No. 24-621

IN THE

Supreme Court of the United States

NATIONAL REPUBLICAN SENATORIAL COMMITTEE, *et al.*,
Petitioners,

v.

FEDERAL ELECTION COMMISSION, *et al.*,
Respondents.

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

BRIEF OF AMERICAN PROMISE AS AMICUS CURIAE SUPPORTING NEITHER PARTY

BRIAN J. BOYLE
JEFFREY D. CLEMENTS
JULIE A. BROGAN
AMERICAN PROMISE
33 Bradford Street
Concord, MA 01742

ANGELA S. BOETTCHER
WILMER CUTLER PICKERING
HALE AND DORR LLP
1225 17th Street, Suite 2600
Denver, CO 80202

JONATHAN W. ELLISON
WILMER CUTLER PICKERING
HALE AND DORR LLP
2100 Pennsylvania Ave. NW
Washington, DC 20037

FELICIA H. ELLSWORTH
Counsel of Record
MADELEINE C. LAUPHEIMER
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000
felicia.ellsworth@wilmerhale.com

TONY J. LEE
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES

CONSTITUTIONS AND STATUTES

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF AMICUS CURIAE

American Promise is a cross-partisan organization committed to promoting the ratification of its proposed For Our Freedom Amendment to the U.S. Constitution.[1] That amendment would empower the States and Congress to decide whether and how to regulate money in America's campaigns and elections.

The proposed For Our Freedom Amendment provides, in part, that "[n]othing in this Constitution shall be construed to forbid Congress or the States, within their respective jurisdictions, from reasonably regulating and limiting spending in campaigns, elections, or ballot measures."[2]

Although this Court's campaign finance precedent, beginning with *Buckley* v. *Valeo*, 424 U.S. 1 (1976), makes the proposed constitutional amendment necessary, the For Our Freedom Amendment in fact would return the country to the original structure the Framers intended, empowering the States and Congress to enact common-sense legislation to address the influence of money in our political system.

American Promise is interested in the outcome of this case because, if the Court were to reconsider its precedent that currently makes the judiciary the primary decider of campaign finance rules, it could

---

[1] No counsel for a party authored this brief in whole or in part, and no entity or person, other than amicus curiae, its members, and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

[2] American Promise, *For Our Freedom Amendment* § 2, https://americanpromise.net/for-our-freedom-amendment/ (last visited Aug. 28, 2025).

appropriately align review of campaign finance laws with originalist principles by largely deferring to the legislative determinations of the States and Congress. This would go a long way toward accomplishing the goal the For Our Freedom Amendment seeks to achieve: restoring the sovereign power of the American people and their elected representatives to determine appropriate campaign finance regulations.

SUMMARY OF ARGUMENT

This Court's 1976 decision in *Buckley* v. *Valeo* established a framework for judicial review of campaign finance legislation that departed from the Framers' and the ratifying public's original understanding and put the judiciary in the position of setting policy best left to legislatures.

Buckley was recognized in its time as an "extraordinary case" presenting "significant and far-reaching" issues that created a "momentous task" for the judges called upon to address its constitutional questions.[3] But this Court addressed those questions without considering First Amendment law as understood by the Framers. *Buckley*'s lengthy—144 pages—majority opinion contains no originalist analysis of the relationship between the First Amendment and campaign finance. 424 U.S. 1. Its failure to do that analysis launched a fifty-year experiment in which the judiciary has served as the nation's apex regulator of money in politics, and the cost to popular sovereignty of that 1976 departure from Founding-era principles has been high.

---

[3] *Buckley* v. *Valeo*, 519 F.2d 821, 833, 835 (D.C. Cir. 1975) (per curiam).

This case—like *Buckley* and the dozens of campaign finance cases it spawned—presents a fundamental constitutional question: Who gets to decide whether and how to regulate money in campaigns and elections?

The Framers would have answered: "We the people." In accordance with the social contract theory prevalent at the time, they would have understood that the sovereign people, through representative institutions, could have adopted reasonable limits on campaign spending to protect the public interest. They would never have imagined that the judiciary—whose role was to police clear violations of the people's constitutional commands—would be strictly scrutinizing statutes and establishing itself as the final arbiter of campaign finance policy.

The Court should take this opportunity to realign the law surrounding campaign finance regulation with Founding-era understanding. At present, the people of the United States overwhelmingly favor reasonable limits on campaign spending, yet at the same time are disempowered to effect that change. This Court should establish a more deferential standard of review for campaign finance laws in keeping with the Framers' original conception, and allow the legislatures to enact laws that effectuate the people's will.

ARGUMENT

I. UNDER ORIGINALIST METHODS, REGULATION OF CAMPAIGN FINANCE RESTS PRIMARILY WITH LEGISLATURES

Originalism seeks to determine the meaning of the Constitution today by looking to the law when it was created. "Whatever rules of law we had at the Founding, we still have today, unless something legally relevant happened to change them. *Our* law happens to consist of

their law, the Founders' law, including lawful changes made along the way."[4] Originalism is more than retrieving the semantic meaning of the Framers' words—it seeks to identify the original legal content those words generated.[5] To understand the Constitution, "we must first recover the conceptual predicates of eighteenth-century constitutionalism,"[6] which includes "know[ing] the content of the Founders' law in its full glory—interpretive rules, context, rules of change, and so on."[7]

Since 1976, this Court has interpreted laws governing campaign finance as implicating First Amendment expressive rights,[8] but First Amendment freedoms should be understood in their historical context. According to the prevailing political philosophy of the Founding era, the freedom of speech recognized in the First Amendment is a retained natural right.[9] The Framers

---

[4] Sachs, *Originalism As a Theory of Legal Change*, 38 Harv. J. L. & Pub. Pol'y 817, 819 (2015).

[5] *See id.* at 874 ("What we're looking for from the Constitution isn't really what its text originally *said* … but what its enactment originally *did*, as a matter of Founding-era law.").

[6] Campbell, *Originalism's Two Tracks*, 104 B.U. L. Rev. 1435, 1444 (2024); *see also* Gienapp, *Historicism and Holism: Failures of Originalist Translation*, 84 Fordham L. Rev. 935, 935-936 (2015) ("[R]ecovering [the Constitution's] original meaning requires engaging in some kind of translation that will transform the Constitution back into its eighteenth-century form[.]").

[7] Sachs, 38 Harv. J. L. & Pub. Pol'y at 888.

[8] *See Buckley* v. *Valeo*, 424 U.S. 1, 14 (1976) (per curiam) ("[C]ontribution and expenditure limitations operate in an area of the most fundamental First Amendment activities.").

[9] *See* Campbell, *Natural Rights and the First Amendment*, 127 Yale L.J. 246, 264-265 & n.73, 269-270 (2017); *see, e.g.*, Madison, *Notes for Speech in Congress* (June 8, 1789), *in* 12 *The Papers of*

viewed natural rights as subject to regulation by representative institutions working in the public interest, leaving only a modest role for the judiciary in enforcing those rights.[10] Thus, even if contributing and spending in campaigns and elections were properly viewed as implicating the freedom of speech, the political philosophy of the Founding generation understood that freedom as subject to reasonable regulation by legislatures.[11]

Although the Framers did not confront modern political campaigns, there is every reason to believe that the Framers would have viewed contributing and spending in campaigns and elections as activities particularly suited to regulation by legislatures. First, campaign finance is one step removed from the core expressive freedoms recognized by the First Amendment. And second, campaign finance raises policy questions that the Framers would have entrusted to legislatures, not courts.

A. The Framers Considered Natural Rights Subject To Regulation By Republican Government

Natural rights, as the Founding generation understood them, are not beyond the reach of republican

---

James Madison 193, 194 (Charles F. Hobson & Robert A. Rutland eds., 1979).

[10] *See* Campbell, *Republicanism and Natural Rights at the Founding*, 32 Const. Comment. 85, 92-98 (2017); *see also* Baude, Campbell & Sachs, *General Law and the Fourteenth Amendment*, 76 Stan. L. Rev. 1185, 1196 (2024) ("[R]etained natural rights looked very different from the modern notion of constitutional rights. Many of them were abstract concepts that lacked legal specificity … and they were regulable by law in promotion of the public good … .").

[11] Campbell, 32 Const. Comment. at 93 (explaining the Founders were "insistent that natural liberty *should be restrained* when doing so promoted the common good").

government. Rather, under Founding-era political philosophy, genuinely representative political institutions could regulate natural rights when such regulations reasonably served the public good.[12] Representative government was seen as the prime protector of natural rights.

Social contract theory "underpinned most of Founding-Era constitutionalism," including that era's conception of rights.[13] Steeped in Enlightenment philosophy, the Framers often discussed natural rights in terms of social contract theory.[14] Social contract theory, a fundamental underpinning of American government, imagines stages of political development.[15] The theory begins by positing a primordial world without government. In that "state of nature," humans hold natural rights that inhere in our very human nature, not government.[16] Or as Thomas Paine put it, "A *natural* right is an animal right … contained within ourselves as individuals."[17] To

---

[12] *See id.* at 92-98.

[13] *See id.* at 87.

[14] *See, e.g.*, 1 Adams, *Defence of the Constitutions of Government of the United States of America* 5-6 (Budd & Bartram 3rd ed., 1797) (Letter II, Oct. 4, 1786); Hamilton, *The Farmer Refuted* (Feb. 23, 1775), Founders Online National Archives, https://founders.archives.gov/documents/Hamilton/01-01-02-0057; Madison, *Essay on Sovereignty* (1835), *in* 9 *The Writings of James Madison* 568, 570 (Gaillard Hunt ed., 1910).

[15] *See generally* Locke, *Second Treatise of Government* (1690), *reprinted* in *Two Treatises of Government and a Letter Concerning Toleration* 100 (Ian Shapiro ed., 2003).

[16] Campbell, 32 Const. Comment. at 87-88.

[17] Common Sense, *Candid and Critical Remarks on Letter 1, Signed Ludlow*, Pa. J. & Wkly. Advertiser (June 4, 1777), *reprinted*

form political society, humans enter into a metaphorical social contract with one another, agreeing to limit their natural rights to "be governed by certain laws for the common good."[18] In forming the body politic, individuals agree to restraints on their natural rights in the public interest.[19]

So, to the Founding generation, natural rights did not mean complete freedom from law. Such an understanding of natural rights would unwind the social contract, keeping humanity in the state of nature. As explained by James Wilson—a signer of the Declaration of Independence, a drafter of the Constitution, and one of this Court's first six Justices—"no government … can exist unless private and individual rights are subservient to the public and general happiness of the nation."[20] "True liberty," another founding Justice, James Iredell, remarked, "consists in such restraints, and no greater, on the actions of each particular individual as the common good of the whole requires."[21] Thus, to the Framers, liberty did not mean immunity from all law.

Rather, under the Founding philosophy, liberty meant freedom from unrepresentative government,

---

in Paine's Writings, https://www.thomaspaine.org/writings/1777/candid-and-critical-remarks-on-a-letter-signed-ludlow.

[18] *E.g.*, Mass. Const. of 1780, Preamble.

[19] *See* Campbell, 32 Const. Comment. at 92-93.

[20] Wilson, *The Substance of a Speech Delivered by James Wilson, Esq. Explanatory of the General Principles of the Proposed Federal Constitution* 8 (Thomas Bradford ed., 1787).

[21] *James Iredell's Charge to the Grand Jury of the Circuit Court for the District of Massachusetts* (Oct. 12, 1972), *in* 2 *The Documentary History of the Supreme Court of the United States, 1789-1800*, at 308, 310 (Maeva Marcus ed., 1988).

freedom from tyranny.[22] The Sons of Liberty did not hurl tea into Boston Harbor merely to protest taxation; they did so to protest taxation *without representation*. In entering the social contract, individuals did not agree to submit to outsiders of the body politic. So, under the Framers' social contract theory, liberty depended on "whether one was subject to an alien will or a will of one's own."[23] When governed by genuinely representative institutions, the people are submitting to their own will, so "the Founding generation assumed that legitimate government acting in the people's interest best protected the people's liberty."[24]

From that premise, there was "broad agreement" in the Founding era that representative government "could restrict natural liberty in the public interest."[25] Specifically, governments could regulate natural rights on two conditions. First, the government must be legitimate, meaning it must genuinely represent the body

---

[22] *See, e.g.*, Skinner, *Liberty as Independence: The Making and Unmaking of a Political Ideal* 150 (2025) ("[S]o long as the wills of the citizens are represented, they may be said to consent to the laws by which they are governed and hence to obey freely.").

[23] Gienapp, *Against Constitutional Originalism: A Historical Critique* 50 (2024); *see also* Hart, *Liberty Described and Recommended: In a Sermon Preached to the Corporation of Freemen in Farmington* (1775), *in* 1 *American Political Writing During the Founding Era*, 305, 310 (Charles S. Hyneman & Donald S. Lutz eds., 1983) ("[C]ivil liberty doth not consist in a freedom from all law and government—but in a freedom from unjust law and tyrannical government.").

[24] Gienapp, *The Foreign Founding: Rights, Fixity, and the Original Constitution*, 97 Tex. L. Rev. Online 115, 125 (2019).

[25] Campbell, 32 Const. Comment. at 96.

politic.[26] And second, the government must act legitimately, meaning the regulation must reasonably further the public good.[27]

The Framers envisioned that legislatures, not judiciaries, would play the primary role in protecting retained natural rights. The historical record indicates that the Framers "preserved retained natural rights principally through constitutional structure, giving legislators, not judges, nearly complete responsibility for determining their proper scope."[28] To understand why, consider the two conditions for regulating retained natural rights: Elected legislators represent the people. And representing the people, legislatures are better positioned to ascertain the policies best serving the public interest.

In short, as the Founding generation understood them, natural rights did not trump legitimate government. Rather, representative government could reasonably restrain natural rights in the public interest. The Framers entrusted legislatures as the primary gatekeepers of these rights.

Thus, to the extent that contributing to and spending by political campaigns is an exercise of a natural right (*see infra*, Part I.B), representative legislatures can reasonably regulate it according to the conception of natural rights in the Founding era.[29]

---

[26] *See id.* at 92-98.

[27] *See id.*

[28] *Id.* at 104.

[29] *See* Campbell, 127 Yale L.J. at 314 ("Even assuming that giving money to a campaign is expressive, or is an exercise of the natural right to freedom of association, this activity was among the

B. Under The Framers' Political Philosophy, Representative Government May Reasonably Regulate Campaign Finance

Today's political campaigns would have been foreign to the Framers, but their framework for natural rights remains salient. Applying that framework, campaign spending would not qualify as a natural right at all. What's more, campaign finance law raises a slew of policy questions, the sort that the Framers would have left to legislatures, the representative bodies best suited to resolve them.

1. Financing Campaigns Does Not Qualify As A First Amendment Right, Natural Or Otherwise, As The Framers Understood Such Rights

Under the Framers' political philosophy, campaign finance would not have been seen as a natural right. Rather, the natural right is freedom of expression; financing campaigns may enable or amplify the exercise of this natural right but, at best, it qualifies as expressive conduct. As such, an originalist analysis of campaign finance would place it even more squarely in the domain of the legislature.

The acts of contributing money to a political campaign or spending money in furtherance of a political campaign do not qualify as natural rights under social contract theory because political campaigns do not exist in a state of nature. Natural rights are those that exist independent from political society.[30] "Speaking, writing,

---

countless aspects of natural liberty subject to regulations that promote the general welfare.").

[30] *See* Campbell, 32 Const. Comment. at 87-88.

and publishing" are "readily identifiable as natural rights," since they do not depend on the existence of government.[31] But political campaigns do not exist without government offices to fill. Thus, spending on political campaigns is not a natural right unless it falls within the more broadly defined right of expression.

While campaign spending may amplify expression, it is not itself expression. Even in *Buckley*, the Court felt the need to explicitly connect the dots between money and speech, highlighting the fact that they are not the same: "A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."[32] Under the *Buckley* Court's analogy, if political campaigning is like driving, money is like gasoline.[33] But despite their relation, the activity and the fuel are not one and the same.

Even accepting the relation between spending and speech, the spending itself would at best have been considered by the Framers as expressive conduct that was just as regulable by legislatures as any other natural right, if not more so by virtue of being one step removed

---

[31] Campbell, 127 Yale L.J. at 253.

[32] *Buckley*, 424 U.S. at 19.

[33] *Id.* at 19 n.18 ("Being free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline.").

from the core freedom of speech.[34] Under the Framers' view, "when expressive conduct caused harm and government power to restrict that conduct served the public good, there is no reason to think that the freedom of opinion nonetheless immunized that conduct."[35] Moreover, "there is no indication" that the principle of shielding "well-intentioned statements of one's thoughts" from regulation "would have extended to … donations to a political candidate."[36]

2. Campaign Finance Regulation Raises The Types Of Policy Questions That The Framers Left To Legislatures

Campaign finance implicates several interests of the American people, as *Buckley* itself recognized. On one hand, "contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities," since broadcasting a platform requires money.[37] On the other hand, the flow of money in politics risks corruption, the appearance of corruption, muting the less wealthy, and inflating the cost of political campaigns.[38] Campaign finance thus presents complex political and empirical questions about how best to serve the public interest.

While the Framers did not experience modern political campaigns, they were concerned with the possibility

---

[34] Campbell, 127 Yale L.J. at 286 (explaining that "the principles of social-contract theory frame the inquiry in a way that disfavors categorical protection for expressive conduct").

[35] *Id.* at 287.

[36] *Id.* at 313-314.

[37] *Buckley*, 424 U.S. at 14.

[38] *See id.* at 25-26.

that corruption could taint their republic.[39] But the mechanism for protecting against corruption was not empowering judges to review legislative acts: It was structuring the legislature to mitigate the effect of corrupting influences.[40] Indeed, when speaking about including a declaration of rights in the Constitution, James Madison conceded it would be a "paper barrier," but reasoned that such "paper barriers … have a tendency to impress some degree of respect for them, to establish the public opinion in their favor, and rouse the attention of the whole community, it may be one mean to control the majority from those acts to which they might be otherwise inclined."[41] Thus, even a declaration of rights was valued for its ability to shape public opinion, facilitating

---

[39] Notes of Robert Yates (June 23, 1787), *in* 1 *The Records of the Federal Convention of 1787*, at 391, 392 (Max Ferrand rev. ed., 1966) (quoting George Mason saying "if we do not provide against corruption, our government will soon be at an end"); The Federalist No. 22, at 142 (Alexander Hamilton) (Jacob Ernest Cooke ed., 1961) ("One of the weak sides of republics, among their numerous advantages, is that they afford too easy an inlet to foreign corruption.").

[40] Notes of James Madison (July 20, 1787), *in* 2 *The Records of the Federal Convention of 1787*, at 63, 66 (Max Ferrand rev. ed., 1966) (James Madison explaining that a larger House was a "security to the public" because of "the difficulty of acting in concert for purposes of corruption" and that "if one or a few members only should be seduced, the soundness of the remaining members[] would maintain the integrity and fidelity of the body").

[41] Madison, *Amendments to the Constitution* (June 8, 1789), Founders Online National Archives, https://founders.archives.gov/documents/Madison/01-12-02-0126.

the political protection of rights, rather than as a blueprint for judicial review.[42]

Given that backdrop, the Framers would have left the nuanced policy questions surrounding the regulation of money in politics to the States and Congress. Under social-contract theory, it is for representative government to pursue the public good.[43] "Historically, it was up to legislators to assess which restrictions of speech would best serve the common good, with very little room for judicial oversight."[44] In contrast to the twentieth century's more scrutinizing approach, courts in the Founding era "were confined to defending 'marked and settled boundaries' of governmental authority, disregarding legislation only where constitutional violations were clear."[45]

The crafting of campaign finance law involves complicated assessments of the public good, not application of a clear constitutional principle. Had the Framers confronted campaign finance as we know it today, they would have left it to legislatures to determine how best to regulate it.

---

[42] Campbell, *Determining Rights*, 138 Harv. L. Rev. 921, 962 (2025).

[43] *See supra* Part I.A.

[44] Campbell, 127 Yale L.J. at 316.

[45] *Id.* at 311; *see also* Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129, 140-142 (1893).

II. THIS COURT'S MODERN CAMPAIGN FINANCE JURISPRUDENCE, MAKING JUDGES THE ARBITERS OF POLICY, DEPARTS FROM THE ORIGINALIST FRAMEWORK

The Court's holding in *Buckley*—which forms the basis for modern campaign finance jurisprudence—departed from the originalist principles outlined above. Indeed, the *Buckley* Court never considered originalist principles at all in its analysis of the constitutionality of contribution and spending limits.[46]

A. *Buckley* v. *Valeo* Lacked An Originalist Foundation And Incorrectly Treats Speech Rights As Trumping Governmental Interests

Buckley presented for this Court's review the Federal Election Campaign Act of 1971 ("FECA"), as amended in 1974—described by the then Court of Appeals for the District of Columbia as "by far the most comprehensive reform legislation (ever) passed by Congress concerning the election of the President, Vice-President, and members of Congress."[47] As relevant here, the case involved three features of FECA: (1) limits on individual contributions to political campaigns; (2) limits on expenditures by a candidate, including independent expenditures on behalf of a campaign and

---

[46] *Buckley* v. *Valeo*, 424 U.S. 1 (1976); Lessig, *The* Buckley *Overreach*, Harv. Pub. L. Working Paper No. 24-22 (Sept. 1, 2024) in *Fifty Years of* Buckley v. Valeo (G. Stone & L. Bollinger, eds.) (forthcoming 2025) (manuscript p.1 ("With no clear textual grounding, and no effort to link its proscriptions to the early or original meaning of the First Amendment, *Buckley*, like Athena, seems to spring forth from the mind of the Court, as if always part of our tradition, and confident it would define our future as well.")), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4957609.

[47] *Buckley*, 424 U.S. at 7.

expenditures by the candidate personally; and (3) requirements that the source of donations be disclosed.[48]

The plaintiffs—including candidates for office and campaign donors—challenged the law, seeking a declaration that major provisions of FECA were unconstitutional and an injunction against their enforcement.[49] After extensive findings of fact in the district court, the Court of Appeals rejected the plaintiffs' primary claims, finding "'a clear and compelling interest,' in preserving the integrity of the electoral process," and upholding FECA's major provisions regulating contributions, expenditures, and disclosures.[50]

While the *Buckley* Court's per curiam opinion began by correctly recognizing that "[t]he constitutional power of Congress to regulate federal elections is well established" (citing the Elections Clause, U.S. Const. art. I, § 4), it went astray in its analysis of "whether the specific legislation that Congress has enacted interferes with First Amendment freedoms[.]"[51] Starting from the false premise that restricting money in politics equates to restricting speech itself, the *Buckley* Court struck down several of FECA's core provisions, including all limits on expenditures either by campaigns or independent entities.[52]

---

[48] *Id.* at 12-13.

[49] *Id.* at 7-8; *Buckley* v. *Valeo*, 387 F. Supp. 135, 137 (D.D.C. 1975).

[50] *Buckley*, 424 U.S. at 8-11.

[51] *Id.* at 13 & n.16.

[52] *Id.* at 39-59.

Notably, in invalidating the policy judgments of a supermajority of legislators, *Buckley*—despite being one of the longest majority opinions ever penned by the Supreme Court—did not spend a single paragraph on whether or how the Court could exercise judicial oversight over campaign finance consistent with the original understanding of the First Amendment.[53]

Without this crucial grounding in the historical conception of the First Amendment, *Buckley* departed from the original understanding by treating free speech rights—contrary to Founding-era understanding of retained natural rights within republican structures—as overriding republican self-governance.

Buckley started from the false premise that limiting spending "necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached,"[54] and proceeded to walk through the FECA's major expenditure provisions, substituting its judgment for that of Congress and using ahistorical conceptions of

---

[53] Black & Spriggs II, *An Empirical Analysis of the Length of U.S. Supreme Court Opinions*, 45 Hous. L. Rev. 621, 631 (2008) ("[T]he longest majority opinion, including footnotes, is *Buckley v. Valeo*, which weighs in with a hefty 65,398 words[.]"); *see also* Penrose, *Enough Said: A Proposal for Shortening Supreme Court Opinions*, 18 Scribes J. Leg. Writing 49, 52 n.13 (2018) (citing to an archived N.Y. Times chart from 2010 describing *Buckley* as the longest opinion also when including the majority, dissenting and concurring opinions at 76,639 words). In contrast, the Court *did* focus on the "intent of the Framers" and how "[t]he Framers regarded" and how the "Framers were attempting" to structure the Constitution when holding that Congressional—not Presidential—appointment of commissioners for the Federal Election Commission violated the Appointments Clause. *Buckley*, 424 U.S. at 109-143.

[54] *Id.* at 19.

the First Amendment right to hamstring legislatures nationwide.

As to limits on expenditures by independent parties, the *Buckley* court stated that that provision's constitutionality "turn[ed] on whether the governmental interests advanced in its support satisfy the *exacting* scrutiny applicable to limitations on the core First Amendment rights of political expression."[55] It then re-wrote the provision (to avoid unconstitutional vagueness) and declared that the re-written provision could not be justified by the governmental interest in preventing corruption because unscrupulous actors might evade it and because, in the Court's judgment, "the independent advocacy restricted by the provision does not presently appear to pose dangers of real or apparent corruption."[56] It further held that the provision could not be justified by the government's interest in "equalizing the relative ability of individuals and groups to influence the outcome of elections" because "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment," and "[t]he First Amendment's protection against governmental abridgement of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion."[57]

As to limits on expenditures by political candidates themselves, the Court rejected the government's asserted interests in preventing corruption (as not served

---

[55] *Id.* at 44-45 (emphasis added).

[56] *Id.* at 45-48.

[57] *Id.* at 48-49.

by the limit) and equalizing the playing field (as insufficient to justify the burden). But "more fundamentally," the Court proclaimed: "the First Amendment simply cannot tolerate [the provision's] restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy."[58]

As to limits on overall expenditures, the *Buckley* Court again substituted its judgment for that of Congress, finding that "[n]o governmental interest that has been suggested is sufficient to justify the restriction on the quantity of political expression imposed by [the provision]," and that limits on contributions (which the Court upheld) were sufficient protection against what the Court thought to be "[t]he major evil associated with rapidly increasing campaign expenditures," namely, "candidate dependence on large contributions."[59] And it again proclaimed broadly that "[t]he First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise."[60]

The decision to apply a standard of "exacting scrutiny," coupled with those broad articulations of the scope of the First Amendment, effectively serves to make the *Buckley* Court's opinion a constitutional block on *any* limit to campaign expenditures: Per *Buckley*, leveling the playing field can *never* be an appropriate reason for regulating expenditures, and any one candidate can *never* be prevented from spending his or her fortune to drown the voice of competitors—because the First

---

[58] *Id.* at 54.

[59] *Id.* at 55-57.

[60] *Id.* at 57.

Amendment trumps. Future legislatures—instead of being free to balance the interests of the polity themselves—must fit any regulation of campaign finance into the narrow framework the *Buckley* Court laid out, where the only governmental interest deemed sufficient is preventing corruption or the appearance of corruption.

But as previously explained, to the extent that campaign finance would have been seen by the Framers as an exercise of free speech rights at all, such rights were retained natural rights subject to reasonable regulation by representative legislatures.[61] As such, questions about whether and how to regulate campaign finance would have been understood by the Framers to be committed to the discretion of representative institutions. *Buckley*'s decisive pivot to rigorous judicial scrutiny, and its basic thrust that "[t]he First Amendment denies government the power" to decide how best to regulate money in politics, represent a massive shift in power away from the American people and towards the judiciary.[62]

Ironically, the *Buckley* Court appealed to the very sovereignty of the people that according to the Framers' view of the First Amendment should allow legislatures to make these judgments. "In the free society ordained by our Constitution it is not the government, but the people individually as citizens and candidates and collectively as associations and political committees who must retain control over the quantity and range of debate on

---

[61] *See supra* Part I.B.

[62] *Buckley*, 424 U.S. at 13, 57.

public issues in a political campaign."[63] But that very concept must grant to the sovereign people the right to reasonably regulate campaign finance when the people, through their elected representatives, determine that such regulation is in the public interest.

To be sure, campaign finance laws do implicate interests in the freedoms of speech, association, and petition; after all, candidates, campaigns, and other entities all need to spend to send their ideas out to the public. But the narrow and restrictive framework launched by *Buckley* tasks courts with scrutinizing all campaign finance laws exclusively through a particular free-speech lens that overrides other valid interests, such as the compelling sovereign interests in representative self-government, federalism, and election integrity. Such an approach is plainly inconsistent with any plausible original understanding of campaign finance and the First Amendment.

B. This Court's Subsequent Precedent Further Departed From The Original Understanding Of Retained Free Speech Rights

All of modern campaign finance jurisprudence has come to rest on the faulty foundation first laid in *Buckley*—unmoored from the original understanding of the proper role and ability of representative institutions to regulate the scope of natural rights without intense judicial scrutiny.

For example, in *Citizens United* v. *Federal Election Commission*, the regulation at issue limited corporations' ability to spend money independently of a specific

---

[63] *Id.* at 57.

political campaign.[64] But because the *Buckley* framework only permitted regulation of campaign finance to address "corruption" or "the appearance of corruption," any "independent" campaign expenditures were definitionally non-regulable under *Buckley*'s understanding of the First Amendment.[65]

While such a result may logically follow from *Buckley*, it highlights the growing gap between the originalist understanding of the First Amendment and modern jurisprudence. Currently, elected legislators cannot regulate "independent" campaign expenditures by corporations because all campaign finance regulations are potential First Amendment violations unless sufficiently tailored to address corruption—with "corruption" being defined solely by the judiciary.[66]

The Court need not and should not continue down this incorrect doctrinal path.

III. The Court Should Return The Power To Regulate Campaign Finance To Legislatures In Keeping With The Originalist Understanding

The Court should revisit its scrutiny of campaign finance laws and employ a more deferential approach consistent with the historical understanding outlined above. Deferential review is historically grounded and respects

---

[64] 558 U.S. 310 (2010).

[65] *Buckley*, 424 U.S. at 27; Lessig, *The* Buckley *Overreach*, *supra* (manuscript pp.9-10).

[66] *See, e.g.*, *Citizens United*, 558 U.S. at 357 ("[W]e now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption."); *id.* at 360 ("Ingratiation and access, in any event, are not corruption.").

the unique constitutional concerns attendant to campaign finance issues.

A. The People, Through Their Representatives, Must Be Free To Enact Reasonable Limits On Campaign Spending

As explained above, *supra* Part I, the Framers intended the people, acting through their representatives, to be free to enact reasonable restrictions on campaign spending. And there are good reasons for that: campaign finance policy touches the very heart of the American public's intersecting sovereign interests in the freedom of speech, representative self-governance, federalism, and the integrity of elections.

These very interests animated bipartisan supermajorities in Congress to enact FECA in 1971.[67] By enacting FECA, Congress intended to "promote fair practices in the conduct of election campaigns for Federal political offices."[68] When signing FECA into law, President Richard Nixon observed in a signing statement that campaign spending and the integrity of the electoral process was an area of "great public concern" and that the act furthered the "highly laudable" "goal of controlling campaign expenditures."[69] He further noted that by imposing limits on contributions and media spending, FECA would "giv[e] the American public full access to the facts of political financing," "guard against campaign

---

[67] *See* Pub. L. No. 92-225, 86 Stat. 3 (1972).

[68] *Id.*

[69] President Richard Nixon, *Statement on Signing the Federal Election Campaign Act of 1971* (Feb. 7, 1972), https://www.presidency.ucsb.edu/documents/statement-signing-the-federal-election-campaign-act-1971.

abuses," and "build public confidence in the integrity of the electoral process."[70]

In 1974, Congress amended FECA—again with the support of a bipartisan supermajority.[71] When President Gerald Ford signed the FECA amendments into law, he noted that both the Republican and Democratic National Committees had "expressed their pleasure with this bill" because it "allows them to compete fairly."[72] President Ford went on to observe that "[t]he times demand this legislation," and that "[t]here are certain periods in our Nation's history when it becomes necessary to face up to certain unpleasant truths."[73] President Ford continued, "We have passed through one of those periods. The unpleasant truth is that big money influence has come to play an unseeming role in our electoral process. This bill will he[l]p right that wrong."[74]

In the intervening years, these concerns have only intensified. In February 2025, Pew Research Center released its annual report about Americans' top policy priorities for the year.[75] According to this report, 72

---

[70] *Id.*

[71] *See* FECA Amendments, Pub. L. No. 93-443, 88 Sat. 1263 (1974).

[72] President Gerald Ford, *Statement by the President* (Oct. 15, 1974), available at https://www.fordlibrarymuseum.gov/sites/default/files/pdf_documents/library/document/0248/whpr19741015-011.pdf.

[73] *Id.*

[74] *Id.*

[75] *See* Pew Research Center, *Americans Continue to View Several Economic Issues as Top National Problems* (Feb. 20, 2025),

percent, or "[r]oughly seven-in-ten Americans say 'the role of money in politics' is a very big problem in the country today."[76] This was the public's number one concern, handily outstripping the other top concerns: affordability of healthcare (67 percent), inflation (63 percent), the federal budget deficit (57 percent), and the ability of Democrats and Republicans to work together (56 percent).[77] The concern about the role of money in politics was noted as one of the few strongly bipartisan areas of concern; "Republicans and Democrats generally agree on the severity of several issues facing the country – including the role of money in politics[.]"[78]

This pressing and bipartisan concern is deeply connected to the American public's interest in representative self-governance. Another recent report by Pew Research Center found that 72 percent of Americans favor limits on political spending and 85 percent feel the cost of campaigns keeps good candidates from running.[79] Further, "[l]arge majorities say big campaign donors (80%) and lobbyists and special interests (73%) have too much influence on decisions made by members of

---

https://www.pewresearch.org/wp-content/uploads/sites/20/2025/02/PP_2025.2.20_national-problems_report.pdf.

[76] *Id.* at 4. Another 21 percent of Americans consider the role of money in politics to be "[a] moderately big problem," and 6 percent of Americans consider it "[a] small problem." *Id.* at 20. All told, some 99 percent of Americans consider the role of money in politics problematic to some degree.

[77] *Id.* at 4.

[78] *Id.* at 7.

[79] Pew Research Center, *Americans' Dismal Views of the Nation's Politics* 9 (Sept. 19, 2023), https://www.pewresearch.org/wp-content/uploads/sites/20/2023/09/PP_2023.09.19_views-of-politics_REPORT.pdf.

Congress."[80] The report acknowledges that this concern is far from new—"[s]ince the 1970s, large majorities have said that the government 'is run by a few big interests looking out for themselves,' rather than for the benefit [of] all the people."[81]

It is imperative that the people be empowered to respond to these concerns by enacting reasonable campaign finance legislation through representative channels; this is the very heart of self-governance and popular sovereignty. Yet, to date, rigorous—and ahistorical—judicial review has stymied these efforts. Indeed, the Court's campaign finance jurisprudence is creating a sense of resignation among lawmakers who feel powerless to respond to their constituents' concerns.[82]

B. Judicial Review Of Campaign Finance Laws Should Be Deferential, Akin To Rational Basis Review

Rigorous judicial review of reasonable campaign finance legislation is not only ahistorical, it also threatens the very self-governance of the American public. Strongly deferential review would be more consistent with history, tradition, and the popular sovereignty of the American people.

---

[80] *Id.*

[81] *Id.*

[82] Davis, *Maine Legislature Ops for Status Quo on Campaign Finance Regulations*, Maine Morning Star (July 14, 2025) ("'I don't think all the laws that we pass are going to change money in politics,' said [Maine] Sen. Jeff Timberlake (R-Androscoggin). … 'It's the way of life now. I wish it wasn't.'"), https://mainemorningstar.com/2025/07/14/maine-legislature-opts-for-status-quo-on-campaign-finance-regulations/.

In what has been called "the most influential essay ever written on American constitutional law,"[83] Professor James Bradley Thayer examined in 1893 early judicial review of constitutional questions in America and concluded that the approach was one of great restraint and deference.[84] Reviewing early judicial decisions regarding the constitutionality of legislative acts, Professor Thayer observed:

> Having ascertained [that an Act of the legislature was in conflict with the Constitution], yet there remains a question — the really momentous question — whether, after all, the court can disregard the Act. It cannot do this as a mere matter of course, — merely because it is concluded that upon a just and true construction the law is unconstitutional. That is precisely the significance of the rule of administration that the courts lay down. It can only disregard the Act when those who have the right to make laws have not merely made a mistake, but have made a very clear one, — so clear that it is not open to rational question. *That is the standard of duty to which the courts bring legislative Acts; that is the test which they apply, — not merely their own judgment as to constitutionality, but their conclusion as to what judgment is permissible to another department which the constitution has charged with the duty of making it.* This rule recognizes that ... the constitution does not impose upon the legislature any one specific

---

[83] *See* Webb, *The Lost History of Judicial Restraint*, 100 Notre Dame L. Rev. 289, 294 (2024) (quoting Monaghan, Marbury *and the Administrative State*, 83 Colum. L. Rev. 1, 7 (1983)).

[84] *See generally* Thayer, 7 Harv. L. Rev. 129.

> opinion, but leaves open this range of choice; and that whatever choice is rational is constitutional.[85]

Professor Thayer identified that early American courts confronting issues of constitutionality of legislative acts applied a restrained, deferential standard of review involving (1) a presumption of constitutionality, (2) a clear-error rule, and (3) a beyond-a-reasonable-doubt standard.[86]

Professor Derek A. Webb has also traced these principles through history and found their roots as far back as the 1780s in Federalist 78, authored by Alexander Hamilton.[87] In Federalist 78, Hamilton wrote that judicial review would be coupled with a rigorous clear error standard whereby courts would only be authorized to set aside a legislative act if it were in "irreconcilable variance" with the "manifest tenor" of the Constitution—in

---

[85] *Id.* at 144 (emphasis added).

[86] Webb, 100 Notre Dame L. Rev. at 294 (discussing Thayer's "'triple helix' of judicial restraint in America"); *see also* Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* 91-92 (2004) (noting Framers' expectations that judges would only invalidate legislation "when the unconstitutionality of a law was clear beyond dispute"); Alfange Jr., Marbury v. Madison *and Original Understanding of Judicial Review: In Defense of Traditional Wisdom*, 1993 Sup. Ct. Rev. 329, 342-349 (1993) (noting Founding-era expectations that judicial invalidation of legislation would only occur where breaches of the Constitution were clear and unequivocal); Casto, *James Iredell and the American Origins of Judicial Review*, 27 Conn. L. Rev. 329, 341-348 (1995) (discussing the "unconstitutional beyond dispute" standard of judicial review); Boyle, *Popular Sovereignty and the For Our Freedom Amendment* 44 (Jan. 8, 2025) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5088593.

[87] Webb, 100 Notre Dame L. Rev. at 307.

other words, the Constitution's meaning must be "manifest" and the act "irreconcilable" with that meaning.[88] By 1810, in the case *Fletcher* v. *Peck*, the United States Supreme Court recognized the need for judicial restraint in addressing constitutional questions—questions that were "of much delicacy,"[89] given that judicial review "permitted an unaccountable court to effectively veto democratic preferences."[90] By 1827, Justice Bushrod Washington argued in *Ogden* v. *Saunders*—where he wrote for himself but was in the majority—that the Court had recognized a beyond-a-reasonable-doubt standard and that "[i]t is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body, by which any law is passed, to presume in favour of its validity, until its violation of the constitution is proved beyond all reasonable doubt."[91] From 1840 and into the 1860s, the clear error rule in the context of judicial review of constitutionality of legislative acts became the "leading rule" among state courts as concerns about "aggressor" courts grew and became yet more heightened in the wake of the Court's 1857 decision in *Dred Scott* v. *Sandford*, 60 U.S. (19 How.) 393.[92]

In keeping with the rich history and tradition of highly deferential judicial review and the Framers' original understanding that campaign finance regulation

---

[88] *Id.* (quoting The Federalist No. 78, at 524-525 (Alexander Hamilton) (Jacob Ernest Cooke ed., 1961)).

[89] 10 U.S. (6 Cranch) 87, 128 (1810).

[90] Webb, 100 Notre Dame L. Rev. at 311.

[91] 25 U.S. (12 Wheat.) 213, 270 (1827) (Washington, J., opinion); *see also* Webb, 100 Notre Dame L. Rev. at 312-313.

[92] *See* Webb, 100 Notre Dame L. Rev. at 320, 327-329.

would be permissible, the Court here should apply a standard that looks to whether the challenged regulation bears a reasonable relation to legitimate sovereign interests.[93] This standard adheres to traditional notions of judicial restraint in invalidating democratically enacted legislation and would be familiar to lower courts. Indeed, this standard is close to rational-basis review, which requires that courts uphold a law unless the evidence "preclude[s] the assumption that it rests upon some rational basis within the knowledge and experience of the legislators."[94] Courts across the Nation routinely apply this standard and determine whether

---

[93] It is not the position of amicus American Promise that campaign finance legislation could never be subject to strict scrutiny consistent with history, tradition, and this Court's precedent. For example, a law that allowed unlimited spending for candidates of one gender or race but limited spending for others could constitute discrimination warranting heightened review constituent with the Equal Protection Clause. But where limits are applied equally, deferential review is appropriate for the reasons laid out here.

[94] *United States* v. *Carolene Prods., Co.*, 304 U.S. 144, 152 (1938). Of course, *Carolene Products* acknowledges that "[t]here may be a narrower scope for operation of the presumption of constitutionality" when legislation: (1) "appears on its face to be within a specific prohibition of the Constitution," (2) "restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation," or (3) is directed at "discrete and insular minorities." *Id.* at 152-153 n.4. But in any event, none of these circumstances are present here. The campaign finance regulation at issue in this case is not on its face prohibited by the Constitution. *See supra* Part I. Nor does it restrict political processes—to the contrary, limits on campaign spending are fervently desired by the vast majority of the American public regardless of political affiliation because they feel their representatives are captured by donors and not adequately representing them. Finally, the regulation at issue here is generally applicable, not directed at any "discrete and insular minority."

legislation bears a rational relation to a legitimate government interest. Applying a standard that requires campaign finance legislation to bear a reasonable relation to a legitimate sovereign interest is therefore a historically rooted and judicially manageable standard.

That historically rooted, deferential approach also gives appropriate respect to the American public's strong interests in representative self-governance, democratic accountability, and federalism, as legislators face the voters directly affected by campaign finance rules. When enacting campaign finance legislation, legislators have democratic legitimacy to make value judgments about electoral democracy. Moreover, legislatures can adjust the adopted rules based on experience and practical considerations in ways that courts cannot, thereby allowing for ongoing refinement via ordinary political processes rather than rigid court-crafted mandates that would require constitutional amendment to refine. A deferential approach also respects federalism by allowing States to experiment and adopt varying approaches appropriately tailored to state and local communities with different needs and values.

Adopting a more originalist approach to campaign finance regulation would not imperil First Amendment rights. Rather, freedom of speech will undoubtably remain an important consideration and centerpiece in legislative debates about campaign finance. That is the proper venue for these considerations—legislative deliberation can better weigh and account for multifarious constitutional values. By adopting a deferential approach to review of the regulation of campaign finance, the Court would not abandon the First Amendment but rather change the institutional venue for considering it alongside other interests in a fashion aligned with what

the Framers and early Americans would have understood and expected.

* * *

Though amicus American Promise takes no position on the ultimate wisdom or desirability of the campaign finance legislation at issue, applying the correct deferential standard makes clear that the limitations on campaign expenditures coordinated between political parties and candidates' campaigns are reasonably related to a legitimate sovereign interest—held as the *top ranking* priority among a polity facing many pressing political issues such as the affordability of healthcare, persistent inflation, and a high federal deficit—addressing and limiting the role of money in modern American politics.

CONCLUSION

For the foregoing reasons, the Court should revisit its campaign finance precedent from an originalist perspective and return the primary authority for regulating money in politics to the people, acting through their representatives.

Respectfully submitted.

BRIAN J. BOYLE
JEFFREY D. CLEMENTS
JULIE A. BROGAN
AMERICAN PROMISE
33 Bradford Street
Concord, MA 01742

ANGELA S. BOETTCHER
WILMER CUTLER PICKERING
HALE AND DORR LLP
1225 17th Street, Suite 2600
Denver, CO 80202

JONATHAN W. ELLISON
WILMER CUTLER PICKERING
HALE AND DORR LLP
2100 Pennsylvania Ave. NW
Washington, DC 20037

FELICIA H. ELLSWORTH
Counsel of Record
MADELEINE C. LAUPHEIMER
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000
felicia.ellsworth@wilmerhale.com

TONY J. LEE
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007

AUGUST 2025