Open Questions in *Lieu v. Federal Election Commission*: Due Process, Adverseness, & Article III Standing

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Other Views:

• Albert W. Alschuler, Laurence H. Tribe, et al., *Why Limits on Contributions to Super PACs Should Survive* Citizens United, 86 Fordham L. Rev. 2299 (2018), *available at* https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=5493&context=flr.

• Press Release, Free Speech for People, *Congressman Ted Lieu, Lead Plaintiff in Lieu v. FEC Discusses Lawsuit Seeking to End Super PAC Spending in U.S. Elections*, https://www.commondreams.org/newswire/2020/07/10/congressman-ted-lieu-lead-plaintiff-lieu-v-fec-discusses-lawsuit-seeking-end# (includes link to virtual briefing).

• Matea Gold, *Can super PACs be put back in the box?* Wash. Post (July 6, 2016), https://www.washingtonpost.com/politics/can-super-pacs-be-put-back-in-the-box/2016/07/06/9beb18ba-43b1-11e6-8856-f26de2537a9d_story.html.

In July 2016, a group of candidates for federal office, led by Representative Ted Lieu and Senator Jeff Merkley, filed an administrative complaint with the Federal Election Commission (FEC). Their target: ten advocacy groups, most of which had either criticized the candidates or praised their opponents in the past. Their demand: for the FEC to prosecute the groups for receiving excessive contributions. Their legal team: a "powerhouse."[1] Their goal: "to end super PAC spending in US elections."[2]

The complaint disappeared from the public consciousness almost immediately. In a way, it was designed to fail, at least in the short term. It asked the FEC to pursue the ten advocacy groups for violating a federal law that sets a $5,000 per-contributor cap on annual contributions to "political committees." (In ordinary English, the law says that if you want to pool your money with others to run ads about federal candidates, the most any one of you can chip in is $5,000.) According to Representative Lieu and his co-complainants, the ten advocacy groups had accepted contributions far exceeding the $5,000 cap.[3]

Factually, they were right. But as their complaint acknowledged, the courts and the FEC have said that the $5,000 cap cannot constitutionally be applied to groups that engage in independent advocacy alone (speech independent of candidates, that is). In 2010, the en banc D.C. Circuit held in a case called *SpeechNow.org v. FEC* that the $5,000 contribution cap violates the First Amendment as applied to "independent expenditure-only group[s]."[4] Months later, the FEC issued an advisory opinion to similar effect, confirming that independent advocacy groups "may solicit and accept unlimited contributions from individuals, political committees, corporations, and labor organizations."[5]

Those rulings made the FEC's dismissal of the *Lieu* complaint something of a foregone conclusion. Representative Lieu and his co-complainants freely acknowledged that the targets of their complaint were independent expenditure committees.[6] They also acknowledged that the FEC's 2010 advisory opinion lets independent expenditure committees accept unlimited contributions.[7] So unsurprisingly, the FEC dismissed the administrative complaint. The candidates then sued the FEC

1 Matea Gold, *Can super PACs be put back in the box?* Wash. Post (July 6, 2016), https://tinyurl.com/zbewje7.

2 Press Release, Campaign for Accountability, *CfA Joins All-Star Legal Team Representing Candidates and Members of Congress Seeking to Abolish Super PAC Spending* (July 7, 2016), https://tinyurl.com/y4lddfx6.

3 Administrative Complaint ¶¶ 44-83, Matter Under Review 7101 (July 7, 2016), *available at* https://tinyurl.com/yxnd7pbp.

4 SpeechNow.org v. FEC, 599 F.3d 686, 696 (D.C. Cir. 2010) (en banc).

5 FEC Adv. Op. 2010-11, 2010 WL 3184269, at *2 (July 22, 2010).

6 Admin. Compl., *supra* note 3, at ¶¶ 24-33.

7 *Id.* at ¶ 7.

in federal court, seeking to compel the agency to reopen the enforcement proceeding. Again unsurprisingly, the U.S. District Court for the District of Columbia considered itself bound by the D.C. Circuit's opinion in *SpeechNow*. It upheld the FEC's decision to dismiss the candidates' administrative complaint.[8] The candidates appealed. And the D.C. Circuit summarily affirmed, observing that "the challenged contributions to independent-expenditure-only political committees cannot constitutionally be prohibited under *SpeechNow.org v. FEC*."[9]

Little in that chain of events appears to have surprised the candidates. As they told the D.C. Circuit, "[t]hey challenged *SpeechNow*, not because they expected the FEC or the district court to overrule it, but simply to preserve their claims for appeal."[10] So when the D.C. Circuit denied their petition for en banc rehearing this past winter, the candidates petitioned the Supreme Court for a writ of certiorari. Their question presented is whether the federal government can constitutionally limit the amount of money Americans pool for political speech. The goal remains the same as in 2016: "giving the Supreme Court the opportunity to overrule the *SpeechNow* decision so we can rebuild our democracy."[11] The Supreme Court is scheduled to consider the petition on November 6.

On the merits, we find the candidates' arguments against *SpeechNow* unpersuasive. (Our firm represented SpeechNow in the *SpeechNow* case, so our views on the merits are probably to be expected.) But a lot has already been written about *SpeechNow* and "SuperPACs," so we're not going to focus on the merits arguments here. Instead, we're going to address three threshold issues that the parties in *Lieu* have largely ignored: (A) due process considerations, (B) lack of party adverseness, and (C) Article III standing. In our view, the *Lieu* case raises serious questions on each of these fronts (and similar ones are likely to arise in future cases that use the FEC complaint process to try to alter campaign-finance laws). Throughout the four year life of the case, however, these questions have received virtually no attention. Whatever the correct answers may be, they should have been ventilated thoroughly by the parties and the lower courts long before *Lieu* arrived at the Supreme Court.

I. Background

A. SpeechNow *and SuperPACs*

Since the 1970s, the Supreme Court has distinguished between "expenditures" and "contributions" made in the context of political campaigns. Simplifying slightly, making an expenditure is the act of spending your own money on a political advertisement. You like Candidate X, so you buy an ad in the newspaper saying, "Vote for Candidate X." Making a contribution, by contrast, is the act of giving money to someone else so that they can use it for political ends. You like Candidate Y, so you donate to Candidate Y's campaign. All of this activity is protected to one degree or another by the First Amendment. But the Supreme Court has said that contributions are somewhat less protected than expenditures. As a result, the Court has upheld some governmental limits on the amount of money you can contribute—to candidates and political parties, for example. But the Court has held that in no circumstances can the government limit the amount of money you can spend for political speech on your own.[12]

For years, this framework created a peculiar result. Each citizen could spend as much money as he or she wanted on independent political speech; those "expenditures" could not constitutionally be capped. At the same time, however, federal campaign-finance law barred citizens from pooling their money for that same speech. If you were to combine your resources with others, that would be a "contribution," your joint effort would be a "political committee," and anyone who chipped in more than $5,000 per year would be courting federal criminal charges. The result favored wealthy individuals (and more recently, corporations and labor unions[13]) over people of more modest means. Sheldon Adelson or Chevron or the SEIU could each spend $100 million of their own money on political ads. Those are "expenditures." But if two citizens were to pool more than $5,000 each for that same kind of advocacy, they'd face federal charges for making excessive "contributions" to one another.[14]

That regime ended just over a decade ago. In March 2010, the en banc D.C. Circuit ruled in *SpeechNow.org v. FEC* that the federal government cannot limit the amount of money Americans pool for independent political speech.[15] As applied to independent advocacy groups, the court held, the Federal Election Campaign Act's $5,000 cap on contributions violates the First Amendment.[16]

The Department of Justice chose not to seek Supreme Court review.[17] The FEC issued an advisory opinion announcing that it would no longer enforce the $5,000 contribution limit against independent advocacy groups like SpeechNow.[18] And those groups entered the popular lexicon as "SuperPACs."

8 Lieu v. FEC, 370 F. Supp. 3d 175, 178 (D.D.C. 2019).

9 Lieu v. FEC, No. 19-5072, 2019 WL 5394632, at *1 (D.C. Cir. Oct. 3, 2019).

10 Appellant's Response in Opposition to FEC's Motion for Summary Affirmance and Affirmative Request to Hold FEC's Motion in Abeyance at 3-4, Lieu v. FEC, No. 19-5072 (D.C. Cir. filed May 30, 2019), *available at* https://tinyurl.com/y4goy5ly.

11 Press Release, Free Speech for People, *Supreme Court Will Have Chance to Review Case Seeking to End Super PAC Spending in U.S. Elections* (June 18, 2020), https://tinyurl.com/yxrsunws.

12 Buckley v. Valeo, 424 U.S. 1, 46-51 (1976) (per curiam). There are some nuances to that rule. For example, the government has some leeway to limit even independent expenditures by foreign nationals and government contractors. Bluman v. FEC, 800 F. Supp. 2d 281 (D.D.C. 2011), *aff'd*, 565 U.S. 1104 (2012); Wagner v. FEC, 793 F.3d 1 (D.C. Cir. 2015) (en banc), *cert. denied sub nom.* Miller v. FEC, 136 S. Ct. 895 (2016).

13 Citizens United v. FEC, 558 U.S. 310, 318 (2010).

14 52 U.S.C. § 30116(a)(1)(C).

15 599 F.3d at 696.

16 *Id.*

17 Letter from Attorney General Eric H. Holder, Jr., to Senate Majority Leader Harry Reid (June 16, 2010), *available at* https://tinyurl.com/y3rd9nja. The plaintiffs in *SpeechNow* sought certiorari, unsuccessfully, on the separate question whether independent expenditure committees could be subject to registration and reporting laws.

18 FEC Adv. Op. 2010-11, 2010 WL 3184269 (July 22, 2010).

In the years since, five other circuits have followed the D.C. Circuit's lead and invalidated limits on the amount of money people can pool for political speech.[19] "Few contested legal questions," the Second Circuit remarked in 2013, "are answered so consistently by so many courts and judges."[20]

B. The Lieu *Litigation*

Over the past decade, proponents of campaign-finance laws have sought to pare back SuperPACs using various strategies. In 2014, for example, law professor Lawrence Lessig created a SuperPAC dedicated to abolishing SuperPACs.[21] Elsewhere, campaign-finance proponents lobbied state and local lawmakers to limit contributions to independent advocacy groups—a tactic designed to tee up the issue for litigation. "One potential route to Supreme Court review," proponents observed in 2018, is "the enactment of legislation incompatible with the right declared by *SpeechNow*."[22] To that end, one coalition began "encourag[ing] legislatures to enact these limits, especially in places where federal courts of appeals have not yet ruled on their validity."[23]

The *Lieu* complaint marked another step in the campaign. Under the Federal Election Campaign Act, "[a]ny person" may file a complaint with the FEC, alleging that a candidate or speaker or group has violated campaign-finance law and asking the agency to prosecute.[24] In mid-2016, Representative Lieu and his co-complainants used that procedure and submitted a complaint.[25] They identified ten independent advocacy groups, most of which had at one time or another spent money opposing one or another of the complaining candidates.[26] They asserted that each of those ten groups had accepted per-person contributions of far more than the $5,000 allowed by federal law.[27] And citing those "knowing"[28] violations, they asked the FEC to "conduct an immediate investigation" and sue the offending groups for declaratory and injunctive relief.[29]

SpeechNow stood as an acknowledged obstacle. The $5,000 contribution cap the candidates invoked was the same one the D.C. Circuit had held could not be applied to independent advocacy groups. Since 2010, FEC Advisory Opinion 2010-11 has formally declared that independent advocacy groups can "solicit and accept unlimited contributions."[30] Congress has long provided that such advisory opinions "may be relied upon" by the public at large.[31] And the candidates nowhere disputed that the ten groups their complaint targeted had complied with the 2010 advisory opinion in all respects.[32] As they acknowledged on filing day, their complaint was less about the ten groups targeted and more about getting *SpeechNow*'s reasoning up to the Supreme Court.[33]

The FEC dismissed the complaint. The candidates, the agency noted, "concede that *SpeechNow* and [Advisory Opinion] 2010-11 permit the conduct described in the Complaint."[34] So the agency found no basis for opening an enforcement action.

The candidates challenged that dismissal in federal court. Federal campaign-finance law authorizes this kind of suit; a complainant "aggrieved" by the FEC's failure to proceed with their complaint can sue the FEC and seek a court order setting aside the agency's decision not to open an enforcement action.[35] And in the candidates' view, the FEC had acted "contrary to law" by dismissing their administrative complaint based on the D.C. Circuit's decision in *SpeechNow*. Because *SpeechNow* was wrongly decided, the candidates argued, it should be abrogated and cannot form a valid basis for dismissing their complaint.

The U.S. District Court for the District of Columbia rejected that argument. To accept the candidates' position, the court reasoned, "would be tantamount to a declaration that binding precedent of the D.C. Circuit was unlawful."[36] Case dismissed.

The candidates fared no better before the D.C. Circuit. The appeals court twice denied their requests for en banc review and summarily affirmed the district court's judgment with one sentence of analysis: "The Federal Election Commission's decision to dismiss the administrative complaint was not contrary to law as the challenged contributions to independent-expenditure-only political committees cannot constitutionally be prohibited under *SpeechNow.org v. FEC*."[37]

With four years of preliminaries out of the way, Representative Lieu and his co-plaintiffs repaired to the Supreme Court for the main event. This past June, the candidates petitioned for certiorari on the question whether "the federal statutory limit on contributions to political committees . . . comports with the First Amendment as applied to committees that make only

19 *See infra* note 111.

20 N.Y. Progress & Prot. PAC v. Walsh, 733 F.3d 483, 488 (2d Cir. 2013).

21 Derek Willis, *Mayday, a Super PAC to Fight Super PACs, Stumbles in Its First Outing*, N.Y. Times (Nov. 17, 2014), https://tinyurl.com/yxznkwml.

22 Albert W. Alschuler, Laurence H. Tribe, et al., *Why Limits on Contributions to Super PACs Should Survive* Citizens United, 86 Fordham L. Rev. 2299, 2346 (2018) (hereinafter Alschuler & Tribe).

23 *Id.*

24 52 U.S.C. § 30109(a)(1).

25 Admin. Compl., *supra* note 3, at ¶¶ 9-21.

26 *Id.* at ¶¶ 9-21, 24-33.

27 *Id.* at ¶¶ 44-83.

28 *Id.* at ¶¶ 1, 3, 85-95.

29 *Id.* at ¶ 96.

30 FEC Adv. Op. 2010-11, 2010 WL 3184269, at *2 (July 22, 2010).

31 52 U.S.C. § 30108(c)(1).

32 Admin. Compl., *supra* note 3, at ¶ 7.

33 Gold, *supra* note 1 ("A team of attorneys including Laurence Tribe, a professor of constitutional law at Harvard University, and Richard Painter, who was the chief ethics lawyer for former president George W. Bush, are taking aim at *SpeechNow.org* with a new complaint they hope will reach the Supreme Court before the 2020 elections.").

34 FEC, Factual and Legal Analysis at 13, Matter Under Review 7101 (June 1, 2017), *available at* https://tinyurl.com/y6qq84r7.

35 52 U.S.C. § 30109(a)(1), (a)(8)(A).

36 *Lieu*, 370 F. Supp. 3d at 186.

37 *Lieu*, 2019 WL 5394632, at *1.

independent expenditures."[38] In September, the FEC filed its brief in opposition,[39] and on October 21 the candidates submitted their reply.[40] With the case distributed for the Court's November 6 conference, a decision on whether to grant certiorari could issue as early as November 9.

II. Questions Unanswered

Much of the parties' cert-stage briefing in *Lieu* centers on the merits of the candidates' argument: whether *SpeechNow* was correctly decided and whether the federal government can limit the amount of money Americans pool for political speech. (Unusually, the FEC's cert-stage brief argues that the $5,000 contribution limit violates the First Amendment as applied to independent advocacy groups.) The parties also argue over whether the enforcement action the candidates asked the FEC to prosecute would technically amount to a "sanction" against the targeted groups. Largely ignored, though, are three issues that implicate the integrity of the adversarial process and traditional notions of fairness. First: whether the premise of the candidates' complaint—that the FEC should have prosecuted political groups for acts the agency had previously blessed—breaks with basic rule of law principles. Second: whether it is prudent to adjudicate the scope of First Amendment rights in a case where no affected speaker is a party. And third: whether the candidates have Article III standing.

A. Lieu *Raises Grave Due Process Concerns*

1. The Candidates Urge the FEC to Prosecute Acts Previously Declared Legal

Foremost are the due process concerns. Consider the circumstances. In July 2010, the FEC announced that independent expenditure committees could lawfully "solicit and accept unlimited contributions."[41] By statute, Congress has provided that FEC advisory opinions "may be relied upon" by "any person" similarly situated to the person who requested the opinion.[42] And by all accounts, every contribution listed in the *Lieu* plaintiffs' administrative complaint conformed to the FEC's 2010 opinion.[43]

Even so, the candidates filed their complaint, asking the FEC to "immediate[ly] investigat[e]" the contributions and to sue the recipients in federal court.[44] The agency rightly dismissed the matter, in part because it found that "Respondents are entitled to rely on [the 2010 advisory opinion] unless they acted contrary to Commission guidance."[45] Resorting to federal court, the candidates have now sought to vacate that dismissal; they seek a federal court order directing the FEC to renew enforcement proceedings based on acts taken in reliance on FEC guidance.

Granting the candidates that relief would raise constitutional concerns of the highest order. Americans have a right to expect "some minimum standard of decency, honor, and reliability in their dealings with their Government."[46] That is why "traditional notions of fairness" bar the government from blessing a course of conduct with one hand and punishing it with the other.[47] For the FEC to take the steps the candidates demand would thus "result in precisely the kind of 'unfair surprise' against which [the Supreme Court's] cases have long warned."[48] The Constitution forbids treating people that way, and the FEC was right to rebuff the candidates' request.

2. The Candidates' Efforts to Minimize the Due Process Concerns Lack Merit

In the lower courts and in their reply brief, the candidates minimized this concern on the ground that they asked the FEC to sue their critics for "only declaratory relief."[49] For three reasons, that contention lacks merit.

First, it appears to misstate the record; the candidates' complaint to the FEC requested not just declaratory relief, but "injunctive relief" too.[50] And whatever might be said of declaratory relief (more on that below), targeting advocacy groups for a federal injunction is a grave exercise of coercive power. In the lower courts, in fact, the candidates acknowledged as much. Before the district court, they contrasted "declaratory judgment[s]" with "the strong remedy of injunction."[51] They distanced declaratory relief from "other coercive relief"—like injunctions.[52] They also noted that "coercive measure[s]" (like injunctions) generally translate to "a 'sanction.'"[53]

Second, even if the candidates had in fact asked the FEC to pursue declaratory relief alone, it's no small matter for the government to single out political groups for declaratory judgment actions. Contrary to the candidates' view, a declaratory judgment absolutely visits "distinctive burden[s]" on those bound by it.[54] It

38 Petition for Writ of Certiorari at i, Lieu v. FEC, No. 19-1398 (U.S. docketed June 18, 2020), *available at* https://tinyurl.com/yyymogvh.

39 Brief in Opposition, Lieu v. FEC, No. 19-1398 (U.S. filed Sept. 21, 2020), *available at* https://tinyurl.com/y3avt58z.

40 Reply Brief, Lieu v. FEC, No. 19-1398 (U.S. filed Oct. 21, 2020), *available at* https://tinyurl.com/y27q7kll.

41 FEC Adv. Op. 2010-11, 2010 WL 3184269, at *2 (July 22, 2010); *see also id.* at *1 ("[T]he Commission concludes the Committee's planned course of action complies with the Act.").

42 52 U.S.C. § 30108(c)(1)(B).

43 *E.g.*, Admin. Compl., *supra* note 3, at ¶¶ 7-8.

44 *Id.* at ¶ 96.

45 Factual and Legal Analysis, *supra* note 34, at 11.

46 Heckler v. Cmty. Health Servs. of Crawford Cty., Inc., 467 U.S. 51, 61 (1984).

47 United States v. Penn. Indus. Chem. Corp., 411 U.S. 655, 674 (1973).

48 Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 156 (2012).

49 *See, e.g.*, Plaintiffs' Opposition to Motion to Dismiss Amended Complaint at 13, Lieu v. FEC, No. 16-cv-2201 (D.D.C. filed June 13, 2018), *available at* https://tinyurl.com/y6zp6k5o; Reply Brief, *supra* note 40, at 3 (stating that "a declaratory judgment" was "the only relief petitioners asked the FEC to issue").

50 Admin. Compl., *supra* note 3, at ¶¶ 7, 96.

51 Pls.' Opp. to Mot. to Dismiss Amended Compl., *supra* note 49, at 14.

52 *Id.*

53 Plaintiffs' Reply in Support of Motion for Leave to File Amended Complaint at 23, Lieu v. FEC, No. 16-cv-2201 (D.D.C. filed Aug. 16, 2017).

54 Pls.' Opp. to Mot. to Dismiss Amended Compl., *supra* note 49, at 13.

does far more than benignly "tell[] people what the law is."[55] It is binding on the defendants specifically—not, as the candidates told the district court, on the world at large.[56] It can be a predicate for injunctive relief.[57] Put simply, "a declaratory judgment is a real judgment, not just a bit of friendly advice."[58] From a rule of law perspective, then, the candidates' line between declaratory judgments and injunctive decrees is irrelevant. Representative Lieu and his co-plaintiffs filed their case with one goal: to compel the FEC to reinstate an enforcement proceeding targeting acts the agency previously declared lawful. Were that enforcement action to proceed, it would contravene basic principles of fairness—whether the remedy sought were monetary or injunctive or "only" declaratory.

Third, whatever remedies their administrative complaint may have requested, the candidates have no control over what sanctions the federal government may mete out for violations of federal law.[59] For this reason, too, the candidates' parsing of "coercive" versus "non-coercive" enforcement is largely beside the point.[60] Being targeted by a federal investigation is serious business. That is doubly true in the First Amendment context, where (to borrow the Supreme Court's words) "[t]he chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution" alone, "unaffected by the prospects of its success or failure."[61] For those on the receiving end, a federal investigation is burdensome, time-consuming, intimidating, and costly—whatever the outcome.[62]

The *Lieu* case illustrates the point. The candidates' administrative complaint alleged under oath that their political critics "knowingly" accepted illegal contributions and "knowingly" violated federal law.[63] It contended that the FEC was "not bound by the D.C. Circuit's ruling" in *SpeechNow*.[64] It urged the agency to "conduct an immediate investigation" and sue the candidates' critics for "declaratory and/or injunctive relief."[65] In response, FEC lawyers then issued notices to a dozen political groups, five companies, one trust, and nineteen citizens.[66] In each notice, the agency advised that the recipients "may have violated the Federal Election Campaign Act of 1971." In each notice, the agency instructed the recipients "to preserve all documents, records and materials relating to the subject matter of the complaint." In each notice, the agency cited its "statutory authority to refer knowing and willful violations of the Act to the Department of Justice for potential criminal prosecution."

Understandably, almost everyone who got that notice hired lawyers—almost all from expensive firms with specialized election law practices. Who can blame them? The Federal Election Campaign Act is "unique and complex."[67] The complainants include powerful federal officeholders, candidates, and a prominent academic. And who would consider ignoring a federal agency's threat of criminal prosecution? Even the candidates' counsel appear to have been struck by the costs imposed by merely opening an investigation of this sort; in a 2018 law review article, they marveled at the "thousands of dollars" the defense lawyers must have "charged their clients for filing responses describing law the plaintiffs had acknowledged in their complaint."[68] That comment seems to have been a dig at the perceived wastefulness of law firm practices. But from our vantage point, it exposes a more fundamental issue: The candidates simply gave no weight to the seriousness, unfairness, and due process implications of subjecting their critics to a federal enforcement action.

B. Lieu *Suffers from a Lack of Party Adverseness*

The *Lieu* petition also raises questions that go to the heart of the adversarial process. Representative Lieu and his co-plaintiffs are asking the Supreme Court to decide a "highly consequential"[69] question implicating the First Amendment rights of countless private speakers. But not one of those speakers is a party to the case. Consistent with the Federal Election Campaign Act, the candidates sued the FEC alone.[70] None of the advocacy groups the candidates asked the agency to prosecute are named as defendants. Nor are any of those groups' supporters. On one side of the caption are politicians who want a federal agency to target their critics. On the other side is the federal agency itself.

That line-up is concerning, particularly in a case involving core First Amendment rights. Our nation's "adversarial system of adjudication" depends on "the principle of party presentation."[71] In *Lieu*, though, one side of the question presented lacks any concrete representation. The candidates (the plaintiffs) want to reinstate the $5,000 contribution cap as it applies to independent advocacy groups. The FEC (the defendant) is the agency charged with enforcing that cap. Granted, the FEC's cert-stage briefing asserts that the $5,000 limit violates the First Amendment as applied to independent advocacy groups.[72] But there is no guarantee the agency would maintain that litigating position if

55 *Id.*

56 *Id.* at 11, 13.

57 *See* Samuel L. Bray, *The Myth of the Mild Declaratory Judgment*, 63 Duke L.J. 1091, 1111 (2014).

58 Badger Catholic, Inc. v. Walsh, 620 F.3d 775, 782 (7th Cir. 2010) (Easterbrook, C.J.).

59 *See, e.g.*, 52 U.S.C. § 30106(b)(1).

60 *See* Pls.' Opp. to Mot. to Dismiss Amended Compl., *supra* note 49, at 3.

61 Dombrowski v. Pfister, 380 U.S. 479, 487 (1965).

62 *See Citizens United*, 558 U.S. at 335 (remarking on "the heavy costs of defending against FEC enforcement").

63 Admin. Compl., *supra* note 3, at ¶¶ 1-3.

64 *Id.* at ¶ 8.

65 *Id.* at ¶ 96.

66 *See, e.g.*, Letter from Jeff S. Jordan to Marlene Ricketts, Matter Under Review 7101 (July 14, 2016), *available at* https://tinyurl.com/y2ycoleu.

67 *Citizens United*, 558 U.S. at 334 (citation omitted).

68 *See* Alschuler & Tribe, *supra* note 22, at 2350.

69 Petition, *supra* note 38, at 11.

70 52 U.S.C. § 30109(a)(8).

71 United States v. Sineneng-Smith, 140 S. Ct. 1575, 1579 (2020).

72 Brief in Opposition, *supra* note 39, at 16-22.

the Court were to set the case for argument.[73] After all, federal agencies and the Solicitor General's Office have an institutional interest in preserving federal laws against constitutional challenges "in all but the rarest of cases."[74]

One solution could be for the Court to appoint an amicus to defend the judgment below. The Court exercises that power on occasion. But usually it has done so when the interest left undefended is one common to society as a whole—an interest in seeing a statute upheld or a sentence affirmed, for instance.[75] Here, by contrast, the unrepresented interest is a distinctly personal one: the right to associate for political expression. It is held by each of us as individuals, not by society as a whole (and certainly not by the Department of Justice or the Federal Election Commission). And at no point in the *Lieu* case has that interest been securely represented.

That lack of adverseness is not a quirk but a structural flaw—one both foreseeable and foreseen. In 2018, in fact, the candidates' attorneys declared not only that it would be "incongruous" for the Solicitor General to argue that the $5,000 limit violates the First Amendment, but that "the administration's political interests also counsel support for the plaintiffs"—the government's ostensible opponents.[76] That lack of concrete party adverseness is nothing if not a red flag. We know of no instance in which the Supreme Court has decided a First Amendment question in circumstances like these.

C. Lieu *Implicates Several Open Questions About Article III Standing*

1. Article III Standing in Federal Election Campaign Act Lawsuits

Article III standing reflects the principle that plaintiffs can get into federal court only if they show that the ruling they seek would redress a cognizable harm. Standing can be tricky at the best of times, and that's especially true when it comes to the Federal Election Campaign Act. Recall that the Act authorizes "any person" to file a complaint with the FEC, asking the agency to prosecute an alleged violation.[77] If the FEC dismisses that complaint, the complainant can then sue the FEC in federal court. That's what Representative Lieu and his co-plaintiffs did: they filed an administrative complaint, the FEC dismissed it, and the candidates now seek a court order setting that dismissal aside. The Act authorizes this sort of lawsuit: Section 30109(a)(8) says that "[a]ny party aggrieved by an order of the Commission dismissing a complaint filed by such party" may sue the agency to set aside the dismissal.[78] But for Article III standing purposes, that statutory green light isn't enough. Section 30109(a)(8) itself "does not confer standing," the courts hold.[79] It merely "confers a right to sue upon parties who otherwise already have standing."[80]

If that sounds complicated, it is. But the takeaway is this. Anyone can file a complaint with the FEC, asking the agency to prosecute a campaign-finance violation. And Section 30109(a)(8) says that anyone whose complaint is dismissed can sue the agency to get the dismissal overturned. But because of the Article III standing doctrine, you can file one of those suits only if the relief you're requesting—a court order setting aside the FEC's dismissal of your complaint—is likely to redress a cognizable harm you've suffered.

So what kinds of harm count? Well, a bare desire for the FEC to "get the bad guys" isn't enough.[81] Rather, the harm the courts have most clearly recognized in the campaign-finance context is "informational injury."[82] According to the Supreme Court, the Federal Election Campaign Act grants people a right to information about campaign spending.[83] That right is harmed if a candidate or committee fails to disclose information the Act requires it to report. In turn, an FEC enforcement action against the violator might lead to the disclosure of the required information.[84] So if you ask the FEC to pursue a disclosure violation and the agency declines, you may have standing to sue the agency to set aside that decision because if you win, the result—the disclosure of information—may redress a "sufficiently concrete" harm.[85] That sort of "informational injury" is the only harm the Supreme Court has yet recognized in the context of Section 30109(a)(8).

2. Article III Standing in *Lieu*

How do those principles apply in *Lieu*? It's not clear. Representative Lieu and his co-plaintiffs certainly don't appear to be claiming an informational injury; they complain not that their critics failed to disclose contributions, but that their critics accepted certain contributions in the first place. So informational injury isn't the harm. Instead, it seems that the candidates claim an injury sounding in "competitor standing"—the notion that their critics' receipt of excess money harmed them by obliging them to campaign in an illegally structured competitive environment.[86] And to be sure, competitor standing is a real doctrine; the Supreme Court has applied it in the commercial context since at least the 1970s, typically to hold that a business can challenge agency action

73 *Cf.* Brent Kendall & Jess Bravin, *Trump's Justice Department Takes U-Turns on Obama-Era Positions*, Wall St. J. (Jan. 5, 2018), https://tinyurl.com/y3dkpvko; Adam Liptak, *Trump's Legal U-Turns May Test Supreme Court's Patience*, N.Y. Times (Aug. 28, 2017), https://tinyurl.com/y95xl85v.

74 Seth P. Waxman, *Defending Congress*, 79 N.C. L. Rev. 1073, 1078 (2001).

75 *See, e.g.*, Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2195 (2020); *see generally* Katherine Shaw, *Friends of the Court: Evaluating the Supreme Court's Amicus Invitations*, 101 Cornell L. Rev. 1533, 1594 (2016) (cataloguing amicus appointments).

76 Alschuler & Tribe, *supra* note 22, at 2354 n.331.

77 52 U.S.C. § 30109(a)(1).

78 *Id.* § 30109(a)(8)(A).

79 Nader v. FEC, 725 F.3d 226, 228 (D.C. Cir. 2013) (citation omitted).

80 *Id.*

81 Common Cause v. FEC, 108 F.3d 413, 418 (D.C. Cir. 1997) (per curiam).

82 FEC v. Akins, 524 U.S. 11, 24 (1998).

83 *Id.* at 21.

84 *Id.* at 25.

85 *Id.*

86 *See* Amended Complaint ¶¶ 28-38, Lieu v. FEC, No. 16-cv-2201 (D.D.C. filed Mar. 7, 2018), *available at* https://tinyurl.com/y3ozbyd2.

that unlawfully exposes the business to increased competition.[87] But if competitor standing is indeed the candidates' theory of harm in *Lieu*, it presents more questions than answers. To start, the Supreme Court has never applied the competitor standing doctrine to politics. In fact, a divided D.C. Circuit panel first did so only in 2005.[88] For our part, we don't have a firm view on whether it makes sense to import competitor standing principles from the commercial context to the political. But one thing is clear: that "thorny issue"[89] would need to be untangled before the Court were ever to reach the merits in *Lieu*.[90]

For now, though, let's assume that competitor standing applies in the political arena. Even accepting that premise, it remains unclear whether the candidates in *Lieu* have alleged an injury. "The nub of the 'competitive standing' doctrine," the D.C. Circuit has summarized, "is that when a challenged agency action authorizes allegedly illegal transactions that will almost surely cause [a company] to lose business, there is no need to wait for injury from specific transactions to claim standing."[91] Thus, litigants typically invoke the doctrine in the commercial context to challenge agency actions authorizing "an actual or imminent increase in competition."[92] That prospect of future harm, the doctrine holds, may qualify as "a cognizable Article III injury."[93]

It's unclear how *Lieu* fits in that framework. The candidates are not challenging an agency action that permits "an actual or imminent increase in competition."[94] They aren't, for example, challenging a regulation that authorizes allegedly illegal campaign activities in the future.[95] Rather, the harms they complained of to the FEC are years in the past. They asked the agency to prosecute ten specific political groups based on past incidents of allegedly unlawful behavior. The agency declined to do so. And with that agency action as the candidates' target,[96] their federal court complaint asserts no obvious link between injury, causation, and redressability. The complaint dutifully recited that each candidate "plans to run" or "expects to run" for federal office in the future.[97] It alleged that most of the ten groups had at one time or another spent money opposing one or another of the candidates.[98] It alleged that the candidates wanted the FEC to investigate and prosecute those groups.[99] Yet nowhere did it allege that any of those groups was likely to speak out against any of the candidates in future campaigns.[100]

Even under the broadest view of competitor standing, that gap raises serious questions. With no allegation that any of the targeted groups is likely to injure the candidates' competitive interests now or in the future, it's unclear what harm would be redressed by the FEC's prosecuting them. In the commercial context, in fact, the D.C. Circuit has made this point explicitly, observing that a "terminated" act of illegal competition "cannot itself form the basis for standing" under the competitor standing doctrine.[101] That principle is hard to square with the candidates' requested relief in *Lieu*. The candidates complained to the FEC about past—sometimes years-old—contributions. They seek a court order directing the FEC to prosecute the groups that received those contributions. Yet their federal court complaint contains no hint that any of those groups is likely to "compete" (i.e., run ads) against them ever again.[102]

In trying to thread that needle, the candidates' complaint retreats from the specific to the general; it alleges not that the targeted committees will harm the candidates again, but that unspecified "groups" might criticize the candidates in the future.[103] But if that is the candidates' claimed injury, the relief their complaint seeks would appear not to remedy it. Unlike a suit contesting a rule of general applicability, the candidates' complaint does not challenge an agency action that affects the "competitive environment's overall rules" going forward.[104] It asks only that the federal courts order the FEC to reinstate an enforcement proceeding against ten specific committees.[105] At most, that renewed proceeding would bind those ten committees alone—not "groups" at large.[106] And the complaint nowhere

87 *E.g.*, Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 152 (1970).

88 Shays v. FEC, 414 F.3d 76, 85-86 (D.C. Cir. 2005).

89 *See Common Cause*, 108 F.3d at 419 n.1.

90 Of course, there are other paths by which speakers and candidates can challenge governmental regulation of political activity. Some laws, for example, have burdened political speech by "grant[ing] funds to publicly financed candidates as a direct result of the speech of privately financed candidates and independent expenditure groups." Arizona Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 742 (2011). Laws of that sort can be challenged, not under a competitor standing theory, but as a direct burden on political speech. *Cf. id.*

91 El Paso Nat. Gas Co. v. FERC, 50 F.3d 23, 27 (D.C. Cir. 1995).

92 Sherley v. Sebelius, 610 F.3d 69, 73 (D.C. Cir. 2010).

93 MD Pharm., Inc. v. DEA, 133 F.3d 8, 11 (D.C. Cir. 1998) (citation omitted).

94 *Sherley*, 610 F.3d at 73; *see also Ass'n of Data Processing Serv. Orgs., Inc.*, 397 U.S. at 152-53; Assoc. Gas Distribs. v. FERC, 899 F.2d 1250, 1258-59 (D.C. Cir. 1990).

95 *Shays*, 414 F.3d at 86.

96 Amended Compl., *supra* note 86, at ¶¶ 22-23 (requested relief).

97 *Id.* at ¶¶ 29, 31, 33-34, 36, 38.

98 *Id.* at ¶¶ 28, 30, 33, 36, 37.

99 *Id.* at ¶ 80.

100 *See id.* at ¶¶ 28-38.

101 *Assoc. Gas Distribs.*, 899 F.2d at 1258-59; *see also* Mobile Relay Assocs. v. FCC, 457 F.3d 1, 13 (D.C. Cir. 2006) ("While we have recognized competitor standing in the licensing context, the party seeking to establish standing on that basis 'must demonstrate that it is "a *direct* and *current* competitor whose bottom line may be adversely affected by the challenged government action."'").

102 In fact, some of the groups appear to have gone inactive even before the candidates asked the FEC to get involved. *E.g.*, Bold Agenda PAC, FEC Financial Summary, https://tinyurl.com/y6c3r5mt; American Alliance, FEC Financial Summary, https://tinyurl.com/y66akcvj.

103 Amended Compl., *supra* note 86, at ¶¶ 29, 31, 33, 34, 36, 38.

104 *Shays*, 414 F.3d at 86.

105 *See* Amended Compl., *supra* note 86, at 22-23 (requested relief).

106 *See* Taylor v. Sturgell, 553 U.S. 880, 884 (2008). If the FEC were to add additional respondents to the enforcement proceeding (as it did in the

alleges that the FEC's pursuing those committees would redress any real-world harm to Representative Lieu and his co-plaintiffs.

Perhaps there's a good answer to all this. And to be clear, we're no friends of overly strict standing rules. People whose federally protected rights are on the line should absolutely have recourse to the federal courts. But in a case that seeks to constrain the First Amendment rights of Americans nationwide, it is unclear what cognizable harm the plaintiffs in *Lieu* seek to redress. That question—unbriefed and unaddressed in the lower courts—would need to be resolved in the first instance by the Supreme Court were certiorari to be granted.

III. Closing Thoughts

There may be plausible answers to the issues detailed above, but we have not been able to come up with them. Nor have the plaintiffs in *Lieu* offered any. Instead, the candidates' cert-stage briefing claims a writ of certiorari almost as of right, on the theory that *SpeechNow* invalidated a federal law and "[w]hen an inferior court has nullified an Act of Congress, its decision should not be the last word."[107] But when the Department of Justice declines to appeal an adverse ruling (as in *SpeechNow*), Congress itself contemplates that lower courts might have the last word.[108] Congress also continued to entrust the D.C. Circuit with deciding cases like *SpeechNow* in the first instance, even after removing a right of direct appeal to the Supreme Court in 1988.[109]

Also unpersuasive is the candidates' other main argument for certiorari: that *Lieu* is the Supreme Court's only chance to address their question presented.[110] In truth, laws similar to the federal contribution limit have offered ample opportunities for state actors to seek the Court's review. Since 2008, for example, six other federal courts of appeals have considered whether independent expenditure groups can be subject to contribution limits.[111] Unlike *Lieu*, each of those cases appears to have been litigated in a concretely adversarial posture throughout. And there is reason to believe that similar cases will continue to arise. For example, sixteen states have appeared as amici in support of the *Lieu* petition;[112] of those, seven are in circuits that have yet to decide whether contributions to independent expenditure groups can be capped. In 2017, St. Petersburg, Florida, enacted just such a cap.[113] Seattle has considered similar legislation.[114] So has Massachusetts.[115] By design, these nationwide legislative efforts seek to "bring the constitutionality of limiting super PAC contributions before the [Supreme] Court."[116] Legal challenges to any of those laws would implicate the same constitutional question Representative Lieu and his co-plaintiffs have raised, with none of the stumbling blocks outlined above.

As the candidates' petition suggests, what they are asking of the Supreme Court is "highly consequential"[117]: Under the candidates' preferred rule, the federal government could once again deploy the full force of its civil and criminal power to police how much money Americans can pool for political speech. If that issue is to be addressed by the nation's court of last resort, it deserves to be heard in a case that presents it cleanly.

early stage of reviewing the *Lieu* complaint), those specific respondents would presumably be parties to any declaratory judgment action as well and bound by the resulting judgment.

107 Petition, *supra* note 38, at 10.

108 28 U.S.C. § 530D(a)(1)(B)(ii).

109 *See* Wagner v. FEC, 717 F.3d 1007, 1010 (D.C. Cir. 2013) (per curiam).

110 *See* Petition, *supra* note 38, at 3.

111 Republican Party of N.M. v. King, 741 F.3d 1089, 1103 (10th Cir. 2013); N.Y. Progress & Prot. PAC v. Walsh, 733 F.3d 483, 487 (2d Cir. 2013); Texans for Free Enter. v. Tex. Ethics Comm'n, 732 F.3d 535, 537-38 (5th Cir. 2013); Wis. Right to Life State Political Action Comm. v. Barland, 664 F.3d 139, 154 (7th Cir. 2011); Long Beach Area Chamber of Commerce v. City of Long Beach, 603 F.3d 684, 696 (9th Cir.), *cert. denied*, 562 U.S. 896 (2010); N.C. Right to Life, Inc. v. Leake, 525 F.3d 274, 293 (4th Cir. 2008).

112 Brief of Washington et al. as Amici Curiae, Lieu v. FEC, No. 19-1398 (U.S. filed July 22, 2020), *available at* https://tinyurl.com/y2v9ytp7.

113 Andrew D. Garrahan, *St. Petersburg Passes Anti-Super PAC Ordinance, Hoping to Set Up Constitutional Showdown*, Nat'l. L. Rev. (Oct. 6, 2017), https://tinyurl.com/y4sqfbz2.

114 Seattle City Council, *Clean Campaigns Act*, https://tinyurl.com/y2but47l.

115 S.394, 191st Gen. Court, Bill (Mass. 2019), https://tinyurl.com/y3ubuj5e.

116 Alschuler & Tribe, *supra* note 22, at 2346.

117 Petition, *supra* note 38, at 11.