No. 19-1398

IN THE

Supreme Court of the United States

REPRESENTATIVE TED LIEU, ET AL.,

Petitioners,

v.

FEDERAL ELECTION COMMISSION,

Respondent.

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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The Government recognizes the "strong presumption in favor of granting writs of certiorari to review decisions of lower courts holding federal statutes unconstitutional." BIO 22 (citation omitted). It also acknowledges that both courts below "rested their judgments *solely* on the constitutional" ground that FECA's limit on contributions to political committees, as applied to Super PACs, violates the First Amendment. *Id.* 25 (emphasis added). And the Government nowhere disputes the extraordinary importance of that constitutional holding.

The Government nevertheless opposes certiorari on three grounds. First, it argues that this case is an unsuitable vehicle for resolving the question presented. There is, however, no impediment to review. Second, the Solicitor General maintains that the D.C. Circuit's holding in *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc), is clearly correct—albeit not for the reason the D.C. Circuit gave. But the D.C. Circuit's holding is not only debatable but wrong. As the Government itself argued in *SpeechNow*, "*Citizens United* does not disrupt *Buckley*'s longstanding decision upholding contribution limits," and this Court's contribution-limits jurisprudence justifies the limit on contributions to Super PACs. Pet. App. 60a. Third, the Government notes that other courts of appeals have invalidated state and local contribution limits similar to the federal limit here. If anything, however, these decisions enhance the need for this Court's review.

This Court should grant certiorari and close the gaping loophole *SpeechNow* opened in the Nation's campaign-finance laws.

I. This case is an excellent vehicle for resolving the constitutionality of FECA's limit on contributions to Super PACs.

The Government's contends that, before deciding whether the contribution limit here is constitutional, this Court might need to address two statutory arguments the Government raised in the district court. *See* BIO 9-16, 25. This contention is doubly misguided. There is no potential barrier to reaching the constitutional question presented. In any event, the statutory arguments the Solicitor General recites lack merit.

1. This Court has explained time and again that it is "a court of review, not first view." *Manuel v. City of Joliet*, 137 S. Ct. 911, 922 (2017) (citation omitted). This Court's custom, therefore, is to address the lower court's resolution of the question presented and then remand for that court to consider, in the first instance, any properly preserved alternative arguments. *See, e.g.*, *id.*

The Solicitor General suggests that this custom does not necessarily apply in this case. He asserts that "[i]f" the Government decides here to raise a statutory argument at the merits stage, then—even though the court of appeals did not reach the issue—"principles of constitutional avoidance" would require the Court to consider the argument "before turning to the constitutional question [presented]." BIO 25. This is incorrect. The Court regularly resolves constitutional questions presented and then remands for lower courts to address alternative arguments for affirmance in the first instance—even where those arguments are statutory in nature. *See, e.g.*, *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2211 (2020) (deciding

separation-of-powers issue and remanding for consideration of statutory "ratification" argument); *McWilliams v. Dunn*, 137 S. Ct. 1790, 1801 (2017) (deciding question regarding the Due Process Clause and remanding for consideration of alternative statutory argument); *Manuel*, 137 S. Ct. at 919, 922 (deciding Fourth Amendment question and remanding for consideration of statute of limitations argument).

If anything, there are stronger reasons than usual to adhere to that custom here. The constitutional question presented is exceptionally pressing. *See* Pet. 11-13. Yet this case has taken four years to reach this Court, and the Government does not point to any other potential vehicles currently pending in any court. Nor does the Government identify any litigation involving a comparable state or local law that has been brought in the past several years. Even if such a case were brought, it is hard to believe that this Court would be better served if the Government were relegated to a mere *amicus* role in a case that could decide the fate of a federal statute as important as this one.

2. At any rate, the statutory arguments the Solicitor General raised below are unconvincing.

a. FECA's safe-harbor provision bars a court from imposing a "sanction" when someone has relied in good faith on an FEC advisory opinion. BIO 10-12 (quoting 52 U.S.C. § 30108(c)(2)). Petitioners, however, seek no "sanction." A "sanction" is a "penalty or coercive measure." *Alabama v. North Carolina*, 560 U.S. 330, 340 (2010) (quoting *Sanction*, *Black's Law Dictionary* (9th ed. 2009)). And a declaratory judgment—the only relief petitioners asked the FEC to issue—is neither a penalty nor "coercive." *Steffel v. Thompson*, 415 U.S. 452, 471 (1974) (internal quotations omitted). A

declaratory judgment merely "states the existing legal rights" of the parties. *Ulstein Mar., Ltd. v. United States*, 833 F.2d 1052, 1055 (1st Cir. 1987).

Falling back, the Government suggests (without actually citing *Chevron*) that the FEC's contrary construction of "sanction" is "at least 'sufficiently reasonable.'" BIO 12 (citation omitted). But even if some form of deference applied here, interpreting a statutory term in the teeth of its ordinary meaning is not reasonable.

b. The Solicitor General's argument (BIO 13-16) based on the FEC's "enforcement discretion" falls flat as well. The Government says the FEC has acted permissibly because "the primary responsibility for judging whether there is reason to believe that a violation [of FECA] has occurred belongs to the FEC, not to the courts." *Id.* 14. But the question here is not whether *a violation of FECA* has occurred. All agree it has. The only question is whether the FECA provision that has been violated is constitutional. That question most assuredly falls squarely within "the province and duty of the judicial department." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

As the district court recognized, the Government's musings (BIO 14-15) about the permissibility of the FEC's "acquiescence" in *SpeechNow* are thus beside the point. Pet. App. 14a-17a. Unlike many other statutory regimes, FECA expressly allows judicial review of agency action that is "contrary to law." 52 U.S.C. § 30109(a)(8)(C). And the FEC acts "contrary to law" when it declines to enforce FECA based on "an erroneous interpretation of Supreme Court precedent and the First Amendment." *Citizens for Resp. & Ethics in Wash. v. FEC*, 209 F. Supp. 3d 77, 81 (D.D.C.

2016). Any other conclusion would let the FEC insulate a lower-court decision from this Court's review simply by declining to seek certiorari and then announcing that it had "acquiesced."

II. The court of appeals has incorrectly invalidated a federal statute.

The Solicitor General declines to defend the linchpin of the D.C. Circuit's reasoning—namely, that "contributions to groups that make only independent expenditures . . . cannot corrupt or create the appearance of corruption." Pet. App. 59a. That is no surprise: The D.C. Circuit's logic flatly contradicts a theory the Government itself has successfully used in *criminal* bribery cases. Pet. 20-23. Instead, the Solicitor General argues that when a large contribution to a Super PAC is not made "*in coordination with* a federal candidate's campaign," it poses no risk of *quid pro quo* corruption. BIO 21 (emphasis in original); *see also id.* 18. The Solicitor General's unwillingness to defend the D.C. Circuit's justification for striking down a federal statute is itself a strong signal that this Court's review is warranted. And the Solicitor General's new argument—no less than the D.C. Circuit's reasoning—misreads this Court's precedent and blinks practical reality.

1. *Precedent.* Contribution limits are "merely 'marginal' speech restrictions." *FEC v. Beaumont*, 539 U.S. 146, 161 (2003). As the Government recognizes, therefore, "this Court has applied more deferential First Amendment scrutiny to limits on campaign contributions than to limits on campaign expenditures." BIO 20. And the Government does not dispute (nor could it) that the statute here limits contributions, not expenditures. But—reversing the

position the Government took in *SpeechNow*, *see* Pet. App. 60a—the Solicitor General argues that the statute is unconstitutional "even under the more deferential standard." BIO 20. He pins this argument on two remarkably thin reeds: (a) dicta in a single Justice's separate opinion in *California Medical Association v. FEC*, 453 U.S. 182 (1981) (*CalMed*), and (b) a lone footnote in the legal background section of the plurality opinion in *McCutcheon v. FEC*, 572 U.S. 185 (2014). BIO 19-20. Neither of those sources indicates that the statute here is unconstitutional, much less compels that conclusion.

True, Justice Blackmun expressed the view in his *CalMed* concurrence that the First Amendment prohibits limiting contributions to political committees that make only independent expenditures. But, as petitioners have explained, Justice Blackmun expressly based this suggestion on a premise that this Court rejected in *Buckley* and has continued to reject ever since—namely, that contribution limits should be subject to the same exacting scrutiny as expenditure limits. Pet. 17 n.5; *see also* Pet. 14-17. The Solicitor General offers no response to this explanation.

The footnote in *McCutcheon* does not help the Solicitor General either. That footnote observed that, under *SpeechNow*, FECA's contribution limits did not apply "to independent expenditure PACs." 572 U.S. at 193 n.2 (plurality opinion). But, contrary to the Solicitor General's assertion (BIO 20), that observation did not "suggest[]" that "*SpeechNow* [i]s correct." The plurality in *McCutcheon* was merely describing the state of affairs that existed leading up to "the 2013-2014 election cycle." 572 U.S. at 193. Nor did any other aspect of *McCutcheon* suggest that

Congress lacked the ability to limit contributions to Super PACs.

To the contrary, the plurality in *McCutcheon* stressed that its ruling did not affect the Court's holding in *McConnell v. FEC*, 540 U.S. 93 (2003), "about 'soft money.'" 572 U.S. at 209 n.6. And, as petitioners have explained, the reasons the Court gave in *McConnell* for upholding the contribution limits there apply equally here. *See* Pet. 17, 23, 25. The Solicitor General's only response is that political parties—the recipients of the contributions in *McConnell*—have particularly "close ties" to candidates they support. BIO 21 (citation omitted). But the same is plainly true of Super PACs—particularly those that are directly linked to political parties. *See* Pet. 24-25. Indeed, the Solicitor General never claims otherwise.

2. *Practical reality.* The Solicitor General's argument with respect to the realities of political fundraising fares no better. The Solicitor General asserts that, so long as a contribution to a political committee is not "coordinated with a candidate," it poses no risk of corruption sufficient to justify regulation. BIO 21-22. This assertion is mistaken.

a. Like the Solicitor General here, those who challenged the contribution limit in *McConnell* maintained that contributions cannot corrupt when neither they nor the expenditures they enable are coordinated with candidates. 540 U.S. at 301 (Kennedy, J., concurring in part and dissenting in part) (reprising this argument). Drawing on "precedent, common sense, and the realities of political fundraising," the Court rejected that proposition. 540 U.S. at 152. It explained that even

when the entity receiving contributions makes only "noncoordinated expenditures," Congress can limit contributions to that entity where an "alignment of interests" exists between it and a candidate. 540 U.S. at 152 & n.48, 155-56; *see also Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 617 (1996) (opinion of Breyer, J.) (recognizing the "danger of corruption" when individuals can make large contributions "for independent party expenditures for the benefit of a particular candidate"). The Court reaffirmed this holding in *Republican Party of La. v. FEC*, 137 S. Ct. 2178 (2017) (mem.), upholding the federal limit on contributions to state and local political parties seeking to use them only for independent expenditures.

Those holdings apply with full force here. In light of the alignment of interests between candidates and Super PACs supporting their election, a serious risk exists that candidates will feel indebted to donors who make big contributions to such organizations. This, in turn, incentivizes donors to make large contributions to create such indebtedness. *See* Pet. 25-26; Amicus Br. of Political Scientists 17-28. Indeed, there is good reason to believe that contributions to Super PACs "present an even higher risk of corruption than soft money does." Amicus Br. of Legal Scholars of Campaign Finance 9. Unlike "soft money" contributions to parties, contributions to Super PACs fund advertisements expressly advocating the election of favored candidates. Moreover, unlike political parties, Super PACs often support a *single* candidate. They can also be used to funnel huge salaries and other payments to candidates' close friends and family members—and thus to enable indirect payments for political favors. *Id.* 9-13.

The Solicitor General protests that if a Super PAC truly became an "alter ego" of a candidate's campaign organization, then *SpeechNow* would be "inapplicable" because the Super PAC would be acting "in coordination with" the campaign. BIO 21 (emphasis removed). This contention misapprehends our argument. We use the term "alter ego" to describe the type of relationship that the FEC *permits* under its anti-coordination rules. Pet. 7; *see also* 11 C.F.R. § 109.21 (defining coordination and establishing safe harbors); FEC Advisory Op. 2011-12, 2011 WL 2662413 (June 30, 2011) (giving finer-grained guidance). Under those rules, donors typically view a contribution to a Super PAC as functionally indistinguishable from a contribution to a candidate himself. *See, e.g.*, Robert Faturechi & Lauren Kirchner, *Super PAC to Billionaire: We Need More Money to Save a Republican Senate*, ProPublica (Oct. 14, 2016), https://perma.cc/Q7SJ-U4M5 (quoting a Super PAC's solicitation of funds: "We are the blessed Super PAC by Sen. Toomey . . . . I am his former senior aide and finance director, and I am working with his former chief-of-staff, cc'd on this email.").

The Government does not suggest that these rules allow "coordinated" activity. Nor does it suggest that any of the real-world practices that petitioners and amici describe constitute "coordination" under FECA. Accordingly, the only pathway available to prevent the potential corruption—and obvious appearance of corruption—enabled by Super PACs is enforcing FECA's contribution limits.

2. The Solicitor General's position that Congress may limit only "coordinated" contributions to Super PACs also flouts public perceptions. The First

Amendment permits Congress to regulate contributions that are not themselves bribes. *Buckley*, 424 U.S. at 27-28. "In addition to 'actual quid pro quo arrangements,' Congress may permissibly limit 'the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual contributions' to particular candidates." *McCutcheon*, 572 U.S. at 207 (plurality opinion) (quoting *Buckley*, 424 U.S. at 27).

Large contributions to Super PACs present equivalent opportunities for abuse. *See* Pet. 21-22, 25-27. A multi-million-dollar contribution to a candidate's designated Super PAC need not be made "pursuant to an agreement with the candidate" (BIO 22) to raise this danger. Where the candidate is aware of the private contribution and later takes an official public act because of it, the public no doubt perceives the outcome as corrupt. Congress thus acted well within constitutional bounds to forestall such conduct.

III. Other courts' decisions invalidating comparable state and local contribution limits make certiorari all the more warranted.

Insofar as federal courts have prevented state and local governments from enforcing contribution limits similar to the FECA limit at issue here, that simply enhances the importance of the constitutional question presented. *See* Amicus Br. of Washington and 17 Other States at 16-21.

Contrary to the Government's contention (BIO 24), it makes no difference that these decisions agree with one another. Just last Term, the Court granted certiorari to review a court of appeals decision declaring a federal statute unconstitutional. Every other federal court to address the issue—two other

courts of appeals and numerous district courts—had reached the same conclusion, and the Solicitor General agreed with that consensus. This Court explained, however, that "[b]ecause the Court of Appeals held a federal statute invalid, we granted certiorari." *Allen v. Cooper*, 140 S. Ct. 994, 1000 (2020); *see also* Pet. for Cert. at 15 n.4, *Allen v. Cooper*, No. 18-877; Br. in Opp. at 10-12, *Allen v. Cooper*, No. 18-877. Similar cases abound. *See, e.g.*, *Coleman v. Court of Appeals of Maryland*, 566 U.S. 30, 35 (2012) & Br. in Opp. at 8-9, *Coleman v. Court of Appeals of Maryland*, No. 10-1016 (granting certiorari where all six courts of appeals to address the constitutionality of a federal statute had invalidated it); *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786 (2011) & Br. in Opp. at 12-16, *Brown v. Entertainment Merchants Ass'n*, No. 08-1448 (granting certiorari where all four federal courts of appeals and every district court to consider the type of state law at issue had held them unconstitutional).

This Court's actions in those cases reflect the respect it accords other branches of the federal government, as well as the States. Even when the Court ultimately agrees with lower courts that a law (or type of law) is unconstitutional, a definitive ruling by this Court advances inter-branch and federal-state dialogue. Indeed, the Court's reasoning often provides critical guidance to legislators regarding how they might accomplish their objectives in a constitutional manner.

Yet the reasons for granting certiorari here go beyond the need to hear this Court's voice on the question presented. Most of the lower court cases the Solicitor General cites—like *SpeechNow* itself—were issued during the brief period between *Citizens United*

and the upsurge of Super PACs. All were issued before elected officials across the political spectrum began complaining that massive contributions to Super PACs are "[v]ery corrupt." Pet. 27 (citation omitted). Especially with the consequences of *SpeechNow* in full view, this Court's review is urgently needed to restore the integrity of FECA and our electoral system.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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