No. _____

In the Supreme Court of the United States

JOHN SCHICKEL and DAVID WATSON,
Petitioners,

v.

GEORGE C. TROUTMAN, PAT FREIBART, TONY GOETZ, ELMER GEORGE, KEN WINTERS, TOM JENSEN, SHELDON BAUGH, PHIL HUDDLESTON, and ANTHONY M. WILHOIT, in their official capacities as members of Kentucky Legislative Ethics Commission; H. JOHN SCHAFF, in his official capacity as Executive Director of the Kentucky Legislative Ethics Commission,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

Thomas B. Bruns
Bruns, Connell, Vollmer, Armstrong
4750 Ashwood Drive, Suite 200
Cincinnati, OH 45241
(513) 326-0274
tbruns@bcvalaw.com

Christopher Wiest
Chris Wiest, Attorney at Law, PLLC
25 Town Center Boulevard, Suite 104
Crestview Hills, KY 41017
(513)257-1895
chris@cwiestlaw.com

Robert A. Winter, Jr.
Counsel of Record
Law Office of
Robert A. Winter, Jr.
P.O. Box 175883
Fort Mitchell, KY 41017-5883
(859) 250-3337
robertawinterjr@gmail.com

Counsel for Petitioners

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

1. Whether incumbents and candidates for political office have standing to assert First and Fourteenth Amendment claims regarding: i) pure campaign speech restrictions that prohibit others from soliciting support to their campaign, and ii) combined legislative ethics and campaign finance restrictions that prohibit certain other persons from associating with those campaigns and candidates through, among other things, campaign donations?

2. Whether this Court should overrule the *Buckley v. Valeo* "closely drawn" scrutiny framework and apply strict scrutiny to First and Fourteenth Amendment claims involving combined legislative ethics and campaign finance restrictions which are, in actuality, speech restrictions?

3. Even if *Buckley v. Valeo* is not overruled, should strict scrutiny nevertheless be applied where campaign speech restrictions as well as combined legislative ethics and campaign finance restrictions violate fundamental rights, and otherwise make impermissible classifications based on the exercise of fundamental rights?

4. Whether the challenged Kentucky campaign speech restrictions and combined legislative ethics and campaign finance restrictions survive whatever level of scrutiny the Court deems applicable under the First and Fourteenth Amendments?

PARTIES TO THE PROCEEDING

The following individuals and entities were Plaintiffs before the trial court and Appellants in the Sixth Circuit and are Petitioners here: Kentucky State Senator John Schickel and candidate David Watson. Ken Moellman, Jr. was a Plaintiff before the trial court.

The following individuals were Defendants before the trial court and Appellees in the Sixth Circuit and are Respondents here: George Troutman, Elmer George, Pat Freibart, Tony Goetz, Ken Winters, Tom Jenson, Sheldon Baugh, Phil Huddleston and H. John Schaaf, in their capacities as members and the executive director of the Kentucky Legislative Ethics Commission (collectively the Legislative Ethics Defendants). Also parties before the trial court, and Appellees before the Sixth Circuit (but not parties to this appeal) were John Steffen, Terry Naydan, Chastity Ross, Robert Mattingly, Rosemary Center, Craig C. Dilger, Reid Haire, Thomas Stevens, in their official capacities ("Registry Defendants"). Respondents are sued in their official capacities that correspond to their respective offices.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Sup. Ct. R. 29.6, the undersigned counsel state that none of the Petitioners are publicly traded companies or have parent entities that are publicly traded companies.

STATEMENT OF RELATED PROCEEDINGS

* *Schickel, et. al. v. Dilger, et. al.*, Case Nos. 17-6456 and 17-6505 (6th Cir.) (opinions issued and judgment entered May 30, 2019; mandate issued July 22, 2019).

* *Schickel, et. al. v. Dilger, et. al.*, Case No. 18-5011 (6th Cir.) (opinion issued and judgment entered April 3, 2019; mandate issued April 24, 2019).

* *Schickel, et. al. v. Dilger, et. al.*, Case No. 2:15-CV-0155 (EDKY) (opinions issued June 6, 2017 and December 1, 2017, injunction entered December 1, 2017, and judgment entered December 6, 2017).

There are no additional proceedings in any court that are directly related to this action.

TABLE OF CONTENTS

APPENDIX

TABLE OF CITED AUTHORITIES

CASES

CONSTITUTION

STATUTES

RULES

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Plaintiffs, State Senator John Schickel and Mr. David Watson, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The subject of this petition for a writ of certiorari is the *Opinion* and *Judgment,* entered May 30, 2019, by the United States Court of Appeals for the Sixth Circuit in Case Nos. 17-6456 and 17-6505 (App.1–App.40), and is reported at *Schickel v. Dilger*, 925 F.3d 858 (6th Cir. 2019). Petitioners' petition for rehearing *en banc* was denied by the Sixth Circuit Court of Appeal's *Order*, entered July 11, 2019 (App.88), which is unreported.

The *Opinion* in the United States District Court, Eastern District of Kentucky, entered June 6, 2017, granting in part and denying in part Petitioners' motion for summary judgment (App.52-App.87), is presently not reported in *Federal Supplement*, but is available at 2017 U.S. Dist. LEXIS 86555. A *Memorandum Opinion and Order* by the United States District Court, Eastern District of Kentucky, entered December 1, 2017 (App.43-App.51), is also not reported in the Federal Supplement. The *Judgment* of the United States District Court, Eastern District of Kentucky, entered December 6, 2017 (App.41-App.43), is also not reported in the Federal Supplement.

STATEMENT OF JURISDICTION

Jurisdiction is vested in this Court pursuant to 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101(c). This Petition was timely filed under the terms of Supreme Court Rule 13(1) and (3).

The Opinion and Judgment of the Sixth Circuit Court of Appeals was entered on May 30, 2019. (App.1). A timely petition for rehearing *en banc* was filed with the Sixth Circuit on June 12, 2019. On July 11, 2019, the Sixth Circuit entered its order denying the petition for rehearing *en banc* (App.88).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following relevant constitutional and statutory provisions are reproduced in Appendix G to this Petition:

A. U.S. Const., Amend I.

B. U.S. Const., Amend XIV, Section 1.

C. Ky. Rev. Stat. Section 6.611.

D. Ky. Rev. Stat. Section 6.751.

E. Ky. Rev. Stat. Section 6.767.

F. Ky. Rev. Stat. Section 6.811.

STATEMENT OF THE CASE

A. Introduction

This case involves challenges to restrictions on campaign speech, and certain other restrictions involving campaign finance and legislative ethics, all of which implicate fundamental rights under the First and Fourteenth Amendments. The Sixth Circuit held that Petitioners lacked standing to challenge many of these restrictions. And, in reaching the merits on others, found that the restrictions met the "closely drawn" scrutiny of *Buckley v. Valeo*.

Petitioners seek review of four issues: first, whether the Sixth Circuit correctly determined that Petitioners did not have standing to assert claims under the First and Fourteenth Amendments despite unrebutted evidence in the record below that the challenged provisions impacted Petitioners' rights to association under the First Amendment, and where this Court has historically applied relaxed standing requirements where First Amendment rights were implicated? Second, whether this Court should revisit *Buckley v. Valeo* and review the challenged statutes under strict scrutiny? Third, because of the nature of the challenges and their impact on fundamental rights, whether strict scrutiny nevertheless applies? And fourth, regardless of the standard applied, whether the challenged statutes survive constitutional scrutiny?

B. The Petitioners and the challenged statutes

Petitioners in this case are State Senator John Schickel and candidate for office David Watson. Each plead and offered proof below that he was negatively impacted by the challenged statutes.

The challenged statutes involve restrictions on legislative agents (also known as lobbyists), and their employers, and provide yet other restrictions on legislators and candidates for the legislature. A "legislative agent" in Kentucky is defined broadly as anyone who lobbies as part of their official responsibilities, or who acts as a legislative liaison on behalf of associations or public interest bodies. K.R.S. 6.611(23). Employers are defined as anyone who engages a legislative agent. K.R.S. 6.611(12).

Perhaps the most egregious statute at issue is K.R.S. 6.767(3), which prohibits legislators and candidates for legislative office from accepting donations from "permanent committees" (*i.e.*, groups of voters who band together to effect political change – political action committees) during the legislative session. This statutory section also prohibits legislators and candidates from accepting donations from employers of lobbyists during this same window. The legislative session runs from January through March or April. In legislative election years, the session lasts through mid-April. This leaves only a month before the primary election during which candidates can accept such donations from these groups.

From an incumbent protection standpoint, it permits incumbents to raise money through the remainder of the year from political action committees, but leaves challengers unable to do so until one month before the primary election. There is also another insidious incumbent protection mechanism with this scheme: political action committees are permitted to donate to campaign caucus committees, run by the leadership of the Democratic and Republican parties during the session, which in turn can contribute unlimited amounts, year-round, to incumbent legislators.

Equally offensive to the Constitution is K.R.S. 6.811(5), which prohibits legislative agents from engaging in pure speech – namely soliciting others (even their own spouses) from donating to a legislative race. The statute also prohibits legislative agents from serving as a campaign treasurer or from controlling or delivering donations.

Petitioners likewise raised appropriate challenges to K.R.S. 6.751, which involves a vague gift ban; K.R.S. 6.767(2), which involves a year-round prohibition on campaign contributions from legislative agents; and K.R.S. 6.811, which involves reciprocal restrictions on legislative agents and their employers from making donations.

C. Factual Background

1. Facts concerning standing

Surprisingly, the Sixth Circuit held that Plaintiffs failed to proffer sufficient evidence to establish standing to challenge Kentucky's restrictions on

lobbyists at K.R.S. 6.811(4), K.R.S. 6.811(5), 6.811(6), and 6.811(7).[1]

The Honorable John Schickel ("Senator Schickel") is the incumbent Kentucky State Senator for the 11th Senate District. [Decl. Schickel, RE#63-2, PAGEID#3236, ¶2]. In connection with his candidacy for office, he desires to engage in campaign activities that are currently prohibited by the statutes challenged in this action. [*Id.*, ¶3].

Senator Schickel desires to attend certain holiday parties hosted by lobbyists who are longtime friends of his; however, as a practical matter, he fears doing so under the new laws, particularly where the parties offer entertainment, even something that would be considered to have a minor value. [*Id.*, PAGEID#3242-3243, ¶25]. He would also accept a cup of coffee, or a soda, or other *de minimis* items from lobbyists, but cannot do so because of the legislation. [*Id.*].

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[1] K.R.S. 6.811 reads in part: "(4) A legislative agent or employer shall not knowingly offer, give, or agree to give anything of value to a legislator, a candidate, or the spouse or child of a legislator or candidate.

(5) A legislative agent shall not serve as a campaign treasurer, and shall not directly solicit, control, or deliver a campaign contribution, for a candidate or legislator.

(6) A legislative agent shall not make a campaign contribution to a legislator, a candidate, or his or her campaign committee.

(7) During a regular session of the General Assembly, an employer of a legislative agent shall not make a campaign contribution to a legislator, candidate, campaign committee for a legislator or candidate, or caucus campaign committee."

Senator Schickel is a retired law enforcement officer. Under the challenged legislation, he was prohibited from taking donations from employers of lobbyists in the law enforcement arena. These include the Kentucky State Lodge Fraternal Order of Police, Inc., the Kentucky Fire Fighters Association, and the National Rifle Association of America. [*Id.*, PAGEID#3243, ¶26]. In terms of lobbyist donations, Senator Schickel would accept, if not prohibited, donations from certain registered lobbyists, including those lobbying on behalf of the employers such as the Fraternal Order of Police. [*Id.*, ¶27].

He would attend holiday parties of his longstanding friends, some of whom are lobbyists or employ lobbyists. [*Id.*, ¶28]. And, to conform to social norms and for ease of interactions, he would accept a cup of coffee, soda, or other *de minimis* items from lobbyists in the Capitol's cafeteria, just as he would from a constituent who came to him with concerns. [*Id.*]. Incidentally, he used to take turns buying the soda or cup of coffee with both constituents and lobbyists who would meet with him in the Capitol. [*Id.*]. Since the 2014 changes, he only does so with constituents. [*Id.*]. Let us be clear: he engaged in these activities before the ban, and then stopped after and because of the ban, and the evidence was unrefuted on that point. [*Id.*].

Senator Schickel testified that these provisions fundamentally restrict his interactions with lobbyists. [*Id.*, PAGEID#3244, ¶29]. Prior to the 2014 changes, he would not hesitate to take a meeting at a lobbyist's office; now he fears doing so, since sitting in an air-conditioned office could be considered "something of

value," just as receiving a piece of paper to take notes on could be considered "something of value." [*Id.*]. In short, what used to be items valued at a *de minimis* amount, which are commonly associated in everyday interaction, are now banned. [*Id.*]. The lobbyists represent Senator Schickel's constituents, who he has the duty to represent on an informed basis. [*Id.*]. Lobbyists, for better or worse, are excellent sources of information and are experts in certain industries and fields. [*Id.*]. The information provided by them benefits Senator Schickel's constituents. [*Id.*].

Prior to the 2014 statutory changes, Senator Schickel did not did not have any problem accepting a piece of paper, a bottle of water, or a soda, since these minor items would be reported, and it never struck him as a problem to publicly report a piece of paper, a cup of coffee, or a soda, since no reasonable person believes there is any *quid pro quo* corruption, or its appearance, with receiving a piece of paper, cup of coffee, or a soda. [*Id.*, ¶30]. Senator Schickel never had a constituent take issue with him over a free piece of paper, cup of coffee, or soda. [*Id.*].

It is hard to imagine any legitimate governmental interest in regulating these activities and none was proffered. KLEC's testimony before the legislature for enacting the "no cup of coffee" provision was that it was intended to placate certain legislators, who liked to attend group events with lobbyists, from being surprised after-the-fact when they sometimes learned the event they were invited to was not a qualifying group event. Therefore, their attendance would have to be reported and this was politically embarrassing. [*Id.*,

¶31]. So, rather than advancing constituent transparency, the "no cup of coffee rule" was passed to defeat transparency. [*Id.*].

Meanwhile, it is common knowledge that group events with legislative agents/lobbyists and their employers have no caps, and legislators frequently attend group events hosted by lobbyists and their employers. [*Id.*, PAGEID#3245, ¶32].

If permitted, Senator Schickel would have a legislative agent serve as his campaign treasurer, and he is aware of legislative agents who would like to solicit others to make campaign donations to him, but cannot under the current legislative ethics scheme. [*Id.*, ¶33].

No *quid pro quo* corruption, or its appearance, led to the passage of the 2014 legislative changes. Although a sexual harassment scandal in the Kentucky House was allegedly a main motivator for the changes, that scandal, of course, had nothing to do with lobbyists, their employers, or campaign donations. [*Id.*, ¶35].

Petitioner David Watson was a candidate for the office of State Representative for Kentucky's 6th House District in 2016. [Decl. Watson, RE#63-3, PAGEID#3247, ¶2]. He likewise sought to engage in conduct and activities prohibited by the challenged legislation. [*Id.* at PAGEID#3247, 3256-3257].

Ultimately, the Sixth Circuit held that the unrebutted testimony of Senator Schickel that he would have accepted such materials and engaged in such prohibited activity, but for the statute, and was

aware of people who would donate if they could (and further evidence that these activities occurred before the legislative changes but then stopped after the changes) was not sufficient to establish standing. Instead, the Sixth Circuit held he needed to come forward with evidence, in the form of affidavits, from these other person(s) indicating their intent to do so, even though it was unrebutted that the activities occurred frequently before the challenged legislation was passed and stopped afterwards.

In a similar vein, Senator Schickel testified he would have attended holiday parties he was invited to by lobbyists but-for the ban in question. [PAGEID#3243-3245]. Those invitations reveal an intent by lobbyists to invite him. He testified to previously accepting a cup of coffee and materials prior to the legislative changes, which, because of the statutory change, no longer occurs. [PAGEID#3244]. Senator Schickel testified that these provisions fundamentally restrict his interactions with lobbyists. [PAGEID#3244].

2. Facts concerning the challenged statutes

In 2014, Kentucky substantially modified its legislative ethics and campaign finance laws. These 2014 changes, which generated the claims below: (i) implemented an in-session ban on political action committee campaign donations; (ii) implemented an in-session ban on employer campaign donations; and (iii) removed a $100 de minimis exemption regarding gifts.

K.R.S. 6.767(1) prohibits the receipt by a legislator, or a candidate for the legislature, of a campaign contribution from a legislative agent (*i.e.*, a lobbyist), in any amount, at any time, to any legislator or candidate for the legislature. This limitation applies not only to donations for legislative races, but also to donations for any other race in which the legislator desires to run (*i.e.*, for Governor, Lt. Governor, or Attorney General), which places legislators who run for these offices at a competitive disadvantage. K.R.S. 6.811(6) is the reciprocal provision to K.R.S. 6.767(1), and prohibits the legislative agent from making these campaign contributions.

K.R.S. 6.767(2) prohibits the receipt of a campaign contribution from an employer of a legislative agent (*i.e.*, a lobbyist), as well as permanent committees (i.e. Political Action Committees or "PACS"), when the legislature is in session. K.R.S. 6.811(7) contains a reciprocal prohibition on the employers of legislative agents from making these same contributions when the legislature is in session.

K.R.S. 6.811(4) and K.R.S. 6.751(2) prohibit the gifting to a legislator of "anything of value" from a legislative agent or its employer, at any time, for any reason, regardless of the circumstances. As noted, a 2014 amendment to these provisions removed a *de minimis* exception from the definition of "anything of value" under K.R.S. 6.611, which previously covered entertainment, every day interactions, or even a cup of coffee.

The 2014 amendment made other substantial changes from the provisions that had been in place for approximately 20 years, thus prompting this lawsuit.

Finally, K.R.S. 6.811(5) prohibits a legislative agent from serving as a campaign treasurer and from soliciting, controlling, or delivering a campaign contribution to a legislator, candidate, or campaign committee.

Petitioners unequivocally demonstrated below that the 2014 changes to the Kentucky ethics legislation, including removal of the *de minimis* exception to the gift ban, were enacted not to discourage corruption, but rather to mask gifts of substantial value by confining them to group events – events where legislators were wined and dined at great expense – none of which was reported. This was in contrast to the previous legislative scheme requiring individual reporting and disclosure. [PAGEID#704-705, 773-775, 808-809, 876-882, 1381-1382, 1394-1402].

3. BOPTROT

In 1993, fifteen former and, at the time, current members of the Kentucky legislature were tried and convicted in federal court for selling their votes and engaging in other unlawful official actions. [Depo.Schaaf, RE#47-1, PAGEID #707-708]. This is commonly known as Operation BOPTROT, which stood for the Business Organizations and Professions ("BOP") Committees in the Kentucky House and Kentucky Senate, where the illicit activity occurred. [*Id.*, PAGEID #896]. The scandal involved the harness racing industry. [*Id.*, PAGEID#896-897]. A number of

legislators were convicted as well as an aid to the Speaker of the House, the nephew of the Governor, and one lobbyist. [*Id. See also* Exhibit 54, RE#47-57, PAGEID#1425-1427].

Today, the same committees exist and they are known as the Licensing and Occupations Committees. [*Id.*, PAGEID#700].

The BOPTROT scandal did not involve the entire harness racing industry or every lobbyist. [*Id.*, PAGEID#897-898]. It involved a handful of lobbyists, flat out bribes to Senators, and illegal cash contributions that were not reported. [*Id.*, PAGEID#897-900].

In response, the legislature passed comprehensive ethics reform in 1994, which included the $100 exemption on *de minimis* gifts, and this, the executive director of the Kentucky Legislative Ethics Commission, John Schaaf testified, changed the culture in Frankfort. [*Id.*, PAGEID#901].

Since BOPTROT and the enactment of comprehensive ethics, Kentucky has not suffered any recurrence of these sorts of ethics issues. [*Id.*, PAGEID#712-713].

Finally, while Senator Schickel is aware of the BOPTROT scandal and its underlying facts, the scandal did not involve publicly disclosed lobbyists' campaign donations, lobbyists soliciting others for campaign donations, employers of lobbyists making campaign donations, or *de minimis* (i.e. less than $100) gifts. [PAGEID#3245, ¶34]. Rather, BOPTROT involved blatant *quid pro quo* corruption among certain

members of the harness racing industry, their lobbyists, and members of the executive and legislative branches. [*Id.*]. The 2014 legislative changes being challenged by Senator Schickel have nothing to do with BOPTROT. [*Id.*].

4. The gift ban

K.R.S. 6.811(4) and K.R.S. 6.751(2) prohibit the gifting or receipt of "anything of value" to a legislator, from a legislative agent or its employer, at any time, regardless of the circumstances, and for any reason. A 2014 amendment removed the *de minimis* exception from the definition of "anything of value" under K.R.S. 6.611. Prior to 2014, there was a $100 exception – allowing minor items, not totaling over $100 per year. That removal is the heart of this case in terms of the challenge on the gift ban.

Kentucky has a number of provisions in its Ethics Code, unchanged since 1994, and unchallenged in this matter, that prohibit *quid pro quo* corruption, such as K.R.S. 6.761, which prohibits use of public office for private gain. [Depo. Schaaf, RE#47-1, PAGEID#658-660]. Another is a provision prohibiting the acceptance of gifts or compensation in exchange for performance of legislative duties at K.R.S. 6.751. [*Id.*, PAGEID#660-663]. None of those provisions are challenged.

But the changes to K.R.S. 6.611 regarding "anything of value" now include within their scope a cup of coffee at the cafeteria lobby, or even a glass of tap water at a lobbyist's office. [*Id.*, PAGEID#663-667]. Meanwhile, it permits certificates, tokens, commemorative items of less than $150 and

promotional items of less than $50. [*Id.*, PAGEID#677]. And there is no limit on the number of such items that can be received. [*Id.*].

At the same time, the law also leaves a giant gap through which chicanery flows. It permits "group events" to which all members of the Kentucky House or Senate are invited (or any Caucus or Committee of legislators), and exempts from the challenged definition all food, drink or entertainment at these events, no matter the cost. [*Id.*, PAGEID#672-673].

A lobbyist can invite all members of the General Assembly to a University of Kentucky basketball game and, importantly, there is no requirement to report the number of legislators who attended, much less identify the legislators who attended. [*Id.*, PAGEID#678]. These group events likewise include out of state conferences where the very pricey food and entertainment does not have to be reported. [*Id.*, PAGEID#679-680].

Not surprisingly, these group events resulted in significant expenditures: $248,000 in 2008, averaging close to $1,800 per legislator (taking the cost divided by the 138 legislators in Kentucky – not all legislators attended all events). [*Id.*, PAGEID#691-692]. In the same period in 2008, there was only $434 spent on food/beverages for individual legislators, a very small fraction of what was spent on group events. [*Id.*, PAGEID#692-693].

In the spring of 2009, these group events included $63,950 on receptions, meals, drinks, and entertainment for groups of legislators, while individual spending was only $33.60. [*Id.*,

PAGEID#694-695]. Again, the Defendants below and, more importantly, the public had, and still have, no idea which legislators attended these group events. [*Id.*].

Defendants below attempted to distinguish between the individual interaction up to $100 (which was reported in terms of which legislators and which lobbyists were involved) and these unreported group events, by stating that it "ensures everyone was treated the same" versus "one on one time with no one around." [*Id.*, PAGEID#697-699]. Defendants admitted that private one on one interactions still occur at these group events, including opportunities for lobbyists to speak with legislators in the hall. [*Id.*].

Prior to 2014, the receipt of the cup of coffee was required to be reported, causing the public to know who received the cup of coffee from whom. [*Id.*, PAGEID#699]. Now, and assuming a cup of coffee is ever a problem, these group events provide no such detail. [*Id.*].

Equally problematic, today, the successor to the BOPTROT committees, the Licensing & Occupations Committees, can be treated to group events with expensive food, wine, and entertainment with lobbyists, and as long as the lobbyists invite everyone on the committee, there is no transparency on who was there. [*Id.*, PAGEID#700].

The following testimony summed up this issue:

Q So if I'm a lobbyist and I invite everybody to an expensive event at Buffalo Trace, wine and dine everybody there, get everybody liquored up there, show everybody a good time there, spend hundreds of dollars on each legislator that shows up there, that doesn't give rise to appearance of an issue but a $3 cup of Coke does?

A Well, again, it depends on who is looking at the issue. A legislator's opponent, for example, in the next election could certainly look at that and ask the legislator if he or she attended that event, and if they did, that may become an issue with the constituents of the legislator.

Q But the constituents don't know, couldn't do an open records request and figure out whether or not that legislator attended that group event, right?

A That's correct.

Q But would know if that legislator accepted the $3 cup of coffee from the lobbyist on the individual spend; is that fair?

> A Under the old law if it was reported, they would know, yes.

[*Id.*, PAGEID#704-705].

Also not surprisingly, and by their own testimony, Defendants acknowledged that the pre-2014 law was effective at preventing *quid pro quo* corruption and its appearance. [*Id.*, 87-94, Exhibits 22-23]. Despite this, defendants indicated that there was some desire to improve the "bright line" between legislators and lobbyists, while also acknowledging there are no examples of a $5 cup of coffee leading to a scandal. [*Id.*, PAGEID#716-717, 721]. Or, as Schaaf said, "[n]ow, yes, you might be hard-pressed to find a story that said, oh, for a $33 dinner I got an official legislative action, nobody is going to say that. And no legislator is going to say I did something because somebody gave me a $33 dinner." [*Id.*, PAGEID#717].

Again – these group events were and are significant, and the record is replete with tens of thousands being spent on a single group event. [*Id.*, PAGEID#727-732, 740-741, Exhibit 24, RE#47-27, PAGEID#1222-1223].

Defendants' reports reveal $148,000 spent on these events in 2010, acknowledge that they are reported because they are "part of the lobbying process," and are the "second largest expenditure in lobbying," and that these events are where "relationships are built." [*Id.*, PAGEID#735-736]. To this day, group events still occur out of state. [*Id.*, PAGEID#738]. Again, these group events totaled hundreds of thousands of dollars per year in 2011, 2012, and 2014. [*Id.*, PAGEID#743-744, 753, 766-781].

Defendants were asked about Senator Schickel's desire to attend holiday parties. Defendants answered that he could do so, if he paid his own way. [*Id.*, PAGEID#748, 916]. When asked how that would occur, there was an acknowledgement that the Senator would need to track what he consumed, figure out the cost of entertainment, and then calculate the value. [*Id.*, PAGEID#748-751]. There is no guessing, or approximating – the requirement is strict compliance, which means calculating the "full cost" of any food or entertainment. [*Id.*]. Defendants conceded that Senator Schickel could still attend, but could not even receive a glass of water without making sure he calculated its true value and paid for it. [*Id.*, PAGEID#747-753, 831-833] (strict accounting and tracking).

While Defendants claimed the desire was to create a bright line, we later found out the truth:

> **Q If they attend. And to be clear, my understanding is where the rubber really met the road on this de minimis hundred dollar exemption, I call it the de minimis exemption because it was a hundred dollars or less a year, so I just wanted to use that term, most of it that went on was a lobbyist catching a legislator in the capitol cafeteria and saying can you give me a couple minutes on a bill, here's a cup of coffee, and that was completely exempted, right? It had to be reported, but that was where this kind of -- if it was going to be**

used at all, that was where it kind of came up?

A No, no, not necessarily. Where it came up more often than that would be legislators attending an event and then finding out later when they received in the mail a copy of the report that a lobbyist was about to file and being surprised that they were going to have their name reported as attending an event because they were either under the perception that someone else was paying for it, not the lobbyist, or that it was an event to which everybody had been invited, so individual legislators would not be reported as having attended. But when they would receive in the mail, as the law requires, ten days before the report is filed the lobbyist or employer would send them a copy of the report, and it says Senator John Schickel received a $12 meal when he attended our meeting, and the legislator would call the Commission and say, why are they reporting this, and we would say, well, you'll have to ask them. It depends on who they invited to the event and who paid for it. So apparently if they're reporting it, they paid for it and they only invited you or they only invited you and a couple of other members, so they're required to let you know that your name is going into the record. And so it was this, I think this – it was somewhat troublesome I think to some members to find out that all of a sudden when they thought they were attending an event that everybody else was invited to, that they were going to be reported as being the only one there.

> **Q Or that they thought their name wasn't going to be reported, for instance, because it was a group event, and then find out that, oh, my gosh, I'm being reported as going to this lobbyist?**
>
> A Right. So it was a combination of factors. I would say I don't remember anybody talking about cups of coffee in the annex cafeteria. That wasn't exactly what the basis for this was.

[*Id.*, PAGEID#773-775].

In fact, Defendants twice provided testimony on the changes before the legislature. [*Id.*, PAGEID#876-882, Exhibits 43-44, RE#47-46, 47-7, PAGEID#1381-1382, 1394-1402]. There, Defendants acknowledged that Kentucky had some of the best ethics laws in the country, that *de minimis* individual spending was minimal (less than $7,500 total in 17 years), that there were no ethical issues with the exception, but there were "administrative problems" involving people who were allegedly reported as being at events but were not, or had not eaten anything. [*Id.*, PAGEID#876-879]. In 2012, Defendants acknowledged that the amount of individual spending "does not appear to be a problem." [*Id.*, PAGEID#881-882].

Said another way:

> **Q Were there any complaints that the Legislative Ethics Commission received in terms of the *de minimis*, the less than a hundred dollar a year exemptions prior to 2014 House Bill 28?**

> A Formal complaints, no. Complaints we heard by and large were from legislators, who, as I suggested earlier, were surprised by the fact that their names were being reported for some event that they didn't think was going to be reported that they attended or didn't attend in some cases.

[*Id.*, PAGEID#808-809].

Defendants attempted to offer three scandals as driving the desire to pass legislation in 2014. First, Representative Keith Hall: (i) failed to file disclosure forms; (ii) had a conflict of interest leading to a fine by Defendants; and (iii) tried to bribe a mine inspector not to report violations on some mines he operated. [*Id.*, PAGEID#868-871]. Ultimately, he was indicted. [*Id.*].

Second, Representative Waide stole money from his business and his partners to fund his campaign, resulting in an indictment and conviction. [*Id.*, PAGEID#868-869]. Finally, Representative John Arno sexually harassed female staffers in the Legislature, causing a significant scandal. [*Id.*, PAGEID#872-873]. None of these scandals involved food or drink under $100 and none involved Political Action Committee or employer donations during the session. [*Id.*, PAGEID#929].

As noted, the law in place prior to 2014 worked. In March 2012, Kentucky Ethics law received high praise. [*Id.*, PAGEID#768-768]. It was the subject of newspaper articles in 2012 noting that it avoided the investigations and scandals of other states. [*Id.*, PAGEID#780]. And, was one of the "most

comprehensive" in the nation. [*Id.*]. Indeed, Defendants noted the law had worked for 20 years. [*Id.*, PAGEID#796-797].

D. The Proceedings Below

Petitioners filed their case on August 24, 2015. [Verified Complaint, RE#1, PAGEID#1]. Subject matter jurisdiction over Petitioners' claims is grounded on 28 U.S.C. § 1331, 28 U.S.C. § 1343, and 42 U.S.C. § 1983. [*Id.*, PAGEID #7].

On December 6, 2017, the District Court granted summary judgment in part to Petitioners, and in part to Respondents, in a final judgment, in accordance with a prior Opinion the Court entered on June 8, 2017. (App.43-App.87). That same day, Respondents filed their Notice of Appeal from the trial court's final judgment to the Sixth Circuit Court of Appeals, and a few weeks later Petitioners filed a Notice of Cross Appeal. [Notice Appeal, RE #141, RE#143]. The Sixth Circuit had jurisdiction over Petitioners' appeal under 28 U.S.C. § 1292(a)(1).

The Opinion and Judgment of the Sixth Circuit Court of Appeals was entered on May 30, 2019. (App.1). A timely petition for rehearing en banc was filed with the Sixth Circuit on June 12, 2019. On July 11, 2019, the Sixth Circuit entered its order denying the petition for rehearing *en banc*. (App.88).

REASONS FOR GRANTING THE WRIT

A. The Sixth Circuit Court of Appeal's decision on standing contradicts decisions in sister circuits and this Court's precedent, and creates an impermissible burden to vindicate fundamental First Amendment Rights.

K.R.S. 6.811(5) provides, in relevant part: "A legislative agent shall not … directly solicit … a campaign contribution, for a candidate or legislator." This is a restriction on pure speech, subject to strict scrutiny. *Green Party of Conn. v. Garfield*, 616 F.3d 189 (2d Cir. 2010); *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656 (2015). Indeed, "a limit on the solicitation of otherwise permissible contributions prohibits exactly the kind of expressive activity that lies at the First Amendment's 'core.'" 616 F.3d at 207.

In fact, all of the Petitioners' challenges involve fundamental First Amendment challenges to the statutes in question.

The Sixth Circuit decision determined that Senator Schickel's testimony about his desire to have legislative agents solicit fundraising for him was not enough. [PAGEID#3243].

This Court has been clear, however, that in these pure speech contexts, standing is substantially lessened, going so far as to permit third parties to assert the rights of those whose rights have been restricted. *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 392 (1988); *Hill v. Colorado*, 530 U.S. 703, 732 (2000); *Broadrick v. Oklahoma*, 413 U.S. 601, 612

(1973); ("Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression."); *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947, 954-958 (1984); *Pestrak v. Ohio Elections Com.*, 926 F.2d 573, 576-577 (6th Cir. 1991).

In *Davis v. FEC*, 553 U.S. 724, 733 (2008), the Plaintiff was found to have standing where he presented "an injury that is concrete, particularized, and actual or imminent, fairly traceable to the defendant's challenged behavior, and likely to be redressed by a favorable ruling." This Court observed that "the injury required for standing need not be actualized." *Id.* at 734. In fact, "[a] plaintiff may challenge the prospective operation of a statute that presents a realistic and impending threat of direct injury." *Id.*

Other circuit decisions are in accord with this holding. *Nat'l Fed'n of the Blind of Tex., Inc. v. Abbott*, 647 F.3d 202, 209-210 (5th Cir. 2011); *FF Cosmetics FL, Inc. v. City of Miami Beach*, 866 F.3d 1290, 1303 (11th Cir. 2017); *Shays v. FEC*, 414 F.3d 76, 83-95 (D.C. Cir. 2005) (candidates had standing to challenge regulations that imposed restrictions and permitted certain contributions from third parties); *Catholic Leadership Coalition of Tex. v. Reisman*, 764 F.3d 409 (5th Cir. 2014) (considering challenges by both candidates and contributors); *see also Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 36-37 (1st Cir. 1993) (holding

that where state law created an "impact on the strategy and conduct of an office-seeker's political campaign constitutes an injury of a kind sufficient to confer standing"). And, recently, in *Libertarian Nat'l Comm., Inc. v. FEC*, 924 F.3d 533, 537-539 (DC. Cir. 2019), the D.C. Circuit found that a political party had standing to challenge contribution limits that were operative on donors; there, as here, the party was not the donor but the donee, and there, as here, the law imposed limits on the donor, not the donee, and there, as here, the law impacted an associational interest.

The Sixth Circuit's decision, through its newly contrived standing requirements places persons such as Petitioners in an impossible position: the Sixth Circuit says they must come forward with declarations from legislative agents and employers who will say that they would donate and engage in activities prohibited by statutes (the same activities they used to engage in before the law changed), or have the case dismissed. The problem is that such persons are highly regulated by Defendants, particularly the legislative agents, who are subject to criminal sanctions – felony convictions – for even routine violations. K.R.S. 6.811(11). It should be no surprise that these persons may be reluctant to go on the record for fear of retaliation.

From a practical perspective, this new standing requirement means that even though the evidence shows an injury that is concrete, particularized, and actual or imminent, fairly traceable to Defendants' challenged behavior, and likely to be redressed by a favorable ruling, and even though it is supported with unrefuted evidence that prior to the statute, activities

occurred that are now banned, more is now apparently needed: obtain the declaration of those in the heavily regulated industry, and get them to go "on the record" to establish standing. What suffers in this scenario, besides Petitioners, is the First Amendment itself.

Thus, the decision below meets several of the Rule 10(a) and (c) considerations for the grant of certiorari, namely that the Sixth Circuit's decision below conflicts with decisions of other United States Courts of Appeal in the same important matter, and it has so far departed from the accepted and usual course of judicial proceedings to warrant the exercise of this Court's supervisory power, and that the Sixth Circuit's decision decided an important federal question in a way that conflicts with relevant decisions of this Court.

At a minimum, the decision regarding standing to challenge K.R.S. 6.811(5)'s solicitation ban was contrary to well established case law from this Court, and from other Circuits, on standing to challenge pure speech restrictions. Certiorari should be granted on the standing question.

B. This case presents an appropriate vehicle and opportunity to revisit the level of scrutiny applicable in First Amendment ethics/campaign finance cases.

In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court adopted strict scrutiny as the standard for challenges to legislation regulating campaign expenditures, and "closely drawn" scrutiny for legislation regulating campaign contributions. In the years since *Buckley*, the doctrinal basis for distinguishing between

contributions and expenditures has eroded significantly.

In *Randall v. Sorrell*, 548 U.S. 230 (2006) three justices expressed the view that *Buckley* should be overruled and strict scrutiny applied to align 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 core of the First Amendment." *Id.* at 273.

Applying strict scrutiny to laws like Kentucky's also avoids 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* "closely drawn" standard, the government has more leeway to curtail core political speech than any of these less valued 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." *Buckley*, 424 U.S. at 29. Whatever the merits of the prophylactic approach *Buckley* permitted at the time, in the years since, neither Kentucky nor any other state government has established that campaign contribution limits actually yield the benefits attributed to them by the *Buckley* Court.

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.").

Given these practical and doctrinal erosions to *Buckley*'s rationale, there is no compelling *stare decisis* reason for continuing to apply its distinction between limits on contributions and expenditures. In *Janus v. AFSCME*, this 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, 2478–2482 (2018). The *Buckley* framework does not survive scrutiny under any of 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

"wordgames," 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.

Instead of applying the *Buckley* distinction and expounding on it in a clear manner, this Court has slowly inched toward what seems to be an inevitable result: overturning *Buckley*.

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. 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.

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 v. FEC*, 558 U.S. 310, 378 (2010) (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.

This case presents a unique vehicle to re-examine the *Buckley* framework: there are several different types of restrictions at issue (including "pure speech"

restrictions), the laws at issue burden particular persons and parties based on their profession and their exercise of fundamental rights (e.g. forming groups to associate together to engage in political action committees to effect governmental change, or hiring persons to petition the government for redress of grievances), and the issue regarding overturning *Buckley* was raised in this case from the filing of the complaint to each and every pleading filed in the case.

Thus, the decision below meets several of the Rule 10(a) and (c) considerations for the grant of certiorari.

C. Because the interests and rights at issue implicate fundamental rights, this case also presents a unique opportunity to clarify the level of scrutiny applicable to campaign speech restrictions and combined legislative ethics and campaign finance restrictions, which violate fundamental rights and make impermissible classifications based on exercise of fundamental rights.

In this matter, the Sixth Circuit determined that Equal Protection, and its reading of *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990), *overruled by Citizens United v. FEC*, 558 U.S. 310, 365 (2010), suggested that something other than strict scrutiny applied, even though fundamental rights were implicated. To reach this conclusion, the Sixth Circuit relied on *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 879–880 (8th Cir. 2012) (*en banc*); *Riddle v. Hickenlooper*, 742 F.3d 922, 928 n.4

(10th Cir. 2014); and *Wagner v. FEC*, 793 F.3d 1, 14 (D.C. Cir. 2015).

This Court's jurisprudence, however, commands that strict scrutiny be applied in the context of fundamental rights. Without question, the right to lobby is protected in the First Amendment's right to petition government. *Autor v. Pritzker*, 740 F.3d 176, 182 (D.C. Cir. 2015); *Liberty Lobby, Inc. v. Pearson*, 390 F.2d 489, 491 (D.C. Cir. 1968) (holding lobbying is protected by the right to petition government); *see also Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 801 (1988) (holding that First Amendment rights are "not lost merely because compensation is received").

This was the distinction made by the Tenth Circuit in *Riddle*, when it correctly applied strict scrutiny based on impairment of fundamental rights. *Riddle,* 742 F.3d at 927-928. Likewise, strict scrutiny should have been applied here, because, again, fundamental rights were at stake. *Id.* Rather than supporting the Sixth Circuit's decision, *Riddle* conflicts with it, creating a circuit split.

Wagner, 793 F.3d 1, 14, was equally distinguishable, as it involved restrictions on government contractors, and the *Wagner* Court noted that government employee speech has historically been curtailed. Here, there is no analogy that can possibly be drawn between *Wagner* and the Political Action Committee restriction, in particular. In terms of employers of legislative agents and legislative agents themselves, they are not government contractors looking to receive money from the government in

exchange for their services. Rather, they are groups of individuals who band together to effect change in government, and put financial resources together to do so.

The Court below also relied on *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864 (8th Cir. 2012), in which the Eighth Circuit cited as its authority and rationale this Court's decision in *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 680 (1990), which was overruled, and a different rationale applied, in *Citizens United v. FEC*, 558 U.S. 310 (2010). The Sixth Circuit's reliance on a sister circuit's decision, the rationale of which was rejected by this Court, calls for review by this Court.

Courts typically apply a strict scrutiny analysis where the discriminatory treatment was based on the person's exercise of fundamental rights. *Windsor v. United States*, 699 F.3d 169, 196 (2d Cir. 2012), *aff'd*, 570 U.S. 744 (2013). Fundamental rights include the freedom of speech guaranteed by the First Amendment, especially speech directed at "the structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes." *Mills v. State of Ala.*, 384 U.S. 214, 218-19 (1966).

Here, the classifications at issue all turn on the exercise of fundamental rights. First, the restrictions completely ban political action committee donations to legislators in the three or four months preceding the primary election in Kentucky, severely impacting the right to association, while simultaneously permitting those groups to make donations through leadership-

controlled campaign caucus committees that can then donate in unlimited amounts to the legislators. *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 … while placing none on individuals acting alone, is clearly a restraint on the right of association.")

The remaining restrictions place bans on contributors based on their exercise of the fundamental right to petition and lobby. Those not engaging in those activities are not limited. While those that do engage in protected activities suffer severe limitations.

The Sixth Circuit justified the speaker-identity issue as furthering the government's proffered anti-corruption interest, and thus found it permissible. But, a proffered public interest, even a laudatory one, has never been sufficient justification for the restriction, or actual elimination, of speech based solely on the identity of the speaker. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 563-566 (2011); *Citizens United v. FEC*, 558 U.S. at 365. Here, the speech rights associated with donations by groups of persons (PACs) and employers of lobbyists are eliminated during the legislative session, while those of lobbyists are eliminated all the time. "By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice." *Citizens United*, 558 U.S. at 340-341. "We find no basis for the proposition that, in the

context of political speech, the Government may impose restrictions on certain disfavored speakers." *Id.* at 342. Finding such distinctions impermissible, the *Citizens United* Court applied strict scrutiny, and invalidated the challenged law. The same should have occurred here.

Again, the decision below meets several of the Rule 10(a) and (c) considerations for the grant of certiorari.

D. Because this case presents a unique opportunity to resolve the split of authority between federal and state courts that have addressed similar issues, certiorari is appropriately granted in this case

Even if "closely drawn" scrutiny is utilized, state courts and other federal courts have split on the issues and questions resolved by the Sixth Circuit in this case, warranting review to resolve these issues by this Court.

Many cases have suggested that even in-session bans on lobbyist contributions are unconstitutional. *State v. Dodd*, 561 So.2d 263, 264-266 (Fla. 1990) (holding unconstitutional law banning candidates for legislative or statewide office from soliciting or accepting any campaign contributions during regular or special session of the state legislature); *Trout v. State*, 231 S.W.3d 140, 147-148 (Mo. 2007) (in-session contribution ban unconstitutional where, as is the case here, it also applied to legislators running for statewide office); *Winborne v. Easley*, 136 N.C. App. 191, 523 S.E.2d 149, 154 (1999) (unconstitutional in-session ban); *Shrink Mo. Gov't PAC v. Maupin*, 922 F. Supp. 1413, 1416-1425 (E.D. Mo. 1996) (striking in-session

ban on contributions); *Emison v. Catalano*, 951 F. Supp. 714, 719 (E.D. Tenn.1996) (striking in-session ban on contributions); *Arkansas Right to Life State PAC v. Butler*, 29 F. Supp. 2d 540, 544-545 (W.D. Ark 1998) (striking in-session ban on contributions).

These decisions demonstrate that the issues presented in this case are the subject of a substantial circuit and state court split, warranting review by this Court.

Importantly, three of this Court's recent pronouncements suggest that this Court has changed how these cases are to be analyzed, even where closely drawn scrutiny is applied. *Citizens United v. FEC*, 558 U.S. 310, 365 (2010); *McCutcheon v. FEC*, 572 U.S. 185, 199 (2014); and *McDonnell v. United States*, 136 S. Ct. 2355 (2016). *Citizens United* teaches that speaker-based distinctions call for greater scrutiny. *McCutcheon* instructs that bans on contributions and gifts, such as those at issue in this case, cannot stand if there exists less restrictive means of furthering the government's interest, including furthering such interests through disclosure. *Id.*, 572 U.S. at 223-224.

McDonnell teaches that ingratiation and access – which is what is at issue in this case – are not *quid pro quo* corruption or its appearance. *Id.*, 136 S. Ct. at 2371-2372. The *McDonnell* Court also found broadly construed gift and bribery bans, such as those here, "raise significant constitutional concerns." *Id.*, 136 S. Ct. at 2372.

While Defedants raised a decades-old issue with the BOPTROT scandal and three other unrelated scandals,

it did not demonstrate any issues with employers of lobbyists generally, and did not demonstrate any issues with political action committees at all. It made no showing that lesser measures would not have furthered the state's interests, such as disclosure or even limits on donations.

Finally, some mention of the "gift ban" is in order. The enforcer of this statute could not tell us what was banned or what was not: maybe a glass of water, maybe attending an event where music was playing and was paid for, maybe obtaining safety equipment for a factory tour. [Depo. Schaaf, RE#47-1, PAGEID#666-671].

A law is vague if it "fails to provide fair notice to those to whom it is directed." *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1048 (1991) (internal quotation marks omitted). To determine whether a law provides such notice, the test in most contexts is whether a law "give[s] the person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982).

In the First Amendment context, however, the "standards of permissible statutory vagueness" are even stricter. *NAACP v. Button*, 371 U.S. 415, 433 (1963). The freedom of speech is "delicate and vulnerable, as well as supremely precious in our society . . . [and] the threat of sanctions may deter [speech] almost as potently as the actual application of sanctions." *Id.*

Laws implicate more intense scrutiny for vagueness purposes if they chill First Amendment rights. *See Houston v. Hill*, 482 U.S. 451 (1987). "The vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech." *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 871-872 (1997). Such is the case here.

Perhaps most importantly, this Court has already indicated similar legislation, in a similar setting, raises significant First Amendment concerns. *McDonnell*, 136 S. Ct. 2355, 2367.

Again, the decision below meets several of the Rule 10(a) and (c) considerations for the grant of certiorari.

E. At a minimum, this Court should hold this decision for the decision in *Thompson v. Hebdon*, Case No. 19-122

Similar issues regarding the level of scrutiny and continued viability of *Buckley* and its application have been raised in *Thompson v. Hebdon*, Case No. 19-122 (cert. pending). As such, if this Court determines not to accept certiorari of this case on its own but accepts *Thompson*, Petitioners respectfully request that the disposition be held pending the outcome in *Thompson*, and, in that event, the decision below be vacated and this case remanded following the decision in that case.

CONCLUSION

For all of the foregoing reasons, Petitioners respectfully request that their petition be granted and that a writ of certiorari issue for the questions presented.

Respectfully submitted,

Thomas B. Bruns
Bruns, Connell,
Vollmer, Armstrong
4750 Ashwood Drive
Suite 200
Cincinnati, OH 45241
(513) 326-0274
tbruns@bcvalaw.com

Robert A. Winter, Jr.
Counsel of Record
Law Office of
Robert A. Winter, Jr.
P.O. Box 175883
Fort Mitchell, KY 41017-5883
(859) 250-3337
robertawinterjr@gmail.com

Christopher Wiest
Chris Wiest,
Attorney at Law, PLLC
25 Town Center Boulevard
Suite 104
Crestview Hills, KY 41017
(513)257-1895
chris@cwiestlaw.com

Counsel for Petitioners