EQUALCITIZENS

To: Friends
From: Albert Alschuler and Laurence Tribe
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Subject: The legal argument against SuperPACs

We are legal scholars and law professors. One of us, Albert Alschuler, is the Julius Kreeger Professor Emeritus at the University of Chicago Law School. The other, Laurence Tribe, is the Carl M. Loeb University Professor of Constitutional Law Emeritus at Harvard University.

We have long studied constitutional limitations on the regulation of political contributions. Today such contributions can be regulated only when they create the risk or appearance of quid pro corruption.

In *Citizens United v. FEC* (2010), the Supreme Court held that political expenditures independent of a candidate made by corporations and unions do not create a risk of quid pro quo corruption and, therefore, cannot be limited. That decision extended a rule announced in *Buckley v. Valeo* (1976) that *independent expenditures* by individuals supporting particular candidates don't pose the same risk of corruption as contributions made to those same candidates and thus can't be limited. The same principle permits political action committees to make unlimited independent expenditures. So long as expenditures by corporations, unions, individuals, and political action committees are "independent," the Court has held that they can't constitute quid pro quo corruption.

In *Speech Now v. FEC* (2010), the D.C. Circuit Court of Appeals considered a superficially related but logically distinct question from that addressed in *Citizens United* and *Buckley v. Valeo*—namely, whether *contributions* to independent political action committees can constitutionally be regulated. Ruling just months after *Citizens United*, the circuit court held they cannot. Despite the long-standing Supreme Court ruling in *Buckley v Valeo* drawing a sharp distinction between contributions and expenditures, that court acted as though there was no distinction between contributions to these independent committees and expenditures by these groups. It wrote:

> In light of the Court's holding as a matter of law 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 appearance of corruption. The Court has effectively held that there is no corrupting "quid" for which a candidate might in exchange offer a corrupt "quo."

The decision in *SpeechNow* wasn't appealed by the government to the United States Supreme Court, and its hasty conclusion, erasing the settled distinction between contributions and expenditures, was quickly embraced by a number of other appeals courts. Based on these lower court decisions, the Federal Election Commission determined not to enforce a federal law that limited the size of contributions to independent political action committees. That decision, in effect, created the "SuperPAC."

The D.C. Circuit made a logical blunder in concluding that (1) because expenditures by independent political action committees don't implicate quid pro quo corruption, (2) contributions to such committees can't either. That conclusion not only flies in the face of a nearly half-century-old Supreme Court precedent, *Buckley v. Valeo*, but is manifestly fallacious for the obvious reason that a contribution *to* an

independent political action committee plainly can corrupt even when an expenditure *by* the same group does not.

In fact, the U.S. Justice Department prosecuted a United States Senator because a contribution to an independent political action committee unmistakably implicated quid pro quo corruption. In *United States v. Menendez* (2018), Senator Robert Menendez was accused of agreeing to give political favors to Doctor Salomon Melgen in exchange for Melgen's contribution to a SuperPAC supporting the senator's reelection. Although the charge against Menendez was dismissed for lack of evidence following a hung jury, the charge itself was upheld by a United States District Court. The fact that the charge involved a contribution to an "independent" political action committee rather than to the senator's own campaign made no difference.

Menendez clearly demonstrates that a contribution to an independent political action committee can involve quid pro quo corruption. And that conclusion is plainly inconsistent with *SpeechNow*, which held that a contribution to an independent political action committee *cannot* involve quid pro quo corruption. The *SpeechNow* court's unexplained conclusion that "as a matter of law" a contribution to an independent political action committee cannot implicate quid pro quo corruption is thus demonstrably incorrect.

We therefore believe that, if the question were presented to the United States Supreme Court, precedent would uphold the power of Congress and state legislatures to limit contributions to independent political action committees. Even on the view that the First Amendment permits Congress and the States to limit political contributions and expenditures only when they create the risk or appearance of quid pro quo corruption, contributions to independent political action committees are clearly subject to regulation even if expenditures by those committees are not.

Given the contrary position in most circuits, the best way to get this question before the United States Supreme Court might be for a court

that has not addressed the question to recognize the legitimacy of regulating contributions to independent political action committees. The U.S. Court of Appeals for the First Circuit is such a court. If a state within the First Circuit, such as Maine or Massachusetts, were to enact an initiative that limited contributions to independent political action committees, we believe the First Circuit would be likely to uphold that initiative. That would create a split in the circuits, forcing the United States Supreme Court to consider the question. It's our view, again, that existing precedent would require that Court to uphold the power to limit contributions to SuperPACs, thereby strengthening our democracy.