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

REPLY BRIEF FOR THE PETITIONER

J. GUTHRIE TRUE
TRUE GUARNIERI AYER, LLP
124 Clinton Street
Frankfort, KY 40601

SHON HOPWOOD
KYLE SINGHAL
HOPWOOD & SINGHAL, PLLC
1701 Pennsylvania Avenue, N.W., Suite 200
Washington, DC 20006

KANNON K. SHANMUGAM
Counsel of Record
AIMEE W. BROWN
MATTEO GODI
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
2001 K Street, N.W.
Washington, DC 20006
(202) 223-7300
kshanmugam@paulweiss.com

SUDHIR V. RAO
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019

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In its brief in opposition, the government continues to ignore both the import of this Court's recent campaign-finance decisions and the requirement that each application of the campaign-finance laws serve to prevent actual or apparent quid pro quo corruption. This Court's decisions do not authorize the government's overreach in criminally prosecuting petitioner for intrafamilial contributions from his closely held, family-run corporation. The government points to no evidence that such intrafamilial contributions pose any risk of actual or apparent quid pro quo corruption. That alone should have doomed the prosecution here.

In arguing that such evidence is unnecessary, the government relies on outdated dicta and waters down closely drawn scrutiny until it is unrecognizable. Contrary to the government's contention, in *Buckley* v. *Valeo*, 424 U.S. 1

(1976), the Court did not consider an as-applied challenge to intrafamilial contribution limits, and the dicta in a footnote referred to a government interest that no longer suffices to uphold the ban here. The government's additional suggestion that closely drawn scrutiny can be satisfied by conclusory assertions is belied by numerous decisions from this Court and other courts of appeals.

The Court should grant certiorari and hold the government to the proper burden. Without review in this case, lower courts will be emboldened to uphold limits on core constitutional speech, even absent evidence that such limits actually serve a sufficiently important government interest. And if closely drawn scrutiny is as feeble as the government contends, the Court should reconsider its application to campaign-finance restrictions altogether. There is no valid impediment to doing so in this case, and the government offers no legitimate basis for concluding that this application of the contribution ban could survive strict scrutiny.

The court of appeals' decision affirming petitioner's convictions cries out for this Court's review. The petition for a writ of certiorari should be granted.

A. The Decision Below Conflicts With This Court's First Amendment Jurisprudence And Is Inconsistent With Other Federal Courts' Analysis

Under the First Amendment, the government bears the burden of proving that "*each application*" of a challenged speech restriction survives the appropriate level of constitutional scrutiny. *FEC* v. *Wisconsin Right to Life, Inc.*, 551 U.S. 449, 478 (2007); see *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 259-260 (1986). Here, the government must prove that the ban on intrafamilial contributions from a closely held, family-run corporation is closely drawn to further an interest in preventing actual or apparent quid pro quo corruption—the only interest

that justifies a campaign-finance restriction. *McCutcheon* v. *FEC*, 572 U.S. 185, 192 (2014). And the government must do so with evidence, not "mere conjecture." *Nixon* v. *Shrink Missouri Government PAC*, 528 U.S. 377, 392 (2000).

The court of appeals erred by failing to hold the government to its burden. The resulting decision affirming petitioner's convictions conflicts with this Court's decisions and warrants the Court's review. The government's contrary arguments are unpersuasive.

1. The government begins with the peculiar argument (Br. in Opp. 5) that certiorari should be denied because petitioner challenges only the ban on corporate contributions, whereas he was convicted of violating a separate statutory provision that applies "only" to contributions of $25,000 or more in a calendar year. That purported distinction is irrelevant.

The Federal Election Campaign Act (FECA) makes it unlawful for "any corporation" to "make a contribution or expenditure," 52 U.S.C. 30118(a), and it specifies aggravated penalties for "knowingly and willfully" violating that section by making contributions "aggregating $25,000 or more during a calendar year," 52 U.S.C. 30109(d)(1)(A)(i). Petitioner was indicted for, and convicted of, violating both of those provisions. See Pet. App. 2a, 44a. The petition thus "offers no argument that the First Amendment precludes Congress from prohibiting corporate contributions of * * * $25,000," Br. in Opp. 5, precisely because Congress has prohibited *all* corporate contributions. Petitioner was sentenced pursuant to Section 30109(d)(1)(A)(i) only because he was convicted of violating the total ban on corporate contributions under Section 30118(a). The petition thus properly asks whether that ban is unconstitutional.

2. The government next attempts (Br. in Opp. 5-9) to evade its burden of justifying this application of the contribution ban by improperly elevating two cursory sentences of dicta in *Buckley* to the status of a controlling holding. But *Buckley* does not resolve this case for the simple reason that an as-applied challenge like petitioner's was not squarely before the Court. The government's response misunderstands the *Buckley* challengers' argument and the Court's rationale for rejecting it.

The government claims the *Buckley* challengers argued that "the federal contribution limits violated the Constitution because they accorded special treatment to contributions from family members." Br. in Opp. 6-7. That framing blatantly misconstrues the challengers' argument. In fact, the challengers argued that the interaction between FECA's expenditure and contribution limits—namely, the $25,000 limit on expenditures of personal and certain family funds and the $1,000 limit on individual contributions—favored wealthier candidates over less wealthy ones. See Br. of Appellants at 140, *Buckley*, *supra* (No. 75-436). Consistent with that position, the only two cases the challengers cited to support their argument involved provisions that allegedly discriminated on the basis of wealth and did not involve distinctions based on family membership. See *ibid.* (citing *Bullock* v. *Carter*, 405 U.S. 134 (1972) (filing fee to appear on ballot), and *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663 (1966) (poll tax)).

The Court roundly rejected the challengers' wealth-discrimination argument and even exacerbated the disparity by invalidating the expenditure limit while leaving intact the general individual contribution limit. See *Buckley*, 424 U.S. at 29, 54. As the Court put it, the "ancillary interest in equalizing the relative financial resources of candidates competing for elective office * * * is clearly

not sufficient to justify the [expenditure limits'] infringement of fundamental First Amendment rights." *Buckley*, 424 U.S. at 54. The Court thus held that no unconstitutional discrimination arises from the fact that wealthier candidates may be able to engage in significant spending of their own funds to support their campaigns, whereas less wealthy candidates must fundraise subject to the general contribution limit. That was sufficient to resolve the wealth-discrimination challenge, rendering the Court's statements in a footnote about intrafamilial contributions mere dicta.

In the footnote, the Court clarified that FECA's provisions governing a candidate's expenditure of personal and family funds did not create a de facto higher contribution limit for members of the candidate's immediate family, correcting the D.C. Circuit's misinterpretation. See *Buckley*, 424 U.S. at 53 n.59; see also *id.* at 51 n.57. In other words, certain intrafamilial exchanges would be subject to the general limit on individual contributions. But the Court's observation about the statute's mechanics was extraneous to the more fundamental *constitutional* holding: FECA did not unlawfully discriminate against less wealthy candidates by permitting wealthier candidates to draw on their financial advantage.

The status of the footnote's statements as dicta is especially clear because the Court was confronted with a *facial* challenge to FECA's contribution limitations, and the constitutionality of regulating intrafamilial contributions as such was barely briefed. The challengers asserted in a single sentence of their opening brief that "family * * * *expenditures*" "[c]learly" pose at least some risk of corruption because "history abounds with charges that the families of public officials have profited by their relationship." Br. of Appellants at 140, *Buckley*, *supra* (emphasis added). But that assertion, which focuses on expenditures

rather than contributions, only weakens the anti-corruption justification for regulating intrafamilial contributions: as petitioner has maintained throughout these proceedings, it is the familial "relationship," not any contribution, that gives rise to any threat of corruption. See Pet. 19-20.

Any reliance on the footnote is further undermined because the Court expressed concern with the "risk of improper influence" surrounding intrafamilial contributions, 424 U.S. at 53 n.59—a risk that the Court has since indicated is insufficient to justify campaign-finance restrictions, see *McCutcheon*, 572 U.S. at 192, 198; *Citizens United* v. *FEC*, 558 U.S. 310, 359-360 (2010). The government contends (Br. in Opp. 8-9) that *Buckley*'s reference to "improper influence" should be understood as limited to quid pro quo corruption, but this Court has already suggested the opposite, expressly distinguishing *Buckley*'s reference to "improper influence" from "*quid pro quo* arrangements." *Shrink Missouri*, 528 U.S. at 389. At a minimum, the footnote's focus on "improper influence" calls into question the persuasive value of the dicta at issue.

3. Changing tack, the government contends (Br. in Opp. 6) that a ruling in petitioner's favor would create its own constitutional and practical problems by impermissibly distinguishing between different speakers. But the government offers little support for that claim. In the primary case on which the government relies, *Davis* v. *FEC*, 554 U.S. 724 (2008), the Court invalidated a statutory provision that raised contribution limits for one candidate once his opponent's personal expenditures exceeded a certain threshold. See *id.* at 738. Unlike in *Davis*, the rule petitioner seeks here would apply equally to all competing candidates and would not be triggered as a "penalty" for

another candidate's exercise of his First Amendment rights. See *id.* at 739.

The only other authority the government can muster is a decades-old dissent involving allegations of nepotism in the awarding of public river pilot licenses. See *Kotch* v. *Board of River Port Pilot Commissioners for Port of New Orleans*, 330 U.S. 552, 564-565 (1947) (Rutledge, J., dissenting). That case has no bearing on the constitutional validity of regulating the intrafamilial contributions at issue here.

The government's passing concern about the proper definition of "family" (Br. in Opp. 6) is likewise overstated. The FEC has already defined the term "immediate family" in the campaign-finance context, see 11 C.F.R. 9003.2 (c)(1), and the propriety of that definition, or another, is a question safely left for the merits stage.

4. The government further contends (Br. in Opp. 7) that petitioner's as-applied challenge does not account for the corporate source of his payments. But the government utterly fails to engage with petitioner's argument on that score. See Pet. 7-8. In particular, the government ignores the Court's firm rejection of the claim that "speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation." *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 784 (1978). And the reasoning of *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014)—another decision the government fails to mention—makes clear that petitioner does not forfeit his First Amendment rights simply because he acted through a corporate entity. See *id.* at 706-707; Pet. 7-8.

5. Turning to its evidentiary burden for justifying the application of the contribution ban, the government contends it "need not produce empirical evidence" on the ground that "*Buckley* already establishes that Congress

may subject family members to the same contribution limits as other donors." Br. in Opp. 11. But *Buckley* did not squarely confront the constitutionality of intrafamilial contributions, and it thus cannot support the application of the ban here. See pp. 4-6, *supra*.

In claiming that it had no obligation to present evidence in support of this application of the contribution ban, the government effectively advocates rational-basis review, rather than closely drawn scrutiny. The government devotes just four sentences of its brief to a potential justification for applying the ban to intrafamilial corporate contributions. The government first makes the wholly conclusory assertion that "[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." Br. in Opp. 9. It then contends that, in the absence of a ban, "family members, like other donors, could use corporations to circumvent the limits on individual contributions." *Ibid.*

But that anti-circumvention rationale ignores the core of petitioner's challenge. There would be no need for family members to establish "any number of corporations" to "serve as a conduit for contributions," Br. in Opp. 9, precisely because limits on those family members' individual contributions would also be unconstitutional. The government's feeble efforts to justify this application of the contribution ban do not rise above the "mere conjecture" that this Court has considered inadequate. *Shrink Missouri*, 528 U.S. at 392.

The government also ignores the contrary position of the Federal Election Commission—the independent agency tasked with civil enforcement of FECA. The FEC has repeatedly declined to pursue civil penalties in cases involving intrafamilial contributions. See Pet. 20-21. That is because, as multiple commissioners have noted, "the

corruption potential for such transfers [between family members] is so insignificant as to make penalties for them unnecessary." FEC MUR 5321, Statement of Reasons of Commissioner Mason 9 (2004); see also FEC MUR 6848, Statement of Reasons of Vice Chairman Petersen and Commissioner Hunter 4 (2019); FEC MUR 5724, Statement of Reasons of Vice Chairman Petersen and Commissioner Hunter 7 (2009); FEC MUR 5321, Statement of Reasons of Chairman Smith and Commissioner Toner 1, 4 (2004). Remarkably, the government makes no effort to grapple with that line of administrative decisions.

Similarly telling is the fact that six States allow unlimited intrafamilial contributions (in addition to the eleven States with no individual contribution limits). See Institute for Free Speech, *Free Speech Index: Grading the 50 States on Political Giving Freedom* 9-10, 84-85 (2018) <tinyurl.com/freespeechindex>. Yet the government has made no attempt to argue that the absence of limits has led to actual or apparent corruption.

6. The lax evidentiary standard imposed by the court of appeals, and the seemingly even more relaxed standard now advanced by the government, clash with the standards other federal courts have applied in addressing challenges to various campaign-finance restrictions. See *Green Party* v. *Garfield*, 616 F.3d 189 (2d Cir. 2010), cert. denied, 564 U.S. 1052 (2011); *Ted Cruz for Senate* v. *FEC*, 542 F. Supp. 3d 1 (D.D.C.), jurisdiction postponed, 142 S. Ct. 55 (2021). The resulting inconsistency warrants the Court's review. See Pet. 21-23.

The government attempts to distinguish those cases on the basis that "[n]either case involved corporations, and neither involved contributions from a candidate's family members," Br. in Opp. 11, but that misses the point. Petitioner has not argued that those cases involved challenges to the corporate-contribution ban as applied to

intrafamilial contributions made by closely held corporations. See Pet. 21-22. Instead, petitioner simply notes that, in each case, the court held that mere speculation was insufficient to justify the restriction at issue and that a more robust evidentiary record was needed—notwithstanding the government's generic interest in preventing quid pro quo corruption. See *Green Party*, 616 F.3d at 206-207; *Cruz*, 542 F. Supp. 3d at 12. The government has no response to the argument that, "[i]f petitioner had been tried in the Second Circuit or in the District of Columbia, the government's evidence of quid pro quo corruption * * * would likely have been held insufficient." Pet. 23. And the government once again ignores its burden of justifying "*each application*" of the contribution ban. *Wisconsin Right to Life*, 551 U.S. at 478. The government's position is thus at odds not only with this Court's decisions, but also with the decisions of other federal courts.

B. The Question Presented Is An Exceptionally Important One That Merits The Court's Review In This Case

The government's extreme position on the proper application of closely drawn scrutiny underscores the importance of this case and the necessity of this Court's review. The government contends that it may criminally prosecute individuals for violations of campaign-finance laws without any evidence that the application of those laws furthers an interest in preventing actual or apparent quid pro quo corruption. But the net result under that approach is that closely drawn scrutiny bears no resemblance to "heightened judicial scrutiny." *Shrink Missouri*, 528 U.S. at 391. The government's claim to such unfettered authority runs directly counter to this Court's recent precedents, which have consistently narrowed the appropriate range of campaign-finance restrictions.

Indeed, if the government is correct that closely drawn scrutiny requires so little, this Court should reconsider whether such a toothless standard properly applies to contribution limits. See Pet. 26-29. As members of this Court have repeatedly recognized, contributions—no less than expenditures—are important forms of political speech that merit full First Amendment protection. See, *e.g.*, *McCutcheon*, 572 U.S. at 228 (Thomas, J., concurring in the judgment); *Shrink Missouri*, 528 U.S. at 405-410 (Kennedy, J., dissenting).

The government contends (Br. in Opp. 12-13) that this case is a "poor vehicle" to reassess the level of scrutiny applicable to contribution limits because it involves corporate contributions and an as-applied challenge. Neither feature poses a barrier to this Court's reconsideration of the appropriate standard. The Court has emphatically rejected the suggestion that corporate speech is subject to less protection than individual speech, see *Citizens United*, 558 U.S. at 342-343, and there is no basis for a different outcome when considering contributions rather than expenditures. And the limited nature of petitioner's as-applied challenge only highlights the expansive nature of the government's claimed reach under the lesser degree of scrutiny.

Notably, the government does not suggest that the ban on intrafamilial corporate contributions could survive strict scrutiny. Nor can the government dispute that petitioner is subject to a total ban on corporate contributions, even though he was subject to heightened criminal penalties for making contributions of $25,000 or more. See p. 3, *supra*. The critical fact is that invalidation of the contribution ban would overturn petitioner's convictions. If anything, the features the government identifies make this case an optimal one in which to clarify important questions of campaign-finance law.

* * * * *

The court of appeals' decision is significantly out of step with the Court's campaign-finance precedents. Leaving that decision in place would signal to the government that it may pursue harsh criminal penalties without making any effort to show that its prosecution furthers the interests supporting campaign-finance restrictions. The Court should not countenance such weak protection for the exercise of core constitutional rights. The petition for a writ of certiorari should be granted.

Respectfully submitted.

J. GUTHRIE TRUE
TRUE GUARNIERI AYER, LLP
124 Clinton Street
Frankfort, KY 40601

SHON HOPWOOD
KYLE SINGHAL
HOPWOOD & SINGHAL, PLLC
1701 Pennsylvania Avenue, N.W., Suite 200
Washington, DC 20006

KANNON K. SHANMUGAM
AIMEE W. BROWN
MATTEO GODI
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
2001 K Street, N.W.
Washington, DC 20006
(202) 223-7300
kshanmugam@paulweiss.com

SUDHIR V. RAO
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019

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