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MIDDLE SECTION AT NASHVILLE

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TENNESSEEANS FOR SENSIBLE ELECTION LAWS,

Plaintiff-Appellee

v. M2018-01967-COA-R3-CV

TENNESSEE BUREAU OF ETHICS AND CAMPAIGN FINANCE, REGISTRY OF ELECTION FINANCE,

Defendant-Appellant

*Chancery Ct. No. 18-821*
*Part III*

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# BRIEF OF *AMICI CURIAE* GOLDWATER INSTITUTE AND LIBERTY JUSTICE CENTER IN SUPPORT OF PLAINTIFF-APPELLEE

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## IDENTITY AND INTEREST OF *AMICI CURIAE*

The Goldwater Institute was established in 1988 as a nonpartisan public policy and research foundation devoted to advancing the principles of limited government, individual freedom, and constitutional protections through litigation, research, policy briefings, and advocacy. Through its Scharf-Norton Center for Constitutional Litigation, the Institute litigates cases and files *amicus* briefs when its or its clients' objectives are directly implicated.

The Institute devotes substantial resources to defending the vital constitutional principle of freedom of speech. The Institute has litigated and won cases challenging unconstitutional campaign-finance restrictions, including *Arizona Free Enterprise Club's Freedom PAC v. Bennett*, 564 U.S. 721 (2011) (matching funds provision violated First Amendment) and *Protect My Check, Inc. v. Dilger*, 176 F. Supp. 3d 685 (E.D. Ky. 2016) (scheme imposing different limits on different classes of donors violated Equal Protection Clause). The Institute also litigates to ensure that state constitutional provisions—which often provide stronger protection for individual rights than their federal counterparts—are duly enforced.

The Liberty Justice Center is a nonprofit, nonpartisan, public-interest litigation center that seeks to protect economic liberty, private property rights, free speech, and other fundamental rights. First and foremost, the Liberty Justice Center seeks to ensure that the rights to earn a living and to start a business—which are essential to a free and prosperous society—are available to all, not just to the politically-privileged. The Liberty Justice Center pursues its goals through

strategic, precedent-setting litigation to revitalize constitutional restraints on government power and protections for individual rights. On multiple occasions the Liberty Justice Center has litigated cases and submitted *amicus* briefs defending the right to freedom of speech in the political arena. *See, e.g.*, *Janus v. AFSCME*, 138 S. Ct. 2448 (2018). This case interests Liberty Justice Center because the right to speak in support of, or against, candidates for elected office is fundamental to a free society.

## INTRODUCTION AND SUMMARY OF ARGUMENT

This *amicus* brief presents several reasons why the lower court's judgment should be affirmed.

*First*, the lower court correctly concluded that campaign-finance laws that impose different limits on different classes of donors, as the statute Plaintiff challenges does, must receive strict scrutiny. The U.S. Supreme Court has recognized that campaign contribution limits in general warrant rigorous scrutiny to ensure that legislators do not use the law to favor some participants in the democratic process over others. That concern is even greater where, as here, the law expressly allows select donors to participate in politics at times when others are prohibited from doing so. And, under Equal Protection Clause principles, any statute that selectively infringes on a fundamental right is presumptively unconstitutional and subject to strict scrutiny.

*Second*, campaign-finance laws that suppress speech immediately before an election—when the public is paying the most attention to politics—cause severe and unjustifiable First Amendment harm. The state's restriction on non-party PAC contributions immediately before an

election appears to be designed, not to prevent corruption, but to suppress speech and competition for the benefit of political parties and incumbent officeholders.

*Third*, in any event, the statute must fail under Article I, Section 19, of the Tennessee Constitution, which provides stronger protection for free speech than its federal counterpart.

## ARGUMENT

### I. Campaign-finance schemes that impose different limits on different classes of donors must receive strict scrutiny.

The lower court correctly concluded that a statute that bans contributions by some political donors, but not others, warrants strict scrutiny.

"[T]he First Amendment stands against … restrictions distinguishing among different speakers, allowing speech by some but not others." *Citizens United v. FEC*, 558 U.S. 310, 340 (2010). The primary reason for this is because "speech restrictions based on the identity of the speaker are all too often simply a means to control content." *Id.* And the First Amendment prohibits content-based speech restrictions "above all else," because they "completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95–96 (1972) (citation omitted).

In addition, laws that treat some speakers preferentially as opposed to others may cause First Amendment harm even "apart from the purpose or effect of regulating content." *Citizens United*, 558 U.S. at 340. Giving some speakers preferential treatment denied to others "deprives

the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice." *Id.* at 340–41. And burdening some speakers, but not others, "deprive[s] the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration." *Id.* at 341.

Further—and especially relevant to campaign-finance restrictions—the First Amendment prohibits government efforts to control "the relative ability of individuals and groups to influence the outcome of elections." *Id.* at 380. Under the First Amendment and our system of government, voters, not elected officials, should "evaluate the strengths of candidates competing for office," and the government therefore must not enact laws "making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election." *Davis v. FEC*, 554 U.S. 724, 742 (2008); *see also Knox v. SEIU Local 1000*, 567 U.S. 298, 322 (2012) ("The First Amendment creates a forum in which all may seek, without hindrance or aid from the State, to move public opinion and achieve their political goals."). In other words, in this country, "those who govern should be the *last* people to help decide who *should* govern." *McCutcheon v. FEC*, 572 U.S. 185, 192 (2014) (plurality opinion) (emphasis in original).

Through campaign contribution limits, the government can "impermissibly inject" itself "into the debate over who should govern," which is a key reason why all campaign finance restrictions—even those that do not expressly discriminate between different classes of donors—must be narrowly drawn to serve the government's interest in preventing

actual or apparent *quid pro quo* corruption and no other purpose. *Id.* (citation and internal marks omitted). First Amendment protections are most necessary when officeholders are placed in a position of using the law to stifle debate or electoral competition; indeed, the First Amendment exists precisely because officeholders cannot be trusted not to abuse their power in this way. *See* *Citizens United*, 558 U.S. at 340 (noting that the First Amendment is "[p]remised on mistrust of governmental power"); *cf.* Richard A. Epstein, *Property, Speech, and the Politics of Distrust*, 59 U. Chi. L. Rev. 41, 54 (1992) (explaining that the First Amendment exists to "control" legislators who would "stifle criticism, rig debate, and disseminate falsehoods to achieve their ends").

Contribution limits that, on their face, favor some donors over others pose the greatest risk that the government is using campaign-finance law to tilt the political playing field. Such limits therefore warrant the greatest scrutiny. Contribution limits impinge on fundamental First Amendment rights. *McCutcheon*, 572 U.S. at 227 (contribution limits "intrude … on a citizen's ability to exercise 'the most fundamental First Amendment activities'") (quoting *Buckley v. Valeo*, 424 U.S. 1, 14 (1976)). And classifications that "impinge upon the exercise of a 'fundamental right'" are "presumptively invidious" and therefore call for strict scrutiny under the Equal Protection Clause. *Plyler v. Doe*, 457 U.S. 202, 216–217 (1982); *see also* *Mosley*, 408 U.S. at 101.

Thus, when the Eighth Circuit considered an Equal Protection Clause challenge to a state scheme that imposed different contribution limits on regular PACs and "small donor" PACs, it applied strict scrutiny

and invalidated the limits because the government failed to meet its burden to show that the differing limits were justified by differences in potential for corruption. *Russell v. Burris*, 146 F.3d 563, 571–72 (8th Cir. 1998). More recently, a Kentucky federal district court applied strict scrutiny in an Equal Protection Clause challenge to a state law that banned political contributions from corporations, but not from unions or LLCs, and concluded that the government could not "justify the disparate treatment." *Protect My Check*, 176 F. Supp. 3d at 691–92.

There is no merit in Defendant's argument that Tennessee's discriminatory rules should survive because they are subject to the "closely drawn" scrutiny that *Buckley*, 424 U.S. at 23–29, prescribed for challenges to contribution limits.

As an initial matter, Tennessee's limits cannot survive even "closely drawn" scrutiny. The Supreme Court has recently clarified that, even under that level of scrutiny, the government must show, with evidence, that its limits are narrowly tailored to prevent *quid pro quo* corruption or the appearance of such corruption, and no other purpose. *See McCutcheon*, 572 U.S. at 191–92, 218. Defendant has failed to do so here: it has not shown with evidence that its differing treatment of party PACs and non-party PACs is closely drawn to address differences in the entities' contributions' potential to corrupt. *Cf. Riddle v. Hickenlooper*, 742 F.3d 922, 928–30 (10th Cir. 2014) (even under "closely drawn" scrutiny, statute imposing different contribution limits for different classes of candidates violated the First Amendment because the

government could not show that the disfavored candidates "were more corruptible (or appeared more corruptible)" than the favored candidates).

Further, *Buckley* does not prescribe less-than-strict scrutiny where a plaintiff specifically challenges a statute's discrimination against some donors and in favor of others. The question whether a limit on a given class of donors is unconstitutionally low—which was *Buckley*'s focus when it prescribed "closely drawn" scrutiny for contribution limits, 424 U.S. at 23–29—is not the same as the question whether different limits on different classes of donors unduly favor some contributors over others.

And strict scrutiny should apply under the Equal Protection Clause regardless of the level of scrutiny that applies in an ordinary First Amendment challenge to contribution limits. Then-Judge Gorsuch explained this point:

> [W]hatever level of scrutiny should apply to *equal* infringements of the right to contribute in the First Amendment context, the strictest degree of scrutiny is warranted under [the] Fourteenth Amendment equal protection doctrine when the government proceeds to *discriminate* against some persons in the exercise of that right. On this account, there is something distinct, different, and more problematic afoot when the government *selectively* infringes on a fundamental right.

*Riddle*, 742 F.3d at 931–32 (Gorsuch, J., concurring) (emphasis in original). Recognizing this, the Tennessee Supreme Court has stated that "[r]egulations which discriminate on the basis of the classification of speakers may violate equal protection even if the regulations do not violate the underlying protected [free-speech] right." *State v. Smoky*

*Mountain Secrets, Inc.*, 937 S.W.2d 905, 912 (Tenn. 1996). Therefore, contrary to the government's argument, regardless of whether Tennessee's discriminatory rules are subject to "closely drawn" First Amendment scrutiny, they still must receive strict scrutiny under the Equal Protection Clause.

To ignore the harm caused by the government's discrimination in favor of some political donors and against others, as the state urges here, would be to tolerate and encourage exactly the sort of abuse the First Amendment, the Equal Protection Clause, and their state counterparts exist to prevent. If courts do not require the government to justify its discrimination, legislators will know that they may play favorites and influence the outcomes of elections, virtually without limitation. The lower court was therefore correct to subject Tennessee's discriminatory rule to strict scrutiny, and this Court should do so as well.

## II. Campaign-finance rules that suppress speech immediately before an election cause great and unjustifiable First Amendment harm.

The statute challenged in this case inflicts especially great First Amendment harm, not only because it discriminates in favor of select speakers, but also because it suppresses political speech when it often matters most: immediately before an election.

The First Amendment protects a speaker's right to choose not only *what* he or she will say but also *how* and *when* he or she will say it. *See United States v. Playboy Entm't Grp.*, 529 U.S. 803, 812 (2000) (applying strict scrutiny to statute restricting certain cable television content to 10 p.m. or later); *Meyer v. Grant*, 486 U.S. 414, 424 (1988) ("The First

Amendment protects [a group's] right not only to advocate their cause but also to select what they believe to be the most effective means for doing so."); *Mills v. Alabama*, 384 U.S. 214, 219 (1966) (striking down a law prohibiting newspapers from printing editorials on election day urging readers to vote a certain way). "The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it. The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion." *Riley v. Nat'l Fed'n Of the Blind of N.C., Inc.*, 487 U.S. 781, 790–91 (1988) (internal citations omitted).

Statutes that stifle select speakers' participation in politics just before an election inflict especially great First Amendment harm because they suppress speech at precisely the time that voters tend to be most interested in hearing it. As the Supreme Court has stated:

> It is well known that the public begins to concentrate on elections only in the weeks immediately before they are held. There are short timeframes in which speech can have influence. The need or relevance of the speech will often first be apparent at this stage in the campaign. The decision to speak is made in the heat of political campaigns, when speakers react to messages conveyed by others.

*Citizens United*, 558 U.S. at 334; *see also* *Cal. Democratic Party v. Jones*, 530 U.S. 567, 586 (2000) (Kennedy, J., concurring) ("Until a few weeks or even days before an election, many voters pay little attention to campaigns … ."). As Justice Harlan put it in another context, "timing is

of the essence in politics. It is almost impossible to predict the political future; and when an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all." *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 163 (1969) (Harlan, J., concurring); *see also FEC v. Wis. Right to Life*, 551 U.S. 449, 462 (2007) (noting that PACs "cannot predict what issues will be matters of public concern" in "blackout" periods before future elections); *Missourians for Fiscal Accountability v. Klahr*, 892 F.3d 944, 952 (8th Cir. 2018) (formation deadline for campaign committee significantly burdened speech because not all "individuals and groups kn[o]w well in advance that they would eventually want to speak"); *Catholic Leadership Coal. of Tex. v. Reisman*, 764 F.3d 409, 431 (5th Cir. 2014) ("[O]ftentimes few observers know the critical issues in an election (and the candidates' position on those issues) until just days before."); *Family PAC v. McKenna*, 685 F.3d 800, 812–13 (9th Cir. 2011) (limit on contributions "during the critical three-week period before the election" was "significant burden" because "committees may want to respond to developing events").

While laws suppressing speech immediately before an election cause great First Amendment harm, they provide relatively little anti-corruption benefit. Immediately before an election, the public's interest in speaking, hearing other speakers, and participating in politics is at its highest, while concerns about contributions' potential to corrupt are at their lowest. A scholar (who supports campaign-contribution limits in general) has explained:

> As the election approaches … the candidate's need to raise campaign funds increases, and the

> government's interest in preventing corruption or its appearance decreases proportionately; contributions made closer in time to an election are more clearly made to support a candidate's election, rather than to gain access or influence over an incumbent, or punish an incumbent by giving to a challenger.

Jessica A. Levinson, *Timing Is Everything: A New Model for Countering Corruption Without Silencing Speech in Elections*, 55 St. Louis U. L.J. 853, 873 (2011). Recognizing this, courts have concluded that restrictions on *post*-election contributions—which do not add to political debate in an election and appear more likely to be given for a corrupt purpose—are more justifiable as anti-corruption measures than pre-election temporal bans. *See State v. Alaska Civil Liberties Union*, 978 P.2d 597, 629–30 (Alaska 1999) (invalidating pre-election temporal limit but affirming post-election limits, which "far more clearly address corruption and its appearance because the election has resolved the critical contingency of which candidate will hold office"); *Ferre v. State ex rel. Reno*, 478 So. 2d 1077, 1079–80 (Fla. Dist. Ct. App. 1985) (upholding ban on post-election contributions, which "to a winning candidate could be a mere guise for paying the officeholder for a political favor"), *aff'd sub nom. Ferre v. State*, 404 So.2d 214 (Fla. 1986).

By suppressing speech when voters are paying the most attention, legislators give themselves, as incumbent officeholders, a political advantage over challengers. Incumbents tend to raise their money early in an election cycle, which means that they will tend to benefit from restrictions on contributions close to election day, as they are more likely

to already have the funds they need to get their message out to voters. *Cf.* Bradley A. Smith, *Unfree Speech: The Folly of Campaign Finance Reform* 50-51 (2001) (explaining how it can be "almost impossible for challengers to match incumbents' early fundraising"). This is in addition to the advantage that virtually any campaign-finance restrictions tend to give incumbents, who generally have greater access to a large number of small donors, the support of their political parties, and means of gaining publicity that do not require them to spend campaign funds. *See id.* at 66-69.

The fact that the temporal limit challenged here restricts contributions, rather than other forms of speech, does not mitigate the First Amendment harm. In *McCutcheon*, the Supreme Court recognized that an "outright ban" on individual contributions beyond an aggregate limit—which effectively limited "*how many* candidates and committees an individual may support through contributions"—was "not a 'modest restraint'" on First Amendment rights but a severe one. 572 U.S. at 204. A statute that imposes an "outright ban" on contributions beyond a certain *date*—just when people are mostly likely to want to associate with each other to make contributions to advance their political ideas—imposes the same severe harm.

Because temporal limits suppress vital First Amendment speech with little corresponding anti-corruption benefit, they should not survive any level of First Amendment scrutiny. This Court should therefore affirm the trial court's order striking down Tennessee's challenged temporal contribution ban.

## III. The statute Plaintiff challenges also fails under Article I, Section 19, of the Tennessee Constitution, which provides stronger protection for free speech than the First Amendment.

As discussed above and in the Plaintiff's brief, Tennessee's discriminatory contribution ban should fail under well-established First Amendment and Equal Protection Clause principles. Even if that were in question, however, Plaintiff would still be entitled to prevail under the free-speech guarantee of Section 19, Article I of the Tennessee Constitution, which is stronger than its federal counterpart.

State constitutions serve as independent guarantors of individual liberty, and it is their proper role to provide greater protection for individual rights than the baseline provided by the U.S. Constitution. The Tennessee Supreme Court has therefore recognized that, although it "may not impinge upon the minimum level of protection established by [United States] Supreme Court interpretations of the federal constitutional guarantees," it may, when "interpreting state constitutional provisions, … impose higher standards and stronger protections than those set by the federal constitution." *Miller v. State*, 584 S.W.2d 758, 760 (Tenn. 1979), *overruled on other grounds, State v. Pruitt*, 510 S.W.3d 398, 416 (Tenn. 2016); *see also* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 491 (1977) ("The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed."); Jeffrey S. Sutton, *51 Imperfect Solutions* 16-21

(2018) (reviewing reasons why state courts can and should conclude that state constitutional provisions provide stronger protection for individual rights than their federal counterparts). Indeed, state courts have long "constru[ed] state constitutional counterparts of provisions of the Bill of Rights as guaranteeing citizens of their states even more protection than the federal provisions, even those identically phrased." Brennan, *supra*, at 495. Therefore, "Tennessee constitutional standards are not destined to walk in lock step with the uncertain and fluctuating federal standards and do not relegate Tennessee citizens to the lowest levels of constitutional protection, those guaranteed by the national constitution." *State v. Black*, 815 S.W.2d 166, 193 (Tenn. 1991) (Reid, J., concurring in part and dissenting in part).

The free-speech guarantee of Section 19, Article I of the Tennessee Constitution states:

> That the printing press shall be free to every person to examine the proceedings of the Legislature; or of any branch or officer of the government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions, is one of the invaluable rights of man and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty.

The Tennessee Supreme Court "has held that Article I, Section 19 is 'a substantially stronger provision than that contained in the First Amendment to the Federal Constitution,'" *Smoky Mountain Secrets*, 937 S.W.2d at 910 n.4, because it is "clear and certain, leaving nothing to

conjecture," *Press, Inc. v. Verran*, 569 S.W.2d 435, 442 (Tenn. 1978). And scholars have observed that, because it declares free speech to be "one of the invaluable rights of man," the Tennessee Constitution is one of several state constitutions that, in contrast with the federal First Amendment, declare freedom of speech to be an "affirmative" right and thus indicate that it deserves the broadest protection. Randall T. Shepard, *The Maturing Nature of State Constitution Jurisprudence*, 30 Val. U. L. Rev. 421, 447-49 (1996); Kevin Francis O'Neill, *The Road Not Taken: State Constitutions as an Alternative Source of Protection for Reproductive Rights*, 11 N.Y.L. Sch. J. Hum. Rts. 1, 62-63 (1993).

Therefore, regardless of the sometimes "uncertain and fluctuating" standards that courts apply in federal constitutional cases, this Court should invalidate Tennessee's discriminatory contribution ban because it infringes on the equal right of "every citizen" to freely communicate in the crucial days before an election.

## CONCLUSION

The judgment of the Davidson County Chancery Court should be affirmed.

Respectfully submitted,

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I hereby certify that a copy of the foregoing *Amicus* Brief has been sent by electronic transmission to:

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This the 14th day of June, 2019.

/s/ Brian Kelsey
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## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief consists of 3,724 words, in compliance with Tenn. Sup. Ct. R. 46.

/s/ Brian Kelsey
Brian Kelsey