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Brendan W. Donkers, Chair
Hardeep Singh Rekhi, Vice Chair
Seattle Ethics and Elections Commission
P.O. Box 94729
Seattle, WA 98124-4729

Dear Chairperson Donkers and Vice Chairperson Rekhi:

I write in the hope that Seattle will enact an ordinance limiting contributions to “independent expenditure groups” or “super PACs.” This letter focuses on concerns that such an ordinance would be unconstitutional.

The concerns stem from a decision of the United States Court of Appeals for the District of Columbia Circuit—*SpeechNow.org v. FEC*, 599 F.3d 686 (2010). In this decision, the D.C. Circuit did hold that contributions to super PACs cannot be restricted. Moreover, in *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684 (9th Cir. 2010), the U.S. Court of Appeals for the Ninth Circuit became one of several federal appeals courts to follow *SpeechNow*.

SpeechNow and *Long Beach Area Chamber of Commerce* have given Seattle a strange system of campaign finance. Although Seattle voters have approved, and the Washington Supreme Court has upheld, a democracy-enhancing system of campaign finance that includes voter vouchers and sharp limits on campaign contributions, *SpeechNow* and *Long Beach Area Chamber of Commerce* make evasion of the contribution limits easy. After making the maximum donation to a candidate, a person may give thousands (or millions) of dollars to a super PAC whose only mission is to support that candidate. Seattle’s limits on contributions do not restrict how much people can give to electoral efforts; they simply require people to send their contributions to less responsible and more destructive speakers. Super PACs have been called “the attack dogs and provocateurs of modern politics.” The candidates they support need not take responsibility for what they say, and these groups usually disappear once an election is over. The attack ads they produce contribute to cynicism about politics, a cynicism that runs especially deep among young people. Of course the negative character of super PAC campaigning does not justify suppressing it, but it’s unfortunate that Seattle now has a system of

campaign financing that actively channels funds toward less responsible speech. In some of this year's election races in Seattle, super PACs have spent more than the candidates themselves. See Daniel Beekman, *Interest Groups Are Pouring Money into Seattle's Elections Using No-Limit PACs*, THE SEATTLE TIMES, July 19, 2019, <https://www.seattletimes.com/seattle-news/politics/interest-groups-are-pouring-money-into-seattles-city-council-elections-using-no-limit-pacs/>.

No sane legislator would vote in favor of this regime of campaign financing, and no legislator ever has. Seattle has this regime because two courts have held that the First Amendment requires it. Yet the thought that the Constitution requires it looks strange too. The Supreme Court held 43 years ago that contributions to candidates can be limited to prevent corruption and the appearance of corruption. *Buckley v. Valeo*, 424 U.S. 1 (1976). According to the D.C. and the Ninth Circuits, however, legislatures may not forbid \$10 million contributions to super PAC because these contributions do not create even an appearance of corruption.

SpeechNow was wrongly decided, and I believe that the Supreme Court is likely to say so if a way can be found to present the issue to the Court.

The Justice Department did not seek review of *SpeechNow*. In a statement that belongs on a historic list of wrong predictions, Attorney General Holder explained that the decision would "affect only a small subset of federally regulated contributions." Letter from Attorney General Eric H. Holder, Jr. to Senate Majority Leader Harry Reid, July 10, 2010, <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/06-16-2010.pdf>.

In a law review article, some co-authors and I explain at length why *SpeechNow* was wrongly decided. (My co-authors are Laurence H. Tribe, the Carl M. Loeb University Professor and Professor of Constitutional Law at the Harvard Law School; Norman L. Eisen, a Senior Fellow at the Brookings Institution; and Richard W. Painter, the S. Walter Richey Professor at the University of Minnesota Law School.) See Alschuler et al., *Why Limits on Contributions to Super PACS Should Survive* *Citizens United*, 86 *FORDHAM L. REV.* 2299 (2018).

As noted in our article, not even the *SpeechNow* opinion maintained that the regime of campaign finance it created was desirable or defensible. Instead, the D.C. Circuit argued that a single sentence of the Supreme Court's decision in *Citizens United v. FEC*, 558 U.S. 310 (2010), compelled its result. The Court wrote in *Citizens United*, "[I]ndependent expenditures . . . do not give rise to corruption or the appearance of corruption," and the D.C. Circuit declared, "In light of the Court's holding as a matter of law that independent expenditures do not corrupt or create the appearance of corruption, contributions to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption."

Our article shows that, contrary to the D.C. Circuit's reasoning, contributions to super PACs can corrupt even when expenditures by these groups do not. Courts have repeatedly held, for example, that a contribution to a public official's favorite charity can be a bribe, but it is the contribution given in exchange for official favors that corrupts, not the charity's virtuous expenditures. Moreover, the statement that the D.C. Circuit took as its premise was dictum, a nonbinding aside. We note several indications that the Supreme Court did not mean this statement to be taken in the way the D.C. Circuit took it.

For 43 years, the Supreme Court has distinguished between contribution limits, which it usually upholds, and expenditure limits, which it invariably strikes down. Reviewing the five distinctions drawn by the Court between contributions and expenditures, we show that contributions to super PACs cannot reasonably be distinguished from the contributions to candidates whose limitation the Court upheld.

The ultimate question posed by the Supreme Court's campaign-finance decisions is whether super PAC contributions create a sufficient appearance of corruption to justify their limitation. Our article describes opinion polls, the views of Washington, D.C. insiders, and the statements of candidates of both parties in the 2016 Presidential election. It shows that *SpeechNow* has sharpened class divisions and helped to tear America apart.

Here is a link to our article. https://fordhamlawreview.org/wp-content/uploads/2018/03/12_Citizens-United_April-v86.pdf

Do not hesitate to contact me at 207-829-3963 or a-alschuler@law.northwestern.edu if I can be of further assistance. Approving a Seattle ordinance to restrict contributions to super PACs could give the Supreme Court an opportunity to rule on an important, unsettled question of constitutional law. Resolving this question correctly would greatly improve our democracy.

Sincerely yours,

A handwritten signature in black ink, reading "Albert W. Alschuler", followed by a long horizontal line extending to the right.