No. 19-5072

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPRESENTATIVE TED LIEU, *et al*.,

Plaintiffs-Appellants,

v.

FEDERAL ELECTION COMMISSION,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Columbia

Case No. 1:16-cv-02201-EGS

APPELLANTS' PETITION FOR REHEARING EN BANC

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QUESTION OF EXCEPTIONAL IMPORTANCE PRESENTED

Can large contributions to super PACs corrupt or create the appearance of corruption? This Court said "no" in *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc), the decision that Representative Ted Lieu, Senator Jeff Merkley, and the other appellants now ask the Court to overrule en banc.[1] Relying on the then two-month-old decision in *Citizens United v. FEC*, 558 U.S. 310 (2010), *SpeechNow* struck down a provision of the Federal Election Campaign Act (FECA) that limited contributions to independent expenditure-only political committees (*i.e*. super PACs) to $5,000 per year. 52 U.S.C. § 30116(a)(1)(C).

The Court could not have anticipated how *SpeechNow* would reshape our democracy. The parties briefed *SpeechNow* before the Supreme Court's decision in *Citizens United*, and argued the case six days after it. The government relied heavily on pre-*Citizens United* arguments, *see SpeechNow*, 599 F.3d at 694, and did not seek an opportunity for supplemental briefing. After this Court's decision, Attorney General Holder explained that the government did not seek certiorari because it would affect "only a small subset of federally regulated contributions."[2]

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[1] Appellants previously sought initial hearing en banc. Denial of such a petition does not preclude a subsequent (and more common) petition for rehearing en banc. *See, e.g., Ali v. Trump*, No. 18-5297, 2019 WL 850757 (D.C. Cir. Feb. 22, 2019) (Tatel and Pillard, JJ., concurring in denial of initial hearing en banc).

[2] Letter from Atty. Gen. Eric Holder to Sen. Harry Reid, June 16, 2010, *available at* https://bit.ly/1MhojVD.

Holder's declaration belongs on a historic list of wrong predictions. In the 2016 election, contributions to federal super PACs substantially outstripped the total amount of money raised by all federal candidates *combined*. The $2,800 limit on direct contributions to candidates still stands, but *SpeechNow* has rendered it "functionally meaningless." Richard Briffault, *Super PACs*, 96 Minn. L. Rev. 1644, 1684 (2012). Major donors pair maximum legal contributions to candidates with multi-million dollar contributions to super PACs supporting the same candidates.[3] Deep into the 2016 presidential primaries, nearly half of all super PAC contributions came from just 50 families.[4] Since *SpeechNow*, the contributions of eleven top donors to super PACs have ranged from $38.4 million to $287 million.[5] Even the president of SpeechNow.org did not anticipate its impact—he later observed that using an independent expenditure group to promote a particular candidate "just never entered my mind."[6]

Do large contributions to super PACs lead to an *appearance* of corruption? *SpeechNow* said no, but overwhelming bipartisan majorities of the public consistently say yes. The rise of super PACs is regularly denounced by statesmen

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[3] Add. to FEC's Mot. for Summ. Aff. ("FEC Add."), ECF No. 1787446 (May 10, 2019), at 33-44.
[4] *Id.* at 29-30.
[5] Michelle Ye Hee Lee, *Eleven donors have plowed $1 billion into super PACs since they were created*, Wash. Post, Oct. 26, 2018, https://wapo.st/2XgpZch.
[6] Alex Altman, *Meet the Man Who Invented the Super PAC*, Time, May 13, 2015, https://ti.me/1KJ7KvT.

as diverse as Senator John McCain ("What we have done is made a contribution limit a joke.") and President Jimmy Carter (describing current system as "unlimited political bribery"). *See* Albert W. Alschuler, Laurence H. Tribe, Norman L. Eisen & Richard W. Painter, *Why Limits on Contributions to Super PACs Should Survive* Citizens United, 86 Fordham L. Rev. 2299, 2340-42 (2018). In 2016, both parties' presidential candidates decried super PACs, and the victor, President Trump, declared, "[T]hese super PACs are a disaster . . . Very corrupt. . . . There is total control of the candidates." *Id*. at 2338-40.

The *SpeechNow* Court believed its ruling was compelled by *Citizens United*, but, as explained here, it was not. The proposition upon which *SpeechNow* depends—that if super PAC expenditures do not corrupt, contributions to super PACs cannot corrupt either—is factually inaccurate and contradicts decades of bribery law. Moreover, two recent Supreme Court decisions substantially undermine *SpeechNow*'s key premises.

This case presents "a question of exceptional importance" under Fed. R. App. 35(a)(2) because of widespread concern about corruption and super PACs in federal elections. A case has "exceptional importance to the public" if it involves "a unique issue of great moment to the community." Douglas H. Ginsburg & Donald Falk, *The Court En Banc: 1981–1990,* 59 Geo. Wash. L. Rev. 1008, 1025 (1991). A decision with "massive real-world consequences" is "plainly one of

exceptional importance." *Coal. for Responsible Regulation, Inc. v. EPA,* No. 09-1322, 2012 WL 6621785, at *14 (D.C. Cir. Dec. 20, 2012) (Kavanaugh, J., dissenting from denial of rehearing en banc).

Whether Congress can limit contributions to super PACs is such a question. This case presents a clash between a clear statutory command of Congress and a constitutional decision that has fundamentally transformed U.S. elections. The super PACs spawned by *SpeechNow* have undermined faith in our democracy, and the question of whether six-figure contributions to super PACs pose a risk of corruption or its appearance is ripe for en banc reconsideration.

LEGAL AND FACTUAL BACKGROUND

I. The Federal Election Campaign Act and the *Buckley* framework

Congress enacted the Federal Election Campaign Act (FECA) "to limit the actuality and appearance of corruption resulting from large individual financial contributions." *Buckley v. Valeo*, 424 U.S. 1, 26 (1976). FECA presently limits contributions to candidates to (inflation-adjusted) $2,800 per contributor per election, and contributions to independent political committees (including the groups now known as super PACs) to $5,000 per contributor per year. *See* 52 U.S.C. §§ 30116(a)(1)(A), (C).

Under *Buckley* and its progeny, limits on campaign financing must advance the government interest in protecting against "corruption or the appearance of

corruption." *McCutcheon v. FEC*, 572 U.S. 185, 191 (2014); *Buckley*, 424 U.S. at 26-27. Different standards apply to limits on *expenditures* by candidates, parties, and groups than limits on *contributions* to those entities. *See Buckley*, 424 U.S. at 23-35, 39-51. Expenditure limits receive strict scrutiny; they must serve a "compelling interest and [be] narrowly tailored to achieve that interest." *Citizens United*, 558 U.S. at 340. But contribution limits are not subject to strict scrutiny. They need only be "closely drawn" to promote a "sufficiently important interest." *McCutcheon*, 572 U.S. at 197 (quoting *Buckley*, 424 U.S. at 25).[7]

II. *Citizens United* and *SpeechNow*

In *Citizens United*, the Supreme Court invalidated FECA's prohibition of independent expenditures by corporations. *See* 558 U.S. at 340-41. It declared, "The anticorruption interest is not sufficient to displace the speech here in question," and added: "[W]e now conclude that independent expenditures,

[7] This petition omits internal punctuation and citations from quotations.

including those made by corporations, do not give rise to corruption or the appearance of corruption." *Id.* at 357.

Two months later, *SpeechNow* held all limits on contributions to super PACs unconstitutional:

> In light of the [Supreme] 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."

599 F.3d at 694-95. The FEC then issued an advisory opinion allowing independent expenditure-only political committees to accept unlimited contributions. *See* FEC Advisory Op. 2010-11, https://www.fec.gov/files/legal/aos/76050.pdf (July 22, 2010).

In rapid succession the Fifth, Seventh, Ninth, and Tenth Circuits followed *SpeechNow*,[8] and the Second Circuit did so provisionally.[9] The Supreme Court has

[8] *See Republican Party of N.M. v. King*, 741 F.3d 1089 (10th Cir. 2013); *Texans for Free Enter. v. Tex. Ethics Comm'n*, 732 F.3d 535 (5th Cir. 2013); *Wisc. Right to Life State Political Action Comm. 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. 2010); *accord N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274 (4th Cir. 2008) (similar but less categorical ruling).

[9] *See Vt. Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 140 (2d Cir. 2014) (expressly reserving the question notwithstanding an earlier opinion that followed *SpeechNow* when approving a preliminary injunction).

never considered whether contributions to super PACs may be limited, but, both before and after *Citizens United*, it has held that contributions to political parties used only to fund independent expenditures may be limited. *McConnell v. FEC*, 540 U.S. 93, 152 & n.48 (2003), *overruled in part on another issue by Citizens United v. FEC*, 558 U.S. 310 (2010); *Republican Party of La. v. FEC*, 137 S. Ct. 2178 (2017) (mem.), *aff'g* 219 F. Supp. 3d 86 (D.D.C. 2016) (discussed *infra* at p. 14); *Republican Nat'l Comm. v. FEC*, 561 U.S. 1040 (2010) (mem.), *aff'g* 698 F. Supp. 2d 150 (D.D.C. 2010) (Kavanaugh, J.) (holding that *Citizens United* did not disturb *McConnell*'s ruling that contributions to parties making only independent expenditures may be limited); *see also Colo. Republican Campaign Comm. v. FEC*, 518 U.S. 604, 617 (1996) (plurality opinion) (recognizing that contributions to a party making only independent expenditures enable donors to evade limits on contributions to candidates, and declaring that, although the party's expenditures cannot be limited for this reason, contributions to the party can be).

III. This challenge to super PACs and *SpeechNow*

Representative Ted Lieu (D-Cal.), Representative Walter Jones (R-N.C.),[10] Senator Jeff Merkley (D-Or.), and three Republican and Democratic congressional candidates filed an administrative complaint before the FEC against ten super

[10] Representative Jones passed away during the litigation.

PACs that had received contributions from single donors ranging from $300,000 to $5,000,000—far exceeding the statutory $5,000 limit.[11]

Relying on *SpeechNow*, the FEC dismissed the complaint. *Lieu v. FEC*, 370 F. Supp. 3d 175, 181 (D.D.C. 2019). Appellants challenged the FEC's dismissal of the complaint in the district court as "contrary to law." 52 U.S.C. §§ 30109(a)(8)(A), (C). Although the FEC cited decisions interpreting this standard when an agency is entitled to deference, the district court found those cases inapposite, noting: "This is not the typical case of administrative review: the FEC's decision to dismiss the complaint was based exclusively on its interpretation of the D.C. Circuit's opinion in *SpeechNow*." *Lieu*, 370 F. Supp. 3d at 183. The court concluded that it should review the FEC's decision *de novo* because "courts need not defer to an agency's interpretation of judicial precedent." *Id*. Relying on *SpeechNow*, however, the court dismissed the complaint. *Id.* at 186.

In this Court, appellants petitioned unsuccessfully for initial hearing en banc.[12] The FEC, meanwhile, sought summary affirmance.[13] The panel summarily affirmed, relying on *SpeechNow* and concluding: "The Federal Election Commission's decision to dismiss the administrative complaint was not contrary to

[11] FEC Add. at 25-26, 39-43, 48-82.
[12] *See* ECF No. 1793993 (June 21, 2019); ECF No. 1802897 (Aug. 20, 2019).
[13] *See* ECF No. 1787446 (May 10, 2019).

law as the challenged contributions to independent-expenditure only political committees cannot constitutionally be prohibited under [*SpeechNow*]."[14]

REASONS FOR GRANTING THE PETITION

I. *SpeechNow* was wrongly decided.

A. Quid pro quo corruption can occur through contributions to entities whose expenditures do not corrupt.

SpeechNow announced that a single sentence of *Citizens United* compelled its result: "[I]ndependent expenditures . . . do not give rise to corruption or the appearance of corruption." 558 U.S. at 357.[15] *SpeechNow* reasoned that if independent expenditures do not corrupt, contributions to entities that make only such expenditures cannot corrupt either. *See* 599 F.3d at 694.

The Court thus insisted that the corrupting potential of a payment to a third party depends on whether the third party's expenditures are corrupting. But federal prosecutions for bribery (the clearest form of quid pro quo corruption) often rest on payments to third parties without regard to how or whether the third party uses the money. *See* 18 U.S.C. § 201(b)(2) (defining bribery to include cases where a candidate or official "corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally *or for any other person or entity*" in

[14] *See* ECF No. 1809245 (Oct. 3, 2019).
[15] Although *SpeechNow* described this statement as holding, it was actually dictum. *See* Alschuler *et al*., 86 Fordham L. Rev. at 2312-14.

exchange for official action) (emphasis added); *United States v. Siegelman,* 640 F.3d 1159, 1165-66, 1169 n.13 (11th Cir. 2011) (affirming a bribery conviction although the "quid" was a contribution to an issue-advocacy campaign that the court acknowledged did "not financially benefit the individual politician in the same way that a candidate-election campaign contribution does"); *United States v. Brewster,* 506 F.2d 62, 68 (D.C. Cir. 1974) (noting that a bribe, unlike a gratuity, can be paid to "any other person or entity"). Just as a contribution to a favorite charity can be the "quid" in a bribe even when the charity's expenditures do not corrupt anyone, super PAC *contributions* create opportunities for corruption even if super PAC *expenditures* do not. And if a donor can bribe a politician with a contribution to a super PAC, the public has an interest in preventing such bribes.

The federal courts' criminal dockets confirm this. Just eight months ago, a federal grand jury returned an indictment for bribery centered on $1.5 million given to an independent expenditure committee in exchange for favorable official action. *See United States v. Lindberg*, No. 19-CR-00022 (W.D.N.C. filed Mar. 18,

2019), ECF No. 3 (indictment), ¶¶ 14, 16(a), 38, 53-61, 84, 86.[16] Under *SpeechNow*, that should be impossible.

Similarly, in *United States v. Menendez*, the district court upheld a grand jury indictment for another (per *SpeechNow*) ostensibly impossible transaction: a bribe in which the "quid" was $600,000 contributed to a super PAC. *See* 132 F. Supp. 3d 635, 639 (D.N.J. 2015). The indictment did not suggest that the recipient super PAC had acted improperly or that its *expenditures* corrupted the official. *See id*; *see also United States v. Menendez*, 291 F. Supp. 3d 606, 621-22 (D.N.J. 2018) (reiterating that a super PAC contribution can be a bribe while dismissing bribery charge for factual insufficiency following trial and a hung jury).[17]

Furthermore, as *Siegelman* and *Menendez* show, a donor can reach a corrupt agreement with a politician without involving the recipient of the contribution in the conversation. "The super PAC need not know about the illegal exchange; the

[16] The charges did not rest on how the independent expenditure committee spent the bribe; in fact, it appears that the money was not spent at all. *Id.* ¶ 75.
[17] The court specifically held that the evidence sufficed to establish that the super PAC contribution was "anything of value," i.e., a quid. *Id.* at 621-23; *cf. SpeechNow*, 599 F.3d at 694-95 ("there is no corrupting 'quid'").

parties surely would prefer that it not." Michael D. Gilbert & Brian Barnes, *The Coordination Fallacy*, 43 Fla. St. U. L. Rev. 399, 419 (2016).

B. Contributions to super PACs are substantially different from independent expenditures by the contributors.

Another superficially plausible argument for *SpeechNow*'s result has been advanced elsewhere: If someone can spend $1 million to place his own campaign advertisements, why can't he join with others to place independent advertisements through a super PAC? *See Emily's List v. FEC*, 581 F.3d 1, 10-11 (D.C. Cir. 2009).

Although two or three people might indeed band together to buy a newspaper advertisement, large-scale political campaigning requires the efforts of many people and the creation of a legally distinct spending organization, e.g., a super PAC. The funders of this organization no longer make their own expenditures; they have become contributors. With the creation of a distinct spending organization, "the transformation of contributions into political debate involves speech by someone other than the contributor." *Buckley*, 424 U.S. at 21. Such "speech by proxy . . . is not the sort of political advocacy that [the] Court in

Buckley found entitled to full First Amendment protection." *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 196 (1981) (plurality opinion).

II. Recent legal and factual developments have undermined *SpeechNow*.

A. *SpeechNow* is inconsistent with two recent Supreme Court decisions.

In *McCutcheon v. FEC*, 572 U.S. 185 (2014), the Supreme Court rejected *SpeechNow*'s interpretation of the statement upon which its decision rested—*Citizens United*'s declaration that "independent expenditures . . . do not give rise to corruption or the appearance of corruption." *SpeechNow* read this statement to say that expenditures have *zero* value to a candidate, declaring: "The Court has effectively held that there is no corrupting 'quid' for which a candidate might in exchange offer a corrupt 'quo.'" 599 F.3d at 694-95. *SpeechNow* concluded that the applicable standard of review did not matter because, even under the less demanding standard applicable to contribution limits, "something . . . outweighs nothing every time." *Id.* at 695.

In *McCutcheon*, however, Chief Justice Roberts's plurality opinion, joined by three other members of the *Citizens United* majority, explained that while independent expenditures may be *worth less*, they are not *worthless*. The Court noted *Buckley*'s statement that "[t]he absence of prearrangement and coordination of an expenditure with the candidate or his agent . . . undermines the value of the expenditure to the candidate," and then it added, "*But probably not by 95 percent*."

572 U.S. at 214 (emphasis added); *see also* Gilbert & Barnes, 43 Fla. St. U. L. Rev. at 415-18 (even with strict coordination rules, value of independent expenditures to candidates "almost certainly exceeds zero"). *McCutcheon*'s recognition that independent expenditures are of *some* value to a candidate cannot be reconciled with *SpeechNow*'s assertion that "there is no corrupting 'quid.'"

More recently, the Court affirmed a decision explicitly rejecting *SpeechNow*'s assumption that the corrupting potential of a payment to a third party depends on whether the third party's expenditures are themselves corrupting. In *Republican Party of Louisiana v. FEC*, a three-judge district court in this Circuit held that "soft money" contributions to a political party can corrupt *even when the party's independent expenditures do not corrupt*. As the court explained, "the inducement occasioning the prospect of indebtedness on the part of a federal officeholder is not the [independent] *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." 219 F. Supp. 3d 86, 97 (D.D.C. 2016), *aff'd*, 137 S. Ct. 2178 (2017) (mem.). The court distinguished *SpeechNow* on the ground that candidates purportedly have closer relationships with political parties than with super PACs. *See* 219 F. Supp. 3d at 98. But even if that proposition once was true, it cannot be assumed today, certainly not for the "party-linked" super PACs cited in the

complaint here.[18] Moreover, *SpeechNow* did not advance that empirical claim; it rested on the proposition that, as a matter of law, contributions that are used to fund only independent expenditures cannot corrupt. The *Republican Party of Louisiana* decision expressly rejected that proposition; it is difficult to see how the Supreme Court could have affirmed if it disagreed.

B. New empirical evidence demonstrates that large contributions to super PACs create the appearance of corruption.

The *appearance* of corruption poses "almost equal concern as the danger of actual quid pro quo arrangements." *Buckley*, 424 U.S. at 27. Since voters cannot "examine the intentions behind suspiciously sizable contributions," unregulated contributions "inflict[] almost as much harm on public faith in electoral integrity as corruption itself. " *Libertarian Nat'l Comm. v. FEC*, 924 F.3d 533, 542 (D.C. Cir. 2019) (en banc). Although *SpeechNow* held as a matter of law that contributions to independent expenditure groups "cannot . . . create the appearance of corruption," 599 F.3d at 694, new empirical evidence demonstrates that they can and have.

Opinion surveys consistently show a pervasive appearance of corruption *specifically attributable to large super PAC contributions*. For example, in a 2012 survey, 69% of respondents (74% of Republicans, 73% of Democrats) agreed that "new rules that let corporations, unions and people give unlimited money to Super

[18] FEC Add. at 34-35, 40, 58-61.

PACs will lead to corruption."[19] And 73% of respondents (75% of Republicans, 78% of Democrats) agreed "there would be less corruption if there were limits on how much could be given to Super PACs."[20] Other national and state surveys yield similar results.[21] *Cf. Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 394 (2000) (finding an appearance of corruption when an "overwhelming 74%" of voters approved an initiative limiting contributions).

III. The FEC's decision was "contrary to law" because it relied on a precedent that is contrary to law.

The panel's opinion is susceptible to two readings: (1) the FEC's action was not "contrary to law" because the contribution limits are unconstitutional, or (2) regardless of *SpeechNow*'s ongoing validity, any FEC decision that relied on then-applicable precedent cannot be "contrary to law." The former is understandable under the law of the circuit doctrine. But the latter is erroneous.

In section 30109 actions where the legal questions involve interpreting ambiguous statutory terms, the FEC may receive deference. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984); *Orloski v. FEC*, 795 F.2d 156 (D.C. Cir. 1986). But for questions of constitutional law and judicial precedent, the "contrary to law" standard affords the FEC no deference. *See Akins v. FEC*, 101

[19] FEC Add. at 31-32.
[20] *Id.* at 32.
[21] *Id.* at 31-33.

F.3d 731, 740 (D.C. Cir. 1996) (en banc) (declining to "defer to an agency's interpretation of Supreme Court precedent under *Chevron* or any other principle"), *vacated on other grounds*, 524 U.S. 11 (1998); *Citizens for Responsibility & Ethics in Washington v. FEC*, 209 F. Supp. 3d 77, 85-87 (D.D.C. 2016) (rejecting FEC's argument for deference under "contrary to law" standard where FEC dismissed complaints based on its interpretation of court precedent and First Amendment), *appeal dismissed*, No. 16-5343, 2017 WL 4957233 (D.C. Cir. Apr. 4, 2017).

This appeal raises a question of law. As the district court held, the FEC's decision "was based exclusively on its interpretation of the D.C. Circuit's opinion in *SpeechNow*." *Lieu*, 370 F. Supp. 3d at 183-84. The "contrary to law" standard does not require deference to the FEC, and deference to an agency on an issue of constitutional interpretation would be inappropriate. *Id*. at 183-84.

Of course, as appellants have acknowledged throughout, *SpeechNow* remains the law of this Circuit, and neither the FEC, the district court, nor the panel could overrule it. But the "contrary to law" standard does not freeze the law forever by requiring an appellate court to ask only whether an administrative agency or lower court adhered to precedent as it stood when a case was filed. A decision may be contrary to law because the precedent itself is contrary to law.

Nearly every challenge to appellate precedent must be initiated before a court or agency that is bound by that precedent. The challenge does not fail simply

because the lower court or agency must adhere to the precedent. *See*, *e.g.*, *Janus v. AFSCME,* 138 S. Ct. 2448 (2018) (reversing after district court dismissed complaint, and court of appeals affirmed, in reliance on precedent that the Court overruled); *Citizens United*, 558 U.S. at 322, 372 (reversing district court that followed precedent that the Court overruled); *Brown v. Bd. of Educ.*, 98 F. Supp. 797, 800 (D. Kans. 1951) (following Supreme Court precedent requiring it to uphold racial segregation in schools), *rev'd*, 347 U.S. 483 (1954) (setting aside district court's ruling, not because the court acted improperly in following precedent, but because the precedent itself was contrary to law).

CONCLUSION

This Court should grant rehearing en banc to reexamine *SpeechNow*.

Respectfully submitted,

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Date: November 15, 2019

ADDENDUM

CERTIFICATE OF COMPLIANCE

This response complies with the word limit of Fed. R. App. R. 27(d)(2)(A) and Circuit Rule 27(c) because the brief contains 3,889 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). The response complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it uses the proportionally spaced typeface Microsoft Word 14-point Times New Roman.

/s/ Ronald A. Fein

Ronald A. Fein

Dated: November 15, 2019

CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2019, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service to all persons required to be served will be accomplished by the CM/ECF system.

I further certify that I also will cause the requisite number of paper copies of the brief to be filed with the Clerk.

/s/ Ronald A. Fein
Ronald A. Fein

Dated: November 15, 2019

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties and Amici. Representative Ted Lieu, Senator Jeff Merkley, State Senator (ret.) John Howe, Zephyr Teachout, and Michael Wager were plaintiffs in the district court and are appellants in this Court. Representative Walter Jones was a plaintiff in the district court but is now deceased and is not an appellant. The Federal Election Commission (FEC) was the defendant in the district court and is the appellee in this Court. No amicus briefs were filed in the district court. The following have appeared as amici curiae in this Court:

(1) Senators Sheldon Whitehouse, Richard Blumenthal, and Mazie Hirono;

(2) Citizens for Responsibility and Ethics in Washington; and

(3) Professor Christopher T. Robertson, Professor Kelly Bergstrand, and D. Alex Winkelman.

(B) Rulings Under Review. This is an appeal from an order of the United States District Court for the District of Columbia (entered on February 28, 2019 by the Honorable Emmet G. Sullivan) granting the FEC's motion to dismiss the complaint. *Lieu v. FEC*, No. 1:16-cv-02201-EGS (D.D.C. Feb. 28, 2019), Dkt. No. 47. The court's Memorandum Opinion appears at 370 F. Supp. 3d 175 (D.D.C. 2019). The panel's order granting the FEC's motion for summary affirmance is

attached to this petition. This petition for rehearing en banc seeks review of the panel's decision.

(C) Related Cases. This case was not previously before this Court or any other court. Counsel is not aware of any other related cases within the meaning of Circuit Rule 28(a)(1)(C) currently pending in this Court or in any other court.

/s/ Ronald A. Fein

Ronald A. Fein

Dated: November 15, 2019

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-5072 **September Term, 2019**

1:16-cv-02201-EGS

Filed On: October 3, 2019

Ted Lieu, Representative, et al.,
Appellants

v.

Federal Election Commission,
Appellee

BEFORE: Rogers, Tatel, and Srinivasan, Circuit Judges

O R D E R

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

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

FURTHER ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). The Federal Election Commission's decision to dismiss the administrative complaint was not contrary to law as the challenged contributions to independent-expenditure-only political committees cannot constitutionally be prohibited under SpeechNow.org v. FEC, 599 F.3d 686 (D.C. Cir. 2010) (en banc), *cert. denied*, 562 U.S. 1003 (2010). See 52 U.S.C. § 30109(a)(8)(C); Orloski v. FEC, 795 F.2d 156, 161 (D.C. Cir. 1986).

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

Per Curiam