UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPRESENTATIVE TED LIEU, *et al.*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, Defendant.	Civ. No. 16-2201 (EGS) **ORAL HEARING REQUESTED**

PLAINTIFFS' OPPOSITION TO THE FEDERAL ELECTION COMMISSION'S MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

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Plaintiffs Representative Ted Lieu, Representative Walter Jones, Senator Jeff Merkley, State Senator (ret.) John Howe, Zephyr Teachout, and Michael Wager (collectively, "Plaintiffs") respectfully submit this memorandum of points and authorities (the "Opposition") in Opposition to the Motion of the Federal Election Commission (the "FEC") to dismiss Plaintiffs' First Amended Complaint (the "Complaint" or "Compl.").

INTRODUCTION

Forty-two years ago, in *Buckley v. Valeo*, 424 U.S. 1, 58 (1976) (per curiam), the Supreme Court upheld limits imposed by the Federal Election Campaign Act ("FECA") on contributions to candidates for federal office. Currently, under FECA, an individual donor may not contribute more than $2,700 in a single primary or general election. 52 U.S.C. § 30116(a)(1)(A); Federal Election Comm'n, *Contribution Limits for 2017-2018 Federal Elections*, https://transition.fec.gov/pages/brochures/contriblimitschart.htm. FECA also limits contributions to political committees, other than party committees, to $5,000 per year. 52 U.S.C. § 30116(a)(1)(C). In *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc), however, the D.C. Circuit held that limit unconstitutional as applied to committees that neither contribute to candidates nor coordinate their spending with candidates. Donors now may give unlimited amounts to electoral efforts in support of particular candidates, as long as the donors funnel their contributions through such committees, which commonly are known as "super PACs."

Super PACs supporting particular candidates often collect more money than the candidates' own campaigns. *See* Note, *Working Together for an Independent Expenditure*, 128 Harv. L. Rev. 1478, 1484 (2015). Super PACs also often place more advertising in support of particular candidates than the candidates' own campaigns, creating the appearance that some campaigns "outsource" their own advertising. *See* Peter Overby et al., *As Bush Campaign Goes Down, The Knives Come Out*, NPR, Feb. 23, 2016, https://n.pr/2J0K681 (reporting that the

campaign committee for presidential candidate Jeb Bush "essentially outsourced its media operation to the supposedly independent superPAC").

No legislator voted in favor of this system of campaign financing. Although the Supreme Court held in *Buckley* that Congress may limit the amount of contributions to an official campaign because large contributions are corrupting or create an appearance of corruption, the D.C. Circuit held in *SpeechNow* that Congress may not prohibit even a $30 million contribution to a super PAC because, according to the D.C. Circuit, no super PAC contribution can ever corrupt or create even an appearance of corruption. The D.C. Circuit offered no empirical support for that conclusion. Nor did the court explain why contributions to a candidate's campaign can corrupt or create the appearance of corruption while contributions to super PACS supporting that candidate supposedly cannot. Instead, as discussed below, the *SpeechNow* ruling rested entirely on faulty logic starting from a misinterpretation of a single sentence of the Supreme Court's opinion in *Citizens United v. FEC*, 558 U.S. 310 (2010).

The Justice Department did not seek Supreme Court review of *SpeechNow*. When explaining the Department's decision not to ask the Supreme Court to weigh in, Attorney General Holder predicted, incorrectly, that *SpeechNow* "will affect only a small subset of federally regulated contributions." Letter from Atty. Gen. Eric Holder to Sen. Harry Reid, July 10, 2010, https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/06-16-2010.pdf. In fact, a massive change in election expenditures and fundraising practices ensued. And, over the eight years since *SpeechNow* was decided, the Supreme Court has had no opportunity to consider whether Congress's limits on contributions to super PACs are valid.

Citing *SpeechNow*, the FEC has refused to enforce limits on super PAC contributions. As alleged in Plaintiffs' Complaint, the FEC's failure to enforce federal contribution limits

against super PACs is "contrary to law"—specifically, FECA and *Buckley*. Plaintiffs have filed this action to give the Supreme Court the opportunity to reaffirm *Buckley*, reaffirm that FECA limits are enforceable where unlimited contributions could corrupt or create the appearance of corruption, and correct the errors of *SpeechNow*.

This Opposition makes three main points.

First, the "contrary to law" standard mandates de novo review when, as here, an agency action is not entitled to deference under *Chevron* or any other doctrine. The FEC's dismissal of Plaintiffs' administrative complaint was not based on an exercise of enforcement discretion or a legal interpretation of a regulatory statute that might merit *Chevron* deference. Instead, the FEC made a legal ruling about the Constitution and judicial precedent. The FEC's ruling should be reviewed de novo and held to be contrary to law because the Constitution does not invalidate FECA limits on contributions to super PACs and, though the FEC relied on *SpeechNow*, that decision also was contrary to law.

Second, the FEC's 2010 FEC advisory opinion does not foreclose this action because this action seeks no sanctions or coercive relief against super PACs. Plaintiffs merely seek a non-coercive declaratory judgment. An FEC advisory opinion may well shield super PACs against sanctions (penalties or coercive relief), but the FEC cannot render unlawful conduct lawful, and no federal court has ever held otherwise.

Finally, while this Court is bound by the Court of Appeals decision in *SpeechNow*, *SpeechNow* should be overruled. This Court therefore should address the constitutional issues raised here, so that Plaintiffs may raise their arguments to appellate courts and thereby rectify the appearance of endemic corruption in U.S. elections that *SpeechNow* has wrought.

STATEMENT OF FACTS

Plaintiffs are a U.S. Senator, two Members of the U.S. House of Representatives, and House candidates of both parties from the 2016 election. All of them faced opposition from super PACs that accepted contributions orders of magnitude above the statutory limit.

On July 7, 2016, Plaintiffs filed an administrative complaint with the FEC alleging that the contributions to those super PACs violated FECA. *See* 52 U.S.C. § 30109(a)(1) (permitting anyone who believes a violation of the Act has occurred to complain to the FEC). In their administrative complaint, Plaintiffs documented contributions to super PACs that exceeded statutory limits by millions of dollars.

Plaintiffs' administrative complaint also demonstrated that:

- super PACs, in many cases, have eclipsed campaigns themselves in fundraising and spending in support of candidates;
- interviews with former Members of Congress, campaign and legislative staff, and political operatives reveal that federal candidate fundraising provides opportunities for quid pro quo corruption through super PAC contributions that is at least as great as opportunities through direct campaign contributions; and
- public opinion surveys show that the overwhelming majority of Americans, including strong majorities of both Republicans and Democrats, agree that large contributions to super PACs present an unacceptable risk of corruption.

See AR 18-21 ¶¶ 38-42.

On November 4, 2016, with the administrative complaint still pending and the 2016 election approaching, Plaintiffs filed this lawsuit, alleging that the FEC's failure to rule on their complaint was contrary to law. *See* 52 U.S.C. § 30109(a)(8) (permitting "party aggrieved" by

FEC order "dismissing a complaint" or by FEC "failure . . . to act" to file an action seeking a declaration that "the dismissal of the complaint or the failure to act is contrary to law"). The FEC dismissed Plaintiff's administrative complaint on June 1, 2017. On March 7, 2018, this Court granted Plaintiffs leave to amend their complaint to allege that the dismissal was contrary to law. Minute Order, Mar. 7, 2018; Compl., ECF No. 36. On May 7, 2018, the FEC moved to dismiss the amended complaint. Mot. to Dismiss, ECF No. 39.[1]

ARGUMENT

I. Under Rule 12(b)(6), the Court Must Assume the Truth of the Plaintiff's Allegations and Must Construe the Complaint Liberally

A motion to dismiss under Fed. R. Civ. P. 12(b)(6) "tests the legal sufficiency of a complaint." *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002). Since the FEC's written basis for decision reflected no fact-finding or evaluation of facts and did not question any of the factual allegations in the administrative complaint, this case involves no factual disputes. In reviewing this motion, the court must "assume the truth of all material factual allegations in the complaint and construe the complaint liberally, granting plaintiff the benefit of all inferences that can be derived from the facts alleged." *Am. Nat'l Ins. Co. v. FDIC*, 642 F.3d 1137, 1139 (D.C. Cir. 2011) (internal quotation marks omitted).[2]

[1] Plaintiffs do not oppose dismissal of Count II, alleging that the FEC's dismissal of the plaintiffs' complaint violated the Administrative Procedure Act. *See* 5 U.S.C. § 706(2).

[2] The FEC asserts in a footnote that the claims of two Plaintiffs are moot because they did not file for candidacy for federal office in 2018. Mot. to Dismiss 22 n.5. The Court need not address that argument for two reasons. First, as long as some of the plaintiffs have live claims, the Court need not consider whether others do as well. *See Hardaway v. D.C. Hous. Auth.*, 843 F.3d 973, 979 (D.C. Cir. 2016) ("'For each claim, if . . . standing can be shown for at least one plaintiff, we need not consider the standing of the other plaintiffs to raise that claim.'") (quoting *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1232 (D.C. Cir. 1996)). Second, the Court "need not consider cursory arguments made only in a footnote." *Hutchins v. D.C.*, 188 F.3d 531, 539 n.3 (D.C. Cir. 1999) (en banc).

II. FECA's Standard of Review—"Contrary to Law"—Affords No Deference to the FEC's Refusal on Constitutional Grounds to Enforce FECA's Limit on Contributions to Super PACs

The plaintiffs are entitled to declaratory relief if the FEC's dismissal of their complaint was "contrary to law." 52 U.S.C. § 30109(a)(8)(C). When the FEC rests its dismissal of a complaint on an interpretation of FECA, which it administers, its statutory interpretation is entitled to deference. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 843-44 (1984); *Orloski v. FEC*, 795 F.2d 156, 161-62 (D.C. Cir. 1986). Similarly, when the dismissal of a complaint rests on a factual determination, a court must defer to such a determination if it is supported by substantial evidence. *See Hagelin v. FEC*, 411 F.3d 237, 242-43 (D.C. Cir. 2005). Here, however, the FEC is not entitled to deference under either of those principles, and the FEC does not argue to the contrary.

As the FEC recognizes, "courts are not obligated to give binding deference to an administrative agency's interpretation of judicial precedent or of the Constitution." Mot. to Dismiss 11. *See also 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"); *Citizens for Responsibility and Ethics in Washington v. FEC*, 209 F. Supp. 3d 77, 81 (D.D.C. 2016), *appeal dismissed*, No. 16-5343 (D.C. Cir. Apr. 4, 2017) ("Finding that the controlling [FEC] Commissioners premised their conclusion on an erroneous interpretation of Supreme Court precedent and the First Amendment, the Court agrees with CREW that the dismissals [of its administrative complaints] were contrary to law.").

Here, the phrase "contrary to law" requires de novo review of legal rulings in accordance with its plain meaning: "illegal; unlawful; conflicting with established law." Black's Law Dictionary (10th ed. 2014). *See, e.g.*, *Haines v. Liggett Grp., Inc.*, 975 F.2d 81, 91 (3d Cir. 1992) (interpreting phrase "contrary to law" in Federal Magistrate Act to require "plenary review as to

matters of law");[3] *accord PowerShare, Inc. v. Syntel, Inc.*, 597 F.3d 10, 15 (1st Cir. 2010) ("[F]or questions of law, there is no practical difference between review under Rule 72(a)'s 'contrary to law' standard and review under Rule 72(b)'s de novo standard [for dispositive orders].").

III. The FEC's Dismissal of Plaintiffs' Complaint Rested on a Legal Ruling Rather than a Discretionary Enforcement Decision, and the Dismissal Is Subject to De Novo Review

Although the FEC acknowledges that agency rulings on constitutional questions are subject to de novo review, it argues that courts must be "highly deferential" to agency "enforcement decisions." Mot. to Dismiss 11. It cites *Heckler v. Chaney*, 470 U.S. 821, 831 (1985), in which the Supreme Court said that "an agency decision not to enforce often involves a complicated balancing of a number of factors," such as "whether agency resources are best spent on this violation or another . . . and, indeed, whether the agency has enough resources to undertake the action at all."

The Supreme Court has held, however, that FECA's express requirement that courts review FEC non-enforcement decisions overrides *Heckler*'s presumption that enforcement decisions are not reviewable. *See FEC v. Akins*, 524 U.S. 11, 26 (1998) ("In *Heckler*, this Court noted that agency enforcement decisions 'have traditionally been 'committed to agency discretion,' ' and concluded that Congress did not intend to alter that tradition in enacting the APA . . . We deal here with a statute [FECA] that explicitly indicates the contrary."); *CREW*, 209

[3] Congress added the "contrary to law" standard to FECA in May 1976. *See* Federal Elections Campaign Act Amendments of 1976, Pub. L. No. 94-283, sec. 109, 90 Stat. 475 (May 11, 1976). Five months later, it used the same standard in the Federal Magistrate Act. Pub. L. No. 94-577, 90 Stat. 2729 (Oct. 21, 1976) (codified at 28 U.S.C. § 636). When construing a statutory term or phrase, courts often look to how Congress has used that term or phrase in other statutes, especially when these statutes have been enacted by the same Congress. *See, e.g., W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 88 (1991) (Scalia, J.).

F. Supp. 3d at 88 n.7 (concluding that FECA's express provision for the judicial review of FEC dismissal decisions rebuts *Heckler*'s presumption of non-reviewability of agency decisions not to enforce and declaring that the court would "apply the contrary-to-law standard, as Congress has instructed it to"); *see also Heckler*, 470 U.S. at 834 (distinguishing an earlier decision because it arose under a statute that, like FECA, "provided guidelines for exercise of [the agency's] enforcement power").

Moreover, the FEC's legal ruling here merely reflected its interpretation of constitutional law and was not an exercise of prosecutorial or enforcement discretion. In *Heckler*, the Supreme Court considered an agency's decision not to proceed even though a violation may have occurred—a decision analogous to a prosecutor's decision not to file criminal charges. By contrast, the FEC's ruling in this case had nothing to do with marshaling limited resources and involved no exercise of discretion. The FEC simply made a legal ruling, concluding that there was "no reason to believe that the Respondent Committees violated" FECA. AR 295-96. The FEC applied FECA as if the statutory limit did not exist because the D.C. Circuit had held in *SpeechNow* that FECA's limit on super PAC contributions was unconstitutional.[4]

Because the FEC's dismissal of the plaintiffs' complaint was based solely on its acquiescence to a D.C. Circuit ruling about constitutional law, the dismissal is subject to de novo review, and no deference to the FEC is warranted.

[4] This case is very different from a recent decision in which the district court concluded that the FEC made no legal ruling at all, but instead declined to investigate a complaint because recently unsettled law was confusing. *Campaign Legal Center v. FEC*, No. 16-CV-00752, 2018 WL 2739920 at *15 (D.D.C. June 7, 2018). There, the district court reviewed a decision not to proceed even if a violation of law might have occurred—a discretionary enforcement decision. Here, the plaintiffs ask the Court to review the FEC's determination that, because of the judicial ruling in *SpeechNow*, no violation of law occurred.

IV. The FEC's Dismissal of the Plaintiffs' Complaint Was Contrary to Law if the Judicial Ruling on Which the FEC Relied was Contrary to Law

The FEC argues that its decision not to challenge *SpeechNow* was "reasonable." Mot. to Dismiss 12. But the question posed by 52 U.S.C. § 30109(a)(8)(C) is not whether the FEC's decision was "reasonable." Rather, it is whether its dismissal of the plaintiffs' complaint was "contrary to law."

The FEC maintains that its dismissal of Plaintiffs' administrative complaint was not contrary to law because *SpeechNow* was correctly decided and, even if *SpeechNow* was incorrectly decided, the FEC acted reasonably in relying on the erroneous decision. If accepted, that reasoning could permanently immunize *SpeechNow* from reconsideration by the D.C. Circuit and the Supreme Court.

The history of our country's civil rights precedents is instructive on how federal district courts should respond in situations, like this one, in which a litigant questions whether a binding adverse precedent is contrary to law. In *Brown v. Bd. of Educ*., 98 F. Supp. 797 (D. Kan. 1951), *rev'd*, 347 U.S. 483 (1954), the district court offered no defense of racially segregated schools. It said, in fact, that it was "difficult to see" why segregation was not a violation of due process. *Id*. at 800. The Court nevertheless denied relief to plaintiffs who challenged school segregation, declaring that *Plessy v. Ferguson*, 163 U.S. 537 (1896), and *Gong Lum v. Rice*, 275 U.S. 78 (1927), "have not been overruled and . . . still presently are authority for the maintenance of a segregated school system." *Brown*, 98 F. Supp. at 800.

When the *Brown* plaintiffs appealed, the Supreme Court did not ask whether the district court's decision was "reasonable," or whether the district court should have disregarded *Plessy* and *Gong Lum*. The Supreme Court nevertheless reversed the district court—something it could

not have done unless it found that the district court's decision, and the precedents on which it relied, were contrary to law. *See Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

If the Supreme Court had asked in *Brown* only whether the district court's adherence to *Plessy* and *Gong Lum* was reasonable, the answer would have been yes. Schools would have remained segregated and precedents that were inconsistent with the Court's constitutional understanding would have endured.

V. The Standard of Review Urged by the FEC Could Permanently Immunize *SpeechNow* from Reconsideration by the Court of Appeals and from Supreme Court Review

Although the FEC seeks to bar the reconsideration or review of *SpeechNow* here, the FEC also asserts that someone might be able to raise the issue in another case. Mot. to Dismiss 21. The FEC's suggestion has no bearing on whether Plaintiffs' Complaint states a valid claim for relief, but, in any event, the FEC overstates the availability of procedural alternatives and minimizes the adverse consequences that dismissal of Plaintiffs' Complaint could have.

State and local limits on super PAC contributions have been unenforced since 2013, the date of the last Court of Appeals decision declaring such limits unconstitutional. Even if a state or local government tries to enforce such limits and they are challenged, a successful defense of such limits would not provide relief to Plaintiffs in a meaningful time frame. And nobody knows whether or when such a case will ever find its way to the courts.

What the FEC calls a "direct challenge" to the FEC advisory opinion that acquiesced in *SpeechNow* appears to be precluded by the statute of limitations. *See* 28 U.S.C. § 2401(a); *Impro Products, Inc. v. Block*, 722 F.2d 845, 849-50 & n.8 (D.C. Cir. 1983).

What the FEC calls the "special review provision" contained in 52 U.S.C. § 30110 is largely unavailable to plaintiffs who challenge "settled principles of law." *Libertarian Nat'l Comm., Inc. v. FEC*, 930 F. Supp. 2d 154, 161 (D.D.C. 2013) (citing *Khachaturian v. FEC*, 980

F.2d 330, 331 (5th Cir. 1992)). Because the Supreme Court has not yet considered the validity of Congress's limit on super PAC contributions, this constitutional question remains unsettled, but the FEC essentially argues here that the question *is* settled. Mot. to Dismiss 14-15 & n.4. If Plaintiffs or someone else filed a § 30110 action, the FEC almost certainly would contend that *SpeechNow* established "settled principles of law" and, accordingly, that no relief is available under § 30110.

The FEC objects that, unlike the procedures it proposes, the procedure initiated by Plaintiffs could affect "the reliance interests of administrative respondents" and could impose "compliance costs on third-parties that ha[ve] relied on Commission guidance in good faith." Mot. to Dismiss 21. But Plaintiffs seek only declaratory relief that would affect the respondents and third parties in the same way that resurrecting FEC enforcement of contribution limits through any other procedure would affect them.

VI. The FEC's Advisory Opinion Acquiescing in *SpeechNow* Precludes Sanctioning Super PACs for Accepting Contributions above the Statutory Limit but Does Not Bar a Declaration that Such Contributions Are Unlawful

In FEC Advisory Op. 2010-11 *(Commonsense Ten)*, https://www.fec.gov/files/legal/aos/76050.pdf (July 22, 2010), the FEC announced that it would accept the D.C. Circuit's ruling that limits on contributions to super PACs are unconstitutional and, accordingly, that it no longer would enforce those limits. 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). The FEC argues that its advisory opinion blocks reconsideration of *SpeechNow* for two reasons: (1) the opinion precludes a finding that anyone who reasonably relied on it violated FECA, and (2) it precludes the declaratory relief the plaintiffs seek. Mot. to Dismiss 23-25. The FEC is wrong on both points. People who relied on

the opinion may not be sanctioned, but that does not mean that their contributions actually were lawful. The FEC opinion did not and could not change the law.

1. FEC advisory opinions do not legalize otherwise unlawful conduct

The FEC cites no authority for the claim that its advisory opinions can not only exempt conduct from punishment but also render it lawful. The statute's bar on administrative sanctions when people have relied reasonably on FEC advisory opinions closely resembles doctrines that bar criminal punishment when defendants have relied reasonably on apparently authoritative assurances that their conduct would be lawful. These doctrines have such names as "official authorization," *Keathley v. Holder*, 696 F.3d 644, 646-47 (7th Cir. 2012), "entrapment by estoppel," *United States v. Tallmadge*, 829 F.2d 767, 773-75 (9th Cir. 1987), "advice of counsel," *United States v. DeFries*, 129 F.3d 1293, 1308 (D.C. Cir. 1997), and "mistake of law," *United States v. Albertini*, 830 F.2d 985, 989 (9th Cir. 1987), *overruled in part on other grounds*, *United States v. Qualls*, 172 F.3d 1136 (9th Cir. 1999). Although these doctrines sometimes excuse an actor's unlawful conduct, the conduct remains unlawful.

The point of these doctrines is to protect people who act in good faith from being unfairly punished, not to change the background law. This is readily apparent from changes that have been made to FECA over the years. The version of FECA Congress approved in 1974 provided that "[a]ny person with respect to whom an advisory opinion is rendered . . . who acts in good faith in accordance with the provisions and findings of such advisory opinion *shall be presumed to be in compliance* with the provision of this Act . . . with respect to which such advisory opinion is rendered." FECA Amendments of 1974, Pub. L. 93-443 § 208, sec. 313, 88 Stat. 1263, 1283-84 (Oct. 15, 1974) (emphasis added). In 1976, however, Congress repealed that provision and substituted one materially identical to § 30108(c)(2). *See* FECA Amendments of

1976, Pub. L. 94-283 § 108, sec. 312, 90 Stat. 475, 482 (May 11, 1976) (stating that a person relying in good faith on an advisory opinion "shall not, as a result of any such act, be subject to any sanction provided by this Act"). A conference report explained, "Subsection (b)(1) provides that any person who relies on an advisory opinion and who acts in good faith in accordance with the advisory opinion may not be penalized under the Act . . . as the result of any such action." H.R. Conf. Rep. 94-1057 at 44, 1976 U.S.C.C.A.N. 946, 959 (Apr. 28, 1976); *see also* H.R. Rep. 94-917 at 62 (Mar. 17, 1976) (same). The revised statute and the conference report show that, although advisory opinions bar the imposition of sanctions, they do not legalize anything.

2. A declaration that conduct is unlawful is not a "sanction"

Plaintiffs have sought only declaratory relief, which is not a sanction. Mot. to Dismiss 22-25. The function of a declaratory judgment is to "declare the rights and other legal relations of any interested party." 28 U.S.C. § 2201(a). It tells people what the law is. Although a losing party must comply with the law going forward, so must everyone else. The losing party incurs no distinctive burden. No one who uses English in the ordinary way would say he was *sanctioned* because someone told him what the law is. Consequently, there was no statutory ambiguity for the FEC to resolve and no reason for the court to defer to the agency's unusual interpretation of a common English word. *Cf. Chevron*, 467 U.S. at 842-43 & n.9.

Courts repeatedly have emphasized that declaratory judgments are not coercive. *See Steffel v. Thompson*, 415 U.S. 452, 471 (1974) ("a declaratory judgment . . . is not ultimately coercive" (internal quotations omitted)); *Ulstein Mar., Ltd. v. United States*, 833 F.2d 1052, 1055 (1st Cir. 1987) ("[a declaratory judgment] does not, in itself, coerce any party"). Declaratory judgments, unlike injunctions, do not mandate or prohibit conduct. *See, e.g.*, *Perez v. Ledesma*, 401 U.S. 82, 124 (1971) (Brennan, J., concurring in part and dissenting in part) ("A declaratory judgment . . . neither mandates nor prohibits state action."); *Knight First Amendment Inst. v.*

Trump, No. 17-CIV-5205, 2018 WL 2327290, at *24 (S.D.N.Y. May 23, 2018) (contrasting "the strong remedy of injunction" with declaratory judgment, which simply relies on the presumption that "once the judiciary has said what the law is," compliance will follow). Violation of a declaratory judgment is not punishable as contempt. *See Steffel*, 415 U.S. at 471; *Rodriguez v. Hayes*, 591 F.3d 1105, 1120 (9th Cir. 2010).

Declaratory judgments are an *alternative* to penalties or other coercive relief and are available even where those other forms of relief are barred. *See* 28 U.S.C. § 2201(a) ("[A]ny court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought."); *see also* Fed. R. Civ. P. 57, Advisory Cmte. notes (1937) (noting that "when coercive relief . . . is deemed ungrantable or inappropriate," a court may issue a declaratory judgment). Courts often grant declaratory relief even when they deny an injunction in the same case. *See, e.g.*, *Doe v. Stephens*, 851 F.2d 1457, 1467 (D.C. Cir. 1988); *Knight First Amendment Inst.*, 2018 WL 2327290 at *24. Indeed, the FEC itself has successfully argued before this Court that it may seek declaratory relief for FECA violations even where penalties for those violations are time-barred. *FEC v. Christian Coalition*, 965 F. Supp. 66, 69-72 (D.D.C. 1997); *FEC v. Nat'l Republican Senatorial Comm.*, 877 F. Supp. 15, 20-21 (D.D.C. 1995).

The FEC's construction of the word "sanction" is unsupported by precedent. In *Alabama v. North Carolina*, 560 U.S. 330 (2010), the Supreme Court defined the "ordinary meaning" of the word "sanction" in two ways: "'[t]he detriment[al] loss of reward, or other coercive intervention, annexed to a violation of a law as a means of enforcing the law,'" and "'[a] penalty or coercive measure that results from failure to comply with a law, rule, or order.'" *Id.* at 340

(quoting Webster's New International Dictionary 2211 (2d ed. 1954) and Black's Law Dictionary 1458 (9th ed. 2009)).

The D.C. Circuit also narrowly construed the meaning of the word "sanction" in *LaRouche v. FEC*, 28 F.3d 137 (D.C. Cir. 1994), a case in which a candidate challenged an FEC order to repay federal matching funds. He claimed that, in obtaining the funds, he had relied in good faith on FEC rules and regulations, but the D.C. Circuit held the candidate's good faith immaterial. "[A]ll the good faith in the world will not save petitioners because the request that they repay the . . . matching funds *was not a sanction*." *LaRouche*, 28 F.3d at 142 (emphasis added) (construing similar "sanction" provision in 52 U.S.C. § 30111(e)).[5]

The FEC notes that sanctions can include nonmonetary obligations and restrictions on future activities, but only when, as in the cases cited by the FEC, such obligations and restrictions are imposed because someone has violated the law and when these sanctions burden the wrongdoer in ways they do not burden the general public. *See U.S. Dep't of Energy v. Ohio*, 503 U.S. 607, 621 (1992); *Alabama v. North Carolina*, 560 U.S. 330, 340-41 (2010); *United States v. Alabama*, 691 F.3d 1269, 1289 (11th Cir. 2012). The declaration here will merely clarify the law for everyone and affect everyone the same way.

VII. *SpeechNow* Rested an Implausible Conclusion—that Contributions to Super PACs Do Not Corrupt or Create Even an Appearance of Corruption—and on Flawed Reasoning

The remainder of this Opposition argues for overruling *SpeechNow*, something this Court cannot do. Plaintiffs submit the following arguments to preserve them for appeal and underscore the extraordinarily high stakes of this litigation.

[5] The FEC questions whether *LaRouche* survives *Kokesh v. SEC*, 137 S. Ct. 1635, 1644 (2017), Mot. to Dismiss 24, but *Kokesh* strongly reinforces *LaRouche*. The Supreme Court emphasized that disgorgement does not constitute a penalty when its purpose is compensatory, as the purpose of the disgorgement in *LaRouche* certainly was. 137 S. Ct. at 1642-43.

1. The Supreme Court has long recognized a distinction between contributions and expenditures

Different constitutional standards apply to limits on contributions to campaigns and limits on expenditures by campaigns. *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), upheld federal limits on contributions while striking down limits on expenditures. *Id*. at 23-35, 39-51. In the forty-two years since *Buckley*, the Supreme Court has continued to distinguish sharply between contribution limits and expenditure limits. *See FEC v. Colo. Republican Fed. Campaign Comm. (Colorado II)*, 533 U.S. 431, 441-42 (2001) ("[W]e have routinely struck down limitations on independent expenditures by candidates, other individuals, and groups, while repeatedly upholding contribution limits." (internal citations omitted)). The Court has held that limits on expenditures are subject to strict scrutiny; they must "further a compelling interest" and must be "narrowly tailored to achieve that interest." *FEC v. Wis. Right to Life*, 551 U.S. 449, 464 (2007). Contribution limits, however, are not subject to strict scrutiny. These limits must merely be "closely drawn" to match a "sufficiently important interest." *FEC v. Beaumont*, 539 U.S. 146, 162 (2003).

In *Citizens United v. FEC*, 558 U.S. 310 (2010), the Court adhered to the pattern. It struck down a restriction on a group's expenditures while reiterating that "contribution limits . . . unlike limits on independent expenditures, have been an accepted means to prevent *quid pro quo* corruption." *Id*. at 359.

In *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc), however, the D.C. Circuit struck down limits on *contributions* to super PACs. Although the court assumed that contribution limits were not subject to strict scrutiny, *id*. at 695-96, it concluded that *Citizens United* implicitly held them unconstitutional.

2. The logical fallacy of *SpeechNow*

SpeechNow rested on a logical fallacy. Since the Supreme Court had held in *Citizens United* that independent expenditures could not give rise to corruption or the appearance of corruption, the D.C. Circuit assumed that contributions to entities that make independent expenditures could not give rise to corruption or the appearance of corruption. The D.C. Circuit was incorrect both logically and empirically.

In *Citizens United*, the Supreme Court said, "[W]e now conclude that independent expenditures . . . do not give rise to corruption or the appearance of corruption," 558 U.S. at 357, and the D.C. Circuit reasoned, "[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. *See also* Albert W. Alschuler, Laurence H. Tribe, Norman L. Eisen & Richard Painter, *Why Limits on Contributions to Super PACs Should Survive* Citizens United, 86 Fordham L. Rev. 2299, 2303 (2018) [hereinafter Alschuler et al.] (calling the Court's analysis "the *SpeechNow* syllogism").[6]

The D.C. Circuit declared that its analysis made the standard of review immaterial:

> [B]ecause *Citizens United* holds that independent expenditures do not corrupt or give the appearance of corruption as a matter of law, then the government can have no anti-corruption interest in limiting contributions to independent expenditure-only organizations. No matter which standard of review governs contribution limits, the limits on contributions to SpeechNow cannot stand.

SpeechNow, 599 F.3d at 696. According to the D.C. Circuit, "the [Supreme] Court held that the government ha[d] *no* anti-corruption interest in limiting independent expenditures." *Id*. at 693

[6] This article by four of the plaintiffs' lawyers addresses many of the issues arising in this litigation. For the Court's convenience, it is appended to this Response.

(emphasis in the original). Whatever the standard of review might be, the Court said, "something . . . outweighs nothing every time." *Id*. at 695.

Acknowledging any regulatory interest at all would have undercut the *SpeechNow* court's analysis. Acknowledging such an interest would have required the court to assess its strength, recognizing that an interest too weak to justify an expenditure limit still may justify a contribution limit. Since the Supreme Court did not in fact hold as a matter of law that Congress's interest in restricting independent expenditures was *nonexistent*, the *SpeechNow* analysis was faulty.

3. The D.C. Circuit misinterpreted *Citizens United*

What the D.C. Circuit called *Citizen's United*'s "holding" was, in fact, dictum. Moreover, the Supreme Court almost certainly did not score the government interest in regulating independent expenditures at *zero*. Even apart from those difficulties, however, the D.C. Circuit's reasoning is unconvincing in light of the actual effects of *SpeechNow* in the real world.

The bottom-line of the *SpeechNow* opinion—that contributions to super PACs cannot corrupt—is plainly wrong. A federal grand jury took a different view when, in 2015, it indicted Senator Robert Menendez and Dr. Salomon Melgen for bribery. The indictment alleged that Melgen made two $300,000 contributions to a super PAC supporting Menendez's reelection in exchange for Menendez's aid in resolving a Medicare billing dispute.

The defendants moved to dismiss the charges based on the super PAC contributions. They maintained that "no *quid pro quo* corruption can arise when a private citizen contributes to a *bona fide* Super PAC, because a *bona fide* Super PAC does not coordinate its expenditures with a candidate." *United States v. Menendez*, 132 F. Supp. 3d 635, 639 (D.N.J. 2015) (quoting

Defendants' Motion to Dismiss). A federal district court denied the motion to dismiss, noting that the federal bribery statute forbids corruptly seeking "anything of value *personally or for any other person or entity*, in return for being influenced in the performance of any official act." *Id*. at 640 (quoting 18 U.S.C. § 201(b)(2)) (emphasis added by the court). Just as a bribe giver cannot escape a bribery conviction by saying, "I'll pay the money to your sister," he cannot avoid conviction by saying, "I'll pay the money to a super PAC." Designating an "independent expenditure group" as the recipient of a bribe giver's payment cannot legalize bribe-giving, and it cannot make bribe-giving a First Amendment right.[7]

The D.C. Circuit disclaimed responsibility for its unfounded conclusion by pointing to the Supreme Court's statement that "independent expenditures . . . do not give rise to corruption or the appearance of corruption." *SpeechNow*, 599 F.3d at 694. But the corrupting effect of a contribution does not depend on whether its recipient spends it under the direction of the candidate. Bribes and other corrupting payments do not lose their corrupting character when they are directed to innocent third parties, as they often are. *See* Raymond Hernandez & David W. Chen, *Gifts to Pet Charities Keep Lawmakers Happy*, N.Y. Times, Oct. 19, 2008, https://nyti.ms/2Jxw61E. Consider a senator who agreed to vote in favor of widget subsidies in exchange for a widget maker's donation to the Feed the Hungry Foundation. Even if the Foundation never spent the widget maker's contribution, the donor and the senator would be guilty of bribery. Moreover, if the Foundation used the donation for the benevolent purposes the

[7] After a jury failed to reach a verdict on the charges against Menendez and Melgen, the district court again rejected the defendants' contention that a contribution to an independent expenditure group cannot be a bribe. *United States v. Menendez*, 291 F. Supp. 3d 606, 621-22 (D.N.J. 2018). The court, however, dismissed the charges based on Melgen's political contributions because the government's evidence at trial failed to establish the sort of quid pro quo the law required. *Id*. at 623-24.

senator intended, few would say that the donor's contribution could not corrupt just because the Foundation's expenditures to feed the hungry did not corrupt.

4. Other decisions have rejected the logical fallacy of *SpeechNow*

SpeechNow is inconsistent with the reasoning of other Supreme Court precedent. For example, the Supreme Court's ruling in *McConnell v. FEC*, 540 U.S. 93 (2003), cannot be reconciled with the D.C. Circuit's reasoning in *SpeechNow*. In a portion of *McConnell* that the Supreme Court specifically reaffirmed after its decision in *Citizens United*, the Court upheld restrictions on contributions that parties would use to make independent expenditures.

The reaffirmed portion of *McConnell* concerned restrictions on the donation of "soft money" to political parties—money the parties would use for such purposes as turning out voters and addressing election issues rather than advocating the election of identified candidates. No evidence indicated that soft money expenditures had been coordinated with the expenditures of candidates in the past or that future expenditures would be.

For Justice Kennedy, writing in dissent, the fact that soft money expenditures were not coordinated with those of any candidate was decisive. He wrote, "[I]ndependent party activity, which by definition includes independent receipt and spending of soft money, lacks a possibility for *quid pro quo* corruption by federal office holders." *Id*. at 301 (Kennedy, J., dissenting). The Court, however, rejected Justice Kennedy's position, calling it "crabbed" and declaring that it ignored "precedent, common sense, and the realities of political fundraising." *Id*. at 152. The Court observed in a footnote that Congress could validly limit contributions made for the purpose of funding "express advocacy and numerous other noncoordinated expenditures." *Id*. at 152 n.48; *see also Colo. Republican Campaign Comm. v. FEC* (*Colorado I*), 518 U.S. 604, 617 (1996) (opinion of Breyer, J.) ("The greatest danger of corruption, therefore, appears to be from

the ability of donors to give sums up to $20,000 to a party which may be used for independent party expenditures for the benefit of a particular candidate.").

In *SpeechNow*, the D.C. Circuit did not attempt to distinguish limits on contributions to super PACs from the limits on soft money contributions *McConnell* upheld. Moreover, on the day that the D.C. Circuit decided *SpeechNow*, a three-judge federal district court in the District of Columbia held that *McConnell*'s approval of limits on soft money contributions survived *Citizens United*. *See Republican Nat'l Comm. v. FEC*, 698 F. Supp. 2d 150 (D.D.C. 2010). The Supreme Court later summarily affirmed the three-judge court's ruling. *Republican Nat'l Comm. v. FEC*, 561 U.S. 1040 (2010).[8]

A more recent decision by a three-judge federal district court in the District of Columbia expressly contradicted the *SpeechNow* syllogism. In *Republican Party of Louisiana. v. FEC*, 219 F. Supp. 3d 86 (D.D.C. 2016), *aff'd*, 137 S. Ct. 2178 (2017), a state political party challenged federal restrictions on its ability to accept soft money contributions that it would use to benefit federal candidates. The party declared that its "activity would be 'independent,' in that . . . [it] would conduct the activity without any coordination with a federal candidate or campaign." *Id*. at 91. The three-judge court disagreed, holding that the absence of coordination was immaterial. The court found that contributions can corrupt even when expenditures do not:

> [P]laintiffs misunderstand the way in which large soft-money contributions to political parties create a risk of *quid pro quo* corruption. . . . [T]he inducement occasioning the prospect of indebtedness on the part of a federal officeholder is not the *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.

Id. at 97 (emphasis in the original).

[8] *Citizens United* overruled *McConnell*'s holding that Congress could prohibit electioneering communications by corporations and labor unions, 558 U.S. at 355-56, but, as noted here, shortly after *Citizens United* the Court specifically reaffirmed *McConnell*'s holding that limits on soft-money contributions are valid.

The FEC says that *Republican Party of Louisiana* does not "undermine the logic of *SpeechNow*" because *Republican Party of Louisiana* did not involve super PACs and instead involved "political parties, which the courts have treated differently in light of their close relationship with officeholders and candidates." Mot. to Dismiss 17. Indeed, the district court itself purported to distinguish *SpeechNow* on that basis. 219 F. Supp. 3d at 98. But *SpeechNow* did not offer an empirical judgment about the closeness of the relationship between the candidates and the groups making independent expenditures in support of the candidates. What mattered to the D.C. Circuit in *SpeechNow* was simply the fact that the super PACs made independent expenditures. *SpeechNow* thus rested on a leap of logic that the three-judge panel flatly rejected when it was articulated by the Republican Party of Louisiana. The Supreme Court summarily affirmed the three-judge court's decision. *Republican Party v. FEC*, 137 S. Ct. 2178 (2017).

VIII. The Statement of the Supreme Court on which the *SpeechNow* Decision Depended Was Dictum, and did Not Have the Meaning the Court of Appeals Attributed to It

In *Citizens United*, the Supreme Court declared restrictions on independent expenditures unconstitutional. It said, "The anticorruption interest is not sufficient to displace the speech here in question." 558 U.S. at 357. The sentence that drove the *SpeechNow* decision came three sentences later: "[W]e now conclude that independent expenditures . . . do not give rise to corruption or the appearance of corruption." *Id*. The statement that the government's interest was *insufficient* to justify any restriction of

independent expenditures fully resolved the case.[9] If the Court's subsequent statement is read to declare the government's regulatory interest *nonexistent*, that statement goes far beyond any issue before the Court. If read as the D.C. Circuit read it, this statement was unmistakably dictum.

Perhaps, as the D.C. Circuit concluded, the Supreme Court truly meant that independent expenditures do not corrupt even a smidgen, but it seems more likely that the Court did not mean its statement to be taken the way the D.C. Circuit took it.

Certainly two of the Justices who joined the majority opinion could not have meant that independent expenditures cannot corrupt. Justices Roberts and Alito said the opposite very forcefully three years earlier, declaring, "[I]t may be that, in some circumstances, 'large independent expenditures pose the same dangers of actual or apparent *quid pro quo* arrangements as do large contributions.'" *FEC v. Wis. Right to Life*, 551 U.S. 449, 478 (2007) (opinion by Roberts, C.J., announcing the judgment of the Court and joined by Alito, J., in the portion of the opinion quoted). Those Justices noted, in fact, "We have suggested that this interest might . . . justify limits on electioneering expenditures." *Id*.

[9] Indeed, it fully resolved the case a second time. *Citizens United*'s principal holding was that "the Government cannot restrict political speech based on the speaker's corporate identity." 558 U.S. at 346. This holding did not depend on the strength of the government's regulatory interest, but rather the identity of the speaker. The Court, however, discussed the strength of the government's regulatory interest at length, concluding that it was insufficient to justify any restriction of independent expenditures. Either branch of the Court's opinion would have sufficed without the other. Once the Court held that the government may not restrict independent expenditures on the basis of corporate identity, there was no reason for it to consider whether the government may not restrict independent expenditures at all. Four Supreme Court Justices have accordingly described *Citizens United*'s description of the kind of corruption needed to justify a restriction of independent expenditures "as dictum, as an overstatement, or as limited to the context in which it appears." *McCutcheon v. FEC*, 134 S. Ct. 1434, 1471 (2014) (Breyer, J., joined by Ginsburg, Sotomayor, and Kagan, JJ., dissenting).

Citizens United is best construed as being consistent with those views, which acknowledge the existence of *some* government interest in preventing corruption and the appearance of corruption in connection with independent election activities. The existence of such a government interest also was expressed in the reasoning of *Buckley*, which *Citizens United* appeared to embrace: "This confirms *Buckley*'s reasoning that independent expenditures do not lead to, or create the appearance of, *quid pro quo* corruption." *Citizens United*, 558 U.S. at 360. *Buckley* never said that there can be *no* legitimate government interest whatsoever in regulating conduct relating to organizations making independent expenditures. The Court stated in *Buckley* that the government interest was too small to justify the limits imposed: "We find that the governmental interest in preventing corruption and the appearance of corruption is *inadequate* to justify § 608(e)(1)'s ceiling on independent expenditures." *Buckley*, 424 U.S. at 45 (emphasis added).

A decision less than a year before *Citizens United* further confirms that the Court did not intend to pronounce any and all independent expenditures as non-corrupting. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009), examined the combined effect of campaign contributions and independent expenditures by Don Blankenship, the Chief Executive of the Massey Coal Company. While Massey was appealing a $50 million verdict against it to a state supreme court, Blankenship spent more than $3 million to prevent the reelection of one of that court's justices. The defeated justice's replacement then provided the decisive vote for reversing the $50 million verdict.

The Court held that the newly elected justice's refusal to recuse himself from the coal company's appeal violated the Due Process Clause. The Court's opinion was written by Justice Kennedy, who also would write for the Court in *Citizens United*. The opinion

declared, "We conclude that there is a serious risk of actual bias . . . when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds . . . when the case was pending or imminent." *Id*. at 884. In *Citizens United*, the Court distinguished *Caperton* by noting that *Caperton*'s "holding was limited to the rule that the judge must be recused, not that the litigant's political speech could be banned." *Citizens United*, 558 U.S. at 360.

Judicial recusal and limiting independent expenditures are indeed different remedies, but if Blankenship's expenditures did "not give rise to corruption or the appearance of corruption," no remedy would have been required. *Caperton* cannot be reconciled with the proposition erroneously attributed to the Supreme Court by *SpeechNow*—that independent expenditures can never corrupt.

A decision subsequent to *SpeechNow* is also inconsistent with the contention that the Court meant to declare independent expenditures non-corrupting. In *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014), four members of the *Citizens United* majority joined a plurality opinion written by Chief Justice Roberts. The opinion 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" and then declared, "But probably not by 95 percent." *Id.* at 1454. The plurality thus recognized that the lack of coordination may make an expenditure worth less but does not make it worthless.

In *SpeechNow*, the D.C. Circuit based the right to give $30 million to a super PAC on an imprecise Supreme Court dictum. The Supreme Court did not hold, and did not intend to imply, that contributions to super PACs can never corrupt or give the appearance of corruption.

IX. Contributions to Super PACs Cannot Reasonably Be Distinguished from the Contributions to Candidates Whose Limitation *Buckley* Upheld

SpeechNow failed to address what should have been the central issue in the case—whether limitations on contributions to super PACs can be distinguished from the limitations on contributions to candidates that *Buckley* upheld.

Buckley's distinction between contributions and expenditures did not rest on the proposition that candidates cannot be corrupted by funds given to and spent by others—a plainly untenable proposition. *See United States v. Menendez*, 132 F. Supp. 3d 635, 639 (D.N.J. 2015) (discussed above); *United States v. Siegelman*, 640 F.3d 1159 (11th Cir. 2011) (affirming a former governor's conviction of bribery although the alleged bribe consisted of a contribution to a group supporting a referendum the governor favored and did not benefit him personally). *Buckley* instead offered three reasons for concluding that contributions to candidates have less communicative value than independent expenditures and two reasons for concluding that contributions are more corrupting. All five of *Buckley*'s reasons for distinguishing contributions from expenditures would place contributions to super PACs on the "contribution" side of that line and support dollar limits on those contributions.

First, the Court said, "[a] contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support." *Buckley*, 424 U.S. at 21. Equally, a contribution to a super PAC does not communicate the underlying basis for the contributor's support.

Second, the Court said, "the transformation of contributions into political debate involves speech by someone other than the contributor." *Id*. Transforming a contribution to a super PAC into political debate also "involves speech by someone other than the contributor."

Third, the Court said, limiting the amount of an individual's contribution "permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues." *Id*. Again, contributions to super PACs are no different. Limiting a contribution to a super PAC allows the contribution to serve as an expression of support but does not limit a contributor's freedom to discuss candidates and issues.

Like all of *Buckley*'s reasons for treating contributions as low-value speech, the first of *Buckley*'s reasons for viewing contributions as more corrupting than expenditures does not distinguish contributions to candidates from super PAC contributions. The Court declared, "The absence of prearrangement and coordination of an expenditure with the candidate or his agent . . . alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate." *Buckley*, 424 U.S. at 47.

Anti-coordination rules may inhibit improper communication between candidates and the people who determine how a super PAC's funds will be spent, but those rules do not inhibit communication between candidates and super PAC donors. Because there can be coordination between candidates and donors to super PACs, the same concerns applicable to contributions to candidates also apply to contributions to super PACs. The rules do not limit what candidates and donors may say to one another. If candidates wish to tell donors how they wish super PAC funds be spent, they may do so freely, as long as the donors do not then act as the candidates' agents by conveying their wishes to the people who will actually determine how the donated funds are spent. *See* 52 U.S.C § 30101(17). And if candidates wish to advise donors how the donors' own funds should be spent—namely, by donating them to a super PAC—again the candidates may do so under the rules. *See* 52 U.S.C. §

30125(e)(1); FEC, Advisory Op. 2011-12 (June 30, 2011), https://www.fec.gov/files/legal/aos/76345.pdf. Finally, the rules do not limit the donor's ability to state the "quo" that he expects in return for his "quid."

The second of *Buckley*'s reasons for regarding independent expenditures as less corrupting than contributions was that expenditures usually have less value to a candidate. *See* 424 U.S. at 46. Of the five reasons *Buckley* offered for distinguishing independent expenditures from contributions, only this one also may distinguish contributions to super PACs from contributions to candidates. A candidate may value a $5,500 contribution to a super PAC urging his election less than a $5,500 contribution to his own campaign.

But reduced value is not the same as no value at all. As noted above, Chief Justice Roberts's plurality opinion in *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014), reiterated *Buckley*'s statement that the absence of coordination diminishes the value of an independent expenditure to a candidate and then acknowledged, "But probably not by 95 percent." *Id.* at 1454. Similarly, a candidate might value a $5,500 contribution to a super PAC less than a $5,500 contribution to his own campaign, but "probably not by 95 percent." A $1 million super PAC contribution produces vastly more corruption and/or appearance of corruption than a $5,500 campaign contribution. If Congress may prohibit the campaign contribution (as it may and has), it should be allowed to prohibit the super PAC contribution as well. If *Buckley* still stands—and *Citizens United* says it does—then *SpeechNow* was wrongly decided. Limits on contributions to super PACs cannot reasonably be distinguished from the limits on contributions to candidates that *Buckley* upheld.

X. Developments Since *SpeechNow* Argue for Its Reconsideration

Since *SpeechNow*, super PACs have transformed U.S. elections. In 2016, 2,392 super PACs campaigning in federal elections raised $1.8 billion. *See* Ctr. for Responsive Politics,

2016 Outside Spending, by Super PAC, https://www.opensecrets.org/outsidespending/summ.php?cycle=2016&chrt=V&disp=O&type=S (visited June 11, 2018). Sixty percent of this amount came from just 100 donors. *See* Ctr. for Responsive Politics, *2016 Super PACs: How Many Donors Give?*, https://www.opensecrets.org/outsidespending/donor_stats.php?cycle=2016&type=B (visited Aug. 15, 2017).

At the time of the *SpeechNow* decision, few recognized the extent to which it would remake American politics. As noted above, Attorney General Holder explained that the Justice Department did not seek certiorari in *SpeechNow* because this decision would "affect only a small subset of federally regulated contributions." Letter from Atty. Gen. Eric Holder to Sen. Harry Reid, June 16, 2010, https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/06-16-2010.pdf. David Keating, the president of SpeechNow.org and the principal architect of the *SpeechNow* litigation, acknowledged five years after the Court of Appeals decision that using an independent expenditure group to promote a particular candidate "just never entered my mind." Alex Altman, *Meet the Man Who Invented the Super PAC*, Time, May 13, 2015, http://ti.me/2wFgp1t.

Since 2010, the appearance of corruption has become widespread and intense to an extent that was not foreseen by most observers when *SpeechNow* was decided. For example, in an October 2012 survey, 59% of voters in fifty-four competitive congressional districts agreed that "[w]hen someone gives 1 million dollars to a super PAC, they want something big in return from the candidates they are trying to elect." Compl. 8 ¶ 19. In an April 2012 survey, 69% of respondents (including 74% of Republicans and 73% of Democrats) agreed that "new rules that let corporations, unions and people give unlimited money to Super PACs will lead to corruption." *Id.* Seventy-three percent of respondents (75% of Republicans, 78%

of Democrats) agreed that "there would be less corruption if there were limits on how much could be given to Super PACs." *Id.*

The appearance of corruption caused by large super PAC contributions has contributed to an unprecedented appearance of corruption and a crisis of democratic legitimacy. A 2015 Gallup survey reported, for example, that 75% of Americans view government corruption as "widespread," an increase from 66% in 2009. Compl. 8 ¶ 18. A 2016 Rasmussen survey found that 61% of likely voters believe that most members of Congress are "willing to sell their vote for either cash or a campaign contribution." *Id.* A survey conducted during the 2016 presidential campaign reported that 92% of registered voters believe that the government is "pretty much run by a few big interests looking out for themselves." This number had grown from 81% only six years earlier. Voice of the People, *Voter Anger with Government and the 2016 Election*: *A Survey of American Voters Conducted by the Program for Public Consultation, School of Public Policy, University of Maryland* 5 (Nov. 2016), http://vop.org/wpcontent/uploads/2016/11/Dissatisfaction_Report.pdf. *See also* Alschuler et al. at 2327-44 (presenting other evidence that *SpeechNow* has "helped to reduce faith in our democracy to a nadir").

These arguments for overruling *SpeechNow* have never been presented to any court. While the FEC's pre-*Citizens United* brief to the D.C. Circuit in *SpeechNow* itself did contend that contributions to super PACs should be regulated as contributions rather than expenditures, neither the FEC nor any party in post-*SpeechNow* litigation in any circuit argued that: (1) the premise of the *SpeechNow* syllogism was dictum; (2) the Supreme Court did not mean that dictum to be taken in the way the D.C. Circuit took it; (3) the logic of the supposed syllogism was erroneous; (4) *Buckley*'s reasons for distinguishing contributions

from expenditures show that limits on contributions to super PACs cannot reasonably be distinguished from limits on contributions to candidates; or (5) that post-*SpeechNow* developments, including *McCutcheon* and *Republican Party of Louisiana*, cast *SpeechNow*'s premises into doubt. Contrary to the FEC's contention, Plaintiffs' arguments are not rehashes of arguments already rejected by the courts. They deserve a chance for review on the merits.

XI. Conclusion

SpeechNow—and the FEC's response to it—have caused widespread mistrust of our country's electoral system. Although this Court does not have the authority to reconsider *SpeechNow*, this Court can and should reject the FEC's strained arguments for preventing reconsideration and review of *SpeechNow* by the Court of Appeals and the Supreme Court.

REQUEST FOR ORAL HEARING

Pursuant to Local Civil Rule 7(f), Plaintiffs request an oral hearing on this motion.

Dated: June 13, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on June 13, 2018, the foregoing was caused to be served on counsel of record for Defendant by the Court's electronic filing system.

Dated: June 13, 2018

/s/ Stephen A. Weisbrod
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