raised Contributions to Super PACs**

6. Alex Isenstadt, *Jeb Bush's \$100M May*, POLITICO (May 8, 2015).

7. Theodore Schleifer, *Cruz super PAC claim: More than \$37 million raised*, CNN (June 3, 2015).

8. Jake Sherman & Alex Isenstadt, *Sheldon Adelson kicks in \$30M to stop Democratic House takeover*, POLITICO (May 10, 2018).

9. Pete H. Stone, *Democrats and Republicans alike are exploiting new fundraising loophole*, THE CENTER FOR PUBLIC INTEGRITY (May 19, 2014).

10. Michael Scherer, *Book: Obama Attended Super PAC Fundraiser, Violating 2012 Campaign Pledge*, TIME (Nov. 4, 2013).

11. Philip Bump, *Coming soon: A campaign run entirely by super PACs*, WASH. POST (July 28, 2014).

12. Maggie Haberman & Nicholas Confessore, *Hillary Clinton Embraces a 'Super PAC,' Trying to Erode a Republican Edge*, N.Y. TIMES (May 6, 2015).

13. Emma Roller, *When a Super PAC Acts Like a Campaign*, THE ATLANTIC (Sept. 10, 2015).

14. Brianne Pfannenstiel & Jeffrey C. Kummer, *In Iowa, super PACs take on new roles*, DES MOINES REGISTER (Aug. 22, 2015).

### **Examples Primarily Raising the Risk of Donors Seeking to Influence Policy Through Super PAC Contributions**

15. Ames Alexander, *Watch secretly recorded videos from the bribery sting that targeted Durham billionaire*, THE CHARLOTTE OBSERVER (Mar. 10, 2020).

16. Matt Friedman, *Testimony at Menendez trial turns to \$600k in donations from Melgen to super PAC*, POLITICO (Oct. 4, 2017); Terry Spencer, *17-year sentence for West Palm Beach eye doctor in \$73 million*

*Medicare fraud case*, S. FLA. SUN SENTINEL (Feb. 22, 2018).

17. Josh Moon, *Source: State Rep. was offered superfund bribe with Luther Strange present*, ALA. POLITICAL REPORTER (June 29, 2017) .

18. Alfred Konuwa, *Linda McMahon's Trump Ties Under Scrutiny As WWE Is Deemed Essential In Florida*, FORBES (Apr. 15, 2020).

19. Andrew Perez & David Sirota, *Rick Scott Super PAC Received Donations From Firms With Florida Pension Business*, MAPLIGHT (Apr. 19, 2018).

### **Examples Primarily Raising the Risk of Circumvention Through Family Donations**

20. Cameron Joseph, *Dan Sullivan's family gives \$300K to super-PAC*, THE HILL (Aug. 14, 2014).

21. Roseann Moring, *PAC funded by Senate candidate Ben Sasse's great-uncle releases Shane Osborn attack ad*, OMAHA WORLD-HERALD (Apr. 16, 2014).

22. Scott Powers, *Congressional candidate has faith in technology*, ORLANDO SENTINEL (Aug. 18, 2014).

23. Chris Casteel, *Outside group backing Mike Turner funded by Turners*, THE OKLAHOMAN (June 20, 2014).

24. Robin Bravender & Kenneth P. Vogel, *Huntsman dad gave super PAC \$1.9M*, POLITICO (Feb. 1, 2012).

25. David Wildstein, *Patrick Kennedy gave \$500k to super PAC attacking his wife's opponent*, N.J. GLOBE (May 28, 2020).

**Examples Primarily Raising the Risk of Coordination Between Campaigns and Super PACs Run by Former Aides or Close Associates**

26. Complaint, *Campaign Legal Center v. Remember Mississippi* (FEC Mar. 26, 2018).

27. Matea Gold, *Pro-Clinton super PAC Priorities USA Action continues steady fundraising pace in July*, WASH. POST (Aug. 1, 2015).

28. Dan Eggen & Chris Cillizza, *Romney backers start 'super PAC,'* WASH. POST (June 23, 2011).

29. Pete H. Stone, *supra*.

30. Complaint, *Campaign Legal Ctr. v. Make America Number 1* (FEC Oct. 6, 2016).

**Examples Primarily Raising the Risk of Coordination Exploiting the “Safe Harbor” for Communication That Occurs in Public**

31. Michelle Ye Hee Lee, *Buttigieg and super PAC improperly coordinated on Nevada ads, watchdog group says*, WASH. POST (Feb. 18, 2020).

32. Paul Blumenthal, *Democrats Used Twitter, Too, To Coordinate With Outside Groups*, HUFFPOST (Dec. 6, 2017).

33. Philip Bump, *Republicans, Twitter and the brave new world of campaign / outside group coordination*, WASH. POST (Nov. 17, 2014); *see also* Complaint, MUR 6908, *Am. Democracy Legal Fund v. Nat'l Republican Congressional Comm.* (FEC Dec. 4, 2014).

34. Press Release, EMILY'S LIST, *EMILY'S List Kicks Off WOMEN VOTE! in 2016 Cycle with \$1 Million Program in Maryland Senate Contest* (Nov. 30, 2015).

35. Press Release, AMERICAN CROSSROADS, *American Crossroads Launches Clinton E-Mail Ad in Iowa* (Sept. 15, 2015).

36. *Has a candidate appeared in ads sponsored by an outside group?*, COORDINATION WATCH (July 2, 2020).

37. Lachlan Markay et al., *How One Dem Super PAC Uses Facebook Ads to Get Critical Voter Data to its Candidate*, THE DAILY BEAST (Apr. 23, 2019).

38. Adam Wollner, *10 Ways Super PACs and Campaigns Coordinate, Even Though They're Not Allowed To*, THE ATLANTIC (Sept. 27, 2015).

39. Nick Corasaniti, *Carly Fiorina's 'Super PAC' Aids Her Campaign in Plain Sight*, N.Y. TIMES (Sept. 30, 2015).

40. Christina Bellantoni, *Obama Plays the Super PAC Game, Endorses Priorities USA*, PBS (Feb. 7, 2012).

41. Ken Thomas, *Biden Campaign Indicates Priorities USA Is Preferred Super PAC*, WALL ST. J. (Apr. 15, 2020).