

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

**BRIEF OF *AMICUS CURIAE* CITIZENS FOR RESPONSIBILITY AND
ETHICS IN WASHINGTON IN SUPPORT OF PLAINTIFFS-
APPELLANTS' PETITION FOR INITIAL HEARING EN BANC**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and 29, and D.C. Circuit Rule 26.1, Citizens for Responsibility and Ethics in Washington (“CREW”) submits its corporate disclosure statement.

(a) CREW has no parent company, and no publicly-held company has a ten percent or greater ownership interest in CREW.

(b) CREW is a non-profit, non-partisan corporation organized under section 501(c)(3) of the Internal Revenue Code. Through a combined approach of research, advocacy, public education, and litigation, CREW seeks to protect the rights of citizens to be informed about the activities of government officials and to ensure the integrity of those officials. Among its principal activities, CREW files complaints with the Federal Election Commission to ensure enforcement of federal campaign finance laws and to ensure its and voters’ access to information about campaign financing to which CREW and voters are legally entitled. CREW disseminates, through its website and other media, information it learns in the process of those complaints to the wider public.

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STATEMENT OF INTEREST¹

Citizens for Responsibility and Ethics in Washington (“CREW”) is a nonpartisan, nonprofit corporation organized under section 501(c)(3) of the Internal Revenue Code. Through a combined approach of research, advocacy, public education, and litigation, CREW seeks to combat corrupting influences in government and protect citizens’ right to be informed about the source of contributions used to fund campaign expenditures. Among its principal activities, CREW monitors FEC filings to ensure proper and complete disclosure as required by law and utilizes those filings to craft reports for public consumption. If CREW observes a violation of campaign finance laws, CREW files complaints with the FEC under 52 U.S.C. § 30109(a). When necessary, CREW seeks judicial review of complaints unlawfully dismissed by the FEC pursuant to 52 U.S.C. § 30109(a)(8)(A).

¹ Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), CREW affirms that no counsel for a party authored this brief in whole or in part, no party or counsel for a party contributed money that was intended to fund preparing or submitting this brief, and no person other than CREW or its counsel contributed money that was intended to fund the preparation or submission of this brief.

GLOSSARY

CREW	Citizens for Responsibility and Ethics in Washington
FEC	Federal Election Commission
FECA	Federal Election Campaign Act

ARGUMENT

Initial en banc review is warranted to reconsider *SpeechNow.Org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc). That decision rested on a false premise—that funds donated to supposedly independent organizations would be of so little value to candidates that they do not risk corruption—and a false promise—that such donated funds, though unlimited, would still be transparent. Time has proven both “fundamentally flawed.” *United States v. Burwell*, 690 F.3d 500, 504 (D.C. Cir. 2012); *see also Al Bahlul v. United States*, 767 F.3d 1, 11 n.7 (D.C. Cir. 2014) (“[O]verruling our precedent on plain-error review is within the authority of the en banc court.”). Moreover, because “this Court is bound to follow circuit precedent until it is overruled either by an en banc court or the Supreme Court,” *Sierra Club v. Jackson*, 648 F.3d 848, 854 (D.C. Cir. 2011), proceeding first before a panel here will simply waste judicial resources.

In addition, and contrary to the FEC’s argument, review here is of a pure question of law. The FECA’s “contrary to law” standard, in relevant part, calls on

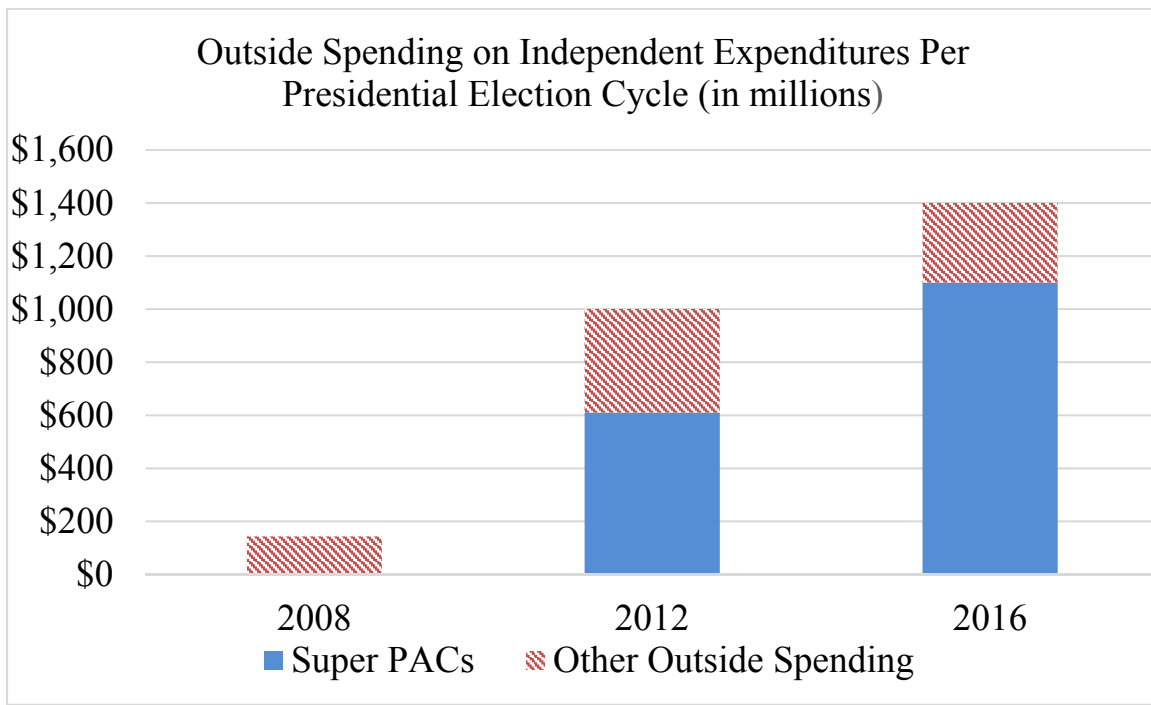
the Court to determine whether a dismissal is “a result of an impermissible interpretation” of law. *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986). Where deference to the FEC’s interpretation is not warranted under *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), as here, the permissibility of that interpretation is determined “*de novo*,” *Akins v. FEC*, 101 F.3d 731, 740 (D.C. Cir. 1996) (en banc), *vacated on other grounds*, 524 U.S. 11 (1998).

I. *SpeechNow* has Proven Fundamentally Flawed

In *SpeechNow*, this Court held the First Amendment barred long-standing limits on contributions to political committees, reasoning that “contributions to groups that make only independent expenditures”—ads “independent from candidates and uncoordinated with their campaigns”—“cannot corrupt or create the appearance of corruption.” *SpeechNow*, 599 F.3d at 693–94. Nonetheless, this Court promised the public that existing disclosure laws would reveal “who is speaking about a candidate and who is funding that speech” and “dete[r] and hel[p] expose violations of other campaign finance restrictions, like those barring contributions from foreign corporations and individuals.” *Id.* at 698. Those predications have proven fundamentally flawed, and appropriately named “super PACs” rose to exploit those flaws.

A. The Value in “Valueless” Speech

Though the decision initially impacted “only a small subset of federally regulated contributions,” Letter from Atty. Gen. Eric Holder to Sen. Harry Reid, June 16, 2010, <https://bit.ly/1MhojVD>, super PACs soon exploded to eclipse traditional election participants. The raw numbers are staggering:



OpenSecrets.org, Outside Spending, All Outside Groups, <https://bit.ly/1Qn72Gh>²;

Id., Super PACs, <https://bit.ly/2XbYaP0>. The FEC estimates that political

committees, which includes super PACs, spent more in the 2016 cycle than all

² All referenced materials last visited June 27, 2019 unless otherwise noted.

political parties, and spent more than all federal candidates. FEC, Spending, <https://bit.ly/2VZJUrn> (01/01/2015 – 12/31/2016).

The picture is even starker on the individual-race level. In 2018, outside groups spent more than candidates in 28 races. OpenSecrets.org, Races in Which Outside Spending Exceeds Candidate Spending, 2018 Election Cycle, <https://bit.ly/2YTzScR>. Of that, super PACs played the largest role. For example, in the 2018 Missouri Senate race, all candidates spent \$52 million but super PACs spent \$56.5 million, with \$40.4 million coming from just two super PACs. OpenSecrets.org, Missouri Senate Race, Outside Spending, <https://bit.ly/2HJaAZv>. Similarly, in the 2016 Pennsylvania Senate Race, all candidates spent \$52.8 million but super PACs spent \$72.7 million. OpenSecrets.org, Pennsylvania Senate Race, Outside Spending, <https://bit.ly/2JHOubX>.

Behind this spending are a few large super PACs fueled by a few big contributors. The fifteen biggest super PACs between 2010 and 2016 collected about two-thirds of all super PAC receipts. Paul S. Herrnson, The Impact of Organizational Characteristics on Super PAC Financing and Independent Expenditures, 6 (Nov. 3, 2017), <https://bit.ly/2IWn94l>. The biggest super PACs collected more than a hundred million dollars in 2018, and 70.6% of all super PAC receipts in that cycle came from just 100 donors. OpenSecrets.org, 2018 Outside

Spending, by Super PAC, <https://bit.ly/30SUXGv>; OpenSecrets.org, Super PACs: How Many Donors Give, <https://bit.ly/2XbwGcn>. For example, Thomas Steyer gave \$72.8 million in 2017-18 alone. FEC, Individual Contributions, <https://bit.ly/2WsInOt>. Miriam and Sheldon Adelson gave \$112.3 million in the same two years to just six super PACs. FEC, Individual Contributions, <https://bit.ly/2HH9M7d>.

Predictably, these vast sums of money attracted candidates' attention, who turned super PACs into "trusted" campaign surrogates. Trump Campaign Statement on Dishonest Fundraising Groups (May 7, 2019), <https://bit.ly/2VRRWm1>. "[C]andidate's top aides ... now leav[e] campaign teams to work for supportive super PACs." Brent Ferguson, Super PACs: Gobbling Up Democracy, Brennan Center for Justice (June 23, 2015), <https://bit.ly/2X6dg8F>. For example, recently, "[a] group of former Trump aides designed the super PAC America First Action." Ashley Balcerzak, Inside Donald Trump's army of super PACS and MAGA nonprofits, The Center for Public Integrity (Feb. 18, 2019), <https://bit.ly/2WujK43>. The managers of the super PAC supporting President Obama's bid were also close to him. Albert W. Alschuler, Limiting Political Contributions After *McCutcheon*, *Citizens United*, and *SpeechNow*, 67 FLA. L. REV. 389, 394 & n.23 (2016). Two of the largest super PACs were set up by

congressional aides to the Republican and Democratic leadership, respectively.

Paul Blumenthal and Ryan Grim, The Inside Story of How Citizens United Has Changed Washington Lawmaking, HuffPost (Dec. 6, 2017),

<https://bit.ly/2FB5Raw>. Campaigns outsource their work to these trusted groups,

because “that’s where the real money is.” Trip Gabriel, ‘Super PACs’ Take on New Role, Organizing Voters, New York Times (July 7, 2015),

<https://nyti.ms/30NnZqO>; *see also* Nick Corasaniti, At Many Carly Fiorina Events, Her ‘Super PAC’ Covers the Costs, New York Times (Oct. 21, 2015),

<https://nyti.ms/2HFP7Ao>; Peter Overby, Arnie Seipel, and Domenico Montanaro, As Bush Campaign Goes Down, the Knives Come Out, NPR (Feb. 23, 2016),

<https://n.pr/2KaI7gH>.

Candidates demonstrate the value of super PAC funds by fundraising for them. Ian Vandewalker, The Rise of Shadow Parties, Brennan Center for Justice (Oct. 22, 2018), <https://bit.ly/30IqScm>. Indeed, President Trump’s campaign recently announced that a supposedly independent super PAC was the “approved outside non-campaign group” because it was “run by allies of the President and is a trusted supporter of President Trump’s policies and agendas.” Trump Campaign Statement.

It is perhaps then no surprise that, despite *SpeechNow*'s assurances that these funds could never give rise to quid-pro-quo corruption, 599 F.3d at 694–95, super PAC contributions have done just that. For example, a foreign national was convicted for funding super PACs “in an effort to buy influence” with elected officials. U.S. Attorney’s Office, Southern District of California, Mexican Businessman Jose Susumo Azano Matsura Sentenced for Trying to Buy Himself A Mayor (Oct. 27, 2017), <https://bit.ly/2WxmHkk>; Third Superseding Indictment ¶¶ 11, 28(g), 29(i), (j), (t), (v), 34(a), (d), *United States v. Matsura*, No. 14-cr-0388-MMA (S.D. Cal. July 8, 2016). Recently, individuals in North Carolina were indicted in a bribery scheme involving contributions “through an independent expenditure committee, [given] in exchange for specific official action favorable to” the contributor. Indictment ¶¶ 14, 16(a), 38, 53–61, 65, 86, *United States v. Lindberg*, No. 5:19-CR-22-FDW-DSC (W.D.N.C. May 18, 2019). Other examples abound. *See, e.g.*, Robert Maguire, A Classic Case of Promised Payback, OpenSecrets.org (Mar. 19, 2014), <https://bit.ly/2xfrfhe>.

Given the “notoriou[s] difficult[y]” in “ferret[ing] out” corrupting transactions, *Libertarian Nat’l Comm., Inc. v. FEC*, 924 F.3d 533, 544 (D.C. Cir. 2019), and the incredibly high standard of proof courts have imposed on contribution-bribery schemes, *see United States v. Menendez*, 291 F. Supp. 3d 606,

624 (D.N.J. 2018), there are almost certainly many more super PAC bribery schemes that go unindicted. Moreover, since “bribery laws ‘deal with only the most blatant and specific attempts of those with money to influence governmental action,’” they simply do not encompass the full scope of transactions Congress may regulate consistent with the First Amendment. *Libertarian Nat’l Comm.*, 924 F.3d at 543 (quoting *Buckley v. Valeo*, 424 U.S. 1, 28 (1976)).

SpeechNow relied on the premise that unlimited contributions to nominally independent organizations present “no corrupting ‘quid’ for which a candidate might in exchange offer a corrupt ‘quo.’” 599 F.3d at 694–95. Time has proven this assumption false.

B. The False Promise of Transparency

In addition to a flawed premise, *SpeechNow* also relied on a false promise: that the unlimited contributions would still be transparent, allowing public scrutiny to deter and bring to light any corrupting influence of money that arose. 599 F.3d at 696. Even at the time, the promise was overly optimistic. See Lawrence Lessig, *Republic Lost* (Aug. 23, 2011), <https://bit.ly/2Lpw4wv> (nonreportable threat of contributions to opposing groups just as corrupting as completed contributions to supporting groups). But here too, experience has proven the Court wrong as *SpeechNow*’s promise of unlimited donations has motivated donors to game the

FEC's reporting deadlines and engage in dead-end disclosure to deny information to the public.

First, the FEC's reporting deadlines are easily gamed. To avoid disclosure, contributors can delay contributing until after October 18—the last quarterly reporting deadline before an election. This method was used in the 2018 Alabama special Senate election to shield the sources behind one super PAC. Ashley Balcerzak, How Democrats use 'dark money' to win elections, despite the rhetoric, The Center for Public Integrity (Feb. 20, 2018), <https://bit.ly/2t6hwaY>. Between October 18 and November 2, 2018, 44 political committees were formed—groups who would not report any of their contributors until *after* the election. Ashley Balcerzak, Pop-Up PACS are Spending Big in Election 2018's Final Days—But They're Hiding Their Bankrollers, The Center for Public Integrity (Nov. 2, 2018), <https://bit.ly/2MeZKyr>. Contribution limits would complicate this strategy—donors couldn't withhold a single massive contribution until the last minute—but *SpeechNow* made it easy.

Second, super PAC contributors can take advantage of “dead-end disclosure,” where super PAC contributions are routed through organizations that are not themselves subject to disclosure (so the public cannot follow the flow of money past the dark money source). Matt Corley and David Crockett, Dead End

Disclosure 2014: The Dark End of the Street, CREW (Dec. 15, 2014),

<https://bit.ly/2QudxQk>. *SpeechNow* permits unlimited sums to flow through these dark-money organizations to super PACS, preventing voters from ever learning “who is funding that [super PAC’s] speech.” *SpeechNow*, 599 F.3d at 698.

In 2018, half of super PAC spending—\$395 million—came from groups that accept untraceable funds, 2018 Outside Spending, by Super PAC (by Disclosure of Group), and untraceable super PACs donations more than quadrupled between 2014 and 2016. Committee for Economic Development, The Landscape of Campaign Contributions: Campaign Finance after *Citizens United*, 17 (July 2017), <https://bit.ly/2tkkKqQ>. For example, one super PAC accepted \$31 million in the 2017-18 cycle from a single dark money group, and another accepted \$18.6 million from another dark money group. FEC, Receipts, <https://bit.ly/31Oa8kt>; FEC, American Action Network, Inc., <https://bit.ly/2HJcrgV> (reporting “0” contributions); FEC, Receipts, <https://bit.ly/2ZD2tUm>; FEC, One Nation, <https://bit.ly/2wmpiPA> (reporting “0” contributions).

Dead-end disclosure also provides an avenue for illicit funds to enter our elections. For example, the Department of Justice recently indicted a foreign national for illegally contributing more than \$1 million to a super PAC by, in part, using a dark money LLC as a conduit. Indictment, *United States v. Michel*, No. 19-

cv-00148-CKK (D.D.C. May 2, 2019), <https://bit.ly/2YRfCbZ>; *see also* Michael Beckel, Rapper-Backed Group Illustrates Blind Spot in Political Transparency, The Center for Public Integrity (Apr. 14, 2016), <https://bit.ly/2W8kjBk>. The availability of infinite contributions from dead-end disclosure entities deprives the public of “essential means of gathering the data necessary to detect violations” of campaign finance laws, like those restricting the use of money from foreign nationals. *Buckley*, 424 U.S. at 68.

The ability to funnel unlimited, untraceable money into super PACs makes it ever-easier to keep the sources of election spending hidden. But, “[w]hile the public [is] not ... fully informed” about super PAC contributors, “candidates and officeholders” most assuredly are, *McConnell v. FEC*, 540 U.S. 93, 128–29 (2003), so they know who to thank for the “corrupting ‘quid,’” *SpeechNow*, 599 F.3d at 694.

* * *

SpeechNow is fundamentally flawed. Its premise—that contributions to super PACs present no corrupting quid—has been proven demonstrably false, despite the “notoriou[s] difficul[ty]” in “ferret[ing] out” corrupting transactions. *Libertarian Nat’l Comm.*, 924 F.3d at 544. The promise the Court made—that transparency would inform voters about the source of super PACs’ funds and help

deter corruption—has similarly proven false. This Court should reconsider its conclusion in *SpeechNow*, and en banc review presents an appropriate vehicle.

II. Review Here is *De Novo*

The FEC’s dismissal below is reversible if it was “contrary to law.” 52 U.S.C. § 30109(a)(8)(C). It is contrary to law if it was grounded on an “impermissible interpretation” of law. *Orloski*, 795 F.2d at 161.³ As this Court held en banc, where *Chevron* deference is unavailable, as here,⁴ that review is *de novo*. *Akins*, 101 F.3d at 740.⁵

In *Akins*, the en banc Court considered a similar challenge to an FEC dismissal brought under 52 U.S.C. § 30109(a)(8)(C). Rather than ask whether the FEC “reasonably adhered to precedent,” FEC Mot. for Summ. Aff. 16, the Court found the FEC’s “plea for deference” was “doctrinally misconceived” and held that

³ Contrary to the FEC’s misleading cite, FEC Mot. for Summ. Aff. 15, *Hagelin* states only *Orloski*’s second analytical step is “highly deferential”: whether “the FEC’s dismissal of the complaint, under a permissible interpretation of the statute, was arbitrary or capricious, or an abuse of discretion.” *Orloski*, 795 F.2d at 161; see *Hagelin v. FEC*, 411 F.3d 237, 242 (D.C. Cir. 2005) (“Highly deferential, the arbitrary and capricious standard presumes the validity of agency action.”).

⁴ See *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1341 (D.C. Cir. 2002); *CREW v. FEC*, 209 F. Supp. 3d 77, 87 (D.D.C. 2016) (collecting cases).

⁵ Though the en banc decision in *Akins* was vacated by the Supreme Court, the Court did not fault the D.C. Circuit’s analysis of the “contrary to law” standard. *Akins*, 524 U.S. at 27. Rather, it similarly rejected the FEC’s pleas for deference, *id.* at 26, stating the FEC’s interpretations of law would merely “aid the Court in reaching a more informed conclusion” of its own about the law, *id.* at 29.

courts “must decide *de novo*” whether the FEC’s interpretation was permissible. *Id.* at 740–41. Indeed, it recognized that deference to the FEC was not justified under *Chevron* or “any other principle.” *Id.* at 740; *see also CREW v. FEC*, 316 F. Supp. 3d 349, 417 (D.D.C. 2018) (finding dismissal “contrary to law” where Commission relied on erroneous interpretation of law); *CREW*, 209 F. Supp. at 86–87 (noting FECA’s “contrary to law” standard “involves a straightforward application of the familiar two-step framework outlined in *Chevron*”; then reviewing legal interpretation *de novo*).

The FEC attempts to supplant this analysis with a framework—“reasonabl[e] ... adher[ence] to clearly established law,” *Tangwall v. Stuckey*, 135 F.3d 510, 516 (7th Cir. 1998)—appropriate only in qualified immunity contexts. That inquiry has no place here, however, as “neither an agency nor a named government official can avoid judicial scrutiny by claiming that the particular action under review did not violate” clearly established law. *Meredith v. Fed. Mine Safety & Health Review Comm’n*, 177 F.3d 1042, 1049 (D.C. Cir. 1999).

Accordingly, the question before the Court is whether *SpeechNow*, and the FEC’s reliance on it, reflects a permissible interpretation of the First Amendment. For the reasons stated above, this Court should consider that question en banc and *de novo* and decide that it does not.

Dated: June 28, 2019

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Dated: June 28, 2019

/s/ Stuart McPhail

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I hereby certify that on June 28, 2019, I electronically filed the foregoing document with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system, thereby serving all persons required to be served.

/s/ Stuart McPhail
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