No. 18-755

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.

KWAME RAOUL, Attorney General of the State of Illinois; CHARLES W. SCHOLZ, Chairman of the Illinois State Board of Elections; ERNEST L. GOWEN, Vice-Chairman of the Illinois State Board of Elections; and WILLIAM MCGUFFAGE, JOHN R. KEITH, ANDREW K. CARRUTHERS, WILLIAM J. CADIGAN, BETTY J. COFFRIN, and CASANDRA WATSON, members of the Illinois State Board of Elections,
RESPONDENTS.

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

BRIEF IN OPPOSITION

KWAME RAOUL
Attorney General
State of Illinois
DAVID L. FRANKLIN*
Solicitor General
FRANK H. BIESZCZAT
Assistant Attorney General

*Counsel of Record

100 West Randolph Street
Chicago, Illinois 60601
(312) 814-5376
dfranklin@atg.state.il.us

Attorneys for Respondents

QUESTIONS PRESENTED

1. Whether to depart from the standard for reviewing contribution limits under the First Amendment adopted in *Buckley v. Valeo*, 424 U.S. 1 (1976), and instead apply strict scrutiny to every distinction in contribution limits between different types of donors.

2. Whether *Buckley*'s holding that contribution limits are permissible so long as they are closely drawn to serve a sufficiently important government interest should be overruled.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

TABLE OF AUTHORITIES–Continued

Page(s)

TABLE OF AUTHORITIES–Continued

STATEMENT

1. Illinois, like most States, has adopted a set of limits on the amount of money that different types of donors may contribute to a candidate's campaign. *See* 10 ILCS 5/9-8.5; State Limits on Contributions to Candidates 2017-2018 Election Cycle, National Conference of State Legislatures, http://bit.ly/2IbvbYu (45 States have contribution limits; 41 of them vary by donor). As relevant here, individuals may contribute $5,000; corporations, unions, and associations may donate $10,000; and political action committees (PACs) may provide $50,000 to a primary or general election candidate. 10 ILCS 5/9-8.5(b).[1] Political parties may give between $50,000 and $200,000 to a primary candidate, depending on the office, and may make unlimited contributions during a general election. *Ibid.* Those limits are lifted for all candidates, however, when certain self-funding or independent-expenditure thresholds are crossed. 10 ILCS 5/9-8.5(h), (h-5), (h-10) ($250,000 for statewide offices, $100,000 for other offices).

The majority and minority leaders of the State Senate and House, or any group of five Senators or ten Representatives, may also form a legislative caucus committee to support candidates for the State legislature. 10 ILCS 5/9-1.8(c). Those entities are

---

[1] Although the contribution limits have been increased to account for inflation, *see* 10 ILCS 5/9-8.5(g) (requiring biennial adjustments), respondents use the 2011 figures throughout this brief for simplicity's sake and because petitioners do not argue that those limits are unconstitutionally low. *See* 7th Cir. Doc. 14 at 51–52 (petitioners not questioning "whether [the] contribution limit is unconstitutionally low").

governed by the same rules as political parties, but candidates may accept funds from only one legislative caucus committee per election cycle. 10 ILCS 5/9-8.5(b).

2. Petitioners (a PAC, one of its donors, and a State Senator) filed suit, alleging that the contribution limits violated their First Amendment speech and association rights by setting higher limits for some types of donors than others. Dist. Ct. Doc. 65. Specifically, petitioners claimed that the contribution laws violated the First Amendment by 1) setting lower limits for individuals than for corporations, unions, and associations; 2) allowing political parties to make unlimited contributions during a general election; 3) lifting the caps after a candidate's self-funding or independent expenditures exceed a specified amount; and 4) favoring legislative leaders by allowing them to form legislative caucus committees. *Id.* at 13–16. The district court dismissed petitioners' first three claims, Dist. Ct. Doc. 96, then held a bench trial and entered judgment in respondents' favor on the fourth, finding that legislative caucus committees were sufficiently similar to political party committees to justify setting the same limits for both, *see* Pet. App. 24a–57a.

3. The Seventh Circuit affirmed in a unanimous opinion authored by Judge Sykes, holding that the contribution limits were closely drawn to promote the State's interests in preventing actual and apparent quid pro quo corruption. Pet. App. 3a–23a. The court began by noting that petitioners had abandoned the equal protection claims they had alleged in an earlier complaint and that they were not arguing that any of the limits, on their own, were unconstitutionally low. *Id.* at 10a–11a.

Instead, petitioners claimed that some limits were underinclusive in that the State had failed to impose the same limits on other classes of donors. *Id.* at 13a. Recognizing that the First Amendment does not generally bar underinclusive regulations as such, the court observed that the existence of higher limits for some categories of donors was relevant only to the extent that it might undermine the conclusion that the lower ones were aimed at combatting corruption. *Id.* at 13a–14a. Petitioners, the court explained, could not state a cognizable First Amendment claim simply by alleging that the law restricted too little of someone else's speech, but had to plausibly plead that the limits that applied to them were not closely drawn to serve the State's anticorruption objectives. *Ibid.*

The court then assessed petitioners' claims. First, the court concluded, the fact that corporations, unions, and associations could contribute $10,000 did not establish that the $5,000 limit for individuals was invalid. *Id.* at 14a. Relying on *Buckley v. Valeo*, 424 U.S. 1, 35–36 (1976) (per curiam), in which this Court upheld a far greater disparity between maximum contributions by organizations and individuals, the Seventh Circuit determined that the presence of higher limits in the Illinois law for corporations, unions, and associations did not "fatally undermin[e] the anticorruption interest served by the somewhat lower limits on contributions from individual donors." *Ibid.* Because petitioners did not identify any other basis for invalidating the individual limits, the court affirmed the dismissal of that claim. *Ibid.*

Second, the court rejected petitioners' claim that the provision allowing political parties to make unlimited contributions during a general election rendered

the limits on individuals and PACs unconstitutional. *Id.* at 15a–17a. The court reasoned that this Court's holding that States could limit parties' contributions did not mean that they had to, *id.* at 15a (citing *FEC v. Col. Republican Fed. Campaign Comm. (Colorado II)*, 533 U.S. 431 (2001)), and observed that this Court has approved of Congress's favorable treatment of political parties in this context, *id.* at 16a–17a (citing *McConnell v. FEC*, 540 U.S. 93, 188 (2003), *overruled on other grounds by Citizens United v. FEC*, 558 U.S. 310, 365–66 (2010)). *Colorado II* and *McConnell*, the court explained, "establish the principle that campaign-finance laws may draw distinctions between political parties and other political donors" and accord parties favorable treatment "without running afoul of the First Amendment." *Id.* at 17a. Consistent with that principle, Illinois's decision to permit parties to provide unlimited support to their own candidates in a general election did not cast doubt on the validity of the limits on individuals and PACs. *Ibid.*

Third, the court upheld the Illinois law's waiver provision, which lifts contribution limits for all candidates once certain thresholds on one candidate's funding have been reached. *Id.* at 18a–20a. The court noted that in the course of invalidating an asymmetrical measure that lifted contribution limits solely for the *opponent* of a self-funded candidate, this Court stated that a First Amendment challenge to an across-the-board cap-lifting measure that applied equally to all candidates "'would plainly fail.'" *Id.* at 19a (quoting *Davis v. FEC*, 554 U.S. 724, 737 (2008)).

Fourth, the court held that the district judge's factual findings about the similarities between political party and legislative caucus committees were sup-

ported by the evidence and affirmed the judgment in respondents' favor on that claim. *Id.* at 20a–23a. In doing so, the court explained that the contribution limits for parties and legislative caucus committees "cast no doubt on the anticorruption justification for the limits on individuals, PACs, and other donors." *Id.* at 21a.

REASONS FOR DENYING THE PETITION

In *Buckley*, this Court established a straightforward framework for reviewing contribution limits under the First Amendment. Such limits are permissible if they are "closely drawn" to serve a sufficiently important government interest. 424 U.S. at 25. The Seventh Circuit faithfully followed that approach when it concluded that the challenged limits in Illinois's law were closely drawn to promote the State's substantial interest in preventing actual and apparent quid pro quo corruption. Other lower courts have likewise applied *Buckley*'s framework without difficulty. Petitioners' alleged conflict of authority is illusory.

Petitioners ask this Court to depart from *Buckley*'s familiar standard and hold that every distinction drawn by state law in contribution limits between different types of donors should receive strict scrutiny—or, alternatively, to abandon the "closely drawn" test altogether. This Court should not grant either request. Contrary to petitioners' claim that the standard for reviewing contribution limits is unclear, lower-court decisions show that it is both clear and workable. *Buckley*'s standard, moreover, fosters robust political debate while leaving room for States to enact effective anticorruption measures. Conse-

quently, this Court has reaffirmed *Buckley*'s reasoning on many occasions, applying its standard to state and federal contribution limits no fewer than eight times just since 2000. Petitioners have identified no special justification for overcoming *stare decisis* and discarding *Buckley*'s time-tested approach.

I. There is no conflict as to the standard for reviewing contribution limits under the First Amendment.

Consistent with this Court's clear precedent, lower courts agree that *Buckley*'s "closely drawn" standard is the appropriate test for reviewing contribution limits under the First Amendment. As the Seventh Circuit explained, a limit's purported underinclusiveness is a factor to consider when applying that standard, not a reason for adopting a different test. The decisions petitioners cite, moreover, confirm that there is neither confusion as to the appropriate analysis nor any conflict in authority.

A. Contribution limits are permissible if they are closely drawn to serve a sufficiently important government interest.

Eight times since 2000 alone, this Court has reaffirmed that contribution limits satisfy the First Amendment when they are closely drawn to serve a sufficiently important government interest. *See McCutcheon v. FEC*, 572 U.S. 185, 196–99 (2014) (plurality opinion); *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 735 (2011); *Davis*, 554 U.S. at 737; *Randall v. Sorrell*, 548 U.S. 230, 247 (2006) (plurality opinion); *McConnell*, 540 U.S. at 136–37; *FEC v. Beaumont*, 539 U.S. 146, 162 (2003);

Colorado II, 533 U.S. at 446; *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 387–88 (2000); *see also Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 196–99 (1981) (plurality opinion); *Buckley*, 424 U.S. at 25–29. Under that test, courts first judge the significance of the government's interest, then assess the fit between that objective and the selected means for achieving it. *McCutcheon*, 572 U.S. at 199 (plurality opinion). The prevention of quid pro quo corruption and its appearance is a sufficiently weighty interest to justify contribution limits that are closely drawn to further that objective. *Id.* at 206–07.

The Seventh Circuit did not struggle to identify the correct standard in this case. Rather, it articulated the controlling test, considered petitioners' claims, and concluded that each challenged provision was closely drawn to serve the State's anticorruption interests. *Id.* at 11a–23a. Although petitioners maintained that strict scrutiny was appropriate because the limits were set higher for some types of donors than others, *see* 7th Cir. Doc. 14 at 51–53, the court properly recognized that this underinclusiveness argument did not determine the level of scrutiny, Pet. App. 12a–14a. Instead, as the court explained, a statute's purported underinclusiveness is a relevant consideration to the extent that it may undermine the government's argument that the challenged law is actually aimed at the stated objective. *Id.* at 13a–14a; *see Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1636, 1668 (2015) ("Underinclusiveness can also reveal that a law does not actually advance a compelling interest."). *Buckley*, in fact, upheld a set of limits that allowed political committees to make far larger contributions than individual donors. 424 U.S. at 35–36.

B. Lower courts consistently follow the "closely drawn" standard.

Like the Seventh Circuit, other courts have had little difficulty applying *Buckley*'s framework. Although petitioners purport to identify "conflicting decisions" on how to analyze contribution limits under the First Amendment, *see* Pet. 8, none of those cases establishes a genuine conflict. Indeed, it is petitioners' argument for strict scrutiny, *see, e.g.*, Pet. 13, that seeks to change—and complicate—the law, not clarify it.

To begin, the Tenth Circuit applied the "closely drawn" standard in *Riddle v. Hickenlooper*, 742 F.3d 922 (10th Cir. 2014). Although then-Judge Gorsuch "confess[ed] some uncertainty about the level of scrutiny" in his concurrence, he did so while considering whether strict scrutiny might be appropriate for some equal protection claims before agreeing that the limits at issue failed the "closely drawn" test. *Id.* at 930–32. Neither the lead opinion nor the concurrence expressed any uncertainty about the applicability of the "closely drawn" standard under the First Amendment. *Id.* at 928, 931. Given that petitioners have abandoned their equal protection claims, *see* Pet. App. 10a, and assert a conflict only as to the First Amendment standard, *see* Pet. 8, any doubt about whether a different test might govern claims brought under the Equal Protection Clause is immaterial to this case.

Similarly, the district court in *Protect My Check, Inc. v. Dilger*, 176 F. Supp. 3d 685, 693–701 (E.D. Ky. 2016), had no trouble deciding that the "closely drawn" test governed a First Amendment challenge

to a contribution limit. The court did apply strict scrutiny to the plaintiff's equal protection claim, but only after the parties had stipulated to that standard. *Id.* at 691.

And while the Eighth Circuit applied strict scrutiny in a First Amendment challenge to a contribution limit in *Russell v. Burris*, 146 F.3d 563 (8th Cir. 1998), it did so under that circuit's mistaken interpretation of *Buckley*, which this Court later corrected in *Shrink Missouri*, 528 U.S. at 384–88 (confirming that contribution limits are reviewed under the "closely drawn" standard). Hence, even if *Russell* once created a conflict, it has since been resolved.

Far from establishing a conflict, petitioners' cases confirm that lower courts have consistently analyzed First Amendment challenges to contribution limits under the "closely drawn" standard. Both *Riddle* and *Protect My Check* applied that standard, and *Russell*'s error in applying a different test has since been corrected. There is nothing for this Court to clarify.

To the extent that petitioners criticize other courts for applying the "closely drawn" test to equal protection claims, they fail to identify a conflict relevant to this case. *See* Pet. 6–7; *1A Auto, Inc. v. Dir. of Office of Campaign & Political Fin.*, 105 N.E.3d 1175 (Mass. 2018); *Wagner v. FEC*, 793 F.3d 1 (D.C. Cir. 2015); *Iowa Right to Life Comm., Inc. v. Tooker*, 717 F.3d 576 (8th Cir. 2013).[2] Petitioners' dissatisfaction

[2] While petitioners do not ask this Court to decide if equal protection challenges to contribution limits give rise to strict scrutiny, this case would be a poor vehicle for answering that question if they had. The Seventh Circuit did not reach that

with decisions that have followed that standard lends no support to their claim that courts are unsure of when to apply it. *See* Pet. 8–9. And their argument that contribution limits should instead receive strict scrutiny makes it plain that they are asking for a change in the law rather than a clarification of existing precedent. *See* Pet. 9–13.

Making that change would be as unwise as it is unnecessary. If this Court were to depart from *Buckley*'s settled framework by requiring courts to strictly scrutinize every discrepancy in contribution limits between types of donors, it would inject unnecessary chaos into a stable area of law. Petitioners offer no judicial yardstick to measure the relative degree to which contributions from political action committees, corporations, unions, and individuals pose the risk of actual or apparent quid pro quo corruption. Nor could they, for that kind of fine-grained calibration is a quintessentially legislative task, which is why this Court has asked instead whether any given contribution limit is "so low as to impede the ability of candidates to amass the resources necessary for effective advocacy." *Shrink Missouri*, 528 U.S. at 397 (internal quotation omitted); *see also*, *e.g.*, *Randall*, 548 U.S. at 248; *McConnell*, 540 U.S. at 135. Petitioners offer no sound reason to abandon that settled approach.

---

issue because petitioners had abandoned their equal protection claims, Pet. App. 10a, and, moreover, a petition presenting that question is currently pending before this Court, *see* Petition for Writ of Certiorari, *1A Auto, Inc. v. Sullivan*, No. 18-733 at *20–33.

II. *Buckley* is legally sound, and petitioners have identified no special justification for overruling it.

Perhaps recognizing the difficulties inherent in strictly scrutinizing the *differences between* contribution limits, petitioners also ask the Court to overrule *Buckley* and apply strict scrutiny to *all* such limits. Pet. 15–20. But they fail to identify any special justifications for departing from *stare decisis* and overruling that longstanding precedent. Nothing in the intervening decades has eroded *Buckley*'s vitality. To the contrary, this Court has consistently reaffirmed the basic principle that a closely drawn contribution limit is an effective tool for combatting corruption. Taking their cue from this Court's decisions, almost all States now enforce contribution limits. *See* State Limits on Contributions, http://bit.ly/2IbvbYu. Given the soundness of *Buckley*'s reasoning and its central role in shaping four decades of legislative developments in the field, this Court should decline petitioners' request to overrule it.

In *Buckley*, this Court began by recognizing that both contributions and expenditures implicate First Amendment freedoms of speech and association. 424 U.S. at 14–15. The Court then distinguished the two based on the degree to which each burdened political speech. *Id.* at 19–22; *see also McCutcheon*, 572 U.S. at 196–97 (plurality opinion). Unlike expenditure limits, which directly restrain a person's ability to engage in public debate, contribution limits do not similarly impair the contributor's ability to discuss candidates and issues. *Buckley*, 424 U.S. at 20–21. Contribution limits, the Court explained, permit the

donor to associate itself with the candidate and symbolically express its support while limiting the potentially corrupting size of the donation. *Id.* at 21–29. For these reasons, the Court did not apply strict scrutiny to contribution limits, instead adopting the lesser, but still rigorous, "closely drawn" standard. *Id.* at 25, 29; *see also McCutcheon*, 572 U.S. at 197 (plurality opinion).

Although petitioners argue that *Buckley* erred by treating contributions differently from expenditures, Pet. 17–19, their criticisms of this Court's decision are unconvincing. Contrary to their claim that this Court has rejected *Buckley*'s dichotomy, subsequent decisions have in fact taken pains to preserve it. *See Bennett*, 564 U.S. at 735; *Randall*, 548 U.S. at 241–42 (plurality opinion); *McConnell*, 540 U.S. at 135–36; *Colorado II*, 533 U.S. at 440–42; *Shrink Missouri*, 528 U.S. at 387–88. After all, it remains the case that expenditure limits directly restrain political speech in ways that contribution limits do not. *See McCutcheon*, 572 U.S. at 196–97 (plurality opinion).

To the extent that petitioners suggest that the "closely drawn" standard provides "minimal scrutiny," *see* Pet. 4, they are incorrect. In fact, this Court has observed that the "closely drawn" test is a form of heightened scrutiny, *see Shrink Missouri*, 528 U.S. at 391, and it has proved sufficiently rigorous to protect against unduly burdensome restrictions on numerous occasions, *see, e.g.*, *McCutcheon*, 572 U.S. at 199 (plurality opinion); *Davis*, 554 U.S. at 740–41; *Randall*, 548 U.S. at 236–37 (plurality opinion); *Riddle*, 742 F.3d at 930.

Even if this Court were to disagree with *Buckley*'s reasoning, petitioners have not established that departing from *stare decisis* is justified here. "[*S*]*tare decisis* is a foundation stone of the rule of law." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 798 (2014). The doctrine "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)). *Stare decisis*, in fact, "carries such persuasive force that [this Court has] always required a departure from precedent to be supported by some special justification," even in constitutional cases. *Dickerson v. United States*, 530 U.S. 428, 443 (2000). To overturn long-settled precedent, this Court requires more than "just an argument that the precedent was wrongly decided." *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014).

Yet that is all petitioners offer. *See* Pet. 19–20. Although they claim that *Buckley* failed to limit campaign spending or effectively curb corruption, *id.* at 20, petitioners provide no empirical basis for concluding that "circumstances have changed so radically as to undermine *Buckley*'s critical factual assumptions," *see Randall*, 548 U.S. at 244 (plurality opinion). Petitioners, moreover, do not argue that *Buckley*'s standard is unworkable. Nor could they, as lower courts have had little difficulty applying the "closely drawn" standard. *See* Part I.B, *supra*. Petitioners' insistence that *Buckley* was wrongly

decided is insufficient to justify overturning that long-settled precedent.

In addition, petitioners fail to address the reliance interests at stake, which this Court has described as "considerable." *See Randall*, 548 U.S. at 244 (plurality opinion). This Court has noted that contribution limits, "of course, [are] the primary means" by which governments may combat corruption. *Bennett*, 564 U.S. at 749. And legislators have heeded this Court's guidance. Almost all States, and the federal government, use contribution limits as a means of preventing corruption. *See* State Limits on Contributions, http://bit.ly/2IbvbYu (45 States have contribution limits); 11 C.F.R. § 110 (2018) (federal contribution limits). Subjecting that crucial anticorruption tool to the highest level of constitutional scrutiny would significantly curtail the ability of the state and federal governments alike to combat corruption and preserve public faith in honest government. "Overruling *Buckley* now would dramatically undermine this reliance on [this Court's] settled precedent." *Randall*, 548 U.S. at 244 (plurality opinion).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

KWAME RAOUL
Attorney General
State of Illinois
DAVID L. FRANKLIN*
Solicitor General
FRANK H. BIESZCZAT
Assistant Attorney General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-5376

* *Counsel of Record*

MARCH 2019