NOT YET SCHEDULED FOR ORAL ARGUMENT

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' RESPONSE IN OPPOSITION TO FEC'S MOTION FOR SUMMARY AFFIRMANCE AND AFFIRMATIVE REQUEST TO HOLD FEC'S MOTION IN ABEYANCE

Ronald A. Fein
Counsel of record
John C. Bonifaz
Ben T. Clements
FREE SPEECH FOR PEOPLE
1320 Centre St #405
Newton, MA 02459
617-244-0234

Malcolm Seymour
Benjamin Lambiotte
Brad Deutsch (*of counsel*)
Andrew Goodman (*of counsel*)
GARVEY SCHUBERT BARER

Albert W. Alschuler (*of counsel*)
Richard Painter (*of counsel*)
Laurence H. Tribe (*of counsel*)
Anne Weismann

May 30, 2019

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INTRODUCTION

This is not an ordinary case. The goal of this litigation under the Federal Election Campaign Act (FECA) is to modify or reverse existing law on a question of exceptional importance: whether the First Amendment requires that political spending vehicles known as super PACs (technically, "independent expenditure-only committees") be allowed to accept unlimited contributions for the purpose of influencing federal elections. The plaintiffs below—Representative Ted Lieu (D-Cal.), the late Representative Walter Jones (R-N.C.), Senator Jeff Merkley (D-Or.), and three 2016 congressional candidates from both major political parties—brought this action on the eve of the 2016 election to establish that existing federal limits on contributions to super PACs are, in fact, constitutional and enforceable.

This Court considered this question before, more abstractly, in *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc). That decision—which birthed the modern super PAC and radically transformed American politics—rested entirely on a misapplication of a single sentence in *Citizens United* to the effect that "independent" expenditures cannot corrupt or even create an appearance of corruption. From this premise, *SpeechNow* purported to reason syllogistically that *contributions* to political committees that make only independent expenditures cannot cause corruption, or even the appearance of corruption. Believing that *SpeechNow* would affect "only a small subset of

federally regulated contributions," the government declined to seek Supreme Court review, and the nation entered the age of the super PAC.[1]

But *SpeechNow*'s reasoning was flawed. The supposed syllogism rested on an unstated and inaccurate premise: that when a political contributor gives money to a third party (i.e., a person or entity other than the politician), this contribution can *only* be part of a quid pro quo exchange if the third party then spends the money in a way that is *itself* corrupting. That premise, however, is simply wrong. As bribery law recognizes, politicians sometimes value large contributions made to favored third parties, regardless of how those third parties spend the money. And a donor to a super PAC can reach a corrupt agreement with a candidate without even involving the super PAC's employees in the conversation.

The *SpeechNow* decision's seemingly neat logical conclusion has been undermined by nearly a decade's actual experience with super PACs in real life—including substantial empirical evidence of the appearance of corruption, and two federal indictments (and one conviction) for bribery of a type that, according to *SpeechNow*, is legally impossible. With American elections increasingly dominated by super PACs, the question of whether six or seven-figure

[1] Letter from Atty. Gen. Eric Holder to Sen. Harry Reid, June 16, 2010 ("Holder Letter"), *available at* https://bit.ly/1MhojVD (last visited May 24, 2019).

contributions to these entities can pose any risk of corruption—or even the appearance of corruption—is ripe for revisiting.

Representative Lieu, Senator Merkley, and the other appellants brought this case for just that purpose. They acknowledged at every stage—before the Federal Election Commission (FEC) and again before the district court—that *SpeechNow* remains the law of this circuit. The FEC's effort to preempt en banc consideration of the merits is misguided. As this Court has noted in a similar context, even for a Supreme Court decision (which *SpeechNow* was not), "what may appear to be 'settled' Supreme Court constitutional law sometimes turns out to be otherwise," and "it is entirely possible to mount a non-frivolous argument against what might be considered 'settled' Supreme Court constitutional law." *Holmes v. FEC*, 823 F.3d 69, 73-74 (D.C. Cir. 2016). The Court's observation is even more true of a circuit decision—even an en banc decision. Indeed, *whenever* someone challenges an appellate precedent, they must initiate the challenge in an agency or lower court that is bound by the precedent. The challenge does not fail simply because the agency or lower court must follow this precedent. If that were so, unfortunate decisions could never be overruled.

Representative Lieu, Senator Merkley, and the other appellants seek to make their case for revisiting a historically fraught decision on one of the most critical questions affecting our democracy today. They challenged *SpeechNow*, not

because they expected the FEC or the district court to overrule it, but simply to preserve their claims for appeal. Contrary to the FEC's assertion, appellants do not argue that the FEC "was required to disregard a clear and binding holding on a constitutional issue."[2] They argue that the FEC's ruling was contrary to law because *SpeechNow* is contrary to law.

The FEC, however, seeks to cut appellants short before they have had an opportunity to make their case. This Court should reject the FEC's attempt to deny appellants their opportunity, and instead hold the FEC's motion in abeyance pending a decision on appellants' forthcoming petition for initial hearing en banc or, in the alternative, deny the motion.[3]

LEGAL AND FACTUAL BACKGROUND

I. The Federal Election Campaign Act

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). Among other limits, FECA limits contributions to candidates to $2,800 per contributor per election, and, at issue here, contributions to political committees (other than the authorized committees of candidates or political parties) to $5,000 per contributor per year.

[2] FEC Mot. for Summary Affirmance, ECF No. 1787446 (May 10, 2019), at 14.
[3] Appellants sought the FEC's consent for their requested affirmative relief to hold the FEC's motion in abeyance. By counsel, the FEC declined to consent.

See 52 U.S.C. §§ 30116(a)(1)(A), (C).[4] The FEC's regulations explain that this last contribution limit "appl[ies] to contributions made to political committees making independent expenditures." 11 C.F.R. § 110.1(n).

Under *Buckley* and its progeny, limits on campaign financing must serve 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 constitutional standards apply to limits on speech-like *expenditures by* candidates, parties, or groups than apply to limits on *contributions to* those who make such expenditures. *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 v. FEC*, 558 U.S. 310, 340 (2010) (citation and quotation marks omitted). But limits on contributions are not subject to strict scrutiny. They need only be "closely drawn" to a "sufficiently important interest." *McCutcheon*, 572 U.S. at 197 (quoting *Buckley*, 424 U.S. at 25) (quotation marks omitted). Limiting "*quid pro quo* corruption and its appearance" is a sufficiently important interest. *Id.*

Applying this framework, the Court has "routinely struck down limitations on independent expenditures by candidates, other individuals, and groups, while

[4] Under 52 U.S.C. § 30116(c), some of these limits are adjusted for inflation. *See* FEC, *Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold*, 84 Fed. Reg. 2504 (Feb. 7, 2019).

repeatedly upholding contribution limits." *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 441-42 (2001) (internal citations omitted).

II. *Citizens United*, *SpeechNow*, and the FEC's advisory opinion

In *Citizens United v. FEC*, 558 U.S. 310 (2010), the Supreme Court held that FECA's prohibition of independent expenditures by corporations violated the First Amendment. The Court explained that the First Amendment prohibits "restrictions distinguishing among different speakers, allowing speech by some but not by others." *Id.* at 340-41. As a result, the Court held, FECA's prohibition on independent expenditures by corporations constituted censorship of a "distrusted source," in violation of the First Amendment. *Id.* at 356.

The Court also noted that, under *Buckley*, the lack of spender-candidate coordination "undermines the value of the [independent] expenditure to the candidate," resulting in a "substantially diminished potential for abuse." *Id.* at 357 (quoting *Buckley*, 424 U.S. at 47) (quotation marks omitted). Given this diminished potential for abuse, the Court stated that "[t]he anticorruption interest is not sufficient to displace the speech here in question." *Id.* Finally, the Court added: "[W]e now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption." *Id.*

Shortly after the Supreme Court's decision in *Citizens United*, this Court decided *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc), a

challenge to the $5,000 limit on contributions to political committees in 52 U.S.C. § 30116(a)(1)(C). *SpeechNow* was argued six days after *Citizens United* but had been briefed earlier. The Federal Election Commission (FEC)'s brief relied heavily on pre-*Citizens United* arguments about gratitude, "'preferential access for donors and undue influence over officeholders.'" 599 F.3d at 694 (quoting FEC brief). The FEC did not request an opportunity for supplemental briefing.

The Court rejected the FEC's arguments and instead reasoned syllogistically from the statement in *Citizens United* that "'independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.'" *Id.* (quoting *Citizens United*, 558 U.S. at 357). 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. The Court has effectively held that there is no corrupting "quid" for which a candidate might in exchange offer a corrupt "quo."

Id. at 694-95. Consequently, *SpeechNow* held that the $5,000 limit on contributions to political committees violated the First Amendment.

The Department of Justice elected not to petition for certiorari, on the theory that *SpeechNow* would affect "only a small subset of federally regulated

contributions."[5] In rapid succession the Fifth, Seventh, Ninth, and Tenth Circuits followed *SpeechNow*,[6] and the Second Circuit did so provisionally.[7] The Supreme Court has not reviewed the question.

In July 2010, the FEC approved an advisory opinion allowing political committees to solicit and accept unlimited contributions if they promise to make only independent expenditures. *See* FEC Advisory Op. 2010-11, https://www.fec.gov/files/legal/aos/76050.pdf (July 22, 2010) (*Commonsense Ten*).[8] Under FECA, "any person who relies upon any provision or finding of an

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[5] Holder Letter, at 2.

[6] *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). The Fourth Circuit had already made a similar but less categorical ruling. *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274 (4th Cir. 2008).

[7] *See Vt. Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 140 (2d Cir. 2014) (expressly declining plaintiff's invitation to "follow [*SpeechNow* and related decisions] and hold that contribution limits may not be constitutionally applied to 'independent expenditure' entities," and instead assuming *arguendo* that "even if contribution limits would be unconstitutional as applied to independent-expenditure-only groups, [plaintiff] would not succeed here.").

[8] Four years later, a contribution to the committee that sought this opinion became part of the basis for a federal indictment for alleged bribery. *See infra* Part II.C.1.

advisory opinion . . . shall not, as a result of any such act, be subject to any sanction provided by this Act." 52 U.S.C. § 30108(c)(2).

III. Administrative proceedings before the FEC

In July 2016, Representative Ted Lieu (D-Cal.), the late Rep. Walter Jones (R-N.C.),[9] Senator Jeff Merkley (D-Or.), State Senator (ret). John Howe (a Republican congressional candidate from Minnesota), Zephyr Teachout (a Democratic congressional candidate from New York), and Michael Wager (a Democratic congressional candidate from Ohio) filed an administrative complaint before the FEC, naming as respondents ten super PACs that had received contributions from single donors ranging from $300,000 to $5,000,000—far in excess of the statutory $5,000 limit. (Add. 48-82).[10]

The complaint acknowledged this Court's decision in *SpeechNow* but argued that this decision was unsound. It noted substantial legal scholarship criticizing *SpeechNow*'s reasoning and offered empirical evidence that large contributions to super PACs were in fact resulting in incidents of corruption and the widespread appearance of corruption. Finally, the complaint acknowledged the FEC's *Commonsense Ten* advisory opinion and recognized that, under 52 U.S.C. § 30108(c)(2), an entity acting in compliance with an FEC advisory opinion is not

[9] Representative Jones died during the pendency of the litigation.
[10] For the convenience of the Court and to avoid duplication of materials, appellants cite the addendum to the FEC's motion for summary affirmance.

subject to "sanction." For this reason, the complaint did "not ask the FEC to seek civil penalties or other sanctions for past conduct, but rather only declaratory and/or injunctive relief against future acceptance of excessive contributions." Admin. Compl. ¶ 7 (Add. 51).

In May 2017, the FEC dismissed the complaint. It made no factual findings, but rather rested its decision entirely on legal determinations, principally *SpeechNow* and the *Commonsense Ten* advisory opinion. (Add. 109).

IV. Proceedings before the district court

Under FECA, any party who files an administrative complaint before the FEC and is "aggrieved by an order of the Commission dismissing a complaint" may challenge the dismissal in federal district court. 52 U.S.C. § 30109(a)(8)(A). In such a proceeding, "the court may declare that the dismissal of the complaint . . . is contrary to law." *Id.* § 30109(a)(8)(C).

Appellants filed such an action. Their complaint and briefing recognized that the district court could not overrule *SpeechNow* and explained that they offered arguments on the issue only to preserve them for appeal. Compl. ¶ 12 (Add. 29).

The district court granted the FEC's motion to dismiss. As the court observed, "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*." (Add. 15). Consequently, the court rejected the

FEC's argument that the agency was entitled to deference, agreeing with appellants that it should review the FEC's decision *de novo* because "courts need not defer to an agency's interpretation of judicial precedent." (Add. 14-15). The district court also rejected the FEC's argument that it was entitled to deference regarding its decision not to enforce, both because FECA provides a specific right to challenge such decisions, and because "the dismissal decision was not rooted in a judgment call such as exercising prosecutorial discretion or policy-based justifications, but rather an interpretation of judicial precedent." (Add. 16).

On the merits, the district court observed that, as appellants had acknowledged, "the D.C. Circuit's interpretation of *Citizens United* in *SpeechNow* binds this Court." (Add. 19). Consequently, the district court concluded that since the FEC followed *SpeechNow*, its decision was not contrary to law. (Add. 22-23). This timely appeal followed.

ARGUMENT

I. Standard of review

The district court reviews the FEC's action to determine whether it is "contrary to law" under 52 U.S.C. § 30109(a)(8)(C). As the district court concluded (Add. 14-17), since the FEC's decision in this case "was based exclusively on its interpretation of" judicial precedent, the "contrary to law" standard means *de novo* review, not deferential review for reasonableness. *See*

Akins v. FEC, 101 F.3d 731, 740 (D.C. Cir. 1996) (en banc) ("We are not obliged 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 administrative 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 Court reviews *de novo* the district court's dismissal of appellants' complaint under Rule 12(b)(6), and must "assume the truth of the complaint's factual allegations and all reasonable inferences to be drawn from them." *Niskey v. Kelly*, 859 F.3d 1, 5 (D.C. Cir. 2017), *cert. denied*, 138 S. Ct. 427 (2017).

On the FEC's motion for summary affirmance, this Court determines whether the FEC has met its "heavy burden of establishing that the merits of [its] case are so clear" that "no benefit will be gained from further briefing and argument." *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297-98 (D.C. Cir. 1987); *accord United States v. Fortner*, 455 F.3d 752, 754 (7th Cir. 2006) (court must be "convinced that [case] is so insubstantial" that full briefing is pointless).

On appellants' motion to hold the FEC's motion in abeyance, "[t]he courts of appeals have wide discretion to adopt and apply procedural rules

governing the management of litigation." *Joseph v. United States*, 135 S. Ct. 705 (2014) (statement of Kagan, J). (quotation marks omitted).

II. The Court should hold the FEC's motion in abeyance pending consideration of appellants' petition for initial hearing en banc.

A. Summary affirmance would lead to inefficient and duplicative processes.

The FEC's motion invites unnecessary duplication of effort. In the right circumstances, summary disposition can produce "a major savings of time, effort, and resources for the parties, counsel, and the Court."[11] But that is not the case here. As appellants advised the district court below, they intend to seek reconsideration of *SpeechNow*. (Add. 2, 17). Since a three-judge panel may not overrule circuit precedent,[12] appellants informed the Court at the outset of this appeal that they intend to submit a petition for an initial hearing en banc—a petition that has been delayed by the FEC's motion for summary affirmance.[13] The FEC's motion purportedly seeks to simplify the Court's adjudication by obtaining

[11] Handbook of Practice & Internal Proc. (D.C. Cir. Dec. 1, 2018), § VII.A, at 28.
[12] *LaShawn A. v. Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996).
[13] *See* Pltfs.'-Appellants' Cert. as to Parties, Rulings and Related Cases, ECF No. 1784640 (Apr. 25, 2019) ("Appellants' Certificate"), at 2-3; Statement of Issues to be Raised, ECF No. 1784641 (Apr. 25, 2019) ("Appellants' Statement"), at 2.

a summary ruling on the merits. But against the backdrop of appellants' forthcoming petition, the FEC's motion is counterproductive.

Appellants' forthcoming petition seeks to conserve time and resources by bypassing this panel's review of the merits and proceeding directly to en banc hearing. But summary disposition entails significant motion practice and requires examination of a dispute's underlying merits. *See Heartland Plymouth Court MI, LLC v. NLRB*, 838 F.3d 16, 27 n.9 (D.C. Cir. 2016) (because motion for summary disposition requires "full-fledged" merits briefing, "[i]t is not at all clear this motions practice would . . . . meaningfully reduce[] . . . attorney fees"). The potential efficiencies of summary disposition are nullified when the foreseeable consequence of such a grant, in this appeal, would be a petition for en banc rehearing. *See* Fed. R. App. P. 35(b). Allowing appellants to seek en banc hearing at the outset would conserve resources.

The apparent aim of the FEC's motion is to prevent earnest reevaluation of *SpeechNow* (the goal of this lawsuit from its inception). Far from streamlining proceedings, the FEC's motion simply interposes an additional round of motion

practice, truncating appellants' time to draft their petition while yielding no real benefit for the Court. *See* Fed. R. App. P. 35(c), 40(a)(1)(B).

B. Summary affirmance would prejudice the development of the law by limiting the participation of *amici curiae*.

Summary disposition would prejudice not just appellants, but the broader public interest and the development of the law, by substantially limiting *amici*'s opportunity to assist the Court during merits consideration. "Even when a party is very well represented, an amicus may provide important assistance to the court." *Neonatology Assocs., P.A. v. Comm'r of Internal Revenue*, 293 F.3d 128, 132 (3d Cir. 2002) (Alito, J.). Both parties have consented to the participation of multiple *amici curiae* who have, in accordance with Circuit Rule 29(b), notified the Court of their intent to submit briefs in this appeal.[14]

The forced conversion of appellants' petition for initial en banc hearing into one for rehearing would also restrict participation of *amici* in another way. The Court's rules prohibit *amici* briefs in support of petitions for en banc *rehearing*, but not in support of petitions for *initial* en banc hearing. *See* Fed. R. App. P. 29(b);

[14] Appellants and the FEC had already consented to the *amicus* participation of Senator Sheldon Whitehouse and of Citizens for Responsibility and Ethics in Washington before the FEC filed its motion for summary affirmance. *See* Appellants' Certificate, at 2; Def.-Appellee FEC's Certificate as to Parties, Rulings and Related Cases, ECF No. 1784712 (Apr. 25, 2019), at 1-2. Since then, Professor Christopher Robertson *et al.* filed a consented-to notice of intent to participate as *amici curiae*. *See* ECF No. 1788798 (May 21, 2019). Sen. Whitehouse has voiced his opposition to summary affirmance. *See* ECF No. 1790040 (May 29, 2019).

Al-Alwi v. Trump, 901 F.3d 294, 295 (D.C. Cir. 2018) (noting without objection an *amicus curiae* brief submitted in support of a petition for initial en banc hearing).

The FEC's motion does not identify any exigencies or special circumstances that would necessitate a provisional decision on the merits. This Court should hold the FEC's motion in abeyance pending the Court's decision on appellants' forthcoming petition for initial en banc hearing.

C. The appeal and petition have substantial merit because *SpeechNow*'s erroneous conclusion has been undermined by subsequent legal and factual developments.

The FEC cannot meet the "heavy burden" needed to establish that "no benefit" will be gained from considering the appeal in the ordinary course, *Taxpayers Watchdog,* 819 F.2d at 297-98. Appellants' claims are well suited for en banc review and speak to issues of profound national importance.

This section briefly summarizes some of the major reasons to overrule *SpeechNow*. A law review article by some of appellants' lawyers provides a more thorough exposition of these arguments. *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 (2018).

1. SpeechNow *rests on a flawed syllogism.*

The superficially plausible logic of the *SpeechNow* decision has a critical flaw: it implicitly relies on an unsupportable premise. The *SpeechNow* opinion

announced that a single sentence of *Citizens United* compelled its result. The Supreme Court wrote in *Citizens United* that "independent expenditures . . . do not give rise to corruption or the appearance of corruption," 558 U.S. at 357, and *SpeechNow* declared that "[i]n light of the Court's holding as a matter of law that independent expenditures do not corrupt or create the appearance of quid pro quo corruption, contributions to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption." 599 F.3d at 694.[15]

This analysis relies on the unstated and incorrect premise that the corrupting potential of a payment to a third party depends on how the third party spends the money. To the contrary, federal prosecutions for bribery (the most extreme form of quid pro quo corruption) often rest on payments to third parties, without regard to how (or whether) the third party spends the money. *See* 18 U.S.C. § 201(b)(2) (defining bribery to include situations in which 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 exchange for official action) (emphasis added); *United States v. Siegelman,* 640 F.3d 1159, 1165-66, 1169 n.13 (11th Cir. 2011) (affirming bribery conviction where the "quid" was a contribution to an issue-advocacy campaign while acknowledging that such contributions "do

[15] Although *SpeechNow* described the quoted statement from *Citizens United* as the Supreme Court's holding, this statement was dictum. *See* Alschuler *et al*., 86 Fordham L. Rev. at 2312-14.

not financially benefit the individual politician in the same way that a candidate-election campaign contribution does").

Just as a contribution to a favorite charity can be the "quid" in a bribe even though the charity's beneficial expenditures do not corrupt anyone, super PAC *contributions* create opportunities for corruption even if super PAC *expenditures* do not. In *United States v. Menendez*, the district court upheld a federal grand jury indictment for an alleged transaction that, according to *SpeechNow*, was legally impossible: a bribe where the "quid" included contributions to a super PAC. *See* 132 F. Supp. 3d 635, 639 (D.N.J. 2015).[16] The indictment did not suggest that the super PAC that received the contribution had acted improperly or that its *expenditures* corrupted the official. *See id*.[17]

Siegelman and *Menendez* cannot be reconciled with *SpeechNow*. Whatever rules may restrict super PACs' media strategists from talking to candidates, these cases illustrate how a *donor* can reach a corrupt agreement with a politician without even involving the super PAC in the conversation. "The super PAC need not know about the illegal exchange; the parties surely would prefer that it not." Michael D. Gilbert & Brian Barnes, *The Coordination Fallacy*, 43 Fla. St. U. L.

[16] These contributions are at issue here too. Compl. ¶¶ 50-51 (Add. 40).
[17] The district court later dismissed this charge for factual insufficiency, but explicitly reiterated that a super PAC contribution can be a bribery "quid." *See United States v. Menendez*, 291 F. Supp. 3d 606, 621-22 (D.N.J. 2018).

Rev. 399, 419 (2016). If it is possible to bribe a politician via a contribution to a super PAC, then the public has an interest in preventing such bribes.

2. **SpeechNow *is inconsistent with recent Supreme Court decisions.***

Two recent cases substantially undermine *SpeechNow*'s foundations.

First, in *McCutcheon*, the Supreme Court rejected *SpeechNow*'s interpretation of the line from *Citizens United* ("independent expenditures . . . do not give rise to corruption or the appearance of corruption") that grounded the entire *SpeechNow* syllogism. *SpeechNow* had interpreted that line to mean that independent expenditures have *zero* value to a candidate, rephrasing the statement as: "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. But in *McCutcheon*, the plurality opinion by Chief Justice Roberts explained that while independent expenditures may be worth *less*, they are not *worthless*. The Court reiterated *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" but then added, "*But probably not by 95 percent*." 572 U.S. at 214 (quotation marks omitted) (emphasis added).

Similarly, even assuming that a super PAC contribution is worth *99 percent* less than a contribution to a candidate, a $1 million super PAC contribution has the same potential for corruption or appearance of corruption as a $10,000 direct

contribution—nearly twice the legal limit. *See* Alschuler *et al*., 86 Fordham L. Rev. at 2324-25; Richard L. Hasen, *Super PAC Contributions, Corruption, and the Proxy War over Coordination,* 9 Duke J. Const. L. & Pub. Pol'y 1, 15 (2014) (stating that "the arguments for individual contribution limits applied to candidate campaign accounts and to single-candidate reliable Super PACs appear to be very close to each other and roughly similar in strength").

More recently, the Court affirmed a decision explicitly rejecting *SpeechNow*'s implicit premise that a contribution used to fund independent expenditures cannot corrupt. In *Republican Party of Louisiana v. FEC,* a three-judge district court in this circuit held that "soft money" (i.e., raised outside of the FECA system) contributions to a political party can corrupt even when the party's *independent expenditure* of those contributed funds does 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." *Republican Party of Louisiana v. FEC*, 219 F. Supp. 3d 86, 97 (D.D.C. 2016) (Srinivasan, J.) (emphases in the original), *aff'd*, 137 S.

Ct. 2178 (2017). Likewise, a contribution to a super PAC can corrupt even if the super PAC never spends it.

***3. New empirical evidence undermines* SpeechNow.**

New empirical evidence not available to the Court in 2010 demonstrates that candidates and donors to super PACs have ample ways to enter into corrupt agreements and wink-and-nod understandings. This evidence—which, on a motion to dismiss, is assumed to be true—includes both quantitative empirical research and interviews with candidates and staff. Compl. ¶¶ 18-24 (Add. 31-35).

Furthermore, new empirical evidence not available to the Court in 2010 demonstrates that large contributions to super PACs have created a pervasive *appearance* of corruption. Compl. ¶¶ 18, 19, 21 (Add. 31-33). As *Buckley* noted, "the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions" poses "almost equal concern as the danger of actual quid pro quo arrangements." 424 U.S. at 27; *Libertarian Nat'l Comm., Inc. v. FEC*, No. 18-5227, 2019 WL 2180336, at *6 (D.C. Cir. May 21, 2019) (en banc) (noting that unregulated contributions "inflict[] almost as much harm on public faith in

electoral integrity as corruption itself" since voters cannot "examine the intentions behind suspiciously sizable contributions").

4. The FEC's advisory opinion provides no basis for summary affirmance because it involves an issue of first impression not decided below.

The Court should not summarily affirm based on the *Commonsense Ten* advisory opinion because it involves a question of first impression that the district court did not decide. FECA provides that anyone who relies in good faith on an FEC advisory opinion "shall not . . . be subject to any sanction provided by this Act." 52 U.S.C § 30108(c)(2). Below, appellants argued that an advisory opinion acts as a shield only against a "sanction," not against a declaratory judgment. The FEC maintained, however, that a declaratory judgment is itself a "sanction." The district court expressly declined to decide this question. (Add. 22).

This Court's internal procedures emphasize that "[p]arties should avoid requesting summary disposition of issues of first impression for the Court." Handbook of Practice & Internal Proc., § VIII.G, at 36. That is even more important when there is no ruling below. The Court should not decide this contested question without full briefing and argument.

D. The case presents a question of exceptional importance because of widespread concern about corruption and super PACs in federal elections.

Appellants' forthcoming petition for initial en banc hearing will demonstrate that this issue presents "a question of exceptional importance" under Fed. R. App.

35(a)(2) because of its profound interest to the American public. In general, 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). As then-Judge Kavanaugh noted in 2012, when "[a] decision in either direction will have massive real-world consequences," it is "plainly one of exceptional importance." *See 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 the denial of rehearing en banc).

The question of whether Congress can limit the amount of contributions to super PACs is such a question. This is not a minor dispute over the technicalities of an obscure statute. It is a clash between a clear statutory command of Congress and a constitutional decision by this Court that, a broad bipartisan swath of the American public agrees, has wreaked havoc on our political system. Compl. ¶¶ 18-19 (Add. 31-32). Indeed, for cases arising in a different procedural context, Congress has determined in advance that all questions regarding FECA's constitutionality *must* be decided en banc, *Wagner v. FEC*, 717 F.3d 1007, 1008 (D.C. Cir. 2013) (per curiam) (construing 52 U.S.C. § 30110), even those that pose

an "argument against what might be considered 'settled' Supreme Court constitutional law," *Holmes v. FEC*, 823 F.3d 69, 74 (D.C. Cir. 2016).

Super PACs now threaten to supersede, and in some cases already have superseded, the regular campaign finance system. Since *SpeechNow*, and contrary to Attorney General Holder's prediction that "the court of appeals' decision will affect only a small subset of federally regulated contributions," the number of super PACs has exploded, as have the size of contributions to them, and their importance in federal races. *See* Compl. ¶¶ 14-15 (Add. 29-30). In the 2016 election cycle, contributions to federal super PACs substantially outstripped the total amount of money raised by political parties and by all federal candidates *combined*. *Id*. ¶ 15 (Add. 30). Yet by April 2016, over 40% of this money had come from just 50 funders and their families. *Id.* ¶ 14 (Add. 29-30).

The takeover of our campaign finance system by super PACs after *SpeechNow* has become an issue of major national importance. It was noted by both Democratic and Republican candidates in the 2016 presidential election, and became a major theme in both parties' primaries and in the general election. *Id.* Politicians of both major political parties—including figures as politically dissimilar as President Donald Trump and former President Jimmy Carter—have described the super PAC system arising from *SpeechNow* as corrupt, as have major donors from both parties. *See* Alschuler *et al.*, 86 Fordham L. Rev. at 2338-2342.

When major Republican and Democratic politicians and donors join a bipartisan majority of the public in concern over the damage that a judicial decision has caused to our political system, it is hard to say that the question is *not* of exceptional importance.

III. In the alternative, the Court should deny the FEC's motion because plenary briefing would elucidate and preserve issues for further appeal.

This is not a case where "no benefit" will be gained from briefing the case in full. Plenary briefing of the parties' arguments would assist in preserving appellants' positions for en banc or certiorari review, two possibilities noted in appellants' initial submissions.[18] As this Court noted in *Heartland Plymouth Court*, when a litigant mounts a non-frivolous challenge to existing law, summary disposition may interfere with preservation of arguments against that challenged precedent for higher court review. *See* 838 F.3d at 27 n.9.

Plenary briefing would also permit the panel, in a case of manifest national significance, to parse and develop the underlying issues in a manner that facilitates streamlined en banc or Supreme Court review. *See, e.g.*, *Nat'l Patent Development Corp. v. Smith & Nephew, Ltd.*, 865 F.2d 353, 357-50 (D.C. Cir. 1989) (concurrence by then-Judge Ruth Bader Ginsburg yielding to controlling case law, but voicing disagreement with that precedent and setting stage for en banc review),

[18] *See* Appellants' Certificate, pp. 2-3; Appellants' Statement, at 2.

vacated, 877 F.2d 1003 (D.C. Cir. 1989) (Judge Ginsburg writing for en banc court and vacating panel decision).

If nothing else, to the extent that the Court might decide that the statutory advisory opinion question—which, as noted above, has *not* been decided by any other panel of this Court—should be decided before the constitutional issue,[19] a panel decision (based on full briefing) on this question could help frame or narrow the issues for the en banc court later. *See, e.g., Church of Scientology v. IRS*, 792 F.2d 153, 155-56 (D.C. Cir. 1986) (noting that entire case was briefed and argued before the panel, and then supplementally briefed and argued to the en banc court on a single issue framed by panel).

Moreover, like briefing for an initial hearing en banc, plenary briefing would permit participation by the *amici curiae* who have signaled their intent to submit briefs in these proceedings, with the FEC's consent. Rare is the case that attracts

[19] *Cf. Pearson v. Callahan*, 555 U.S. 223, 236 (2009) (authorizing courts to decide constitutional issues first in qualified immunity cases to further development of the law); *Wagner*, 717 F.3d at 1008 (explaining Congress's interest in expeditiously resolving constitutional questions about FECA).

the interest of three different *amici*, including a United States Senator, in which the court would derive "no benefit" from briefing on the merits.

CONCLUSION

Appellants respectfully request that the FEC's motion be held in abeyance pending appellants' submission, and the Court's disposition, of a petition for initial en banc hearing. In the alternative, appellants ask that the Court deny the motion and decide appellants' petition and appeal in the ordinary course of proceedings.

Respectfully submitted,

/s/ Ronald A. Fein

Ronald A. Fein
John C. Bonifaz
Ben T. Clements
FREE SPEECH FOR PEOPLE
1320 Centre St. #405
Newton, MA 02459
(617) 244-0234
rfein@freespeechforpeople.org

Laurence H. Tribe (*of counsel*)
Hauser Hall 420
Harvard University*
Cambridge, MA 02138
(617) 495-1767

Albert W. Alschuler (*of counsel*)
220 Tuttle Road
Cumberland, ME 04021
(207) 829-3963

Malcolm Seymour
Andrew Goodman (*of counsel*)
GARVEY SCHUBERT BARER
100 Wall Street, 20th Floor
New York, NY 10005
(212) 431-8700
mseymour@gsblaw.com

Benjamin Lambiotte
Brad Deutsch (*of counsel*)
GARVEY SCHUBERT BARER
Flour Mill Building
1000 Potomac Street NW, Suite 200
Washington, DC 20007-3501
(202) 965-7880

Anne Weismann
6117 Durbin Road
Bethesda, MD 20817

Richard Painter (*of counsel*)
Mondale Hall, Office 318
University of Minnesota Law School*
229 19th Avenue South
Minneapolis, MN 55455
(612) 626-9707

* University affiliation noted for identification purposes only.

Attorneys for Appellants

Date: May 30, 2019

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 6,037 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: May 30, 2019

CERTIFICATE OF SERVICE

I hereby certify that on May 30, 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.

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Ronald A. Fein

Dated: May 30, 2019