No. 19-___

IN THE

Supreme Court of the United States

REPRESENTATIVE TED LIEU ET AL.,

Petitioner,

v.

FEDERAL ELECTION COMMISSION,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Laurence H. Tribe
Hauser Hall 420
HARVARD LAW SCHOOL*
Cambridge, MA 02138

Albert W. Alschuler
220 Tuttle Road
Cumberland, ME 04021

Ronald A. Fein
John C. Bonifaz
Ben T. Clements
FREE SPEECH FOR PEOPLE
1320 Centre Street #405
Newton, MA 02459

Jeffrey L. Fisher
Counsel of Record
Pamela S. Karlan
Brian H. Fletcher
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081
jlfisher@stanford.edu

(*additional counsel listed on inside cover*)

Richard W. Painter
Mondale Hall, Office 318
U. OF MINN. LAW SCHOOL*
229 19th Avenue South
Minneapolis, MN 55455

* University affiliation noted for identification purposes only.

Malcolm Seymour
Andrew Goodman
FOSTER GARVEY P.C.
100 Wall Street, 20th Fl.
New York, NY 10005

Brad Deutsch
Benjamin Lambiotte
FOSTER GARVEY P.C.
Flour Mill Building
Suite 200
1000 Potomac St. NW
Washington, DC 20007

QUESTION PRESENTED

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

PARTIES TO THE PROCEEDING

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

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

RELATED PROCEEDINGS

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

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

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PETITION FOR A WRIT OF CERTIORARI

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

OPINIONS BELOW

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 App. 1a) is unpublished but is available at 2019 WL 5394632.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

JURISDICTION

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

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

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

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

INTRODUCTION

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

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

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

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

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

STATEMENT OF THE CASE

A. The Federal Election Campaign Act

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Proceedings below

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

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

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

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

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

REASONS FOR GRANTING THE WRIT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,

Laurence H. Tribe
Hauser Hall 420
HARVARD LAW SCHOOL*
Cambridge, MA 02138

Albert W. Alschuler
220 Tuttle Road
Cumberland, ME 04021

Ronald A. Fein
John C. Bonifaz
Ben T. Clements
FREE SPEECH FOR PEOPLE
1320 Centre Street #405
Newton, MA 02459

Richard W. Painter
Mondale Hall, Office 318
U. OF MINN. LAW SCHOOL*
229 19th Avenue South
Minneapolis, MN 55455

* University affiliation noted for identification purposes only.

Jeffrey L. Fisher
Counsel of Record
Pamela S. Karlan
Brian H. Fletcher
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081
jlfisher@stanford.edu

Malcolm Seymour
Andrew Goodman
FOSTER GARVEY P.C.
100 Wall Street, 20th Fl.
New York, NY 10005

Brad Deutsch
Benjamin Lambiotte
FOSTER GARVEY P.C.
Flour Mill Building
Suite 200
1000 Potomac St. NW
Washington, DC 20007

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