No. 21-943

In the Supreme Court of the United States

GERALD G. LUNDERGAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether federal laws prohibiting corporate campaign contributions aggregating $25,000 or more in a calendar year, 52 U.S.C. 30109(d)(1)(A)(i) and 30118(a), violate the First Amendment as applied to contributions from a corporation owned by a member of the candidate's family.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-42a) is reported at 8 F.4th 454. The order of the district court (Pet. App. 43a-65a) is not published in the Federal Supplement but is available at 2019 WL 1261354.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 2021. A petition for rehearing was denied on September 23, 2021 (Pet. App. 66a-67a). The petition for a writ of certiorari was filed on December 22, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Kentucky, petitioner was convicted on one count of conspiring to commit

offenses against the United States, in violation of 18 U.S.C. 371; one count of making unlawful corporate campaign contributions aggregating $25,000 or more, in violation of 52 U.S.C. 30109(d)(1)(A)(i) and 30118; four counts of making false statements, in violation of 18 U.S.C. 1001(a)(2); and four counts of falsifying a record or document, in violation of 18 U.S.C. 1519. Judgment 1-2. The court sentenced him to 21 months of imprisonment, to be followed by two years of supervised release. Judgment 3-4. The court of appeals affirmed. Pet. App. 1a-42a.

1. Petitioner owned and operated S.R. Holding Company, a corporation that provides catering and organizes special events. Pet. App. 2a. In 2013 and 2014, petitioner used S.R. Holding's funds to make unlawful corporate contributions to his daughter's campaign for one of Kentucky's seats in the U.S. Senate. *Ibid.* For example, in July 2013, S.R. Holding paid $25,495 to four vendors who provided lighting and audiovisual services at a campaign kick-off event. *Id.* at 3a. S.R. Holding collected $3706.25 from the campaign to reimburse it for costs associated with the event, but it covered the balance of the bill itself. *Ibid.* Then, from July to November 2013, S.R. Holding paid $90,500 to two political consultants who were providing services to the campaign. *Id.* at 4a. Among other things, S.R. Holding reimbursed one of the consultants for the costs of mailings and robocalls promoting the campaign. *Id.* at 4a-5a. Some of the mailings and robocalls included disclaimers stating that they were "[p]aid for by Alison for Kentucky," even though they were in fact paid for by S.R. Holding. *Id.* at 6a (citation omitted). S.R. Holding also paid for campaign merchandise, audiovisual services at

campaign rallies, and internet maintenance at the campaign office. *Id.* at 5a-7a.

A grand jury indicted petitioner on one count of conspiring to commit offenses against the United States, in violation of 18 U.S.C. 371; one count of making unlawful corporate contributions aggregating $25,000 or more, in violation of 52 U.S.C. 30109(d)(1)(A)(i) and 30118; four counts of making false statements, in violation of 18 U.S.C. 1001(a)(2); and four counts of falsifying a record or document, in violation of 18 U.S.C. 1519. Indictment 1-29. The district court denied multiple motions to dismiss the indictment. Pet. App. 43a-65a. Among other things, the court rejected petitioner's contention that the federal prohibition on corporate campaign contributions, as applied to the contributions at issue in this case, violated the First Amendment. *Id.* at 59a-64a.

The jury found petitioner guilty on all counts. Pet. App. 13a. The district court denied petitioner's motions for a judgment of acquittal or a new trial. *Id.* at 13a-14a. The court sentenced petitioner to 21 months of imprisonment, to be followed by two years of supervised release. *Id.* at 14a.

2. The court of appeals affirmed. Pet. App. 1a-42a.

The court of appeals rejected petitioner's contention that the federal restriction on corporate campaign contributions, as applied to contributions from a corporation owned by a member of the candidate's family, violates the First Amendment. Pet. App. 14a-24a. The court observed that this Court has both held that the First Amendment allows Congress to prohibit corporate campaign contributions, *id.* at 22a (citing *FEC* v. *Beaumont*, 539 U.S. 146, 152 (2003); *FEC* v. *National Right to Work Committee*, 459 U.S. 197, 210 (1982)), and upheld the application of contribution limits to

contributions from members of a candidate's family, *id.* at 19a (citing *Buckley* v. *Valeo*, 424 U.S. 1, 53 n.59 (1976) (per curiam)). The court accordingly explained that "the ban on corporate contributions is not unconstitutional as applied to intrafamilial contributions from a closely-held, family run corporation." *Id.* at 24a.

ARGUMENT

Petitioner contends (Pet. 12-26) that the federal prohibition on corporate campaign contributions, as applied to contributions from corporations owned and run by the candidate's family members, violates the First Amendment. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or any other court of appeals. The petition for a writ of certiorari should be denied.

1. Congress has made it unlawful for "any corporation whatever" to make campaign contributions in connection with a presidential or congressional election. 52 U.S.C. 30118(a). Congress has also made it a felony to violate that prohibition "knowingly and willfully" if the unlawful contributions "aggregat[e] $25,000 or more during a calendar year." 52 U.S.C. 30109(d)(1)(A).

Petitioner does not challenge the constitutionality of those restrictions as a general matter. This Court has explained that the First Amendment allows Congress to restrict campaign contributions if the restrictions are "closely drawn" to prevent actual or apparent *quid pro quo* corruption. *Buckley* v. *Valeo*, 424 U.S. 1, 25 (1976). Applying that standard, the Court has twice determined that the First Amendment allows Congress to prohibit corporate campaign contributions. See *FEC* v. *Beaumont*, 539 U.S. 146, 156 (2003); *FEC* v. *National Right to Work Committee*, 459 U.S. 197, 209 (1982). The Court has explained that the prohibition both directly combats

quid pro quo corruption and prevents the use of corporations to circumvent limits on individual contributions. See *Beaumont*, 539 U.S. at 154-155. The Court also has expressly distinguished bans on corporate independent expenditures, which the First Amendment forbids, from bans on corporate contributions to candidates, which the First Amendment allows. *Citizens United* v. *FEC*, 558 U.S. 310, 358-359 (2010).

Petitioner instead contends (Pet. i) that the "federal ban on corporate contributions is unconstitutional as applied to intrafamilial contributions from a closely held, family-run corporation." But petitioner's focus on the federal "ban" is misplaced. Although federal law does ban corporate contributions, the specific statutory provision under which petitioner was convicted applies only to contributions aggregating $25,000 or more in a calendar year. See 52 U.S.C. 30109(d)(1)(A). And petitioner's own corporate contributions aggregated more than $200,000, see Pet. App. 38a, far in excess of the unchallenged limit on contributions that petitioner could have personally made, see p. 9, *infra*. The petition for a writ of certiorari, however, offers no argument that the First Amendment precludes Congress from prohibiting corporate contributions of $200,000 or $25,000. That alone justifies denying the petition.

Petitioner's arguments lack merit. In *Buckley* v. *Valeo*, *supra*, this Court expressly determined that Congress could subject "members of the candidate's immediate family" to the same contribution limits as other donors. 424 U.S. at 53 n.59. The Court recognized that, unlike a candidate's expenditure of his own funds, a contribution from another person, including a family member, poses a "threat of corruption." *Ibid.* And the Court explained that, "[a]lthough the risk of improper influence

is somewhat diminished in the case of large contributions from immediate family members, [it could not] say that the danger is sufficiently reduced to bar Congress from subjecting family members to the same limitations as nonfamily contributors." *Ibid.* That principle resolves this case. Because Congress may prohibit corporate campaign contributions in general, see *Beaumont*, 539 U.S. at 156, and because Congress may subject "family members to the same limitations as nonfamily contributors," *Buckley*, 424 U.S. at 53 n.59, it follows that Congress may prohibit corporate campaign contributions from corporations owned and run by members of a candidate's family.

A contrary approach would create its own constitutional and practical problems. This Court has explained that "restrictions distinguishing among different speakers, allowing speech by some but not others," can raise First Amendment concerns. *Citizens United*, 558 U.S. at 340; see, *e.g.*, *Davis* v. *FEC*, 554 U.S. 724, 738-744 (2008) (holding unconstitutional a federal law imposing different contribution limits on different candidates in the same election). In addition, classifications based on family membership can raise equal-protection issues. See *Kotch* v. *Board of River Port Pilot Commissioners*, 330 U.S. 552, 564-565 (1947) (Rutledge, J., dissenting). And petitioner's failure to offer a clear definition of "family"—which, if offered, would inevitably be subject to challenge—would heighten such concerns.

As a result, imposing different contribution limits on different contributors, based on family membership, may itself violate the Constitution. In fact, the challengers in *Buckley* argued that the federal contribution limits violated the Constitution because they accorded special treatment to contributions from family

members. See Appellants' Br. at 139-140, *Buckley*, *supra* (No. 75-436). The Court avoided that objection only by rejecting the premise that federal law distinguished between family members' contributions and other contributions. See *Buckley*, 424 U.S. at 51 n.57.

Finally, petitioner's argument "fails to account for the key fact that the payments were made by [petitioner's] corporation, S.R. Holding, rather than from [petitioner's] personal funds." Pet. App. 22a. It is a blackletter principle of corporate law that corporations are legally distinct from the people who own and run them. See *Agency for International Development* v. *Alliance for Open Society International*, 140 S. Ct. 2082, 2087 (2020). The relevant entity here, S.R. Holding, was not a part of the candidate's "family" (Pet. 17), and its contributions to her were not "intrafamilial" (Pet. 18). Even if the First Amendment protected petitioner's personal right to contribute $200,000—an issue that is not directly presented here—it would not necessarily protect S.R. Holding's right to do so.

2. Petitioner's contrary arguments lack merit. To start, petitioner errs in describing (Pet. 12) *Buckley*'s discussion of contributions from family members as "dicta." The challengers in *Buckley* argued, among other things, that federal contribution limits violated the First Amendment. 424 U.S. at 12-14. Resolving that question required the Court to consider whether the contribution limits were appropriately tailored to the compelling interest in preventing actual or apparent corruption. *Id.* at 25. In the course of considering the tailoring between the "contribution limitations" and the "prevention of actual and apparent corruption," the Court explained that, because contributions from family members pose a "threat of corruption," Congress could

subject them to the "same limitations" as other contributions. *Id.* at 53 & n.59.

For that reason—and because correcting the lower court's misimpression about the contribution limits' applicability to family members obviated the need to address the challengers' differential-treatment claim, see pp. 6-7, *supra*—the discussion of family contributions formed part of the rationale for the Court's decision, making it binding precedent rather than mere dictum. See *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44, 67 (1996) ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound."); *Ramos* v. *Louisiana*, 140 S. Ct. 1390, 1416 n.6 (2020) (Kavanaugh, J., concurring in part) ("In the American system of *stare decisis*, the result and reasoning each independently have precedential force.").

Petitioner also observes that, when *Buckley* upheld the application of contribution limits to contributions from family members, it stated that such contributions pose a "risk of improper influence." Pet. 17 (quoting *Buckley*, 424 U.S. at 53 n.59). Petitioner argues (Pet. 17-18) that this rationale conflicts with the Court's more recent precedents, which make clear that Congress may limit contributions to prevent actual and apparent *quid pro quo* corruption but not to prevent contributors from having influence over candidates. But "the language of an opinion is not always to be parsed as though we were dealing with language of a statute." *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 341 (1979). And despite *Buckley*'s repeated use of the term "improper influence," see, *e.g.*, 424 U.S. at 27, 29, 30, 45, 58, this Court has understood *Buckley* to rest solely on Congress's interest in preventing actual and apparent *quid pro quo* corruption, not on

an interest in denying contributors influence over candidates, see *McCutcheon* v. *FEC*, 572 U.S. 185, 208 (2014) (opinion of Roberts, C.J.); *Citizens United*, 558 U.S. at 359. *Buckley*'s use of that term in addition to the phrase "threat of corruption," 424 U.S. at 53 n.59, in connection with upholding the limit on family-member contributions therefore does not suggest any potential infirmity in that aspect of the Court's holding.

Petitioner likewise errs in arguing (Pet. 18-21) that no sufficient governmental interest is served by applying the restrictions on corporate campaign contributions to corporations owned by members of the candidate's family. Contributions given by corporations owned by family members, like other corporate contributions, present a risk of *quid pro quo* corruption. A candidate could easily decide to take official action of benefit to a family member only in return for contributions from corporations that the family member controls. And family members, like other donors, could use corporations to circumvent the limits on individual contributions. In this case, for example, the contribution limits applicable in the 2014 election cycle prohibited petitioner from contributing more than $2600 to his daughter's campaign, see *McCutcheon*, 572 U.S. at 193 (opinion of Roberts, C.J.), but petitioner used his corporation to give more than $200,000, see Pet. App. 38a. Nor, on petitioner's view, would anything prevent a family member from establishing any number of corporations, each of which could serve as a conduit for contributions.

Although the threat of corruption posed by contributions from corporations owned by family members may differ in degree from the threat posed by other kinds of contributions, a given interest "may be implicated to

varying degrees in particular contexts," and the "First Amendment does not confine [the government] to addressing evils in their most acute form." *Williams-Yulee* v. *Florida Bar*, 575 U.S. 433, 453-454 (2015); see, *e.g.*, *McConnell* v. *FEC*, 540 U.S. 93, 158-159 (2003) (holding that Congress may subject minor parties to the same campaign-finance restrictions as major parties, despite the contention that minor parties posed a lower risk of corruption); *Beaumont*, 539 U.S. at 156-163 (holding that Congress may apply the ban on corporate contributions to nonprofit advocacy corporations, despite the contention that contributions from such corporations posed a lower risk of corruption). As the Court noted in *Buckley*, even if the threat of corruption "is somewhat diminished in the case of large contributions from immediate family members," it is not "sufficiently reduced to bar Congress from subjecting family members to the same limitations as nonfamily contributors." 424 U.S. at 53 n.59.

3. Petitioner does not identify any decision of another court of appeals that conflicts with the decision below. Indeed, petitioner does not identify even a single case in which any other court has even considered the question presented here (Pet. i): "[w]hether the federal ban on corporate contributions is unconstitutional as applied to intrafamilial contributions from a closely held, family-run corporation."

Contrary to petitioner's suggestion (Pet. 22-23), the decision below does not conflict with *Green Party* v. *Garfield*, 616 F.3d 189 (2d Cir. 2010), cert. denied, 564 U.S. 1052 (2011), or *Ted Cruz for Senate* v. *FEC* (*Cruz*), 542 F. Supp. 3d 1 (D.D.C.), jurisdiction postponed, 142 S. Ct. 55 (2021). *Green Party* involved a ban on contributions from individual lobbyists, see 616 F.3d at 212,

while *Cruz* involved a restriction on the use of post-election contributions to repay candidate loans, see 542 F. Supp. 3d at 19. Neither case involved corporations, and neither involved contributions from a candidate's family members.

Petitioner contends (Pet. 23) that *Green Party* and *Cruz* required more evidence that the challenged restriction prevented *quid pro quo* corruption than the decision below required. But even assuming that were correct, it would not warrant this Court's review. The Court has explained that "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down" depending on the specific restriction and justification at issue. *Beaumont*, 539 U.S. at 162 n.9 (citation omitted). And the Court has found it particularly inappropriate to require extensive empirical evidence in the context of restrictions on corporate contributions, given the historical pedigree of such restrictions. *Ibid.*; see *id.* at 153 (noting that the federal ban on campaign contributions dates to 1907); *Citizens United*, 558 U.S. at 343 (noting that state bans on corporate campaign contributions date to the 19th century). In any event, *Buckley* already establishes that Congress may subject family members to the same contribution limits as other donors, and the government need not produce empirical evidence to support a proposition already settled by this Court's precedents.

Petitioner's passing suggestion (Pet. 22 n.3) that the petition for a writ of certiorari in this case be held pending this Court's decision in *Cruz* is misplaced. As discussed, *Cruz* concerns a restriction on the use of post-election contributions to repay candidate loans; it involves neither corporate contributions nor contributions

from members of a candidate's family. Petitioner identifies no sound reason to expect the Court's decision in *Cruz* to affect the outcome of this case.

4. Petitioner also briefly contends (Pet. 26-29) that this Court should revisit its cases distinguishing restrictions on campaign contributions (to which the Court has applied a form of intermediate scrutiny) from restrictions on independent expenditures (to which the Court has applied strict scrutiny). But the Court drew that distinction in *Buckley* almost half a century ago, see 424 U.S. at 23, and has consistently adhered to it in the cases decided since then, see, *e.g.*, *McCutcheon*, 572 U.S. at 199 (opinion of Roberts, C.J.); *Citizens United*, 558 U.S. at 345; *Davis*, 554 U.S. at 743. No sound basis exists to overrule that long line of precedent.

This case, moreover, would be a poor vehicle for reconsidering the distinction between contributions and independent expenditures. First, this case concerns corporate rather than individual contributions, and this Court has previously expressed the view that, "[w]ithin the realm of contributions generally, corporate contributions are furthest from the core of political expression." *Beaumont*, 539 U.S. at 161 n.8. Second, petitioner does not even challenge the restriction on corporate contributions itself; instead, he argues that corporations owned by members of the candidate's family enjoy a special exemption from that restriction. The Court should reject that argument regardless of the applicable standard of scrutiny; as *Buckley* makes clear, members of candidates' families must follow the same rules as everyone else. Third, as noted above, the specific statutory provision under which petitioner was convicted applies only to contributions aggregating $25,000 or more in a calendar year, and the contributions

in this case aggregated more than $200,000. See p. 5, *supra*. Regardless of the applicable level of scrutiny, prohibiting corporate contributions of that size does not violate the First Amendment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2022