No. 19-458

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

REPLY BRIEF FOR PETITIONERS

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The decision by the Sixth Circuit upheld significant restrictions on protected First Amendment activity. In an effort to justify the decision, Respondents unconvincingly attempt to distinguish cases that struck down similar restrictions, and cases that demonstrate a well-developed split of authority. Respondents do so by arguing that the name by which these restrictions are called, rather than the substance of the restrictions, is what matters, and by mischaracterizing court decisions that demonstrate the clear circuit split.

Then, perhaps recognizing that the decision below and the few decisions they cite in support stand on the flimsiest of grounds under this Court's First Amendment jurisprudence, Respondents incredibly argue that a legislature has the power to fundamentally restrict the speech of its members however it chooses, and by whatever means, including the imposition of criminal penalties. Respondents then claim that federal courts have no ability to right such a wrong, contravening the Supremacy Clause, the Incorporation Doctrine that has incorporated the First Amendment, and this Court's precedents that stand for the exact opposite proposition.

Respondents next mislead this Court by arguing there is no standing because a few lobbyists and their employers indicated in an amicus filing that they do not want the challenged laws to be struck. Respondents would have this Court ignore the undisputed testimony that the challenged laws prohibit speech/activities that actually occurred before the

challenged legislation was enacted, and would occur again if the legislation was declared unconstitutional.

Finally, Respondents argue that *Thompson v. Hebdon*, Case No. 19-122, is distinguishable, even though both cases involve questions about the judicial scrutiny to be employed in these types of challenges as well as the application of that scrutiny, and the outcome in *Thompson* is likely to fundamentally impact the analysis employed below.

Respondents are simply wrong on every point they raise, and *certiorari* should be granted.

I. Reply to Statement of the Case.

Respondents argue that legislative immunity applies, citing *Taylor v. Beckham*, 178 U.S. 548 (1900). But, *Taylor* dealt with the right to hold office (the "elections, qualifications, and returns"), and not, as here, the ability of public office holders and their supporters to engage in fundamental free speech activities. *Id. Cf. Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 677 fn. (1996) (immunity did not apply where declaratory and injunctive relief sought), *quoting Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 166 (1993). Indeed, even instrumentalities of courts that suppress free speech are subject to review. *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1664-1665 (2015).

Importantly, Respondents completely ignore that the challenged statutes involve the imposition of both civil and criminal sanctions.[1]

Next, Respondents suggest that the laws at issue survived early review, citing *Assoc. Indus. of Ky. v. Commonwealth*, 912 S.W.2d 947, 953 (Ky. 1995). But *Assoc. Indus. of Ky.* dealt almost exclusively with disclosure and registration provisions that are not challenged here, and, further, found that the lobbyist employer in that case could not mount a challenge due to standing issues. *Id.*

II. The Sixth Circuit's decision conflicts with decisions of this Court, Federal Courts of Appeal, and State Supreme Courts.

While Respondents argue there is no circuit split, they do not even attempt to distinguish cases that have struck the very restrictions at issue in this case. *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

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[1] K.R.S. 6.767(2) and K.R.S. 6.767(3) are "ethical misconduct" provisions which invoke the enforcement mechanisms of K.R.S. 6.691(5) (including a civil penalty of $2,000) and K.R.S. 6.691(6) (referral for criminal prosecution); K.R.S. 6.751(2) is a Class B misdemeanor; K.R.S. 6.811(4) and (5) are "ethical misconduct" for the first offence and a Class D felony for a second offence. All of these provisions, applied to legislators, are subject to prosecution as Class B misdemeanors under Kentucky law. K.R.S. 522.030. The penalty is 90 days in jail. K.R.S. 532.090.

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).

Respondents cite *Ognibene v. Parkes*, 671 F.3d 174 (2nd Cir. 2011). But that citation, at best, demonstrates there is a split with the authority cited above. At worst, *Ognibene* is of no help as it upheld lower limits on contributions by lobbyists, rather than an absolute ban. Respondents likewise cite *FEC v. Beaumont*, 539 U.S. 146, 155 (2003), and *McConnell v. FEC*, 540 U.S. 93, 137 (2003). *Beaumont* involved upholding a direct corporate contribution ban and *McConnell* upheld a soft money ban under an anti-circumvention rationale, but neither involved, as this matter does, prohibitions on individuals, based solely on their profession, from making contributions or otherwise prohibiting engagement in expressive First Amendment protected activity.

Respondents argue *McDonnell v. United States*, 136 S. Ct. 2355 (2016), has no application, but *McDonnell* teaches that ingratiation and access – which is precisely at issue here – are not *quid pro quo* corruption or its appearance. *Id.* at 2371-2372. The *McDonnell* Court also found broadly construed gift and

bribery bans, such as those here, "raise[s] significant constitutional concerns." *Id.,* 136 S. Ct. at 2372. In contrast to Respondents' argument that the concern was one of deference to state law, this Court observed that the law at issue was a "breathtaking expansion of public-corruption law [that] would likely chill federal officials' interactions with the people they serve and thus damage their ability effectively to perform their duties." *Id.*

Respondents actually argue that any law that governs what legislators can or cannot do, whether in a campaign function or otherwise, is insulated from judicial review, *citing Nevada Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 126 (2011). Certainly, that observation can be derived from the decision below and demonstrates further grounds to grant review. But, *Carrigan* actually says nothing of the sort. *Carrigan* deals with the power of a legislator to vote – a plain legislative power that belongs to the people – and not the power of officeholders to speak and associate with constituents. Respondents cite *Rangel v. Boehner*, 785 F.3d 19, 21 (D.C. Cir. 2015), but the citation to the reprimand and removal process in that case – a process protected by the Speech and Debate Clause – is nothing like the First Amendment chilling, criminal laws at issue here. Indeed, this Court has not hesitated to review restrictions imposed by court rules and in other contexts that implicate First Amendment rights. *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656 (2015). Further, the imposition of civil penalties and criminal fines for violations of the challenged statutes take the matter plainly outside the realm of purely legislative activities.

Respondents next argue that *Winborne v. Easley*, 136 N.C. App. 191, 523 S.E.2d 149 (1999), is distinguishable because it "upheld an in-session ban on lobbyist and PAC contributions." Respondents are wrong again. The *Winborne* Court upheld the trial court's finding that "the prohibition … which bans solicitation and contributions by lobbyists and their related political committees … is overly broad and invalid in that it imposes a too rigid restraint and restriction on political free speech under the First and Fourteenth Amendments to the United States Constitution." *Id.*, 136 N.C. App. at 196.

Next, Respondents argue that Petitioners' cases demonstrating the circuit split do not "specifically concern the validity of provisions of a state legislative ethics code." [Opp. at 12]. That misses the point: this Court properly looks to the substance of the law, not what it is named or what section of the state code it is found in, to determine its constitutionality. *Wagner v. Covington*, 251 U.S. 95, 102 (1919), *citing St. Louis S. R. Co. v. Arkansas*, 235 U.S. 350, 362-363 (1914).

Respondents next cite *Preston v. Leake*, 660 F.3d 726, 741 (4th Cir. 2011), and *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), as favorable authority that addressed some (but not all) of the issues below. Actually, neither case dealt with an in-session ban on contributions from a Political Action Committees ("PAC"). Again, a circuit split, by its very nature, involves cases that are resolved on both sides of the same issue. Contrary to Respondents' argument, these cases support the presence of a circuit

split that warrants granting review. Turning to *Maryland Right to Life State PAC v. Weathersbee*, 975 F. Supp. 791 (D. Md. 1997), that case merely prohibited lobbyists from serving as treasurers of PACs, and had nothing to do with soliciting campaign contributions or serving as a treasurer of a candidate's committee, as Respondents suggest.

Respondents next attempt to distinguish *Riddle v. Hickenlooper*, 742 F.3d 922 (10th Cir. 2014), but again miss or ignore the point. *Riddle*, unlike the Sixth Circuit below, invoked strict scrutiny to review the challenged provisions because contributions to candidates involve fundamental rights, and the challenged statutes treated contributors to candidates differently. That is precisely the issue here: the challenged legislation treats contributors differently based on their engagement in protected First Amendment activity and/or their desire to associate together in a PAC.

Perhaps recognizing that there actually is a significant circuit split on the issue of campaign contributions, Respondents argue that the gift ban challenged here presents no split. The issue, however, is that the challenged gift ban makes improper distinctions about those giving the gifts, and otherwise severely infringes on protected interactions, based solely on the exercise of fundamental rights. This clearly places the Sixth Circuit's decision at odds with *Riddle*, 742 F.3d 922, and other authorities.

III. The Sixth Circuit's standing decision is in contrast to this Court's precedent.

The testimony of both Senator Schickel and the Legislative Ethics Commission in its FRCP 30(b)(6) deposition confirmed that, prior to the laws' changes, activities now banned under the challenged legislation occurred frequently. [PageID#3243-3245; PageID#977, 994, 995]. Senator Schickel testified that he would continue to engage in prohibited activities but for the challenged legislation. [PageID#3243-3245]. Surprisingly, the Sixth Circuit found this evidence was not sufficient to establish standing. In defense of the indefensible, Respondents argue that because two lobbyists filed amicus briefs in support of the challenged legislation (but offered no testimony that if the laws were invalidated that they would not engage in activities prohibited by the laws), this somehow defeats standing on behalf of those actually harmed. Respondents make this argument despite evidence that there are hundreds of registered lobbyists, and Senator Schickel's testimony, and that of the Commission itself, demonstrating that the prohibited activities occurred with regularity before the ban.

More to the point, Respondents have not even attempted to distinguish the authorities cited by Petitioners demonstrating that the Sixth Circuit just created a circuit split on this issue by failing to adhere to this Court's standing jurisprudence in this First Amendment context. *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."). Other cases support the conclusion standing was met. *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947, 954-958 (1984); *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); *Catholic Leadership Coalition of Tex. v. Reisman*, 764 F.3d 409 (5th Cir. 2014); *see also Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 36-37 (1st Cir. 1993).

Finally, Respondents contend that Mr. Watson's claims are now moot, but this contention ignores the capable of repetition yet evading review exception that is almost always applicable in election-related matters, such as this case. *Citizens United v. FEC*, 558 U.S. 310, 334 (2010) (capable of repetition exception applied where campaign finance restriction could not be fully litigated in period before election); *Davis v. FEC*, 554 U.S. 724, 735-736 (2008) (same).

IV. This case presents several federal matters of significant public importance.

Respondents argue that "a legislator does not possess[] a fundamental right to free coffee and meals from persons who professionally seek the passage of legislation." (Opp. at 18). They misconstrue the issue. If the challenged legislation precluded *everyone*, versus making distinctions based on one's profession, from

offering meals or coffee to the legislator, there would be far less of an issue with meals or coffee (but not with other vagueness issues).

More significantly than the gift ban, however, are the campaign finance restrictions. Respondents argue that "there is no inherent right for legislative candidates to receive campaign contributions from those who have vested interests in the passage of legislation." All campaign donors likely have a vested interest in the passage (or often the prevention of passage) of legislation. Sometimes these issues are self-interested business interests, sometimes not.

This Court has long held that making campaign contributions invokes fundamental rights including associational interests between candidates and their contributors. In fact, this Court has never upheld the placement of restrictions on such donations which are based solely on potential self-interest by donors, and it has re-affirmed this fact fairly recently. *See, e.g. McCutcheon v. FEC*, 572 U.S. 185 (2014) and cases cited therein (right to make contributions and government could not impose aggregate ban to limit corruption or a contributors influence).

Next, Respondents argue there is a "self-regulation interest" and deference is due. Again, that does not insulate the enactment from judicial scrutiny. *Davis*, 554 U.S. 724, 733; *McCutcheon,* 572 U.S. 185; *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656 (2015).

Further, the cases Respondents cite regarding legislative immunity are readily distinguishable. For instance, *Gravel v. United States*, 408 U.S. 606, 625

(1972) dealt with a Speech and Debate Clause issue in a subpoena context.

More significantly, "[l]egislative immunity does not, of course, bar all judicial review of legislative acts." *Powell v. McCormack*, 395 U.S. 486, 503 (1969). "That issue was settled by implication as early as 1803, *see Marbury v. Madison*, 1 Cranch 137." *Id. See, also, Kilbourn v. Thompson*, 103 U.S. 168 (1880); *Ex parte Young*, 209 U.S. 123 (1908).

This Court has been clear that legislative immunity does not bar actions for injunctive and declaratory relief for enforcement related activities of legislative branch officials. *Supreme Court v. Consumers Union of United States*, 446 U.S. 719 (1980). Here, of course, the action at issue is for declaratory and injunctive relief for enforcement related activities of legislative branch officials, and the action comes well within the confines of *Ex parte Young*, 209 U.S. 123 (1908).

V. *Buckley v. Valeo* should be revisited.

Respondents argue that *Buckley v. Valeo*, 424 U.S. 1, 14 (1976), should be adhered to, first arguing that there is a reliance interest at stake. (Opp. at 20). However, "when fidelity to any particular precedent does more to damage to 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 misshape the law, and it does not shield the inappropriate distinction created in *Buckley* from being reexamined and overturned.

Not surprisingly, Respondents also argue that the challenged legislation meets even strict scrutiny. (Opp. at 22). The Court below did not make that assessment, and, if review is granted, this Court should make that assessment for itself. Petitioners strongly contend that the restrictions at issue will not survive such review (and do not even meet the closely drawn scrutiny). As noted, the restrictions at issue are overly broad, and have an ill-defined fit to the proffered governmental interests.

VI. *Thompson v. Hebdon* presents similar issues that warrants, at a minimum, holding this case for decision in that matter.

Finally, Respondents argue that this case is distinguishable from *Thompson v. Hebdon*, Case No. 19-122. But that is simply not the case. In both that case and this mater, the continued viability of the distinction for the standard of review for contributions set forth in *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) is at issue. In both cases, the application of the closely drawn standard to uphold legislative restrictions that implicate fundamental First Amendment interests is also at issue. And in both cases, reliance on that standard was used to justify a watered down "closely drawn" scrutiny by both the Sixth and Ninth Circuits. As such, issues implicated in *Thompson* are plainly raised here, and holding this matter pending a decision in that case, if not granting certiorari and then consolidating the matters for purposes of briefing and argument, is plainly warranted.

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,

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