No.

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

PETITION FOR A WRIT OF CERTIORARI

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
KATHERINE S. STEWART
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

QUESTION PRESENTED

Whether the federal ban on corporate contributions is unconstitutional as applied to intrafamilial contributions from a closely held, family-run corporation.

RELATED PROCEEDINGS

United States District Court (E.D. Ky.):

United States v. *Lundergan*, Crim. No. 18-106 (Mar. 18, 2019) (memorandum opinion and order denying motions to dismiss indictment)

United States Court of Appeals (6th Cir.):

United States v. *Lundergan*, No. 20-5890 (Aug. 9, 2021)

United States v. *Emmons*, No. 20-5869 (Aug. 9, 2021)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Page

Cases—continued:

Page

In the Supreme Court of the United States

No.

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

PETITION FOR A WRIT OF CERTIORARI

Petitioner Gerald G. Lundergan respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-42a) is reported at 8 F.4th 454. The opinion of the district court (App., *infra*, 43a-65a) is not reported 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 (App., *infra*, 66a-67a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part:

> Congress shall make no law * * * abridging the freedom of speech[.]

Section 30118 of Title 52 of the United States Code provides in relevant part:

> (a) It is unlawful for * * * any corporation whatever * * * to make a contribution or expenditure in connection with any election at which * * * a Senator or Representative in * * * Congress are to be voted for[.]

Section 30109 of Title 52 of the United States Code provides in relevant part:

> (d)(1)(A) Any person who knowingly and willfully commits a violation of any provision of this Act which involves the making, receiving, or reporting of any contribution, donation, or expenditure—
>
> > (i) aggregating $25,000 or more during a calendar year shall be fined under Title 18, or imprisoned for not more than 5 years, or both[.]

STATEMENT

This case presents an exceptionally important question concerning the constitutionality of a particular application of a federal campaign-finance law. In this unprecedented prosecution, the government charged petitioner with several campaign-finance violations arising out of payments made from his closely held, family-run corporation. Those payments covered a small fraction of the expenses of petitioner's daughter, Alison Lundergan Grimes, in connection with her 2014 Senate campaign

against Senator Mitch McConnell. The question presented here is whether the corporate-contribution ban in the Federal Election Campaign Act (FECA) can be applied, consistent with the First Amendment, to intrafamilial contributions.

In affirming petitioner's convictions, the court of appeals brushed past the intrafamilial nature of the contributions and misapplied a key principle of this Court's jurisprudence: the government must offer more than "mere conjecture" to establish that a challenged regulation advances the government's interest, especially in a distinctive factual context such as this case. The court of appeals misinterpreted this Court's decision in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), as holding that intrafamilial contributions can be constitutionally regulated. And it offered no meaningful support for the conclusion that regulating intrafamilial contributions advances a governmental interest in combating actual or apparent quid pro quo corruption.

Review by this Court is warranted because the court of appeals' decision conflicts with this Court's decisions, as well as the decisions of other federal courts that have held the government to its evidentiary burden to prove a risk of quid pro quo corruption. In permitting the corporate-contribution ban to be applied to a category of contributions that the government failed to connect to any risk of quid pro quo corruption, the court of appeals has extended the government's regulatory reach far beyond what the First Amendment permits. That decision has broad implications for how lower courts address First Amendment challenges. Because the court of appeals misinterpreted and misapplied this Court's precedents and parted ways with other federal courts on an exceptionally important question of constitutional law, the petition for a writ of certiorari should be granted.

A. Background

1. The Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (FECA), as amended, regulates the financing of federal election campaigns. FECA imposed disclosure requirements; restricted expenditures that could be made for media advertising and the like; and, of particular note here, restricted contributions to candidates and political organizations. See *Buckley* v. *Valeo*, 424 U.S. 1, 7, 23 (1976). Congress sought to "limit the actuality and appearance of corruption resulting from" such contributions. *Id.* at 26.

FECA's contribution limits apply to any "person." See 52 U.S.C. 30116(a)(1). That term is defined so as to allow contributions (subject to FECA's limits) by individuals, partnerships, and limited liability companies that elect partnership tax treatment. See 52 U.S.C. 30101(11); 11 C.F.R. 110.1(e), (g)(2).

Although corporations also fall within FECA's definition of a "person," a separate provision makes it "unlawful * * * for any corporation * * * to make a contribution * * * in connection with any [federal] election." 52 U.S.C. 30118(a). That provision applies to any corporation, regardless of whether the corporation elects partnership tax treatment, and also applies to limited liability companies that elect corporate tax treatment. See 11 C.F.R. 110.1(g)(3), 114.2. Violations of FECA's corporate-contribution ban can be prosecuted as felonies, punishable by a fine and imprisonment up to five years. See 52 U.S.C. 30109(d)(1)(A).

The ban on corporate campaign contributions "grew out of a 'popular feeling' in the late 19th century 'that aggregated capital unduly influenced politics, an influence not stopping short of corruption.'" *FEC* v. *Beaumont*, 539 U.S. 146, 152 (2003) (quoting *United States* v. *Automobile Workers*, 352 U.S. 567, 570 (1957)). There was "popular

sentiment" against "'big money' campaign contributions," with commentators decrying "the giving of $50,000 or $100,000 by a great corporation toward political purposes upon the understanding that a debt is created from a political party to it." *Automobile Workers*, 352 U.S. at 571-572 (citation omitted). In response to such concerns, the 1907 Tillman Act "banned 'any corporation whatever' from making 'a money contribution in connection with' federal elections." *Beaumont*, 539 U.S. at 152, 153 (quoting Act of Jan. 26, 1907, ch. 420, 34 Stat. 864, 864-865).

2. This Court has considered FECA's constitutionality on multiple occasions. It addressed First Amendment challenges to FECA's expenditure and contribution limits in *Buckley* v. *Valeo*, 424 U.S. 1 (1976). The Court distinguished between those two kinds of provisions, subjecting only expenditure limits to the strict scrutiny that governs restrictions on "political expression." *Id.* at 44-45. According to the *Buckley* Court, contribution limits entailed "only a marginal restriction upon the contributor's ability to engage in free communication" and thus were subject only to "closely drawn" scrutiny. *Id.* at 20, 25.

Applying that two-tiered approach, the *Buckley* Court held that the government's interest in preventing corruption was insufficient to justify FECA's expenditure limits. See 424 U.S. at 45. In particular, as relevant here, the Court addressed the limits on expenditures by a candidate "from his personal funds, or the personal funds of his immediate family," and approvingly cited the lower court's conclusion that "the core problem of avoiding undisclosed and undue influence on candidates from outside interests has lesser application when the monies involved come from the candidate himself or from his immediate family." *Id.* at 51, 53 (citations omitted).

At the same time, the Court upheld the constitutionality of contribution limits against a facial challenge, concluding that the interest in "limit[ing] the actuality and appearance of corruption" was a "constitutionally sufficient justification" for those limits. 424 U.S. at 26. Although a challenge to contribution limits as applied to intrafamilial contributions was not before the Court, the *Buckley* decision included a footnote stating that "the risk of improper influence is somewhat diminished in the case of large contributions from immediate family members." *Id.* at 53 n.59. The Court nevertheless declined to "say that the danger is sufficiently reduced to bar Congress from subjecting family members to the same limitations as nonfamily contributors." *Ibid.*

The Court subsequently upheld the constitutionality of the corporate-contribution ban as applied to nonprofit advocacy corporations in *FEC* v. *Beaumont*, 539 U.S. 146 (2003). There, the Court identified four rationales supporting the corporate-contribution ban: (1) counteracting perceived distortion of the political process caused by the "state-created advantages" that allow corporations to "attract capital" and then "permit them to use resources amassed in the economic marketplace to obtain an unfair advantage in the political marketplace," *id.* at 154 (internal quotation marks and citations omitted); (2) preventing "corruption or the appearance of corruption," *ibid.* (citation omitted); (3) protecting shareholders who paid into the corporation "for purposes other than the support of candidates," *ibid.* (citation omitted); and (4) preventing "circumvention of [valid] contribution limits," *id.* at 155 (citation omitted; alteration in original). The Court concluded that those rationales applied with sufficiently similar force to nonprofit advocacy corporations as to for-profit corporations and upheld the application of the ban. See *id.* at 154-156, 159-160.

3. Since *Buckley* and *Beaumont*, the Court has rejected and refined certain rationales relied upon in those cases. Specifically, in *Citizens United* v. *FEC*, 558 U.S. 310 (2010), the Court rejected *Beaumont*'s first rationale, regarding the perceived distortion caused by significant wealth, and held that "political speech cannot be limited based on a speaker's wealth." *Id.* at 350. The Court also rejected *Beaumont*'s third rationale, regarding protection for shareholders who may invest in the corporation but do not support the candidates, and observed that it could not justify a ban that applied to "all corporations, including nonprofit corporations and for-profit corporations with only single shareholders." *Id.* at 362. The Court further clarified that the anticorruption rationale identified in *Buckley* and cited in *Beaumont* was "limited to *quid pro quo* corruption." *Id.* at 359. The fact that "speakers may have influence over or access to elected officials does not mean that these officials are corrupt." *Ibid.*; see *McCutcheon* v. *FEC*, 572 U.S. 185, 206-207 (2014).

4. The Court has also made clear that individuals who act through corporations remain entitled to First Amendment protections, particularly where the corporation is closely held and family-run. More than forty years ago, the Court rejected the proposition 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 more than a decade ago, the Court confirmed that "the First Amendment does not allow political speech restrictions based on a speaker's corporate identity." *Citizens United*, 558 U.S. at 347. The Court thus has long recognized that "[a] corporation is simply a form of organization used by human beings to

achieve desired ends," and, "[w]hen rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people." *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 706-707 (2014).

B. Facts And Procedural History

1. Petitioner is a 74-year-old former chair of the Kentucky Democratic Party and self-made entrepreneur who built a successful catering and events business. That company—S.R. Holding Company—is owned by petitioner and operated by members of his immediate family. App., *infra*, 2a; Tr. 216 (Aug. 20, 2019).

In 2012, the Democratic Party recruited petitioner's daughter, Alison Lundergan Grimes, to oppose Senator Mitch McConnell in the 2014 Kentucky Senate race. After discussing a possible run with the Democratic Senatorial Campaign Committee (DSCC), Ms. Grimes told her family that she had decided not to enter the race. But Ms. Grimes had a sudden change of heart after meeting with supporters, and on July 1, 2013, Ms. Grimes announced her intention to challenge Senator McConnell. Tr. 21 (Aug. 29, 2019 PM); Tr. 98-100 (Sept. 3, 2019 AM); Tr. 185-189 (Sept. 6, 2019).

No campaign infrastructure was in place at the time. In the wake of Ms. Grimes' surprise announcement, petitioner and other family members stepped in. Petitioner helped his daughter hold a kickoff event, establish a fundraising network, and connect with voters. The campaign reimbursed petitioner's corporation, S.R. Holding, over $100,000 for properly reported services over the course of the campaign. Yet during a fast-paced and often chaotic campaign, S.R. Holding made approximately $200,000 in payments for which it did not receive reimbursement. Those payments fell into three main categories: (1) payments related to subvendor services for the campaign

kickoff event; (2) payments to petitioner's longtime associate Dale Emmons for his work as a political consultant; and (3) payments to third-party vendors for automated calls, merchandise, and audiovisual production. App., *infra*, 2a & n.2, 3a-7a.

a. Following Ms. Grimes' unexpected announcement, the campaign immediately focused on hosting a formal kickoff event at the Carrick House, an event facility in Lexington owned by petitioner. S.R. Holding hired outside vendors to provide various services and paid them approximately $25,000. When one of petitioner's daughters—an employee of S.R. Holding—submitted invoices to the Grimes campaign, she neglected to include the subvendor payments because of an oversight. App., *infra*, 3a & n.3.

b. S.R. Holding also made payments to Mr. Emmons for political consulting services. Ms. Grimes hoped that Mr. Emmons would serve as the director of the coordinated campaign—a campaign entirely separate from Ms. Grimes' campaign, largely funded by the DSCC and run through the Kentucky Democratic Party to support all levels of Democratic candidates in the state. Mr. Emmons was not well known to the DSCC, and he sought to prove himself by laying the groundwork for the coordinated campaign as the DSCC and Kentucky Democratic Party considered the appointment of a coordinated campaign director. App., *infra*, 4a & n.4.

Because the coordinated campaign was not yet up and running in 2013, petitioner initially paid Mr. Emmons and his assistant from S.R. Holding. The payments totaled approximately $90,000. In addition, petitioner reimbursed Mr. Emmons with corporate funds for mailers and automated calls for events considered within the purview of the coordinated campaign, totaling approximately $33,000. Petitioner also reimbursed Mr. Emmons $2,850

for an Internet upgrade for his office. When it became clear that Mr. Emmons would not be appointed director of the coordinated campaign, he began working directly for Ms. Grimes' campaign, and petitioner stopped paying him. App., *infra*, 4a-6a & n.4.

c. Finally, S.R. Holding made payments to third-party vendors for merchandise, automated calls, and audiovisual services. All but one of those payments were made in 2015—after Ms. Grimes had lost the election. At that point, vendors began reaching out to petitioner in hopes of receiving payment for balances that the campaign had not yet settled, even though the campaign still had more than $150,000 in funds. Because petitioner had preexisting business relationships with those vendors, he paid them approximately $50,000. App., *infra*, 7a; Tr. 184 (Aug. 15, 2019); Tr. 6 (Aug. 21, 2019); Tr. 73-75 (Sept. 4, 2019 AM).

2. In 2016, it was publicly disclosed that the Federal Bureau of Investigation was investigating petitioner concerning S.R. Holding's payments related to Ms. Grimes' campaign. While responding to grand-jury subpoenas, petitioner became aware of the failure to receive reimbursement for the full expenses of the kickoff event and promptly invoiced the campaign for the balance owed, which was paid in full. App., *infra*, 3a-4a; Tr. 62-64 (Aug. 16, 2019); Tr. 24-25 (Aug. 28, 2019 PM); Tr. 29-30 (Aug. 29, 2019 AM).

Rather than pursuing civil enforcement, the government took the unusual step of criminally charging petitioner and Mr. Emmons. They were indicted on multiple counts of campaign-finance violations, including knowingly and willfully causing unlawful corporate contributions in excess of $25,000. App., *infra*, 7a-8a; 52 U.S.C. 30109(d)(1)(A)(i), 30118.

Before trial, petitioner moved to dismiss the indictment, arguing that FECA's corporate-contribution ban was unconstitutional facially and as applied to intrafamilial contributions from petitioner's closely held, family-run corporation. The district court rejected those arguments. App. *infra*, 8a-9a, 43a-65a.

After a 21-day trial, the jury returned a guilty verdict against petitioner and Mr. Emmons on all counts. App., *infra*, 13a.

3. Petitioner and Mr. Emmons appealed. In relevant part, petitioner argued that the corporate-contribution ban was unconstitutional as applied to the charged contributions. See Pet. C.A. Br. 20-30. Petitioner contended that the government was required to show that the application of the corporate-contribution ban to this particular category of conduct—intrafamilial payments from a closely held, family-run corporation—is closely drawn to further a sufficiently important interest and avoids an unnecessary abridgment of First Amendment rights. But the only legitimate governmental interest capable of justifying campaign-finance limitations is the prevention of actual or apparent quid pro quo corruption, and the government did not show that this interest was more than conjectural in cases involving intrafamilial contributions. In such cases, it is the existence of the familial relationship itself—and not the contribution—that may lead the candidate to favor the family member. Petitioner also argued that, under this Court's precedents, his use of the corporate form does not alter the analysis. See *id.* at 28-29 (citing *Bellotti*, 435 U.S. at 784).

The court of appeals affirmed. App., *infra*, 1a-24a. As a threshold matter, the court recognized that "quid pro quo corruption" is "the only legitimate interest that the government has in regulating individual campaign contri-

butions." *Id.* at 17a (citation omitted). The court of appeals nevertheless reasoned that, in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), this Court "conclu[ded] that intrafamilial contributions can be constitutionally regulated." App., *infra*, 19a. The court of appeals implicitly acknowledged that what it characterized as a holding was actually dicta, since "there was no as-applied challenge to the contribution limit based on intrafamilial contributions in *Buckley*." *Ibid.* Yet the court found sufficient evidence of the required "cognizable risk of * * * quid pro quo corruption or its appearance" in a handful of cases from other circuits "not dealing explicitly with a quid pro quo agreement between a family member and a candidate for an official act." *Id.* at 19a-21a. The court further reasoned that, "given that intrafamilial contributions can be constitutionally restricted," there is "no basis" to treat contributions from closely held, family-run corporations "any differently." *Id.* at 23a-24a.

4. Petitioner filed a petition for rehearing, which the court of appeals denied without recorded dissent. App., *infra*, 66a-67a.

REASONS FOR GRANTING THE PETITION

This case presents the important question whether the corporate-contribution ban can be constitutionally applied to intrafamilial contributions absent evidence that such contributions pose a risk of quid pro quo corruption. In upholding the ban's application to intrafamilial contributions, the court of appeals improperly relied on outdated dicta and applied an evidentiary standard that is inconsistent with this Court's decisions, as well as decisions from other courts. In so doing, the court of appeals sanctioned an unprecedented and unwarranted extension of the government's regulatory reach. The Court should intervene now to prevent that result.

The Court should not permit a father to serve a prison sentence and live with a permanent criminal record for helping his daughter by making campaign contributions that lack any plausible risk of the dangers animating the corporate-contribution ban. To the extent the existing level of scrutiny applicable to the corporate-contribution ban would countenance that result, the Court should reconsider that standard. Members of the Court have repeatedly questioned the propriety of applying a lower level of scrutiny to contribution limits. As an important form of political expression, campaign contributions merit full First Amendment protection, and their regulation should be subject to strict scrutiny, with the requisite narrow tailoring that is absent from the ban at issue here. This case is an optimal vehicle for addressing the question presented and clarifying important issues of First Amendment law. 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

1. The First Amendment provides that "Congress shall make no law * * * abridging the freedom of speech." This Court has explained that political speech "is central to the meaning and purpose of the First Amendment," *Citizens United* v. *FEC*, 558 U.S. 310, 329 (2010), because it is "indispensable to decisionmaking in a democracy," regardless of whether "the speech comes from a corporation rather than an individual," *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 777 (1978). The Federal Election Campaign Act of 1971, however, contains an outright ban on corporate contributions, see 52 U.S.C. 30118(a), backed with harsh criminal sanctions, see 52 U.S.C. 30109(d)(1)(A)(i).

This Court upheld the constitutionality of contribution limits against a facial challenge in *Buckley* v. *Valeo*, 424 U.S. 1 (1976). In reaching that conclusion, the Court identified the "dangers of actual or apparent quid pro quo arrangements" as the relevant compelling governmental interest that justified regulation of political speech. *Id.* at 45. In more recent decisions, this Court has recognized that quid pro quo corruption is the only interest that may justify campaign-finance restrictions. See *McCutcheon* v. *FEC*, 572 U.S. 185, 192 (2014). The "hallmark" of this brand of corruption "is the financial *quid pro quo*: dollars for political favors." *FEC* v. *National Conservative Political Action Committee*, 470 U.S. 480, 496-497 (1985). Campaign-finance regulations aimed merely at limiting influence, access, or the "general gratitude a candidate may feel toward those who support [her]" contravene the First Amendment. *McCutcheon*, 572 U.S. at 192; see *Citizens United*, 558 U.S. at 360.

This Court has also held that the question whether a particular regulation serves an anticorruption interest cannot be answered with "mere conjecture." *Nixon* v. *Shrink Missouri Government PAC*, 528 U.S. 377, 379, 392 (2000). "When the Government defends a regulation on speech as a means to * * * prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured." *Colorado Republican Federal Campaign Committee* v. *FEC*, 518 U.S. 604, 618 (1996) (citation omitted). Although the Court has not announced a bright-line rule for the quantum of evidence required to satisfy closely drawn scrutiny, the government's evidentiary burden "will vary up or down with the novelty and plausibility of the justification raised." *Shrink Missouri*, 528 U.S. at 391.

Also of relevance here, this Court has recognized that, in order to defeat an as-applied challenge, the government

must show that "*each application*" of the challenged 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).

With respect to contribution limits, the Court applies "exacting scrutiny," which requires a showing that the application is closely drawn to further a sufficiently important interest and avoids "unnecessary abridgment" of the contributor's First Amendment rights. *McCutcheon*, 572 U.S. at 197, 218 (citation omitted). That standard "must give the benefit of any doubt to protecting rather than stifling speech," because "First Amendment freedoms need breathing space to survive." *Citizens United*, 558 U.S. at 327-329 (internal quotation marks and citation omitted).

2. Despite the foregoing law, the court of appeals misconstrued this Court's decision in *Buckley* as upholding the constitutionality of individual contribution limits *as applied to intrafamilial contributions*, ignoring the absence of any justified concern over quid pro quo corruption in that particular application. See App., *infra*, 18a-21a. The court of appeals' decision to reject petitioner's as-applied challenge contravenes this Court's settled precedents and is inconsistent with the approach of other courts.

a. Contrary to the decision below, the *Buckley* Court did not "conclu[de] that intrafamilial contributions can be constitutionally regulated." App., *infra*, 19a.

i. In *Buckley*, the validity of intrafamilial contribution limits was not before the Court. Accordingly, the Court held only that preventing actual or apparent corruption was a constitutionally sufficient justification to sustain individual contribution limits against a *facial* challenge. To support that conclusion, the Court relied on the

"deeply disturbing" abuses during the 1972 election cycle as evidence that the problem of quid pro quo corruption was not "illusory." 424 U.S. at 27 & n.28. Those abuses included instances of potential ambassadors contributing to the Nixon presidential campaign to secure postings, as well as large corporations contributing to congressional candidates "motivated by the perception" that such contributions were "necessary as a 'calling card, something that would get [them] in the door and make [their] point of view heard.'" *Buckley* v. *Valeo*, 519 F.2d 821, 839-840 nn.37-38 (D.C. Cir. 1975), aff'd in part, rev'd in part, 424 U.S. 1 (1976), modified, 532 F.2d 187 (D.C. Cir. 1976) (citation omitted).

None of the evils that *Buckley* associated with large individual contributions involved intrafamilial contributions. Instead, the Court focused on the corruptive potential of large individual contributions to candidates who *lack* "immense personal or family wealth"—evincing a diminished concern with intrafamilial contributions. 424 U.S. at 26. And in addressing expenditure limits, the Court endorsed the District of Columbia Circuit's explanation that "the core problem of avoiding undisclosed and undue influence on candidates from outside interests has lesser application when the monies involved come from the candidate himself or from his immediate family." *Id.* at 53 (quoting 519 F.2d at 855).

The court of appeals cast aside the reasoning behind the *Buckley* Court's actual holding and instead homed in on dicta in one footnote. See App., *infra*, 19a. There, the Court addressed the D.C. Circuit's misinterpretation of how FECA's expenditure provision interacted with the general contribution limit. See 424 U.S. at 53 n.59. The D.C. Circuit had construed the statute as "relax[ing]" the $1,000-per-candidate limit for contributions where payments were made to an immediate family member, and it

rejected an argument that the statute thereby unconstitutionally benefited wealthy candidates. See 519 F.2d at 854-855. After explaining that the expenditure provision did not affect the applicability of the general limit on individual contributions to family members, the Court stated that, "[a]lthough the risk of improper influence is somewhat diminished," it would not "say that the danger is sufficiently reduced to bar Congress from subjecting family members to the same limitations as nonfamily contributors." 424 U.S. at 53 n.59. In making those statements, the Court was not addressing a challenge to any particular application of the contribution ban.

ii. Even setting aside its error in relying on dicta, the court of appeals also ignored the fact that the *Buckley* Court's brief comment about the potential for family members' "improper influence" over candidates cannot suffice to uphold such contribution limits in light of this Court's more recent precedents. As the Court recognized in *Shrink Missouri*, *supra*, "[i]n speaking of 'improper influence' and 'opportunities for abuse' in addition to '*quid pro quo* arrangements,'" *Buckley* "recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors." 528 U.S. at 389.

But the Court has since clarified that only the prevention of actual or apparent quid pro quo corruption, not the broader prevention of "improper influence," is a valid governmental interest. See *McCutcheon*, 572 U.S. at 192, 198. Plainly, the fact that "speakers may have influence over or access to elected officials does not mean that these officials are corrupt." *Citizens United*, 558 U.S. at 359. Accordingly, the interest that justifies regulation of political speech cannot be the mere "possibility that an individual * * * may garner 'influence over or access to' elected officials." *McCutcheon*, 572 U.S. at 208 (quoting

Citizens United, 558 U.S. at 359). In placing heavy reliance on *Buckley*'s footnote, the court of appeals thus effectively ignored decades of intervening precedent.

b. Having erroneously determined that *Buckley*'s footnote controls, the court of appeals compounded its error by departing from this Court's clear guidance on how to evaluate as-applied challenges to campaign-contribution regulations. Under governing case law, the government was required to show that the application of the contribution ban to intrafamilial contributions was closely drawn to advance an interest in preventing actual or apparent quid pro quo corruption. Yet the court of appeals failed to hold the government to that burden.

i. This Court's precedents require the government to supply some factual basis to justify regulating campaign contributions on anticorruption grounds. In *Buckley*, for instance, the Court relied on congressional findings detailing the abuses during the 1972 federal election cycle as evidence that the problem of quid pro quo corruption was not "illusory." See 424 U.S. at 27.

Although the Court has declined to specify the quantum of evidence necessary to satisfy the "closely drawn" standard, it has made clear that "mere conjecture" is not "adequate." *Shrink Missouri*, 528 U.S. at 392. Instead, the government's evidentiary burden "will vary up or down with the novelty and plausibility of the justification raised." *Id.* at 391. While the Court in *Shrink Missouri* recognized that the dangers of large contributions are "neither novel nor implausible," *ibid.*, it nevertheless considered other "evidence introduced into the record," specific to the challenged state law, to determine whether there was "enough to show that the substantiation of the congressional concerns reflected in *Buckley* has its counterpart supporting the [state] law" at issue. *Id.* at 393.

The applicable evidentiary burden is clear in post-*Buckley* as-applied challenges to campaign-finance laws. *Massachusetts Citizens for Life, supra*, illustrates the point. There, the Federal Election Commission sought to bring a nonprofit corporation within FECA's prohibition on direct corporate expenditures by arguing that the government had long regulated direct corporate political activity. See 479 U.S. at 256. This Court, however, held that the FEC's rationale for regulating for-profit corporations did not apply to nonprofits. See *id.* at 259-261. Identifying the litany of ways in which the two types of corporations differ, the Court concluded that the latter simply "do not pose that danger of corruption" that prompted the statute. *Id.* at 259-260.

Despite the government's implausible claim that a ban on intrafamilial contributions would serve an anticorruption justification here, the court of appeals resorted to nothing more than conjecture to validate that justification. In fact, the court of appeals found sufficient evidence of the required "cognizable *risk* of * * * quid pro quo corruption or its appearance" in a handful of out-of-circuit cases, even though those cases did not "deal[] explicitly with a quid pro quo agreement between a family member and a candidate for an official act." App., *infra*, 19a, 20a-21a (citation omitted). At most, those cases showed relatives acting together to benefit one another despite the complete *absence* of a quid pro quo arrangement between them—supporting petitioner's argument that, where family members receive favored treatment, it is not because of any intrafamilial contributions.[1]

---

[1] See App., *infra*, 20a-21a (citing cases); cf. *United States* v. *Reed*, 908 F.3d 102, 107-108 (5th Cir. 2018) (district attorney who used donor funds to hire his son to provide services at inflated prices); *United States* v. *Skelos*, 707 Fed. Appx. 733, 739 (2d Cir. 2017) (state senator

The court of appeals was forced to grasp at such attenuated support because that was all the government could muster. That is hardly surprising: in a case involving an intrafamilial contribution, the risk of favored treatment is not tied to the contribution but rather to the familial relationship itself. The court of appeals also offered the conclusory speculation that "[j]ust because a family member can choose to contribute to a candidate based on the familial relationship does not mean that the family member could not also contribute to the candidate for the purpose of receiving a quid pro quo." App., *infra*, 19a. But that is precisely the sort of unsupported "conjecture" this Court has recognized as insufficient. See *Shrink Missouri*, 528 U.S. at 392.[2]

ii. The court of appeals also ignored relevant authority weighing against application of the contribution ban to intrafamilial contributions.

As the agency charged with civil enforcement of FECA, the FEC has repeatedly declined to pursue civil penalties in cases involving intrafamilial contributions. Indeed, commissioners have "argue[d], in essence, that

---

who traded his vote for payments to his son); Information ¶¶ 1-13, *United States* v. *Bera*, Crim. No. 16-97, 2016 WL 4492413 (E.D. Cal. May 9, 2016) (candidate who allegedly used family members to make straw contributions); *United States* v. *Acevedo Vila*, 588 F. Supp. 2d 194, 199-200 (D.P.R. 2008) (same); Information ¶¶ 20-23, *United States* v. *Foley*, Crim. No. 14-65, 2014 WL 4686481 (D. Conn. Mar. 31, 2014) (husband and wife who allegedly conspired with others to conceal in-kind contributions made to wife's campaign).

[2] Neither the court of appeals nor the government took issue with petitioner's argument that the corporate contributions at issue here should be treated as intrafamilial contributions under this Court's precedents. See App., *infra*, 22a-24a; Gov't C.A. Br. 26-43. Nor could they: this Court has held that persons are no less entitled to the First Amendment's protections because they act through corporations, particularly closely held corporations. See pp. 7-8, *supra*.

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). For instance, in a case involving an $800,000 gift from a candidate's mother during her candidacy, the Commission declined to take any action, because treating that action "similarly to other violations involving excessive contributions * * * would lead the Commission to propose a civil penalty far in excess of what is appropriate given that this matter involves transactions among family members." FEC MUR 5321, Statement of Reasons of Chairman Smith and Commissioner Toner 1 (2004).

In short, the fact that the very agency tasked with enforcing the federal campaign-finance laws has a decade-long, consistent practice of non-enforcement highlights the lack of fit between the conduct and the claimed basis for regulation. See FEC MUR 5724, Statement of Reasons of Vice Chairman Petersen and Commissioner Hunter 7 (2009); FEC MUR 6848, Statement of Reasons of Vice Chairman Petersen and Commissioner Hunter 4 (2019). The court of appeals erred by ignoring that evidence and excusing the government from bearing its burden of presenting evidence of its own.

iii. Unsurprisingly, given its departure from this Court's precedents, the court of appeals' approach contrasts starkly with that of other federal courts addressing the government's evidentiary burden in challenges to other campaign-finance laws.

In *Ted Cruz for Senate* v. *FEC*, Civ. No. 19-908, 2021 WL 2269415 (D.D.C. June 3, 2021), consideration of jurisdiction postponed, No. 21-12 (oral argument scheduled for Jan. 19, 2022), for example, a three-judge district court properly reasoned that, under *Shrink Missouri*, the FEC could not merely "*assert* an interest in preventing quid

pro quo corruption" to defend the regulations at issue. *Id.* at *7. Just like the government here, the FEC failed to identify "a single case of actual quid pro quo corruption" arising from the purported corruption threat the FEC sought to regulate, while, "in cases that have found a sufficient anticorruption interest, the record has been robust." *Id.* at *7-*8. The district court concluded that the FEC's mere "speculation" that "contributions to pay off a candidate's personal loans carry a danger of quid pro quo corruption" was insufficient to carry the government's "substantial" First Amendment burden. *Id.* at *8, *10; accord *EMILY's List* v. *FEC*, 581 F.3d 1, 14 (D.C. Cir. 2009) (Kavanaugh, J.) (holding unconstitutional FEC regulations limiting nonprofits' ability to spend and raise money when there was "no record evidence that non-profit entities have sold access to federal candidates and officeholders in exchange for large contributions").[3]

Similarly, in *Green Party of Connecticut* v. *Garfield*, 616 F.3d 189 (2010), the Second Circuit undertook a careful analysis of the evidence supporting Connecticut's ban on contributions by state contractors and lobbyists. The Second Circuit upheld the ban on contributions by current and prospective contractors, noting that "nearly all of the corruption scandals that gave rise to the [statute] * * * involved both current and prospective state contractors offering bribes in exchange for assistance in winning new state contracts." *Id.* at 202.

---

[3] In *Cruz*, the FEC is challenging the district court's holding as to the adequacy of the evidence of quid pro quo corruption. See FEC Br. 42-44, *Cruz*, *supra* (No. 21-12). Should the Court decide not to grant this petition outright, petitioner respectfully requests that the Court hold the petition pending its decision in *Cruz*.

Turning to the ban on lobbyist contributions, however, the Second Circuit noted that Connecticut's "recent corruption scandals had nothing to do with lobbyists," and thus "there is insufficient evidence to infer that *all* contributions made by state lobbyists give rise to an appearance of corruption." 616 F.3d at 206 (citation omitted). The court rejected as insufficient the plaintiffs' evidence "suggesting that many members of the public generally distrust lobbyists and the 'special attention' they are believed to receive from elected officials." *Ibid.* Such evidence did not show quid pro quo corruption, but rather the kind of influence and access this Court has recognized as inadequate. See *ibid.* Accordingly, the court found "insufficient evidence to demonstrate that all lobbyist contributions give rise to an appearance of corruption" and held that the ban violated the First Amendment. *Id.* at 207.

If petitioner had been tried in the Second Circuit or in the District of Columbia, the government's evidence of quid pro quo corruption in intrafamilial contributions would likely have been held insufficient and this application of the corporate-contribution ban deemed unconstitutional. Here, by contrast, the court of appeals wholly excused the government from its burden of providing a factual basis to show that its prosecution of intrafamilial contributions actually advances an anticorruption interest. The court of appeals thus opened the door to campaign-finance prosecutions targeting activity that lacks any "connection with an effort to control the exercise of an officeholder's official duties." *McCutcheon*, 572 U.S. at 208.

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

The question presented here is important both in its own right and because it has far-reaching implications. In

relying on outdated dicta and ignoring important limits on the government's ability to restrict contributions, the court of appeals' decision flouts this Court's guidance and stretches the government's regulatory reach at the expense of First Amendment rights. The Court should grant review to address the court of appeals' misunderstanding of *Buckley* and of the quantum of evidence required under heightened scrutiny to demonstrate that a particular regulation serves a sufficiently important state interest.

1. At a time when this Court has repeatedly narrowed campaign-finance restrictions, the court of appeals' decision represents a significant step in the opposite direction. The court of appeals sanctioned the government's unprecedented prosecution by relying on *Buckley*'s dicta and accepting mere conjecture that intrafamilial contributions *might* result in quid pro quo corruption. See App., *infra*, 18a-21a. The government failed to identify a single example of quid pro quo corruption arising from intrafamilial contributions. The court of appeals ignored the views of FEC commissioners that such contributions do not pose a risk of corruption sufficient to merit even civil penalties. And the court of appeals acknowledged that none of the government's cited authorities "deal[] explicitly with a quid pro quo agreement between a family member and a candidate for an official act." *Id.* at 20a-21a. Yet the court of appeals concluded the government had carried its burden of establishing that this application of the corporate-contribution ban advanced an anticorruption interest. See *ibid.* Upholding a criminal conviction based on such a record constitutes a breathtaking expansion of the government's regulatory authority.

2. Absent any evidence that intrafamilial contributions pose a risk of actual or apparent quid pro quo corruption, the court of appeals effectively permitted the

government to prosecute petitioner for engaging in protected speech based on an amorphous concern that family members might sometimes act badly together. If left undisturbed, the court of appeals' decision will invite lower courts to assess whether a legitimate state interest justifies challenged regulations by lumping together generalized fears of undue influence and access, on the one hand, and quid pro quo corruption, on the other.

This Court should grant review to remove any doubt that only the prevention of actual or apparent quid pro quo corruption—*viz.*, a "direct exchange of an official act for money"—may justify restrictions on core political speech. *McCutcheon*, 572 U.S. at 192. And only this Court can provide the needed clarity. After all, the court of appeals considered itself bound by *Buckley*'s purported "conclusion that intrafamilial contributions can be constitutionally regulated." App., *infra*, 19a. But for all the reasons discussed above, *Buckley*'s brief observation on the matter came in dicta and, in any event, has lost any purchase it may have had in 1976. See pp. 15-18, *supra*. Even the district court here, in granting petitioner's motion for a stay pending appeal, recognized the shaky status of the dicta when it observed that this Court's recent decisions "potentially open the door for footnote fifty-nine in *Buckley* * * *, and the *Buckley* opinion in general, to be revisited." D. Ct. Dkt. 393, at 6. This Court should grant review to provide much-needed clarity on an important question of campaign-finance law.[4]

---

[4] Nor is the impact of the court of appeals' decision necessarily limited to the campaign-finance context. In considering other restrictions on speech, courts ask whether the government has "demonstrate[d] that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broadcasting System, Inc.* v. *FCC*, 512 U.S.

C. The Court May Wish To Revisit The Level Of Scrutiny Applied To Contribution Limits

Petitioner submits that the application of the corporate-contribution ban to intrafamilial contributions plainly fails even under closely drawn scrutiny based on the utter lack of any evidence of actual or apparent quid pro quo corruption, and certiorari is warranted on that basis alone. But if the Court were to conclude that the government's conjecture is sufficient to satisfy closely drawn scrutiny, it would be appropriate for this Court to reconsider that level of scrutiny of contribution limits. With no evidence that intrafamilial contributions threaten quid pro quo corruption or its appearance, the total ban on intrafamilial contributions from a closely held, family-run corporation could not survive strict scrutiny.

In upholding the application of the corporate-contribution ban to petitioner's intrafamilial contributions, the court of appeals applied closely drawn scrutiny. See App., *infra*, 16a-17a, 24a. Limits on expenditures, by contrast, are subject to strict scrutiny and must be invalidated unless the government shows that they are "justified by a compelling state interest" and "narrowly tailored" to serve that interest. *Massachusetts Citizens for Life*, 479

622, 664 (1994) (must-carry provisions); *Edenfield* v. *Fane*, 507 U.S. 761, 770-771 (1993) (restrictions on the ability of certified public accountants to solicit clients). Even beyond the speech context, as-applied constitutional challenges routinely depend on whether the government has offered sufficient evidence to warrant a restriction on constitutional rights. See, *e.g.*, *Tyler* v. *Hillsdale County Sheriff's Department*, 837 F.3d 678, 695-696 (6th Cir. 2016) (holding that the government failed to establish that formerly involuntarily committed persons presented continued risk of gun possession to justify a lifetime ban on their gun possession under the Second Amendment). The court of appeals' decision sets a dangerous precedent that could be used to lower the government's burden in the context of those as-applied constitutional challenges as well.

U.S. at 252, 261; see *Buckley*, 424 U.S. at 44-45. That two-tiered approach was dubious when *Buckley* was decided and has only become less defensible in light of intervening precedents. This Court has recognized that its precedent may merit reconsideration where it has "been questioned by Members of the Court in later decisions" and "defied consistent application by the lower courts." *Pearson* v. *Callahan*, 555 U.S. 223, 235 (2009) (citation omitted). That is the case here.

1. Campaign contributions are a vital means of expressing support for candidates and assisting the dissemination of their views. Yet *Buckley*'s "closely drawn" standard offers "only tepid protection to the core speech and associational rights that our Founders sought to defend." *FEC* v. *Colorado Republican Federal Campaign Committee*, 533 U.S. 431, 466 (2001) (Thomas, J., dissenting). The rationales for offering lesser protection, moreover, have been overtaken by precedent.

Buckley relied on two main rationales for subjecting contributions and expenditures to different levels of review: "First, though contributions may result in speech, that speech is by the candidate and not by the contributor; and second, contributions express only general support for the candidate but do not communicate the reasons for that support." *Colorado Republican Federal Campaign Committee* v. *FEC*, 518 U.S. 604, 635 (1996) (Thomas, J., concurring in the judgment and dissenting in part) (citing *Buckley*, 424 U.S. at 21). Neither rationale holds water.

As Justice Thomas has explained, "[w]hen an individual donates money to a candidate or to a partisan organization, he enhances the donee's ability to communicate a message and thereby adds to political debate, just as when that individual communicates the message himself." *Colorado Republican*, 518 U.S. at 636. The only difference

between contributions and expenditures is that contributions "pass through an intermediary," whereas expenditures need not do so. *Id.* at 638. But "[w]hether an individual donates money to a candidate or group who will use it to promote the candidate or whether the individual spends the money to promote the candidate himself, the individual seeks to engage in political expression and to associate with like-minded persons," and that action is no less worthy of First Amendment protection. *Ibid.*

Similarly, an expression of general support through a contribution is entitled to the same First Amendment protection as an expression of specific support through an expenditure. See *Colorado Republican*, 518 U.S. at 639-640 (Thomas, J., concurring in the judgment and dissenting in part). Indeed, this Court has repeatedly rejected efforts to weaken First Amendment protections based on judicial assessments of the expression's value. See, *e.g.*, *Brown* v. *Entertainment Merchants Association*, 564 U.S. 786, 798-799 (2011); cf. *United States* v. *Alvarez*, 567 U.S. 709, 717 (2012) (plurality opinion). Where speech implicates "matters of public concern," moreover, it "occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection," even if "its contribution to public discourse may be negligible." *Snyder* v. *Phelps*, 562 U.S. 443, 452, 453, 460 (2011) (internal quotation marks and citation omitted).

2. Members of this Court have repeatedly called for reconsideration of the two-tiered approach to campaign regulation. See, *e.g.*, *McCutcheon*, 572 U.S. at 228 (Thomas, J., concurring in the judgment); *Beaumont*, 539 U.S. at 164 (Thomas, J., joined by Scalia, J., dissenting); *id.* at 163-164 (Kennedy, J., concurring in the judgment); *Colorado Republican*, 533 U.S. at 465 (Thomas, J., joined by Scalia and Kennedy, JJ., dissenting); *Shrink Missouri*, 528 U.S. at 405-410 (Kennedy, J., dissenting); *id.* at 410-

430 (Thomas, J., joined by Scalia, J., dissenting). In the event this Court were to conclude that the government's evidentiary (non-)showing satisfies closely drawn scrutiny, this case would present an excellent vehicle for reconsidering that standard. In light of the absence of any evidence of quid pro quo corruption in intrafamilial contributions and the lack of tailoring presented by the total ban on such contributions from closely held, family-run corporations, the ban could not survive strict scrutiny.

* * * * *

The decision below improperly elevates outdated dicta from *Buckley* while ignoring binding precedent requiring the government to provide evidence beyond mere conjecture of the risk of quid pro quo corruption. That decision parts ways with this Court's decisions, as well as decisions from other federal courts, undermining First Amendment protections and allowing the government to regulate speech without any showing that the harms on which its authority is based actually exist. The Court should grant review to make clear that the First Amendment does not tolerate such untethered intrusions on protected speech.

CONCLUSION

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
KATHERINE S. STEWART
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

DECEMBER 2021