

TESTIMONY BEFORE GOVERNMENT ADMINISTRATION AND
ELECTIONS COMMITTEE

Monday, February 27, 2017

In Support Of:

**S.B. 582, An Act Prohibiting Independent Expenditures By Foreign-
Influenced Business Entities And Limiting Covered Transfers**

TO: Chair Gary A. Winfield, Chair Michael A. McLachlan, Chair Daniel J. Fox,
Ranking Member Laura Devlin, and Members of the Government
Administration and Elections Committee

FROM: Albert W. Alschuler, Julius Kreeger Professor Emeritus, the University
of Chicago Law School

I write in support of S.B. 582—specifically, in support of its proposed limitation of “covered transfers” by any individual exceeding \$70,000. A similar limitation on contributions to “independent expenditure groups” or “super PACs” is included in an ordinance that is currently under consideration by the St. Petersburg, Florida City Council. On October 26, 2016, I wrote to the members of the City Council to explain why I believe that (a) limiting Super PAC contributions is constitutional, (b) the Supreme Court is likely to say so if a way can be found to present the issue to the Court, and (c) the proposed limitation would greatly improve our democracy.

S.B. 582 presents the same constitutional issues as those presented by the St. Petersburg ordinance. I attach my letter to the St. Petersburg City Council in the hope that you will find it useful. If you have any questions or if I can be of further help, please let me know. I can be reached at 207-829-3963 or a-alschuler@law.northwestern.edu.

A handwritten signature in black ink, reading "Albert W. Alschuler", followed by a long horizontal line extending to the right.

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October 21, 2016

Hon. Amy Foster, Chair
Hon. Darden Rice, Vice Chair
Hon. Charlie Gerdes
Hon. Jim Kennedy
Hon. Ed Montanari
Hon. Steve Kornell
Hon. Karl Nurse
Hon. Lisa Wheeler-Bowman

Dear Members of the St. Petersburg City Council:

I understand that the Council is considering an ordinance that would limit political contributions to “independent expenditure groups” or “super PACs.” In *SpeechNow.org v. FEC*, 599 F.3d 686 (2010), the United States Court of Appeals for the District of Columbia Circuit held that limiting contributions to super PACs violates the First Amendment, and five other federal courts of appeals have endorsed the D.C. Circuit’s ruling. These decisions have prompted concern that the proposed ordinance might be held unconstitutional. The United States Supreme Court has not ruled on the issue, however, and neither has the United States Court of Appeals for the Eleventh Circuit, whose jurisdiction includes Florida. Neither has the Florida Supreme Court.

I believe that *SpeechNow* was wrongly decided. I also believe that the Supreme Court is likely to say so if a way can be found to present the issue to the Court. The purpose of this letter is to explain why *SpeechNow* was improperly decided and to encourage you to enact the proposed ordinance. This ordinance might in fact give the Supreme Court an opportunity to rule on an important, unsettled question. Resolving this question correctly would greatly improve our democracy.

By way of introduction, I am the Julius Kreeger Professor Emeritus at the University of Chicago Law School. I have been a professor of law at the University of Texas, the University of Colorado, the University of Pennsylvania, and Northwestern

University as well as the University of Chicago, and I have been a visiting professor at the Brooklyn Law School, the University of California at Berkeley, Columbia University, N.Y.U., the University of Michigan, and the University of San Diego.¹ Altogether, I have taught law for 50 years. Early in my career, I clerked for a Justice of the Illinois Supreme Court and was a prosecutor in the Criminal Division of the United States Department of Justice. My principal scholarly work on campaign-finance law is Albert W. Alschuler, *Limiting Political Contributions After McCutcheon*, *Citizens United*, and *SpeechNow*, 67 FLA. L. REV. 389 (2015). (I will cite this work as *Limiting Political Contributions* at p. __.)

The law governing campaign contributions is complex. Justice Scalia once said from the bench that he didn't understand much of it. This letter is, in essence, a legal brief, but I will do my best to make it readable by non-lawyers.

The Current State of the Law: An Overview

Federal law bars people from contributing more than \$5400 to a candidate's campaign for federal office, and this restriction is constitutional. The Supreme Court upheld it forty years ago in *Buckley v. Valeo*, 421 U.S. 1 (1976). *SpeechNow* ruled, however, that contributions to super PACs cannot be limited.

Super PACs are political action committees that do not make contributions to candidates but instead place their own "independent" advertisements supporting candidates and disparaging their opponents.² In *SpeechNow*, the D.C. Circuit struck down the federal law that, until 2010, had limited contributions to Super PACs to \$5000 per year.

After *SpeechNow*, although a wealthy person may not give \$5500 to a candidate, he may give \$10 million to a super PAC whose only mission is to urge voters to support the candidate. Million-dollar contributions to groups advocating the election of

¹ Although my teaching positions have not included any in the State of Florida, I was an advisor to the original Florida Sentencing Guidelines Commission, and I gave the Annual Dunwoody Distinguished Lecture in Law at the University of Florida in 1997. See Albert W. Alschuler, *The Descending Trail, Holmes' Path of the Law One Hundred Years Later*, 49 FLA. L. REV. 353 (1997). I also have spoken at the Florida Bar Association Annual Convention.

² "Independent expenditure committees" need not be entirely independent. Candidates may, within limits, solicit donations to these groups and may speak at their gatherings. They may thank contributors to these groups for making their donations. A recent solicitation for funds by a super PAC advised a prospective donor, "We are the blessed Super PAC by Sen. Toomey. I am his former senior aide and finance director, and I am working with his former chief-of-staff." Robert Faturechi & Lauren Kirchner, *Super PAC to Billionaire: We Need More Money to Save a Republican Senate*, PRO PUBLICA, Oct. 14, 2016, <https://www.propublica.org/article/super-pac-to-billionaire-we-need-more-money-to-save-a-republican-senate>.

particular candidates in fact exploded following the *SpeechNow* decision. As early as February, 2016, the New York Times listed 85 people and groups who had donated \$1 million or more to super PACs supporting candidates for President in the 2016 race. See *Million-Dollar Donors in the 2016 Presidential Race*, NEW YORK TIMES, Feb. 9, 2016, http://www.nytimes.com/interactive/2016/us/elections/top-presidential-donors-campaign-money.html?_r=0. See also *Limiting Political Contributions* at pp. 418-23, 493-97.

Limiting contributions to candidates while permitting unlimited contributions to Super PACs is upside down. Super PACs have been called “the attack dogs and provocateurs of modern politics.” The candidates they support need not take responsibility for what they say, and these groups usually disappear once an election is over. The attack ads they produce contribute to the nation’s cynicism about politics, a cynicism that runs especially deep among young people. After *SpeechNow*, limits on contributions to candidates do not restrict what people can give to electoral efforts; they simply channel funds to less responsible and more destructive speakers.

No sane legislator would vote in favor of this regime of campaign financing, and no legislator ever has. The United States has this regime because *SpeechNow* held that the First Amendment requires it.

Yet the thought that the Constitution requires it looks loopy too. According to the Supreme Court, Congress can prohibit a \$5500 contribution to an official campaign because this contribution is corrupting or creates the appearance of corruption. According to the D.C. Circuit, however, Congress cannot prohibit a \$10 million contribution to a super PAC because this contribution does not give rise to corruption or even the appearance of corruption.

The Basis for the *SpeechNow* Decision

SpeechNow did not contend that the regime of campaign finance it created was desirable or even defensible. It made no effort to distinguish contributions to super PACs from the contributions to candidates that the Supreme Court has held Congress may forbid. The court instead insisted that a single sentence of the Supreme Court’s decision in *Citizens United v. FEC*, 558 U.S. 310 (2010), compelled the result it reached.

Citizens United did not address *contribution* limits at all. As the Supreme Court emphasized from the first sentence of its opinion through the last, that case concerned *expenditure* limits. In *Buckley* in 1976, the Supreme Court distinguished between political contributions and political expenditures. It upheld contribution limits but struck down expenditure limits. Since *Buckley*, the Court has struck down every expenditure limit that has come before it, but it has upheld most contribution limits. The *Citizens United* opinion reiterated, “[C]ontribution limits, unlike limits on independent expenditures, have been an accepted means of preventing *quid pro quo* corruption.” 558 U.S. at 359.

Citizens United followed the pattern of the earlier cases; it struck down limits on expenditures by super PACs. In the course of its decision, the Supreme Court said, “We now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.” *Id.* at 357.

In *SpeechNow*, the D.C. Circuit treated this statement as the major premise of a syllogism. It wrote, “In 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.” 599 F.3d at 694. The court reiterated: “[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.* at 696.

The conclusion that the government had no regulatory interest whatever in limiting super PAC expenditures was crucial to the D.C. Circuit’s analysis. In *Buckley*, the Supreme Court applied a less demanding standard of review to contribution limits than to expenditure limits. An interest that is too weak to justify a limitation of expenditures may nevertheless be strong enough to justify a limitation of contributions. Holding the government’s regulatory interest *insufficient* to justify a restriction of super PAC expenditures would have left open the question whether this interest could justify a limitation of contributions. The D.C. Circuit concluded, however, that the standard of review did not matter. It wrote that in *Citizens United* “the Court held that the government has *no* anti-corruption interest in limiting independent expenditures,” *id.* at 693 (emphasis in the original), and it concluded, “[S]omething . . . outweighs nothing every time.” *Id.* at 695. Acknowledging even a smidgen, soupçon, or scintilla of regulatory interest would have undercut the court’s analysis.

This letter will make three points about the D.C. Circuit’s supposed syllogism:

- 1) The syllogism is fallacious. Contributions to super PACs can be corrupting even when expenditures by these groups do not corrupt.
- 2) The major premise of the supposed syllogism—the statement that super PAC expenditures do not corrupt even a little bit—was what lawyers call dictum. It was a nonbinding aside.
- 3) The Supreme Court did not intend its dictum to be read as literally as the D.C. Circuit read it. As the Court’s other statements and decisions make clear, it did not mean to deny the existence of *any* regulatory interest; it meant only to declare this interest insufficient to justify a restriction of expenditures. The D.C. Circuit seized on the Supreme Court’s momentary literary imprecision.

After examining the *SpeechNow* opinion, this letter will consider what should have been the decisive issue in the case—whether limits on contributions to super PACs can be distinguished from the limits on contributions to candidates that *Buckley v. Valeo*

upheld. Finally, this letter will note some developments since *SpeechNow*. Even if it could have been claimed plausibly in 2010 that contributions to super PACs do not corrupt or create the appearance of corruption, that claim is now untenable.

***SpeechNow's* Supposed Syllogism Was Fallacious**

Count Fifteen of the bribery indictment currently pending against Senator Robert Menendez alleges that “MENENDEZ, a United States Senator, sought and received from SOLOMON MELGEN approximately \$300,000 for [the Senate Majority PAC] that was earmarked for the New Jersey Senate race, which benefitted MENENDEZ, in return for MENENDEZ’s advocacy at the highest levels of [the Centers for Medicare and Medicaid Services] and [the Department of Health and Human Services] on behalf of MELGEN in his Medicare billing dispute.” Indictment, *United States v. Menendez*, (D.N.J No. 15 CR 155) at 61, available at https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/04/01/menendez_and_melgen_indictment.pdf.³

I do not know whether the allegations against Menendez are true. The indictment itself makes clear, however, that a contribution to a super PAC *can* corrupt. A public official cannot escape a bribery charge simply by saying, “Please pay the money to an independent expenditure group supporting my reelection.” See *United States v. Menendez*, 132 F. Supp. 3d 635, 639 (D.N.J. 2015) (rejecting Menendez’s claim “that no *quid pro quo* corruption can arise when a private citizen contributes to a *bona fide* Super PAC, because a *bona fide* Super PAC does not coordinate its expenditures with a candidate”).

The Menendez indictment contains no suggestion that the super PAC that received Melgen’s contribution did anything wrong or that this group’s *expenditures* corrupted the senator. Contrary to the argument advanced by the D.C. Circuit, contributions to super PACs can corrupt even when super PAC expenditures do not.

Typically in fact, it is the contributions to super PACs rather than the groups’ expenditures that corrupt or create the appearance of corruption. It was the people who wrote the checks, not the operatives who received and spent their funds, who might have given America its carried-interest deduction, its armaments approved by Congress despite opposition by the Pentagon, and a public health care system shaped to accommodate the interests of pharmaceutical and insurance companies as well as the public. Contrary to the D.C. Circuit’s argument, the government has a legitimate interest in limiting contributions to super PACs even when these groups’ expenditures are unlimited. A regime in which individual contributions are restricted but in which super PACs can spend all the contributions they receive is a coherent and perhaps even a desirable system. See *Limiting Political Contributions* at pp. 445-57.

³ Count 17 of the indictment alleges that a second \$300,000 payment from Melgen to the super PAC was also a bribe.

The Statement Upon Which the D.C. Circuit Relied Was Dictum

Citizens United was argued initially on statutory grounds, but the Supreme Court ordered the parties to reargue the case. It noted that two of its prior decisions had said that Congress could limit political speech simply because the speaker was a corporation, and it asked the parties to discuss whether these decisions should be overruled.

The first part of the *Citizens United* opinion did overrule the earlier decisions. The Court held that political speech cannot be restricted simply because the speaker is a corporation. This portion of the opinion fully resolved the case before the Court. Congress had restricted only expenditures by corporations, and the Court said that corporations must have the same right to speak as individuals and non-incorporated groups. Accordingly, a super PAC like the plaintiff in *Citizens United*—a corporation—could not be prevented from making the expenditures that Congress had allowed individuals and unincorporated groups to make.

Although this conclusion fully resolved the case before the Court, the Court did stop. A second portion of its opinion declared that Congress could not restrict independent expenditures at all. Whether these expenditures were made by corporations, unincorporated groups, or individuals, they were insufficiently corrupting to be prohibited.

There was no reason for the Court to have discussed this second issue, but even after resolving the case before it a second time, the Court did not stop. Three sentences after it said, “The anticorruption interest is not sufficient to displace the speech here in question,” 558 U.S. at 357, it offered the sentence that drove the decision in *SpeechNow*: “We now conclude that independent expenditures . . . do not give rise to corruption or the appearance of corruption.” *Id.*

Note the difference between the Court’s two formulations. Its first statement declared the government’s regulatory interest *insufficient* to justify a restriction of expenditures. The second declared this interest *nonexistent*. As noted above, if the Court had made only the first statement, the D.C. Circuit’s analysis in *SpeechNow* would have been impossible. *Citizens United* would have said nothing that even arguably invalidated Congress’s limits on contributions to super PACs.

The statement that independent expenditures do not corrupt at all or even create an appearance of corruption was gratuitous and unnecessary, and four Supreme Court justices (three of whom dissented in *Citizens United*) have already observed that *Citizens United*’s “statements . . . about the proper contours of the corruption rationale” should be regarded “as dictum, as . . . overstatement, or as limited to the context in which [they] appear[.]” *McCutcheon v. FEC*, 134 S. Ct. 1434, 1471 (2014) (Breyer, J., joined by Ginsburg, Kagan, and Sotomayor, JJ., dissenting).

The Statement Upon Which the D.C. Circuit Relied Was Not Meant Literally

In *Citizens United*, the Court slipped easily from the statement that independent expenditures are insufficiently corrupting to the statement that these expenditures do not corrupt at all. It gave no indication that it sensed an important difference between these statements or

that it realized the different consequences they might have. The Court reinforced the sense that it had not focused on the difference between these statements when it attributed the view that independent expenditures do not corrupt at all to *Buckley*: “This confirms *Buckley*’s reasoning that independent expenditures do not lead to, or create the appearance of, *quid pro quo* corruption.” 558 U.S. at 360. *Buckley*, however, had not said that independent expenditure do not corrupt; it had said only that these expenditures were insufficiently corrupting to justify their restriction: “We find that the governmental interest in preventing corruption and the appearance of corruption is *inadequate* to justify § 608(e)(1)’s ceiling on independent expenditures.” 424 U.S. at 45 (emphasis added).

The clearest indication that the Court did not mean its dictum literally is that this statement, if taken literally, would be inconsistent with a ruling the Court made less than a year before it decided *Citizens United*—one in which the Court’s opinion was written by Justice Kennedy, the same justice who wrote the *Citizens United* opinion. The decision in *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009), concerned political contributions and expenditures made by Don Blankenship, the chairman and chief executive officer of the Massey Coal Company.

After a jury returned a \$50 million verdict against Massey, Blankenship spent more than \$3 million to prevent the reelection of a justice of the state court that would hear the company’s appeal. He contributed \$1000 to the campaign of the justice’s opponent (the maximum allowed by law) and \$2.5 million to a PAC supporting the opponent. He also spent \$500,000 directly. The justice’s opponent won the election and provided the decisive vote for reversing the \$50 million verdict.

The United State Supreme Court held that the recently elected justice’s refusal to recuse himself from the coal company’s appeal violated the Due Process Clause: “We conclude that there is a serious risk of actual bias . . . when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds . . . when the case was pending or imminent.” 556 U.S. at 884.

Citizens United distinguished *Caperton* on the ground that the two cases concerned different remedies: “*Caperton*’s holding was limited to the rule that the judge must be recused, not that the litigant’s political speech could be banned.” 558 U.S. at 360. But if Blankenship’s PAC contributions and independent expenditures did “not give rise to corruption or the appearance of corruption,” why was a remedy of any sort required? *Caperton* clearly recognized that PAC contributions and independent expenditures can corrupt. They can create “a serious risk of actual bias.” Justice Kennedy’s opinion in *Citizens United* did not mean to abandon Justice Kennedy’s opinion in *Caperton*.

Citizens United apparently meant its statement that independent expenditures do not corrupt as a shorthand way of saying that these expenditures are insufficiently corrupting to justify their restriction. In *SpeechNow*, however, the D.C. Circuit made the most of the Court’s verbal imprecision. It attributed to the Court an implausible proposition—that independent expenditures do not create even the appearance of corruption.

Lower courts have disregarded other statements in the *Citizens United* opinion that the Court apparently did not mean literally or apparently did not fully consider at the time it made them. Notably, in the first part of its opinion, the Court declared, “[T]he government cannot restrict speech based on the speaker’s corporate identity.” 558 U.S. at 346. Unlike the dictum emphasized by *SpeechNow*, this statement appeared to be the Supreme Court’s principal holding. After *Citizens United*, however, four federal courts of appeals upheld a restriction of speech that was based only on the speaker’s corporate identity—Congress’ longstanding prohibition of contributions by corporations to candidates’ official campaigns.⁴ Moreover, the Supreme Court declined to review two of these court of appeals decisions. See *Limiting Political Contributions* at pp. 416-17.

Taking the Court’s broad pronouncement literally would have yielded troublesome results. The number of corporations an individual can form is unlimited. Individual contribution limits would be pointless and discriminatory if an individual could contribute the maximum allowable amount to a candidate’s campaign 100 times simply by creating 100 corporations. In upholding Congress’s prohibition of corporate contributions, the courts of appeals tempered a literal reading of the Supreme Court’s language with common sense. They refused to read the Court’s broad pronouncement for all it might be worth. The D.C. Circuit should have done the same thing in *SpeechNow*.

Limits on Contributions to Super PACs Cannot Be Distinguished from the Limits on Contributions to Candidates that *Buckley v. Valeo* Upheld

The Supreme Court has upheld limits on contributions to candidates and political parties, but it has not considered limitations on contributions to other political groups. Some defenders of *SpeechNow* maintain that contributions to these other organizations should be treated in the same manner as these organizations’ expenditures. They see the Supreme Court’s distinction between contributions and independent expenditures as resting on the proposition that a contribution cannot corrupt a candidate unless it reaches the candidate or his party or unless the candidate himself controls how the contribution is spent.

That proposition, however, is untenable. If it were true, someone would need to inform former Alabama Governor Don Siegelman, who is now serving a six-and-one-half year term for bribery. The bribe that Siegelman allegedly accepted consisted of a contribution to a group supporting a referendum he favored, a contribution that apparently did not benefit him personally. See *United States v. Siegelman*, 640 F.3d 1159, 1169 n.13 (11th Cir. 2011) (affirming Siegelman’s conviction while acknowledging that “contributions to [issue oriented campaigns] do not financially benefit the individual politician in the same way that a candidate-election campaign contribution does.”). The idea that an official can avoid a charge of corruption by

⁴ Although the Supreme Court treats contributions to political campaigns as low-value speech, it does treat them as speech. The Court has in fact held that contribution limits violate the First Amendment if they are unreasonably low. *Randall v. Sorrell*, 548 U.S. 230 (2006).

saying, “Please pay the money to my sister, my alter-ego super PAC, or my favorite charity,” has little to commend it.

The Supreme Court’s distinction between contributions and expenditures in fact rests on a number of considerations. Perhaps the key idea, however, is that, although writing a check to a candidate or a super PAC deserves some measure of constitutional protection, it is not entitled to the same protection as actually speaking. As the plurality opinion in *California Medical Ass’n v. FEC*, 453 U.S. 182, 196 (1981), explained, “[S]peech by proxy’ . . . is not the sort of political advocacy that this Court in *Buckley* found entitled to full First Amendment protection.”

The central question in *SpeechNow* should have been whether limits on contributions to super PACs can reasonably be treated differently from the limits on contributions to official election campaigns that *Buckley v. Valeo* upheld. That question, however, remained the superPACHyderm in the room; the D.C. Circuit did not discuss it. The question would have been easy to answer.

Buckley offered five reasons for upholding contribution limits while striking down expenditure limits. Three of them suggested that campaign contributions have less communicative value than expenditures. The other two suggested that contributions are more corrupting. The reasons the Supreme Court gave for treating contributions to official election campaigns as low-value speech all apply equally to super PAC contributions.

First, the Court declared that a campaign contribution “serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support.” 424 U.S. at 21. Equally, a check written to a super PAC does not convey the underlying basis for the check-writer’s support.

Second, the Court noted, “The transformation of contributions into political debate involves speech by someone other than the contributor.” *Id.* Transforming a check to a super PAC into political debate also “involves speech by someone other than the contributor.”

Third, the Court said that limiting the amount of an individual’s contribution “permits the symbolic support evidenced by the contribution but does not in any way infringe the contributor’s freedom to discuss candidates and issues.” *Id.* Contributors might be surprised to learn that writing a check for the maximum permissible amount to a political campaign—a check for thousands of dollars—is merely “symbolic support.” If it is, however, so is writing a check for the same amount to a super PAC. Moreover, restricting super PAC contributions leaves a contributor free to communicate his views of candidates and issues in other ways.

Super PAC contributions have no greater communicative value than campaign contributions. In addition, one of the two reasons *Buckley* offered for viewing independent expenditures as less corrupting than campaign contributions does not apply to super PAC contributions. The Court said, “The absence of prearrangement and coordination of an expenditure with the candidate or his agent . . . alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.” *Id.* at 47.

The rules forbidding the coordination of expenditures do not prevent a candidate from discussing anything at all with a *contributor* to a super PAC (although the contributor may not then act as an “agent” of the candidate by conveying the candidate’s thoughts concerning *expenditures* to those who will determine how the super PAC’s funds are spent). When the candidate and the donor wish to speak improperly about the likelihood of the donor’s appointment as ambassador to Belize, the rules against coordinating campaign expenditures do nothing to stop them.

Buckley’s second reason for viewing independent expenditures as less corrupting than campaign contributions was that independent expenditures are of less value to a candidate. The Court wrote, “Unlike contributions, independent expenditures may well provide little assistance to the candidate’s campaign and indeed may prove counterproductive.” *Id.* at 47. Experience in the years since *Buckley* has called this judgment into question, but even if a candidate is likely to value a \$5400 contribution to a super PAC less than a \$5400 contribution to his own campaign, he is unlikely to value a \$10 million contribution to a super PAC less than a \$5400 contribution to his campaign.

In a post-*Citizens United* decision, Chief Justice Roberts and three other members of the *Citizens United* majority quoted *Buckley*: “The absence of prearrangement and coordination of an expenditure with the candidate or his agent . . . undermines the value of the expenditure to the candidate.” Then, however, they acknowledged, “But probably not by 95 percent.” *McCutcheon v. FEC*, 134 S. Ct. 1434, 1454 (2014). A \$10 million super PAC contribution produces many times over whatever corruption or appearance of corruption a \$5500 campaign contribution can produce. If Congress may prohibit the \$5500 campaign contribution (as it may and has), it should be allowed to prohibit the super PAC contribution as well. If *Buckley* still stands (and *Citizens United* says it does), *SpeechNow* was wrongly decided.

The Appearance of Corruption Today

SpeechNow rested on the claim that neither super PAC expenditures nor contributions to super PACs create the appearance of corruption. According to the D.C. Circuit, the government has no legitimate interest in regulating them—not even a scintilla. This claim seemed implausible when the court made it in 2010, and it has now become untenable. Unleashed super PAC contributions have given rise to widespread perceptions of corruption.

Many Americans now seem convinced that political contributions by wealthy people have led officials to approve tax breaks, trade agreements, immigration regulations, and other measures that benefit the “one percent” while they harm “ordinary Americans.” Denunciations of “Wall Street,” “super PACs,” “big banks,” “Hollywood,” “Silicon Valley,” “the Koch brothers,” “George Soros,” “*Citizens United*,” “the billionaire class” and other perceived villains are commonplace.

In this year’s Democratic presidential primaries, a 74-year-old Senator who described himself as a democratic socialist received more than 12 million votes, 43% of the votes cast. This candidate’s refusal to accept any support from super PACs was a prominent feature of his campaign. At rallies, crowds chanted with him that the average contribution he received was \$27. This candidate said of his opponent, “Are you qualified to be President of the United States

when you're raising millions of dollars from Wall Street whose greed, recklessness and illegal behavior helped to destroy our economy?" See Sam Frizel, *Clinton and Sanders Clash on Qualifications as Democratic Race Gets Bitter*, TIME, Apr. 16, 2016, <http://time.com/4284934/bernie-sanders-hillary-clinton-qualified-new-york-primary/>.

This year's Republican presidential nominee emphasized during his primary campaign, "I'm self-funding my campaign. . . . I'm not getting millions of dollars from all of these special interests and lobbyists and donors that once they get it, they literally do whatever the politicians want. That's not going to happen." See Alex Giorioso, *Presidential Hopefuls Stretch the Truth Talking About Campaign Finance*, OPENSECRETS.ORG, Mar. 1, 2016, <http://www.opensecrets.org/news/2016/03/presidential-hopefuls-stretch-the-truth-talking-about-campaign-finance/>. This candidate said in a primary debate, "These Super PACs are a disaster by the way, folks, very corrupt. . . . There is total control of the candidates. I know it better than anybody that probably ever lived." He tweeted, "I wish good luck to all of the Republican candidates that traveled to California to beg for money, etc. from the Koch Brothers. Puppets?," and "Sheldon Adelson is looking to give big dollars to Rubio because he feels he can mold him into his perfect little puppet. I agree!" See Dave Levinthal, *Donald Trump Embraces Donors, Super PACs He Once Decried*, TIME, June 17, 2016, <http://time.com/4373124/donald-trump-donors-super-pacs/>.

In final presidential debate of the 2016 campaign, the Republican candidate said to the Democratic candidate, "I sat there watching ad after ad, false ad. All paid for by your friends on Wall Street that gave you so much money because they know you're going to protect them." Aaron Blake, *The Final Clinton-Trump Debate Transcript, Annotated*, WASHINGTON POST, Oct. 19, 2016, <https://www.washingtonpost.com/news/the-fix/wp/2016/10/19/the-final-trump-clinton-debate-transcript-annotated/>. In stump speeches, he referred to this opponent as "crooked Hillary." The Democratic candidate whom the Republican so described voiced similar concern about the corrupting effect of unlimited political contributions. She said, "We need a Supreme Court that will stand up and say no to *Citizens United*, a decision that has undermined the election system in our country." *Id.*

In a February 2016 Rasmussen Reports survey, 61% of likely voters agreed that most members of Congress were "willing to sell their vote for either cash or a campaign contribution." The same percentage called it likely that their own representative had done the same. Rasmussen Reports, *Congressional Performance: Voters Still Say Congress is For Sale* (Feb. 22, 2016), http://www.rasmussenreports.com/public_content/politics/mood_of_america/congressional_performance.

In a September 2015 Gallup survey, 75% of respondents agreed that corruption was widespread in government. That number had grown from 66% in 2009. Gallup, *75% in U.S.* See *Widespread Government Corruption* (Sept. 19, 2015), <http://www.gallup.com/poll/185759/widespread-government-corruption.aspx>.

In an April 2012 Pew Research Center survey, 54% of respondents described the United States government as "mostly corrupt." Pew Research Ctr. for the People & the Press, *Growing Gap in Favorable Views of Federal, State Governments* (Apr. 26, 2012), <http://www.people-press.org/files/legacy-pdf/4-26-12%20Govt%20Favorability.pdf>.

In a 2011 survey by the Center for Competitive Politics/Cooperative Congressional Election Study, 59.2% of respondents agreed that a contribution of \$5,000 or more could exert a corrupting influence on a candidate for Congress. See Jason M. Farrell & Nima Veisoh, *Public Perception and the “Appearance of Corruption” in Campaign Finance* 7-8, Ctr. for Competitive Politics (Dec. 16, 2011), <http://www.campaignfreedom.org/wp-content/uploads/2012/11/Public-Perception-and-the-Appearance-of-Corruption-in-Campaign-Finance-Report-Final.pdf>.

In an October 2012 Democracy Corps/Public Campaign Action Fund 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.” Stan Greenberg et al., *In Congressional Battleground, Voters Intensely Concerned About Money in Politics* 4, Democracy Corps (Oct. 1, 2012), <http://www.democracycorps.com/attachments/article/910/dcor.pcaf.memo.093012.v4.pdf>.

In an April 2012 Brennan Center for Justice survey focusing specifically on super PACs, 69% of respondents (74% of Republicans and 73% of Democrats) agreed that “new rules that let corporations, unions and people give unlimited money to Super PACs will lead to corruption.” Seventy-three percent of respondents (75% of Republicans and 78% of Democrats) agreed that “there would be less corruption if there were limits on how much could be given to Super PACs.” Sixty-eight percent of respondents (71% of Democrats and 71% of Republicans) agreed that “a company that spent \$100,000 to help elect a member of Congress could successfully pressure him or her to change a vote on a proposed law.” Brennan Ctr. for Justice, *National Survey: Super PACs, Corruption, and Democracy* (Apr. 24, 2012), <https://www.brennancenter.org/analysis/national-survey-super-pacs-corruption-and-democracy> (summary and appendix).

In a March 2012 ABC News/Washington Post survey, 69% of respondents stated that super PACs should be illegal. Damla Ergun, *Seven in 10 Would Send Super PACs Packing*, ABC News (Mar. 13, 2012), <http://abcnews.go.com/blogs/politics/2012/03/seven-in-10-would-send-super-pacs-packing/>; Wash. Post, *Washington Post-ABC News Poll* (Mar. 10, 2012), http://www.washingtonpost.com/wp-srv/politics/polls/postabcpoll_031012.html (question 33).

Conclusion

The Justice Department failed to seek Supreme Court review of the *SpeechNow* decision. Attorney General Eric Holder explained in a letter to Senator Harry Reid: “The court of appeals decision will affect only a small subset of federally regulated contributions.” <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/06-16-2010.pdf>. Perhaps the Justice Department now realizes how badly it blew it. The “small subset of federally regulated contributions” has become the monster that devoured election law.

If the Justice Department had sought review of the *SpeechNow* decision, the Supreme Court might have disapproved it in 2010. Now that the Court can see how greatly unlimited super PAC contributions have aggravated the appearance of corruption, it might be even more likely to disapprove *SpeechNow*. Moreover, with the death of Justice Scalia and the likelihood that a new justice soon will be on the bench, the Court may be more receptive to Congress’s

efforts to regulate money in politics than it was in 2010. The issue will not come before the Court at all, however, if public officials acquiesce in the *SpeechNow* decision and allow the continuing spread of super PACs into federal, state, and local elections.

I hope the City Council will approve the proposed ordinance limiting contributions to super PACs.

Sincerely yours,

A handwritten signature in cursive script, reading "Albert W. Alschuler", followed by a horizontal line extending to the right.

cc: Mayor Rick Kriseman

City Attorney Jacqueline Kovilaritch