

ORAL ARGUMENT NOT YET SCHEDULED

No. 19-5072

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

REPRESENTATIVE TED LIEU, ET AL.,

Plaintiffs-Appellants,

v.

FEDERAL ELECTION COMMISSION,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Columbia, No. 16-cv-2201

**BRIEF OF SENATORS SHELDON WHITEHOUSE,
RICHARD BLUMENTHAL, AND MAZIE HIRONO AS *AMICI CURIAE*
IN SUPPORT OF APPELLANTS' PETITION FOR HEARING EN BANC**

Jennifer R. Cowan
Counsel of Record
Gary W. Kubek
Laura J. Samuels
Michael C. McGregor
Nora Niedzielski-Eichner
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, New York 10022
(212) 909-6000
jrcowan@debevoise.com
gwkubek@debevoise.com
ljsamuels@debevoise.com
mcmcgregor@debevoise.com
nniedzielskieichner@debevoise.com

Jonathan M. DeMars
DEBEVOISE & PLIMPTON LLP
801 Pennsylvania Avenue, NW
Washington, D.C. 20004
(202) 383-8000
jmdemars@debevoise.com

June 28, 2019

Counsel to Amici Curiae

**CERTIFICATE AS TO PARTIES,
RULINGS, AND RELATED CASES**

A. Parties and *Amici*

To counsel's knowledge, the parties, intervenors, and *amici* appearing before this Court are listed in the Plaintiffs-Appellants' Certificate as to Parties, Rulings, and Related Cases. Counsel understands additional *amici curiae* may appear in this matter.

B. Rulings Under Review

An accurate reference to the ruling at issue appears in the Plaintiffs-Appellants' Certificate as to Parties, Rulings, and Related Cases.

C. Related Cases

The case on review was not previously before this Court. Counsel is not aware of any other related cases within the meaning of Circuit Rule 28(a)(1)(C) currently pending in this Court.

/s/ Jennifer R. Cowan

Jennifer R. Cowan

STATEMENT REGARDING SEPARATE BRIEFING

Pursuant to Circuit Rule 29(d), *amici* certify that a separate brief is necessary because *amici* share a unique perspective as elected members of the United States Senate, which may be of significant value to the Court in considering Appellants' petition for an initial hearing *en banc*. No other *amicus* is capable of providing this unique perspective.

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GLOSSARY OF ABBREVIATIONS

DISCLOSE Act	Democracy Is Strengthened by Casting Light On Spending in Elections Act
PAC	Political Action Committee

INTEREST OF AMICI CURAE¹

Amici curiae are United States Senators Sheldon Whitehouse of Rhode Island, Richard Blumenthal of Connecticut, and Mazie Hirono of Hawaii. The Senators are members of the Senate Judiciary Committee and Senator Whitehouse is the lead sponsor of the DISCLOSE Act. *Amici* are democratically elected legislators, with firsthand experience of the disastrous consequences that unlimited contributions to organizations that “only engage in independent expenditure political spending” inflict on our democracy. Accordingly, *amici* respectfully support Appellants’ request that the Court grant an initial hearing *en banc* to reexamine its holding in *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010).

ARGUMENT

I. *SpeechNow* has Created a New and Ever-growing Shadow Campaign Finance System in Which Corruption, or the Appearance Thereof, Is Endemic.

In *SpeechNow*, this Court held, “[i]n light of the [Supreme] Court’s holding as a matter of law [in *Citizens United v. FEC*] that independent expenditures do not corrupt or create the appearance of *quid pro quo* corruption, contributions to groups that make only independent expenditures also cannot corrupt or create the

¹ All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel for a party, nor any person other than the *amici curiae*, or their counsel, contributed money that was intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E).

appearance of corruption.”² From *amici*’s perspective as active participants in political campaigns and the legislative process, this Court’s conclusion as to the effect of contributions to groups that make only independent expenditures was and remains incorrect. Under *SpeechNow*, special interest donors have used super PACs and other outside organizations to evade limitations on contributions and to exert undue influence tending to produce corruption and the appearance thereof. The safeguards the Court thought would cabin the political evil of unlimited contributions – independence of unlimited-spending organizations from campaigns and public disclosure of donors – do not and cannot protect against this risk.

A. Unlimited Contributions Have Created an End Run Around Campaign Finance Restrictions.

Super PACs are overtaking the campaign finance system, giving vastly disproportionate influence to a small number of big donors. Super PACs have received more than \$4.8 billion in contributions since 2010,³ and just eleven donors have contributed more than \$1 billion of those funds.⁴ Outside interest groups

² *SpeechNow.org*, 599 F.3d at 694. *Amici* note that whether an activity tends to corrupt appears to be an issue of fact, not of law, and in our experience it is not factual that large contributions cannot corrupt.

³ *Super PACs*, OpenSecrets.org, <https://www.opensecrets.org/pacs/superpacs.php> (last visited June 27, 2019).

⁴ Michelle Ye Hee Lee, *Eleven Donors Have Plowed \$1 Billion into Super PACs Since They Were Created*, Wash. Post (Oct. 26, 2018), <https://www.washingtonpost.com/politics/eleven-donors-plowed-1-billion-into->

have outspent the candidates themselves in 48 congressional races since *Citizens United*.⁵ Once an aberration, this form of influence is increasingly the new normal.⁶

Even if super PACs operated with “independence” and within a “regime of effective disclosure,” as the *SpeechNow* Court presumed (inaccurately, we believe), nothing prevents donors from discussing their contributions – and what they want in exchange – with candidates. This is a regime of improper influence, *quid pro quo* corruption, and the appearance thereof. The risk of *quid pro quo* corruption comes from the communication between the donor and the candidate, which can occur whether or not the PAC is “independent” of the candidate (single-candidate super PACs worsen this obvious danger). While the potential for money in politics to lead to corruption is hardly a new phenomenon, the risk of corruption posed by the unlimited contributions to super PACs permitted by *SpeechNow* is substantially greater than the risk from limited direct campaign contributions.

[super-pacs-since-2010/2018/10/26/31a07510-d70a-11e8-aeb7-ddcad4a0a54e_story.html?utm_term=.2d60b5a9f21a](https://www.issueone.org/wp-content/uploads/2018/12/2018-outside-spending.pdf).

⁵ Michael Beckel, *Super PACs and Dark Money Groups Outspent Candidates in a Record Number of Races in 2018*, Issue One (Dec. 18, 2018), <https://www.issueone.org/wp-content/uploads/2018/12/2018-outside-spending.pdf>.

⁶ *Id.*

Our view is broadly shared, as illustrated by two recent Republican candidates for President. President Trump said when campaigning in 2016, “these super PACs are a disaster Very corrupt. . . . There is total control of the candidates”⁷ Senator John McCain, 2008 Republican nominee for President, said in 2012, “What we have done is made a contribution limit a joke.” He added, “[t]here will be huge scandals, because there’s too much money washing around, too much of it we don’t know who’s behind it and too much corruption associated with that kind of money.”⁸ As recent investigations in North Carolina⁹ and Washington D.C.¹⁰ show, large contributions to super PACs create large opportunities for *quid pro quo* corruption and the appearance of such corruption.

⁷ Albert W. Alschuler et al., *Why Limits on Contributions to Super PACs Should Survive Citizens United*, 86 Fordham L. Rev. 2299, 2338-42 (2018).

⁸ *Id.*

⁹ Emery P. Dalesio and Gary D. Robertson, *Focus on investor’s political donations after bribery charge*, AP News (Apr. 3, 2019), <https://www.apnews.com/22ede8fe83044bbe9bd0f73aeefe103e> (allegations against investor include donating \$150,000 to a super PAC supporting a candidate he believed would pressure state regulators).

¹⁰ Aruna Viswanatha, *Rap Artist Indicted for Obama 2012 Campaign Donations*, Wall St. J. (May 10, 2019), <https://www.wsj.com/articles/former-rap-artist-indicted-for-obama-2012-campaign-donations-11557522077> (rapper indicted for allegedly funneling a foreign contribution of over \$1 million to a super PAC dedicated to President Obama’s 2012 re-election).

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

By giving donors the right to make unlimited contributions, the Court also gave them the power to promise or threaten to make (or not make) those contributions. This power allows large contributors another way to manipulate and influence politicians outside the public eye. Legislators tasked with exercising independent judgment instead fear uncapped spending by adverse third parties in their next campaigns.¹¹ *SpeechNow* failed to recognize the increased risk of corruption from the private threats and promises in an arena allowing unlimited campaign spending. Consequently, elected public officials face worsened pressure to answer not to their constituents, but to interests with the economic means and motive to subvert the democratic process.

Over our years in the Senate, we have seen firsthand the ways in which allowing unlimited contributions has exponentially increased the power of super PACs and threatened the integrity of the legislative process. On issues ranging from climate change, to prescription drug pricing, to campaign finance itself, we

¹¹ See generally Daniel P. Tokaji & Renata E.B. Strause, *The New Soft Money: Outside Spending in Congressional Elections*, The Ohio State University Moritz College of Law (2014), <https://moritzlaw.osu.edu/thenewsoftmoney/wp-content/uploads/sites/57/2014/06/the-new-soft-money-WEB.pdf> (“Members may perceive that if they do not take the legislative action preferred by [a given] group, then they will be targeted with retaliatory independent spending.” (Statement of Representative Steve LaTourette)).

have heard Senate colleagues lament that they cannot support legislation for fear that a super PAC donor adverse to the legislation will drop millions supporting a primary opponent. Our experiences are not unique, as the nine years since this Court decided *SpeechNow* have demonstrated the pressure that politicians face from unlimited spending flowing through super PACs.¹²

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

Unsurprisingly, the American public witnesses the tawdry spectacle of money influencing politics and feels the untoward changes in our democracy. As elected officials, we hear these concerns from constituents all the time. Survey data confirm that Americans increasingly feel that our government is corrupt and

¹² Other members of Congress have spoken publicly about the detrimental effect of super PACs and unlimited outside spending. Former Senator Evan Bayh, explaining his decision to retire from the Senate, said, “[t]he threat of unlimited amounts of negative advertising from special interest groups will only make members more beholden to their natural constituencies and more afraid of violating party orthodoxies.” Evan Bayh, *Why I'm Leaving the Senate*, N.Y. Times (Feb. 20, 2010), <https://www.nytimes.com/2010/02/21/opinion/21bayh.html>. Former Representative Tom Davis commented, “the system today is completely discombobulated. You have the ability of these super PACs to come in or some angry billionaire to come in and get a PAC and go after you. And that has a chilling effect on members of Congress and their voting habits, not wanting to offend these groups unless there's some backup.” Michael Beckel, *Behind the Price of Power: Q&A with Former Rep. Tom Davis (R-VA)*, Issue One (July 25, 2017), <https://www.issueone.org/behind-price-power-qa-former-rep-tom-davis-r-val/>; see also Michael Beckel, *Behind the Price of Power: Q&A with Former Rep. Mike Castle (R-DE)*, Issue One (Aug. 15, 2017), <https://www.issueone.org/behind-price-power-qa-former-rep-mike-castle-r-de/> (“What super PACs are doing today is probably as problematic as anything in the financing of campaigns out there.”).

unrepresentative of ordinary citizens.¹³ *Citizens United* and *SpeechNow* have exacerbated a disturbing trend in Americans' views of corruption in their government,¹⁴ with seventy-five percent of U.S. adults perceiving corruption as “widespread” in the country's government in 2015.¹⁵ Super PACs lie at the heart of this shift in opinion; in 2012, nearly 70% thought super PACs should be

¹³ This impression that government is not responsive to ordinary citizens is accurate. For instance, Mick Mulvaney, while serving as acting Director of the Consumer Financial Protection Bureau, told an American Bankers Association conference that: “[w]e had a hierarchy in my office in Congress, [i]f you're a lobbyist who never gave us money, I didn't talk to you. If you're a lobbyist who gave us money, I might talk to you.” Glenn Thrush, *Mulvaney, Watchdog Bureau's Leader, Advises Bankers on Ways to Curtail Agency*, N.Y. Times (Apr. 24, 2018), <https://www.nytimes.com/2018/04/24/us/mulvaney-consumer-financial-protection-bureau.html>. More generally, a Princeton University study found that “the views of constituents in the upper third of the income distribution received about 50% more weight [from senators] than those in the middle third (with even larger disparities on specific salient roll call votes), while the views of constituents in the bottom third of the income distribution received no weight at all in the voting decision of their senators.” Larry M. Bartels, *Economic Inequality and Political Representation*, Princeton Univ. Dep't. of Pol. 4 (2005), <http://citeseerx.ist.psu.edu/viewdoc/download;jsessionid=33B7AA4E26A0F19D5A08B7AF9069E25F?doi=10.1.1.172.7597&rep=rep1&type=pdf>.

¹⁴ Joseph Carroll, *Americans Increasingly View Most Members of Congress as Corrupt*, Gallup (May 17, 2006), <https://news.gallup.com/poll/22837/americans-increasingly-view-most-members-congress-corrupt.aspx> (analyzing polling data from 1994 – 2006).

¹⁵ 75% in U.S. See *Widespread Government Corruption*, Gallup (Sept. 19, 2015), <https://news.gallup.com/poll/185759/widespread-government-corruption.aspx>.

illegal,¹⁶ and today, 72% of the public disagree with the statement that “people who give a lot of money to elected officials do not have more influence than others,” with 43% saying it describes the country “not at all well.”¹⁷

The influence of money is worse when such spending is unlimited, worse still when it is anonymous, and worst of all when it is anonymous to all except the donor and the candidate. The absence of limits on contributions to super PACs worsens all these dangers, giving a small set of influencers disproportionate influence in American politics, distorting election outcomes and causing millions of ordinary Americans to lose faith in the political process. This fundamental threat to democracy warrants initial consideration of this appeal by the Court sitting *en banc* to revisit and correct the holding in *SpeechNow*.

¹⁶ *Washington Post – ABC News Poll*, Wash. Post (Mar. 10, 2012), https://www.washingtonpost.com/wp-srv/politics/polls/postabcpoll_031012.html?tid=a_inl_manual.

¹⁷ Bradley Jones, *Most Americans Want to Limit Campaign Spending, Say Big Donors Have Greater Political Influence*, Pew Research Ctr. (May 8, 2018), <https://www.pewresearch.org/fact-tank/2018/05/08/most-americans-want-to-limit-campaign-spending-say-big-donors-have-greater-political-influence>.

III. Conclusion.

For the foregoing reasons, this Court should grant appellants' petition for initial hearing *en banc*.

Respectfully submitted,

/s/ Jennifer R. Cowan

Jennifer R. Cowan
Counsel of Record
Gary W. Kubek
Laura J. Samuels
Michael C. McGregor
Nora Niedzielski-Eichner
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, New York 10022
(212) 909-6000
jrcowan@debevoise.com
gwkubek@debevoise.com
ljsamuels@debevoise.com
mcmcgregor@debevoise.com
nniedzielskieichner@debevoise.com

Jonathan M. DeMars
DEBEVOISE & PLIMPTON LLP
801 Pennsylvania Avenue, NW
Washington, D.C. 20004
(202) 383-8000
jmdemars@debevoise.com

June 28, 2019

Counsel to Amici Curiae

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 29(a)(5) and 32(a)(7), the undersigned certifies that this brief has been prepared in a proportionally spaced typeface, Times New Roman, in 14-point font. According to the word processing system used to prepare the brief, Microsoft Word 2010, it contains 1,888 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

/s/ Jennifer R. Cowan

Jennifer R. Cowan

Counsel of Record

Gary W. Kubek

Laura J. Samuels

Michael C. McGregor

Nora Niedzielski-Eichner

DEBEVOISE & PLIMPTON LLP

919 Third Avenue

New York, New York 10022

(212) 909-6000

jrcowan@debevoise.com

gwkubek@debevoise.com

ljsamuels@debevoise.com

mcmcgregor@debevoise.com

nniedzielskieichner@debevoise.com

Jonathan M. DeMars

DEBEVOISE & PLIMPTON LLP

801 Pennsylvania Avenue, NW

Washington, D.C. 20004

(202) 383-8000

jmdemars@debevoise.com

June 28, 2019

Counsel to Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that, on June 28, 2019, a true and correct copy of the foregoing document was filed with the Clerk of the United States Court of Appeals for the District of Columbia via the Court's CM/ECF system. Counsel for all parties will be served electronically by the Court's CM/ECF system.

/s/ Jennifer R. Cowan

Jennifer R. Cowan

Counsel of Record

Gary W. Kubek

Laura J. Samuels

Michael C. McGregor

Nora Niedzielski-Eichner

DEBEVOISE & PLIMPTON LLP

919 Third Avenue

New York, New York 10022

(212) 909-6000

jrcowan@debevoise.com

gwkubek@debevoise.com

ljsamuels@debevoise.com

mcmcgregor@debevoise.com

nniedzielskieichner@debevoise.com

Jonathan M. DeMars

DEBEVOISE & PLIMPTON LLP

801 Pennsylvania Avenue, NW

Washington, D.C. 20004

(202) 383-8000

jmdemars@debevoise.com

June 28, 2019

Counsel to Amici Curiae