

No. 19-1398

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IN THE  
Supreme Court of the United States

REPRESENTATIVE TED LIEU ET AL.,  
*Petitioners,*

v.

FEDERAL ELECTION COMMISSION,  
*Respondent.*

**On Petition for Writ of Certiorari  
to the United States Court of Appeals for the  
Federal Circuit**

**BRIEF OF AMICI CURIAE POLITICAL SCIENTISTS**

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**INTEREST OF *AMICI CURIAE*<sup>1</sup>**

Amici curiae are political scientists specializing in research on federal campaign financing, including a strong focus on Super PACs. Their findings have been published in leading scholarly journals and books. Their professional efforts to inform the public about campaign finance issues have included: holding leadership positions in nonpartisan organizations and task forces, serving as experts in court cases, testifying before Congress and the Federal Election Commission, and writing for general interest publications. Amici are interested in sharing with the Court relevant empirical research on Super PACs, which shows how they have substantially transformed the federal campaign finance system over the last decade.

Anne E. Baker is an Assistant Professor of Political Science at Santa Clara University. Dr. Baker's research focuses on the influence of money on congressional elections and representation as well as its impact on the electoral operations and strategies of political parties and interest groups.

Robert G. Boatright is a Professor of Political Science at Clark University and Director of Research at the National Institute for Civil Discourse at the University of Arizona. He has served as a research fellow and member of the academic advisory board at the

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<sup>1</sup> Pursuant to Supreme Court Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amici* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief.

Campaign Finance Institute, and a member of Bipartisan Policy Center's Campaign Finance Task Force.

Anthony Corrado is a Professor of Government at Colby College and former Chair of the Board of Trustees of the Campaign Finance Institute. He served as an expert witness in *FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001), and this Court cited and quoted his expert report in its opinion in that case.

Diana Dwyre is a Professor of Political Science at California State University, Chico who does research on U.S. campaign finance, political parties, and congressional elections. She is the 2020-2022 President of the American Political Science Association Political Organizations and Parties organized section.

John C. Green is the Director of the Bliss Institute of Applied Politics and a Distinguished Professor of Political Science at the University of Akron. He has published extensively on campaign finance, with a particular emphasis on presidential campaigns and Super PACs.

Stephen R. Weissman is the former Associate Director for Policy of the non-partisan Campaign Finance Institute, where he produced political and legal analyses of major campaign finance issues. Previously, he was Associate Professor of Political Science and Political Economy at the University of Texas at Dallas.

Clyde Wilcox is a Professor of Government at Georgetown University. He has written widely on interest groups and campaign finance, and has served as an expert witness on national and state campaign finance cases, including *SpeechNow.org v. FEC*.

## SUMMARY OF ARGUMENT

In *SpeechNow.org v. Federal Election Commission*, 599 F.3d 686 (D.C. Cir. 2010), the D.C. Circuit held that 52 U.S.C. § 30116(a)(1)(C)’s limitation on “contributions to independent expenditure-only organizations” violated the First Amendment. *Id.* at 696. The Government elected not to appeal that decision to this Court because it believed that the “particularly limited nature of SpeechNow’s contribution and expenditure practices means that the court of appeals’ decision will affect only a small subset of federally regulated contributions.” Letter from Eric Holder, Attorney Gen., to Harry Reid, Senate Majority Leader at 2 (June 16, 2010), [perma.cc/G9KL-MHMS](http://perma.cc/G9KL-MHMS). More than a decade later, campaign finance data and academic research make clear that that prediction could not have been more wrong.

*SpeechNow* paved the way for the introduction of a new actor in campaign finance: “Independent Expenditure-only” Political Committees or, as they are more commonly known, “Super PACs.” Unlike ordinary Political Action Committees (“PACs”), which can “both make contributions to candidates and engage in independent spending that expressly advocates the election or defeat of a clearly identified candidate for federal office,” Super PACs are permitted only to make independent expenditures. Richard Briffault, *Super PACs*, 96 Minn. L. Rev. 1644, 1647 (2012). These independent expenditures may be used to “expressly advocat[e] the election or defeat of a clearly identified candidate” but cannot be “made in concert or cooperation with or at the request or suggestion of such candidate, the candidate’s authorized political committee, or their agents, or a political party committee or its

agents.” 52 U.S.C. § 30101(17); *see also SpeechNow*, 599 F.3d at 689. Super PACs are able to solicit unlimited contributions from donors to fund their independent expenditures, whereas contributions to PACs are limited. Briffault, *Super PACs*, 96 Minn. L. Rev. at 1647.

Since *SpeechNow*, academics have closely studied the rise of these organizations. That research has identified three major changes in campaign financing that are attributable to Super PACs.

*First*, Super PACs, fueled by unlimited contributions, have assumed an outsized role in the financing of federal elections in the last decade, often surpassing more conventional sources of campaign financing, including regular PACs, party committees, and sometimes even candidates themselves. Their activity has increased from 2% of total federal election spending in the 2010 elections to 23% in 2016 and 2018. Notably, between eight and 23 Super PACs have accounted for 75% of all Super PAC independent expenditures in each of the last five federal election cycles. These groups are predominantly devoted to advancing a single-candidate or party, and they primarily focus their expenditures on close races that determine which party controls Congress and the Presidency. Thus, tremendous power has been concentrated in the hands of a small number of wealthy Super PACs that strive to influence the outcome of some of the most consequential elections.

*Second*, although FEC regulations prohibit Super PACs from formally coordinating their communications and strategy with campaigns, Super PACs often maintain close relationships with campaigns and

harmonize their operations with them. Single-candidate and party-centered Super PACs are often publicly sanctioned, and sometimes even launched, by candidates and party leaders, who also participate in the groups' events and fundraising. And they are frequently managed by former staff members, consultants, vendors, and donors of the very campaigns they assist, who are able to use their intimate knowledge of past candidate or party strategies to guide Super PAC activities. These groups are able to mirror and complement campaign activities, and even assume traditional campaign functions, without depending on prohibited private communications with campaigns. As Super PACs that accept unlimited contributions are increasingly seen by donors, candidates and party leaders, as extensions of candidates and parties' campaigns, contribution limits that apply only to candidates and parties become less meaningful and effective.

*Third*, Super PACs tend to be financed by a small number of wealthy individuals and organizations. Typically, the top 100 individual and top 100 organizational donors provide 75-80% of total individual and organizational contributions to Super PACs. High proportions of these donors combine substantial direct, limited contributions to candidates and parties with larger, unlimited contributions to Super PACs supporting the same candidates and parties. The size of those individuals' donations to Super PACs dwarf their contributions to candidates or parties. In 2016, for example, 20 individuals made contributions to Super PACs ranging from \$10 million to \$89.5 million. This "dual giving" undermines the limits that federal law places on individual contributions to candidates

(\$2,800 per election) and party committees (\$35,000 per committee general account per year). *See Contribution Limits for 2019-2020*, [https://www.fec.gov/resources/cms-content/documents/contribution\\_limits\\_chart\\_2019-2020.pdf](https://www.fec.gov/resources/cms-content/documents/contribution_limits_chart_2019-2020.pdf).

Contrary to DOJ's assessment in 2010, it is clear that by enabling the growth of Super PACs, *SpeechNow* has substantially transformed the federal campaign finance system. Amici take no position on whether Super PACs are beneficial or detrimental to the American electoral system. Instead, they wish to make the Court aware of the political science scholarship that shows in the decade since *SpeechNow*, Super PACs have fundamentally changed the landscape of campaign finance. This case offers the Court an opportunity to review whether limits on contributions to independent expenditure-only organizations violate the First Amendment, a question of undeniable importance. *See* Supreme Court Rule 10(c).

## ARGUMENT

### I. SUPER PACS HAVE BECOME A MAJOR FORCE IN FEDERAL ELECTIONS, GREATLY EXPANDING THE ROLE OF UNLIMITED CONTRIBUTIONS IN THE CAMPAIGN FINANCE SYSTEM

#### A. Super PAC Spending Has Skyrocketed Since *SpeechNow*

The growth of Super PACs in the decade since *SpeechNow* has been meteoric. Super PACs accounted for less than two percent of expenditures in the 2010 midterm elections. In 2016 and 2018, by contrast, they accounted for *twenty-three percent* of total election

spending, constituting a staggering \$1.674 and \$1.526 billion respectively.<sup>2</sup>

A summary of the strong and steady increase in Super PACs' influence in the federal campaign finance system is contained in Table 1.<sup>3</sup>

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<sup>2</sup> These figures include spending by so-called "Hybrid PACs." These fraternal twins of Super PACs were legalized in 2011 via a consent agreement that permits "nonconnected" political committees—PACs that donate to candidates and are subject to contribution limits—to create separate accounts for independent expenditures from unlimited contributions. *See* Stipulated Order and Consent Judgment, *Carey v. Federal Election Commission* Civ. No. 11-259 RMC (D.D.C Aug. 19, 2011), ECF No. 28. In practice these accounts are no different from Super PACs. We include them in "Super PACs" except where otherwise noted.

<sup>3</sup> Super PAC independent spending for the ongoing 2020 presidential election cycle was higher, as of June 20, 2020, than it was on the same date in 2012, 2014 or 2018. *See* <https://www.opensecrets.org/outsidespending/index.php?type=Y&filter=S>.

**Table 1: Spending in Federal Elections 2010-18 (Millions of Dollars)  
(U) = From Unlimited Contributions)**

	2010	2012	2014	2016	2018
<b>Presidential Candidates</b>		1,368.2		1,447.5	
<b>House Candidates</b>	1,013.3	994.6	891.0	902.9	1,571.4
<b>Senate Candidates</b>	780.0	754.7	684.3	650.5	1,015.0
<b>Fed/State Parties</b>	1,101.2	1,565.4	1,188.7	1,564.8	1,499.9
<b>PAC Overhead</b>	225.8	246.9	292.8	306.4	380.7
<b>PAC Independent Expenditures</b>	248.0	331.7	293.5	325.4	291.9
<b>Super PACs (U)</b>	83.9	778.2	650.7	1,627.4	1,452.8
<b>Hybrid PAC Independent Expenditures (U)</b>		12.2	2.7	46.8	73.0
<b>Federal 527 Organizations (U)</b>	201.6	153.7	203.6	244.2	182.2
<b>501(c) Independent Expenditures (U)</b>	174.2	336.8	168.2	213.5	133.1
<b>Other Independent Expenditures</b>	2.7	1.0	0.1	2.9	0.8
<b>Total</b>	<b>3,830.8</b>	<b>6,543.3</b>	<b>4,375.5</b>	<b>7,332.2</b>	<b>6,600.8</b>
<b>Subtotal: SuperPACs + Hybrid PAC IEs</b>	84.0	790.4	653.4	1,674.2	1,525.8
<b>Percentage:</b>	2%	12%	15%	23%	23%
<b>Subtotal: From Unlimited Contributions</b>	462.4	1,281.9	1,025.3	2,134.8	1,841.9
<b>Percentage:</b>	12%	20%	23%	29%	28%

Table Prepared for amici, based upon Federal Election Commission data, by the Center for Responsive Politics  
<https://www.opensecrets.org/>, June 12, 2020.

As Table 1 also shows, Super PACs now account for the vast majority of expenditures by organizations permitted to receive unlimited contributions.<sup>4</sup> During 2012 and 2014, the first two full election cycles in which they were legal, Super PACs were responsible for two-thirds of spending by groups receiving unlimited contributions. By the 2016 and 2018 cycles they represented close to 80% of such expenditures. At the same time, as Super PACs have cemented their status as the dominant spender among groups receiving unlimited contributions, the proportion of total electoral spending funded by such contributions has more than doubled, rising from 12% in 2010 to 28% in 2018. Thus, Super PACs have brought about a major change in the campaign finance system, which was long based on limited contributions.

Because of their ability to receive unlimited contributions, Super PACs also increasingly outspend traditional political committees and regular PACs, which depend on limited donations. One study found that from 2010 to 2016, Super PAC independent expenditures rose from 4.8% to 43.6% of non-candidate spending, whereas national political parties' contributions, coordinated spending, and independent expenditures declined from 18.8% to 13.3%, and traditional PACs' expenditures fell from 37% to 20.6%. Diana Dwyre, *Political Parties and Campaign Finance: What Role Do the National Parties Play?* at 60, Paper prepared for the Campaign Finance Task Force, Bipartisan Policy Center, Washington, D.C. (revised May 2017),

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<sup>4</sup> Federal tax law permits two other types of organizations—section 527 committees and section 501(c) organizations—to accept unlimited contributions, but restricts the type or amount of their political spending. Briffault, 96 Minn. L. Rev. at 1648-49.

<https://bipartisanpolicy.org/wp-content/uploads/2019/05/Political-Parties-and-Campaign-Finance-What-Role-Do-the-National-Parties-Play.-Diana-Dwyre.-Diana-Dwyre.pdf> (Professor Dwyre provided full dollar figures and percentages for this graph). In 2016, Super PAC expenditures exceeded those of the party campaign committees by nearly \$200 million. See Molly E. Reynolds & Richard L. Hall, *Financing the 2016 Congressional Election*, in *Financing the 2016 Election* 224.

Another telling indication of the considerable role Super PACs now play in funding federal elections is their capacity to dominate independent spending within particular races. Single-candidate Super PACs have substantially outraised and outspent candidates in certain presidential and senatorial elections. For example, Right to Rise, the candidate-specific Super PAC supporting Jeb Bush for the Republican presidential nomination in 2016, raised \$121.7 million, while the Bush campaign raised only \$34.1 million. See *Jeb Bush*, OpenSecrets.org, <https://www.opensecrets.org/pres16/candidate?id=N00037006>. Super PACs backing Marco Rubio, Scott Walker, Chris Christie, John Kasich, and Carly Fiorina also all spent more than those candidates did in the 2016 cycle. See John C. Green, *Financing the 2016 Presidential Nomination Campaigns*, in *Financing the 2016 Election* 149. And Granite State Solutions, a single-candidate Super PAC active in the New Hampshire Senate election, spent \$24.2 million in support of Senator Kelly Ayotte; whereas Ayotte spent only \$19.6 million. Compare *Granite State Solutions*, OpenSecrets.org, <https://www.opensecrets.org/pacs/index-pend.php?cmte=C00580381&cycle=2016> (detailing

Granite State Solutions' spending), *with New Hampshire Senate 2016 Race*, OpenSecrets.org, <https://www.opensecrets.org/races/summary?cycle=2016&id=NHS1> (summarizing Ayotte's).

Also notable are two developments discussed below. First, the vast majority of the contributions amassed by Super PACs have been concentrated in the hands of a small number of organizations that focus their expenditures on a single candidate or party. Second, these funds are disproportionately spent on competitive electoral campaigns.

**B. A Small Number of Super PACs have Been Responsible for the Overwhelming Majority of Super PAC Independent Expenditures**

A small subset of Super PACs account for the great majority of the independent expenditures made by these organizations. See Paul S. Herrnson, Jennifer A. Heerwig, & Douglas M. Spencer, *The Impact of Organizational Characteristics on Super PAC Financing*, in *The State of the Parties* 250 (John C. Green, Daniel J. Coffey, & David B. Cohen, eds., 2018) (noting that from 2010 to 2016, “[t]he 72 groups that raised \$10 million or more each...accounted for two-thirds of all Super PAC receipts”). Indeed, in each election cycle from 2010 through 2018, just eight to 23 groups accounted for 75% of Super PAC independent expenditures, with between three and seven supplying 50% of them.<sup>5</sup> See *2020 Outside Spending, by Super*

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<sup>5</sup> Independent expenditures, “vote for” or “vote against” appeals (on the air or on the ground), are the major Super PAC activities, comprising approximately two-thirds of all spending. They are the only ones where data allows comparisons among Super PACs. See Diana Dwyre & Evelyn Braz, *Super PAC Spending*:

PAC, OpenSecrets.org, <https://www.opensecrets.org/outsidespending/summ.php?chrt=V&type=S>; *2020 Outside Spending, by Group*, OpenSecrets.org, <https://www.opensecrets.org/outsidespending/summ.php?chrt=V&type=H>.

The highest spending Super PACs have specific characteristics. Political scientists distinguish between Super PACs by their missions: (1) single-candidate groups; (2) party-centered groups; and (3) more ideological or issue-oriented groups. See David B. Magleby and Jay Goodliffe, *Interest Groups in the 2016 Election* in *Financing the 2016 Election* 105. The Super PACs that have dominated federal election spending fall principally into the first two categories. In fact, single-candidate and party-centered Super PACs accounted for 75% of all Super PAC independent expenditures from 2010 through 2018. *Outside Spending*, OpenSecrets.org, <https://www.opensecrets.org/outsidespending/>.<sup>6</sup>

Indeed, the eight Super PACs that spent the most money in federal elections from 2010 to 2018—comprising an eye-opening 47% of total Super PAC independent expenditures during this timeframe—were all either single-candidate or party-centered. See Table 2. Five of those groups focused on bringing a party to power in the House, Senate, or Presidency and operated in multiple election cycles. The remainder were

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*Strategies and Goals*, 13 *The Forum* 245, 258-260 (2015). For total spending, including operational expenses and transfers, see Table 1; for total independent expenditures, see n. 6, *infra*.

<sup>6</sup> Of \$3.027 billion in Super PAC independent expenditures in this time period, single-candidate groups made \$990 million and party-centered ones \$1.271 billion, totaling \$2.262 billion.

single-candidate Presidential Super PACs which supported Democratic and Republican candidates Barack Obama, Mitt Romney, Hillary Clinton, and Bush.

**Table 2: Top 8 Super PACs in Independent Expenditures 2010-18 (Millions of Dollars)**

Group	Partisan Affiliation	Office	Total Spending (in millions)
Senate Majority PAC <sup>7</sup>	Democratic	Senate	\$271.2
Priorities USA Action (Obama, Clinton)	Democratic	President	226.2
Congressional Leadership Fund	Republican	House	197.9
Senate Leadership Fund	Republican	Senate	181.1
House Majority PAC	Democratic	House	179.4
Restore Our Future (Romney)	Republican	President	142.1
American Crossroads	Republican	House, Senate, President	129.2
Right to Rise (J. Bush)	Republican	President	86.6
Total IEs			1,414
(All Super PAC IEs)			3,027
Percentage of all Super PAC IEs			47%
Table Prepared using Federal Election Commission data, available at <a href="https://www.opensecrets.org/">https://www.opensecrets.org/</a> , June 12, 2020.			

<sup>7</sup> This group was called “Majority PAC” in the 2012 cycle.

**C. Super PACs' Independent Expenditures Are Mainly Concentrated in Competitive Campaigns, Enhancing Their Potential Influence over Elections**

Super PACs, especially single-candidate and party-centered ones, also tend to focus their expenditures on competitive races. *See* Magleby & Goodliffe, *supra*, at 107.<sup>8</sup> This strategy provides Super PACs even greater potential influence over the outcome of important elections than their already-considerable share of federal election spending might suggest.

Single-candidate Super PACs' preoccupation with competitive races is perhaps most visible in Presidential elections. During the 2016 presidential primaries, for example, Super PACs spent approximately \$323 million on independent expenditures, 36% of what the candidates themselves spent. John C. Green, *Financing the 2016 Presidential Nomination Campaigns*, in *Financing the 2016 Election*, 154.

But Super PACs have also spent heavily in competitive Senate races. The principal Senate Republican and Democratic party-centered Super PACs, for example, made *all* of their independent expenditures in 2016 in only 17 races. Their choices mirrored the

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<sup>8</sup> This behavior has not been observed as clearly in ideological or issue-oriented Super PACs, which may spend considerable sums in "safe districts" to advance their policy priorities or to obtain access to legislators who can affect their interests. Some groups spread their funds across non-competitive as well as competitive arenas. Kolodny & Dwyre, *Convergence or Divergence: Do Parties and Outside Groups Spend on the Same Candidates and Does it Matter?* 46 *American Political Research* 375, 395 (2018). Others, however, are more inclined to focus on competitive races targeted by the relevant national party committees. Dwyre & Braz, *infra*, 256.

corresponding party campaign committee's target list of competitive seats. In all but one of those races, the winner prevailed with 55% or less of the vote. See Table 3 of Campaign Finance Institute, *Press Release: Political Parties and Candidates Dominated the 2016 House Elections While Holding Their Own in the Senate* (April 13, 2017), [http://www.cfinst.org/pdf/federal/congress/2016/PartyIE\\_Table3.pdf](http://www.cfinst.org/pdf/federal/congress/2016/PartyIE_Table3.pdf).

Similarly for the House, in 2012 party-centered Super PACs directed 91% of their independent expenditures to competitive races targeted by the Democratic or Republican campaign committees. See Diana Dwyre & Evelyn Braz, *Super PAC Spending: Strategies and Goals*, 13 *The Forum* 245, 255 (2015); see also Thomas E. Mann & Anthony Corrado, *Party Polarization and Campaign Finance*, Brookings Center for Effective Public Management, 12-13 (July 15, 2014). <https://www.brookings.edu/research/party-polarization-and-campaign-finance/>. And in 2014, there was a "close match" between seats targeted by the pro-Democratic House Majority PAC and the Democratic Congressional Campaign Committee. Robin Kolodny & Diana Dwyre, *Convergence or Divergence: Do Parties and Outside Groups Spend on the Same Candidates and Does it Matter?* 46 *American Political Research* 375, 393 (2018). Likewise, in 2016, the House party-centered Super PACs concentrated on the 34 contests prioritized by the national committees of the major parties. Campaign Finance Institute, *supra*, Table 2, [http://www.cfinst.org/pdf/federal/congress/2016/PartyIE\\_Table2.pdf](http://www.cfinst.org/pdf/federal/congress/2016/PartyIE_Table2.pdf).

These findings make clear that Super PACs do not simply play a major role in federal election spending; they largely focus their spending on the most important races. This strategy increases their ability to

influence which political party controls the Presidency and Congress.

**II. SUPER PACS' CLOSE ASSOCIATION AND INFORMAL COORDINATION WITH CANDIDATES AND PARTIES WEAKENS THE EFFECTIVENESS OF CONTRIBUTION LIMITS APPLYING ONLY TO CANDIDATES AND PARTIES**

FEC regulations prohibit Super PACs and other independent political groups from coordinating with candidates or party campaign committees. *See* 11 C.F.R. §§ 109.20–109.23; *see also* Richard Briffault, *Coordination Reconsidered*, 113 Colum. L. Rev. Sidebar 88, 92 (May 2, 2013) (noting that a Super PAC's spending will be “considered coordinated with a candidate...if there is either some close involvement of the candidate with the group in decisions concerning...a specific ad, or if there has been some transmission of information between the candidate and the group with respect to the campaign's strategies, messages, or needs”). Nevertheless, Super PACs are able to use a variety of indirect means to associate themselves with campaigns and harmonize their activities with them. The result is “structurally independent but functionally coordinated” spending. Victoria A. Farrar-Myers & Richard Skinner, *Super PACs and the 2012 Elections*, 10 *The Forum* 105, 111 n.2, 111-14 (2013); *see also* Mann & Corrado, *Party Polarization*, *supra*, at 6 (noting that Super PACs are “formally separate and independent but effectively hardwired to [candidates and party campaigns]”).

As Super PACs accepting unlimited contributions are increasingly seen by donors, candidates and party leaders as extensions of candidates and parties'

campaigns, contribution limits applying only to candidates and parties become less meaningful and effective.

**A. Super PACs and Candidates or Parties Broadcast The Fact that Particular Super PACs' Sole Purposes Are to Support a Particular Candidate or Party**

The predominant single-candidate and party-centered Super PACs almost always declare that their very purpose is to support a particular candidate or party, thereby closely associating themselves with their favorites. Those beneficiaries in turn often make clear to donors that a particular Super PAC will support their campaign via independent expenditures. The purpose of these signals is to ensure that donors to a candidate or party-centered Super PAC know contributions will be used in a way that is implicitly sanctioned by that candidate or party.

Examples of this pattern abound. The America First Super PAC, for instance, currently includes material on its home page describing itself as the “Trump Super PAC” and prominently displays the “Make America Great Again” slogan. <https://www.a1apac.org/>. And Jeb Bush was listed as an honorary chairman of Right To Rise, the Super PAC that supported him, up until he began his formal campaign. Nicholas Confessore & Eric Lichtblau, *Campaigns' Aren't Necessarily Campaigns in the Age of 'Super PACs'*, New York Times, May 17, 2015, <https://www.nytimes.com/2015/05/18/us/politics/super-pacs-are-remaking-16-campaigns-official-or-not.html>.

In turn, candidates and party leaders publicly signal their support for candidate or party-centered

Super PACs. Ben Carson, for instance, stated that the US First PAC would “lay the groundwork” for his campaign. Ian Vandewalker, *Shadow Campaigns: The Shift in Presidential Campaign Funding to Outside Groups*, Brennan Center for Justice, 13 (Aug. 2019), [https://www.brennancenter.org/sites/default/files/analysis/Shadow\\_Campaigns.pdf](https://www.brennancenter.org/sites/default/files/analysis/Shadow_Campaigns.pdf). And House and Senate Democratic and Republican leaders initiated the creation of party-centered Super PACs. Magleby & Goodliffe, *supra*, at 106.

Candidates, party leaders, or their surrogates also attend fundraisers and meetings of these groups. For example, in 2014, President Obama attended fundraisers for two Democratic congressional Super PACs. *See Super Connected*, Public Citizen, 14-15 (October 14, 2014), <https://www.citizen.org/wp-content/uploads/super-connected-2014-citizens-united-outside-groups-report.pdf>. And in 2011, Senate Majority Leader Harry Reid wrote letters introducing the new Senate Majority PAC to prospective donors, saying it was “solely devoted to leveling the playing field and protecting the Democratic majority in the Senate.” Michael Beckel, *Senate Majority Leader Harry Reid Solicits Cash for New Democratic Super PAC*, OpenSecrets.org (June 22, 2011), <https://www.opensecrets.org/news/2011/06/senate-majority-leader-harry-reid-solicits/>.

Finally, candidates and party leaders’ actions can subtly direct donations to a preferred Super PAC. For example, Joe Biden indicated his support for “Unite the Country,” a Super PAC run by his former aides, in November of 2019. Stephen R. Weissman, *Joe Biden’s Super PAC Stumble*, The Hill (Nov. 20, 2019). In mid-April 2020, Biden in effect redirected donors to another Super PAC by releasing a statement praising

Priorities USA Action. Contributions followed accordingly—Unite the Country raised over \$18 million during the first three months of 2020, but just \$7,000 in the last half of April after Biden’s announced his support for Priorities USA Action. The latter, meanwhile, raised over \$7 million in April 2020. Karl Evers-Hillstrom, *Biden Statement Guides Donors from One Super PAC to Another*, OpenSecrets.org (May 20, 2020), <https://www.opensecrets.org/news/2020/05/biden-guides-super-pac-contribs/>.

**B. Single-Candidate and Party-Centered Super PACs are Often Staffed By Individuals Whose Backgrounds Make Clear Their Associations With and Abilities to Assist a Particular Candidate or Party**

Single-candidate and party-centered Super PACs are often run by the former staff members, consultants, vendors, and donors of the candidates they support. The presence of these individuals helps ensure that potential donors are aware of a Super PAC’s desire to effectively assist a campaign and that expenditures are deployed in a way that will be most useful to that campaign.

Directors of candidate-specific presidential Super PACs have included former campaign directors, chiefs of staff, and others with detailed knowledge of the candidate’s campaign strategy, supporters, and fundraising activities. For instance, the staff of pro-Clinton Priorities USA Action included the political director, finance director, and pollster from her 2008 presidential campaign. Vandewalker *supra*, at 17-18. And the director of America First Action, a Super PAC supporting Trump’s 2020 campaign, is Linda

McMahon, a Trump donor and former Trump Cabinet member. Raymond Arke, *Linda McMahon, Trump Donor and Cabinet Member, to Head Pro-Trump Super PAC*, OpenSecrets.org (April 1, 2019), <https://www.opensecrets.org/news/2019/04/linda-mcmahon-to-head-pro-trump-super-pac/>.

Similar patterns exist at the congressional level. For example, the director of Granite State Solutions, the Super PAC active in favor of Ayotte in the 2016 New Hampshire Senate race, was the director of Ayotte's 2010 Senate campaign. John DiStaso, *Pro-GOP Super PAC begins \$15 million fall ad campaign attacking Hassan*, WMUR (Sept. 1, 2016), <https://www.wmur.com/article/pro-gop-super-pac-begins-15-million-fall-ad-campaign-attacking-hassan/5214664>. And key former political advisers to Senator Mitch McConnell staffed Kentuckians for Strong Leadership, a pro-McConnell Super PAC, in 2014. Public Citizen, *Super Connected* (2014), update on report published in October 2014 (January 14, 2015), 8-9.

Scholars evaluating this dynamic have concluded that “[t]he shared relationships and mutual understandings between a candidate’s campaign staff and [single-candidate group’s] staff facilitate the ‘orchestration’ of some of these organizations’ campaign efforts.” Herrnson, Heerwig, & Spencer, *supra*, at 251-52.

### **C. Super PACs Undertake a Variety of Campaign Functions to Complement and Amplify Candidates’ Efforts**

Super PACs do not merely indicate to donors that they are aligned with a particular candidate or

party. They also serve as extensions of their campaigns.

As previously noted, congressional party-centered Super PACs intervene in the same close races as their respective party committees. See *supra*, pp. 15-16. Super PACs' television advertisements often mirror or complement campaign themes, see Farrar-Meyers & Skinner, at 111-12, though they may be "more...oppositional in tone" towards candidates' rivals, Bipartisan Policy Center, *Campaign Finance in the United States: Assessing an Era of Fundamental Change*, at 39, <https://bipartisanpolicy.org/report/the-state-of-campaign-finance>. And Super PACs assist in preparing candidates' events and conducting opposition research. See David B. Magleby, *Change and Continuity in the Financing of the 2016 Election*, in *Financing the 2016 Election* 33; Anthony Corrado, *The Regulatory Environment of the 2016 Election*, in *Financing the 2016 Election* 74.

Indeed, these groups increasingly perform many of the tasks traditionally undertaken by candidates or parties. See Herrnson, Heerwig, & Spencer, *supra*, at 253. An analysis of the activities of single-candidate Super PACs and other "outside groups" for major 2016 presidential candidates revealed eight different types of campaign-related activities that Super PACs undertook, including rapid response, field work, and campaign-specific events. Eleven candidates (all but Democrat Bernie Sanders) were the beneficiaries of Super PAC activity in at least one, and usually more, of these categories. Magleby, *supra*, at 32, 44-47. Other ways in which Super PACs connect with campaigns without running afoul of the law include publicizing opposition research and

utilizing publicly released video footage by candidates. Corrado, *The Regulatory Environment of the 2016 Election*, in *Financing the 2016 Election* 74.

The close relationships between Super PACs and the campaigns they support blur the lines between these two groups. Citizens, donors, and political actors themselves are increasingly unlikely to perceive Super PACs as entities that are clearly distinct from campaigns. See Farrar-Myers & Skinner, *supra*, at 114. This development has rendered contribution limits applying only to candidates and parties less meaningful and less effective.

### **III. “DUAL GIVING” UNDERMINES FEDERAL CONTRIBUTION LIMITS**

A relatively small number of very large donors provide the bulk of Super PAC financing. These unlimited contributions frequently benefit the same candidates and parties that those donors support directly through limited contributions. This “dual giving” undercuts federal contribution limits.

#### **A. A Small Number of Wealthy Individual Donors Provide the Vast Majority of Individual Contributions to Super PACs**

The vast majority of Super PAC individual contributions in any election cycle consistently come from the top 100 individual donors. In 2018, for example, while 156,193 individuals gave a total of \$852,159,552 in reported contributions to Super PACs, \$662,244,552 of that total (78%) was collected from the top 100 donors. *Super PACs: How Many Donors Give*, OpenSe-

crets.org, <https://www.opensecrets.org/outside-spending/donor-stats?cycle=2018&type=I>. That number was similar in 2016 (73%), 2014 (73%), and 2012 (67%). *Id.*

The contributions of these individuals are orders of magnitude larger than the current legal limits for individual contributions to candidates (\$2800 per primary or general election) and general accounts of party committees (\$35,000 per committee per year). *See Contribution Limits for 2019-2020*, [https://www.fec.gov/resources/cms-content/documents/contribution\\_limits\\_chart\\_2019-2020.pdf](https://www.fec.gov/resources/cms-content/documents/contribution_limits_chart_2019-2020.pdf). In 2016, for example, twenty donors made contributions to Super PACs that ranged from \$10 million to \$89.5 million. *See* Magleby & Goodliffe, *supra*, at 102. And a report by Public Citizen found that between 2010 and 2020 just “25 people and their spouses” contributed nearly half of the “\$3 billion in total individual Super PAC donations.” Alan Zibel, *Oligarch Overload*, Public Citizen, <https://www.citizen.org/article/oligarch-overload/>.

The explosion of individual contributions to Super PACs has greatly elevated the role of the top 400 donors—“0.00016% of the voting age population”—in federal elections. *See* Adam Bonica, *Expert Report*, Equal Citizens, 7 (2018), <https://equalcitizens.us/wp-content/uploads/2018/10/Bonica-Expert-Report.pdf>. From 2012 to 2016, donations to all political entities from this elite group rose from 10% (\$772 million) to 20% (\$1.3 billion) of total contributions. *See Id.*<sup>9</sup>

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<sup>9</sup> This study does not indicate what percentage of this spending is attributable to contributions to Super PACs. However, as noted

**B. A Small Number of Organizational Donors Provide the Vast Majority of Organizational Contributions to Super PACs.**

Although organizational contributions to Super PACs make up about 40% of these groups' contributions, *see* Herrnson, Heerwig & Spencer, *supra*, at 250, as with individual donors, a small number of contributors play an outsized role in funding these groups.

The top 100 organizational donors accounted for 80% or more of Super PAC receipts from organizations in each of the past four election cycles. *See Super PACs: How Many Donors Give*, OpenSecrets.org, <https://www.opensecrets.org/outside-spending/donor-stats?cycle=2020&type=O>. These contributors included a wide variety of organizations, especially unions, social welfare groups, professional associations and other Super PACs. *See 2018 Top Donors to Outside Spending Groups*, OpenSecrets.org, <https://www.opensecrets.org/outsidespending/summ.php?cycle=2018&disp=D&type=O&super-only=S>.<sup>10</sup>

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in Part I, donors have few other vehicles for unlimited contributions and Super PACs' proportion of such donations has risen dramatically.

<sup>10</sup> Despite many observers' initial fears, corporations and LLCs do not constitute a major source of funds for Super PACs. Data from the Center for Responsive Politics indicates that since 2010 their contributions have amounted to 6 percent of the total funds raised by Super PACs. *See Corporate & LLC Contributions to SuperPACs*, OpenSecrets.org, [https://docs.google.com/spreadsheets/d/138cCta\\_eIYHToVqDZdsV4mCM7q](https://docs.google.com/spreadsheets/d/138cCta_eIYHToVqDZdsV4mCM7q)

**C. Wealthy Donors’ Dual Giving To Parties or Candidates and the Super PACs Supporting Them Undermines Federal Contribution Limits**

High proportions of the top 100 Super PAC donors contribute both directly to a particular candidate or party *and* to one or more Super PACs (single-candidate, party-centered or ideological) supporting the same candidate or party. This “dual giving” ensures that certain wealthy donors are able to provide large-scale support for their expressly preferred candidate or party that exceeds, by many orders of magnitude, contribution limits for that candidate or party.

In the 2012 and 2014 election cycles, 81 of the top 100 individual Super PAC donors contributed to both candidates and Super PACs supporting those same candidates. Stephen R. Weissman, *The Speech-Now Case and the Real World of Campaign Finance*, Free Speech for People, 2 (Oct. 2016), <https://freespeechforpeople.org/wp-content/uploads/2016/10/FSFP-Weissman-Report-final-10-24-16.pdf>. In 2014, the average number of candidates benefiting from donors’ dual-giving was eight per donor. *Id.* at 6. These donors on average contributed \$30,120 to their preferred candidates and \$2,474,046 to Super PACs supporting them. *Id.* at 4. As for organizational givers, 31 of the top 50 practiced such

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BYHEjWgCxvUU3sR6Q/edit#gid=758087243. Notably, however, it is not possible to trace all of the corporate money Super PACs receive. Although Super PACs must report contributions over \$200 to the FEC, their 501(c) social welfare group and business league donors, are not required to reveal *their* contributors.

dual-giving. *Id.* at 9. On average, each organizational donor assisted 33 candidates, with total direct contributions averaging \$265,827 to preferred candidates and \$3,157,832 to Super PACs supporting those same candidates. *Id.*

Research has also revealed an overlap in donors to national political party committees and Super PACs, especially party-centered ones. Donors who contributed to one or more party committees in both 2010 and 2012 were also likely to contribute to a wide variety of Super PACs. See Anne Baker, *The Fundraising Disadvantages Confronting American Political Parties*, 13 *The Forum* 223 (2015). Moreover, in 2012, 48 of the top 103 individual donors to Super PACs simultaneously contributed both to party committees and party-centered Super PACs for that election cycle. On average, they gave \$69,522 to party committees and \$2,222,854 to party-centered Super PACs. See Stephen R. Weissman, *The SpeechNow Case and the Real World of Campaign Finance, Part II: Undermining Federal Limits on Contributions to Political Parties*, Free Speech For People, 7 (May 2017), [https://freespeechforpeople.org/wp-content/uploads/2017/05/Research-Report-2017\\_01.pdf](https://freespeechforpeople.org/wp-content/uploads/2017/05/Research-Report-2017_01.pdf).

These figures suggest that many large donors are behaving strategically, combining their limited but direct contributions to favored candidates and parties with unlimited indirect ones to Super PACs for greater impact. This kind of activity is consistent with studies indicating that campaign donors are politically sophisticated and capable of strategically targeting their contributions to maximize their influence over election outcomes. See Michael Barber, *Donation Motivations: Testing Theories of Access and Ideology*, 69

Political Research Quarterly 148 (2016); Peter Francia, John Green, Paul Herrnson, Lynda Powell & Clyde Wilcox, *The Financiers of Congressional Elections* (2003); James Gimpel, Frances Lee & Shanna Pearson-Merkowitz, *The Check is in the Mail: Interdistrict Funding Flows in Congressional Elections*, 52 American Journal of Political Science 373 (2008). Of particular relevance is one of the only recent studies containing a special examination of wealthier donors, which found “evidence of a class of engaged and wealthy donors who spread their dollars widely” to “out-of-jurisdiction congressional candidates and ideologically congruent political organizations and PACs.” Jesse H. Rhodes, Brian F. Schaffner & Raymond J. La Raja, *Detecting and Understanding Donor Strategies in Midterm Elections* 71 Political Research Quarterly, 503, 514 (2018).

Even if many Super PAC donors are not consciously striving to circumvent contribution limits, the very existence of this dual giving undermines the functioning of those limits. Furthermore, it supports the earlier conclusion that donors increasingly perceive Super PACs as extensions of candidate and party campaigns. *See supra* Part II.

## CONCLUSION

In the decade since *SpeechNow* was decided, Super PACs have left an indelible mark on federal elections. Super PACs accepting unlimited contributions spend nearly one in every four federal election campaign dollars, concentrated in the most competitive races. They enable million dollar, even tens of millions of dollar, donors to support organizations that market and conduct themselves as extensions of candidates’

and parties' campaigns – *regardless of federal contribution limits applying to those campaigns*. This extraordinary transformation of the campaign finance system, enabled by *SpeechNow*, confirms that this case poses a question of undeniable importance.

Respectfully submitted,

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