

No. 19–1398

IN THE
Supreme Court of the United States

REPRESENTATIVE TED LIEU, ET AL.,
PETITIONERS

v.

FEDERAL ELECTION COMMISSION,
RESPONDENT.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF UNITED STATES SENATORS AS
AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

Amici curiae are United States Senators Sheldon Whitehouse of Rhode Island, Patrick Leahy of Vermont, Tom Udall of New Mexico, Richard Blumenthal of Connecticut, Mazie Hirono of Hawaii and Chris Van Hollen of Maryland.¹ *Amici* are popularly elected Senators. We have seen the damage inflicted on our democracy by a regime of unlimited contributions to organizations that engage in so-called “independent” political spending. Accordingly, *amici* respectfully support Petitioners’ request that the Court grant the petition for a writ of *certiorari* in this case.

SUMMARY OF ARGUMENT

Amici have participated in dozens of federal campaigns and legislative efforts, both before and after *SpeechNow*,² and bear witness to the corrupting effects of Super PACs and their big donors in this country’s political and legislative spheres. Our long-standing dispute with this Court’s

¹ *Amici* affirm that no counsel for a party to these proceedings authored this brief in whole or in part, and that no person other than *amici* or their counsel made a monetary contribution to its preparation or submission. The parties received timely notice of filing, and consents have been provided to *amici*. See Sup. Ct. R. 37.

² *SpeechNow.org v. Fed. Election Comm’n*, 599 F.3d 686 (D.C. Cir. 2010).

decision in *Citizens United v. FEC*³ is well documented, but we do not ask the Court in this case to overturn or reconsider *Citizens United*. At issue here is the D.C. Circuit’s incorrect application of *Citizens United*.

An independent-expenditure-only organization (hereinafter “independent” organization or group) spending unlimited amounts in an election is a very different thing from such a group accepting unlimited donations. By every practical measure, the latter activity will increase the risk of corruption and further the appearance of *quid pro quo* corruption. In this case, the Court of Appeals applied its own incorrect precedent from *SpeechNow* to allow unlimited contributions to Super PACs. This Court should reject *SpeechNow*’s conclusion that unlimited contributions to “independent” organizations do not corrupt or create the appearance of corruption. That conclusion is neither required by *Citizens United* nor consistent with the facts on the ground in our politics.

Permitting unlimited contributions to “independent” entities allows the appearance of *quid pro quo* corruption—and actual corruption—to flourish, demoralizing voters and concentrating power in the hands of a startlingly tiny number of very wealthy individuals. The Super PAC shadow campaign finance system has overwhelmed

³ 558 U.S. 310 (2010).

candidates and political parties, and allows special interests to conceal their identities from voters who seek to understand what is happening in the public sphere. The notion that officeholders or candidates will not learn the identity of their enormous donors is fanciful and without foundation. And the ability to make unlimited contributions confers the ability to *threaten or promise* unlimited contributions, allowing mega-donors a dangerous means of influence undetectable to the public eye.

This is all a rich recipe for corruption. Massive donations inherently tend toward corruption. Covert massive donations—known only to the donor, the candidate, and those facilitating the transaction—exacerbate the risk of corruption. And private threats and promises of massive donations defy the predicates of “transparency” and “independence” that *Citizens United* applied to expenditures, presumed to protect against corruption.

These dangers are irremediable. The rot must be cut at its source. Given the stakes often at play in Congress, there is no natural upper bound on political contributions by special interests and no limit to the force of their corrupting influence. Hundred-million-dollar influence operations can yield hundred-billion-dollar political returns. It should be no surprise that there is a public crisis of confidence in our democracy. The disenchanting voters are not wrong.

Citizens United does not support, much less compel, the result below. *SpeechNow* defeats the transparency and independence that the majority in *Citizens United* presumed to be safeguards against corruption. *SpeechNow* was wrongly decided; it runs contrary to our daily experience of human and political nature; and its consequences have befouled our democracy. This Court should reassert its jurisprudence allowing sensible limits on contributions and protecting the health of America's body politic.

ARGUMENT

I. *SpeechNow* Wrongly Created a Shadow Campaign Finance System in Which Corruption, or the Appearance Thereof, Is Endemic and Inevitable.

The hallmarks of the *SpeechNow* shadow campaign finance system are these: contributions so large that they dominate an election; concentration of power in the hands of a few mega-donors; and covert political operations that deny citizens basic civic information.

Start with size. "Independent" groups outraising even candidates themselves is becoming increasingly common. During the 2020 election cycle, with the election still more than three months away,

Super PACs have already raised \$1.06 billion.⁴ In contrast, the combined amount raised directly by Donald Trump and Joe Biden is only \$630 million.⁵ “Independent” groups outspent candidates in 126 congressional races since *SpeechNow*, including 28 races in 2018.⁶ At one point in the 2016 presidential election cycle, an astounding two out of every three dollars had flowed to an “independent” group rather than to candidates’ campaigns.⁷ Once an aberration, this form of political influence is increasingly the new normal—indeed it is now the dominant presence in many elections.

On to concentration: just ten donors account for over \$1 billion, or one-fifth, of all Super PAC

⁴ *Super PACs*, OpenSecrets, <https://www.opensecrets.org/pacs/superpacs.php> (last visited July 21, 2020).

⁵ Amisa Ratliff, *The Outside Money Race: How much are outside groups spending in the 2020 presidential race?*, Issue One (July 20, 2020), <https://www.issueone.org/10-key-numbers-from-the-latest-presidential-campaign-finance-filings/>.

⁶ *Races in Which Outside Spending Exceeds Candidate Spending, 2018 Election Cycle*, OpenSecrets, <https://www.opensecrets.org/outsidespending/outvscand.php?cycle=2018>. Note that these figures include spending on primary and general elections (last visited July 17, 2020).

⁷ Idrees Kahloon, *Does Money Matter?*, Harvard Mag. (Aug. 2016), <https://harvardmagazine.com/2016/07/does-money-matter>.

contributions from 2010 through 2019.⁸ Unlimited Super PAC donations allow individuals with sufficient wealth to exert outsized influence, not just on election dynamics, but also on policy. Billionaire Sheldon Adelson contributed \$20 million to Super PACs supporting President Trump, which apparently secured him a personal meeting days before Trump took office, where Adelson could lobby on a major policy goal (moving the U.S. embassy in Israel), which Trump effectuated during his first year in office.⁹ The likelihood of those facts being unconnected is nil in our estimation; at the very least, it creates an appearance of corruption.¹⁰

⁸ Karl Evers-Hillstrom et al., *More money, less transparency: A decade under Citizens United*, OpenSecrets (Jan. 14, 2020), <https://www.opensecrets.org/news/reports/a-decade-under-citizens-united>.

⁹ Mark Landler, *For Trump, an Embassy in Jerusalem Is a Political Decision, Not a Diplomatic One*, N.Y. Times (Dec. 6, 2017), <https://www.nytimes.com/2017/12/06/us/politics/trump-embassy-jerusalem-israel.html>.

¹⁰ *See, e.g.*, a similar effort by Adelson involving congressional leadership. In the run-up to the 2018 midterms, then-House Speaker Paul Ryan met with Adelson, from whom the GOP sought a \$30 million contribution into a Super PAC aimed at holding a GOP House majority. While Ryan could not officially solicit the contribution, after the meeting he “left the room” as former Senator Norm Coleman “made the ask and secured the \$30 million contribution.” Jake Sherman & Alex Isenstadt, *Sheldon Adelson kicks in \$30M to stop Democratic House takeover*, Politico (May 10, 2018), <https://www.politico.com/story/2018/05/10/adelson-republicans->

And last, secrecy. Mega-donors can be the dominant force in an election without voters knowing. While Super PACs are required to disclose their donors, they do so in FEC filings that can be made weeks or months after the advertising they funded has run, even after the election is over.¹¹ Belated transparency is little better than no transparency. Worse, contributions are often shuttled through non-profits, shell corporations, donor-advised trusts, LLCs and other screening entities to hide the true donors from the public.¹² Back-channel information flowing between donors and candidates is impossible to regulate. A system where only the donor and the candidate know the origin of large Super PAC contributions is a highway to corruption.

midterms-579436. This Court has long recognized that this type of “prearrangement and coordination” invites a “danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate,” *Citizens United*, 558 U.S. at 346 (2010) (quoting *Buckley v. Valeo*, 424 U.S. 1. 47 (1976)).

¹¹ See, e.g., *infra* notes 38, 39.

¹² See, e.g., Bill Allison et al., *Trump's Mysterious Super-PAC Donor Accused of Breaking Law*, Bloomberg (July 25, 2018), <https://www.bloomberg.com/news/articles/2018-07-26/pro-trump-super-pac-got-illegal-contributions-complaint-alleges>; *Doe, 1 v. Fed. Election Comm'n*, 920 F.3d 866, 873 (D.C. Cir. 2019), *cert. denied*, 206 L. Ed. 2d 462 (Mar. 23, 2020) (affirming FEC authority to disclose identities of donors who illegally funneled a contribution through a nonprofit).

The corruption and appearance of corruption created by Super PACs is exacerbated by so-called “single candidate” Super PACs. A contribution to a Super PAC that solely supports a single candidate in a single election has the same practical effect as a contribution to that candidate for that election—but the former is unlimited under *SpeechNow*, while the latter is limited to \$2,800.¹³ Most presidential candidates in the 2020 campaign have had a single-candidate Super PAC.¹⁴ Many congressional elections do as well.¹⁵ These single-candidate Super PACs have received eye-popping individual contributions, such as Texas petroleum billionaires Farris and Jo Ann Wilkes’s \$10 million to a Super PAC supporting Senator Ted Cruz’s presidential campaign;¹⁶ billionaire car dealer Norman Braman’s

¹³ See Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 84 Fed. Reg. 2504, 2506 (Feb. 9, 2019).

¹⁴ See, e.g., Kate Ackley, *Super PACs after 10 years: Often maligned but heavily used*, Roll Call (Jan. 16, 2020), <https://www.rollcall.com/2020/01/16/super-pacs-after-10-years-often-maligned-but-heavily-used/>; Maggie Severns, *Warren, Biden and Buttigieg dangerously close to going broke*, Politico (Feb. 21, 2020), <https://www.politico.com/news/2020/02/21/fec-bernie-2020-funding-116558>.

¹⁵ See, e.g., Ackley, *supra* note 14.

¹⁶ *Wilks, Farris C. & Jo Ann: Donor Detail*, OpenSecrets, https://www.opensecrets.org/outsidespending/donor_detail.php?cycle=2016&id=U0000004569&type=I&super=N&name=Wilks%2C+Farris+C.+%26+Jo+Ann_ (last visited July 17, 2020).

\$7 million to a Super PAC supporting Senator Marco Rubio’s presidential campaign;¹⁷ RAI Service Company (a subsidiary of Reynolds Tobacco)’s \$1.1 million to a Super PAC supporting Senator Richard Burr’s campaign;¹⁸ and Florida builder Thomas Murphy Jr.’s \$1.5 million to two Super PACs supporting the Senate campaign of his son, Representative Patrick Murphy.¹⁹ Such massive donations foster an appearance of *quid pro quo* corruption.²⁰

The 2017 federal tax cuts bill exemplifies the appearance-of-corruption problem caused by unlimited contributions. Mega-donor Doug Deason told lawmakers attending a weekend retreat hosted

¹⁷ *Conservative Solutions PAC*, OpenSecrets, https://www.opensecrets.org/outsidespending/contrib_all.php?cmte=C00541292&type=A&cycle=2016 (last visited July 17, 2020).

¹⁸ *Grow NC Strong*, OpenSecrets, https://www.opensecrets.org/outsidespending/contrib_all.php?cmte=C00545152&type=A&cycle=2016 (last visited July 17, 2020).

¹⁹ Kristen M. Clark, *Patrick Murphy’s dad dumps \$1M into Senate Democrats’ super PAC*, Tampa Bay Times (Aug. 20, 2016), <https://www.tampabay.com/patrick-murphys-dad-dumps-1m-into-senate-democrats-super-pac/2290408/>.

²⁰ Truth be told, the very existence of single-candidate Super PACs, and worse yet single-*donor* single-candidate Super PACs, mocks the *Citizens United* predicate of “independence.”

by big donors²¹ that “the Dallas piggy bank” was closed until they repealed Obamacare and “[got] tax reform passed.”²² A few months later, Representative Chris Collins told reporters in relation to the tax bill, “My donors are basically saying: ‘Get it done or don’t ever call me again.’”²³ An analysis found that 144 donors gave a minimum of \$50,000 each—and an unlimited maximum—to Republican and conservative PACs during the sixty days around the passage of the 2017 tax cuts.²⁴ For 87 of those donors, their contributions were a significant aberration from their usual contribution patterns.²⁵ Such contributions obviously lend the appearance of *quid pro quo* corruption, given the personal financial benefit big donors reaped from the bill.

Defending the political system from actual or apparent corruption is one high and proper purpose

²¹ Pause and reflect for a moment just on that: lawmakers attending a weekend retreat hosted by big donors.

²² Allan Holmes et al., *Did Billionaires Pay Off Republicans for Passing the Trump Tax Bill?*, Ctr. for Pub. Integrity (Feb. 7, 2019), <https://publicintegrity.org/inequality-poverty-opportunity/taxes/trumps-tax-cuts/did-billionaires-pay-off-republicans-for-passing-the-trump-tax-bill/>.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

of campaign finance limits. A regime of unrestricted contributions, particularly through vehicles like Super PACs that were invented and deployed for purposes of influence, is improper *per se* and spawns a multitude of other improprieties. The Court should take this occasion to reassert its decisions protecting America's democracy against powerful forces of corrupting influence.²⁶

A. "Independent" Contributions Have a Significant and Unhealthy Influence over the Legislative Process.

During our years in the Senate, we have seen firsthand how unlimited contributions increased the power of Super PACs, obscured the hands of the true actors in the political drama, and worsened the integrity of the legislative process. On issues from prescription drug pricing to climate change to campaign finance itself, special interests stop progress; and Senate colleagues lament that a Super PAC donor adverse to legislation may emerge to spend millions against them. Even when the concern is not verbalized, we have seen behavior change. Former senators and representatives who lost their seats in an onslaught of outside

²⁶ This is not the occasion to dwell on the point, but history and experience highlight the recurring political contest between powerful, well-connected 'influencers' and regular citizens as one of governance's eternal battles, a battleground where vigilance remains the price of freedom.

expenditures provide memorable examples for candidates seeking to avoid a similar fate. As “independent” groups come to dominate elections, the incentive to avoid their attacks, or to solicit safe-passage assurances from them, is powerful.

This change in behavior is no surprise. Unlimited contributions enable sophisticated special interests to effectively control Super PACs for their own purposes, using them to bombard candidates or elected officials who do not bend the knee.²⁷ This bombardment can begin even before serious public campaigning (the political equivalent of strafing an enemy’s air fleet while it is still on the ground).²⁸

²⁷ We believe that it is obvious that unlimited political contributions authorized by *SpeechNow* are far more than mere ‘speech’; they are weaponry. They can be deployed by one donor to limit, not increase, debate. They can be deployed by one donor to undermine, not invigorate, democracy. They can be deployed by one donor to silence, not add, voices. They can act as cajolery, muscle, threat, lies, smear and brute force. Their product has been described as a “tsunami of slime.” See Joe Hagan, *The Coming Tsunami of Slime*, N.Y. Mag. (Jan. 22, 2012), <https://nymag.com/news/features/negative-campaigning-2012-1/>.

²⁸ By way of example, two “independent” organizations, Americans for Prosperity and the Club for Growth—both funded by a small cadre of mega-donors—spent millions of dollars against Democratic Senate candidates over a year before the 2016 election. See, e.g., Andrea Drusch, *AFP Launches TV Ads Against Ted Strickland. Are They the Start of Another Big Campaign?*, The Atlantic (Aug. 18, 2015), <https://www.theatlantic.com/politics/archive/2015/08/afp-launches-tv-ads-against-ted-strickland-are-they-the-start-of->

Or massive, sudden, unpredictable²⁹ attacks just before Election Day can leave a candidate no time even for a response.³⁰

another-big-campaign/435378/ (explaining that the Americans for Prosperity spent \$1.4 million on ads against Ohio Senate candidate Ted Strickland in August of 2015, over a year before the election); *see also* Alana Abramson, *A Koch Brothers Group Is Targeting These Democratic Senators for Voting Against Tax Reform*, Time (Feb. 13, 2018) <https://time.com/5154530/koch-brothers-democrats-tax-reform/> (discussing the \$4 million ad campaign Americans for Prosperity launched against Senators McCaskill and Donnelly nine months before the 2018 election); *Independent Expenditures Against Former Sen. Russell Feingold, 2015–2016*, Fed. Election Comm’n, https://www.fec.gov/data/independent-expenditures/?data_type=processed&cycle=2016&is_notice=false&candidate_id=S8WI00026&support_oppose_indicator=O (last visited July 17, 2020) (documenting that The Club for Growth Action Fund spent nearly \$700,000 on ads against Wisconsin Senate candidate and former Senator Russell Feingold between July and September 2015).

²⁹ A candidate can ordinarily watch an adversary’s fundraising and spending, or the other party’s fundraising and spending, and derive some sense of how the race is shaping up. The prospect of unexpected, unlimited “independent” attacks creates the incentive to find one’s own “independent” champion, in a perverse political arms race. *See, e.g.*, Michael Beckel, *Behind the Price of Power: Q&A with Former Rep. Tom Davis (R-VA)*, Issue One (July 25, 2017), <https://www.issueone.org/behind-price-power-qa-former-rep-tom-davis-r-va/>. As former Rep. Davis notes, “You have the ability of these Super PACs to come in . . . and go after you. And that has a chilling effect on members of Congress and their voting habits, not wanting to offend these groups unless there’s some backup.” *Id.*

Unlimited donations make the situation even more dangerously prone to corruption. Why? Because a whole new vector of influence opens for the mega-donor, who may in fact be the true principal with the Super PAC his mere tool. We police this vector of donor influence when it is in the form of campaign contributions; why create an end-around without limits for massive contributions to Super PACs that are similar in practical effect to campaign contributions?³¹

³⁰ See, e.g., Maggie Severns, *'Oh that's cool — do that!': Super PACs use new trick to hide donors*, Politico (Aug. 17, 2018), <https://www.politico.com/story/2018/08/17/super-pacs-hidden-donors-disclosures-741795> (discussing pop-up Super PACs that form within weeks of an election and then “unleash[] their spending during the final days of the race,” which allows them to avoid disclosing their donors until after the election).

³¹ Honest and fatalistic assessments come from mega-donors themselves. One donor who gave \$39 million to Democratic Super PACs and allied groups in 2016 told the Washington Post, “It’s very odd to be giving millions when your objective is to actually get the money out of politics.” Matea Gold, *Hedge-fund manager S. Donald Sussman gave \$21 million to pro-Clinton super PAC Priorities USA*, Wash. Post (Oct. 20, 2016), http://wapo.st/2eWWjeB?tid=ss_tw&utm_term=.ea9737a06ac8; Albert W. Alschuler et al., *Why Limits on Contributions to Super PACs Should Survive* Citizens United, 86 Fordham L. Rev. 2299, 2342 (2018). A Republican donor who gave \$78 million to Republican Super PACs and allied groups in 2016 told an interviewer, “I’m against very wealthy people attempting to or influencing elections But as long as it’s doable I’m going to do it.” Steven Bertoni, *Billionaire Sheldon Adelson Says He Might Give \$100M To Newt Gingrich Or*

Even if Super PACs operated with “independence” and within a regime of effective disclosure, little prevents mega-donors (or their surrogates) from discussing their contributions—and what they want in exchange for contributions—with candidates (or their surrogates). The current regime is rife with opportunity for improper influence and *quid pro quo* corruption, and it reeks of the appearance of it. Communication between the donor and the candidate can readily occur when the Super PAC is nominally “independent” of the candidate. “Independence,” where unlimited contributions are allowed, means nothing, except that the donor and the candidate are not likely to communicate through the Super PAC itself. But telephones have been around for a long time, and intermediaries for as long as politics. This defect is irremediable. This information ooze cannot be stopped. The only remedy is preventing the mega-donations.

And this is not the only irremediable flaw of *SpeechNow*.

Other Republican, Forbes (Feb. 21, 2012), <https://www.forbes.com/sites/stevenbertoni/2012/02/21/billionaire-sheldon-adelson-says-he-might-give-100m-to-newt-gingrich-or-other-republican/#51757f934400>.

B. The Ability to Make Unlimited Contributions Gives Special Interests the Power to Threaten to Make or Withhold Those Contributions.

By giving donors the right to make unlimited contributions, the D.C. Circuit gave big donors the power to promise or threaten to make (or withhold) those contributions. The right to do something and the power to threaten or promise to do that thing are inseparable. That power to threaten or promise allows large donors an even darker way to manipulate and influence politicians, this one entirely outside the public eye. Legislators can be threatened with unlimited opposition, or assured of unlimited support,³² and the public will have no way to know. Intermediaries can pass the information and threats and protect the principals. Sometimes the information and threats are made in public statements, which are actually directed at specific candidates.³³ If a candidate yields to the threat or

³² See generally Daniel P. Tokaji & Renata E.B. Strause, *The New Soft Money: Outside Spending in Congressional Elections* 83 (2014) (“Members may perceive that if they do not take the legislative action preferred by [a given] group, then they will be targeted with retaliatory independent spending.”).

³³ Sophisticated and repeat players who are the real political threat know all too well how to couch the threat or promise to technically comply with anti-coordination rules, including making a general announcement to the world. For example, Tim Phillips, president of Americans for Prosperity (“AFP”) Super PAC, trumpeted AFP’s success in making

promise, the donor’s influence achieves its purpose without the need to make the contribution.³⁴ The

climate science “political”: “What it means for candidates on the Republican side is, if you [] buy into green energy or you play footsie on this issue, you do so at your political peril. The vast majority of people who are involved in the [Republican] nominating process—the conventions and the primaries—are suspect of the science. And that’s our influence. Groups like Americans for Prosperity have done it.” Coral Davenport, *Heads in the Sand*, *The Atlantic* (Dec. 4, 2011), <https://www.theatlantic.com/politics/archive/2011/12/heads-sand/334776>. *See also* Matea Gold, *It’s bold, but legal: How campaigns and their super PAC backers work together*, *Wash. Post* (July 6, 2015), https://www.washingtonpost.com/politics/here-are-the-secret-ways-super-pacs-and-campaigns-can-work-together/2015/07/06/bda78210-1539-11e5-89f3-61410da94eb1_story.html (explaining the various ways Super PACs and campaigns share information, including “publicly” posting campaign footage and strategic plans).

³⁴ In the wake of the 2012 massacre at Sandy Hook Elementary School, Democratic Senator Joe Manchin and Republican Senator Pat Toomey introduced legislation that would require universal background checks for firearm purchases. *See* Robert Draper, *Inside the Power of the NRA*, *N.Y. Times Mag.* (Dec. 12, 2013), <https://www.nytimes.com/2013/12/15/magazine/inside-the-power-of-the-nra.html>. The measure “appeared to have a strong chance of passage,” including the support of up to ten Republican senators. Jonathan Weisman, *Senate Blocks Drive for Gun Control*, *N.Y. Times* (Apr. 17, 2013), <https://www.nytimes.com/2013/04/18/us/politics/senate-obama-gun-control.html>. Days before the scheduled vote, the NRA sent every senator an email threatening to factor senators’ votes into the overall grades it assigns to politicians in an election year. Draper, *supra*. This threat was credible due to the enormous contributions the NRA receives for its “independent” expenditures. *See, e.g.*, Charlotte

political waters are unrippled. Of course if a candidate does not yield, a massive donation can be made for her opponent, spreading the shadow of influence while leaving the public utterly in the dark as to what transpired.

In our experience, elected officials have taken heed, and big donors can now exert their influence without overtly threatening massive contributions. There is a saying that a good horse runs at the sting of the whip, a very good horse runs at the shadow of the whip, and a great horse runs when its rider thinks of the whip. A threat is the shadow of the whip; but the mere existence of the whip of unlimited contribution power, in our view, affects the behavior of the horses, to the point where big forces of influence standing in the shadows need merely have the whip at their disposal to augment their influence.

The power to make an unlimited contribution is the power to threaten or promise to make that contribution. The power to threaten or promise always lurks, even where no contribution is made. And there is no way in the world to bring adequate

Hill, *The real reason the NRA's money matters in elections*, Vox (Mar. 24, 2018), <https://www.vox.com/the-big-idea/2018/2/27/17051560/money-nra-guns-contributions-donations-parkland-march>. As the NRA desired, the motion failed by a vote of 54 to 46. Draper, *supra*.

transparency into this nether region created by the *SpeechNow* regime of unlimited contributions.

C. Unlimited Contributions to Independent Expenditure Groups Make Effective Regulation of Political Spending Impossible.

Citizens United presumed that a regime of “effective disclosure” and anti-coordination rules would provide transparency and independence and thereby police and prevent corruption and even the appearance of corruption.³⁵ Setting aside whether those presumptions were correct when *Citizens United* was decided, *SpeechNow’s* authorization of unlimited contributions to “independent” organizations has utterly undermined those presumptions today. No amount of regulation can address the problems created by unlimited contributions.

Citizens United assumed that campaign finance disclosures would be “rapid and informative” in “a campaign finance system that pairs corporate independent expenditures with effective disclosure....”³⁶ Instead, a shadow system of

³⁵ *Citizens United*, 558 U.S. at 357, 370 (2010) (explaining that anti-coordination rules “substantially diminish[]” the “potential for abuse” of independent expenditures) (quoting *Buckley* 424 U.S. at 47 (1976)).

³⁶ *Id.* at 370.

unlimited and often anonymous donations to “independent” campaign groups mocks that premise and denies the public timely intelligible information.

When donor X contributes to candidate Y, no matter the amount, there is a clear and public link between donor X and candidate Y. When donor X makes a contribution to an “independent” organization, which then spends on behalf of candidate Y, the public link between donor X and candidate Y is obscured—except likely to donor X and candidate Y. Add another layer by creating a front group to route the contribution through (the task of an afternoon), and the link is even more obscure—except again to the donor and candidate. For a small donor, this does not matter. The signal of her small donation gets lost in a campaign’s noise. But make it a five million dollar contribution and everything changes.

This is a pathway to corruption; the risk of corruption is unavoidable in a system where “independent” and “transparent” expenditures are in fact neither; and that pathway widens to a corruption interstate highway when expenditures enabled by unlimited donations flow in amounts surpassing direct candidate expenditures.

The whole scheme enabled by *SpeechNow* lets mega-donors deprive voters of information they need to evaluate the political contest unfolding before them. Super PACs ostensibly must disclose their

donors,³⁷ but various practices allow Super PACs to dodge pre-election disclosure, depriving voters of information when it is most actionable: when they cast their ballot. “Pop-Up” Super PACs flout disclosure by materializing just prior to an election, rapidly spending, and then disclosing donors only after the election.³⁸ Or Super PACs can claim to spend on credit and not disclose their donors until after Election Day.³⁹ Sometimes, disclosure comes not merely too late, but never, because the mere threat or promise of an unlimited contribution achieves its goal with no reportable contribution—or because contributions are often routed through complex webs of front groups to obscure the linkage.

³⁷ See 11 CFR 104.3(a)(4) (requiring disclosure of expenditures and receipts in excess of \$200).

³⁸ See Karl Evers-Hillstrom, *Super PACs outmaneuver outdated rules to leave voters in the dark*, OpenSecrets (Mar. 18, 2020), <https://www.opensecrets.org/news/2020/03/sunshine-week-2020-super-pacs-loophole/>; *Dodging Disclosure* 4, Campaign Legal Center (Nov. 2018), <https://campaignlegal.org/sites/default/files/2018-11/11-29-18%20Post-Election%20Report%20%281045%20am%29.pdf> (“[I]n the final weeks of the [2018] general election, over \$29.3 million was spent by 17 Super PACs that were newly created and had reported no contributors, or whose spending exceeded their last-reported cash-on-hand by 500 percent,” which did not need to be reported until after the election.)

³⁹ *Dodging Disclosure*, *supra* note 38 at 4, 7, 9.

In our view, this mischief is impossible to regulate or remediate. But it is possible to prevent, with contribution limits on money to “independent” groups. Covert threats, assurances or promises have little force when contributions are properly limited. Corrupting arrangements through elaborate intermediary screens are not worth constructing. There is a difference in kind between a five-thousand-dollar contribution and a five-million-dollar contribution—or the looming threat or promise of that five-million-dollar contribution. The worst of this mischief evaporates in a regime of sensible contribution limits.

This Court also presumed that separation between campaigns and “independent” groups would “negate the possibility” of *quid pro quo* corruption from independent expenditures.⁴⁰ The decision in *SpeechNow* referenced this Court’s view that “[t]he absence of...coordination of an expenditure with the candidate...alleviates the danger that expenditures will be given as a quid pro quo.”⁴¹ However, the DC Circuit failed to recognize that this Court expressed

⁴⁰ See *Free Enterprise Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721, 751 (2011) (“The separation between candidates and independent expenditure groups negates the possibility that independent expenditures will result in the sort of *quid pro quo* corruption with which our case law is concerned.”) (citing *Citizens United*, 558 U.S. at 357–61).

⁴¹ *SpeechNow.org*, 599 F.3d at 693 (quoting *Citizens United*, 558 U.S. at 357).

that view in a context where contributions to “independent” organizations were limited, and thus there was little incentive for candidates and independent organizations to coordinate.

Ten years of Super PACs authorized by *SpeechNow* have exposed the D.C. Circuit’s failure, and this Court should correct it. Examples abound of coordination between campaigns and affiliated Super PACs, ranging from coordination performed through public channels, to candidates or surrogates appearing at affiliated fundraisers, to behind-the-scenes campaign tactics that share resources and break supposed “firewalls.”⁴² One example: both major candidates for President in 2020 officially “endorsed” a Super PAC supporting them.⁴³ Does anyone seriously think candidates do not note who contributes to their private, endorsed, “independent” Super PAC?

⁴² See Adam Wollner, *10 Ways Super PACs and Campaigns Coordinate, Even Though They’re Not Allowed To*, *The Atlantic* (Sept. 27, 2015), <https://www.theatlantic.com/politics/archive/2015/09/10-ways-super-pacs-and-campaigns-coordinate-even-though-theyre-not-allowed-to/436866/>.

⁴³ Ken Thomas, *Biden Campaign Indicates Priorities USA Is Preferred Super PAC*, *Wall St. J.* (Apr. 15, 2020), <https://www.wsj.com/articles/biden-campaign-indicates-priorities-usa-is-preferred-super-pac-11586986904> (noting the statement “sends a message to top donors about where they should give money”); Alex Isenstadt, *Trump to appear at fundraiser for allied Super PAC*, *Politico* (May 29, 2018), <https://www.politico.com/story/2018/05/29/trump-fundraiser-super-pac-611594>.

It will not do to blame lax anti-coordination or disclosure rules. A campaign finance system that permits unlimited contributions, and in turn weaponizes private threats of those contributions by those wealthy enough to demand a candidate's or elected official's attention, will undermine any regulatory regime. At bottom, *SpeechNow's* problem of unlimited contributions cannot be corrected by regulation. It must be treated at its source: the unlimited contributions.

II. The Public's Declining Faith in Our Democracy Is Evidence That Unlimited Contributions Give Rise to the Perception of Corruption.

The American public witnesses the tawdry spectacle of money influencing politics, and feels the untoward changes in our democracy. As elected officials, we hear these concerns from constituents all the time. It is not just us—survey data confirm that Americans increasingly feel that government is corrupted and unrepresentative of ordinary citizens: 77% of registered voters reported in September 2018 that “reducing the influence of special interests and corruption in Washington” was either the “single most” or a “very important” issue.⁴⁴ Super PACs lie

⁴⁴ *NBC News/Wall Street Journal Survey*, NBC News 12 (Sept. 19, 2018), http://media1.s-nbcnews.com/i/today/z_creative/18955%20NBCWSJ%20September%20Poll.pdf; *See also Widespread Government Corruption*, Gallup (Sept. 19, 2015), <https://news.gallup.com/poll/185759/widespread-govern>

at the heart of this concern; in 2012, nearly 70% thought Super PACs should be illegal.⁴⁵ In 2018, 72% of the public disagreed with the statement (pardon the double negative here) that “people who give a lot of money to elected officials do not have more influence than others.”⁴⁶

This belief is well founded—studies show no correlation between what the public wants and what the public gets; instead, the statistical correlation is with what wealthy interests want.⁴⁷ One recent study found members of Congress over three times more likely to meet with a constituent if that constituent claims to be a donor.⁴⁸ Another study found that “senators are more responsive to the

ment-corruption.aspx (75% of Americans “perceived corruption as widespread in the country’s government” in 2014).

⁴⁵ See *Washington Post – ABC News Poll*, Wash. Post (Mar. 10, 2012), https://www.washingtonpost.com/wp-srv/politics/polls/postabcpoll_031012.html?tid=a_inl_manual.

⁴⁶ *Id.*

⁴⁷ See Martin Gilens, *Affluence and Influence* 7, 171-74 (2012) (demonstrating that responsiveness to the preferences of low and middle-income voters is virtually non-existent, particularly in non-election years, whereas responsiveness to the preferences of high-income voters almost always wins out).

⁴⁸ See Joshua L. Kalla & David E. Broockman, *Campaign Contributions Facilitate Access to Congressional Officials: A Randomized Field Experiment*, 60 Am. J. of Pol. Sci. 545, 552 tbl.1 (2016).

opinions of affluent constituents than of middle-class constituents—and totally unresponsive to the opinions of poor constituents.”⁴⁹ More specifically, “the views of constituents in the upper third of the income distribution received about 50% more weight than those in the middle third (with even larger disparities on specific salient roll call votes), while the views of constituents in the bottom third of the income distribution received no weight at all in the voting decisions of their senators.”⁵⁰

The public are not oblivious; people may not know exactly why, or how, but they assuredly know when they are not being heard. The D.C. Circuit’s incorrect application of *Citizens United* in *SpeechNow* creates precisely the conditions that justify Americans’ disenchantment.⁵¹ Based on our

⁴⁹ Larry M. Bartels, *Economic Inequality and Political Representation* 20 (Aug. 2005), <http://citeseerx.ist.psu.edu/viewdoc/download;jsessionid=33B7AA4E26A0F19D5A08B7AF9069E25F?doi=10.1.1.172.7597&rep=rep1&type=pdf>.

⁵⁰ *Id.* at 4.

⁵¹ This Court’s precedent focuses on corruption and the appearance thereof. Voters are rightly outraged about instances of *quid pro quo* corruption, and indeed that outrage can actually be galvanizing. In our experience as elected officials, however, the appearance of corruption no less sullies our American City upon a Hill. When the campaign finance system builds an Express Lane for only big and powerful donors, voters become disheartened that they will be unheard by the elected officials, and that disheartening effect feeds the appearance that every contribution and every interaction

experience, unlimited contributions—and the inevitable threats and promises around such unlimited contributions—massively exacerbate this undemocratic miscorrelation. It stinks, and people know it.

Former Congressman Mick Mulvaney recently told an American Bankers Association conference: “We had a hierarchy in my office in Congress[.] If you’re a lobbyist who never gave us money, I didn’t talk to you. If you’re a lobbyist who gave us money, I might talk to you.”⁵² Imagine the attention a lobbyist capable of orchestrating multi-million-dollar Super PAC contributions would receive.

The influence of money in our democracy is obviously heightened when political *spending* is unlimited; but the influence problem is aggravated when political *donations* are unlimited. The absence of limits on contributions to Super PACs opens a world of unregulable threats and promises; it

between a donor and a candidate or public official is a corrupt one. The *SpeechNow* regime creates this Express Lane, one for the already powerful and wealthy alone, and at great public cost. This regime serves a small subset of political interests that has both the economic means and political motive to subvert the democratic process.

⁵² Glenn Thrush, *Mulvaney, Watchdog Bureau’s Leader, Advises Bankers on Ways to Curtail Agency*, N.Y. Times (Apr. 24, 2018), <https://www.nytimes.com/2018/04/24/us/mulvaney-consumer-financial-protection-bureau.html>.

confounds the independence and transparency predicates of *Citizens United*; it gives a small set of participants disproportionate and undemocratic influence in American politics; it distorts election and policy outcomes; and it causes millions of ordinary Americans justifiably to lose faith in the political process. This fundamental threat to American democracy warrants review by the Court of this case to correct the holding in *SpeechNow*.

CONCLUSION

For the foregoing reasons, this Court should grant Petitioners' petition for a writ of *certiorari*.

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