No. 18-755

IN THE

Supreme Court of the United States

ILLINOIS LIBERTY PAC,
Political Action Committee
registered with the
Illinois State Board of Elections,
EDGAR BACHRACH, and KYLE MCCARTER,

PETITIONERS,

V.

KWAME RAOUL, Attorney General
of the State of Illinois, *et al.*,

RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF OF PETITIONERS

Jeffrey M. Schwab
Counsel of Record
Brian Kelsey
Reilly Stephens
LIBERTY JUSTICE CENTER
190 LaSalle St., Ste. 1500
Chicago, IL 60603
(312) 263-7668
jschwab@libertyjusticecenter.org
Counsel for Petitioners

QUESTIONS PRESENTED

1. Should political contribution limits that favor one type of speaker over another receive strict scrutiny?

2. Should the holding in *Buckley v. Valeo*, 424 U.S. 1 (1976) applying a "closely drawn" test to all political contribution limits be overruled in favor of applying strict scrutiny?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

REPLY BRIEF FOR PETITIONER

Respondent contends that the Court should not grant this Petition because there is no need to clarify the standard of review at issue as to when political contribution limits favor one type of speaker over another. Yet there is confusion in the courts below as to how to treat the sort of discrimination challenged in this case.

The Attorney General argues in defense of a statutory scheme that privileges legislative leadership, allowing those who write the laws to accrue more power and control to themselves. Pet. 13-15. This Court long ago suggested that "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). This abuse of campaign finance regulation for the benefit of those entrusted with designing it is exactly the type of speech restriction that this Court should reject by applying the strictest judicial scrutiny.

Alternatively, the Court should reconsider the erroneous distinction that was made in *Buckley v. Valeo*, 424 U.S. 1 (1976) between the standards of review used for campaign expenditures and campaign contributions. In the more than forty years since this Court's decision in *Buckley*, subsequent opinions of the Court have eroded the grounds for the distinction. The regime has been revised by this Court repeatedly because of its unworkability, and there is no reliance interest Illinois can reasonably claim to justify violating First Amendment rights.

The Court should, therefore, grant the Petition.

ARGUMENT

I. THIS COURT SHOULD CLARIFY FOR LOWER COURTS THAT POLITICAL CONTRIBUTION LIMITS THAT FAVOR ONE TYPE OF SPEAKER OVER ANOTHER SHOULD RECEIVE STRICT SCRUTINY.

The Attorney General characterizes the distinctions in the Illinois statutes as simply a matter of "underinclusiveness." Opp. 6. But Petitioners' objection is not to a group the legislature declined to include in its statutes but precisely to a group Illinois chose to include: legislative caucus committees. The statute includes legislative caucus committees in the scheme as unlimited donors and restricts candidates from accepting contributions from more than one such committee in order to maximize the influence of the legislative leaders who control the committees. The statutes at issue are under-inclusive of different speakers only in the sense a grant program that gives ten times more money for the construction of Catholic churches than Protestant churches would be under-inclusive of different religious denominations.

A. The level of scrutiny used to analyze contribution limits that discriminate among speakers is an open question in *Buckley*.

Buckley never considered whether distinctions among types of contributors require a higher standard of review. Respondent makes much of the fact that some of the contribution rules upheld in *Buckley* distinguished among categories of donors. Opp. 3, 7. But the pages cited undermine, rather than support, the contention. *See Buckley*, 424 U.S. at 35-36. In the passage cited by Respondent, the Court was rejecting a

challenge to *equal* contribution requirements: applying the same dollar limit to both major and minor candidates: "[W]e conclude that the impact of the Act's $1,000 contribution limitation on major-party challengers and on minor-party candidates does not render the provision unconstitutional on its face" *Id.* The argument this passage rejects is that the contribution limits in question will advantage incumbents and major party candidates at the expense of challengers and minor party candidates and, likewise, will privilege established committees over new start-ups, thus denying a level playing field. *Id* at 32-36. This is a different matter entirely from the question of when discriminating among categories of contributors oversteps constitutional bounds.

The Brief in Opposition then contends that the difference between individuals and Political Action Committees (PACs) that existed in *Buckley* represented "a far greater disparity" than the Illinois laws challenged here. Opp. 3. But the distinction in *Buckley* was simpler, and the differential far smaller: $1,000 for individuals and $5,000 for PACs. 424 U.S. at 35-36. The caps in Illinois are $5,000 for individuals, $50,000 for PACs, and for caucus committees, they're *unlimited*. Opp. 1. The disparity in Illinois between limitations on individuals and PACs is, therefore, a multiple of ten, compared with only five in *Buckley*, and when compared with caucus committees, the disparity is infinite.

B. Since *Buckley*, the Court has failed to clarify the level of scrutiny for contribution limits that discriminate among speakers.

The Attorney General goes on to point out that "since 2000 alone" this Court has taken eight cases regarding contribution limits. Opp. 6-7. But the fact that this Court must constantly clarify the application of *Buckley's* standard is simply more evidence of the lack of clarity of the standard. *See Johnson v. United States,* 135 S. Ct. 2551, 2558 (2015) (striking down a statute as vague where four prior attempts to interpret it did not resolve the vagueness).

Recent developments in the doctrine have also made many of the prior decisions of this Court unusable as relevant precedent for lower courts. In the Court's most recent decision on the matter, *McCutcheon v. FEC,* 572 U.S. 185 (2014), the Court limited the sufficiently important governmental interests that can be used to justify campaign contribution limits to one interest only: preventing *quid pro quo* corruption or its appearance. *Id* at 192. This limitation restricts the application of prior Supreme Court cases in which the government relied on less important interests to satisfy the "closely drawn" standard utilized in *Buckley*.

The current case represents a strong vehicle for providing further clarity because, on its face, the Illinois preference for legislative caucus committees has the opposite effect of preventing corruption. As the Petition explains, "In Illinois, the state has effectively decided that support from the state's political parties and legislative leaders should be allowed to contribute to a candidate's success much more than support from other classes of donors." Pet. 9. Legislative caucus committees empower political bosses to control the political process. As they are the actors who also oversee the design of the scheme itself, this represents exactly

the type of self-dealing by the politically powerful that should be subject to the strictest form of review.

C. The courts below are in disagreement as to how to interpret this Court's standards.

The Attorney General admits that *Russell v. Burris*, 146 F.3d 563 (8th Cir. 1998), is in conflict with the Seventh Circuit's decision in this case, but the Attorney General attempts to wave this circuit split away by contending this Court's decision in *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000), overruled the Eighth Circuit, and by implication, overruled *Russell*. Opp. 9. The Eighth Circuit Court of Appeals, however, has never questioned *Russell*'s validity. Dozens of opinions have cited *Russell* in the intervening years, and the only circuit case questioning the validity of the decision is a single footnote in a First Circuit opinion. *See Daggett v. Comm'n on Governmental Ethics & Election Practices,* 205 F.3d 445, 455 n.8 (1st Cir. 2000). Indeed, fourteen years later, the Tenth Circuit cited *Russell* with approval when it struck down discriminatory contribution limits. *See Riddle v. Hickenlooper*, 742 F.3d 922, 929 (10th Cir. 2014) (citing *Russell* for the proposition that the state interest in preventing corruption is "not advanced by a law that allows Republicans or Democrats to collect larger donations than write-ins, unaffiliated candidates, or minor-party nominees"). Even if the Attorney General is right that *Russell* can be resolved by existing precedent, lower courts have failed to recognize a resolution of the conflict, and this Court should grant the Petition to correct the problem.

The Attorney General next claims that *Riddle* is distinguishable because the court ultimately addressed an Equal Protection argument rather than a

First Amendment theory. But the concurring opinion of then-Judge Gorsuch states only that this Court "*has yet* to apply strict scrutiny to contribution limit challenges." *Riddle,* 742 F.3d at 931 (Gorsuch, J., concurring) (emphasis added). Petitioners concede this Court has not expressly done so, and that is why they bring this Petition to allow the Court the opportunity to do so. Thus far, this Court is "employing instead something pretty close [to] but not quite the same thing" as strict scrutiny. *Id.* When previously confronted with the question, this Court has not had occasion to clarify the instances in which strict scrutiny applies. *See McCutcheon,* 572 U.S. at 199 (since "the aggregate limits fail even under the 'closely drawn' test . . . [the Court] need not parse the differences between the two standards in this case.") That the Court demurred in the past from addressing the question does not mean it approved of the Attorney General's position. *Riddle*, 742 F.3d at 931 (Gorsuch, J., concurring) ("even in the First Amendment context 'imposing different contribution . . . limits on candidates vying for the same seat' may call out for especially heightened scrutiny") (quoting *Davis v. FEC*, 554 U.S. 724, 744 (2008)).

The Attorney General claims that there is no problem applying the "closely drawn" standard rather than strict scrutiny to differential treatment of speakers because "the 'closely drawn' test is a form of heightened scrutiny." Opp. 12. This statement exemplifies the exact problem with the "closely drawn" test: no one knows what form of scrutiny is meant. In the present case, the Seventh Circuit Court of Appeals did not apply a form of heightened scrutiny, as the Attorney General asserts, but instead applied "a form of intermediate scrutiny." Pet. 9 (citing *Ill. Liberty PAC v. Madigan,* 904 F.3d 463, 469 n.3 (7th Cir. 2018), App. 10a).

Next, the Brief in Opposition attempts to distinguish *Protect My Check, Inc. v. Dilger*, 176 F. Supp. 3d 685, 694 (E.D. Ky. 2016) as an Equal Protection case and contends that the court there applied strict scrutiny "only after the parties had stipulated to that standard." Opp. 9. But the Court there likewise applied the "closely drawn" standard to the other part of the case because the parties "agree[d]" to that mode of analysis. *Protect My Check*, 176 F. Supp. at 694. If agreeable parties undermine the force of a holding, that is as much a problem for Respondent's position as Petitioners'.

The Attorney General points to other lower court opinions that disagree with Petitioners' position. Opp. 9. The existence of these cases does not undermine the case for certiorari; indeed, the cases are precisely what creates a conflict ripe for this Court's resolution.

A decision for Petitioners on the first question presented would, therefore, not "depart from *Buckley's* settled framework," Opp. 10, but instead answer a question *Buckley* never considered— in an area of the law where lower courts are in disagreement and have often failed to apply sufficiently strict review.

II. IN THE ALTERNATIVE, *BUCKLEY* IS NOT LEGALLY SOUND, AND THERE ARE STRONG REASONS TO RECONSIDER IT.

Question 2 in the Petition asks the Court to consider whether *Buckley*'s "closely drawn" test should be replaced entirely. Contrary to Respondent's suggestion, Petitioners' submission is not a recognition of any difficulty in distinguishing between different types of

contribution limits. *See* Opp. 11. It is rather a recognition of the unworkability of the distinction *Buckley* made between contributions and expenditures. Pet. 15. The court should jettison this anomaly and extend full scrutiny of the First Amendment to all restrictions on political speech. That many states currently enforce some form of contribution limit, Opp. 11, is not relevant to a constitutional analysis. Likewise, the fact that most states have license plate slogans did not stop this Court from recognizing that the imposition of a slogan can constitute compelled speech. *See Wooley v. Maynard,* 430 U.S. 705 (1977).

Far from reaffirming *Buckley*, this Court has expressed ambivalence toward its "closely drawn" test, invoking it most recently in a circumstance where it ultimately decided the contribution limit failed under any standard. *See McCutcheon,* 572 U.S. 199. As Justice Thomas observed almost twenty years ago, "The analytic foundation of *Buckley* . . . was tenuous from the very beginning and has only continued to erode in the intervening years." *Shrink Missouri*, 528 U.S. at 412 (Thomas, J., dissenting).

This Court has repeatedly rejected the grounds *Buckley* gave for its distinction between campaign contributions and expenditures. Discounting political speech because a campaign donor doesn't speak directly to his or her audience undermines the group association of those who wish to aggregate their resources with others. Pet. 17. That the donation doesn't specify the particular purpose of the gift does not undermine the rights of the giver. *Id.* Contributions certainly amplify the speech of the recipient, and that an individual contribution is only a small piece of the overall pie is irrelevant. Pet. 18. That there are other

avenues for speech or other outlets for donation does not rectify *Buckley*'s deprivation. Pet. 18-19. This Court should recognize the erosion of *Buckley*'s premises and rectify its error.

Indeed, this Court has now clarified that it recognizes only one legitimate government target in regulating campaign finance: *quid pro quo* corruption. Justifications that rest on some particular feature of an entity's form or a desire to disfavor those with more resources to devote to the political process cannot be a basis for curtailing First Amendment rights. "Many people might find those latter objectives attractive. . . . Money in politics may at times seem repugnant to some, but so too does much of what the First Amendment vigorously protects." *McCutcheon*, 572 U.S. at 191. "Any regulation must instead target what [this Court has] called *quid pro quo* corruption or its appearance." *Id.* at 192. In contrast with the opinion below, this Court holds that "government regulation may not target the general gratitude a candidate may feel toward those who support him or his allies, or the political access such support may afford." *Id.* It is *quid pro quo* corruption and its equivalent that the First Amendment allows the government to regulate, not abstract concepts of "influence" or "access." *Citizens United*, 558 U.S. 310, 360 (2010) ("Ingratiation and access . . . are not corruption").

The Attorney General explains that "subsequent decisions have in fact taken pains to preserve" the distinction from *Buckley*. Opp. 12. Petitioner agrees that these decisions are often pained in their efforts to sensibly apply *Buckley*'s framework. Indeed, Respondent's multiple string cites identifying the many cases in which this Court has had to revisit *Buckley,* Opp. 6-7,

12, are simply a demonstration of the standard's unworkability. *Johnson*, 135 S. Ct. at 2558 ("the failure of 'persistent efforts . . . to establish a standard' can provide evidence of vagueness.") (quoting *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 91 (1921)).

Buckley is an unworkable precedent whose basis has eroded over time, and whose continuance impinges upon fundamental constitutional rights. This is precisely the sort of "special justification" Respondent insists is lacking. Opp. 13.

The Attorney General submits that the "closely drawn" test is stricter than the Petitioners admit, but with little basis. Opp. 12. Petitioners never contended that the test was a toothless rational basis standard. *See* Pet. 9-10. But it is axiomatically less protection than this Court otherwise provides to First Amendment rights. That the Court found the constitutional limits transgressed in *Randall v. Sorrell*, 548 U.S. 230 (2006), or in *McCutcheon*, 572 U.S. at 199, simply reflects how beyond-the-pale many of these contribution restrictions have become.

Finally, Respondent asserts that states have a reliance interest in perpetuating their system of contribution limits. Opp. 14. But reliance interests are at their lowest ebb in First Amendment cases, since "it would be unconscionable to permit free speech rights to be abridged in perpetuity" simply because it is more convenient for the government to maintain its present arrangements. *Janus v. AFSCME*, 138 S. Ct. 2448, 2484 (2018). "The fact that [Illinois] may view the [s]tate's version of [campaign finance regulation] as an entitlement does not establish the sort of reliance interest that could outweigh the countervailing interest that all individuals share in having their constitutional

rights fully protected." *Arizona v. Gant*, 556 U.S. 332, 349 (2009). *See also Janus*, 138 S. Ct. at 2484 (quoting *Gant*).

For this reason, "this Court has a considered practice not to apply that principle of policy as rigidly in constitutional as in nonconstitutional cases." *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 500 (2007) (Scalia, J., concurring). Particularly, "[t]his Court has not hesitated to overrule decisions offensive to the First Amendment . . . and to do so promptly where fundamental error was apparent." *Id.*

CONCLUSION

This Court should clarify for lower courts that political contribution limits that facially discriminate against certain types of speakers should receive strict scrutiny. In the alternative, the Court should rule that limitations on campaign contributions, like those on campaign expenditures, must be subject to strict scrutiny. For these reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Jeffrey M. Schwab
Counsel of Record
Brian K. Kelsey
Reilly Stephens
LIBERTY JUSTICE CENTER
190 LaSalle St., Ste. 1500
Chicago, IL 60603
(312) 263-7668
jschwab@libertyjustice-center.org
Counsel for Petitioners

March 22, 2019