No. 19-458

In the Supreme Court of the United States

JOHN SCHICKEL and DAVID WATSON,
Petitioners,

v.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether state legislative ethics provisions that (i) prohibit legislators from accepting gifts from lobbyists; (ii) prohibit legislators, legislative candidates, or their campaign committees from accepting campaign donations from lobbyists; and (iii) temporarily restrict legislative candidates from accepting campaign contributions from employers of lobbyists and PACs during the legislature's regular session, violate the First and Fourteenth Amendments?

Whether a state legislator and state legislative candidate have standing to challenge legislative ethics restrictions applicable to the conduct of lobbyists and their employers?

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STATEMENT OF THE CASE

Petitioners mischaracterize this case as a challenge to campaign finance limits. Rather, as Petitioners recognized in their brief before the Sixth Circuit, this case concerns constitutional challenges to "certain provisions of Kentucky's Legislative Ethics regime . . . ." (Case 17-6456, Doc. 36, p. 10.) In particular, this case concerns legislative ethics and lobbying restrictions found in the Commonwealth of Kentucky's ethics code.

The Kentucky General Assembly, like all other state legislatures, has the ability to regulate the conduct of its members. KY. CONST. §§ 38, 39, and 43. Kentucky's Code of Legislative Ethics ("Ethics Code") is codified at KRS 6.601 to 6.849. 1993 Ky. Acts 1st Extra Sess. 4. The Ethics Code established the Kentucky Legislative Ethics Commission ("KLEC") as an agency[1] of the

[1] The Kentucky Legislative Ethics Commission was established by the Kentucky General Assembly as "an independent authority and . . . agency of the legislative department of state government." KRS 6.651(1). The Commission members may be removed only by the elected leadership of the Kentucky General Assembly, and only for cause. KRS 6.651(8). The Commission is part and parcel of the legislative branch and forms an essential part of the rules and sanctioning process for members of the General Assembly. Upon the Commission's investigation and recommendation, the House or Senate may take action to censure or expel a member, which is a plenary function exclusively grounded in the state legislative body. As noted by the United States Supreme Court in a similar case about the Kentucky General Assembly's power to decide a contest action for Kentucky's Governor, an action such as this, whether it is to decide the "elections, qualifications, and returns" of its members, or to sanction a member, is both inherently legislative in nature and political. *Taylor v. Beckham*, 178 U.S.

legislative branch to enforce its provisions. *Id.* at 23-24.

The General Assembly enacted the Ethics Code in 1993 in response to the infamous Operation BOPTROT. (KLEC 30(b)(6) Dep. 40: 8-12, Doc. 47-1 ("KLEC Dep."), Page ID # 659.)[2] In *United States v. Blandford*, 33 F.3d 685 (6th Cir. 1994), the court described the BOPTROT investigation as follows:

> This case arises out of an FBI investigation into public corruption in Kentucky. The investigation, dubbed "Operation BOPTROT," focused on certain members of the Kentucky General Assembly who were suspected of extorting cash payments in exchange for assurances that they would take a particular stance on legislation pertaining to the horse racing industry. Initiated in September 1990, Operation BOPTROT ultimately ensnared several public officials, including Donald J.

548, 571 (1900) ("And where controversies over the election of state officers have reached the state courts in the manner provided by, and been there determined in accordance with, the state Constitutions and laws, the cases must necessarily be rare in which the interference of this court can properly be invoked.").

[2] *See also Assoc. Indus. of Ky. v. Commonwealth,* 912 S.W.2d 947, 950 (Ky. 1995) ("Kentucky's public scandal involving the indictment and conviction of legislators, former legislators, and lobbyists for criminal misconduct prompted/hastened the enactment of Senate Bill 7 during . . . 1993. Such legislation made changes to KRS Chapters 6 and 11A which are referred to as the 'Kentucky Code of Legislative Ethics' and the 'Executive Branch Code of Ethics.'").

Blandford, Speaker of Kentucky's House of Representatives.

Id. at 688. *See generally id.* at 688-93 (summarizing the events leading to the conviction of Blandford).[3]

The Ethics Code survived an early constitutional challenge. In upholding the Code, the Kentucky Supreme Court stated, "The Commonwealth of Kentucky has a compelling interest in insuring the proper operation of a democratic government and deterring corruption, as well as the appearance of corruption." *Assoc. Indus. of Ky. v. Commonwealth,* 912 S.W.2d 947, 953 (Ky. 1995). The Court continued, "[t]o determine otherwise would be a denial, in large measure, to the legislature of the power of self-protection." *Id.* at 954.

The aim of the Ethics Code is to preserve legislative independence and impartiality, maintain public confidence in the integrity of its government and public officials, and prevent actual and apparent *quid pro quo* corruption. KRS 6.606. In keeping with these purposes, the Kentucky General Assembly amended its Ethics Code in 2014. The amendments added restrictions on contributions by employers of lobbyists to legislative candidates during the legislature's regular session and eliminated a confusing, *de minimis* limitation on gifts by lobbyists.

Petitioners here include a sitting state Senator who was the **sole dissent** to the 2014 amendments to the

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[3] *See also* KLEC Dep. Exhs. 53-54, Docs. 47-56, 57, Page ID ## 1422-27 (discussing Operation BOPTROT).

Ethics Code, as well as a former Libertarian Party candidate who unsuccessfully ran for the Kentucky House of Representatives in 2016 and is no longer subject to the Ethics Code. Petitioners challenge several lobbying restrictions and ethics provisions subject to the jurisdiction of the KLEC Respondents.[4] Specifically, the Ethics Code provisions at issue are as follows:

- KRS 6.767(2): "A member of the General Assembly, candidate for the General Assembly, or his or her campaign committee shall not accept a campaign contribution from a legislative agent[5]." KRS 6.811(6) reciprocally provides that "[a] legislative agent shall not make a campaign contribution to a legislator, a candidate, or his or her campaign committee."
- KRS 6.767(3): "A member of the General Assembly, candidate for the General Assembly, or his or her campaign committee shall not, during a regular session of the General Assembly, accept a campaign contribution from an employer of a legislative agent, or from a

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[4] Petitioners' initial suit also included challenges to campaign finance provisions administered by the Kentucky Registry of Election Finance ("KREF"). All such challenges have been resolved.

[5] The statutory term "legislative agent" is narrowly defined to include only those persons paid to seek legislative action. *See* KRS 6.611(23)(a). There are specific exceptions to the definition. KRS 6.611(23)(b). A "legislative agent" is referred to as a "lobbyist" herein. Under Kentucky law, all legislative agents (lobbyists) and their employers must register with the KLEC. KRS 6.807.

permanent committee as defined in KRS 121.015." KRS 6.811(7) reciprocally provides that, "[d]uring 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."

- KRS 6.751(2): "A legislator or his spouse shall not solicit, accept, or agree to accept anything of value[6] from a legislative agent or an employer." KRS 6.811(4) reciprocally provides that "[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."

- KRS 6.811(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."

Below, the District Court largely agreed with Petitioners, striking down all of the ethics provisions except those prohibiting legislators and legislative candidates from accepting campaign contributions from employers of lobbyists and PACs during a regular session of the Kentucky General Assembly, and the corresponding prohibition on employers of lobbyists making such contributions. The District Court's Judgment and Permanent Injunction would have wiped

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[6] The statutory term "anything of value" is defined and includes specific exceptions. *See* KRS 6.611(2)(a) & (b).

out key lobbying and gift restrictions less than a month before the start of the legislature's regular session. (*See* Petition App. B, App. D, and App. E.) However, KLEC appealed and requested an immediate stay, which the Sixth Circuit swiftly granted. (Case No. 17-6456, Doc. 21-2.).) Thus, at all times during this action, the Ethics Code provisions at issue have been in effect.

The Sixth Circuit affirmed the District Court's judgment with respect to the ethics provision barring legislators and legislative candidates from accepting campaign donations from employers of lobbyists and PACs during a regular legislative session. However, it otherwise reversed the lower court. Specifically, the Sixth Circuit held that the ethics provisions prohibiting legislators and legislative candidates from accepting campaign donations and gifts from lobbyists were closely drawn to further the sufficiently important government interest of preventing *quid pro quo* corruption or its appearance. The Sixth Circuit further held that Petitioners – again, a legislator and legislative candidate – lacked standing to challenge provisions restricting lobbyists and employers of lobbyists, due to the absence of specific evidence supporting their claim.

The Sixth Circuit denied Petitioners' request for a rehearing and further denied Petitioners' motion to stay the issuance of its mandate. The Sixth Circuit's mandate issued on July 22, 2019. The Petition for Writ of Certiorari timely followed.

REASONS FOR DENYING THE WRIT

The broad-based questions presented by Petitioners mischaracterize case law and are misleading. This is a case about ethics provisions enacted by the Kentucky General Assembly to regulate legislative conduct. The provisions at issue are narrowly drawn to ensure against *quid pro quo* corruption and its appearance, preserve legislative independence and impartiality, and maintain public confidence in the integrity of its government and public officials. *See* KRS 6.606.

Accordingly, this case presents no "compelling reasons" justifying this Court's review. *See* Sup. Ct. R. 10. In particular, the decision of the Sixth Circuit upholding key provisions of Kentucky's Ethics Code is in line with this Court's precedents, creates no circuit split, and presents no federal issue of significant public importance. *See id.* Further, Petitioners provide no justification for holding the disposition of this case pending review of *Thompson v. Hebdon*, Case No. 19-122 (cert. pending.) Respondents therefore ask this Court to deny the Petition for Writ of Certiorari.

I. The Decision of the Sixth Circuit Does Not Conflict with Any Decision of This Court, the Federal Courts of Appeal, or State Supreme Courts.

As stated above, the Sixth Circuit ruled that Kentucky ethics provisions – prohibiting legislators and legislative candidates from accepting campaign contributions or gifts from lobbyists and from accepting campaign contributions from employers of lobbyists and PACs during the legislature's regular session – are

constitutional. The Sixth Circuit further ruled that Petitioners lacked standing to challenge corresponding provisions applicable to the conduct of lobbyists and their employers. The Sixth Circuit's holdings adhere to this Court's precedents, and there is no circuit split on these or "similar issues." Accordingly, there is no sufficient basis for this Court's review.

A. The Sixth Circuit's Decision that the Challenged Kentucky Ethics Provisions Applicable to Legislators and Legislative Candidates Are Constitutional Is Consistent with this Court's Precedents, and There Is No Circuit Split.

Although Petitioners may disagree with the Sixth Circuit's application of established law to the challenged statutes, there is no conflict between the Sixth Circuit opinion and decisions of this Court or any other Circuit.

The Sixth Circuit correctly applied closely drawn scrutiny to the Kentucky Ethics Code provisions at issue. Given the historical context of the BOPTROT scandal and the special expertise of legislators in interacting with lobbyists, the Sixth Circuit held that the challenged Ethics Code restrictions applicable to legislators and legislative challengers carefully target "'*quid pro quo*' corruption or its appearance." *McCutcheon v. FEC*, 572 U.S. 185, 192 (2014) (quoting *Citizens United v. FEC*, 558 U.S. 310, 359 (2010).) "The hallmark of corruption is the financial *quid pro quo*: dollars for political favors." *McCutcheon*, 572 U.S. at 192 (quoting *Federal Election Comm'n v. National*

Conservative Political Action Comm., 470 U.S. 480, 497 (1985).) There is no question that the Government's interest in preventing *quid pro quo* corruption or its appearance is "sufficiently important." *McCutcheon*, 572 U.S. at 199 (quoting *Buckley v. Valeo*, 424 U.S. 1, 26-27 (1976)). The interest may even properly be labeled "compelling" so as to satisfy strict scrutiny. *McCutcheon*, 572 U.S. at 199; *see National Conservative Political Action Comm.,* 470 U.S. at 496–497.

None of this Court's recent precedents on campaign finance law concern a state legislative ethics code. Importantly, the restrictions challenged here are not only preventative, but also aim to ensure the independence of legislators and public confidence in the integrity of the legislature. *See* KRS 6.606. The Sixth Circuit's opinion shows appropriate deference to legislative determinations regarding campaign contribution restrictions. *See Ognibene v. Parkes*, 671 F.3d 174, 182 (2d Cir. 2011); *see also FEC v. Beaumont,* 539 U.S. 146, 155 (2003); *McConnell v. FEC,* 540 U.S. 93, 137 (2003).

Petitioners' reliance on *McDonnell v. United States*, 136 S. Ct. 2355 (2016), does not compel a contrary result. *McDonnell* was a criminal case that analyzed the statute under which "Virginia Governor Robert McDonnell and his wife, Maureen McDonnell," were indicted on bribery charges. *Id.* at 2361. "The charges related to the acceptance by the McDonnells of $175,000 in loans, gifts, and other benefits from [a] businessman . . . while Governor McDonnell was in office." *Id.* at 2361. *McDonnell* case is not relevant to

the instant fact pattern because the Governor there was challenging the definition of "official action" in relation to a federal anti-corruption statute as given in the jury instructions in his criminal case. *Id.* at 2373. Further, this Court made clear that its concern with the statute focused on the use of a federal statute to criminalize conduct that was not made illegal by a state, thus raising federalism concerns:

> A State defines itself as a sovereign through "the structure of its government, and the character of those who exercise government authority." *Gregory v. Ashcroft,* 501 U.S. 452, 460, 111 S. Ct. 2395, 115 L.Ed.2d 410 (1991). That includes the prerogative to regulate the permissible scope of interactions between state officials and their constituents. Here, where a more limited interpretation of "official act" is supported by both text and precedent, we decline to "construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards" of "good government for local and state officials." *McNally v. United States,* 483 U.S. 350, 360, 107 S. Ct. 2875, 97 L.Ed.2d 292 (1987); see also *United States v. Enmons,* 410 U.S. 396, 410–411, 93 S. Ct. 1007, 35 L.Ed.2d 379 (1973) (rejecting a "broad concept of extortion" that would lead to "an unprecedented incursion into the criminal jurisdiction of the States".)

Id. Here, federalism concerns would also arise if federal courts prevented a state legislature from

defining and restricting the very conduct which, in its view, creates corruption and the appearance thereof.

This Court has held that state legislative ethics rules for legislative conduct should be upheld, and legislators have no First Amendment rights to challenge them because "[t]he legislative power thus committed is not personal to the legislator but belongs to the people; the legislator has no personal right to it." *Nevada Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 126 (2011). A legislator's disagreements with ethics rules imposed by legislative bodies have no place in a judicial forum. *Rangel v. Boehner*, 785 F.3d 19, 21 (D.C. Cir. 2015), *cert. denied,* 136 S. Ct. 218 (2015). Instead, a legislator's concerns with a statutory lobbyist gift ban are appropriately addressed by the legislative body – not this Court.

No split of authority on "similar issues" has been created by the Sixth Circuit's decision. Unlike the state and federal cases cited by Petitioners in support of an alleged split of authority, Kentucky's Ethics Code does not impose a total "black-out" period in which no contributions can be accepted, nor does it involve contribution bans that apply to candidates for offices outside the legislative process.

Petitioners misread *Winborne v. Easley*, 136 N.C. App. 191, 523 S.E.2d 149 (1999). The court in *Winborne* upheld an in-session ban on lobbyist and PAC contributions as applied to challengers and legislative incumbents. *Id.* at 152-153. The *Winborne* court reasoned that similar treatment of a challenger prevented lobbyists and their political committees from using the "threat" of a contribution to a challenger as

pressure to cause an incumbent to vote on an issue which the lobbyist or the related political committee opposed or championed. *Id.* Kentucky's Ethics Code likewise treats legislators and challengers the same.

None of the cases cited by Petitioners in support of a circuit split on the standard of review specifically concern the validity of provisions of a state legislative ethics code. And federal courts have consistently upheld similar restrictions. *See, e.g.*, *Preston v. Leake*, 660 F.3d 726, 741 (4th Cir. 2011) (upholding ban on lobbyist contributions); *Fl. Ass'n of Lobbyists, Inc. v. Div. of Legislative Info. Servs. of the Fl. Office of Legislative Servs.*, 525 F.3d 1073, 1079 (11th Cir. 2008) (upholding ban on lobbyists giving legislators "anything of value"); *Md. Right to Life State Political Action Comm. v. Weathersbee*, 975 F. Supp. 791, 798 (D. Md. 1997) (upholding prohibition on lobbyists soliciting campaign contributions or serving as campaign treasurers).

No circuit split is created by *Riddle v. Hickenlooper*, as the case did not involve legislative ethics provisions, and the facts there concerned disparate campaign contribution limits for individuals running for the same public office. 742 F.3d 922 (10th Cir. 2014). Here, there is no such disparity, as the contribution limits apply both to legislative incumbents and their challengers. And *Wagner v. FEC*, which involved restrictions on campaign contributions by government contractors, is more closely aligned than Petitioners represent. 793 F.3d 1 (D.C. Cir. 2015). As in government contracting, there is a very specific "quo" (passage of desired legislation) for which a contribution

or gift from a lobbyist, employer, or PAC may serve as the "quid."

Notably, Petitioners fail to demonstrate any grounds for review of the Sixth Circuit decision concerning the gift ban. Petitioners cite no authority in conflict with the Sixth Circuit. Petitioners' concerns that the gift ban has chilled legislative interactions with constituents and damaged the ability of legislators to effectively to perform their duties are illusory. The Petitioner, a sitting legislator, states to this Court that he "would accept a cup of coffee, or a soda, or other de minimis items from lobbyists, but cannot do so." However, lobbyists voiced their support for the gift ban in the Sixth Circuit, indicating they have no interest in providing free drinks to legislators, and their interactions with legislators have not been hindered by the challenged gift ban. (*See* 17-6456, Doc. 29, pp. 27-34.) Indeed, lobbyists still may meet with and discuss legislation with legislators at any time; the ban does not inhibit their ability to contribute to political dialogue.[7] In similar cases, this Court has denied certiorari. *See Fl. Ass'n of Lobbyists, Inc. v. Div. of Legislative Info. Servs. of the Fl. Office of Legislative Servs.*, 525 F.3d 1073 (11th Cir. 2008), *cert. denied*, 130 S. Ct. 372 (2009).

Accordingly, the Sixth Circuit's decision on the Kentucky ethics provisions restricting legislators and

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[7] Furthermore, Kentucky legislators receive specific statutory expense accounts, in addition to their legislative salary, for discretionary use to purchase cups of coffee or soda consumed during their interactions with lobbyists.

legislative candidates from accepting campaign contributions and gifts from lobbyists and/or their employers adheres to this Court's precedents, and there is no circuit split. The cases cited by Petitioners in support of their arguments are readily distinguishable from this matter involving a state legislative ethics code. There is no basis for acceptance of certiorari.

B. The Sixth Circuit's Decision that Petitioners Lacked Standing to Challenge the Ethics Provisions for Lobbyists and their Employers Adheres to this Court's Precedents.

The Sixth Circuit correctly ruled that Petitioners lacked standing to challenge the Kentucky legislative ethics provisions found in KRS 6.811(4)-(7), applicable only to the conduct of lobbyists and their employers. Petitioners argue the Sixth Circuit's ruling is in conflict with this Court's precedents. In so doing, Petitioners misrepresent the Sixth Circuit's decision.

In order to establish standing to challenge the restrictions on the conduct of lobbyists and their employers, the legislator and legislative challenger (Petitioners) needed to show that a restriction had been or imminently would be applied to such third parties, and that the application had caused or imminently would cause Petitioners concrete injury. *See, e.g., Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-562 (1992); *Tenn. Republican Party v. Sec. & Exch. Comm'n*, 863 F.3d 507, 520 (6th Cir. 2017). However, in support of standing, Petitioners offered only their own affidavits, stating their belief that others would like to violate the restrictions and their personal desires to accept money,

gifts, and services from lobbyists or employers of lobbyists.[8]

The Sixth Circuit decision on standing reflects the fact that there are no plaintiffs associated with the profession of lobbying in this case. A legislator and challenger cannot presume to stand in the shoes of a lobbyist under the Ethics Code. In contrast to the authority cited by petitioners, this is not a case in which the real party in interest is deceased. *See Libertarian Nat'l Comm., Inc. v. FEC*, 924 F.3d 533, 537-539 (D.C. Cir. 2019). Though the petitioner in *Davis v. FEC*, 554 U.S. 724 (2008), was held to have standing, the legislative candidate there was personally being restricted from spending his own money on his own campaign. That is not the case here, but rather Petitioners seek to assert standing on behalf of lobbyists and employers, who are not parties to this case. Petitioners provide no other citation to a relevant case that contradicts the Sixth Circuit or otherwise supports their argument.

Thus, there is no "newly contrived standing requirement" in the Sixth Circuit's decision. Instead, the Sixth Circuit found that Petitioners could not make the requisite showing of injury under the facts. In particular, the Sixth Circuit found that Petitioners offered no affidavit from a lobbyist or his employer regarding the restrictions and otherwise failed to

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[8] *See* Decl.Schickel, RE # 63-2, PAGE ID # 63-2, PAGE ID ## 3236-3246; Decl.Watson, RE # 63-3, PAGE ID ## 3247-3258. Notably, Petitioners' declarations never mentioned, let alone supported, any claim regarding the in session PAC contribution restriction of KRS 6.676(3).

provide any evidence that any lobbyist or lobbyist's employer attempted to act in ways prohibited by the restrictions but was stopped due to the provisions at issue. This lack of evidence proved fatal to their claims. *See Tenn. Republican Party*, 863 F.3d at 517.

Petitioners argue that the Sixth Circuit's decision puts them in an impossible position because lobbyists and their employers are highly regulated by KLEC, making them reluctant to go on the record for fear of retaliation. But this argument ignores a key fact – several employers of lobbyists did go on the record in this very case, filing an *amicus curiae* brief with the Sixth Circuit that **supported Respondents** and **defended the challenged statutes**. (Case 17-6456, Doc. 29). Accordingly, the only affected third parties actually before the court indicated that the interests of lobbyists and employers of lobbyists diverge from Petitioners' interests.

Notably, with respect to KRS 6.811(5), Petitioners only partially cite the statute in service of their argument that the provision restricts pure speech. In its entirety, KRS 6.811(5) provides, "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." The statute thus only prohibits a lobbyist from material participation in legislative campaign fundraising efforts so that he or she may not do indirectly what he or she is barred from doing directly – contribute to a legislative candidate. Importantly, lobbyists may speak publicly in favor of legislative candidates, volunteer, put up yard signs, display bumper stickers,

and engage in any other voluntary non-financial activity in support of a legislative candidate.

Therefore, based on the record before it, the Sixth Circuit properly determined Petitioners lacked standing to challenge the ethics provisions applicable to the conduct of lobbyists and their employers.[9] That decision is consistent with the decisions of this Court and other circuits, and thus it provides no basis for acceptance of certiorari.

II. This Case Presents No Federal Issue of Significant Public Importance.

This case presents no federal issue of significant public importance. Rather, it is a case concerning Kentucky legislative ethics provisions targeted at preventing corruption and its appearance in a state that has experienced such corruption by narrowly limiting donations and gifts between legislators and the lobbyists paid to influence them.

The premise of Petitioners' argument is that strict scrutiny should apply to any state restriction on a

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[9] Furthermore, Petitioner Watson's claims regarding the Ethics Code are now moot. Watson unsuccessfully ran for a seat in Kentucky's legislature in 2016, but he is no longer a candidate. Only Petitioner Schickel remains subject to the Ethics Code. *See Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013) ("Most standing cases consider whether a plaintiff has satisfied the requirement when filing suit, but Article III demands that an 'actual controversy' persist throughout all stages of litigation."); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n. 22 (1997) ("The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).") (citations and internal quotation marks omitted).

legislator's perceived entitlement to monetary contributions and gifts. But a legislator does not possesses a fundamental right to free coffee and meals from persons who professionally seek the passage of legislation. Likewise, there is no inherent right for legislative candidates to receive campaign contributions from those who have vested interests in the passage of legislation.

As discussed above, the Sixth Circuit correctly determined that Petitioners have no standing to assert the rights of lobbyists or their employers. Further, the Sixth Circuit correctly upheld all provisions targeting the legislators' own conduct: KRS 6.767(2) (lobbyist contribution ban), KRS 6.767(3) (regular session contribution ban), and KRS 6.751(2) (gift ban). The Sixth Circuit's decision is in line with precedent, thus there is no circuit split or conflict with decisions of this Court creating a significant federal issue.

Importantly, the Ethics Code is self-regulation by Kentucky's own legislature. Perhaps in this area more than any other, the judiciary owes deference to legislative determinations regarding campaign contribution restrictions. *Ognibene*, 671 F.3d at 182; *see also Beaumont,* 539 U.S. at 155; *McConnell,* 540 U.S. at 137. The legislative sphere includes matters integral to the legislative process, which are within the jurisdiction of the legislative branch. *Gravel v. United States*, 408 U.S. 606, 625 (1972). A state ethics law aimed squarely at creating an accountable and legitimate legislative process that is free from actual corruption or its appearance is a legislative prerogative. This Court has historically denied

certiorari where rules that govern the conduct of lobbyists aim to ensure the independence of a state legislature.[10] *See, e.g., Reeder v. Madigan*, 780 F.3d 799, 804 (7th Cir. 2015), *cert. denied,* 136 S. Ct. 116 (2015) (upholding rules applied to lobbyists and those associated with lobbying groups enacted to prevent interference with core legislative activities); *Larsen v. Afflerbach*, 525 U.S. 1145 (1999) (denying certiorari in a case where the Third Circuit held that disciplinary proceedings against legislators are protected by privilege against any type of relief against any actors involved in that fundamental legislative process); *Rangel*, 136 S. Ct. 218 (2015 (denying certiorari as legislative immunity prevents legislators from airing legislative disagreements in a judicial forum).

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[10] Although the petitioners claim that "jurisdiction is vested in this Court pursuant to 28 U.S.C. 1254(1) and 28 USC 2101(c)", the common law doctrine of legislative immunity and privilege also applies to this case. Under *Tenney v. Brandhove* and its progeny, state legislative bodies and their adjuncts are immune from 42 U.S.C. § 1983 lawsuits, attorneys fee awards under 42 U.S.C. § 1988, and federal court action, where the actions in question are encompassed in the "legitimate legislative sphere". 341 U.S. 367 (1951). As this Court said in *Tenney*, "courts are not the place for such controversies. Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses" if there are any. 341 U.S. at 378. Legislative activities, such as adopting and enforcing rules and regulations governing the behavior of members, are immune from suit. *Supreme Court of Virginia v. Consumers Union of U. S., Inc.*, 446 U.S. 719 (1980). As the Petitioners state, their cases are based upon their statuses as a legislator and a former (though not current) legislative candidate, alleging a 42 U.S.C. § 1983 violation. Notably, no lobbyists or employers of lobbyists are parties, and they actively opposed this lawsuit and defended the challenged ethics provisions in the lower court.

There is no compelling reason to second guess the legislative response when sufficient alternative means for political expression exist. Under Kentucky's Ethics Code, lobbyists remain free to engage in all manner of political activities. As explained above, lobbyists "can still have lunch or dinner with a legislator or otherwise meet in private with a legislator . . . volunteer or provide services, other than serving as treasurer or raising funds, for a legislative campaign, including speaking publicly in favor of the candidate, calling constituents or going door to door to campaign for the candidate." (Case 17-6456, Doc. 29, p. 27.) The restrictions here are narrowly tailored to prevent corruption or the appearance of corruption and do not hinder political speech.

Thus, the Sixth Circuit's decision adheres to precedent, and this case involves a state legislature's ability to regulate its own conduct through narrowly drawn ethics provisions that target corruption in the relationships where it is most likely to transpire. As such, there is no federal issue of significant public importance meriting this Court's review. This Court should deny the Petition for Writ of Certiorari.

A. The Facts of This Case Do Not Support Revisiting *Buckley v. Valeo.*

A state ethics law targeted squarely at creating an accountable and legitimate legislative process is not an appropriate vehicle to revisit *Buckley v. Valeo*, 424 U.S. 1, 14 (1976).

Petitioners rely on *Citizens United* in urging this Court to use this case as an opportunity to overturn

Buckley. However, "precedent is to be respected unless the most convincing of reasons demonstrates that adherence to it puts us on a course that is sure error." *Citizens United*, 558 U.S. at 362–63. "Beyond workability, the relevant factors in deciding whether to adhere to the principle of *stare decisis* include the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned." *Id.* The Court has also considered whether "experience has pointed up the precedent's shortcomings." *Id.* (quoting *Pearson v. Callahan,* 555 U.S. 223, 233 (2009)).

Here, the "reliance interests at stake" are clear. Multiple courts have held Kentucky's Ethics Code was created to preserve legislative independence and impartiality, maintain public confidence in the integrity of its government and public officials, and prevent actual and apparent *quid pro quo* corruption. KRS 6.606. The Ethics Code was enacted in response to a major ethics scandal in the Kentucky General Assembly, and Kentucky's own Supreme Court has upheld the Code, stating in part, "[t]he Commonwealth of Kentucky has a compelling interest in insuring the proper operation of a democratic government and deterring corruption, as well as the appearance of corruption." *Assoc. Indus. of Ky.*, 912 S.W.2d at 953. The Kentucky Supreme Court continued, "[t]o determine otherwise would be a denial, in large measure, to the legislature of the power of self-protection." *Id.* at 954.

The Sixth Circuit likewise held in unequivocal terms that "Kentucky's stated interest '[is] neither

novel nor implausible.'" (Opinion, p. 11 (quoting *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 391 (2000)). "The contribution ban . . . plainly furthers Kentucky's anticorruption interest." (*Id.*)

As recognized by the Sixth Circuit, "[r]estrictions on gift giving, like those on contributions, are marginal restrictions that do not in any way hinder lobbyists' or legislators' ability to discuss candidates or issues." (*Id.* at 9.) Lobbyists may still meet with legislators and promote their viewpoints and preferred candidates; the Ethics Code only prohibits them from providing the legislators with gifts. This is not an invasion of political speech, and *Buckley* should not be revisited in this context.

Moreover, as previously stated, this Court has recognized that the government's interest in preventing *quid pro quo* corruption may even properly be labeled "compelling" so as to satisfy strict scrutiny, which is precisely what the petitioners would have this Court apply if it overturned *Buckley*. *McCutcheon*, 572 U.S. at 199; *see National Conservative Political Action Comm.,* 470 U.S. at 496–497. Strict scrutiny requires that a statute or regulation be "narrowly tailored to advance the State's compelling interest through the least restrictive means." *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1670 (2015) (holding that "banning all personal solicitations by judicial candidates is narrowly tailored to address" "public confidence in the integrity of the judiciary"). Here, Kentucky's Ethics Code is narrowly tailored to avoid the precise type of corruption exposed in BOPTROT, namely lobbyists paying legislators to pass certain legislation. The Sixth

Circuit emphasized the shockingly low bribes lobbyists were able to use to influence legislation in their favor. Citing Tom Loftus & Al Cross, *Lies, Bribes and Videotape*, The Courier-Journal, July 1, 1993, the Sixth Circuit observed that "[c]orruption was rampant and came cheap—in some cases, legislators accepted as little as $400 from lobbyists in exchange for influencing legislation." The Sixth Circuit weighed heavily KLEC's research when determining to end the de minimis exception to gifts from lobbyists. KLEC found accounts from "across the country supporting inferences of impropriety arising from gifts of value . . . including several that discussed how lobbyists and their employers skirted de minimis exceptions with tickets to sporting events, rounds of golf, and cigars." The Ethics Code was narrowly tailored to prevent corruption or its appearance in the Kentucky Legislature and would survive strict scrutiny regardless of whether this Court overturned *Buckley* here.

This case does not present the appropriate fact pattern to overturn *Buckley*, and Petitioners have not proven that departing from *stare decisis* is warranted in the context of a state-legislature-created ethics code intended to prevent corruption. This Court should deny the Petition for Writ of Certiorari.

III. Any Decision by the Court in *Thompson v. Hebdon* Will Not Affect this Case.

Petitioners argue that if the Court determines not to accept certiorari in this case, it should at a minimum hold disposition of the case pending the outcome in *Thompson v. Hebdon*, Case No. 19-122 (cert. pending.)

Petitioners contend that "[s]imilar issues regarding the level of scrutiny and continued viability of *Buckley* and its application have been raised" in *Thompson*. It is therefore Petitioners' position that *Thompson*'s resolution could impact the resolution of the instant matter.

The *Thompson* Petition concerns individuals who wanted to make contributions to individual candidates, but could not legally do so due to extremely low and broadly applied campaign contribution limits in the state of Alaska passed by ballot initiative, as well as an aggregate limit on contributions from contributors outside of Alaska. *See Thompson v. Hebdon*, 909 F.3d 1027 (9th Cir. 2018), cert. pending No. 19-122. By contrast, this Petition involves a former legislative challenger and the sole legislator who dissented to legislative changes in the Ethics Code. Their claims concern limited, narrowly targeted ethics restrictions enacted by the legislature for the purposes of ensuring the independence of legislators from lobbyists, restoring and maintaining public confidence in the integrity of the legislature, and preventing actual and apparent *quid pro quo* corruption in the legislative process. *See* KRS 6.606. Arguably, Petitioners lack standing to bring the claims before this Court and the provisions at issue would satisfy even strict scrutiny.

Accordingly, the Court's disposition of this case does not hinge on the resolution of *Thompson*. Therefore, Petitioners fail to state a basis for holding this matter pending *Thompson's* final outcome.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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