No. 19-234

In the Supreme Court of the United States

LIBERTARIAN NATIONAL COMMITTEE, INC.,
Petitioner,

v.

FEDERAL ELECTION COMMISSION,
Respondent.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The District of Columbia

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONER

Ilya Shapiro
Counsel of Record
Trevor Burrus
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

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QUESTION PRESENTED

A will reflects the deceased's plans for the final disposition of his estate. Some wills bequeath property to political groups. Does the FEC's requirement that these gifts be parceled out over the years in accordance with the maximum contribution rules for living donors violate the First Amendment?

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

This case interests Cato because political speech is at the heart of a free society. Any restrictions on such speech must be subject to the strictest scrutiny and the narrowest tailoring.

SUMMARY OF ARGUMENT

This Court is once again faced with clarifying the test for evaluating the constitutionality of campaign contribution limits. Now the question is whether, to prevent *quid pro quo* corruption (by the dead?), political contributions in wills must be parceled out at the same yearly increment as the living, long after the testator has reached his final resting place. This is unconstitutional for two reasons.

First, *Buckley v. Valeo*, 424 U.S. 1 (1976), does not apply here. The *Buckley* test primarily weighs the suppression of free speech and association rights inherent in contribution limits with the government interest in preventing corruption or the appearance thereof. The

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[1] Rule 37 statement: All parties were timely notified and consented to the filing of this brief. No part of this brief was authored by any party's counsel; no person or entity other than *amicus* funded its preparation or submission.

speech interests at stake in bequests are primarily expressive, not associative, while there is no corruption risk from the miniscule number of such bequests. *Buckley*'s scale uses different weights. In *McCutcheon v. FEC*, 572 U.S. 185 (2014), the Court declined to apply the *Buckley* test when that balancing is inapplicable, and it should do so here.

Second, even if the Court finds the *Buckley* test applicable, it should create an exception for bequests. Bequests are a discrete and identifiable subset of contributions. Even if there is some sort of corruption risk, there is nowhere near the type of risk posed by annual contributions made by a living person. In analyzing the application of legal ethics rules to political organizations and unions, the Court has created carveouts to prophylactic restrictions on the freedom of speech. Those carveouts are easy to apply to discrete and easily identifiable activities—and are demanded by the First Amendment.

ARGUMENT

I. *BUCKLEY*'S BALANCING TEST CONSIDERS DIFFERENT INTERESTS, SO COURTS SHOULD NOT APPLY IT TO BEQUESTS

The right to contribute money to political candidates and organizations is an integral part of the political speech at the core of the First Amendment. *Buckley v. Valeo*, 424 U.S. 1, 14 (1976). "Speech is an essential mechanism of democracy." *Citizens United v. FEC*, 558 U.S. 310, 339 (2010). Generally, "[p]olitical speech must prevail against laws that would suppress it, whether by design or inadvertence." *Id.* at 340.

Despite these principles, the Court has developed narrow restrictions on political speech to combat cor-

rupt *quid pro quo* agreements between citizens and political entities. *See Buckley*, 424 U.S. at 12–37 (upholding a contribution limit of $1,000 for individual candidates and $5,000 for groups). *Buckley* authorized a prophylactic rule allowing Congress to restrict the total contribution a person can give to any candidate or group. Using this rule, the current annual contribution limit is $35,000. 52 U.S.C. § 30116(a)(1)(B). When a decedent leaves a contribution to a political group in his will, the FEC contends that it must be parceled out yearly in accordance with the contribution minimum. FEC Advisory Ops. 2015-05. But *Buckley*'s reasoning, extended to the current situation, does not reach the same conclusion. Accordingly, the Court should hold bequests to be outside of *Buckley*'s prophylactic rule.

A. The Interests at Stake with Bequests Do Not Align with Those in *Buckley*

Buckley created a balancing test for evaluating laws restricting the people's general right to contribute to political causes. On one arm of the scales are the dual interests of free expression and free association. *Buckley*, 424 U.S. at 20. On the other arm, the Court recognized a sufficient government interest in preventing corruption and the appearance of corruption. *Id.* at 27. Even though the vast majority of political contributions are innocent, the government has been allowed to cast a wide, prophylactic net. *Id.* at 30.

But the weights for these scales are very particular. The government's interest must be in preventing corruption and its appearance; *Buckley* chose anti-corruption out of three proffered rationales. *Id.* at 26. Indeed, in the near half-century since *Buckley*, the Court has not recognized any other rationale for restricting political contributions. *See McCutcheon v. FEC*, 572 U.S.

185, 191–92 (2014) (plurality) (discussing rejected rationales). Furthermore, the Court's reliance on free association was based on a constant value given to the expressive conduct of a yearly contribution. *Buckley*, 424 U.S. at 21–22. The interests attending bequests are quite different.

1. There is more expressive value in a bequest than in an annual contribution.

An annual contribution of, say, $100 to a political party has some expressive value, and the money is used to facilitate political speech and activity. Yet the contribution also carries with it great associative value—indicating that the donor is part of the "team," so to speak—that in many ways outshines the expressive value. The reverse is true for bequests. In *Buckley*, so long as a person may speak through the act of contributing, the amount he contributes has merely a "marginal" impact on communicative value.[2] *Id.* at 21 ("The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing."). The greater part of the First Amendment consideration rests on the contribution's associative value. *Id.* at 24.

In contrast, the amount given in a bequest entails a great deal of communicative value. While each year's contribution represents continued support of an organization, a bequest manifests only at death—which is, of course, a once-in-a-lifetime event. Moreover, while yearly contributions are temporally limited to support

[2] This is not entirely true. A specific amount has the potential for immense communicative value. Just five years ago, this Court heard a case where the petitioner sought to donate $1,776 to multiple candidates. *See McCutcheon*, 572 U.S. at 194 (plurality).

for a particular election cycle, a bequest represents a gift to the future and expresses faith that the organization will still espouse the testator's values after he is gone. The actual amount thus gains considerable significance. A trip to the local probate court will demonstrate how much expressive significance is attached to individual bequests. If two siblings receive different sums in their father's will, the communicative aspect of the amount is readily apparent. While a yearly contribution is part of a testator's ever-shifting assets, a bequest is out of a finite and unrenewable estate, symbolizing the share of the deceased's remainder dedicated to the cause.

While yearly contributions are usually weighed primarily by the value of their associational speech, bequests are primarily expressive. It is uncontested that free association is not at issue here. *Libertarian Nat'l Comm., Inc. v. FEC*, 924 F.3d 533, 540 (2019); Pet. Br. at 2. The distinction between free association and free expression is significant; it affected *Buckley*'s outcome. *Buckley* ruled on the constitutionality of both contribution limits and expenditure limits. 424 U.S. at 12. However, the free expression interests at stake were weighed against the government interests of equalizing the amount spent on campaigns, limiting the growing cost of running for office, and discouraging circumvention of contribution limits. *Id.* at 56–57. These differing interests mean that the Court cannot simply plug bequests into Buckley's balancing test for campaign expenditures.

2. Bequests do not create the same corruption danger as contributions from living donors.

The interest in preventing *quid pro quo* corruption is absent here. There is no appearance of corruption

that depends on the total size of a bequest, as the FEC concedes. The FEC has approved the one-time placement of large bequests into trusts, which then distribute the maximum yearly contribution to political groups. FEC Advisory Ops. 2015-05; FEC Advisory Ops. 2004-02. To the FEC, it is the timing, not the size, of a gift that triggers the corruptive element. But timing is the concern of the living, not the dead.

The illusory nature of a will obviates timing concerns. A will may be revoked at any time. Unif. Probate Code §§ 2-507–09; *see also* Alex M. Johnson, Jr., *Is It Time For Irrevocable Wills?*, 53 U. Louisville L. Rev. 393 (2016). Indeed, after receiving the consideration for his promise of a contribution, a corrupt testator would never actually need to *give* the gift. Likewise, if the bequest is in consideration for a corrupt benefit to the decedent's heirs, the heirs would have no means of enforcing the promise once the gift is transferred.[3]

That is not to say that a *quid pro quo* is impossible by bequest. A testator could conspire with third parties to enforce bribes after his death, but that situation is different than *Buckley*'s anti-corruption interest. That Court decided that a prophylactic rule was necessary precisely because the vast number of independent contributions made bribery laws ineffective at preventing *quid pro quo* corruption. *Buckley*, 424 U.S. at 262.

But anti-bribery laws are more than sufficient to prevent corrupt bequests, thus obviating the need for a blanket, prophylactic rule. There has only been $3.7 million bequeathed to political causes in the last 40 years. *Libertarian Nat'l Comm.*, 924 F.3d at 540. In

[3] In that regard, the FEC's recommendation to create a trust actually facilitates corrupt purposes because the heirs could affect trust assets if the corrupt promise went unfulfilled.

contrast, the FEC reports that political committees have raised nearly $2 billion in the first half of 2019 alone.[4] This is not to say that bequests are a drop in the bucket, but rather that where the FEC's interest in stopping corruption usually leaves the Commission sifting through an ocean of contributions, here it need only sift through a puddle. The increased complexity of schemes to bribe by bequest, coupled with the miniscule pool of bequests to examine, means normal anti-bribery laws can perform that function.

Further, there has never been a known corrupt bequest to political groups. As Judge Katsas noted below, the FEC has failed to justify a concern about corruption by pointing to a single instance of bribery by bequest in four separate court records and investigations over the past decade. *Libertarian Nat'l Comm.*, 924 F.3d at 540 (Katsas, J., concurring in part and in judgment, dissenting in part). In contrast, when the Court upheld yearly soft-money contribution limits, the FEC produced voluminous record evidence and testimony about an epidemic of corrupt soft-money contributions. *McConnell v. FEC*, 540 U.S. 93, 153–54 (2003); *see also Republican Nat'l Comm. v. FEC*, 698 F. Supp. 2d 150, 158 (2010) (Kavanaugh, J.) ("*McConnell*'s decision to uphold the soft-money ban rested on something more specific: record evidence of the selling of preferential access to federal officeholders and candidates in exchange for soft-money contributions.").

In short, there is no evidence of a corruption problem around bequests. A bequest is an illogical way to make a bribe. Even if there were an issue, the minimal number of bequests and the complexity involved in

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[4] Campaign finance data available at the FEC website, https://www.fec.gov/data/browse-data/?tab=raising

making them work as bribes would make normal anti-bribery laws more than sufficient to tackle the issue.

Between the considerable expressive value of bequests and the lack of a compelling and realistic anti-corruption interest, the *Buckley* balancing test is inapposite as applied to bequests. The expressive value of bequests, whatever it might be, outweighs the Commission's complete absence of anti-corruption interest. This Court has repeatedly noted that it lacks the "scalpel to probe" whether a $1,000 or $2,000 yearly contribution limit better balances free association rights with anti-corruption interests. *Buckley*, 424 U.S. at 30; *Randall v. Sorrell*, 548 U.S. 230, 248 (2006) (plurality). The precision of a scalpel is unnecessary here, however, because the scales simply do not balance.

B. When *Buckley* Is Inapposite, the Court Should Follow *McCutcheon* and Apply Strict Scrutiny

In *McCutcheon*, the Court returned to first principles, recognizing that the case differed from *Buckley* in two important respects. First, the speech at issue was an aggregate contribution limit. *McCutcheon*, 572 U.S. at 191–92. Second, the limit had little if any effect on the state's interest in combating corruption. *Id.* at 192.

Here, as in *McCutcheon*, the contribution limit applied to bequests is different in kind than the yearly contribution limit. Similarly, this case presents a campaign finance law with little to no actual effect on *quid pro quo* corruption or its appearance. This case also has one advantage over *McCutcheon*. *Buckley*, in three sentences out of a 139-page opinion, upheld an aggregate yearly contribution limit as ancillary to the general contribution limit. *Buckley*, 424 U.S. at 30. While

the Court in *McCutcheon* had to distinguish that aspect of *Buckley*, here it may preempt such problems by recognizing now that bequests simply do not implicate the interests presented by yearly contributions.

The position of bequests outside of the *Buckley* framework is stark when compared to the rest of *Buckley*'s progeny. In the first post-*Buckley* case presenting a contribution-limits challenge, the Court was already split on how to apply the balancing test. *See Cal. Med. Ass'n v. FEC*, 453 U.S. 182 (1981). In a divided opinion, the plurality reasoned that a *Buckley*-style yearly contribution limit on multicandidate committees was necessary to prevent corruption by those donating an amount greater than the individual contribution limit on the understanding that the whole amount would go to a single candidate. *Cal. Med. Ass'n*, 453 U.S. at 198–99 (plurality). That part of the opinion failed to command a full majority of the Court; the concurrence opined that the contribution limit survived strict scrutiny as an expenditure limitation. *Id.* at 201–02 (Blackmun, J., concurring in part and in judgment).

Other decisions have found contribution limits to be unconstitutionally low. *See*, *e.g.*, *Randall*, 548 U.S. at 249 (plurality) (striking down contribution limits of $500 per candidate, per election cycle); *Citizens Against Rent Control/Coal. for Fair Hous. v. Berkeley*, 454 U.S. 290, 300 (1981) (invalidating a $250 limit on contributions to groups formed to support or oppose specific ballot initiatives). Unlike those cases, the issue here is not the size of contributions, but the source.

Bequests are different than yearly contributions. As in *McCutcheon*, the traditional *Buckley* analysis is inapplicable, so the Court should apply strict scrutiny.

II. EVEN IF *BUCKLEY*'S TEST APPLIES, THE COURT SHOULD RECOGNIZE AN EXCEPTION FOR CONTRIBUTIONS BY BEQUEST, AS IT HAS IN OTHER CONTEXTS

Even if *Buckley*'s reasoning applies to bequests, the Court should exempt them from such regulation. When the Court recognizes an area where the government may regulate speech, it carefully polices that regulation to prevent undue speech suppression. The Court has done this in other areas of concerning freedom of expression and association, and can easily recognize an exception for bequests.

In *In re Primus*, the Court was asked to consider whether to apply the legal ethical canon against solicitation of clients to an ACLU attorney who offered representation to a woman who had been sterilized as a condition to receiving public medical assistance. 436 U.S. 412 (1978). The rule against solicitation is a prophylactic one and, in regulating the practice of law, states have considerable interests in taking measures to protect against the "substantive evils of undue influence, overreaching, misrepresentation, invasion of privacy, [and] conflict of interest[.]" *Id.* at 426. Yet the Court recognized that "[b]road prophylactic rules in the area of free expression are suspect, and precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Id.* at 432 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)). Because the ACLU is a political organization and the solicitation of a client was "undertaken to express personal political beliefs and to advance the civil-liberties objectives of the ACLU," the freedoms of expression and association were implicated. *Id.* at 422. "Where political expression or association is at issue," precision is particularly important because "courts

cannot tolerate the degree of imprecision that often characterizes government regulation." *Id.* at 434.

Primus built on and clarified *Button*, which exempted the NAACP from certain state laws regulating lawyer conduct. The rational of both of these cases has also been applied to unions. *R.R. Trainmen v. VA Bar*, 377 U.S. 1 (1964) (union recommendations of lawyers overcome restrictions on solicitation of clients); *Mine Workers v. Ill. Bar Ass'n*, 389 U.S. 217 (1967) (union lawyers may represent employees in claim disputes).

These cases share a common theme. All involve discrete identifiable entities: either unions or political organizations that require impact litigation to function fully. Categorically applying prophylactic legal-ethics rules—whatever their merits in other contexts—would have severely harmed the political, associative, and expressive goals of the organizations.

The same is true here. In the realm of campaign contributions, bequests are discrete and identifiable. The necessity of third-party trust personnel and probate representatives makes it easy to determine if a contribution is from the deceased. The other distinguishing feature is the minimal danger these organizations pose to the government interests at stake. Similarly, the Court in *Primus* distinguished the ACLU from ordinary ambulance chasers by virtue of the political bent of expressive and associational rights. *Primus*, 436 U.S. at 434 (distinguishing *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) (holding an attorney lacked free association rights to solicit clients in hospital rooms)). Context matters; bequests are as different from *inter vivos* contributions as ACLU (or Cato) legal advocates are from ambulance chasers.

This Court has repeatedly noted that it lacks the "scalpel to probe" whether a $1,000 or $2,000 contribution limit better balances associational rights with anti-corruption interests. *Buckley*, 424 U.S. at 30. But that level of precision is not necessary here. The Court can use the cutting tools at its disposal to remove bequests from *Buckley*'s contribution framework.

Bequests can be separated from general contributions and treated as a separate class, because it is clear what is and is not a bequest. Like unions and political groups in other contexts, bequests do not significantly implicate the state interest at stake here. They can and should be removed them from the general prophylactic suppression of political contributions.

CONCLUSION

For the foregoing reasons, and those expressed by the petitioner, the Court should grant certiorari.

Respectfully submitted,

Ilya Shapiro
Counsel of Record
Trevor Burrus
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

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