No. 24-621

In The
Supreme Court of the United States

NATIONAL REPUBLICAN
SENATORIAL COMMITTEE, et al.,

Petitioners,

v.

FEDERAL ELECTION COMMISSION, et al.,

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

AMICUS CURIAE BRIEF OF RANDY ELF IN SUPPORT OF PETITIONERS NATIONAL REPUBLICAN SENATORIAL COMMITTEE, ET AL.

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August 28, 2025

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[1] This brief is at https://ssrn.com/abstract=5400107 (all Internet sites, except the one for this brief, visited Aug. 18, 2025).

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[2] "Authorities upon which [this filing] chiefly rel[ies] are marked with asterisks." D.C.CIR.R. 28(a)(2), *available at* https://www.cadc.uscourts.gov/circuit-rules-procedures; *accord* 11TH CIR.R. 28-1(e), *available at* https://www.ca11.uscourts.gov/rules-procedures.

This filing cites slip- or manuscript-opinion/order pages, rather than Westlaw star pages, where bound-volume pagination will later be available, because Westlaw removes star pagination when West issues bound-volume pagination.

RULES

LAW REVIEWS

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INTEREST OF AMICUS CURIAE[3]

Amicus has presented many briefs and oral arguments on speech law's constitutionality and written a law-review article addressing this. Randy Elf, *The Constitutionality of State Law Triggering Burdens on Political Speech and the Current Circuit Splits,* 29 REGENT U.L. REV. 35 (2016) ("*Triggering*"), *available at* https://ssrn.com/abstract=5283417.

Amicus has also made many presentations across the country on this topic. *E.g., id.* at 35 n.*; Randy Elf, *How Political Speech Law Benefits Politicians and the Rich* (Aug. 20, 2020) (one-hour video), *available at* https://www.youtube.com/watch?v=h3ebymA7xOo.

Where this brief quotes *Triggering* text, some cites from corresponding footnotes are inserted into the text, and some cites remain in footnotes. Cites are converted from law-review style to brief style; many are condensed. Emphases are as in *Triggering*.

[3] No party's counsel wholly or partly authored this brief. No such counsel, party, or other person—other than Amicus or Amicus's counsel—contributed monetarily to preparing or submitting this brief. Amicus has no members. *Cf.* S.CT.R. 37.2(a), 37.6.

SUMMARY OF ARGUMENT

► The Court would serve the law well by explaining that "government's interest in preventing circumvention of law ... can apply only when the ... law is valid in the first place." *Infra* Part I.

► The Court would further serve the law well by contrasting burdens of proof. *Infra* Part II.

► The Court should distinguish law regulating political speech from law banning or otherwise limiting political speech. To regulate political speech is to require disclosure of it. A political-speech ban or other political-speech limit is not a political-speech regulation. *Infra* Part III.

► Government has three possible interests in *regulating*—i.e., requiring disclosure of—political speech. *Infra* Part IV.

By contrast, preventing quid-pro-quo corruption or its appearance is the only government interest in *banning or otherwise limiting* political speech other than by aliens. *Infra* Part V.

► No political-speech-disclosure law is at issue here. If the Court nevertheless mentions disclosure beyond distinguishing it from bans and other limits, *infra* Part III, or contrasting the government interests, *infra* Parts IV-V, the Court should briefly drive home the difference between types of disclosure, *infra* Part VI.

Amicus submits the Court's not driving home the difference has led some lower courts to lump dif-

ferent types of disclosure into one disclosure analysis and has led to circuit splits.

ARGUMENT

I. The Court would serve the law well by explaining that 'government's interest in preventing circumvention of law ... can apply only when the ... law is valid in the first place.'

A. 'Government's interest in preventing circumvention of valid law neither saves otherwise invalid law nor allows government to prevent circumvention of valid with invalid law.'

In addressing circumvention of law—a phrase that has arisen in this action (*e.g.,* PET'RS'-BR. at 1)—the Court would serve the law well by explaining that

> government's interest in preventing circumvention of law ... can apply only when the ... law is valid in the first place. *Yamada v. Snipes*, 786 F.3d 1182, 1200 (9th Cir. 2015) (referring to "the circumvention of valid campaign finance laws"). Government's interest in preventing circumvention of valid law neither saves otherwise invalid law nor allows government to prevent circumvention of valid with invalid law, *McCutcheon v. FEC*, 572 U.S. 185, 134

> S.Ct. 1434, 1452-53 & n.7, 1454-59 (2014) [(opinion of Roberts, C.J.)], because "there can be no freestanding anti-circumvention interest." *Republican Party of N.M. v. King,* 741 F.3d 1089, 1102 (10th Cir. 2013); *accord Landell v. Sorrell,* 406 F.3d 159, 169 (2d Cir. 2005) (Walker, C.J., dissenting) ("anti-circumvention is not an independent state interest" (citing *McConnell v. FEC,* 540 U.S. 93, 161 (2003))), *rev'd on other grounds sub nom. Randall v. Sorrell,* 548 U.S. 230, 246-62 (2006).

Triggering at 66 & nn.163-66.

B. 'On the one hand, when law is constitutional, one may circumvent it legally yet not illegally. That is the difference between avoiding taxes, which is legal, and evading taxes, which is illegal. On the other hand, when law is unconstitutional, and enforcement/prosecution of it is enjoined, one may freely circumvent it.'

> That "speakers find ways to circumvent campaign finance law," *Citizens United v. FEC,* 558 U.S. 310, 364 (2010) (citing *McConnell,* 540 U.S. at 176-77), does not allow anyone to prevent circumvention with unconstitutional law. In other words: On the one hand, when law *is* constitutional, one may circumvent it legally yet not illegally. That is the difference between avoiding taxes, which is legal, and evading

> taxes, which is illegal. *Compare Tax Avoidance*, BLACK'S LAW DICTIONARY (10th ed. 2014), *with Tax Evasion*, BLACK'S LAW DICTIONARY (10th ed. 2014). On the other hand, when law is unconstitutional, and enforcement/prosecution of it is enjoined, one may freely circumvent it.

Triggering at 66 n.166.

II. The Court would further serve the law well by contrasting burdens of proof.

The Court would further serve the law well by contrasting burdens of proof: When government defends political-speech law against as-applied/facial[4] overbreadth challenges, government must prove the law survives constitutional scrutiny. *E.g., McCutcheon,* 572 U.S. at 210 (opinion of Roberts, C.J.) (citation omitted). Meanwhile, parties asserting *facial* overbreadth must prove *facial* overbreadth, *e.g., McConnell,* 540 U.S. at 207 (citations omitted), *overruled on other grounds by Citizens United,* 558 U.S. at 365-66,[5] but only if the challenged law is narrowly tailored, *Ams. for Prosperity Found. v. Bonta,* 141 S.Ct. 2373, 2389 (2021).

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[4] The label "overbreadth" applies to both. *Triggering* at 41-42 n.53 (citing *Alaska Right to Life Comm. v. Miles,* 441 F.3d 773, 785 (9th Cir. 2006)).

[5] Under this dichotomy, no one must "prove a negative." *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett,* 564 U.S. 721, 745 (2011) (citation omitted).

III. The Court should distinguish law regulating political speech from law banning or otherwise limiting political speech.

Political speech is at the "core" of what the First Amendment protects. *E.g., Buckley v. Valeo,* 424 U.S. 1, 44-45 (1976) (per curiam); *Triggering* at 35 & n.1.

> Other "speech" is *not* at the core of the First Amendment. *See, e.g., Nixon v. Shrink Mo. Gov't PAC,* 528 U.S. 377, 411–12, 412 nn.1-2 (2000) (Thomas, J., dissenting) (addressing lesser "speech" and collecting authorities).

Triggering at 41 n.40.

The Court should distinguish law regulating political speech from law banning or otherwise limiting political speech.

A. To regulate political speech is to require disclosure of it.

To regulate political speech is to

> require disclosure of [it], which differs from "ban" or otherwise "limit." *See Yamada v. Kuramoto,* 744 F.Supp.2d 1075, 1082 & n.9 (D. Haw. 2010) (distinguishing restrictions, i.e., bans or other limits, from regulation, i.e., disclosure). The umbrella term "disclosure" can cover registration, recordkeeping, reporting, attributions, and disclaimers in all their forms. *Wis. Right to Life,*

> *Inc. v. Barland,* 751 F.3d 804, 812-16, 836 (7th Cir. 2014). *Barland* understands the difference between attributions and disclaimers. *Id.* at 815-16. By definition, an "attribution" attributes and says who *is* speaking, while a "disclaimer" disclaims and says who is *not* speaking. *Id.*

Triggering at 35 n.2.

The Court should please dispense with saying "disclaimer and disclosure requirements." *E.g., Citizens United,* 558 U.S. at 319, 321-22, 366-67, 371. It is like saying "apples and fruit," because the latter includes the former. The Court should also please dispense with using "disclaimer" for *both* attributions and disclaimers, *e.g., id.*, because they are different.

B. Political-speech bans or other political-speech limits are not political-speech regulation.

Political-speech bans or other political-speech limits[6] are not political-speech regulation. *See supra* at 6 (defining "regulate").

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[6] A ban is a limit of zero. *Ala. Democratic Conference v. Strange,* No. 11-cv-02449-JEO, at 17 (N.D. Ala. Dec. 14, 2011), *vacated on other grounds*, 541 F.App'x 931, 935-37 (11th Cir. 2013) (unpublished).

Triggering at 38 n.25.

The challenged law limits political speech in the form of *spending—spending,* not just *expenditures* properly understood as *Buckley* express advocacy, *Triggering* at 36 n.9 (citing *Buckley,* 424 U.S. at 44 & n.52, 80)—that political parties coordinate with candidates. (*See, e.g.,* PET'RS'-BR. at i (statement of issues); RESP'TS'-BR. at i (same).)[7]

IV. Government has three possible interests in regulating—i.e., requiring disclosure of—political speech.

Government has three possible interests in *regulating*—i.e., requiring disclosure of, *supra* at 6—political speech. *Buckley*, 424 U.S. at 66-68.[8]

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[7] The use of money for political speech is itself political speech. *See, e.g., Austin v. Mich. Chamber of Com.,* 494 U.S. 652, 657 (1990) (holding that using money to support a candidate is speech (quoting *Buckley*, 424 U.S. at 39)), *overruled on other grounds by Citizens United,* 558 U.S. at 365; *Buckley*, 424 U.S. at 19 & n.18 (explaining that limiting money limits speech).

Triggering at 48 n.77.

[8] However, only *Buckley* Interest 1 can apply to regulating

- independent spending for political speech or
- contributions for it.

Interest 2—government's interest in preventing quid-pro-quo corruption or the appearance of quid-pro-quo corruption,

V. By contrast, preventing quid-pro-quo corruption or its appearance is the only government interest in banning or otherwise limiting political speech other than by aliens.

By contrast, preventing quid-pro-quo corruption or its appearance is the *only* government interest in *banning or otherwise limiting* political speech, *FEC v. Ted Cruz for Senate,* 142 S.Ct. 1638, 1652 (2022) (citing *McCutcheon,* 572 U.S. at 207 (opinion of Roberts, C.J.)), *other than by aliens, Bluman v. FEC,* 800 F.Supp.2d 281, 286-89 (D.D.C. 2011) (Kavanaugh, J.), *aff'd,* 565 U.S. 1104 (2012) (mem.). *All law should be written so it is clear to the laity, see Triggering* at 41 n.44 (quoting Clarence Thomas, *Be Not Afraid,* AM. ENTER. INST. (Feb. 13, 2001)), and *Bluman* explains well why preventing quid-pro-quo corruption or its appearance is no prerequisite to banning or otherwise limiting *aliens'* political speech.

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compare Buckley, 424 U.S. at 67 (addressing Interest 2), *with McCutcheon,* 572 U.S. at 192, 207-08 (opinion of Roberts, C.J.) (defining these terms)—*cannot* apply to *independent* spending for political speech, *Citizens United,* 558 U.S. at 357-61, or contributions *not* directed to candidates/officeholders, *McCutcheon,* 572 U.S. at 211 (opinion of Roberts, C.J.) (quoting *McConnell,* 540 U.S. at 310 (Kennedy, J., concurring/dissenting) (*overruled on other grounds by Citizens United,* 558 U.S. at 365-66)).

Interest 3 applies only to facilitating enforcement of *constitutional* "restrictions," *McConnell,* 540 U.S. at 196 (discussing *Buckley*), i.e., *constitutional* bans or other *constitutional* limits on contributions received/made, *Buckley,* 424 U.S. at 67-68 (addressing Interest 3).

VI. No political-speech-disclosure law is at issue here. If the Court nevertheless mentions disclosure beyond distinguishing it from bans and other limits and contrasting the government interests, the Court should briefly drive home the difference between types of disclosure.

No political-speech-disclosure law is at issue here. (*See, e.g.,* PET'RS'-BR. at i (questions presented).)

If the Court nevertheless mentions disclosure, *see McCutcheon,* 572 U.S. at 223-24 (opinion of Roberts, C.J.) (doing so when it was not at issue), beyond distinguishing it from bans and other limits, *supra* at 6-8, and contrasting the government interests, *supra* at 8-9, the Court should briefly drive home the difference between types of disclosure.

Track 1, political-committee and political-committee-like burdens can include registration (including, in turn, treasurer designation, bank-account designation, and termination, i.e., deregistration), recordkeeping, extensive reporting, and ongoing reporting. *Citizens United*, 558 U.S. at 338; *FEC v. Mass. Citizens for Life, Inc.,* 479 U.S. 238, 253-56 & nn.7-9 (1986) (opinion of Brennan, J.); *Buckley,* 424 U.S. at 63; *Triggering* at 43-44 & nn.60-65, 56 & nn.117-24.

To require Track-1-burden-triggering analysis, law need *not*

> ● trigger all such burdens, *e.g., Triggering* at 45-46 & nn.71-72 (collecting authorities), or
>
> ● apply to all of challengers' income/spending, *e.g., Triggering* at 43-44 & nn.59-60, 50-51 & nn.90-92, 65 n.157 (addressing funds/accounts and other law applying only to *particular* income/spending (collecting authorities)).

By contrast, Track 2,[9] non-political-committee disclosure, includes *no* Track 1 burdens: For example,

> Track 2 reporting occurs only for reporting periods when the particular speech occurs,[10] and the reports are less burdensome than extensive or ongoing reporting. *See, e.g., Mass. Citizens,* 479 U.S. at 262 ("less

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[9] The *terms* "Track 1" and "Track 2" are [Amicus's], yet the *concepts* have been in the case law since the ... Court first distinguished what [Amicus] calls Track 1 law and Track 2 law in *Buckley,* 424 U.S. at 63-64.

Triggering at 36 n.7.

[10] This is what "one-time" and "event-driven" mean. *E.g.*, *Barland,* 751 F.3d at 824, 836, 841. It is time to abandon these confusing labels and simply say what one means.

Triggering at 57 n.127 (explaining why).

> than the full panoply of" Track 1 burdens); *Buckley*, 424 U.S. at 63-64 (describing Track 2, *non*-political-committee reporting); 52 U.S.C. 30104(c), (f)-(g) (same).

Triggering at 56-57 & nn.125-28 (ellipses omitted).

> In short: Challenges to
>
> **(a)** Track-1-burden-triggering law can address the constitutionality of triggering any such burdens, *Triggering* at 53, for the challengers,

and are distinguishable from constitutional challenges to

> **(b)** *particular* Track 1 burdens on challengers, *Davis v. FEC,* 554 U.S. 724, 744 (2008), for which it *is* constitutional to trigger Track 1 burdens in the first place,
>
> **(c)** Track 2 law, *supra* at 11-12, and
>
> **(d)** ballot-access law, *Doe v. Reed,* 561 U.S. 186, 196 (2010).

Triggering at 45 n.71, 77-78 & nn.236-38, 79 n.247.

Not driving home the difference between **(a)**, **(b)**, **(c)**, and **(d)**, *see, e.g., McCutcheon,* 572 U.S. at 223-24 (opinion of Roberts, C.J.) (addressing disclosure without mentioning the difference); *Citizens United,* 558 U.S. at 366-71 (addressing **(c)** law without mentioning it was neither **(a)** nor **(b)**)—has led some lower courts to lump different disclosure types

into one disclosure analysis, *e.g., Triggering* at 51-53 & nn.97-107 (addressing the lumping together of **(a)** and **(c)** (collecting authorities)); *id.* at 79 n.247 (addressing the lumping together of **(a)** and **(b)** (citation omitted)), and has led to circuit splits, *e.g., id.* at 84 & nn.272-75 (citing circuit splits on **(a)**).

Neither **(a)**, **(b)**, **(c)**, nor **(d)** is at issue here (*see, e.g.,* PET'RS'-BR. at i (questions presented)), so the First Amendment boundaries around such law, *compare Triggering* at 48 & nn.83-84, 62-65 & nn.153-58 *with* Randy Elf, *How Political Speech Law Benefits Politicians and the Rich* (*supra* at 1) at 0:19.25-0:30.35 (each addressing **(a)**); *compare Triggering* at 68-70 & nn.180-84, 72-73 & nn.190-92, 77 *with* Randy Elf, *How Political Speech Law Benefits Politicians and the Rich* (*supra* at 1) at 0:41.40-0:42.55 (each explaining why the appeal-to-vote test, once known as "the functional equivalent of express advocacy," "no longer has any place in law"), are unnecessary to discuss.

CONCLUSION

In reversing *National Republican Senatorial Committee v. FEC,* 117 F.4th 389 (6th Cir. 2024) (en banc), which arises from *National Republican Senatorial Committee v. FEC,* 712 F.Supp.3d 1017 (S.D. Ohio 2024), the Court should:

- Explain that "government's interest in preventing circumvention of law ... can ap-

ply only when the ... law is valid in the first place." *Supra* Part I.

- Contrast burdens of proof. *Supra* Part II.

- Distinguish law regulating political speech from law banning or otherwise limiting political speech. *Supra* Part III.

- Contrast the three possible government interests in *regulating*—i.e., requiring disclosure of—political speech, *supra* Part IV, with the only government interest in *banning or otherwise limiting* political speech other than by aliens, *supra* Part V, and

- Briefly drive home the difference between types of disclosure, *supra* Part VI, if the Court mentions disclosure beyond distinguishing it from bans and other limits, *supra* Part III, and contrasting the government interests, *supra* Parts IV-V.

Respectfully submitted,

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