No. 19-1398

In the Supreme Court of the United States

TED LIEU, UNITED STATES CONGRESSMAN, ET AL., PETITIONERS

v.

FEDERAL ELECTION COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

LISA J. STEVENSON
Acting General Counsel
KEVIN DEELEY
Associate General Counsel
HARRY J. SUMMERS
Assistant General Counsel
JACOB S. SILER
Acting Assistant General Counsel
Federal Election Commission
Washington, D.C. 20463

QUESTIONS PRESENTED

1. Whether the Federal Election Commission acted "contrary to law," 52 U.S.C. 30109(a)(8)(C), when it dismissed petitioners' administrative complaint and declined to commence enforcement proceedings against various political committees that had allegedly received unlawful contributions.

2. Whether a federal statute that limits the amounts that may be contributed to political committees, 52 U.S.C. 30116(a)(1)(C), can constitutionally be applied to committees that make only independent expenditures.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 8
A. Regardless of whether *SpeechNow* was correctly decided, the FEC acted lawfully in dismissing petitioners' administrative complaint 9
B. *SpeechNow* was correctly decided 16
C. This Court should deny the petition 22
Conclusion 27

TABLE OF AUTHORITIES

Cases:

Alabama v. *North Carolina*, 560 U.S. 330 (2010) 12
American Civil Liberties Union v. *Mukasey*, 534 F.3d 181 (3d. Cir. 2008), cert. denied, 555 U.S. 1137 (2009) 23
Arizona Free Enterprise Club's Freedom Club PA v. *Bennett*, 564 U.S. 721 (2011) 18, 21
Ashwander v. *Tennessee Valley Authority*, 297 U.S. 288 (1936) 25
Beer v. *United States*, 696 F.3d 1174 (Fed. Cir. 2012), cert. denied, 569 U.S. 947 (2013) 23
Binderup v. *Attorney General United States of America*, 836 F.3d 336 (3d Cir. 2016), cert. denied, 137 S. Ct. 2323 (2017) 23
Buckley v. *Valeo*, 424 U.S. 1 (1976) 17, 18, 19, 20
California Medical Ass'n v. *FEC*, 453 U.S. 182 (1981) 19, 26
Carey v. *FEC*, 864 F. Supp. 2d 57 (D.D.C. 2012) 15

Cases—Continued: Page

Citizens for Responsibility & Ethics in Washington v. *FEC*, 892 F.3d 434 (D.C. Cir. 2018) 14
Citizens United v. *FEC*, 558 U.S. 310 (2010) ...2, 3, 10, 18, 19
City of Long Beach v. *Long Beach Area Chamber of Commerce*, 562 U.S. 896 (2010) 26
Colorado Republican Federal Campaign Committee v. *FEC*, 518 U.S. 604 (1996) 18
Farris v. *Seabrook*, 677 F.3d 858 (9th Cir. 2012) 24
FEC v. *Akins*, 524 U.S. 11 (1998) 14
FEC v. *Beaumont*, 539 U.S. 146 (2003) 17
FEC v. *Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) 17, 22
FEC v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27 (1981) 12
FEC v. *National Conservative Political Action Committee*, 470 U.S. 480 (1985) 18
Granfinanciera, S. A. v. *Nordberg*, 492 U.S. 33 (1989) 25
Heartland Plymouth Court MI, LLC v. *NLRB*, 838 F.3d 16 (D.C. Cir. 2016) 15
Heckler v. *Chaney*, 470 U.S. 821 (1985) 13
Iancu v. *Brunetti*, 139 S. Ct. 2294 (2019) 23
ICC v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987) 13
Johnson v. *United States R.R. Retirement Board*, 969 F.2d 1082 (D.C. Cir. 1992), cert. denied, 507 U.S. 1029 (1993) 15
Long Beach Area Chamber of Commerce v. *City of Long Beach*, 603 F.3d 684 (9th Cir.), cert. denied, 562 U.S. 896 (2010) 24
Maricopa County v. *Lopez-Valenzuela*, 574 U.S. 1006 (2014) 22

Cases—Continued: Page

McConnell v. *FEC*, 540 U.S. 93 (2003) 21
McCutcheon v. *FEC*, 572 U.S. 185 (2014) 19, 20, 24
New York Progress & Protection PAC v. *Walsh*, 733 F.3d 483 (2d Cir. 2013) 24
North Carolina Right to Life, Inc. v. *Leake*, 525 F.3d 274 (4th Cir. 2008) 23
Plaut v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) 14
Republican Party of New Mexico v. *King*, 741 F.3d 1089 (10th Cir. 2013) 24
Rostker v. *Goldberg*, 453 U.S. 57 (1981) 22
SpeechNow.org v. *FEC*, 599 F.3d 686 (D.C. Cir.), cert. denied, 562 U.S. 1003 (2010) 3, 4, 8, 20, 23
Keating v. *FEC*, 562 U.S. 1003 (2010) 4
Texans for Free Enterprise v. *Texas Ethics Committee*, 732 F.3d 535 (5th Cir. 2013) 24
Thalheimer v. *City of San Diego*, 645 F.3d 1109 (9th Cir. 2011) 24
United States v. *Alabama*, 691 F.3d 1269 (11th Cir. 2012), cert. denied, 569 U.S. 968 (2013) 12
United States v. *Mendoza*, 464 U.S. 154 (1984) 14
United States v. *Nixon*, 418 U.S. 683 (1974) 13
Wisconsin Right to Life State Political Action Committee v. *Barland*, 664 F.3d 139 (7th Cir. 2011) 24

Constitution and statutes:

U.S. Const. Amend. I ..... *passim*
Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (52 U.S.C. 30101 *et seq.*) 2
52 U.S.C. 30101(4)(A) 2
52 U.S.C. 30101(8)(A)(i) 2
52 U.S.C. 30101(9)(A)(i) 2
52 U.S.C. 30108(a)(1) 10

Statutes—Continued: Page

52 U.S.C. 30108(a)(1)-(2) 10
52 U.S.C. 30108(c)(1) 10
52 U.S.C. 30108(c)(1)(B) 5
52 U.S.C. 30108(c)(2) 10, 11
52 U.S.C. 30108(d) 10
52 U.S.C. 30109(a)(1) 4
52 U.S.C. 30109(a)(2) 4, 13, 14
52 U.S.C. 30109(a)(4)-(5) 4
52 U.S.C. 30109(a)(8) 5
52 U.S.C. 30109(a)(8)(A) 14, 15
52 U.S.C. 30109(a)(8)(C) 9
52 U.S.C. 30110 26
52 U.S.C. 30116(a) 2
52 U.S.C. 30116(a)(1)(C) ..... *passim*
52 U.S.C. 30116(a)(7)(B) 17
52 U.S.C. 30116(a)(7)(B)(i) 22
52 U.S.C. 30116(f) 2
5 U.S.C. 551(10) 12
28 U.S.C. 2412 ..... 15, 16

Miscellaneous:

FEC Advisory Op. 2010-11, 2010 WL 3184269 (July 22, 2010) ..... *passim*
Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 Yale L.J. 679 (1989) 15

In the Supreme Court of the United States

No. 19-1398

TED LIEU, UNITED STATES CONGRESSMAN, ET AL., PETITIONERS

v.

FEDERAL ELECTION COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-2a) is not published in the Federal Reporter but is available at 2019 WL 5394632. The opinion of the district court (Pet. App. 3a-22a) is reported at 370 F. Supp. 3d 175.

JURISDICTION

The judgment of the court of appeals was entered on October 3, 2019. A petition for rehearing was denied on January 24, 2020 (Pet. App. 23a-24a). The petition for a writ of certiorari was filed on June 18, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners filed an administrative complaint with the Federal Election Commission (FEC or Commission), alleging that certain groups had violated federal

laws restricting contributions to such groups, and requesting that the FEC initiate an enforcement action against those groups. The Commission dismissed the administrative complaint. Pet. App. 27a-44a. The district court dismissed petitioners' suit seeking review of the FEC's decision. *Id.* at 3a-22a. The court of appeals summarily affirmed. *Id.* at 1a-2a.

1. The Federal Election Campaign Act of 1971 (FECA), Pub. L. No. 92-225, 86 Stat. 3 (52 U.S.C. 30101 *et seq.*), regulates contributions to certain groups known as "political committees." FECA defines the term "political committee" to include "any committee, club, association, or other group of persons" that receives contributions or makes expenditures aggregating in excess of $1000 during a calendar year "for the purpose of influencing any election for Federal office." 52 U.S.C. 30101(4)(A), (8)(A)(i), and (9)(A)(i).

FECA's contribution limitations further delineate three general classes of political committees: committees authorized by a federal candidate, committees established by a political party, and other committees. See 52 U.S.C. 30116(a). This case concerns a subset of the third type of political committee—*i.e.*, certain committees that are neither authorized by a federal candidate nor established by a political party. FECA makes it unlawful for any person to contribute more than $5000 to such a committee within a calendar year, or for such a committee to accept a contribution in excess of that limit. See 52 U.S.C. 30116(a)(1)(C) and (f).

2. In *Citizens United* v. *FEC*, 558 U.S. 310 (2010), this Court held that a federal statute prohibiting corporations and unions from using general treasury funds for independent electioneering violated the First Amendment. *Id.* at 319. The Court explained that, under its

precedents, a limit on independent campaign expenditures is subject to strict scrutiny. *Id.* at 336-337. While acknowledging that the government has a compelling interest in preventing the reality and appearance of *quid pro quo* corruption, the Court held that, as a categorical matter, "independent expenditures * * * do not give rise to corruption or the appearance of corruption." *Id.* at 357. The Court noted that, "[b]y definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate." *Id.* at 360. The Court explained that the "absence of prearrangement and coordination" reduces "the value of the expenditure to the candidate" and "alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Id.* at 357 (citation omitted).

Two months later, in *SpeechNow.org* v. *FEC*, 599 F.3d 686 (en banc) (*SpeechNow*), cert. denied, 562 U.S. 1003 (2010), the en banc D.C. Circuit unanimously held that FECA's limit on contributions to political committees, as applied to committees that make only independent expenditures, violates the First Amendment. *Id.* at 689. The court observed that, under this Court's precedents, "contribution limits * * * implicate fundamental First Amendment interests," although "they do not encroach upon [those] interests to as great a degree as expenditure limits." *Id.* at 692. The court observed that this Court has "recognized only one interest sufficiently important to outweigh the First Amendment interests implicated by contributions for political speech: preventing corruption or the appearance of corruption." *Ibid.* The court concluded that, given *Citizens United*'s holding that independent expenditures do not give rise

to corruption or the appearance of corruption, "contributions to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption." *Id.* at 694.

The government did not file a petition for a writ of certiorari in *SpeechNow*. The challenger in that case filed a petition seeking review of a separate holding relating to FECA's disclosure requirements, but the Court denied that petition. See *Keating* v. *FEC*, 562 U.S. 1003 (2010) (No. 10-145).

Approximately four months after the D.C. Circuit's decision, the FEC issued an advisory opinion announcing, in light of *Citizens United* and *SpeechNow*, that individuals and groups may "make unlimited contributions to organizations * * * that make only independent expenditures," and that such organizations may "solicit and accept unlimited contributions." FEC Advisory Op. 2010-11, 2010 WL 3184269, at *2 (July 22, 2010) (AO 2010-11). Since issuing AO 2010-11, the FEC has not enforced the limits in 52 U.S.C. 30116(a)(1)(C) against political committees that make only independent expenditures.

3. This case arises out of an administrative complaint that petitioners filed in 2016. Under FECA, "[a]ny person" who believes that a violation of the statute has occurred "may file a complaint" with the Commission. 52 U.S.C. 30109(a)(1). If the FEC "determines * * * that it has reason to believe that a person has committed * * * a violation," it "shall * * * notify the person of the alleged violation" and "shall make an investigation of such alleged violation," potentially culminating in a civil suit in federal district court. 52 U.S.C. 30109(a)(2); see 52 U.S.C. 30109(a)(4)-(5). FECA grants

a cause of action to "[a]ny party aggrieved" by the Commission's dismissal of an administrative complaint, and it empowers the reviewing court to determine whether the FEC's dismissal decision based on its interpretation of the statute was "contrary to law." 52 U.S.C. 30109(a)(8).

Petitioners' administrative complaint alleged that ten independent-expenditure-only political committees had knowingly accepted contributions in excess of the $5000-per-year limit imposed by 52 U.S.C. 30116(a)(1)(C). Pet. App. 29a. The complaint asked the FEC to enforce the contribution limit against those committees. *Ibid.*

The FEC found no reason to believe that a FECA violation had occurred, and it accordingly dismissed the complaint. Pet. App. 27a-44a. The FEC observed that the D.C. Circuit's decision in *SpeechNow* "plainly permit[s] the contributions described in the Complaint." *Id.* at 39a. The Commission also observed that, under FECA and its implementing regulations, "an advisory opinion may be relied upon * * * by any person involved in any specific transaction or activity 'which is indistinguishable in all its material aspects from the transaction or activity with respect to which such advisory opinion is rendered.'" *Id.* at 40a (quoting 52 U.S.C. 30108(c)(1)(B)).

The FEC explained that it had issued an advisory opinion (AO 2010-11) acquiescing in the holding of *SpeechNow*. Pet. App. 40a. The agency further explained that, because the committees identified in petitioners' administrative complaint had acted in accordance with the Commission's guidance in AO 2010-11, they were entitled to rely on that opinion and could not be subjected to any sanction for conduct that the advisory opinion allowed. *Id.* at 40a-42a. The Commission

observed that FECA "does not permit the Commission to investigate an allegation before making a finding that there is reason to believe that a respondent has violated or is about to violate the law." *Id.* at 42a. The FEC concluded that the committees' adherence to the agency guidance in AO 2010-11 precluded any "finding of reason to believe that [the committees] violated the law." *Ibid.*

The FEC also stated that it chose "not to accept [petitioners'] invitation not to acquiesce [in] the binding *SpeechNow* decision." Pet. App. 42a. The Commission explained that, in the years since *SpeechNow* was decided, several additional courts of appeals have considered the constitutionality of state and local laws capping contributions to independent-expenditure-only groups, and that all of those courts have held that such laws violate the Constitution. *Id.* at 43a. In light of those decisions, the FEC explained that there was "simply no basis to conclude that the law remains unsettled in a way that would begin to justify Commission nonacquiescence, as [petitioners] contend, even if the Commission had not already adopted the holding of *SpeechNow* in AO 2010-11." *Ibid.*

4. Petitioners filed suit in the United States District Court for the District of Columbia, seeking judicial review of the FEC's dismissal of their administrative complaint. See Pet. App. 4a. The court granted the Commission's motion to dismiss petitioners' suit, concluding that the FEC's decision to dismiss petitioners' administrative complaint was not "contrary to law." *Id.* at 17a.

The district court first determined that it owed no deference to the FEC's decision to dismiss the complaint. Pet. App. 14a-17a. The court believed that this

case was "not * * * typical" because the FEC's decision to dismiss the complaint rested "on its interpretation of the D.C. Circuit's opinion in *SpeechNow*." *Id.* at 16a. The court stated that "courts need not, and should not, defer to agency interpretations of opinions written by courts." *Ibid.* (citation omitted).

Reviewing the FEC's dismissal decision without deference, the district court described the D.C. Circuit's holding in *SpeechNow* that FECA's cap on contributions to political committees cannot constitutionally be applied to committees that make only independent expenditures. Pet. App. 17a-21a. The court concluded that, because no subsequent decision had overruled *SpeechNow*, that decision remained binding and justified the FEC's dismissal of the complaint. *Id.* at 21a. The court then stated that, "[b]ecause the FEC correctly applied *SpeechNow* in dismissing the administrative complaint, the Court need not decide whether the Commission erroneously acquiesced [in] *SpeechNow* or whether the FEC'[s] reliance on its advisory opinion was contrary to law." *Id.* at 21a n.5.

5. The full D.C. Circuit denied petitioners' request for an initial en banc hearing of the appeal. Pet. App. 25a-26a. A panel of the court of appeals summarily affirmed the district court's judgment. *Id.* at 1a-2a. The court explained that the FEC's decision to dismiss petitioners' administrative complaint "was not contrary to law as the challenged contributions to independent-expenditure-only political committees cannot constitutionally be prohibited under [*SpeechNow*]." *Ibid.* The full court then denied petitioners' request for rehearing en banc. *Id.* at 23a-24a.

ARGUMENT

Petitioners challenge (Pet. 9-29) the D.C. Circuit's holding in *SpeechNow.org* v. *FEC*, 599 F.3d 686 (en banc), cert. denied, 562 U.S. 1003 (2010), that 52 U.S.C. 30116(a)(1)(C) cannot constitutionally be applied to contributions to political committees that make only independent expenditures. That challenge does not warrant this Court's review.

The FEC's dismissal of petitioners' administrative complaint, which asked the agency to initiate enforcement proceedings against political committees that had allegedly received excessive contributions, was not "contrary to law." Because the political committees identified in petitioners' administrative complaint had relied in good faith on AO 2010-11, FECA precluded the Commission from imposing any sanction on them. And even setting aside the binding effect of the FEC's advisory opinion, the Commission here lawfully acquiesced in *SpeechNow* and in the numerous other appellate decisions that have reached the same conclusion. In any event, as the D.C. Circuit in *SpeechNow* correctly held, the application of Section 30116(a)(1)(C) to contributions to groups that make only independent expenditures violates the First Amendment.

Although this Court ordinarily applies a strong presumption in favor of reviewing decisions that have held Acts of Congress unconstitutional, that presumption is overcome here. All the courts of appeals that have considered the question have agreed that federal, state, or local laws that restrict contributions to political groups cannot constitutionally be applied to groups that make only independent expenditures. And because this suit involves a challenge to the FEC's decision not to initiate

enforcement proceedings, this case would be a poor vehicle for considering the constitutional question. The petition for a writ of certiorari should be denied.

A. Regardless Of Whether *SpeechNow* Was Correctly Decided, The FEC Acted Lawfully In Dismissing Petitioners' Administrative Complaint

FECA authorizes a court to review the FEC's dismissal of an administrative complaint to determine whether that agency decision was based on an interpretation of FECA that is "contrary to law." 52 U.S.C. 30109(a)(8)(C). The FEC's dismissal of petitioners' administrative complaint was not "contrary to law."

In AO 2010-11, the FEC acquiesced in *SpeechNow*'s holding that Section 30116(a)(1)(C) cannot constitutionally be applied to contributions to political committees that make only independent expenditures. That advisory opinion has remained in effect throughout the past decade, and it precluded the agency from undertaking an enforcement action against committees that had adhered to the Commission's guidance. And even setting aside the binding effect of AO 2010-11, the Commission here lawfully acquiesced in *SpeechNow* and in the subsequent appellate decisions that have reached the same conclusion. Either of those grounds alone forecloses petitioners' challenge to the Commission's dismissal of their administrative complaint, regardless of whether *SpeechNow* was correctly decided.

1. The FEC's prior advisory opinion acquiescing in *SpeechNow* justified, and indeed required, the dismissal of petitioners' administrative complaint. FECA establishes a detailed procedure for the FEC to issue advisory opinions. Any person may request an advisory opinion from the Commission concerning the applica-

tion of FECA or of FEC regulations to "a specific transaction or activity by the person." 52 U.S.C. 30108(a)(1). The Commission must make the request public and "accept written comments submitted by any interested party." 52 U.S.C. 30108(d). FECA also requires the agency to "render a written advisory opinion" within a specified period of time after receiving the request. 52 U.S.C. 30108(a)(1)-(2).

FECA protects persons who rely in good faith on the FEC's advisory opinions. "Any advisory opinion rendered by the Commission * * * may be relied upon by—(A) any person involved in the specific transaction or activity with respect to which such advisory opinion is rendered; and (B) any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which such advisory opinion is rendered." 52 U.S.C. 30108(c)(1). The statute further provides that, "[n]otwithstanding any other provisions of law, any person who relies upon any provision or finding of an advisory opinion * * * and who acts in good faith in accordance with the provisions and findings of such advisory opinion shall not, as a result of any such act, be subject to any sanction provided by [FECA]." 52 U.S.C. 30108(c)(2). The advisory-opinion process is an important part of the statutory scheme, since it helps to clarify the line between lawful and unlawful activities, and thus to alleviate the potential chilling effect on lawful conduct that FECA might otherwise cause.

AO 2010-11 states that, in light of *Citizens United* v. *FEC*, 558 U.S. 310 (2010), and *SpeechNow*, individuals and groups may "make unlimited contributions to organizations * * * that make only independent expenditures," and that such organizations may in turn "solicit

and accept unlimited contributions." AO 2010-11, 2010 WL 3184269, at *2 (July 22, 2010). In dismissing petitioners' administrative complaint in this case, the FEC explained that the committees against which petitioners seek enforcement action have engaged in transactions or activities that are "indistinguishable in all [their] material aspects from the transaction or activity with respect to which [the] advisory opinion [wa]s rendered." Pet. App. 40a (citation omitted). The Commission further explained that those committees had acted "in good faith reliance" on AO 2010-11. *Ibid.* The FEC therefore correctly concluded that "[t]he contributions described in the Complaint * * * clearly fall within the Act's protection for persons entitled to rely on an advisory opinion." *Ibid.* That determination independently justified the FEC's dismissal of petitioners' administrative complaint, regardless of whether *SpeechNow* was correctly decided.

While conceding that the FEC may not retrospectively punish committees for past contributions accepted in good-faith reliance on AO 2010-11, petitioners have argued that the agency may still provide prospective relief from future contributions through a declaration that such contributions violate the law. See D. Ct. Doc. 42, at 11-15 (June 13, 2018). As the Commission observed, however, FECA prohibits the imposition of any "sanction" on a committee that has relied in good faith on an advisory opinion. Pet. App. 41a n.45 (quoting 52 U.S.C. 30108(c)(2)). In dismissing petitioners' administrative complaint, the FEC construed the term "sanction" to include the declaratory relief that petitioners have requested. *Ibid.*

Petitioners have challenged that interpretation of the statutory term "sanction." D. Ct. Doc. 42, at 13-15.

This Court has held, however, that "in determining whether the Commission's action was 'contrary to law,' the task for [a court] [i]s not to interpret the statute as it th[inks] best but rather the narrower inquiry into whether the Commission's construction [i]s 'sufficiently reasonable' to be accepted by a reviewing court." *FEC* v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27, 39 (1981) (*DSCC*) (citation omitted). That standard is especially apt where (as here) the challenged agency action is a decision *not* to initiate a government enforcement proceeding—a decision that in most contexts lies within the government's unreviewable discretion. See p. 13, *infra*.

Here, the FEC observed that courts have interpreted the word "sanction" to cover "nonmonetary limits on future activities." Pet. App. 41a n.45 (citing *Alabama* v. *North Carolina*, 560 U.S. 330, 340-341 (2010); *United States* v. *Alabama*, 691 F.3d 1269, 1289 (11th Cir. 2012), cert. denied, 569 U.S. 968 (2013)). The Commission further noted that "[s]uch a construction would also be consistent with * * * the Administrative Procedure Act," which defines "'sanction'" to include a "'prohibition, requirement, limitation, or other condition affecting the freedom of a person.'" *Ibid.* (quoting 5 U.S.C. 551(10)). Finally, the FEC explained that a contrary reading of FECA would expose individuals and groups who rely on advisory opinions to FEC investigations and administrative proceedings, undermining "the purpose of the advisory opinion process." *Ibid.* That interpretation of the word "sanction" is at least "'sufficiently reasonable' to be accepted by a reviewing court." *DSCC*, 454 U.S. at 39 (citation omitted).

2. In dismissing petitioners' administrative complaint, the FEC also stated that, "even if the Commission had not already adopted the holding of *SpeechNow* in AO 2010-11," the agency would find "no basis to conclude that the law remains unsettled in a way that would begin to justify Commission nonacquiesence." Pet. App. 43a. The agency's decision to acquiesce in *SpeechNow* and in the many other appellate decisions that have reached the same result was not "contrary to law," whether or not *SpeechNow* was correctly decided.

Even when Executive Branch officials believe that a violation of law has occurred, they generally retain authority to decide "not to prosecute or enforce, whether through civil or criminal process." *Heckler* v. *Chaney*, 470 U.S. 821, 831 (1985); see, *e.g.*, *United States* v. *Nixon*, 418 U.S. 683, 693 (1974). In most statutory contexts, "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion," *Chaney*, 470 U.S. at 831, and is presumptively not subject to judicial review, *id.* at 832, even when it rests on the agency's belief "that the law will not sustain" a prosecution or enforcement action, *ICC* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270, 283 (1987).

To be sure, FECA constrains the Commission's enforcement discretion in significant respects. FECA provides that, if the FEC "determines * * * that it has reason to believe that a person has committed * * * a violation," the FEC "*shall* make an investigation of such alleged violation." 52 U.S.C. 30109(a)(2) (emphasis added). And while an agency's decision not to undertake enforcement action ordinarily is not subject to judicial review, FECA authorizes "[a]ny party aggrieved by an order of the Commission dismissing a complaint

filed by such party" to "file a petition with the United States District Court for the District of Columbia." 52 U.S.C. 30109(a)(8)(A); see *FEC* v. *Akins*, 524 U.S. 11, 25-26 (1998) (holding that the FEC's decision not to commence enforcement proceedings was subject to judicial review where that decision rested on an erroneous interpretation of FECA); *Citizens for Responsibility & Ethics in Washington* v. *FEC*, 892 F.3d 434, 441 & n.11 (D.C. Cir. 2018) (distinguishing *Akins* and holding that the FEC's decision not to commence enforcement proceedings was not subject to judicial review where that decision rested on an exercise of prosecutorial discretion and not on an interpretation of FECA). Even so, FECA makes plain that the primary responsibility for judging whether there is reason to believe that a violation has occurred belongs to the FEC, not to the courts. The statute requires the FEC to conduct an investigation only when "*the Commission* * * * determines, by an affirmative vote of 4 of *its* members, that *it* has reason to believe that a person has committed * * * a violation." 52 U.S.C. 30109(a)(2) (emphases added). Nothing in FECA suggests that the Commission is disabled from considering (and potentially acquiescing in) applicable case law in making its own determination whether there is "reason to believe that" a violation has occurred.

The law governing agency acquiescence in judicial decisions reinforces that conclusion. As a general matter, a lower federal court's decision binds the Executive Branch in the specific case in which the judgment was rendered, see *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 218-219 (1995), but does not necessarily bind the Executive Branch in other cases, see *United States* v.

Mendoza, 464 U.S. 154, 158-163 (1984). Federal administrative agencies therefore may, in appropriate circumstances, decline to acquiesce in a precedent set by a lower federal court. See, *e.g.*, *Johnson* v. *United States R.R. Retirement Board*, 969 F.2d 1082, 1093 (D.C. Cir. 1992), cert. denied, 507 U.S. 1029 (1993); see generally Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 Yale L.J. 679 (1989). Agency officials may also choose, however, to conform their practices to lower-court case law, whether or not those officials subjectively believe that the case law is correct. FECA provides for review of the FEC's dismissal decisions in the United States District Court for the District of Columbia, see 52 U.S.C. 30109(a)(8)(A), and *SpeechNow* is "binding" there, Pet. App. 39a. The FEC also noted that "seven federal courts of appeals have addressed the constitutionality of limiting contributions to [groups that make only independent expenditures]; each has ruled that such limits are unconstitutional." *Id.* at 43a; see pp. 23-24, *infra*.

Given this established body of precedent, the FEC found "no basis to conclude that the law remains unsettled in a way that would begin to justify Commission nonacquiescence." Pet. App. 43a. The FEC also explained that "[a]ttempting to enforce contribution limits against independent expenditure groups might expose the Commission to awards of legal fees." *Id.* at 43a n.51; see 28 U.S.C. 2412 (authorizing fee awards against the government where the government's legal position is adopted in "bad faith" or is not "substantially justified"); *Heartland Plymouth Court MI, LLC* v. *NLRB*, 838 F.3d 16, 18 (D.C. Cir. 2016) (awarding fees under 28 U.S.C. 2412 on the ground that an agency had unjustifiably failed to acquiesce in circuit precedent); *Carey* v.

FEC, 864 F. Supp. 2d 57, 61 (D.D.C. 2012) (awarding fees under 28 U.S.C. 2412 on the ground that the FEC had failed to follow *SpeechNow*). The FEC's decision to dismiss the administrative complaint in light of those circumstances was not "contrary to law" even setting aside the binding effect of AO 2010-11.

Petitioners argued below that "the FEC's legal ruling here merely reflected its interpretation of constitutional law and was not an exercise of prosecutorial or enforcement discretion." D. Ct. Doc. 42, at 8. But the FEC has not made an independent "legal ruling" that Section 30116(a)(1)(C) violates the First Amendment. Rather, the FEC recognized that the D.C. Circuit in *SpeechNow* had held the statute unconstitutional as applied; noted that other courts had reached similar conclusions; observed that disregarding those precedents could lead to the award of legal fees against the agency; and concluded that acquiescence in those precedents would be appropriate even if AO 2010-11 did not independently preclude the initiation of enforcement proceedings against the ten political committees that were the subject of petitioners' administrative complaint. See Pet. App. 42a-43a. Dismissal of the administrative complaint on that basis reflected a permissible exercise of enforcement discretion and was not "contrary to law."

B. *SpeechNow* Was Correctly Decided

As applied to contributions to political committees that make only independent expenditures, Section 30116(a)(1)(C) violates the First Amendment. Such an application of Section 30116(a)(1)(C) restricts speech protected by the First Amendment, but is not properly tailored to serve the government's interest in prevent-

ing actual or apparent *quid pro quo* corruption. *SpeechNow* therefore was correctly decided; the FEC was right to dismiss petitioners' complaint; and the court of appeals and district court were right to reject petitioners' challenge to that dismissal decision.

1. In *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam), this Court held that the First Amendment protects the right to spend money on, and to make contributions to, electoral campaigns. *Id.* at 14-23. The Court also made clear, however, that those rights are not absolute, and that Congress may regulate campaign financing in order to prevent the reality or appearance of *quid pro quo* corruption. *Id.* at 26-27.

Since *Buckley*, this Court has held that Congress may limit direct contributions to candidates and expenditures coordinated with candidates (which FECA treats as contributions, see 52 U.S.C. 30116(a)(7)(B)). In particular, the Court has held that Congress may cap individuals' contributions to candidates, see *Buckley*, 424 U.S. at 24-38; prohibit corporations from making contributions to candidates, see *FEC* v. *Beaumont*, 539 U.S. 146, 149 (2003); and limit expenditures that are coordinated with candidates, see *FEC* v. *Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) (*Colorado II*). The Court has explained that direct contributions and coordinated expenditures raise the risk that candidates will accept or appear to accept such payments in exchange for political favors. See *Buckley*, 424 U.S. at 46-47.

At the same time, the Court has repeatedly struck down restrictions on independent expenditures—that is, expenditures that are not coordinated with candidate campaigns. The Court has invalidated caps on independent expenditures by individuals or groups, see

Buckley, 424 U.S. at 39-59; caps on independent expenditures by political committees, see *FEC* v. *National Conservative Political Action Committee*, 470 U.S. 480, 497 (1985) (*NCPAC*); caps on independent expenditures by political parties, see *Colorado Republican Federal Campaign Committee* v. *FEC*, 518 U.S. 604, 618-619 (1996) (lead opinion of Breyer, J.); and prohibitions on independent expenditures by corporations, see *Citizens United*, 558 U.S. at 357. The Court has explained that independent expenditures have a "substantially diminished potential for abuse" because the "absence of prearrangement and coordination * * * alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Citizens United*, 558 U.S. at 357 (quoting *Buckley*, 424 U.S. at 47). The Court has further explained that "[t]he candidate-funding circuit is broken" by an independent expenditure, and that the "separation" between a candidate and such an expenditure ordinarily "negates the possibility" that the expenditure is part of a *quid pro quo*. *Arizona Free Enterprise Club's Freedom Club PAC* v. *Bennett*, 564 U.S. 721, 751 (2011). The Court's decisions thus have recognized a "fundamental constitutional difference" between, on the one hand, direct contributions and coordinated expenditures, and, on the other hand, "money spent to advertise one's views independently of the candidate's campaign." *NCPAC*, 470 U.S. at 497.

The D.C. Circuit's decision in *SpeechNow* follows logically from those principles. So long as it is not coordinated with any candidate, a contribution to a group that makes only independent expenditures raises no greater risk of *quid pro quo* corruption than do the group's independent expenditures themselves. In that

circumstance, the "absence of prearrangement and coordination" between the group and the candidate necessarily "alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Citizens United*, 558 U.S. at 357 (quoting *Buckley*, 424 U.S. at 47).

This Court's decisions in *California Medical Ass'n* v. *FEC*, 453 U.S. 182 (1981) (*CalMed*), and *McCutcheon* v. *FEC*, 572 U.S. 185 (2014), reinforce that conclusion. In *CalMed*, this Court upheld FECA provisions that limited the amounts that could be contributed to certain political committees. See 453 U.S. at 193-199 (plurality opinion); *id.* at 201-204 (Blackmun, J., concurring in part and concurring in the judgment). Justice Blackmun, whose vote was necessary to the judgment, emphasized that the committees at issue there could make *contributions* to political candidates. See *id.* at 203 (Blackmun, J., concurring in part and concurring in the judgment). He explained that, because the committees were "essentially conduits for contributions to candidates," they posed a "threat of actual or potential corruption." *Ibid.* He further explained, however, that "a different result would follow" if—as in *SpeechNow* and in this case—the limit "were applied to contributions to a political committee established for the purpose of making independent expenditures." *Ibid.* "[C]ontributions to a committee that makes only independent expenditures," he reasoned, "pose no such threat" of actual or apparent *quid pro quo* corruption. *Ibid.*

Chief Justice Roberts's controlling opinion in *McCutcheon* drew the same distinction as Justice Blackmun's opinion in *CalMed*. See *McCutcheon*, 572 U.S. at 193 n.2 (plurality opinion). The *McCutcheon*

plurality explained that FECA's contribution limits apply to committees whose activities include "contributing to candidates." *Ibid.* The opinion then stated that those contribution limits do "not" apply to any group that "makes only independent expenditures and cannot contribute to candidates." *Ibid.* The opinion cited *SpeechNow* for that proposition, suggesting that the Justices who joined the opinion regarded *SpeechNow* as correct. *Ibid.*

2. Petitioners' contrary arguments lack merit. Petitioners observe (Pet. 13-19) that this Court has applied more deferential First Amendment scrutiny to limits on campaign contributions than to limits on campaign expenditures. That observation is accurate, but it is beside the point here. The Court has made plain that even a limit on contributions imposes "significant First Amendment costs for individual citizens," and it "has identified only one legitimate governmental interest"—"preventing corruption or the appearance of corruption"—that can justify those costs. *McCutcheon*, 572 U.S. at 206-207 (plurality opinion); see *Buckley*, 424 U.S. at 23-38. And as explained above, the Court's precedents establish that "the government has no anti-corruption interest in limiting contributions to an independent expenditure group." *SpeechNow*, 599 F.3d at 695. It is therefore unnecessary to parse the differences between the standard applicable to contribution limits and the standard applicable to expenditure limits; even under the more deferential standard, the absence of a legitimate anti-corruption interest means that Section 30116(a)(1)(C) cannot constitutionally be applied under the circumstances here. *Ibid.*

Petitioners also invoke (Pet. 17) this Court's decision in *McConnell* v. *FEC*, 540 U.S. 93 (2003), upholding limits on contributions to political parties. Political parties, however, differ from independent-expenditure-only groups in material ways. The Court has held that the "special relationship," "unity of interest," "close affiliation," and "close ties" between political parties and candidates create a real risk that a donor could corrupt a candidate by contributing to the candidate's party. *Id.* at 145, 152. In contrast, the Court has emphasized in subsequent cases that non-party committees that make independent expenditures are "separat[e]" from candidates. *Arizona Free Enterprise*, 564 U.S. at 751. That separation "negates the possibility that independent expenditures" (and therefore contributions to non-party groups that make independent expenditures) "will result in the sort of *quid pro quo* corruption with which [the Court's] case law is concerned." *Ibid.*

Petitioners contend (Pet. 24) that, in practice, "[m]any" political committees operate as "alter egos of candidates' campaigns," and that contributions to such committees raise "the same prospects" of corruption as contributions to candidates and political parties. If a particular political committee makes expenditures *in coordination with* a federal candidate's campaign, the *SpeechNow* holding will be inapplicable by its terms. But petitioners do not "allege that any of the committees [named in their complaint] coordinated their spending with a candidate." Pet. App. 40a.

As explained above, this Court's campaign-finance jurisprudence has drawn a sharp distinction between expenditures that are coordinated with a candidate for federal office, which are treated for both statutory and

constitutional purposes as contributions to the candidate, and independent expenditures to advocate a particular electoral result. The concept of a committee that does not coordinate with any candidate, yet acts as a candidate's "alter ego," has no grounding in this Court's precedents. And petitioners identify no workable constitutional standard that could be used to identify the political committees that are properly regarded as a candidate's alter ego even though they make only independent expenditures.

Petitioners raise (Pet. 20-23) the possibility that a candidate could enter into a *quid pro quo* in which a contribution to an independent-expenditure-only political committee serves as the illicit *quid*. A separate FECA provision, however, already guards against that possibility. As discussed, FECA provides that any payment that is coordinated with a candidate "shall be considered to be a contribution to such candidate." 52 U.S.C. 30116(a)(7)(B)(i); see, *e.g.*, *Colorado II*, 533 U.S. at 443. Under that provision, a contribution that is given to an independent-expenditure-only group pursuant to an agreement with the candidate would be treated as a contribution to the candidate (not simply as a contribution to the group), and it would accordingly be subject to the caps on direct contributions to candidates.

C. This Court Should Deny The Petition

This Court has described judging the constitutionality of a federal statute as "the gravest and most delicate duty" of the federal judiciary. *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981) (citation omitted). The Court has therefore applied "a strong presumption in favor of granting writs of certiorari to review decisions of lower courts holding federal statutes unconstitutional," even in the absence of a circuit conflict. *Maricopa County* v.

Lopez-Valenzuela, 574 U.S. 1006, 1007 (2014) (Thomas, J., respecting the denial of the application for a stay); see, *e.g.*, *Iancu* v. *Brunetti*, 139 S. Ct. 2294, 2298 (2019). That strong presumption is not absolute, however, and the Court has occasionally denied review even when a court of appeals has held an Act of Congress unconstitutional. See, *e.g.*, *Binderup* v. *Attorney General United States of America*, 836 F.3d 336 (3d Cir. 2016) (en banc), cert. denied, 137 S. Ct. 2323 (2017); *Beer* v. *United States*, 696 F.3d 1174 (Fed. Cir. 2012), cert. denied, 569 U.S. 947 (2013); *American Civil Liberties Union* v. *Mukasey*, 534 F.3d 181 (3d. Cir. 2008), cert. denied, 555 U.S. 1137 (2009). In the unusual circumstances of this case, the question whether Section 30116(a)(1)(C) can constitutionally be applied to independent-expenditure-only groups does not warrant this Court's review.

1. The courts of appeals that have considered the issue have uniformly concluded that the First Amendment precludes caps on contributions to groups that make only independent expenditures. Before *Citizens United*, one court of appeals had already held that a state law imposing such a limit violated the First Amendment. See *North Carolina Right to Life, Inc.* v. *Leake*, 525 F.3d 274, 293-295 (4th Cir. 2008). Two months after *Citizens United* was decided, the D.C. Circuit sitting en banc unanimously held in *SpeechNow* that the FECA limit on contributions to political committees is unconstitutional as applied to independent-expenditure-only committees. See 599 F.3d at 689.

Since the decisions in *Citizens United* and *SpeechNow*, five more courts of appeals have likewise held that state and local campaign-finance laws imposing such limits violated the First Amendment; in each case, the decision was unanimous. See *New York Progress &*

Protection PAC v. *Walsh*, 733 F.3d 483, 486-488 (2d Cir. 2013); *Texans for Free Enterprise* v. *Texas Ethics Committee*, 732 F.3d 535, 537-538 (5th Cir. 2013); *Wisconsin Right to Life State Political Action Committee* v. *Barland*, 664 F.3d 139, 151-155 (7th Cir. 2011); *Farris* v. *Seabrook*, 677 F.3d 858, 864-868 (9th Cir. 2012); *Thalheimer* v. *City of San Diego*, 645 F.3d 1109, 1117-1121 (9th Cir. 2011); *Long Beach Area Chamber of Commerce* v. *City of Long Beach*, 603 F.3d 684, 696-699 (9th Cir.), cert. denied, 562 U.S. 896 (2010); *Republican Party of New Mexico* v. *King*, 741 F.3d 1089, 1092-1103 (10th Cir. 2013). All in all, 30 federal appellate judges have considered the issue since *Citizens United*, and all 30 have reached the same conclusion: Limits on contributions to political committees cannot constitutionally be applied to groups that make only independent expenditures. "Few contested legal questions are answered so consistently by so many courts and judges." *New York Progress*, 733 F.3d at 488. That consensus renders this Court's intervention unnecessary, particularly since the controlling opinion in *McCutcheon* appeared to embrace *SpeechNow*. See *McCutcheon*, 572 U.S. at 193 n.2; pp. 19-20, *supra*.

2. Even if the constitutional question warranted this Court's review, this case would be an unsuitable vehicle in which to resolve it. As explained above, the FEC's decision to dismiss petitioners' administrative complaint was lawful whether or not *SpeechNow* was correctly decided. That is so both because AO 2010-11 precluded any enforcement action against the committees named in petitioners' administrative complaint, and because the Commission lawfully acquiesced in the uniform appellate case law even setting aside the binding effect of the advisory opinion. See pp. 13-16, *supra*.

To be sure, the courts below (which were bound by *SpeechNow*'s First Amendment holding as a matter of circuit precedent) rested their judgments solely on the constitutional ruling in *SpeechNow*. Those courts did not decide "whether the Commission erroneously acquiesced [in] *SpeechNow* or whether the FEC'[s] reliance on its advisory opinion was contrary to law." Pet. App. 21a n.8; see *id.* at 1a-2a. Under this Court's precedents, however, a respondent is entitled to "defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals." *Granfinanciera, S. A.* v. *Nordberg*, 492 U.S. 33, 38-39 (1989) (citation omitted). If this Court grants review, and the FEC then argues on the merits that the dismissal decision properly protects parties that had relied on AO 2010-11 and reflects a lawful exercise of enforcement discretion, principles of constitutional avoidance will require the Court to address those arguments before turning to the constitutional question raised by petitioners. See *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.").

3. Denying this petition would not wholly insulate the First Amendment question from this Court's review. Substantially the same First Amendment issue can arise—and has arisen—in the context of state and local limitations on contributions to groups that make only independent expenditures. See pp. 23-24, *supra*. As petitioners acknowledge (Pet. 13 n.3), the petition for a writ of certiorari in *City of Long Beach* v. *Long*

Beach Area Chamber of Commerce, 562 U.S. 896 (2010) (No. 10-155), raised precisely that question. The Court denied that petition, but future petitions presenting the same question could still arise. Review might also be available under 52 U.S.C. 30110, which authorizes a national political party or voter to sue to determine "the constitutionality of any provision" of FECA, and which requires the district court in such an action to certify non-frivolous constitutional questions to the court of appeals, which must hear the matter sitting en banc. See *ibid.*; *CalMed*, 453 U.S. at 193 n.14.

A case that comes to this Court through either of those routes would squarely present the question that petitioners ask the Court to resolve, without any threshold complications relating to the FEC's advisory opinions or its enforcement discretion. Such a case, unlike this one, also would avoid imposing burdens on groups that have relied in good faith on clear judicial and administrative guidance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General

LISA J. STEVENSON
Acting General Counsel
KEVIN DEELEY
Associate General Counsel
HARRY J. SUMMERS
Assistant General Counsel
JACOB S. SILER
Acting Assistant General Counsel
Federal Election Commission

SEPTEMBER 2020