No. 18-149

In The

Supreme Court of the United States

DOUG LAIR, ET AL.,
Petitioners,

v.

JEFF MANGAN, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF POLITICAL PRACTICES, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

AMICUS CURIAE BRIEF OF THE WISCONSIN INSTITUTE FOR LAW & LIBERTY IN SUPPORT OF THE PETITIONERS

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Interest of Amicus

Amicus Wisconsin Institute for Law & Liberty[1] is a public interest law firm dedicated to advancing the public interest in limited government, free markets, individual liberty, and a robust civil society. Founded in June of 2011, Amicus has served as counsel for a litigant or amicus party in a number of campaign finance cases including *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185 (2014), *CRG Network v. Barland*, 139 F. Supp. 3d 950 (E.D. Wis. 2015), *State ex rel. Two Unnamed Petitioners v. Peterson*, 2015 WI 85, 363 Wis. 2d 1, 866 N.W.2d 165, and *Young v. Vocke*, No. 13-CV-635 (E.D. Wis. 2014).

Its founder, President, and General Counsel, Richard M. Esenberg, has written on the subject of campaign finance law. *See* Richard M. Esenberg, *If You Speak Up, Must You Stand Down:* Caperton *and its Limits*, 45 WAKE FOREST L. REV. 1287 (2010); Richard M. Esenberg, *The Lonely Death of Public Campaign Financing*, 33 HARV. J.L. & PUB. POL'Y 283 (2010) [hereinafter Esenberg]; Richard M. Esenberg, Citizens United *Is No* Dred Scott*,* 16 NEXUS: CHAP. J.L. & POL'Y 99 (2010-11); Richard M. Esenberg, *Playing Out the String: Will Public*

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[1] As required by Supreme Court rule 37.6, Amicus states as follows. No counsel for a party authored this brief in whole or in part. No such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus, its members, or its counsel, made such a monetary contribution. Counsel of record received timely notice of intent to file this brief under Supreme Court rule 37.2 and consent has been given by all parties for this brief.

Financing of Elections Survive McComish v. Bennett?, 10 ELECTION L.J. 165 (2011).

Summary of Argument

It would not be unfair to say that the complicated and dissonant progress of campaign finance law has at times been reminiscent of Frankenstein's monster. It has been borne of ambition, cobbled together with provisions that could not withstand constitutional scrutiny and which often work at cross-purposes, and fraught with cascading unforeseen consequences. *See* Mary Wollstonecraft Shelley, *Frankenstein; or, The Modern Prometheus* 198 (James Rieger ed., The University of Chicago Press 1982) (1818) ("Man," I cried, "how ignorant art thou in thy pride of wisdom!"). Intended to limit money in politics, modern campaign finance reform has led to exploding expenditures and increased reliance on independent expenditures financed by a small number of well-heeled donors operating outside the control or influence of the actual candidates. Intended to encourage citizen participation, it has resulted in self-financing "millionaire candidates." Rather than usher in a new Athenian democracy, it has yielded sepia-toned attack ads and SuperPACs with anodyne names containing words like "children," "families" and "America."

While some might see this Court in the role of Dr. Frankenstein, the real culprit was the ambition of reformers who have thought that, with enough regulation, political debate could be idealized to ensure that no one has "too much influence" and that

participation is somehow balanced. Our Constitution simply doesn't give the state that much power over political participation. Quoting former United States Solicitor General and Associate Justice of the Massachusetts Supreme Judicial Court Charles Fried, Floyd Abrams recently noted that the United States is the "most libertarian and speech protective of any liberal democratic regime." Floyd Abrams, *The Soul of the First Amendment* xv (2017). Our constitutional jurisprudence is suspicious of the notion that the free market of ideas can be effectively or prudently umpired. We believe that the remedy for bad speech is more speech. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."). In our constitutional landscape, "[t]hose who govern should be the *last* people to help decide who *should* govern." *McCutcheon*, 572 U.S. at 192 (plurality opinion).

For this reason, government efforts to tailor and control political speech frequently cross constitutional lines resulting in a patchwork of permissible and impermissible provisions that cannot achieve the overly ambitious designs of reformers. An example is the distinction between contributions and expenditures implicated by this case. In 1976, this Court adopted a "bifurcated standard of review under which contribution limits receive less rigorous scrutiny" than expenditure limits, *McCutcheon*, 572 U.S. at 228 (Thomas, J., concurring in the judgment) (citing *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (per curiam)), even though both

types of limits "implicate fundamental First Amendment interests," *Buckley*, 424 U.S. at 23. Pursuant to *Buckley* and its progeny, while expenditure limits are subject to strict scrutiny – a demanding test well-known to this Court – contribution limits escape invalidation if the state "demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement" of "First Amendment rights." *McCutcheon*, 572 U.S. at 197, 199 (plurality opinion) (quoting *Buckley*, 424 U.S. at 25).

Although contribution limits face a lighter burden, they may be restricted only to serve a specific and narrow interest in preventing "*quid pro quo*" corruption – "a direct exchange of an official act for money" – or its appearance. *McCutcheon*, 572 U.S. at 191-92 (plurality opinion) ("Our cases have held that Congress may regulate campaign contributions to protect against corruption or the appearance of corruption . . . Any regulation must instead target what we have called "*quid pro quo* " corruption or its appearance."); *see also, e.g.*, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 359 (2010) ("When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption."); *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 741 (2008); *Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985).

Some members of this Court have criticized the dichotomy, maintaining that "contribution limits

infringe as directly and as seriously upon freedom of political expression and association as do expenditure limits." *Randall v. Sorrell*, 548 U.S. 230, 266 (2006) (Thomas, J., concurring in the judgment, joined by Scalia, J.) (quoting *Colorado Republican Fed. Campaign Comm. v. Fed. Election Comm'n*, 518 U.S. 604, 640 (1996) (Thomas, J., concurring in the judgment and dissenting in part)). This disagreement has produced fractured decisions in this area of the law, *see Randall*, 548 U.S. 230; *McCutcheon*, 572 U.S. 185, but *Buckley*'s framework endures.

Irrespective of who has the better of the argument, the Court's treatment of independent expenditures seems correct. If the First Amendment's strong interdiction – "Congress shall make no law," U.S. Const. amend. I – means anything, it must mean that citizens or groups of citizens be permitted to deploy their resources to be heard on political questions. But even if one accepts the differing treatment of contributions, this Court has long recognized that their limitation nevertheless raises substantial First Amendment concerns. *See, e.g.*, *Buckley*, 424 U.S. at 14-15, 21-25; *Davis*, 554 U.S. at 737; *Fed. Election Comm'n v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 440 (2001).

This case poses the question of just how those limitations are to be scrutinized. Although this Court has insisted that the review of contribution limits ought to be "rigorous," *Buckley*, 424 U.S. at 29, lower courts have not always followed its lead. Indeed, the review below bears more than a passing

resemblance to deferential rational basis review. Even if expenditure restrictions, as Judge Diane Sykes of the Seventh Circuit Court of Appeals has noted, "usually flunk," *Wisconsin Right To Life State Political Action Comm. v. Barland*, 664 F.3d 139, 153 (7th Cir. 2011), it does not follow that contribution limits should always pass.

This Court's limitation of the rationale for contribution limits – the prevention of *quid pro quo* corruption or its appearance and no more – as well as the notion that the state may not set the terms of the debate requires, if not strict scrutiny, then far more rigorous examination than that afforded below. This case provides a vehicle for the Court to make that clear.

The need for such review is implied in the Court's limitation of the basis for contribution limits and the rejection of more ambitious objectives. Some have argued that the state can limit political participation in pursuit of what has been termed "barometric equality" of resources – "the notion that financial support should roughly reflect popular support," Esenberg, *supra*, at 303 (citing Richard L. Hasen, *The Supreme Court and Election Law: Judging Equality From* Baker v. Carr *to* Bush v. Gore 111-12 (2003)). But, of course, the notion that there is some "true" level of support that can be ascertained prior to public debate and that then justifies the limitation of resources during that debate is antithetical to deliberative democracy.

Others may call for limits to ensure relative or even absolute equality of resources. But any attempt

to "equalize" voices by restricting who can say how much "impermissibly inject[s] the Government 'into the debate over who should govern,'" threatening the robust exchange of ideas central to the process of electing representatives. *McCutcheon*, 572 U.S. at 192 (plurality opinion) (quoting *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 750 (2011)). Even if contributions are more susceptible to regulation, limiting the ability of citizens to support candidate speech or of candidates to amass resources to speak raises grave constitutional concerns.

Nor would it be proper to expand the interest in preventing *quid pro corruption* to the more expansive one in preventing contributors from exercising "influence" over or obtaining access to politicians, a term decidedly more nebulous than "*quid pro quo* corruption." *See, e.g.*, *Citizens United*, 558 U.S. at 359. Yet an interest in reducing influence is "susceptible to no limiting principle"; and because "[d]emocracy is premised on responsiveness," legislation intended to reduce "influence" strikes at the very heart of our governmental system. *Id.* (quoting *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 296-97 (2003) (opinion of Kennedy, J.)).

This expanded interest would justify limiting contributions that are not large enough to raise the spectre of *quid pro quo* corruption. Put another way, it would allow the government to prevent citizens from making non-corrupting contributions – ones that do not suggest the purchase of official conduct – simply because they are higher than others to some

impermissible degree. It is, however described, nothing more than an interest in equalizing resources.

This Court has rejected such a justification and should continue to do so. Persons who expend resources to support candidates do so in the hope of influencing public policy. Citizens and organizations who support candidates will necessarily exert differing levels of influence. The American Association of Retired Persons may have outsize influence because its many members are highly interested in and passionately resist reduction in Social Security and Medicare payments. Unions may exert disproportionate influence because of their ability to direct their members. A celebrity or media organization may have a louder voice because of the unique platform they possess and attention they can command. Incumbents who enjoy name recognition and have access to public resources may also have an advantage over their opponents.

Attempts to distinguish between "legitimate" and "illegitimate" influence and restrict speech in an effort to level the playing field cannot be squared with our Constitution's strong protection of speech. Nor would it be desirable. In a deliberative democracy with a representative form of government, it is not clear why some forms of influence are preferable to others. It is not clear that the most influential voices should be groups with the most (or most passionate) members. It is not obvious that the New York Times or Fox News should have a platform that is denied Charles Koch or George Soros. There is nothing intrinsically legitimate – or

illegitimate – about the capacity of Donald Trump or Oprah Winfrey to attract attention to themselves. Our First Amendment trusts the people and not the state to sort things out.

The proper limitation of contribution restrictions to those needed to combat *quid pro quo* corruption or its appearance requires a sufficiently close nexus between that purpose and the restriction that has been imposed. This might, as Petitioners suggest, call for strict scrutiny. But, at minimum, courts must ensure that contribution limits are "closely drawn." *McCutcheon*, 572 U.S. at 197 (plurality opinion) (quoting *Buckley*, 424 U.S. at 25). Low contribution limits may "prevent[] candidates and political committees from amassing the resources necessary for effective advocacy." *Buckley*, 424 U.S. at 21. Such limits may also "prevent challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability." *Randall*, 548 U.S. at 249 (plurality opinion). Finally, because "[w]hat cannot be done through contribution can be done with expenditure," Esenberg, *supra*, at 286, low contribution limits cause money to flow to entities besides candidates, an inefficient result that reduces accountability and pollutes political discourse.

Most fundamentally, contributions that do not suggest *quid pro quo* corruption are not subject to restriction. "Erring on the side of caution" is not a matter of prudence but of constitutional injury. Overly deferential review is not permissible where the First Amendment is involved.

In sum, where *Buckley*'s test is not applied with care, numerous "constitutional risks to the democratic electoral process," *Randall*, 548 U.S. at 248 (plurality), arise. Despite the stakes, lower courts are struggling to analyze contribution limits, as is well-illustrated by the proceedings below. This case thus presents an opportunity for the Court to provide needed guidance on a critical issue of law which will help safeguard the electoral system.

ARGUMENT

I. Contribution Limits May Be Justified Only by the Interest in Preventing *Quid Pro Quo* Corruption or its Appearance

Statutory restrictions on the amount of money citizens can spend or contribute during election seasons "operate in an area of the most fundamental First Amendment activities." *Buckley*, 424 U.S. at 14. For one thing, "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." *Id.* Moreover, "the First Amendment protects political association as well as political expression," because "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *Id.* at 15 (alteration in original) (quoting *NAACP v. Alabama*, 357 U.S. 449, 460 (1958)). For these reasons, courts must carefully scrutinize any attempts by the state to interfere with the free flow of political speech and with free political association.

Although this Court has suggested a high, albeit not strict, scrutiny of contribution limits, it has made clear that only a single and relatively narrow government interest goes into the balance: that of combatting *quid pro quo* corruption and its appearance. *See, e.g.*, *Citizens United*, 558 U.S. at 359 ("When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption."); *see also, e.g.*, *McCutcheon*, 572 U.S. at 191-92 (plurality opinion); *Davis*, 554 U.S. at 741; *Nat'l Conservative Political Action Comm.*, 470 U.S. at 496-97. Other interests volunteered by the state must be rejected.

A. Contribution limits may not be justified by a state interest in reducing the amount of money in politics

Calls to "get money out of politics" or to "'level the playing field' in terms of candidate resources," *Bennett*, 564 U.S. at 748, are by now commonplace in American political discourse. These initiatives take many different forms. For example, some contend that "barometric equality" – a term coined by Richard Hasen in reference to a statement by Justice Brennan in *Fed. Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 258 (1986) – is desirable, meaning that "contending candidates and interests ought not to be able to deploy financial resources that are not proportionate to their public support ex ante." Esenberg, *supra*, at 289 (citing Hasen, *supra*, at 111-12). The basic idea is that "[t]he availability of funds is – or ought to be

– a 'rough barometer of public support.'" *Id.* at 299 (quoting *Massachusetts Citizens for Life*, 479 U.S. at 258). A related, but more expansive goal of certain campaign finance reformers is a relative or even absolute equalization of financial resources available to candidates running for office. *See, e.g.*, *Davis*, 554 U.S. at 741-42. A full discussion of the many different iterations of such reform ideas is beyond the scope of this brief, but most share the general goal of reducing the amount of money spent during election cycles by "insulati[ng] . . . the political marketplace from the disparities of wealth created in a market economy." Esenberg, *supra*, at 299.

While this Court has flirted with approval of versions of such goals in campaign finance cases, *see, e.g.*, *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 659–60 (1990) (discussing "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas"), *overruled by Citizens United*, 558 U.S. 310, it has more recently criticized the notion of "[l]eveling electoral opportunities." *Davis*, 554 U.S. at 742. Unfortunately, the Court's position on this question has been plagued with inconsistency. *See McCutcheon*, 572 U.S. at 208 (plurality opinion) ("[This Court] ha[s] not always spoken about corruption in a clear or consistent voice." (quoting *Citizens United*, 558 U.S. at 447 (Stevens, J., concurring in part and dissenting in part)).

Access to money is just one of numerous extraneous factors providing advantage to individuals running for office, such as celebrity or incumbency. *See Davis*, 554 U.S. at 742; Esenberg, *supra*, at 329. The last presidential election provides an excellent case in point. The two individuals who won the major parties' nominations, Hillary Clinton and Donald Trump, each had "the benefit of a well-known family name." *Davis*, 554 U.S. at 742. Unlike their lesser-known competitors, Clinton and Trump arguably did not have to battle as hard to introduce themselves to the voters. Trump in particular demonstrated a penchant for obtaining "earned media" – unpurchased attention on various news outlets. *See, e.g.*, Chris Deaton, *Study: Trump Has Earned $2 Billion of Free Media Coverage*, The Weekly Standard (Mar. 15, 2016), https://www.weeklystandard.com/chris-deaton/study-trump-has-earned-2-billion-of-free-media-coverage.

As a result, during the period during which the Republican nomination was won, President Trump was outspent by a number of his opponents. *See, e.g.*, Dan Clark, *Trump was Outspent by his Closest Primary Opponents*, PolitiFact New York (July 1, 2016, 9:05 AM), https://www.politifact.com/new-york/statements/2016/jul/01/michael-caputo/trump-was-outspent-his-closest-primary-opponents/. Conversely, Secretary Clinton, who raised more money than anyone, almost lost to Senator Bernie Sanders who mobilized an enthusiastic base of supporters around a program of massive income redistribution. *See, e.g.*, Anu Narayanswamy et al., *How Much Money Is Behind Each Campaign?*, The Washington Post, https://www.washingtonpost.com/

graphics/politics/2016-election/campaign-finance/ (last updated Feb. 1, 2018); Jeff Stein et al., *How Hillary Clinton Almost Lost the Nomination – But Won the History-Making Victory*, Vox (July 27, 2016, 9:40 AM), https://www.vox.com/2016/7/27/12241420/how-hillary-clinton-almost-lost-nomination-but-won-history; Tony Nitti, *Bernie Sanders Releases Tax Plan, Nation's Rich Recoil in Horror*, Forbes (Jan. 17, 2016, 9:42 PM), https://www.forbes.com/sites/anthonynitti/2016/01/17/bernie-sanders-releases-tax-plan-nations-rich-recoil-in-horror/. There are many types of differing – and unequal – influence.

But if the government has an interest in "leveling the playing field" with respect to money, why shouldn't it be permitted to burden First Amendment freedoms in the service of controlling the election for these other variables? And once the government begins to do so, who will ensure that the only restrictions enacted are in the public interest, the public's principal safeguard – the ability to select its representatives – having been compromised in the service of equal electoral opportunity?

Davis summarized the problem this way:

> Leveling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election. The Constitution, however, confers upon voters, not Congress, the power to choose the Members of the House of Representatives, Art. I § 2, and it is a dangerous business for Congress to use

> the election laws to influence the voters' choices.

Davis, 554 U.S. at 742.

But the problem does not stop there. Even assuming that governmental tinkering could be confined to the equalization of financial ability, contribution limits, like any artificial restrictions in a free market, lead to unintentional market distortions. These market distortions are counterproductive. For example:

> Removing the advantage of those who can attract wealthy donors benefits incumbents whose advantage lies not only in their existing name recognition, but also in their ability to use the resources of the state and the guise of "communicating" with constituents to enhance their own electoral prospects and shape public opinion.
>
> Reduction of the influence of those who wish to financially support candidates will benefit celebrities and those who already have access to the public. It will enhance the power of the media and . . . the "scribal class." It may enhance the prospects of candidates further to the left or the right who can attract larger numbers of small donors if, as seems plausible, it turns out that the ideologically committed are more likely to contribute. It may help those in a

> position to attract the endorsement of large membership organizations – such as unions – whose members are likely to follow the cue of their leadership.
>
> We cannot eliminate all of these advantages to attain a public conversation unsullied by confounding elements unrelated to the collective deliberation regarding candidates' ideas and qualifications.

Esenberg, *supra*, at 329-30 (footnotes omitted) (citing John O. McGinnis, *Against the Scribes: Campaign Finance Reform Revisited*, 24 HARV. J.L. & PUB. POL'Y 25, 27-28 (2010)).

The fallacy at the root of all these efforts is that some "pure form of participatory democracy" is attainable. *Id.* at 329. But "[t]here is, in fact, no public conversation and no prior distribution of support apart from" the "confounding elements" and "extraneous factors" referenced above. *Id.* at 330.

"[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley*, 424 U.S. at 48-49. If this Court allows government to pursue the chimera of a "level playing field," the country will quickly lose sight of this truth.

B. Justifying contribution limits on the basis of a state interest in preventing contributors from possessing "influence"

over politicians is inconsistent with the nature of a democratic republic

A subtler attempt to permit intervention for the purpose of official reordering of the political balance is framed in terms of reducing the "influence" that particular contributors might have over politicians. The influence to be limited is not that of *quid pro corruption* or its appearance. In other words, this interest is invoked to justify restricting contributions that do not present this harm. This is presumably because they are too low to exert that type of influence, i.e., they are not enough to "buy" official action. Thus the argument must be that they can be restricted because they are too much more than others might give. Properly understood, this interest reduces to a desire to equalize resources.

The Court appears to have settled on the view that a bare desire to prevent "influence" is not an acceptable governmental interest in the campaign finance sphere. It was correct to do so. As the Court explained in *Citizens United*:

> Favoritism and influence are not . . . avoidable in representative politics. It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies. It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the

> candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness.

Citizens United, 558 at 359 (alteration in original) (quoting *McConnell*, 540 U.S. at 297 (opinion of Kennedy, J.)). The *Citizens United* Court was largely discussing independent expenditures, but these principles are similarly applicable to contributions. Whether used to justify expenditure limits or contribution limits, "[r]eliance on a 'generic favoritism or influence theory' . . . is at odds with standard First Amendment analyses because it is unbounded and susceptible to no limiting principle." *Id.* at 359 (alteration in original) (quoting *McConnell*, 540 U.S. at 296 (opinion of Kennedy, J.)). Once courts begin approving contribution limits in the name of reducing influence, they will have set out on a crusade with no end and one which will result in the creation of a giant chasm between representatives and their electors.

Because the "influence" to be checked is not *quid pro quo* corruption, it must consist of a purportedly greater ability of those who give larger – but not too large – contributions to influence a candidate. But, as we have seen, there are numerous attributes that might cause certain persons or groups to have greater influence or access to a politician. Newspaper editors and celebrities, rock stars and actors, crime victims and elected officials all may have a special ability to attract the attention of a candidate or office holder. Those who represent highly motivated special interests or populist

schemes may have outsized influence in comparison to the general public. It is simply not possible or desirable to restrict political participation so that no one asserts influence that is "undue."

When these more ambitious objectives of regulation are put aside, it is imperative that courts ensure that limits serve the limited interest in preventing *quid pro quo* corruption.

II. When Courts Fail to Ensure That Contribution Limits Are Closely Drawn to Avoid Unnecessary Abridgment of First Amendment Rights, Harms to the Electoral System Result

A license to fight *quid pro quo* corruption is not carte blanche to trample the First Amendment rights of voters, interested organizations, and candidates. *See, e.g.*, *Randall*, 548 U.S. at 248 (plurality opinion) ("[T]he interests underlying contribution limits, preventing corruption and the appearance of corruption, 'directly implicate the integrity of our electoral process.' Yet that rationale does not simply mean "the lower the limit, the better." (citation omitted) (quoting *McConnell*, 540 U.S. at 136)). Even where the government is properly attempting to prevent *quid pro quo* corruption or its appearance, courts must ensure that the government employs means closely drawn to avoid unnecessary abridgement" of "First Amendment rights." *McCutcheon*, 572 U.S. at 197, 199 (plurality opinion) (quoting *Buckley*, 424 U.S. at 25).

But just what does "closely drawn" mean? To date, the Court has offered relatively little guidance. *See, e.g.*, *Randall*, 548 U.S. at 249 (plurality opinion) ("[W]e see no alternative to the exercise of independent judicial judgment as a statute reaches . . . outer limits."); *McCutcheon*, 572 U.S. at 199 (plurality opinion) ("[R]egardless whether we apply strict scrutiny or *Buckley*'s 'closely drawn' test, we must assess the fit between the stated governmental objective and the means selected to achieve that objective. . . . We . . . need not parse the differences between the two standards in this case.").

For the panel majority here, "closely drawn" appears to have meant something like "not wholly unrelated" or "not made up." Indeed, its language – upholding limitations because the threat of *quid pro quo* corruption was not "illusory," *Lair v. Motl*, 873 F.3d 1170, 1178-79 (9th Cir. 2017) – does not resemble rigorous scrutiny. Such review would require a showing of more than mere possibility and a close nexus between the limits chosen and the interest pursued.

It may be that courts need not require "fine tuning" of legislatively chosen limits, *see Id.* at 1182 (quoting *Buckley*, 424 U.S. at 30), but a high degree of deference to legislative judgment is inappropriate when free speech and association are being limited. As noted earlier, the legislature does not have the kind of discretion it has with, say, economic regulation when the First Amendment is involved.

Most of the panel's analytic work was given over to establishing that "not too many"

contributions would be banned and that candidates could still run some type of campaign. *Lair v. Motl*, 873 F.3d at 1180-86. This simply does not read like First Amendment analysis. The level of deference more closely resembles rational basis review. That not all speech – in this case not all contributions – are restricted would normally not carry much weight if some constitutionally protected contributions – those that do not suggest *quid pro quo* corruption – have been. A newspaper cannot be banned from publishing on Mondays and Fridays because it remains free to do so for the rest of the week.

It is vital that this issue receive further attention, because when the government fails to ensure contribution limits are "closely drawn," First Amendment rights are not the only casualty; the electoral system is also damaged. Contribution limits, by their very nature, make it difficult for candidates to run effective campaigns, hinder new candidates from effectively challenging incumbents, and cause money to flow to entities besides candidates, increasing inefficiency and decreasing accountability. And the less closely drawn the limits, the less these inherent harms are mitigated.

A. Low contribution limits make it difficult to run effective campaigns

Political campaigns are expensive, and candidates depend on supporters for funding. As far back as *Buckley* itself, this Court recognized that "[g]iven the important role of contributions in financing political campaigns, contribution restrictions could have a severe impact on political

dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy." *Buckley*, 424 U.S. at 21.

This raises serious concerns for the political system at large:

> The Founders sought to protect the rights of individuals to engage in political speech because a self-governing people depends upon the free exchange of political information. And that free exchange should receive the most protection when it matters the most – during campaigns for elective office. "The value and efficacy of [the right to elect the members of government] depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively." Madison, *Report on the Resolutions* (1799), in 6 *Writings of James Madison* 397 (G. Hunt ed. 1906).

Nixon v. Shrink Missouri Gov't PAC, 528 U.S. 377, 411 (2000) (Thomas, J., dissenting).

Contribution limits thus damage political discourse at multiple points. First, they prevent voters and other supporters from a means of providing a "general expression of support for [a] candidate and his views." *Buckley*, 424 U.S. at 21.

Second, they muzzle the candidate him- or herself from effectively communicating with the electorate. Besides injuring the candidate's own rights, this muzzling restricts the amount of information flowing from the candidate to voters and prevents would-be contributors from the benefit of having the views they support be widely disseminated.

Placing "control over the quantity and range of debate on public issues in a political campaign," *Id.* at 57, in the hands of those who govern the voters is a bad idea. Only unforgiving scrutiny of contribution limits offers adequate protection.

B. Low contribution limits hinder new candidates from effectively challenging incumbents

The harm done to the electoral process by contribution limits only intensifies when the difficulties faced by candidates challenging incumbents are considered. This is because, as discussed above, "[r]emoving the advantage of those who can attract wealthy donors benefits incumbents whose advantage lies not only in their existing name recognition, but also in their ability to use the resources of the state and the guise of 'communicating' with constituents to enhance their own electoral prospects and shape public opinion." Esenberg, *supra*, at 329–30 (footnote omitted); *see also id.* at 330 n.271 ("Although we frequently hear reference to 'phony' or 'sham' issue ads, we less often hear of 'sham newsletters' distributed through the congressional franking privilege."). Contribution limits artificially restricts the flow of money to those candidates who need it most, in this way potentially

"prov[ing] an obstacle to the very electoral fairness [the limits] seek[] to promote." *Randall*, 548 U.S. at 249 (plurality opinion).

Justice Breyer's plurality opinion in *Randall* was sensitive to this issue. *See Id.* at 248-49. Indeed, this concern provided much of the impetus for the multifactor test established in that opinion. *See Id.* Justice Breyer's concern is well-placed, because the incumbents who stand to benefit from low contribution limits are the same ones who enact these laws. In other words, incumbents have a continuing incentive to inch contribution limits ever lower.

It has been said that "[t]he effect of regulation or nonregulation on the competitiveness of elections is a difficult empirical question." Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 687 (1997). Determining when a contribution limit is too low under this Court's precedent is not an exact science. But that simply counsels in favor of abundant caution. "[I]n drawing [the] line" between permissible contribution limits and contribution limits that are too low, "the First Amendment requires [this Court] to err on the side of protecting political speech rather than suppressing it." *McCutcheon*, 572 U.S. at 209 (plurality opinion) (quoting *Fed. Election Comm'n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 457 (2007) (opinion of Roberts, C.J.)) (discussing drawing the line between *quid pro quo* corruption and "general influence"). "Incumbent legislators cannot be allowed to pass laws which debilitate their opponents' campaigns." James Bopp, Jr. & Susan

Lee, *So There Are Campaign Contribution Limits That Are Too Low*, 18 STAN. L. & POL'Y REV. 266, 286 (2007).

C. Low contribution limits cause money to flow to entities besides candidates

The truth about campaign finance reform is that it is essentially a giant game of "Whac-A-Mole." *See* Note, Robert P. Beard, Note, *Whacking the Political Money "Mole" Without Whacking Speech: Accounting for Congressional Self-Dealing in Campaign Finance Reform After* Wisconsin Right to Life, 2008 U. ILL. L. REV. 731, 731. That is, as restrictions are enacted, "[d]ollars that can no longer be spent in one way simply flow to a new use." Esenberg, *supra* at 287. It is not a winnable fight.

This might not be much cause for constitutional concern were it not for the effect on political discourse and the electoral process. When contributions go straight to candidates, those candidates are accountable for the manner in which they spend the money. Similarly, the voters hear the candidates' own voices rather than voices filtered through the megaphone of individuals or organizations over which the candidates have no control.

But because "[w]hat cannot be done through contribution can be done with expenditure," Esenberg, *supra*, at 286, contribution limits simply direct money that would otherwise be contributed to candidates away from candidates and toward groups unaccountable to the candidate and the voter alike.

These groups present the public with a less authentic picture of candidates than would obtain if the public could hear from the candidates themselves. And because these groups do not have to account for themselves, they are freer than candidates to engage in negative speech. In sum, political discourse becomes disproportionately polluted and unnaturally distorted. That is not the "unfettered interchange of ideas" the founders intended. *Buckley*, 424 U.S. at 14 (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

Far better to let the chips fall where they may, at least to the extent possible under this Court's precedent. That means lending teeth to the "closely drawn" requirement.

CONCLUSION

Unless painstakingly tailored to combat specific harms, contribution limits threaten to inflict substantial damage on the electoral system. This case gives the Court the occasion to circumscribe more clearly the boundaries of permissible campaign finance regulation and to prevent the weakening of the *Buckley* standard. The Court should therefore grant the petition for writ of certiorari.

Respectfully submitted,

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