No. 18-____

IN THE

Supreme Court of the United States

ILLINOIS LIBERTY PAC, Political Action Committee registered with the Illinois State Board of Elections, EDGAR BACHRACH, and KYLE MCCARTER,

Petitioners,

v.

LISA MADIGAN, Attorney General of the State of Illinois, *et al.*,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should political contribution limits that favor one type of speaker over another receive strict scrutiny?
2. Should the holding in *Buckley v. Valeo*, 424 U.S. 1 (1976) applying a "closely drawn" test to all political contribution limits be overruled in favor of applying strict scrutiny?

RULE 29.6 STATEMENT

Petitioner Illinois Liberty PAC is a political action committee registered with the Illinois State Board of Elections.

Petitioner Edgar Bachrach is a resident of Illinois and a donor to political candidates and committees.

Petitioner Kyle McCarter is a resident of Illinois and an Illinois state Senator.

Respondents Attorney General Lisa M. Madigan and Members of the Illinois State Board of Elections William McGuffage, Jesse R. Smart, Harold D. Byers, and Betty J. Coffrin are representatives of the State of Illinois, sued in their official capacities.

Because Petitioners are not a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

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The Seventh Circuit's opinion is reported at *Ill. Liberty PAC v. Madigan*, 904 F.3d 463 (7th Cir. 2018). The opinion and judgment are reproduced in the Appendix. App. 3a, 1a. The district court's opinion is reported at *Ill. Liberty PAC v. Madigan*, 212 F. Supp. 3d 753 (N.D. Ill., Sept. 7, 2016) and reproduced at App. 24a. The district court's judgment is reproduced at App. 58a.

JURISDICTION

The Seventh Circuit entered its judgment on September 13, 2018. App. 1a. This Court has Jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I.

The Statutes of the State of Illinois challenged by this petition are 10 Ill. Comp. Stat. 5/9-8.5(b)–(d), (h), (h-5), (h-10) and 5/9-1.8(c), App. 60a.

STATEMENT OF THE CASE

This case is brought under the Free Speech Clause of the First Amendment against an Illinois statutory scheme on political contribution limits that favors certain speakers over others.

A. The Illinois statutory scheme and how it favors some speakers over others

In particular, the Illinois Disclosure and Regulation of Campaign Contributions and Expenditures Act (the "Act") gives political spending advantages to

legislative caucus committees that it does not give to other political speakers. The most striking advantage is that in general elections a legislative caucus committee, like a political party committee, may make unlimited contributions to a candidate's campaign committee. 10 Ill. Comp. Stat. 5/9-8.5(b). App. 63a. In contrast, donations to a candidate for General Assembly are limited to $5,000 from an individual; $10,000 from a corporation, labor organization, or association; and $50,000 from a political action committee ("PAC") or another candidate committee. *Id.*[1]

Only a small number of speakers, however, may take advantage of the uninhibited free speech given to legislative caucus committees. A legislative caucus committee may be formed by one of only four individuals in the State of Illinois: the Speaker of the House of Representatives, the Minority Leader of the House of Representatives, the President of the Senate, or the Minority Leader of the Senate. *Id.* 5/9-1.8(c), App. 60a. Alternatively, it may be formed by a group of five or more state Senators or ten or more state representatives, and it must be established for the purpose of electing candidates to the General Assembly. *Id.*

Another advantage given to established legislative caucus committees is that once candidates receive a contribution from one legislative caucus committee, they may not receive a contribution from another caucus committee. *Id.* 5/9-8.5(b), App. 64a. This rule

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[1] The contribution limits have been adjusted upward for inflation since the Act was enacted, but the original figures are used herein for simplicity's sake. *See* 10 Ill. Comp. Stat. 5/9-8.5(g).

does not apply to contributions from individuals, PACs, corporations, labor organizations, associations, and other candidate committees. *Id*.

Finally, the Act's differing limits on contributions from different types of speakers are lifted for most speakers when self-funding or independent expenditures hit a certain level in a race. *Id.* 5/9-8.5(h), (h-5), and (h-10), App. 67a-69a.

B. Proceedings below

Petitioners are a PAC, an individual contributor, and a state Senator in Illinois seeking to make and receive political contributions in excess of the discriminatory limits imposed by the Act. On July 24, 2012, Petitioners filed this declaratory judgment action under 42 U.S.C. § 1983 in U.S. District Court for the Northern District of Illinois against the Illinois Attorney General and members of the Illinois State Board of Elections. Petitioners challenged the Act on grounds that favoring one type of speaker over another violated the Free Speech Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment.

Petitioners filed an initial Motion for Preliminary Injunction, which the district court denied and the Seventh Circuit summarily affirmed. The district court then dismissed most of Petitioners' claims under Federal Rule of Civil Procedure 12(b)(6). The court then held a bench trial on the claim that legislative caucus committees, in particular, are unconstitutionally favored over other types of political committees. On September 7, 2016, the district court ruled in favor of Respondents/Defendants that the Act was constitutional. *Ill. Liberty PAC v. Madigan*, 212 F. Supp. 3d 753 (N.D. Ill., Sept. 7, 2016), App. 24a. Petitioners

appealed the decision to the U.S. Court of Appeals for the Seventh Circuit. On September 13, 2018, the Seventh Circuit affirmed the decision of the district court. *Ill. Liberty PAC v. Madigan,* 904 F.3d 463 (7th Cir. 2018), App. 3a.

In affirming the decision of the district court, the Court of Appeals subjected the Act only to intermediate scrutiny. *Id.*, at 469 n.3, App. 10a.

ARGUMENT

I. THIS COURT SHOULD CLARIFY FOR LOWER COURTS THAT POLITICAL CONTRIBUTION LIMITS THAT FAVOR ONE TYPE OF SPEAKER OVER ANOTHER SHOULD RECEIVE STRICT SCRUTINY.

Lower courts require clarity regarding the level of scrutiny they should apply in First Amendment challenges to statutes that impose different campaign finance contribution limits on different classes of donors. *See Riddle v. Hickenlooper*, 742 F.3d 922, 930 (10th Cir. 2014) (overturning a Colorado contribution limit scheme that doubled the contribution limits to major party candidates versus write-in candidates) (Gorusch, J., concurring) ("I confess some uncertainty about the level of scrutiny the Supreme Court wishes us to apply. . . .").

In the absence of guidance from this Court, some lower courts, including the court below, have given contribution limits that treat some donors less favorably than others only minimal scrutiny. In light of the fundamental First Amendment interests at stake, such limits should receive the highest scrutiny to require the government to justify its discriminatory treatment of different donors.

In this Court's most recent case on political contribution limits, the facts of the case did not require addressing what level of scrutiny should be applied. The Court determined that it "need not parse the differences" between whether strict scrutiny or the "closely drawn" test applies. *McCutcheon v. FEC*, 572 U.S. 175, 199 (2014).

In the present case, Petitioners challenge a legislative contribution limit scheme that strongly favors committees run by Illinois's legislative leaders over other political donors. The case presents an opportunity for the Court to clarify the law and ensure that courts sufficiently protect First Amendment rights.

A. Lower courts have not given meaningful scrutiny to contribution limits that favor some donors over others.

Although the First Amendment generally demands that the government treat all speakers equally, especially when they speak about politics, the court below and other lower courts have given minimal scrutiny to campaign finance schemes that impose lower limits on some donors than on others.

"The First Amendment stands against . . . restrictions distinguishing among different speakers, allowing speech by some but not others." *Citizens United v. FEC*, 558 U.S. 310, 340 (2010). "[S]peech restrictions based on the identity of the speaker are all too often simply a means to control content," *Id.* The First Amendment prohibits efforts by the government to control the "relative ability of individuals and groups to influence the outcome of elections." *Id.* at 350. The Court has stated that campaign contribution limits must be narrowly tailored to serve the government's interest. The only government interest that the Court

has recognized as "compelling" is the interest in preventing actual or apparent *quid pro quo* corruption. *McCutcheon v. FEC*, 572 U.S. 185, 192 (2014). Allowing the government to pursue other interests would "impermissibly inject" the government "'into the debate over who should govern.'" *Id*.

Nonetheless, the lower court's decision showed no concern for the discriminatory nature of Illinois's scheme of campaign contribution limits. Those limits allow select committees to give candidates unlimited amounts at times when all other donors' contributions are limited. Although Petitioners challenged the scheme's apparent favoritism, the lower court analysis focused not on whether the state was justified in treating some donors more favorably than others, but only on whether the limit on any given class of donor was too low. App. 11a. The court concluded that Petitioners could not challenge the state's more favorable treatment of certain donors unless they could "plausibly plead" that the state was motivated by a desire to benefit those donors and not actually "concerned about corruption." App. 14a.

In other words, the lower court held that contribution limits that provide higher contributions for some donors than for others present no First Amendment problem unless a plaintiff can, somehow, show that the legislature had an improper motive.

The Massachusetts Supreme Judicial Court took the same view in a recent decision. It rejected First Amendment and Equal Protection Clause challenges to a Massachusetts statute that bans for-profit business entities from making political contributions, but it does not ban unions and non-profit organizations. *See 1A Auto, Inc. v. Dir. of the Office of Campaign & Political Fin.,* 480 Mass. 423, 425 (2018). In that

case, the Court concluded that a ban on corporate contributions would tend to prevent corruption, and the government's failure to similarly limit union and nonprofit contributions was irrelevant. Like the Seventh Circuit in this case, the Massachusetts court concluded that plaintiffs could not prevail on their First Amendment claim in the absence of evidence that the legislature was actually motivated by a desire to favor some political donors over others rather than a desire to prevent corruption. *Id.* at 438.

The District of Columbia Circuit and the Eighth Circuit have similarly held that if a ban on contributions by a particular class of donors, considered by itself, survives First Amendment scrutiny, then an Equal Protection Clause challenge to the ban, based on the government's more favorable treatment of other donors, can receive no greater scrutiny and can fare no better. *See Wagner v. FEC*, 793 F.3d 1, 32 (D.C. Cir. 2015); *Iowa Right to Life Comm., Inc. v. Tooker*, 717 F.3d 567, 600-03 & n.11 (8th Cir. 2013).

Some lower courts, however, have required the government to justify its differential treatment of different donors. They have required the government to show that its contribution limits are narrowly tailored to address differences in the potential to corrupt that are inherent in the different classes' respective contributions. *See Riddle*, 742 F.3d at 928-30 (government must justify different contributions limits for different candidates by showing the candidates subject to lower limits "were more corruptible (or appeared more corruptible)" than the favored candidates); *Russell v. Burris*, 146 F.3d 563, 571-72 (8th Cir. 1998) (government must justify different contribution limits for regular PACs and "small-donor" PACs by showing they were based on differences in the potential for corruption); *Protect*

My Check, Inc. v. Dilger, 176 F. Supp. 3d 685, 691-92 (E.D. Ky. 2016) (government required to justify different treatment where statute banned contributions by corporations but not by unions or LLCs).

These conflicting decisions illustrate that courts require guidance on how to analyze First Amendment challenges to campaign finance rules that place lower contribution limits on some speakers than on others. They also show that, in the absence of guidance from this Court, some lower courts will not require the government to justify its decisions to discriminate, despite the potential harm to fundamental First Amendment interests.

B. Courts that take a deferential approach to discriminatory contribution limits insufficiently protect First Amendment rights.

The analysis the lower court in this case and other courts have applied is inadequate to protect First Amendment rights.

To disregard the government's preferential treatment of certain political donors, as these courts have, is to disregard key reasons why the Court subjects contribution limits, in general, to rigorous scrutiny. Those reasons are to ensure that the government does not use limits to indirectly control the content of speech, *Citizens United*, 558 U.S. at 340; to ensure that the public is not "deprive[d] . . . of the right and privilege to determine for itself what speech and speakers are worthy of consideration, *id.* at 341; and to prevent the government from "impermissibly inject[ing] [itself] 'into the debate over who should govern,'" *McCutcheon*, 572 U.S. at 750.

Indeed, discriminatory limits threaten to distort the outcomes of elections. When the government exempts

select donors from contribution limits that apply to others, it "make[s] and implement[s] judgments about which strengths should be permitted to contribute to the outcome of an election." *Davis v. FEC*, 554 U.S. 724, 742 (2008). In Illinois, the state has effectively decided that support from the state's political parties and legislative leaders should be allowed to contribute to a candidate's success much more than support from other classes of donors. That violates the principle, under our system of government, that voters, rather than elected officials, should "evaluate the strengths and weaknesses of candidates competing for office." *Id.* Uniquely empowering the top four members of the legislature to give unlimited or outsized contributions, as Illinois has, directly contradicts the principle that "those who govern should be the *last* people to help decide who *should* govern." *McCutcheon*, 572 U.S. at 192.

Despite discriminatory limits' threat to fundamental First Amendment interests, lower courts have taken a deferential approach that ensures that such limits will virtually never be struck down.

C. Contribution limits that facially discriminate between different classes of donors warrant the highest level of judicial scrutiny.

To ensure that courts adequately protect First Amendment rights, this Court should subject contribution limits that favor some donors over others to strict scrutiny, or at least to rigorous scrutiny that requires the government to justify its differential treatment of different classes of donors.

The Court has stated that even ordinary campaign contribution limits warrant "rigorous" scrutiny, which requires an assessment of "the fit between the stated

governmental objective and the means selected to achieve that objective." Although the fit need not be "perfect," it must be "reasonable" and must use a "means narrowly tailored to achieve the desired objective." *McCutcheon,* 572 U.S. at 218.

In addition to the narrow tailoring requirement, the Court has also said that campaign contribution limits must serve a "compelling" government interest. *Id.* at 199. And the Court has recently clarified that there is only one government interest sufficiently important to justify contribution limits: preventing *quid pro quo* corruption or its appearance. *Id.* at 192.

Thus, when a plaintiff challenges campaign contribution limits under the First Amendment, as Petitioners do here, the government bears the burden to show that those limits are narrowly tailored to prevent corruption. *Id.* at 192, 218. To meet that burden, the government must provide "adequate evidentiary grounds." *FEC v. Colo. Republican Campaign Cmte.*, 533 U.S. 431, 456 (2001). "[M]ere conjecture" will not suffice. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 392 (2000); *see also Randall v. Sorrell*, 548 U.S. 230, 261 (2006) (striking limits where government presented no evidence to justify them).

Strict scrutiny is especially necessary when campaign contribution limits favor some political speakers over others. "Premised on mistrust of governmental power, the First Amendment stands against . . . restrictions distinguishing among different speakers, allowing speech by some but not others." *Citizens United v. FEC*, 558 U.S. 310, 340 (2010). "Speech restrictions based on the identity of the speaker are all too often simply a means to control content." *Id.* In particular, the First Amendment prohibits government attempts

to control the "relative ability of individuals and groups to influence the outcome of elections." *Id.* at 350. The government may not "restrict the political participation of some in order to enhance the relative influence of others." *McCutcheon,* 572 U.S. at 191 (citing *Ariz. Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 749-750 (2011)).

This Court, however, has not specifically addressed how courts should analyze contribution limits that impose lower limits on some donors than on others, such as the Illinois limits that Petitioners challenge.

The First Amendment should require strict scrutiny in such instances because such restrictions are "all too often simply a means to control content." *Citizens United*, 558 U.S. at 340. Petitioners' challenge to the Illinois contribution limits implicates not only the First Amendment concerns inherent in any challenge to contribution limits, but also the First Amendment's opposition to discrimination favoring or opposing certain political speakers; therefore, strict scrutiny should apply. *See Austin v. Mich. State Chamber of Comm.*, 494 U.S. 652, 666 (1990) (statute imposing different independent-expenditure limits on different types of associations subject to strict scrutiny), *overruled on other grounds by Citizens United*, 558 U.S. 310; *Riddle*, 742 F.3d at 931-322 (Gorusch, J., concurring) ("[W]hatever level of scrutiny should apply to equal infringements of the right to contribute in the First Amendment context, the strictest degree of scrutiny is warranted under the Fourteenth Amendment equal protection doctrine when the government proceeds to discriminate against some persons in the exercise of that right."); *Russell,* 146 F.3d at 571-72 (applying strict scrutiny in equal protection challenge to statute allowing "small donor" PACs to give candidates as

much as $2,500 while limiting other PACs' contributions to $300 or $100); *Protect My Check, Inc. v. Dilger*, 176 F. Supp. 3d 685, 691-92 (E.D. Ky. 2016) (concluding that "strict scrutiny applies to contribution bans with equal protection implications," holding Kentucky statute unconstitutional to the extent that it banned contributions by corporations and their PACs but not union and LLC PACs).

Although the *Austin*, *Russell*, and *Protect My Check* cases addressed claims under the Equal Protection Clause, it would make no sense to apply lesser scrutiny to a First Amendment claim challenging the same type of discrimination. *Cf. Ark. Writers' Project v. Ragland*, 481 U.S. 221, 227 n.3 (1987) (although First Amendment challenge to state's collection of sales tax from one magazine, but not other magazines and newspapers, was "obviously intertwined with interests arising under the Equal Protection Clause," the Court "analyze[d] it primarily in First Amendment terms" because it "directly implicate[d] freedom of the press"); *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 55 n.4 (1986) (Court summarily rejected equal protection claim after analyzing and rejecting First Amendment claim, stating that plaintiffs could "fare no better under the Equal Protection Clause than under the First Amendment itself").

In this case, however, the Seventh Circuit differed from the line of cases above and, instead, applied intermediate scrutiny: "[The] argument that the First Amendment requires strict judicial scrutiny of contribution limits . . . is foreclosed by *Buckley* and its successors. . . . [T]he Supreme Court has adopted a form of intermediate scrutiny for use in First Amendment challenges to contribution limits." *Ill. Liberty*

PAC v. Madigan, 904 F.3d 463, 469 n.3 (7th Cir. 2018), App. 10a.

This Court should grant certiorari in this case to clarify to lower courts that instances of discriminatory contribution limits require strict scrutiny.

D. The Illinois statutory scheme that strongly favors legislative caucus committees and other political contributors over other speakers is not narrowly tailored to prevent corruption and cannot survive strict scrutiny.

The main reason the Act's contribution limits cannot survive strict scrutiny is that Respondents have failed to offer evidence to show that the Act's limits are narrowly tailored to serve a compelling governmental interest. Respondents must show the Act's contribution limits "curtail speech only to the degree necessary to meet the problem at hand," avoiding unnecessary infringement of "speech that does not pose the danger that has prompted the regulation." *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 265 (1986).

Respondents have never argued, much less shown, that the Act's discriminatory limits are the least restrictive means of the preventing any corruption inherent in donors' contributions. Indeed, Respondents have never explained how the Act's different limits on different types of donors relate to the potential for corruption inherent in those donors' contributions.

The most preferential treatment in the Act is given to legislative caucus committees. To show narrow tailoring, Respondents would have had to show why the potential for corruption inherent in legislative caucus committees' contributions to candidates is so much less than the potential for corruption inherent

in contributions by other donors, such as PACs. Only then would the state be justified in allowing caucus committees to make unlimited contributions to candidates while limiting PAC contributions to $50,000 and limiting other donors to lower amounts. But Respondents did not present any evidence regarding the potential for corruption inherent in any type of donor's contributions.

It is evident from the face of the Act that these limits are not narrowly tailored in light of their treatment of legislative caucus committees versus their treatment of all other types of campaign committees. First, while the Act treats legislative caucus committees like political party committees, which are generally allowed to make unlimited contributions to candidates, unlike political party committees, legislative caucus committees are run by legislative leaders, who can use their caucus committees to serve their personal interests. Second, there is no reason to believe that contributions from legislative caucus committees, which the Act does not limit, pose a significantly lesser threat of corruption than contributions from a PAC controlled by a legislator, which the Act limits. Third, a candidate may accept contributions from only one legislative caucus committee during a given primary or general election. This limitation serves no apparent purpose except to "lock in" a candidate to depend on the first legislative caucus committee that gives him or her money and to make it difficult for new legislative caucus committees to arise and compete.

In addition, the Illinois statutory scheme preferences other political speakers. It discriminates against individual citizens and in favor of corporations, unions, and other associations in donation limits. It removes limits in response to self-funding and inde-

pendent expenditures, belying the notion that the limits were designed to prevent corruption. It also places no limits on political party committees. In sum, it is not narrowly tailored to prevent corruption and, therefore, cannot survive strict scrutiny.

If the lower courts had correctly applied strict scrutiny in this case, they would have overturned the Act, as this Court now should do.

II. IN THE ALTERNATIVE, THE COURT SHOULD OVERRULE THE HOLDING IN *BUCKLEY* THAT APPLIED A LESSER STANDARD OF SCRUTINY TO POLITICAL CONTRIBUTION LIMITS THAN STRICT SCRUTINY.

For the reasons explained in Section I, political contribution limits that favor one type of speaker over another should receive strict scrutiny. That specific question was not addressed in *Buckley*, and that is the standard that this Court applies in other First Amendment cases where the government favors some speakers over others. *See Austin v. Mich. State Chamber of Comm.*, 494 U.S. 652, 666 (1990) (statute imposing different independent-expenditure limits on different types of associations subject to strict scrutiny), *overruled on other grounds by Citizens United*, 558 U.S. 310 (2010). In the alternative, all campaign contribution limits should receive strict scrutiny, regardless of whether they favor one type of speaker over another.

Both contributions to political campaigns and direct expenditures, "generate essential political speech" by fostering discussion of public issues and candidate qualifications. *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 412 (2000) (Thomas, J., dissent-

ing); *see also id.*, at 410–411. *Buckley* itself recognized that both contribution and expenditure limits "operate in an area of the most fundamental First Amendment activities" and "implicate fundamental First Amendment interests." 424 U.S., at 14, 23. Yet, the *Buckley* decision distinguished between limits on campaign expenditures and limits on campaign contributions. *Buckley,* 424 U.S. at 23. For expenditures, this Court in *Buckley* applied strict scrutiny. *Id.* at 44. For contributions, this Court in *Buckley* applied what this Court in *McCutcheon* later described as the "closely drawn" test, *id.* at 25, and what the Seventh Circuit, below, in this case described as intermediate scrutiny. App. 10a. The "closely drawn" test is a lesser standard of review than strict scrutiny but is still "rigorous." *Id*. at 29. It requires that contribution limits be "closely drawn" to the asserted government interest of preventing corruption. The *Buckley* court held that congressional campaign contribution limits survived the "closely drawn" test, while campaign expenditure limits did not survive strict scrutiny. *Id.* at 58.

In the plurality opinion in *McCutcheon*, this Court ruled that aggregate campaign contribution limits did not survive scrutiny, regardless of whether the "closely drawn" test or strict scrutiny applied. *McCutcheon*, 572 U.S. at 199. The Court did not address the question of whether the lesser standard used in *Buckley* should be abandoned.

"The analytic foundation of *Buckley* . . . was tenuous from the very beginning and has only continued to erode in the intervening years." *Shrink Missouri*, 528 U.S. at 412 (Thomas, J., dissenting). "To justify a lesser standard of review for contribution limits, *Buckley* relied on the premise that contributions are different in kind from direct expenditures. None of the

Court's bases for that premise withstands careful review." *McCutcheon*, 572 U.S. at 229 (Thomas, J, concurring).

The first justification that this Court in *Buckley* gave for applying lesser scrutiny to contribution limits was that "the transformation of contributions into political debate involves speech by someone other than the contributor." 424 U.S., at 21. But the Court has since rejected this approach as affording insufficient First Amendment protection to "the voices of those of modest means as opposed to those sufficiently wealthy to be able to buy expensive media ads with their own resources." *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 495 (1985); *see Shrink Missouri*, 528 U.S. at 413–414 (Thomas, J., dissenting).

Another justification for lesser scrutiny for contribution limits given in *Buckley* was that restriction on speech by contribution limits is only marginal because "[a] contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support." 424 U.S. at 20, 21. But this Court has never required a speaker to explain the reasons for his position in order to obtain full First Amendment protection. *McCutcheon*, 572 U.S. at 229 (Thomas, J., concurring). Rather, this Court has consistently held that speech is protected even "when the underlying basis for a position is not given." *Shrink Missouri*, 528 U.S. at 415, n. 3 (Thomas, J., dissenting); *see, e.g., City of Ladue v. Gilleo*, 512 U.S. 43, 46 (1994) (sign reading "For Peace in the Gulf"); *Texas v. Johnson*, 491 U.S. 397, 416 (1989) (flag burning); *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 511 (1969) (black armband signifying opposition to

Vietnam War); *see also Colo. Republican Campaign Cmte. v. FEC*, 518 U.S. 604, 640 (1996) (opinion of Thomas, J.) ("Even a pure message of support, unadorned with reasons, is valuable to the democratic process").

A third rationale for lesser scrutiny for contribution limits presented by this Court in *Buckley* was that contribution limits warrant less stringent review because "[t]he quantity of communication by the contributor does not increase perceptibly with the size of his contribution," and "[a]t most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate." 424 U.S. at 21. But political contributions do increase the quantity of communication by "amplifying the voice of the candidate" and "help[ing] to ensure the dissemination of the messages that the contributor wishes to convey." *Shrink Missouri*, 528 U.S. at 415 (Thomas, J., dissenting). They also serve as a quantifiable metric of the intensity of a particular contributor's support, as demonstrated by the frequent practice of giving different amounts to different candidates.

This Court in *Buckley* also found less scrutiny was warranted for contribution limits on a political contributor because they "involve[] little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues." *Buckley*, 424 U.S. at 21. But this Court rejected that justification for aggregate contribution limits, noting that "[i]t is no answer to say that the individual can simply contribute less money to more people" because "[t]o require one person to contribute at lower levels than others because he wants to support more candidates

or causes is to impose a special burden on broader participation in the democratic process." *McCutcheon*, 572 U.S. at 231.

The rationales provided for providing lesser scrutiny to contribution limits in *Buckley* have not stood the test of time. Contributions and expenditures are deserving of the same strict scrutiny because "[c]ontributions and expenditures are simply 'two sides of the same First Amendment coin.'" *Id*. quoting *Buckley*, 424 U.S. at 241, 244 (Burger, C. J., concurring in part and dissenting in part). They both represent political speech and should be deserving of the highest level of protection afforded by the Court. The distinction between contributions and expenditures should be reexamined by the Court, and "the half-way house . . . created in *Buckley* ought to be eliminated." *Shrink Missouri*, 528 U.S. at 410 (Kennedy, J., dissenting).

This Court has "not hesitated to overrule decisions offensive to the First Amendment." *Citizens United*, 558 U.S. at 363 (quoting *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 500 (2007) (opinion of Scalia, J.)). *Stare decisis* applies with perhaps least force of all to decisions that wrongly denied First Amendment rights. *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2478 (2018). This Court has identified factors that it will consider in deciding to revisit a decision. Among the relevant ones here are: the quality of *Buckley*'s reasoning, whether it conflicts with its other precedents, developments since *Buckley*, and reliance on *Buckley*. *See Janus*, 138 S. Ct. at 2478-2479. Here, the rationale for *Buckley* has eroded; this Court's precedents since *Buckley* have conflicted with it as they have recognized the importance of such speech, *see McCutcheon*, 572 U.S. at 231, *Citizens United*, 558

U.S. at 363; developments since *Buckley* have shown that limits on contributions have not limited the amount of money in political races; there is no discernable decrease in corruption or its appearance; and any reliance interest that a government has for imposing restrictions on contributions are outweighed by the First Amendment interests.

This case is a suitable vehicle for this Court to reevaluate *Buckley*'s application of lesser scrutiny to contribution limits in favor of a more consistent approach: applying strict scrutiny to all limits on political contributions.

CONCLUSION

This Court should clarify for lower courts that political contribution limits that facially discriminate against certain types of speakers, like those in Illinois, should receive strict scrutiny. In the alternative, the Court should overrule the holding in *Buckley* and subject all political contribution limits to strict scrutiny. For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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