No. 19-234

In the Supreme Court of the United States

LIBERTARIAN NATIONAL COMMITTEE, INC.,
PETITIONER

v.

FEDERAL ELECTION COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

LISA J. STEVENSON
Acting General Counsel
KEVIN DEELEY
Associate General Counsel
HARRY J. SUMMERS
Assistant General Counsel
JACOB S. SILER
Attorney
Federal Election Commission
Washington, D.C. 20463

QUESTIONS PRESENTED

1. Whether the Free Speech Clause of the First Amendment forbids the application of federal campaign-contribution limits to a particular bequest that has not been shown to be part of a corrupt exchange.

2. Whether Federal Election Campaign Act amendments enacted in 2014, which allow national party committees to accept contributions beyond the otherwise applicable limit to defray specific categories of expenses, violate the Free Speech Clause.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes, and regulation:

Miscellaneous—Continued: Page

In the Supreme Court of the United States

No. 19-234

LIBERTARIAN NATIONAL COMMITTEE, INC.,
PETITIONER

v.

FEDERAL ELECTION COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-80a) is reported at 924 F.3d 533. The opinion of the district court (Pet. App. 81a-196a) is reported at 317 F. Supp. 3d 202. The order of the district court (Pet. App. 197a-199a) is unreported. The opinion of the district court denying the Federal Election Commission's motion to dismiss (Pet. App. 200a-217a) is reported at 228 F. Supp. 3d 19.

JURISDICTION

The judgment of the court of appeals was entered on May 21, 2019. The petition for a writ of certiorari was filed on August 19, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. "For the past 40 years," this Court's "campaign finance jurisprudence has focused on the need to preserve authority for the Government to combat corruption" while ensuring "that the Government's efforts do not have the effect of restricting the First Amendment right of citizens to choose who shall govern them." *McCutcheon* v. *FEC*, 572 U.S. 185, 227 (2014) (plurality opinion). One way that citizens exercise that right is to organize political parties, which in turn nominate candidates to run for office. Congress has recognized, however, that contributions to political-party committees have sometimes been used to effect actual or apparent quid-pro-quo exchanges, and it has addressed that risk by imposing limits on contributions to those committees.

a. In the late 1930s, representatives of the Democratic National Committee pressured government contractors to buy the party's souvenir convention books at exorbitant prices in exchange for continuing government business. See *Wagner* v. *FEC*, 793 F.3d 1, 11-12 (D.C. Cir. 2015) (en banc), cert. denied, 136 S. Ct. 895 (2016); Pet. App. 152a-153a. Shortly thereafter, as part of the Hatch Political Activity Act, ch. 410, 53 Stat. 1147, Congress imposed a limit of $5000 per year on contributions to national political parties. See Act of July 19, 1940, ch. 640, § 13(a), 54 Stat. 770.

b. The Watergate scandal and the election campaign of 1972 featured several "deeply disturbing examples" of large campaign contributions designed "to secure a political quid pro quo from current and potential office holders." *Buckley* v. *Valeo*, 424 U.S. 1, 26-27 & n.28 (1976) (per curiam) (emphasis omitted). For example, lawmakers determined that national Republican Party

committees were involved in funneling funds from the dairy industry to President Nixon's reelection campaign, after which President Nixon and his Attorney General took actions that favored that industry. *The Final Report of the Select Comm. on Presidential Campaign Activities*, S. Rep. No. 981, 93d Cong., 2d Sess. 615, 738-739 (1974); see *id.* at 1205, 1209 (views of Sen. Weicker).

In 1974, Congress responded to those and other practices by amending the Federal Election Campaign Act of 1971 (FECA), 52 U.S.C. 30101 *et seq.*,[1] to limit an individual's contribution to a candidate to $1000 per election, and by amending the public-financing system for presidential-election campaigns to include funds for nominating conventions. See Federal Election Campaign Act Amendments of 1974 (1974 Amendments), Pub. L. No. 93-443, Tits. I, IV, §§ 101, 403-408, 88 Stat. 1263-1268, 1291-1297. In *Buckley*, the Court largely upheld those provisions. See 424 U.S. at 23-35, 85-109. In 1976, Congress imposed a limit of $20,000 per year on an individual's contribution to "the political committees established and maintained by a national political party." Federal Election Campaign Act Amendments of 1976 (1976 Amendments), Pub. L. No. 94-283, sec. 112(2), § 320(a)(1)(B), 90 Stat. 487.

c. Donations that fell within the original statutory definition of a "'contribution'"—*i.e.*, donations "made for the purpose of * * * influencing the nomination for election, or election, of any person to Federal office," 2 U.S.C. 431(e)(1)(A) (Supp. IV 1974)—came to be known as "hard money." See *McConnell* v. *FEC*, 540

---

[1] Unless otherwise indicated, all references in this petition to Title 52 of the United States Code are to Supplement V (2017) to the 2012 edition.

U.S. 93, 122 (2003). Donations falling outside that definition, known as "soft money," were not limited in amount and were left largely unregulated by FECA. See *id.* at 123. Soft money included donations "specifically designated for the purpose of defraying any cost incurred with respect to the construction or purchase of any office facility which is not acquired for the purpose of influencing the election of any candidate in any particular election for Federal office." 1976 Amendments, sec. 102(d)(2), 90 Stat. 478; see 11 C.F.R. 100.7(b)(12) (2002). Soft money also included donations to pay the expenses of recounts. See 11 C.F.R. 100.7(b)(20) (2002); FEC Advisory Op. 2006-24, Fed. Election Camp. Fin. Guide (CCH) ¶ 6512, at 17,266-17,268 (Oct. 20, 2006) (National Republican Senatorial Committee). And FECA permitted individuals to make unlimited soft-money donations to political parties for activities intended to influence state or local elections. See *McConnell*, 540 U.S. at 123.

In 1998, after an extensive investigation, the Senate Committee on Governmental Affairs concluded that parties' ability to solicit and spend soft money had rendered the limitations on campaign contributions ineffective. See *Investigation of Improper Activities in Connection with 1996 Federal Election Campaigns*, S. Rep. No. 167, 105th Cong., 2d Sess. 105-165 (1998); *McConnell*, 540 U.S. at 129-132. In addition, a series of quid-pro-quo arrangements involving former lobbyist Jack Abramoff and former Representative Bob Ney included substantial donations to party committees. Pet. App. 160a-164a. In the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81, Congress prohibited national political parties and their officers from soliciting, receiving, or spending any

funds outside the federal contribution limitations. See 52 U.S.C. 30125(a). As a result of those changes, national party committees may no longer use soft money to fund office space and recount expenses. The amounts that individuals may donate to state and local party committees continue to depend in part on the uses to which the donated funds will be spent. See 52 U.S.C. 30125(b); *McConnell*, 540 U.S. at 161-164.

d. In two different statutes enacted in 2014, Congress again amended the laws that govern the financing of national party committees. In April 2014, Congress terminated public financing for presidential nominating conventions. See 26 U.S.C. 9008(i) (Supp. II 2014). In December 2014, Congress amended FECA to allow individuals to give money to national party committees, over and above the contribution limits that would otherwise apply, so long as those funds were placed in one of three kinds of "segregated account[s]." 52 U.S.C. 30116(a)(1)(B) and (9) (Supp. II 2014).

A party committee may use those segregated accounts to pay for (1) a "presidential nominating convention," (2) party "headquarters buildings," and (3) "election recounts and contests and other legal proceedings." 52 U.S.C. 30116(a)(9)(A)-(C). The new provisions neither limit expenditures in those categories, nor prohibit any party from spending its general funds on those types of expenses. The new provisions merely allow national party committees to accept additional contributions, beyond the ordinary contribution limits, for those expenses. Today, as a result of adjustments for inflation, an individual may donate up to $35,500 into a national party committee's general account, and up to $106,500 (*i.e.*, three times the limit for donations into

the general account) into each of a national party committee's segregated accounts. See 84 Fed. Reg. 2504, 2506 (Feb. 7, 2019); 52 U.S.C. 30116(a)(1)(B).

e. FECA applies to contributions from decedents and their estates in the same way that it does to living donors. The statute provides that "no person shall make contributions" above certain dollar thresholds to candidates or political committees. 52 U.S.C. 30116(a)(1). It defines "'person'" to include a variety of entities, including individuals, associations, and "any other organization or group of persons." 52 U.S.C. 30101(11). Because a decedent's estate falls within the statutory definition of "person," the Federal Election Commission (FEC or Commission) has concluded that contributions bequeathed in a will or made through a testamentary trust are "subject to the same limitations and prohibitions applicable to the decedent." FEC Advisory Op. 1999-14, Fed. Election Camp. Fin. Guide (CCH) ¶ 6294, at 12,457 (July 16, 1999) (Council for a Livable World); see FEC Advisory Op. 1983-13, Fed. Election Camp. Fin. Guide (CCH) ¶ 5727 (Sept. 26, 1983) (National Maritime Union Political and Legislative Organization on Watch). Where the amount to be contributed exceeds the relevant annual limit, the estate or an independent third party (such as a trustee or escrow agent) may retain the excess funds and contribute them to the designated recipient in successive years, in amounts that comply with the statutory limits, until the full sum is distributed. See FEC Advisory Op. 2015-05, Fed. Election Camp. Fin. Guide (CCH) ¶ 6715, at 11,977-11,978 (Aug. 11, 2015) (Shaber).

2. In 2014, Joseph Shaber, a longtime supporter of the Libertarian Party, died. See Pet. App. 180a. Shaber named petitioner Libertarian National Committee

as a beneficiary of a trust that he had created to distribute his assets upon his death. See *ibid.* Petitioner routinely "solicits potential contributors to include [it] as a beneficiary in donors' estate planning materials," and it has offered various perks to donors who do so. *Id.* at 184a. Petitioner's share of the trust was worth $235,575.20. *Id.* at 181a.

Once petitioner's share of the trust became available in 2015 (after normal delays in administering the estate), the statute and the Commission's guidance left petitioner with a choice. See Pet. App. 180a. Petitioner could accept the entire amount of Shaber's gift at once by placing the then-applicable legal maximum of $33,400 in its general account, and the remaining $202,175.20 in some combination of segregated accounts. Alternatively, petitioner could accept $33,400 in its general account at once and place the remaining funds in escrow, to be distributed over the course of the next several years in accordance with the general limits applicable for those years. Petitioner chose the latter course. See *id.* at 182a-183a.

3. In 2016, petitioner sued the Commission, arguing that (1) the contribution limits violate the First Amendment as applied to Shaber's contribution and (2) the limits violate the First Amendment on their face because they allow donors to increase the size of their contributions to national party committees, but only if the recipient spends the money on specified categories of expenses. See Pet. App. 2a-3a. With respect to the first of those arguments, petitioner acknowledged that it had previously litigated the constitutionality of the contribution limits as applied to bequeathed contributions generally, and that it had lost that challenge. *Id.* at 95a-104a; see *Libertarian Nat'l Comm., Inc.* v. *FEC*,

930 F. Supp. 2d 154, 166-167 (D.D.C. 2013). As a result, petitioner "concede[d] that collateral estoppel foreclose[d]" a challenge to the constitutionality of applying contribution limits to bequests. Pet. App. 97a n.8. Petitioner accordingly challenged only the application of the contribution limits to Shaber's bequest "in particular." *Id.* at 92a.

The Commission moved to dismiss the complaint for lack of Article III standing, but the district court denied that motion. See Pet. App. 200a-217a. Petitioner invoked a statutory provision that requires district courts to "certify all questions of constitutionality of [FECA]" in cases brought by certain types of parties "to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc." 52 U.S.C. 30110; see Pet. App. 197a. The district court made findings of fact and certified three constitutional questions to the court of appeals. See Pet. App. 127a-199a.

4. Sitting en banc, the court of appeals held that petitioner had established Article III standing, but it rejected each of petitioner's contentions on the merits. See Pet. App. 1a-80a.

a. The court of appeals held that petitioner had Article III standing to challenge the contribution limits. See Pet. App. 7a-11a. The court rejected the Commission's argument that petitioner had inflicted its own injury by choosing to place Shaber's gift in escrow for distribution into its general account over the course of the next several years, rather than placing it in its general and segregated accounts immediately. *Id.* at 8a-10a. The court stated that petitioner's injury "stems not from its inability to accept the entire bequest immediately (which it could have done), but rather from the committee's 'inability to accept immediately the entire

bequest for *general expressive purposes*' (which FECA prohibits)." *Id.* at 8a (brackets and citation omitted). The court also rejected the Commission's argument that, because petitioner sought only forward-looking relief, a favorable judicial determination would not redress petitioner's earlier inability to place Shaber's gift in its general account. *Id.* at 10a. The court explained that "much of the money remains tied up in escrow, and [the court] most certainly do[es] have authority to invalidate the challenged portions of FECA—which, per the escrow agreement, would afford [petitioner] immediate access to the remainder of the bequest for all purposes." *Ibid.*

b. On the merits, the court of appeals first held that the application of the contribution limits "specifically to Shaber's bequest" did not violate petitioner's rights under the First Amendment. Pet. App. 11a; see *id.* at 11a-26a. The court explained that, although this Court has applied "closely drawn scrutiny" to determine whether a statute violated a donor's right to contribute money, neither this Court nor the court of appeals has determined the appropriate level of scrutiny for laws "limiting a recipient's right to receive a donation" after the donor has died. *Id.* at 15a. The court assumed without deciding that the appropriate level of scrutiny is "closely drawn scrutiny," rather than some more lenient standard of review. *Id.* at 15a-16a.

Applying closely drawn scrutiny, the court of appeals rejected petitioner's First Amendment challenge. The court observed that petitioner had "[d]isclaim[ed] any 'categorical challenge to the limitation of all bequests'"; had "concede[d] 'the theoretical corruption potential of bequests'"; and had "decline[d] to dispute" the district courts' factual findings regarding the "threat of quid

pro quo corruption" posed by bequests. Pet. App. 19a-20a (quoting Pet. CA. Br. 30, Pet. C.A. Reply Br. 13). It explained that petitioner had "instead ask[ed] [the court] to conduct an 'as-applied' inquiry 'narrowly focused on one particular bequest': 'whether Shaber's bequest, specifically, warrants government limitation.'" *Id.* at 20a (quoting Pet. C.A. Br. 30, 35). It also noted that the district court's certification order was limited to that case-specific question. *Id.* at 25a.

The court of appeals rejected petitioner's contention that the government could not restrict Shaber's bequest because that particular bequest "was not corrupt." Pet. App. 20a. The court explained that "restrictions on direct contributions are preventative, because few if any contributions to candidates will involve quid pro quo arrangements." *Id.* at 21a (quoting *Citizens United* v. *FEC*, 558 U.S. 310, 357 (2010)). It observed that this Court has upheld such prophylactic restrictions because it is "difficult to isolate suspect contributions." *Ibid.* (quoting *Buckley*, 424 U.S. at 30). The court of appeals further explained that, "even if through some omniscient power courts could separate the innocent contributions from the nefarious, an appearance of corruption would remain." *Id.* at 22a.

c. The court of appeals also upheld the system of segregated accounts that Congress had established in 2014. See Pet. App. 26a-41a. The court rejected petitioner's argument that the 2014 amendments were subject to strict scrutiny. *Id.* at 30a-34a. The court explained that this Court has applied strict scrutiny to limits on expenditures, but has applied closely drawn scrutiny to limits on contributions. *Id.* at 31a. It further explained that the system of segregated accounts "imposes no expenditure limit" but instead regulates the

permissible amounts that may be contributed. *Id.* at 32a. Petitioner contended that, under *Reed* v. *Town of Gilbert*, 135 S. Ct. 2218 (2015), the system of segregated accounts was subject to strict scrutiny because it imposed content-based restrictions on speech. The court of appeals rejected that argument, explaining that nothing in *Reed* purported to overrule the Court's precedents distinguishing between contribution limits and expenditure limits. Pet. App. 32a-33a.

Applying closely drawn scrutiny, the court of appeals held that the segregated-account limits were constitutional. Pet. App. 34a-41a. The court observed that the 2014 amendments "*increased* the total amount individuals may contribute to a political party," and that petitioner's argument "sounds very much like a grievance with Congress's decision to *raise* contribution limits." *Id.* at 35a. The court added that "legitimate interest[s]" supported Congress's decision to "allow[] donors to make larger contributions into each of the new dedicated-purpose accounts." *Id.* at 36a. The court explained that the "new, higher limit on contributions to pay for presidential nominating conventions" gives political parties "a tool for making up for [the] shortfall" created by the end of "public funding for such conventions." *Ibid.* The court viewed the increased segregated-account limits for party headquarters and for recounts and other legal proceedings as "[e]qually benign." *Id.* at 37a. The court explained that "Congress could have permissibly concluded that unlike contributions that can be used for, say, television ads, billboards, or yard signs, contributions that fund mortgage payments, utility bills, and lawyers' fees have a comparatively minimal impact on a party's ability to persuade voters and win

elections"—and, thus, pose a reduced threat of corruption. *Ibid.*

d. Three judges of the court of appeals concurred in part and dissented in part. Judge Griffith agreed with the majority that the application of the contribution limits to bequeathed contributions is constitutional, but he concluded that Congress had not sufficiently justified the scheme of segregated accounts. Pet. App. 42a-53a. Judge Griffith declined, however, to address the question whether an increase in the amounts that individuals can contribute for general party activities, or severance of the increased limits for specified party activities that the 2014 amendments created, was the appropriate remedy for any constitutional violation. See *id.* at 52a & n.2. Judge Katsas, joined by Judge Henderson, agreed with the majority that the scheme of segregated accounts is constitutional, but concluded that the contribution limits are unconstitutional as applied to "any of three nested categories: bequests, uncoordinated bequests, and Shaber's bequest." *Id.* at 62a.

ARGUMENT

Petitioner contends (Pet. 26-31) that the application of federal contribution limits to Shaber's bequest violates the First Amendment. Petitioner argues (Pet. 31-35) that the segregated-account provisions that Congress enacted in 2014 violate the First Amendment as well. The court of appeals, reflecting an accurate interpretation of this Court's precedents, correctly rejected those arguments, and its decision does not conflict with any decision of another court of appeals. In addition, this case would be an unsuitable vehicle for considering

the first question that petitioner presents. Further review is not warranted.[2]

1. As the court of appeals correctly held, the federal limits on campaign contributions are constitutional as applied to Shaber's bequest.

a. This case comes to this Court on the understanding —established in previous litigation between petitioner and the Commission, and conceded by petitioner below —that Congress may constitutionally apply campaign contribution limits to bequests generally. See Pet. App. 19a-20a, 97a n.8. The only issue before the Court is whether Shaber's bequest must be exempted from those concededly valid limits because that particular bequest was not corrupt. As the court of appeals recognized, nothing in this Court's precedents suggests that a particular contribution is constitutionally exempt from federal contribution limits simply because it has not been shown to involve a corrupt exchange.

In *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam), this Court accepted the premise that "most large contributors do not seek improper influence over a candidate's position or an officeholder's action." *Id.* at 29. For two reasons, the Court nonetheless upheld those limits. First, the Court explained that, because it is "difficult to isolate suspect contributions," contribution limits are permissible preventive measures. *Id.* at 30. Second, and "more importantly," the Court explained that "the interest in safeguarding against the *appearance* of impropriety requires that the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated." *Ibid.* (emphasis added).

---

[2] The Commission argued below that petitioner lacked Article III standing. The court of appeals rejected that contention, see Pet. App. 7a-11a, and the Commission does not renew it here.

In subsequent decisions, this Court has reaffirmed both of those rationales for contribution limits. It has repeatedly described such limits as "a prophylactic measure" against corruption—meaning that such limits will necessarily apply to some contributions that do not involve corrupt bargains. *McCutcheon* v. *FEC*, 572 U.S. 185, 221 (2014) (plurality opinion); see, *e.g.*, *Citizens United* v. *FEC*, 558 U.S. 310, 357 (2010) ("[R]estrictions on direct contributions are preventative, because few if any contributions to candidates will involve *quid pro quo* arrangements."); *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 260 (1986) (explaining that "a broad prophylactic rule" is justified "[i]n light of the historical role of contributions in the corruption of the electoral process"); *FEC* v. *National Right to Work Comm.*, 459 U.S. 197, 210 (1982) ("Nor will we second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared."). The Court likewise has repeatedly reaffirmed Congress's authority to use contribution limits to combat "the appearance of corruption." *Citizens United*, 558 U.S. at 359 ("*Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption."); see, *e.g.*, *California Med. Ass'n* v. *FEC*, 453 U.S. 182, 194-195 (1981) (opinion of Marshall, J.) (The Court in *Buckley* "reasoned that contribution restrictions * * * served the important governmental interests in preventing the * * * appearance of corruption."). Petitioner's contention—that a particular contribution, whether made in the form of a bequest or otherwise, is constitutionally entitled to an exemption from a contribution limit simply because that particular bequest is not corrupt—is therefore inconsistent with this Court's decisions, including decades of

precedents confirming Congress's authority to impose contribution limits as prophylactic measures.

Petitioner also does not explain how its alternative regime would operate in practice. Petitioner appears to contemplate (Pet. 29) that, whenever a decedent leaves a political contribution in his will, the government or the courts would conduct a case-by-case investigation (including "adversarial and third-party discovery") to determine whether that particular contribution was part of a corrupt bargain. This Court has cautioned, however, that campaign-finance restrictions should generally operate through clear rules, not through "intricate case-by-case determinations." *Citizens United*, 558 U.S. at 329.

b. Petitioner's contrary arguments reflect an erroneous understanding of this Court's decisions.

Petitioner faults (Pet. 26-27) the court of appeals for applying closely drawn scrutiny rather than strict scrutiny in reviewing its as-applied challenge. But this Court has consistently drawn a distinction beween limits on campaign expenditures and limits on campaign contributions. It has subjected expenditure limits to "exacting scrutiny," explaining that such limits "'necessarily reduce the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *McCutcheon*, 572 U.S. at 197 (plurality opinion) (quoting *Buckley*, 424 U.S. at 19) (brackets omitted). In contrast, it has subjected contribution limits to "'closely drawn'" scrutiny, "a lesser but still 'rigorous standard of review,'" because such limits "'permit the symbolic expression of support evidenced by a contribution but do not in any way infringe the contributor's freedom to

discuss candidates and issues.'" *Ibid.* (quoting *Buckley*, 424 U.S. at 21, 25, 29) (brackets omitted).

To be sure, this Court has issued those decisions in cases that involved contributions by living people, not testamentary bequests. But petitioner identifies no sound justification for the counterintuitive theory that contributions by people who have died receive *more* constitutional protection than contributions by people who are still alive. Petitioner seizes on this Court's observation that contribution limits ordinarily "may bear more heavily on the associational right than on freedom to speak," and it emphasizes that this associational right is not implicated here. Pet. 26 (quoting *McConnell* v. *FEC*, 540 U.S. 93, 135 (2003)). But the fact that Shaber's death eliminates the associational interest that a contributor could ordinarily assert does not cause petitioner's own interest in receiving above-limit amounts for general party activities to be greater than it otherwise would be.[3]

---

[3] Petitioner faults the court of appeals for "assum[ing], without deciding, that closely drawn scrutiny applies to the imposition of contribution limits on Shaber's bequest." Pet. App. 16a; see Pet. 26. But the court took that approach in response to the Commission's argument that a *more lenient* standard of review should apply because Shaber had died and therefore had no continuing First Amendment right of association. Pet. App. 13a-16a; see Pet. 26 (acknowledging that contribution limits "do not implicate associational rights *at all* when applied against testamentary bequests, because the dead do not engage in political association"). The court ultimately concluded that, because the application of FECA's contribution limits to Shaber's bequest would be upheld under either of the two potentially applicable standards of review, it was unnecessary for the court to choose between them. That approach was correct.

Petitioner also asserts (Pet. 27) that, even under closely drawn scrutiny, the government lacks an interest in limiting Shaber's bequest, because "[d]eath disrupts all individual capabilities in this world—including the ability to corrupt a political party." As an initial matter, that argument is directed to an issue that is not properly before this Court: the constitutionality of applying contribution limits to bequests in general, as opposed to Shaber's bequest in particular. In any event, the argument is unpersuasive. As the court of appeals explained, the "donor's death simply imposes a sequencing constraint on a quid pro quo exchange"; a donor can receive "political favors *now* for the promise of money *later*." Pet. App. at 17a-18a. "And even that constraint evaporates in the case of corrupt donors seeking favors for their survivors," because "the donor's surviving friends and family remain all too capable of accepting political favors that their deceased benefactor may have pre-arranged for their benefit." *Id.* at 18a.

Petitioner likewise objects (Pet. 27-29) that the government has failed to present evidence that bequests can have corrupting effects. Again, that objection concerns an issue that is not properly before this Court: the constitutionality of limiting testamentary contributions in general. And again, that objection fails on its own terms. Petitioner conceded below that bequests "raise valid anticorruption concerns," and the court of appeals accepted that concession. Pet. App. 19a (citation omitted). The district court also made factual findings that "nothing prevents a living person from informing the beneficiary of a planned bequest about that bequest"; that political committees "'could feel pressure to . . . ensure that a (potential) donor is happy with the

committee's actions lest [that donor] revoke the bequest'"; and that such pressure could cause a "'national party committee, its candidates, or officeholders * * * [to] grant that individual political favors.'" *Id.* at 172a, 174a, 175a (citations omitted; first set of brackets in original). Petitioner "decline[d] to dispute" those findings. *Id.* at 19a.

c. Petitioner's first question presented is not sufficiently important to warrant this Court's intervention. The Commission's records indicate that estates contributed $3.7 million between 1978 and August 2017. Pet. App. 175a. Although that figure is likely underinclusive due to the lack of uniformity in the reporting of bequeathed contributions, *id.* at 175a-176a, the true amount is undoubtedly a very small portion of the more than $4.8 billion contributed to all candidates and party committees during the most recent presidential election cycle alone, see Press Release, FEC, Statistical summary of 24-month campaign activity of the 2015-2016 election cycle (Mar. 23, 2017), https://www.fec.gov/updates/statistical-summary-24-month-campaign-activity-2015-2016-election-cycle/. The decision below, moreover, addresses only the constitutionality of limiting Shaber's contribution, not the constitutionality of limiting bequeathed contributions in general. That narrow, case-specific holding does not warrant this Court's review.

d. This case would also be an unsuitable vehicle for addressing the question presented. In the course of addressing the narrow question regarding the constitutionality of applying contribution limits to Shaber's bequest, petitioner makes a series of broader contentions about bequests in general—for instance, that the government lacks an interest in limiting testamentary contributions, and that the government has failed to show

that such contributions pose a risk of corruption. See Pet. 27-29. Several obstacles stand in the way of this Court's addressing those arguments.

First, the district court's certification order is limited to the question whether "imposing annual contribution limits against the bequest of Joseph Shaber violate[d] the First Amendment." Pet. App. 198a. Petitioner brought this case to the en banc D.C. Circuit under a special statutory provision that allows district courts to certify "questions of constitutionality of [FECA]" to the court of appeals. 52 U.S.C. 30110. Because Section 30110 by its terms authorizes the certification only of particular "questions," it limits the court of appeals "to addressing only the matters * * * certified." Pet. App. 24a-25a. The "matter * * * certified" in this case is the constitutionality of applying the contribution limits to Shaber's bequest, not the constitutionality of applying the limits to bequests in general.[4]

Second, petitioner previously litigated the constitutionality of contribution limits as applied to bequests in general, and it lost that challenge. See *Libertarian Nat'l Comm., Inc.* v. *FEC*, 930 F. Supp. 2d 154, 166-167 (D.D.C. 2013). Petitioner "concede[d]" below that "collateral estoppel" (issue preclusion) prevented it from relitigating those issues. Pet. App. 97a n.8.

Third, this Court's ordinary practice "precludes a grant of certiorari * * * when 'the question presented

---

[4] In this respect, Section 30110 differs from statutes that authorize the certification for appellate review of particular *orders*. See, *e.g.*, 28 U.S.C. 1292(b) (authorizing the certification of certain interlocutory "order[s]"); *Yamaha Motor Corp., U.S.A.* v. *Calhoun*, 516 U.S. 199, 205 (1996) (explaining that, under the text of Section 1292(b), "it is the *order* that is appealable, and not the controlling question identified by the district court") (citation omitted).

was not pressed or passed upon below.'" *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (citation omitted). Petitioner did not press any broader challenge to the contribution limits in the court of appeals. To the contrary, petitioner "ask[ed] [the court] to conduct an 'as-applied' inquiry 'narrowly focused on one particular bequest'"; framed the question before the court as "'whether Shaber's bequest, specifically, warrants government limitation'"; "[d]isclaim[ed] any 'categorical challenge to the limitation of all bequests'"; and explained that its "'as-applied Shaber challenge . . . does not contest any contribution limit's general sweep.'" Pet. App. 20a, 24a (quoting Pet. C.A. Br. 30, 35; Pet. C.A. Reply Br. 11). Relying on petitioner's statements, the court "decline[d] to venture" beyond the narrow question "whether applying FECA's annual contribution limts specifically to Shaber's bequest violates [petitioner's] First Amendment rights." *Id.* at 11a, 25a.

Fourth, petitioner conceded below that bequests in general "raise valid anticorruption concerns." Pet. App. 19a. And it "decline[d] to dispute" the district court's factual findings, including findings "that amount to substantial evidence demonstrating the government's anticorruption interest in regulating bequests." *Ibid.* Those concessions preclude petitioner's current argument that the government lacks the constitutional authority to limit Shaber's testamentary contribution because "[t]he dead cannot perform the 'winks and nods' of *quid pro quo* policing." Pet. 28 (citation omitted).

e. The decision below does not conflict with any decision of another court of appeals. And, contrary to petitioner's suggestion (Pet. 36), the standard for certifying questions under Section 30110 would not prevent other circuits from addressing the application of FECA

contribution limits to testamentary bequests. Section 30110's procedures fully apply outside the D.C. Circuit, and litigants in other circuits have frequently invoked the statute. See, *e.g.*, *CAO* v. *FEC* (*In re Cao*), 619 F.3d 410, 414-415 (5th Cir. 2010) (en banc), cert. denied, 562 U.S. 1286 (2011); *California Med. Ass'n* v. *FEC*, 641 F.2d 619, 622-623 (9th Cir. 1980) (en banc), aff'd, 453 U.S. 182 (1981); *Republican Nat'l Comm.* v. *FEC*, 616 F.2d 1, 1-2 (2d Cir.) (en banc), aff'd, 445 U.S. 955 (1980). And even where the Section 30110 procedure is unavailable, litigants may invoke "the usual remedies" under "the federal-question jurisdiction granted the federal courts." *Bread Political Action Comm.* v. *FEC*, 455 U.S. 577, 584-585 (1982).

2. Petitioner's First Amendment challenge to the system of segregated accounts that Congress established in 2014 likewise does not warrant this Court's review.

a. The court of appeals correctly held that the segregated-account provisions are consistent with this Court's precedents. In *McConnell*, this Court upheld a law that prohibited a donor from contributing more than $25,000 to a national political party, concluding that the law served the government's interests in preventing the reality and appearance of corruption. See 540 U.S. at 142-161. Under the segregated-account provisions, a donor may still donate that same sum (adjusted for inflation) to a national political party, and the party may use that money for any campaign expenses it chooses. The 2014 amendments at issue here simply allow a donor to give *additional* amounts so long as those additional funds are placed in special accounts dedicated to defraying the expenses of conventions, party headquarters, and legal expenses. See pp. 5-6, *supra*.

This Court has held that, in general, "'the First Amendment imposes no freestanding "underinclusiveness" limitation,'" and laws ordinarily do not violate that Amendment "by abridging *too little* speech." *Williams-Yulee* v. *Florida Bar*, 135 S. Ct. 1656, 1668 (2015) (citation omitted). As Judge Katsas explained below, that principle means that, while Congress must identify an "anti-corruption justification" to limit contributions in the first place, it "d[oes] not need a further, corruption-related justification to restrict contributions for nominating conventions, headquarters, and legal expenses less severely than it restricts other contributions." Pet. App. 77a.

In any event, Congress did have justifications for loosening the restrictions on contributions that fund conventions, headquarters, and legal expenses, while maintaining restrictions on other contributions. The higher limit for contributions that fund nominating conventions "gives parties a tool for making up for th[e] shortfall" that arose when "Congress ended public funding for such conventions." Pet. App. 36a. And the "'dedicated-purpose accounts'" for headquarters and legal expenses are "[e]qually benign": "Congress could have permissibly concluded that unlike contributions that can be used for, say, television ads, billboards, or yard signs, contributions that fund mortgage payments, utility bills, and lawyers' fees have a comparatively minimal impact on a party's ability to persuade voters and win elections." *Id.* at 37a (citation omitted). Or, as Judge Katsas observed, "Congress could have chosen to restrict those contributions less severely * * * simply to permit more speech rather than less." *Id.* at 77a.

Petitioner suggests that the approach Congress took in 2014, by allowing donors to contribute greater

amounts to political parties for use in specified activities, represents an abrupt departure from established campaign-finance norms. See Pet. 24 ("[N]ow that the D.C. Circuit has blessed content-based spending restrictions on speech, look out."). In fact, differential contribution limits of this sort, under which the amounts that an individual can give to a political party committee depend in part on the uses to which the donated funds may be put, are a longstanding feature of federal campaign-finance law. Until BCRA was enacted, soft-money donations that were largely unregulated by federal law could be used for various national-party activities. See *McConnell*, 540 U.S. at 122-126; pp. 3-4, *supra*.[5] And the federal statutory limits on contributions to state and local party committees continue to vary depending on the ultimate uses of the contributed funds. See *McConnell*, 540 U.S. at 161-164. The feature of the 2014 amendments that petitioner finds objectionable is thus consistent with longstanding congressional practice. See Pet. App. 32a-33a.

b. Petitioner contends (Pet. 31-32) that the segregated-account provisions draw "content-based" distinctions that trigger strict scrutiny. Petitioner relies on this Court's statement *Reed* v. *Town of Gilbert*, 135 S. Ct. 2218 (2015), that a law is content-based if it

---

[5] Two of the three national-party activities to which the 2014 increased contribution limits apply—*i.e.*, "headquarters buildings" and "election recounts," 52 U.S.C. 30116(a)(9)(B) and (C) (Supp. II 2014)—could have been financed with unregulated soft money under the pre-BCRA regime. See p. 4, *supra*. For the third ("presidential nominating convention[s]," see 52 U.S.C. 30116(a)(9)(A) (Supp. II 2014)), national party committees received public funding until 2014. See p. 4, *supra*.

"defin[es] regulated speech by particular subject matter, * * * function[,] or purpose." *Id.* at 2227. But the distinctions drawn by the segregated-account provisions are not based on content, as the ability to use the segregated accounts to defray expenses does not "depend" on the "communicative content" of any speech. *Id.* at 2224. In any event, even assuming arguendo that the distinctions drawn by the segregated-account provisions are properly viewed as content-based, under this Court's decisions, strict scrutiny would still be unwarranted here.

This Court has long held that restrictions on contributions warrant closely drawn scrutiny rather than strict scrutiny. It has done so even in analyzing restrictions that defined regulated contributions by reference to the ultimate permissible uses of the contributed funds. In *Buckley*, for example, the Court applied closely drawn scrutiny to a law that restricted contributions "made *for the purpose* of influencing * * * a general election for any federal office." 424 U.S. at 23 (emphasis added). And in *McConnell*, the Court upheld a federal statute that imposed differential limits on contributions to state and local party committees depending on the uses to which the contributed funds would be put. 540 U.S. at 171-173 (upholding statutory scheme that imposed a limit of $10,000 on funds used for general expenses; a separate limit of $10,000 on funds used for voter registration, get-out-the-vote efforts, and other generic campaign activities; and no federal limit on funds used for nonfederal expenses).

Petitioner contends (Pet. 32) that the issue of content discrimination was neither brought to this Court's attention nor ruled upon in the cases just discussed. That

is incorrect. In *Buckley*, the Libertarian Party and others argued that limits on contributions to candidates were "a regulation on the content as well as the quantity of political communication" and therefore could be justified only by a "compelling governmental interest." Appellants Reply Br. at 19, 53, *Buckley*, *supra* (No. 75-436). The Court rejected that argument. *Buckley*, 424 U.S. at 23. Petitioner likewise was a party to *McConnell*, and it argued that BCRA's restrictions discriminated against political parties in a manner "similar to that from content-based regulation." Political Parties Br. at 92, *McConnell*, *supra* (No. 02-1727) (citation omitted). By upholding BCRA under closely drawn scrutiny, the Court rejected that argument.

c. Petitioner appears to assume that, if the differential contribution limits are found to be unconstitutional, the proper remedy would be to increase the limits on individual contributions for general party activities. See Pet. App. 52a n.2 (Griffith, J., concurring in part and dissenting in part). But it is not clear why that remedy, rather than severance of the increased segregated-account limits that Congress enacted in 2014, would be the appropriate response. The one judge below who would have held that the "two-tiered scheme" for contributions to national political parties is unconstitutional specifically declined to address that remedial question. See *id.* at 52a. The uncertainty as to whether petitioner would derive any tangible benefit from a favorable constitutional ruling provides a further reason for this Court to deny review.

d. The decision below does not conflict with any decision of another court of appeals. Although petitioner asserts that the standard for certification under Section

30110 would prevent litigation of this issue in other circuits, that assertion is mistaken for the reasons set forth above. See pp. 20-21, *supra*.

3. Contrary to petitioner's request (Pet. 37), there is no need for the Court to hold this petition pending its disposition of *Thompson* v. *Hebdon*, petition for cert. pending, No. 19-122 (filed July 22, 2019) (*Thompson* Pet.).

The petition in *Thompson* seeks the Court's review of the question whether Alaska's campaign contribution limits are unconstitutionally low. In a footnote, the *Thompson* petitioners suggest that, if Alaska's limits "really are compatible with this Court's precedents[] * * * then it would be appropriate to reconsider" the standard of review applicable to contribution limits. *Thompson* Pet. at 8 n.1. Petitioner has not asserted any similar challenge to the federal contribution limits at issue here, which are "no lower than the ceilings the Court approved in *McConnell*." Pet. App. 14a. Nor does petitioner urge the Court to reconsider the standard of review that applies to contribution limits generally. Rather, it argues only that strict scrutiny applies to limits on bequests, and to limits that are tied to the ultimate uses of contributed funds. There is consequently no meaningful likelihood that the Court's disposition of *Thompson* will affect the outcome of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

LISA J. STEVENSON
Acting General Counsel
KEVIN DEELEY
Associate General Counsel
HARRY J. SUMMERS
Assistant General Counsel
JACOB S. SILER
Attorney
Federal Election Commission

OCTOBER 2019