No. 21-

IN THE
Supreme Court of the United States

DONNA PATRICK, JAMES K. BARNETT, AND JOHN P. LAMBERT

Petitioners,

v.

THE ALASKA PUBLIC OFFICES COMMISSION,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Alaska

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioners are Alaskan citizens who challenged the Alaska Public Offices Commission's ("APOC's") refusal to enforce Alaskan law regulating contributions to independent political action committees. APOC had defended its refusal on the basis of federal circuit court rulings that held such regulations violate the First Amendment. Petitioners had asked the Alaska courts to consider the original meaning of the First Amendment, to conclude that a majority of this Court would not affirm those circuit court decisions. The Alaska Supreme Court rejected the relevance of any argument from originalism and upheld APOC's refusal.

The question presented in this petition is whether this Court should grant certiorari, vacate the judgment below, and remand ("GVR") with instructions to weigh the arguments from originalism in determining whether the First Amendment permits the regulation of contributions to independent political action committees.

PARTIES TO THE PROCEEDINGS

All parties to the proceedings are named in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Donna Patrick, James K. Barnett, and John P. Lambert respectfully petition this Court for a writ of certiorari to the Supreme Court of the State of Alaska.

OPINIONS BELOW

The opinion of the Alaska Supreme Court is available at *Alaska Pub. Offices Comm'n v. Patrick*, 494 P.3d 53 (Alaska Sep. 3, 2021) and is reproduced in the Appendix at App. A.

The opinion of the Superior Court, *Patrick v. Interior Voters,* No. 3AN-18-05726CI (Nov. 4, 2019), is available at https://perma.cc/YLW2-KHRJ.

JURISDICTION

Petitioners seek review of the opinion and judgment of the Supreme Court of Alaska entered on September 3, 2021. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or

abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Alaska Statute § 15.13.070 provides in relevant part:

> (a) An individual or group may make contributions, subject only to the limitations of this chapter and AS 24.45, including the limitations on the maximum amounts set out in this section.
>
> (b) An individual may contribute not more than
>
> (1) $500 per year to a nongroup entity for the purpose of influencing the nomination or election of a candidate, to a candidate, to an individual who conducts a write-in campaign as a candidate, or to a group that is not a political party;
>
> …
>
> (c) A group that is not a political party may contribute not more than $1,000 per year
>
> (1) to a candidate, or to an individual who conducts a write-in campaign as a candidate;
>
> (2) to another group, to a nongroup entity, or to a political party.
>
> …
>
> (f) A nongroup entity may contribute not more than $1,000 a year to another nongroup entity for the purpose of influencing the nomination or election of a candidate, to a candidate, to an individual who conducts a write-in campaign

> as a candidate, to a group, or to a political party.

Alaska Statute § 15.13.380(b) provides in relevant part that "[a] person who believes a violation of this chapter or a regulation adopted under this chapter has occurred or is occurring may file an administrative complaint with the commission within five years after the date of the alleged violation."

Alaska Statute § 15.13.400 provides in relevant part:

> (10) "independent expenditure" means an expenditure that is made without the direct or indirect consultation or cooperation with, or at the suggestion or the request of, or with the prior consent of, a candidate, a candidate's campaign treasurer or deputy campaign treasurer, or another person acting as a principal or agent of the candidate;

28 U.S.C. § 2601 provides that "[t]he Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

INTRODUCTION

This Court's judgments are sometimes compound. Throughout its history, in a small proportion of its cases, a majority of this Court has reached the same conclusion but on different, or distinctive, grounds, none commanding a majority. *See* James F. Spriggs II & David R. Stras, *Explaining Plurality Decisions*, 99 Geo. L.J. 515, 519 (2011); Database of Supreme Court Decisions, *available at* https://bit.ly/3p09Yms (plurality decisions constitute less than 3% of judgments). Those differences reflect good faith differences in the approach to constitutional or statutory interpretation. Such differences are both inevitable and healthy, reflecting the diversity of American jurisprudence.

Originalism is one such distinctive ground. Throughout its history, Justices on this Court have drawn upon the original meaning of the Constitution to determine its scope and reach. Sometimes that approach has commanded a majority. Sometimes less than a majority has based its decision on originalist grounds which, together with other opinions, then constitute a compound judgment of this Court.

Most prominently most recently, a majority of this Court relied upon the original meaning of the Second Amendment to conclude that that Amendment protects an individual right to bear arms for self-defense. *D.C. v. Heller,* 554 U.S. 570 (2008). Earlier authority, *United States v. Miller*, 307 U.S. 174 (1939), had rejected that conclusion. That authority was then reversed in *Heller* on originalist grounds. As the Court noted, the government's brief in *Miller* had "provided

scant discussion of the history of the Second Amendment." 554 U.S. at 623-24. That fact left this Court free to examine afresh what the historical evidence showed. Based on that review, the Court reframed the scope of the Second Amendment in light of its original meaning.

By contrast, in *Harmelin v. Michigan*, 501 U.S. 957 (1991), Justice Scalia, joined by Chief Justice Rehnquist, announced the judgment of this Court in an opinion grounded in originalism. That judgment was joined by Justices O'Connor, Kennedy, and Souter, but not on the basis of the originalist argument advanced by Justice Scalia. That compound judgment, nonetheless, had the effect of allowing Michigan's judgment to stand.

In this case, Petitioners have argued that a compound judgment by this Court would affirm Alaska's power to regulate independent political action committees ("SuperPACs"). In *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc) ("*SpeechNow*"), the United States Court of Appeals for the D.C. Circuit concluded to the contrary. This Court did not review *SpeechNow*, *cert. denied sub nom. Keating v. FEC*, 562 U.S. 1003 (2010). Neither has this Court ever considered an originalist argument about the regulation of independent political action committees under the First Amendment.

Petitioners had asked the Alaska courts to consider these originalist arguments so as to conclude that there would not be a majority on this Court to affirm the holding in *SpeechNow*. Petitioners had based their

argument in part upon the extensive and unchallenged testimony in the trial court of one of America's leading historians on the original meaning of the Constitution and constitutional culture, Professor Jack Rakove. Apps. B, D. That testimony was complemented by work recognized by Justice Thomas mapping the original meaning of the First Amendment and revealing its relatively limited scope. *See United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1584 (2020) (Thomas, J., concurring) (citing Jud Campbell, *Natural Rights and the First Amendment,* 127 Yale L.J. 246, 259 (2017)). Together, Petitioners argued, these authorities suggested that a majority of this Court would uphold the power of a state to regulate *institutional*, as distinct from *individual,* or *quid pro quo,* corruption. Put most directly, Petitioners argued that Alaska's law would be upheld in a compound judgment supported on both originalist and non-originalist grounds.

The Superior Court agreed with Petitioners about the constitutionality of the Alaska law under federal law, though on separate grounds, not defended by Petitioners.

The Alaska Supreme Court reversed. Though it conceded that this Court has not yet addressed the question, and it acknowledged that "institutional corruption" is distinct from "*quid pro quo* corruption," App. 15a; *see also* Jacob Eisler, *Conceptualising Corruption and the Rule of Law*, Modern L. Rev. 1 (2021), *available at* https://perma.cc/VY8M-RXW3, the court felt bound by language in the plurality opinion in

McCutcheon v. FEC, 572 U.S. 185, 207 (2014) (plurality), that "Congress may target only a specific type of corruption — 'quid pro quo' corruption." App. 17a.

Petitioners ask this Court to grant this petition for certiorari, vacate the decision of the Alaska Supreme Court, and remand with instructions to evaluate its law according to the historical evidence properly presented in its courts. Until this case, it is Petitioners' belief that no court has ever been presented with the original meaning of the First Amendment, or with a historical understanding of the core idea within the modern test announced in *Buckley v. Valeo*, 424 U.S. 1 (1976), "corruption." Given the clear and good faith jurisprudential commitments of a substantial number of this Court, the Alaska courts should not have discounted the arguments from originalism nor ignored how they could be relevant to the ultimate judgment of this Court about the power of a sovereign to regulate SuperPACs. GVR is the appropriate procedure to direct the Alaska courts to consider such arguments, giving this Court, if Petitioners prevail, a chance to review that conclusion ultimately.

As explained below, *infra* Part V, Petitioners are not asking for full review by this Court at this time. This is both because the courts below ignored, and hence left untested, the historical record, and because there is a legitimate question about Petitioners' standing in this Court. That question, however, does not block this Court's power to GVR.

STATEMENT OF THE CASE

I. Legal Background

This case involves a state statute that aims, in part, to regulate contributions to independent political action committees. Alaska Statute § 15.13.070 sets the limits on such contributions by both individuals and non-political groups. Those limits were upheld by the Alaska Supreme Court. *State v. Alaska Civil Liberties Union*, 978 P.2d 597, 600 (Alaska 1999). The Alaska legislature then amended the law to increase the amount individuals and groups could contribute to independent political action committees. 2003 Alaska Laws Ch. 108 § 8. In 2006, citizens in Alaska objected to that increase, successfully ratifying an initiative to lower the limits once again. State of Alaska, 2006 Primary Election Official Results, *available at* https://perma.cc/ZK36-7GRD (Measure 1).

In 2010, this Court decided *Citizens United v. FEC,* 558 U.S. 310 (2010), which, consistent with *Buckley*, upheld the rights of corporations and labor unions to *spend* money to affect political elections without limit. "Independent" expenditures, this Court reasoned, "by definition" could not be "*quid pro quo*." *Id.* at 360. Limitations on such expenditures could therefore not be justified as a way to avoid individual, or *quid pro quo,* corruption. Two months later, the United States Court of Appeals for the D.C. Circuit extended that rule to cover *contributions* as well as *expenditures*. *SpeechNow*, 599 F.3d at 696. This Court did not review the judgment in *SpeechNow*, *cert. denied sub nom. Keating v. FEC*, 562 U.S. 1003 (2010).

Following this Court's decision in *Citizens United*, then-Alaska Attorney General (now United States Senator) Dan Sullivan concluded that Alaska's regulation of contributions to independent political action committees remained constitutional. Respondents' Excerpts of Record 197-204, APOC v. Patrick, 494 P.3d 53 (AK 2021) (No. S-17649). Two years later, however, citing *SpeechNow*, Alaska's Public Offices Commission (APOC) reversed its position and announced it would no longer enforce its statute limiting contributions to independent political action committees. Petitioner's Excerpts of Record 2, APOC v. Patrick, 494 P.3d 53 (AK 2021) (No. S-17649) ("Exc.").

II. This Case

Alaska law gives "persons" the right to challenge a decision by APOC not to enforce election laws. Alaska Statute § 15.13.380(b). Under that provision, Petitioners Donna Patrick, James K. Barnett, and John P. Lambert filed a complaint with APOC about its refusal to enforce § 15.13.070(b). In a 3-2 vote, APOC rejected Petitioners' complaints on the grounds that contributions above the statutory limits were permitted by its 2012 advisory opinion. Exc. 10-73.

On appeal, the Superior Court heard the testimony of two expert witnesses, Stanford Professors Jack Rakove and Adam Bonica. Both appeared for live testimony. As described below, Professor Rakove provided extensive evidence of the Framers' understanding of the concept of "corruption." App. 20a-58a, 79a-110a. Professor Bonica provided detailed evidence of current trends in political donations and the

dependence they created. App. 59a-78a. APOC did not cross-examine either witness, nor did it offer any testimony to counter the experts' evidence or conclusions.

In November 2019, the Superior Court sustained Petitioners' complaint, based on a legal theory not advanced by Petitioners. In September 2021, the Alaska Supreme Court reversed the Superior Court's judgment. Though APOC had conceded that this Court had not decided this question, Oral Argument before Alaska Supreme Court, January 20, 2021, *available at* https://bit.ly/3CveRIT, the Alaska Supreme Court concluded that to affirm the judgment below would require this Court to "reverse itself." App. 18a. And while the Alaska Supreme Court acknowledged that Petitioners had grounded their argument on the original meaning of the First Amendment, App. 7a, the court refused to uphold its own law against the perception that this Court had already determined against the original meaning of the First Amendment.

REASONS FOR GRANTING THE WRIT

I. Whether the Original Meaning of the First Amendment Forbids Regulations against What The Framers Plainly Considered "Corruption" Is a Critically Important Question.

The Alaska Supreme Court has affirmed a conventional view of this Court's campaign finance jurisprudence. Like the view of academics and commentators on the Second Amendment before *Heller*, that conventional view holds that this Court has determined finally the scope of the state's power to regulate political speech within campaigns. That power is limited, as the Alaska Supreme Court held, to regulations targeting individual, or *quid pro quo*, corruption alone. App. 3a, 10a-11a, 18a. As contributions independent of any political campaign cannot, on this reasoning, implicate "corruption" so defined, regulations targeting SuperPACs are unconstitutional. App. 10a.

Petitioners agree that contributions "independent" of any political campaign cannot constitute individual, or "*quid pro quo*," corruption.

But Petitioners reject the claim that the only compelling interest recognized by this Court for regulating political speech is "*quid pro quo* corruption." *See, e.g.*, *Bluman v. FEC*, 800 F. Supp. 2d 281 (D.D.C. 2011) (Kavanaugh, J.), *aff'd*, 565 U.S. 1104 (2012) (upholding restriction on independent campaign expenditures by non-citizens). And Petitioners strongly reject the claim that this Court has ever considered either the

application of the original meaning of the First Amendment to campaign finance regulations, or, in applying *Buckley*, to the Framers' conception of the core concept in *Buckley*, "corruption."

These arguments establish two conclusions that should be fundamental to any originalist.

First, following Justice Thomas' suggestion in *Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1223-24 (2021) (Thomas, J., concurring) ("regulations that might affect speech are valid if they would have been permissible at the time of the founding") and *McKee v. Cosby*, 139 S. Ct. 675 (2019) (Thomas, J., concurring in denial of certiorari) (rejecting the "policy-driven decisions masquerading as constitutional law," instead embracing "the original meaning of the First and Fourteenth Amendments"), they demonstrate that the regulation of contributions to political action committees would not be subject to judicial constraint under the original meaning of the First Amendment, at least so long as such regulation was (1) promulgated by legislatures (2) in pursuit of the general welfare. *See United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1584 (2020) (Thomas, J., concurring) ("there is 'no evidence [from the founding] indicat[ing] that the First Amendment empowered judges to determine whether particular restrictions of speech promoted the general welfare,'" citing Jud Campbell, *Natural Rights and the First Amendment*, 127 Yale L.J. 246, 259 (2017) (providing extensive analysis of the original meaning of the First Amendment)).

Second, following the method of Justice Scalia in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (plurality) (original understandings used to set the scope of "Due Process"), even in applying the modern First Amendment test announced in *Buckley*, these arguments would be relevant to determining the scope of the core concept within that test, "corruption." For *Buckley*, with respect to the First Amendment, like *United States v. Miller,* with respect to the Second Amendment, declared its standard without any effort to tie its rule to either the historical understanding of the First Amendment or any historical conception of "corruption." The per curiam in *Buckley* simply declared, *ipse dixit*, that the state could suppress speech to regulate "*quid pro quo*" corruption, 424 U.S. at 26-29, without any argument grounded in either history or logic for why this conception would be the *only* conception of "corruption" that a state may police. Whether or not limiting a sovereign's power to this extremely narrow conception of "corruption" makes good sense from the perspective of political science, *Buckley* made no effort to establish that it made any sense from the perspective of our Framers. By contrast, as Petitioners argued, in determining how to apply *Buckley's* modern test, an originalist, following Justice Scalia's method in *Michael H.*, would fix the conception of "corruption" to the framing conception of "corruption" so as to constrain judicial discretion to craft a test according to a judge's personal political preferences. As described below, the uncontradicted evidence in this case demonstrates that the framing conception of "corruption" included institutional as well as individual, or *quid pro quo*, corruption. That fact should mean that

an originalist has no constitutional sanction for disabling a sovereign from regulating against such corruption.[1]

The Alaska Supreme Court refused to consider either argument in determining the rule of this Court. Instead, it observed that the argument that "corruption should be defined more broadly than quid pro quo corruption is not new." App. 17a. Petitioners agree that many have tried to persuade this Court that "corruption" should be interpreted more broadly. But *none* of those arguments have been grounded in originalism.[2] And while it is true that history was referenced

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[1] Petitioners have set the Framing as the relevant baseline for measuring the scope of "corruption" under *Buckley*. If anything, the period surrounding the adoption of the Fourteenth Amendment would reveal an even broader conception. *See, e.g., Trist v. Child,* 88 U.S. 441, 451 (1874) ("If any of the great corporations of the country were to hire adventurers who make market of themselves in this way, to procure the passage of a general law with a view to the promotion of their private interests, the moral sense of every right-minded man would instinctively denounce the employer and employed as steeped in corruption, and the employment as infamous. If the instances were numerous, open and tolerated, they would be regarded as measuring the decay of the public morals and the degeneracy of the times.").

[2] In *Citizens United v. FEC*, 558 U.S. 310 (2010), the Court considered an originalist argument about the status of corporations. 558 U.S. at 425-32 (Stevens, J., dissenting). Justice Stevens relied upon that history to justify the regulation of corporate independent political spending. Justice Scalia rejected that history, as an incomplete account of the Framers' view of corporations. *Id.* at 386 (Scalia, J., concurring) (criticizing the dissent for failing to take a "straightforward approach to determining the Amendment's meaning," instead embarking "on a detailed exploration of the Framers' views about the 'role of corporations in society.'").

by Justice Breyer in his dissent in *McCutcheon*, 572 U.S. at 235-37, Justice Breyer certainly did not make an originalist argument for interpreting the scope of *Buckley's* conception of "corruption" differently.

Three Justices on this Court have indicated clearly that they would uphold the regulation of SuperPACs. *McCutcheon v. FEC*, 572 U.S. 185, 232 (2014) (Breyer, J., dissenting). If just two of the remaining six were persuaded by these originalist arguments, then a compound judgment of this Court would uphold Alaska's law.

This fact should incline the Court to resolve its position with respect to regulations of institutional as distinct from individual, or *quid pro quo,* corruption. States have sovereign authority within our federalist system. That authority should not be restricted through an overreaching overreading of this Court's precedent. Because of the plurality opinion in *McCutcheon*, the Alaska courts understandably did not feel free to evaluate the originalist arguments completely. This Court should grant the court that freedom by vacating its judgment and remanding with instructions to consider the argument from originalism directly.

But the Framers' view of corporations is distinct both from the original meaning of the First Amendment and from an original understanding of "corruption." Those questions no party has ever presented to this Court.

II. Until This Case, No Court Has Considered Originalist Arguments for Regulating Institutional Corruption.

Since *SpeechNow*, a wide range of courts have considered challenges to the conclusion that the First Amendment forbids the regulation of contributions to independent political action committees. Every one of those cases has upheld the position articulated in *SpeechNow*. *See, e.g.*, *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 486-88 (2d Cir. 2013); *Texans for Free Enter. v. Tx. Ethics Comm.*, 732 F.3d 535, 537-38 (5th Cir. 2013); *Wis. Right to Life State Political Action Comm. v. Barland*, 664 F.3d 139, 151-55 (7th Cir. 2011); *Farris v. Seabrook*, 677 F.3d 858, 864-68 (9th Cir. 2012); *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1117-21 (9th Cir. 2011); *Long Beach Area Chamber of Comm. v. City of Long Beach*, 603 F.3d 684, 696-99 (9th Cir. 2010), *cert. denied*, 562 U.S. 896 (2010); *Republican Party of New Mexico v. King*, 741 F.3d 1089, 1092-1103 (10th Cir. 2013); *Lieu v. FEC*, 370 F. Supp. 3d 175 (D.D.C. 2019), *cert. denied*, 141 S.Ct. 814 (2020). As the Second Circuit has put it, "[f]ew contested legal questions are answered so consistently by so many courts and judges." *N.Y. Progress*, 733 F.3d at 488.

Yet in none of those cases did the parties raise an originalist argument about the scope of the First Amendment. To the contrary, in every single case, the challengers tried to convince the courts that the influence effected by SuperPACs was, in effect, even if not in form, *quid pro quo* corruption.

This Court has rejected these arguments for expanding the scope of individual, or *quid pro quo,* corruption. *McCutcheon* v. *FEC*, 572 U.S. 185, 192 (2014) (plurality) ("hallmark of corruption is the financial *quid pro quo*"). That rejection in turn has been read to mean that this Court has considered — and rejected — an argument that has never been presented to it or any other court: namely, that an originalist understanding of the First Amendment should permit the regulation of institutional corruption. States like Alaska have thus stopped enforcing anti-SuperPAC regulations. So too has the FEC. *Lieu v. FEC*, Brief for the Respondent in Opp. 16 (No. 19-1398) (2020), *available at* https://perma.cc/MK3M-HF74 (arguing that *SpeechNow* was "correctly decided"). That resolve thus leaves little opportunity for the question to be raised in any lower court or to this Court directly. Without any clear signal by this Court, there is little reason for litigators or courts to take the arguments from originalism seriously.

III. Laws Regulating SuperPACs Are Laws Regulating Institutional Corruption.

Petitioners have argued that an originalist would ***either*** read the First Amendment narrowly, limiting judicial power to second guess legislative judgments about corruption, *see Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1226 (2021) (Thomas, J., concurring); *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1584-85 (2020) (Thomas, J., concurring); *McKee v. Cosby*, 139 S. Ct. 675, 682 (2019) (Thomas, J., concurring in the denial), ***or*** interpret the

scope of "corruption" in *Buckley* according to the Framers' conception of that concept, so as to constrain the discretion of judges. *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (looking to the most "specific level at which a relevant tradition . . . can be identified" to avoid giving judges the power to "dictate rather than discern").

To prevail under the first alternative, Petitioners need only establish that the law they defend was enacted by a legislature. To prevail under the second, they must demonstrate that SuperPACs would be considered a "corruption" of representative democracy under the Framers' conception of that idea.

Neither the Alaska Supreme Court nor Superior Court engaged this analysis seriously. The Superior Court bypassed any consideration of the originalist argument because it decided the case on alternative grounds. *Patrick v. Interior Voters*, No. 3AN-18-05726CI, 23 n.68 (Nov. 4, 2019) ("the Court need not address Patrick's argument about the understanding of corruption that the Founders of the United States Constitution had"). The Supreme Court described the originalist argument but did not engage in an analysis to determine whether independent political action committees should qualify as institutional corruption. This incomplete record is reason enough to remand the case for further consideration in light of the framework provided by Professors Rakove and Bonica.

That framework would reveal a view of "corruption" that is distinct from the modern view. For the Framers, the paradigm "corruption" of government

was *institutional,* not individual. *See* Excerpt, Dr. Rakove, App. 88a-91a. The "corruption" at the core of their concern was the development of improper dependencies within public institutions. The clearest and most frequently cited example of such corruption was the British House of Commons. Expert Report of Dr. Rakove, App. 22a, 34a-37a, 40a-41a, 43a; Excerpt, Dr. Rakove, App. 83a-85a, 89a-90a. Constitutionally, the Commons was to be dependent upon the British people. Yet because of rotten boroughs, many members of Parliament were actually dependent upon the Crown. That monarchical dependence thought improper. That improper dependence the Framers called "corruption." Expert Report of Dr. Rakove 34a-35a; 45a-46a; Excerpt, Dr. Rakove, App. 84a.-85a. Their aim in crafting the institutions of the American Republic was to avoid such improper dependence. Thus, Judges were to be dependent upon the law, not upon Congress or the President for reappointment. Senators (originally) were to be dependent upon state legislatures, not upon the People. And the House of Representatives was to be, as James Madison promised, "dependent on the people alone" — whereby "the people," he explained, he meant "not the rich, more than the poor." The Federalist Nos. 52, 57. Professor Rakove clearly articulated these original understandings to the Superior Court in Alaska. Excerpt, App. 92a-94a. That testimony was neither challenged nor contradicted by APOC.

The evidence offered by Professor Bonica complemented Professor Rakove's by showing how SuperPACs have now created just such an improper

dependence within the representative institutions of the American Republic. Increasingly and across a wide range of offices, representatives have recognized that they are dependent not "on the people alone," but dependent as well upon the very few funders of these SuperPACs. Indeed, as Professor Bonica established, in some contexts, SuperPACs have become *the* dominant force driving political speech in an election. Expert Report of Dr. Bonica, App. 59a-78a.

This improper dependence is especially salient in state elections. As the Alaska Supreme Court was told,

> In Alaska, 99% of the independent money comes from contributions of $1,000 or more. In 2018, in the governor's race, the outside spending was four times the spending of the candidates themselves. In 2020, we've seen a 1,000% increase since 2016, in outside spending, mainly in the ballot measures. . . . In Measure One, five groups spent $17 million to oppose that measure. In Measure Two, $5 million was spent to support the measure, most of it . . . coming from large, independent liberal groups outside of Alaska. This is a dependence on a tiny slice of America — the very rich[, for] corporations, or non-Alaskans—and out-of-state spending in Alaska has gone up by 47-fold between 2016 and 2020. The same growth exists with non-measure spending as well. "Defend Alaska" was a group . . . aiming to support Democrats

> and oppose Republicans in Alaska. Two liberal groups from DC each contributed more than $100,000 to that group.

Argument Before the Alaska Supreme Court, January 20, 2021, *available at* https://bit.ly/3FFa3Tv.

This concentration in funding, Petitioners argued, has created corrupting dependencies within our representative democracies. When a handful of coordinating SuperPACs dominate political spending, politicians become dependent upon these entities either supporting them or opposing their opponents. That dependence, as Petitioners proffered, is a corruption of representative democracy — or at least, as Petitioners established below, it would be considered a corruption by the Framers of our Constitution.

In light of this corruption, Alaska cannot promise its people a representative government "dependent upon the [citizens of Alaska] alone," at least so long as its representatives are dependent upon SuperPACs based in Washington, D.C., or elsewhere. For the same reason that the United States should be free to protect its political institutions from foreign influence, a state should have at least some freedom to protect itself from influences foreign to it. *Cf. Bluman v. FEC*, 800 F. Supp. 2d 281 (D.D.C. 2011) (Kavanaugh, J.), *aff'd,* 565 U.S. 1104 (2012). (upholding the power to exclude independent spending to protect domestic democratic institutions from foreign influence).[3]

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[3] Petitioners concede that Alaska's power to protect its republic from outside influence is less than the power of the United States,

Petitioners maintain that SuperPACs effect an improper dependence within representative institutions. Such improper dependence, from an institutional perspective, corrupts representative democracy — *whether or not* such a dependence is also *quid pro quo* corruption. The concepts are distinct; one does not entail the other. Thus, regulations limiting the power of SuperPACs could well target that dependence, or institutional corruption, even if they do not target *quid pro quo* corruption.

These conclusions about SuperPACs may or may not apply to the independent expenditures generally. Petitioners did not argue that *Citizens United* must be overruled. Nor do we believe that the speech protected by *Citizens United* has been shown to be similarly corrupting. In 2020, direct political spending by corporations (the speech enabled by *Citizens United*) was less than $2 million; in the same cycle, SuperPAC and hybrid PAC spending was $2.6 *billion*. Of that $2.6 billion, the top ten committees accounted for more than 54% of spending. *See Post CU spending by group type*, *generated by* OpenSecrets.org, *available at* https://bit.ly/3FIKC3i. The economy of influence enabled by *Citizens United* is thus radically different from the economy of SuperPACs enabled by *SpeechNow*.

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since citizens of the United States have an interest in the affairs of Alaska that is more legitimate than German citizens have in the affairs of the United States. But the reasoning supporting *Bluman* suggests why such power in Alaska should not be denied, even if it is not as strong. At the very least, *Bluman* should establish that the interest of Alaska in protecting its republic extends beyond the interest in avoiding *quid pro quo* corruption alone.

The likelihood that uncoordinated corporate spending has produced an improper dependence is thus significantly less than with SuperPACs. Recognizing that the First Amendment does not forbid sovereigns from regulating institutional corruption would therefore not necessarily entail the reversal of *Citizens United*. Put differently, while the First Amendment may well protect the freedom of individuals, corporations, and labor unions to spend money to speak, *Citizens United*, 558 U.S. 310 (2010), an originalist understanding of "corruption" would not necessarily protect all contributions to independent committees, at least if the institutions coordinating such contributions were shown to have effected a corrupting dependence within a representative democracy. Reversing *SpeechNow* therefore does not entail reversing *Citizens United*.

Consistent with the Framers' own values, sovereigns such as Alaska should be free to protect their republics from improper, corrupting dependencies. The Alaska Supreme Court acknowledged the risk of such dependence, App. 16a (Petitioners' "historical argument may be particularly apt in Alaska"), but it viewed this Court's precedents as forbidding it from determining whether such corrupting dependence had in fact been shown.

Were this Court to GVR in light of these originalist arguments, the lower court would have reason to engage in this analysis more completely. That more complete analysis would in turn give this Court a clearer record for evaluating whether, consistent with its values, sovereigns such as Alaska should be free to regulate independent political action committees.

IV. Exercising Its Power under § 2106, This Court Should Return This Case to Alaska, Directing Those Courts to Consider Arguments Grounded in Originalism before Embracing a Conclusion Grounded in an Ahistorical, Non-originalist Understanding of the First Amendment.

28 U.S.C. § 2106 provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

As this Court has recognized, § 2106 affords it broad equitable power ("as may be just under the circumstances") to vacate a judgment and remand with instructions to a lower court. *Lawrence v. Chater*, 516 U.S. 163, 166 (1996) (per curiam). Traditionally, this power is triggered by an intervening decision of this Court or explicit changes in law. *Stutson v. United States*, 516 U.S. 163, 180 (1996) (Scalia, J., dissenting). But this Court has relied upon this power to "grant, vacate and remand" in a wide range of cases beyond that traditional practice.

1. This Court has GVR'd when there has been no intervening change in law. In *Youngblood v. West Virginia*, 547 U.S. 867 (2006) (per curiam), this Court vacated a judgment of the state Supreme Court because the opinion had not addressed *Brady v. Maryland*, 373 U.S. 83 (1963) — a decision then more than 40 years old. Likewise, in *Walker v. True*, 546 U.S. 1086 (2006) (per curiam), this Court vacated a judgment based on an opinion of this Court that predated the lower court decision by more than a year. As Professor Buhl has concluded, based upon the largest empirical analysis of this Court's GVR practice to date, "GVRs in light of precedents that were already on the books at the time of the decision below are not especially uncommon."[4]

2. This Court has GVR'd when a lower court has failed to recognize what this Court has considered to be an important argument. Thus, in *Maryland Casualty Co. v. Jones*, 279 U.S. 792, 796-97 (1929), this Court remanded to consider objections that went unmentioned in the lower court opinion. Likewise, in *Blackburn v. Alabama*, 354 U.S. 393 (1957) (per curiam), this Court vacated the judgment of a state court that had apparently failed to consider a Due Process argument, remanding the case "in order that it may pass upon this claim." *Id.* at 393.

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[4] Aaron-Andrew P. Bruhl, *The Supreme Court's Controversial GVRs — And an Alternative*, 107 Mich. L. Rev. 711, 716 (2009). Bruhl refers to this class of cases as "Antecedent-Event GVRs." *Id.* at 727.

3. This Court has GVR'd when it would have preferred that the case be considered on different grounds. Thus, in *Beer v. United States*, 564 U.S. 1050 (2011) (per curiam), this Court vacated and remanded with instructions to consider a different basis to resolve the issue — presumptively reaching the same conclusion. Likewise in *Barr v. Matteo*, 355 U.S. 171 (1957) (per curiam), this Court vacated a judgment grounded on a claim of absolute immunity and directed the lower court to apply a qualified immunity standard instead.

4. This Court has GVR'd to help it determine whether a cause is worthy of certiorari. *See Taylor v. McKeithen*, 407 U.S. 191, 194 & n.4 (1972) (per curiam).

5. This Court has GVR'd to declare the applied standard incorrect, without specifying which standard ought to be applied in its place. *See Elonis v. United States*, 135 S. Ct. 2001, 2004, 2006, 2013 (2015).

As Justice Gorsuch has remarked, "[w]e vacate and remand for reconsideration under different — new tests all the time." *Rodriguez v. FDIC*, 2019 WL 6530435 (U.S.), 37 (U.S. Oral. Arg., 2019). This range of examples affirms the Justice's claim and affirms the broad discretion that § 2106 secures.[5]

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[5] Justice Scalia had criticized this practice, remarking the Court "[has] no power to set aside the duly recorded judgments of lower courts unless we find them to be in error, or unless they are cast in doubt by a factor arising after they were rendered." *Beer*, 564 U.S. at 1050 (Scalia, J., dissenting). But as Professor Buhl has observed, "the skeptics are wrong about the extent of the remand

Petitioners know of no case in which this Court has GVR'd in light of a competing theory of constitutional interpretation such as originalism. Yet this case shows precisely why such an exercise of § 2106 authority is appropriate.

Lower courts are understandably cautious about reckoning the authority of this Court by counting the votes of individual Justices, or even groups of Justices. Though that was effectively the method of Judge Silberman in the case that gave rise to *Heller*, *Parker v. D.C*, 478 F.3d 370, 385 (D.C. Cir. 2007), *aff'd sub nom. D.C. v. Heller*, 554 U.S. 570 (2008), very few lower court opinions deduce the position of this Court through any such accounting. *But see Barnette v. W. Va. State Bd. of Educ.*, 47 F.Supp. 251, 253 (1942) (justifying reversal of this Court's authority because "[o]f the seven justices now members of the Supreme Court who participated in that decision, four have given public expression to the view that it is unsound."). This reluctance remains even when, as in this case, the resulting conclusion would not overturn any prior Supreme Court precedent. It is especially true when, as in *Barnette*, such reckoning yields a conclusion that is flatly contrary to earlier Supreme Court authority.

Yet when litigants have presented that alternative understanding from the beginning of their case, and when that alternative has been effectively ignored by

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power. There are in fact few relevant limits on appellate remedies found in Article III, federal statutes, or historical practice." Aaron-Andrew P. Bruhl, *The Remand Power and the Supreme Court's Role*, 96 Notre Dame L. Rev. 171, 177 (2020), *available at* https://perma.cc/W23H-REMX.

the lower courts, this Court should GVR if the alternative theory could plausibly result in a different, even if compound, judgment.

GVRing at this stage would give the Alaska courts a clear signal to engage the factual and historical arguments that Petitioners have pressed. If the Alaska Supreme Court then accepted the results of this compound analysis, its decision would come before this Court in a manner that would afford it the chance to review the issue fully. By GVRing here, this Court could thus establish a practice that might guide in other cases where there is a plausible basis for believing that a compound decision grounded in originalism might yield a different judgment.

V. Questions about Standing Are Not a Barrier to GVR.

Under the principles announced in *Hollingsworth v. Perry*, 570 U.S. 693, 715 (2013), Petitioners would likely not have standing to ask this Court to rule on the merits of their cause directly. As in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), Petitioners' standing in the state courts is grounded on a statute. AS § 15.13.380(b). Under existing precedent, that statutory standing would likely not suffice to secure Article III standing in this Court. Had Petitioners prevailed in the Alaska Supreme Court, then Alaska would have had standing to defend its law in this Court. *ASARCO Inc. v. Kadish*, 490 U.S. 605, 618-19 (1989). But without that ruling, this Court would plausibly not have jurisdiction to rule on the merits of this case.

That uncertainty, however, does not limit this Court's power under § 2106. As noted in *Sinochem International Co. Ltd. v. Malaysia International Shipping Corp.*, 549 U.S. 422 (2007), "there is no mandatory 'sequencing of jurisdictional issues.'" *Id.* at 431 (citing *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999)). Instead, as Judge Easterbrook has written, "[j]urisdiction is vital only if the court proposes to issue a judgment on the merits." *Sinochem*, 549 U.S. at 431 (citing *Intec USA v. Engle*, 467 F.3d 1038, 1041 (7th Cir. 2006) (Easterbrook, J.)).[6]

As a GVR is not a judgment on the merits, there is no jurisdictional bar to this Court vacating the judgment of the Alaska Supreme Court and remanding under § 2106. The only consequence of such an action would be to direct the lower courts to engage in further

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[6] *See also Sinochem*, 549 U.S. at 425 ("a court need not resolve whether it has authority to adjudicate the cause (subject-matter jurisdiction) or personal jurisdiction over the defendant if it determines that, in any event, a foreign tribunal is plainly the more suitable arbiter of the merits of the case."); *Younger v. Harris*, 401 U.S. 37 (1971) (a federal court need not decide whether the parties present an Article III case or controversy before abstaining); *Tenet v. Doe*, 544 U.S. 1, 7, n.4 (2005) ("a dismissal under *Totten v. United States*, 92 U.S. 105 (1876), prohibiting suits against the Government based on covert espionage agreements, 'may be resolved before addressing jurisdiction.'"); *Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 465 (1962) (permitting transfer of case even without personal jurisdiction over the parties); 28 U.S.C. §1631, "Transfer to cure want of jurisdiction." Finally, this Court's long practice of GVRing to clarify whether an independent and adequate state ground bars Supreme Court review confirms that jurisdiction need not be established before a GVR. *See, e.g.*, *Montana v. Jackson*, 460 U.S. 1030 (1983).

review — as in *Maryland Casualty Co. v. Jones*, 279 U.S. 792, 796-97 (1929) (directing lower court to consider objections unmentioned in opinion), *Blackburn v. Alabama*, 354 U.S. 393 (1957) (directing court to consider a Due Process claim related to confession) and *Beer v. United States*, 564 U.S. 1050 (2011) (asking court to consider alternative basis for dismissing claim). If that review produces a reversal of the Alaska Supreme Court's earlier opinion, this Court would then have jurisdiction to review the Alaska Supreme Court's conclusion. *ASARCO*, 490 U.S. at 624. If it does not, this Court could then address whether Petitioners' statute-based standing should be sustained. The function of a GVR in this case would therefore simply be to signal to the lower courts the appropriateness of considering the alternative jurisprudential grounds that the Petitioners have raised and to offer to this Court a more careful analysis of how they might apply.

* * *

So long as Justices on this Court continue to craft opinions that identify alternative jurisprudential approaches to interpreting the federal Constitution — approaches such as originalism — an effective way within the lower courts to reckon those differences is necessary. Or put differently, if the Court is going to choose to speak with more than one voice, there must be a way to count those voices faithfully. Petitioners submit that the method we have advanced here — to GVR in light of the potential for a compound judgment grounded in alternative jurisprudential approaches —

is the most conservative way to permit such perspectives to be recognized without destabilizing the law in the lower courts.

This review is important and timely now. Given the position of the FEC and the uniform judgment of the courts of appeals, it is extremely unlikely that this issue will work its way back to this Court. But if indeed a full accounting of the positions of Justices on this Court would permit states the sovereign power they otherwise would hold to regulate institutional corruption, there could be no justification for this Court allowing that misunderstanding to continue. The authority of this Court to limit state sovereignty is grounded in the belief that the federal Constitution, speaking for "We, the People," disables state regulatory power. But if, as Petitioners insist, no "People" ever ratified a constitution that purported to disable their representative democracies from protecting themselves against corrupting dependencies, then there is no authority to restrict either the states or federal government as they struggle to sustain public faith in representative institutions.

Originalism grounds the power of this Court to restrict legislative action in the view that the Constitution, properly interpreted in the particular case, requires it. *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 Cincinnati Law Rev. 849, 862 (1989) (describing the "need for theoretical legitimacy"). Petitioners submit that the First Amendment, properly interpreted both from originalist and non-originalist perspectives, cannot be held to restrict the power of

states to regulate institutional corruption. If Petitioners' submission is correct, then the Alaska Supreme Court was wrong to restrict Alaska's power to regulate institutional corruption. This Court should therefore vacate and remand the case to give Alaska courts the opportunity to consider this practical, judicial reality.

There is no partisan valence anymore to the question of SuperPAC spending. Spending on the Right has been exceeded by spending on the Left. *See* OpenSecrets.org*, Total Liberal vs. Conservative Outside Spending by Election Cycle,* OpenSecrets.org, *available at* https://perma.cc/EU4N-RRCB. Rather, the simple, non-partisan question that begs answering now is whether our Constitution forbids states from resisting this form of "corruption," by limiting the contributions that effect such a corrupting dependence. Petitioners submit that once the full range of arguments relevant to the Justices on this Court is considered, this Court will conclude that it does not.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari, vacate the judgment below, and remand for further consideration in light of its instruction.

Respectfully submitted,

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APPENDIX