No. 19-122

In the Supreme Court of the United States

DAVID THOMPSON; AARON DOWNING;
and JIM CRAWFORD,
Petitioners,

v.

HEATHER HEBDON, in her Official Capacity
as the Executive Director of the
Alaska Public Offices Commission, *et al.*,
Respondents.

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

Brief of the Cato Institute and the Institute for Justice as *Amici Curiae* in Support of Petitioners

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The Cato Institute is a nonpartisan public policy research foundation that advances individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies helps restore the principles of constitutionalism that are the foundation of liberty. Toward those ends, Cato conducts conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

The Institute for Justice ("IJ") is a nonprofit, public interest law firm dedicated to defending the foundations of a free society, including the right to speak out on elections and other matters of public import. IJ litigates First Amendment cases that challenge restrictions on political speech and files *amicus curiae* briefs in important campaign-finance cases. IJ has also published empirical studies about the impact of campaign finance laws, including disclosure requirements and contribution limitations.

This case concerns *amici* because it involves overbroad and unjustified restrictions on political speech, the protection of which is at the core of the First Amendment. The perspective, experience, and research of *amici* will provide valuable insights into the

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[1] Pursuant to Rule 37.6, *amici curiae* affirm that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, its members, and its counsel has made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of *amici curiae* to file this brief. All parties consented to the filing of the brief.

damaging effects of limitations on the rights of individuals to donate to political campaigns and election-related groups.

SUMMARY OF ARGUMENT

This Court's precedents have long held that government may not limit campaign contributions absent a sufficiently compelling purpose, and even then only by means "closely drawn to avoid unnecessary abridgment of associational freedoms." *Buckley v. Valeo*, 424 U.S. 1, 25 (1976). That standard reflects the special protection that the First Amendment affords core political speech because campaign contributions and expenditures facilitate the exchange of ideas that is vital to our democracy. In recent years, this Court has only reinforced the strength of this heightened form of scrutiny.

The Ninth Circuit's outlier decision upholding Alaska's outlier contribution limits is flatly inconsistent with this Court's precedents and core First Amendment principles. While this Court's jurisprudence permits closely drawn limitations on campaign contributions as needed to prevent corruption or the appearance thereof, it has never granted the federal or state governments license to restrict valid First Amendment activity in the extreme form embodied in Alaska's $500 limits. Those limits are *more problematic* than the limits that six justices voted to strike down in *Randall v. Sorrell*, 548 U.S. 230 (2006). And the Ninth Circuit's disregard for that decision is even further inconsistent with the Court's First Amendment jurisprudence since *Randall*.

The Ninth Circuit's flouting of this Court's precedents deserves a decisive rebuke. In doing so, the Court should emphasize, once again, that core political speech and association activities, including political contributions, are entitled to robust protection by the First Amendment. Indeed, in light of the Ninth Circuit's efforts to evade this Court's recent precedents regarding contribution limits, the Court may wish to take the opportunity in this or some future case to reconsider the validity of *Buckley*'s distinction between contributions and other expenditures and apply the same strict scrutiny to campaign contributions that it applies to other forms of core political speech. For these reasons and those set forth below, *amici* urge the Court to grant certiorari and reverse.

ARGUMENT

I. The Right To Participate In Politics Through Campaign Contributions Is A Fundamental Freedom Guaranteed By The First Amendment.

The First Amendment freedoms of speech and of association are defining features of the Republic. At its core, the First Amendment (as incorporated against the States through the Fourteenth Amendment) prevents state and federal governments from interfering with individuals' lawful efforts to educate and persuade their fellow citizens. Accordingly, this Court has long viewed legal barriers to political expression with a skeptical eye. In *Buckley v. Valeo*, this Court held that contributions to political campaigns implicate these core First Amendment rights and thus warrant heightened scrutiny. 424 U.S. at 19–22. Although

Buckley held that some limits on campaign contributions may be constitutionally permissible, it held that such limits violate the First Amendment to the extent they "prevent[ ] candidates and political committees from amassing the resources necessary for effective advocacy." *Id.* at 21–22. And, since *Buckley*, the Court has not hesitated to invalidate federal and state statutes intended to "improve" U.S. election processes without due regard for core First Amendment freedoms. *See McCutcheon v. FEC*, 572 U.S. 185, 207 (2014). Specifically, under *Buckley*'s framework, laws infringing these important rights must further a "sufficiently important interest" and "employ means closely drawn to avoid unnecessary abridgment of associational freedoms." 424 U.S. at 25. The limits challenged here fail on both accounts.

A. The First Amendment Guarantees the Right to Engage in Lawful Political Expression and Organization.

The First Amendment's guarantees of free expression and association are essential to the proper functioning of our democratic Republic. Free expression ensures the "unfettered interchange of ideas for the bringing about of political and social changes desired by the people," *Roth v. United States*, 354 U.S. 476, 484 (1957), and free association "enhances" the "[e]ffective advocacy of both public and private points of view, particularly controversial ones," *NAACP v. Alabama*, 357 U.S. 449, 460 (1957). Taken together, these guarantees are prerequisites for the "[c]ompetition in ideas and governmental polices" that this Court has recognized as being at the "core of our

electoral process." *Williams v. Rhodes*, 393 U.S. 23, 32 (1968). In other words, "[i]n a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation." *Buckley*, 424 U.S. at 15.

In addition, the freedoms of expression and association have an undeniable social character. While the right to hold an opinion concerning the conduct of public affairs is *necessary* for free and republican government, it is not *sufficient*. If elections are to serve as "the primary control on the government," citizens must be permitted to engage with each other in free and open debate and to form associations of like-minded individuals for the promotion of that debate. *The Federalist* No. 51, at 316 (James Madison) (Garry Wills ed., 2003). To interpret the First Amendment as merely protecting "the individual on a soapbox and the lonely pamphleteer," would "subvert the vibrant public discourse that is at the foundation of our democracy." *Citizens United v. FEC*, 558 U.S. 310, 373 (2010) (Roberts, C.J., concurring). Instead, this Court has long held that the First Amendment protects the rights of individuals to "associate with others for the common advancement of political beliefs and ideas," *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973), and has rejected laws that treat "corporations or other associations . . . differently under the First Amendment simply because such associations are not 'natural persons.'" *Citizens United*, 558 U.S. at 342. "When rights-bearing individuals associate to better engage in a whole host of constitutionally protected activity, their

constitutional rights remain fully intact." Ilya Shapiro and Caitlyn W. McCarthy, *So What if Corporations Aren't People?*, 44 J. Marshall L. Rev. 701, 716 (2011).

B. Campaign Contribution Limits Warrant Heightened Judicial Scrutiny.

The First Amendment requires the federal courts to carefully scrutinize any law restricting individuals' expenditure of funds in furtherance of political speech—including by donating funds to campaigns. Indeed, in the context of contemporary electoral politics, where "virtually every means of communicating ideas . . . requires the expenditure of money," *Buckley*, 424 U.S. at 19, the First Amendment guarantees the ability of "like-minded persons to pool their resources in furtherance of common goals." *Id.* at 22; *see also Citizens Against Rent Control / Coalition for Fair Housing v. City of Berkeley, Cal.*, 454 U.S. 290, 296 (1981) ("To place a Spartan limit—or indeed any limit—on individuals wishing to band together to advance their views on a ballot measure, while placing none on individuals acting alone, is clearly a restraint on the right of association.").

Consistent with these constitutional principles, this Court's precedents place tight guardrails on any effort to reduce political speech through contribution limits. While *Buckley* upheld certain restrictions on contributions to federal electoral campaigns, it squarely rejected the notion that "equaliz[ing] the relative ability of all citizens to affect the outcome of elections" or reducing "the skyrocketing costs of political campaigns" are legitimate justifications for contribution limits. *Buckley*, 424 U.S. at 25–26.

Rather, the *Buckley* Court expressly recognized that contribution limits can withstand First Amendment scrutiny only upon a showing that the state has a "sufficiently important interest" and employed "means closely drawn to avoid unnecessary abridgment of associational freedoms." *Id.* at 25. In *Buckley*, the Court held that the particular contribution limitations at issue were "closely drawn" to prevent *quid pro quo* corruption or its appearance, *id.* 26–27, but it did not give governments *carte blanche* to impinge the "protected associational freedom" to make campaign contributions. *Id.* at 22. On the contrary, it left intact the principle that "the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971).

In the decades since *Buckley*, this Court has reinforced the constitutional protection afforded to campaign contribution limits. In particular, this Court's decisions in *Randall v. Sorrell* and *McCutcheon v. FEC* have emphasized that any regulation of the right to make campaign contributions "must . . . target what we have called '*quid pro quo*' corruption or its appearance." 572 U.S. 185, 192 (2014). By contrast, "[c]ampaign finance restrictions that pursue other objectives . . . impermissibly inject the Government 'into the debate over who should govern.'" *Id.* (quoting *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 750 (2011)).

In *Randall*, the Court held that Vermont's exceptionally low restrictions on the amounts that individuals, organizations, and political parties may contribute to campaigns imposed "disproportionately severe" burdens upon First Amendment interests. 548 U.S. at 236–37. In doing so, the plurality observed that "contribution limits that are too low can . . . harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability." *Id.* at 248–49. Noting that Vermont had one of the lowest contribution limits of any state and that the limit was not indexed to inflation, the plurality opinion determined that Vermont's limits simply went far beyond what is necessary to serve any permissible government interest. *Id.* at 262.

Three justices in *Randall* argued that the First Amendment demands even more searching scrutiny for campaign finance laws. Citing concerns that the existing standard for assessing contribution limitations is too favorable to governments and that the Court's jurisprudence had resulted in the impermissible infringement of core political speech, Justice Kennedy wrote that the standard of review had become "unduly lenient." *Id.* at 264–65 (Kennedy, J., concurring) ("On a broader, system level political parties have been denied basic First Amendment rights."). Justice Thomas, joined by Justice Scalia, similarly noted that contribution limits unduly infringe the core freedoms guaranteed by the First Amendment and that such limits "disproportionately burden challengers, who often have smaller bases of support than incumbents." *Id.* at 271 (Thomas, J., concurring). In their view, any

restrictions on the right to participate in electoral politics should be subjected to strict scrutiny, and *Buckley* should be overruled because it provides inconsistent protection to the core of the First Amendment. *Id.* at 267, 273 (Thomas, J., concurring).

In *McCutcheon*, the Court confronted the question of whether restrictions on "how many candidates or committees [a] donor may support" comported with the protections of the First Amendment. 572 U.S. at 194. While *Buckley* had upheld aggregate federal election contribution limits as legitimate on the theory that it was necessary to prevent circumvention of the base contribution limit, in *McCutcheon* the Court revisited the issue in light of intervening developments and held that this aggregate limit was an impermissible "prophylaxis-upon-prophylaxis approach" to the ultimate goal of preventing campaign contributions in excess of the base limit. *Id.* at 221. In doing so, the Court emphasized that *Buckley*'s framework required rigorous scrutiny of contribution limits: Given the "substantial mismatch between" the stated objective of the legislation and the "means selected to achieve it," the Court determined that the aggregate contribution limit could not stand. *Id.* at 199. Justice Thomas, concurring in the judgment, agreed that the aggregate limits were unconstitutional, but he urged the Court to reach that conclusion by overruling *Buckley* and aligning the constitutional scrutiny applied to both contribution limits and expenditure limits. *See id.* at 231–32 (Thomas, J., concurring).

II. This Court Should Reaffirm These Critical Rights By Reversing The Ninth Circuit's Outlier Ruling Upholding Alaska's Outlier Contribution Limits.

As Petitioners ably explain, the Ninth Circuit's decision here is flatly inconsistent with this Court's precedents. In addition, the Ninth Circuit's misguided approach highlights the need for this Court to reaffirm that federal courts must apply heightened scrutiny to analyze contribution limits.

Any proper application of *Buckley*, *Randall*, and *McCutcheon* to the facts here compels a conclusion that Alaska's contribution limits cannot withstand First Amendment scrutiny. Alaska law restrains individuals from contributing "more than . . . $500 per year to . . . a candidate . . . or to a group that is not a political party." Alaska § 15.13.070(b)(1). The statute thus severely restricts individuals' constitutional right to contribute to individuals or election-related groups, while a group that qualifies as a "political party" is subject to a higher, $5,000 per year limit. *Id.* § 15.13.070(b)(2). In upholding these draconian limitations below, the Ninth Circuit made two fundamental errors: (1) it failed to apply *Randall*'s clarification of the circumstances in which any contribution limitations exceed the permissible limits of the First Amendment; and (2) it misconstrued *McCutcheon* and *Citizens United* to the extent it upheld the individual-to-group limits in particular on an "anti-circumvention" theory.

On the first point, the Ninth Circuit summarily disregarded *Randall* based on its view that "*Randall* is

not binding authority because no opinion commanded a majority of the Court." Pet. App. 16 n.5. But lower courts may not ignore the holdings of this Court simply because no opinion commanded a majority. As the Court held in *Marks v. United States*, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." 430 U.S. 188, 193 (1977) (quotations omitted). And there is no legitimate debate that the views expressed by a majority of justices in *Randall* (specifically, the Chief Justice and Justices Breyer, Alito, Kennedy, Thomas, and Scalia) compel the conclusion that the limits here, like the limits in *Randall*, violate the First Amendment.

On the second point, the Ninth Circuit flatly contradicted this Court's precedents by holding that anti-circumvention, standing alone, is a sufficient interest that justifies the extreme outlier limits at issue here. The Ninth Circuit accepted the district court's conclusion that the First Amendment permits limitations on political contributions in excess of $500 to *any* group that is "not a political party" merely because there is an "apparent" risk that individuals could form groups that would serve as "pass-through entities" to violate the contribution limitation. The Ninth Circuit did not even address, as *Randall* and *McCutcheon* require, the potentially deleterious effects on political contributions to other groups; instead, it simply held that, "[i]f . . . the individual-to-candidate limit is constitutional, then under *California Medical*

Ass'n[*v. FEC*, 453 U.S. 182 (1981)], so too is Alaska's law that prevents evasion of that limit." Pet. App. at 21. Whatever room *McCutcheon* left for the "anti-circumvention" theory, it clearly held that measures constituting "prophylaxis-upon-prophylaxis" require "particularly diligent" scrutiny. 572 U.S. at 221. Here, the Ninth Circuit conducted precisely the opposite.

The Ninth Circuit's attempt to evade this Court's precedents calls out for swift rebuke. In doing so, the Court should dispel the notion that contribution limits can be upheld so long as a government utters the magic word, "anti-corruption." Instead of meaningfully grappling with the "danger signs" articulated in the *Randall* plurality opinion—including whether a campaign contribution limitation "is well below the lowest limit this Court has previously upheld," and whether it has been indexed for inflation, *Randall*, 548 U.S. at 251–52—the Ninth Circuit simply asserted that Alaska's $500 limit on campaign contributions would not prevent a hypothetical state legislative candidate from mounting an effective campaign. Moreover, the decision is entirely silent on how the $500 limit might affect the ability of other candidates—especially non-incumbents—to raise funds to mount an "effective campaign" or why all candidates should be expected to expend the same amounts of funds on certain categories of campaign expenses. Under *Buckley*, *Randall*, and *McCutcheon* a much more particularized showing is required where a state government seeks to impede robust political speech and thus diminish the "[c]ompetition in ideas and governmental polices" at the "core of our electoral process." *Williams*, 393 U.S. at 32.

III. This Court Should Revisit The *Buckley* Framework In Order To Ensure The Protection Of Core First Amendment Freedoms.

The Ninth Circuit's efforts to evade this Court's reasoning in *Randall* and *McCutcheon* only highlight the need for this Court to reconsider the *Buckley* framework in an appropriate case. Over the years, state legislators and lower courts have sought to exploit the narrow distinction that *Buckley* drew between contribution limits and expenditure limits to justify increasingly more aggressive infringements on core First Amendment freedoms. Alaska's law and the decision below are a case in point. And, in the years since *Buckley*, the doctrinal basis for distinguishing between contributions and expenditures has eroded significantly. Thus, in this or another appropriate case, the Court should reconsider whether it should apply strict scrutiny to all laws that infringe on core political speech and associational freedoms—whether exercised through expenditures or contributions.

In *Randall*, three justices expressed this view and articulated the doctrinal logic and liberty-enhancing value of aligning the test for all forms of political expression. Justice Kennedy warned in his *Randall* concurrence that the Court had "upheld contribution limits that do not come even close to passing any serious scrutiny." *Randall*, 548 U.S. at 264 (Kennedy, J., concurring). And Justice Thomas' concurrence, joined by Justice Scalia, similarly explained that "the presence of an intermediary between a contributor and the speech eventually produced" did not justify

applying a lower standard to contributions than expenditures. *Id.* at 266–67. Applying strict scrutiny, by contrast, would afford "consistent protection to the fore of the First Amendment." *Id.* at 273.

Applying strict scrutiny to laws like Alaska's would also avoid the incongruous result that they receive a lower level of scrutiny than restrictions on several categories of low-value speech. Core political speech and association rights should receive at least as much protection as speech that advocates for the "forcible overthrow" of the U.S. government, *Yates v. United States*, 354 U.S. 298 (1957); deliberately false speech about one's military record, *United States v. Alvarez*, 567 U.S. 709 (2012); operating a sexually oriented business in a sensitive location, *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425 (2002); producing "crush" videos, *United States v. Stevens*, 559 U.S. 460 (2010); protesting the funeral of U.S. servicemembers, *Snyder v. Phelps*, 562 U.S. 443 (2011); or burning the American flag, *Texas v. Johnson*, 491 U.S. 397 (1989). Yet, under the *Buckley* standard, government has more leeway to curtail core political speech than any of these activities.

Apart from the fact that there is no textual or historical basis to apply a lower standard of scrutiny to core political speech, many of the assumptions that motivated the *Buckley* decision have turned out to be critically flawed. *Buckley* itself recognized that "most large contributors do not seek improper influence over a candidate's position or an officeholder's action." 424 U.S. at 29. Whatever the merits of the prophylactic approach *Buckley* permitted at the time, in the years since, neither Alaska nor any other state government

has established that campaign contribution limits actually yield the benefits attributed to them in *Buckley*. On the contrary, scholarship since *Buckley* has shown that contribution limitations and other restrictions on political associational activity can have severely *negative* effects on the rigor of political speech. Indeed, research shows that "exposure to campaign advertising produces citizens who are more interested in the election, have more to say about the candidates, are more familiar with who is running, and ultimately, are more likely to vote." Paul Freedman, Michael Franz & Kenneth Goldstein, *Campaign Advertising and Democratic Citizenship* 48 Am. J. of Pol. Science 723 (2004); *see also* John J. Coleman, *The Distribution of Campaign Spending Benefits Across Groups*, 63 J. Pol. 916 (2002) (campaign spending improves public trust and engagement and improves the accuracy of perceptions about candidates, particularly among socially disadvantaged groups); John J. Coleman, *The Benefits of Campaign Spending*, Cato Institute Briefing Paper No. 84 (Sept. 4, 2003). At the same time, contribution restrictions have little impact on the public confidence in government. David M. Primo & Jeffrey Milyo, *Campaign Finance Laws and Political Efficacy: Evidence from the States*, 5 Elec. L.J. 23 (2006) ("Given the importance placed on public opinion for the development of campaign finance law, it is remarkable that we have found so little evidence that citizens are influenced by the campaign finance laws of their state."); Ronald M. Levin, *Fighting the Appearance of Corruption*, 6 Wash. U. J.L. & Pol'y 171, 176–78 (2001) ("[T]he appearance [of corruption] rationale is self-defeating, because with restrictions will always come more occasions for accusations of

noncompliance. Rules will always force campaign staffs to make judgment calls on debatable issues, and politicians and other partisans will always have incentives to accuse their opponents of fudging on the rules.").

Given these practical and doctrinal erosions in *Buckley*'s rationale, there is no compelling *stare decisis* rationale for continuing to apply its distinction between limits on contributions and expenditures. In *Janus v. AFSCME*, the Court articulated five principles for when it should or should not follow *stare decisis*: (1) the quality of the precedent's reasoning; (2) the workability of the rule; (3) its consistency with other related decisions; (4) developments since the decision; and (5) reliance upon the decision. 138 S. Ct. 2448, 2478–82 (2018). The *Buckley* framework does not survive scrutiny under these factors.

The distinction between expenditures and contributions is poorly reasoned and unworkable. As stated above, it has been the target of much criticism over the nearly half-century since it was created—including by members of this Court. From its inception, it has been characterized as playing "word games," and thus it should not continue to stand. *Buckley*, 424 U.S. at 244 (Burger, C.J., concurring in part and dissenting in part). And, in recent precedents applying it, at least one (and often many) justices have called for its reconsideration.

Nor has the Court applied the distinction consistently, instead chipping away at it in subsequent decisions. "Those who apply the rule to particular cases, must of necessity expound and interpret that

rule." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). Instead of applying the *Buckley* distinction and expounding on it in a clear manner, the Court has slowly inched toward what seems to be an inevitable result: overturning *Buckley*. The distinction has effectively been sentenced to death by a thousand cuts, and the Court should put it to rest once and for all.

Nor has the contribution-expenditure distinction, controversial and confusing in its own day, engendered the kind of reliance interests that *stare decisis* contemplates protecting. On the contrary, restrictions on contributions have had a chilling effect on the exercise of constitutionally protected free speech rights. And it would be antithetical to the spirit of the Bill of Rights to say that one group is "relying" on the First Amendment rights of another group being extinguished. The Court should not uphold a distinction that allows states to prefer one type of speaker over all others. Further, the Court must recognize the danger of maintaining distinctions that micromanage and silence political speech, the cornerstone of our democracy. Indeed, "when fidelity to any particular precedent does more to damage [the rule of law] than to advance it, we must be more willing to depart from that precedent." *Citizens United*, 558 U.S. at 378 (Roberts, C.J., concurring). *Stare decisis* does not require preserving or extending precedents that misstate the law, and it does not shield the distinction created in *Buckley* from being reexamined and overturned.

CONCLUSION

For the foregoing reasons, *amici curiae* urge the Court to grant certiorari and reverse.

Respectfully submitted,

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