STATEMENT OF ALBERT W. ALSCHULER, JULIUS KREEGER PROFESSOR EMERITUS, THE UNIVERSITY OF CHICAGO LAW SCHOOL, TO THE JOINT COMMITTEE ON ELECTION LAWS OF THE 190TH GENERAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

In Support Of H.2082 (An Act Relative to Political Contributions)

September 27, 2017

I write in support of H.2082, which would limit contributions to "independent expenditure groups" or "super PACs" to $5000 per calendar year. I focus particularly on concerns that this measure would be unconstitutional.

These concerns stem primarily from a decision of the United States Court of Appeals for the District of Columbia Circuit—*SpeechNow.org v. FEC*, 599 F.3d 686 (2010). In this decision, the D.C. Circuit held a federal statute resembling H.2082 unconstitutional. The Federal Election Commission acquiesced in the D.C. Circuit's decision, ceasing its enforcement of federal limits on contributions to super PACs. The Massachusetts Office of Campaign and Political Finance then followed the FEC's lead. In Interpretive Bulletin OCPF-IB-10-03 (Oct. 26, 2010), the Office wrote, "We agree with the FEC that . . . independent expenditure-only committees may raise unlimited contributions from individuals, political committees, and corporations."

The Massachusetts ruling and the D.C. Circuit decision that prompted it have created a strange system of campaign financing. Today, although a wealthy person may not donate $1001 dollars to a Massachusetts candidate, he may give $1 million to a super PAC whose only mission is to support this candidate. The state's limit on contributions to candidates no longer restricts how much people can give to electoral efforts; it simply requires them to send their contributions to less responsible and more destructive speakers. 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 cynicism about politics, a cynicism that runs especially deep among young people.

In the 2014 gubernatorial election in Massachusetts, super PACs favoring the Democratic candidate, Martha Coakley, spent $122,907 urging voters to support her while they spent $6,378,000 (51 times as much) opposing the Republican candidate, Charles Baker. Super PACs favoring Baker spent $3,861,749 urging voters to support him while they spent $7,140,466 (1.8 times as much) opposing Coakley. The amount spent by these super PACs dwarfed the amounts spent by the candidates themselves. Coakley's campaign reported expenditures of $3.9 million and $2 million in in-kind contributions, while Baker's reported expenditures of $5.6 million and $1.2 million in in-kind contributions. Massachusetts Office of Campaign and

Political Finance, Super PACs and Independent Groups Spent $20.4 Million in 2014, Mar. 27, 2015, http://files.ocpf.us/pdf/releases/2015IEPACstudy.pdf.

No sane legislator would vote in favor of this regime of campaign financing, and no legislator ever has. Massachusetts has this regime because the United States Court of Appeals for the District of Columbia Circuit held that the First Amendment requires it.

Yet the thought that the Constitution requires it looks strange too. The Supreme Court held 41 years ago that contributions to candidates can be limited to prevent corruption and the appearance of corruption. *Buckley v. Valeo*, 424 U.S. 1 (1976). According to the D.C. Circuit, however, legislatures may not forbid $10 million contributions to super PAC because these contributions do not create even an appearance of corruption.

I believe that *SpeechNow* was wrongly decided, and I believe the Supreme Court is likely to say so if a way can be found to present the issue to the Court. The Court has never had an opportunity to address the question.

The Justice Department did not seek review of *SpeechNow*. In a statement that belongs on a historic list of wrong predictions, Attorney General Holder explained that the decision would "affect only a small subset of federally regulated contributions." Letter from Attorney General Eric H. Holder, Jr. to Senate Majority Leader Harry Reid, July 10, 2010, https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/06-16-2010.pdf. Several federal courts of appeals have approved the *SpeechNow* decision, but these courts do not include the court whose jurisdiction includes Massachusetts, the U.S. Court of Appeals for the First Circuit. Like the First Circuit, the Supreme Judicial Court of Massachusetts has not addressed the issue.

In a forthcoming law review article, some co-authors and I explain at length why *SpeechNow* was wrongly decided. My co-authors are Laurence H. Tribe, the Carl M. Loeb University Professor and Professor of Constitutional Law at the Harvard Law School; Norman L. Eisen, a Senior Fellow at the Brookings Institution (formerly the ethics "czar" of the Obama White House); and Richard W. Painter, the S. Walter Richey Professor at the University of Minnesota Law School (formerly the ethics "czar" of the George W. Bush White House).

As noted in our article, not even the *SpeechNow* opinion maintained that the regime of campaign finance it created was desirable or defensible. Instead, the D.C. Circuit argued that a single sentence of the Supreme Court's decision in *Citizens United v. FEC*, 558 U.S. 310 (2010), compelled its result. The Court wrote in *Citizens United*, "[I]ndependent expenditures . . . do not give rise to corruption or the appearance of corruption," and the D.C. Circuit declared, "In light of the Court's holding as a matter of law that independent expenditures do not corrupt or create the appearance of corruption, contributions to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption."

Our article shows that, contrary to the D.C. Circuit's reasoning, contributions to super PACs can corrupt even when expenditures by these groups do not. Moreover, the statement that the D.C. Circuit took as its premise was dictum, a nonbinding aside. We note several indications that the Supreme Court did not mean this statement to be taken in the way the D.C. Circuit took it.

For 41 years, the Supreme Court has distinguished between contribution limits, which it usually upholds, and expenditure limits, which it invariably strikes down. Reviewing the five

distinctions drawn by the Court between contributions and expenditures, we show that contributions to super PACs cannot reasonably be distinguished from the contributions to candidates whose limitation the Court upheld.

The ultimate question posed by the Supreme Court's campaign-finance decisions is whether super PAC contributions create a sufficient appearance of corruption to justify their limitation. Our article describes opinion polls, the views of Washington insiders, and the statements of candidates of both parties in the 2016 Presidential election. It shows that *SpeechNow* has sharpened class divisions and helped to tear America apart.

I attach a copy of our article as an appendix to this statement.

Do not hesitate to contact me at 207-829-3963 or a-alschuler@law.northwestern.edu if I can be of further assistance. Enacting H.2082 could give the Supreme Court an opportunity to rule on an important, unsettled question of constitutional law. Resolving this question correctly would greatly improve our democracy.