No. 19-234

In The
Supreme Court of the United States

LIBERTARIAN NATIONAL COMMITTEE, INC.,

Petitioner,

v.

FEDERAL ELECTION COMMISSION,

Respondent.

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF *AMICUS CURIAE* OF GOLDWATER INSTITUTE IN SUPPORT OF PETITIONER

TIMOTHY SANDEFUR
JACOB HUEBERT*
SCHARF-NORTON CENTER FOR CONSTITUTIONAL LITIGATION AT THE GOLDWATER INSTITUTE
500 E. Coronado Rd.
Phoenix, AZ 85004
(602) 462-5000
litigation@goldwaterinstitute.org

**Counsel of Record*

Counsel for Amicus Curiae Goldwater Institute

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

1. In the asserted interest of preventing *quid pro quo* corruption, the Federal Election Commission limits the amount of money that a political party may receive each year from a deceased donor.

Over the course of his life, Joseph Shaber made various small donations to the Libertarian Party. He was unknown to party officials and candidates. Upon his death, the party learned that Shaber had unconditionally left it $235,575.20. Does limiting the size of Joseph Shaber's uncoordinated testamentary bequest to the party violate the party's First Amendment right to free speech?

2. In 2014, Congress imposed content-based spending restrictions on contributions to political parties. A national political party committee may now spend only 10% of an individual's maximum annual contribution on unrestricted speech. Of an individual's maximum annual contribution, 30% must be spent on presidential nominating conventions, 30% on election contests and other legal proceedings, and 30% on party headquarters buildings. 52 U.S.C. §§ 30116(a)(1)(B), (a)(9), 30125(a)(1). Money being fungible, these restrictions negligibly impact, if at all, party committees that would otherwise spend money from general funds on such government-preferred speech. Party committees that cannot or do not prioritize government-preferred spending purposes can raise and spend as little as 10% of each donor's otherwise-allowable contribution.

QUESTIONS PRESENTED—Continued

Do 52 U.S.C. §§ 30116(a)(1)(B), (a)(9) and 30125(a)(1) violate the First Amendment right of free speech by conditioning the size of contributions to a political party on the content of the party's speech?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

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 Club 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).

[1] Pursuant to Supreme Court Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *Amicus Curiae*'s intention to file this brief. Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* affirms that no counsel for any party authored this brief in whole or in part and that no person or entity, other than *amicus*, their members, or counsel, made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

"[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972). And "the First Amendment has its fullest and most urgent application precisely to the conduct of campaigns for political office." *McCutcheon v. FEC*, 572 U.S. 185, 191–92 (2014) (plurality opinion) (internal marks and citation omitted). In particular, the First Amendment prohibits laws that control "the relative ability of individuals and groups to influence the outcome of elections." *Citizens United v. FEC*, 558 U.S. 310, 350 (2010).

Given those premises, one might expect courts to require the government to carry a heavy burden to justify campaign-finance restrictions—especially those that would restrict political speech based on its content. Yet, too often, lower courts barely require the government to justify campaign-finance restrictions at all, regardless of their tendency to benefit some political candidates and groups over others.

This case illustrates the point. The lower court upheld a content-based restriction on political contributions: a rule allowing a political party to spend only 10 percent of an individual's maximum annual contribution on unrestricted speech, while requiring 30 percent to be spent on presidential nominating conventions, another 30 percent to be spent on election contests and

other legal proceedings, and another 30 percent to be spent on party headquarters buildings. 52 U.S.C. §§ 30116(a)(1)(B), (a)(9) and 30125(a)(1).[2] The district court found that this restriction benefits major parties over minor ones such as Petitioner, App. 51a—but the lower court did not require the government to justify the rule, let alone provide evidence in support of a justification.

The Court should hear this case to make clear that—to protect individuals' freedom of speech and association, and to prevent undue government interference in the political process—the First Amendment demands more.

ARGUMENT

I. The Court should grant certiorari to ensure that *all* campaign-finance restrictions receive rigorous scrutiny.

"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." *Knox v. SEIU Local 1000*, 567 U.S. 298, 322 (2012). It reflects a "profound national commitment to the principle that debate on public issues should be

[2] This brief addresses the second question presented by the petition for certiorari, regarding the constitutionality of the statutory provisions described here. The Court should also grant certiorari on the first question presented for the reasons stated in the petition.

uninhibited, robust, and wide-open." *Mosley*, 408 U.S. at 95–96 (internal marks and citation omitted). That is why the Court subjects content-based restrictions on speech—whether based on the viewpoint expressed or the subject matter discussed—to strict scrutiny. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226–29 (2015).

Protection against government interference with open debate is especially important in the context of campaigns for political office, where officials might use the law to suppress competition and preserve the status quo—including their own power. *See id.* at 2233 (Alito, J., concurring) ("Limiting speech based on its 'topic' or 'subject' favors those who do not want to disturb the status quo. Such regulations may interfere with democratic self-government and the search for truth."). "[I]ntrusion by the government into the debate over who should govern goes to the heart of First Amendment values." *Bennett*, 564 U.S. at 750. Under the First Amendment and our republican system of government, it is the people, not elected officials, who should "mak[e] and implement[] judgments about which strengths should be permitted to contribute to the outcome of an election." *Davis v. FEC*, 554 U.S. 724, 742 (2008). "[T]hose who govern should be the *last* people to help decide who *should* govern." *McCutcheon*, 572 U.S. at 192.

Campaign-finance restrictions are one means by which officeholders might use the law to try to suppress some ideas and boost others. Because of that threat, this Court has required the government to

justify any campaign-finance restriction by showing that it is either narrowly tailored or closely drawn[3] to prevent *quid pro quo* corruption. *Id*. "Campaign finance restrictions that pursue other objectives . . . impermissibly inject the Government into the debate over who should govern." *Id*. (quotation marks and citation omitted).

The Court has required such rigorous scrutiny even where contribution limits are not content-based on their face. But the restrictions at issue here are content-based, and for that reason, are subject to the even stronger protection of strict scrutiny. *See Reed*, 135 S. Ct. at 2226–29.

Although the potential for lawmakers to abuse campaign-finance laws might seem obvious, courts—including the lower court here—often act as though they are blind to it. Despite this Court's precedents calling for "rigorous" scrutiny, under which the government bears the burden to justify any infringement of First Amendment rights, *McCutcheon*, 572 U.S. at 197, lower courts too often do not require the government to justify restrictions on campaign contributions at all.

In this case, the lower court did not require the government to show that the restriction Petitioner

---

[3] *Amicus* agrees with Petitioner that the rule challenged here is a content-based restriction on speech and therefore subject to strict scrutiny under *Reed*, 135 S. Ct. at 2226–29, not the "closely drawn" scrutiny that the Court prescribed for challenges to contribution limits in *Buckley v. Valeo*, 424 U.S. 1, 25 (1976). *See* Pet. 33–34. *Amicus*'s arguments about the need for rigorous scrutiny, however, apply under either standard.

challenges is narrowly tailored or closely drawn to prevent *quid pro quo* corruption. Instead, it analyzed the statute Petitioner challenges as though there was *nothing for the government to justify*. The court observed that, "[b]efore 2014, [a political party] could accept only a base-limit sized contribution from any one person"; with a 2014 amendment to the statute, a party could "accept ten times that amount," provided that it restricted its use of amounts exceeding the base limit to the purposes specified in the statute. App. 35a. Therefore, the court characterized Petitioner's claim as one impermissibly challenging "Congress's decision to *raise* contribution limits." App. 35a–36a. As a result, the court concluded that Petitioner could not prevail unless the statute were shown to be so underinclusive as to "raise doubts about whether the government is in fact pursuing the [anticorruption] interest it invokes." App. 44a (quoting *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1668 (2015)). Without requiring the government to meet its burden, the court readily concluded that there was "no reason for such skepticism," and upheld the law. App. 36a–41a.

That approach was exactly backward. The First Amendment default against which *any* campaign-finance restriction must be judged is *unlimited* political speech—including unlimited political expenditures and unlimited contributions to candidates and other political committees. *See McCutcheon*, 572 U.S. at 192 (discussing need for First Amendment scrutiny of "[a]ny regulation" of campaign contributions or expenditures). To the extent that the government limits

contributions or expenditures *at all*, it must justify its restrictions—in their entirety—by showing that they are (at a minimum) "closely drawn" to prevent *quid pro quo* corruption. *See id.* at 197.

That remains true where, as here, a plaintiff challenges restrictions on contributions that exceed a base limit that, standing alone, might survive, or has in the past survived, First Amendment scrutiny. This content-based restriction on contributions above the base limit creates the risk, just as any campaign-finance restriction does, that the government is using the law to favor some voices in politics over others—i.e., that it is committing one of the primary evils the First Amendment exists to prevent. That is exactly what is happening here: this restriction tends to benefit the major parties, which can use the restricted funds to advance their political agenda, and to hinder the minor parties, which would better pursue their political goals by using the money for other purposes. *See* Pet. 11–13; App. 50a–51a.

A court applying *meaningful* First Amendment scrutiny—placing the burden on the government, where it belongs, *McCutcheon*, 572 U.S. at 209—would at least demand that the government provide (and substantiate) a compelling explanation as to *why* contributions restricted for certain uses have so much less potential to corrupt than unrestricted contributions as to warrant the restriction. A court seeking to "'avoid unnecessary abridgment' of First Amendment rights," *McCutcheon*, 572 U.S. at 199 (citation omitted), would demand that the government explain why it could not

serve its anticorruption purpose equally well without placing restrictions on the use of contributions exceeding the $33,400 base limit. But here, the lower court required virtually nothing of the government.

The lower court was not troubled by the statute's tendency to benefit major parties over minor ones because, it said, the First Amendment does not allow the government to seek to "equalize the financial resources of candidates." App. 39a (internal marks and citations omitted). That is true—the government may not restrict contributions for the purpose of equalizing resources or otherwise leveling the political playing field, *see Bennett*, 564 U.S. at 749–50—but it also may not enact restrictions that *tilt* the playing field to favor one side over another, at least not without meeting its burden to show that the restriction is closely drawn to prevent corruption. *Cf. McCutcheon*, 572 U.S. at 192, 199. And here, again, Petitioner challenges the restriction, not the lack of one. Petitioner challenges the statute's restrictions on contributions to political parties exceeding $33,400. *See* App. 7a.

In short, the lower court gave virtually no scrutiny to the type of restrictions that warrant the most rigorous scrutiny to prevent the government from violating a fundamental premise and purpose of the First Amendment. To conclude, as the lower court did, that a past decision upholding a base limit automatically validates future content-based restrictions on contributions that exceed the base limit creates a perverse incentive antithetical to the goals of the First Amendment: it encourages legislators to impose new

restrictions designed to skew political debates and elections in ways that will serve their interests, knowing that these new restrictions will be virtually immune from challenge.

Unfortunately, this is not the only case in which a lower court has failed to appreciate the threat posed by contribution restrictions that favor some political players over others. Courts have also failed to provide sufficient scrutiny where governments have discriminated even more overtly by imposing higher contribution limits on some donors than on others.

For example, the Massachusetts Supreme Judicial Court applied virtually no scrutiny to a statute banning for-profit businesses—but not unions and non-profits—from making political contributions in *1A Auto, Inc. v. Director of the Office of Campaign and Political Finance*, 105 N.E.3d 1175 (Mass. 2018), *cert. denied*, 139 S. Ct. 2613 (2019). That court concluded that it was enough that the restriction on business contributions, considered alone, would tend to prevent corruption stemming from such contributions. *Id.* at 1182–90. The court did not require the government to justify its lack of restrictions on union and non-profit contributions, but instead—like the lower court here—performed an "underinclusiveness" analysis under which the government was not required to prove *anything*, and the plaintiffs, to prevail, would have had to provide evidence that the restriction on business was enacted for the purpose of benefiting those who were left unrestricted. *Id.* at 1188–89.

In another recent case, the Seventh Circuit applied minimal scrutiny to an Illinois campaign finance statute that, among other things, allowed corporations and other associations to make double the political contributions that individuals may make—for example, by allowing individuals to give $5,000 to a candidate while allowing a corporation to give $10,000. *Ill. Liberty PAC v. Madigan*, 904 F.3d 463, 469–71 (7th Cir. 2018), *cert. denied sub nom. Ill. Liberty PAC v. Raoul*, 139 S. Ct. 1544 (2019). The court said the proper focus of analysis was only on whether the limit on individuals, considered alone, was unconstitutionally low. *Id.* at 470. It concluded that the scheme's more favorable treatment of corporations was irrelevant—and the statute could not be deemed fatally underinclusive—in the absence of evidence "that Illinois was not *actuall*y concerned about corruption when it promulgated the individual contribution limits." *Id.* at 470.

Similarly, the District of Columbia Circuit has held that if a ban on contributions by a given class of donors, considered by itself, survives First Amendment scrutiny, then the government's failure to similarly limit other donors cannot violate the Equal Protection Clause. *Wagner v. FEC*, 793 F.3d 1, 32–33 (D.C. Cir. 2015), *cert. denied sub nom. Miller v. FEC*, 136 S. Ct. 895 (2016). And the Eighth Circuit summarily rejected an Equal Protection Clause[4] challenge to a

[4] Although these cases framed the issue under the Equal Protection Clause, the Court has treated the First Amendment's requirement of equal treatment of speakers as similar if not identical. *See*, *e.g.*, *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 55

discriminatory contribution ban after concluding that the ban on corporate contributions, considered by itself, did not violate the First Amendment. *Iowa Right to Life Comm., Inc. v. Tooker*, 717 F.3d 576, 601–03 & n.11 (8th Cir. 2013).

By not requiring the government to fully justify its decisions about *who* and *what* to restrict (and not restrict) by reference to its interest in preventing corruption, the courts in these cases have disregarded the fundamental First Amendment principles requiring equal treatment of political speakers. These decisions disregard the need for content-, identity-, and motive-neutrality, and they ignore one of the most important reasons why contribution limits must be closely drawn to serve the government's interest in preventing *quid pro quo* corruption and no other purpose: to ensure that the government does not "impermissibly inject [itself] 'into the debate over who should govern.'" *McCutcheon*, 572 U.S. at 192 (quoting *Bennett*, 564 U.S. at 750).

If lower courts continue to ignore this Court's requirement for rigorous scrutiny of campaign-finance restrictions, legislators will know that they may manipulate contribution limits—restricting the purpose for which contributions may be used, or overtly discriminating in favor of some donors and against others—to play favorites and improperly influence the

---

n.4 (1986) (summarily rejecting equal protection claim after analyzing and rejecting First Amendment claim because plaintiffs could "fare no better under the Equal Protection Clause than under the First Amendment itself").

outcome of elections. One might hope that public servants could be trusted to resist the urge to engage in such meddling, "but experience has taught mankind the necessity of auxiliary precautions." *The Federalist* No. 51 (J. Madison) at 349 (J. Cooke ed. 1961). The First Amendment is one of those precautions; it exists precisely because elected officials cannot be trusted to oversee the process of electing officials. *See Citizens United*, 558 U.S. at 340 (the First Amendment is "[p]remised on mistrust of governmental power"); 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").

To prevent this, the Court should clarify courts' obligation to rigorously scrutinize *all* types of campaign-finance restrictions by requiring the government to fully justify any decisions that limit a donor's ability to give money to a political candidate or committee, or that limit a candidate or political committee's ability to use contributions for political speech.

II. The Court should grant certiorari to ensure that courts require the government to justify any campaign-finance restriction with evidence.

The lower court's decision also reflects another common problem with courts' analyses of First Amendment challenges to campaign-finance restrictions:

failure to require the government to justify its restrictions on First Amendment rights with *evidence* that the restriction is *actually* drawn to prevent corruption.

This Court has made clear that the government must support any purported justification for a restriction on First Amendment rights—including any restriction on campaign contributions—with evidence. *See Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 391–92 (2000) (considering contribution limits); *Edenfield v. Fane*, 507 U.S. 761, 770–71 (1993) (considering commercial speech restriction). "[M]ere conjecture" will not suffice. *Nixon*, 528 U.S. at 392.

Yet lower courts—including the lower court here—have upheld restrictions on campaign contributions based on little more than conjecture. To justify the government's restrictions on contributions to political parties exceeding $33,400, the court in this case speculated 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." App. 37a (emphasis added). For its "evidence," the court cited two statements from congressional leaders stating that "'many' of the 'expenditures made from the [dedicated-purpose] accounts' are 'not for the purpose of influencing federal elections.'" *Id.* (quoting 160 Cong. Rec. S6814 (daily ed. Dec. 13, 2014)

(statement of Sen. Reid); *id*. at H9286 (daily ed. Dec. 11, 2014) (statement of Rep. Boehner)).

What does "many" mean? And, given that money is fungible—and money given to major parties' dedicated-purpose accounts would therefore tend to free up unrestricted funds for influencing elections (*see* Pet. 11; App. 50a–51a)—why wouldn't contributions to dedicated-purpose accounts still give rise to the same corruption concerns as unrestricted contributions? And why should a court credit assertions by politicians—who are also leaders of the major parties that stand to benefit from the restriction at issue—urging support for their own legislation? Or where such assertions might very well have been made "not primarily to inform the Members of Congress what the bill meant . . . but rather to influence judicial construction[?]" *Blanchard v. Bergeron*, 489 U.S. 87, 98–99 (1989) (Scalia, J., concurring in judgment). These are questions a court would ask if it were to meaningfully scrutinize a restriction on speech under the First Amendment. The lower court, however, save for a partial dissent (App. 44a–48a (opinion of Griffith, J.)), showed no concern for them.

The lower court's decision is not the first to rely on statements from politicians who passed or supported a campaign-finance restriction as evidence that the law serves a legitimate anticorruption purpose. *See*, *e.g.*, *Lair v. Motl*, 873 F.3d 1170, 1179–80 (9th Cir. 2017), *cert. denied sub nom. Lair v. Mangan*, 139 S. Ct. 916 (2019) (upholding contribution limit based in part on testimony from legislator); *State v. Alaska Civil*

Liberties Union, 978 P.2d 597, 615–16, 620–21 (Alaska 1999) (upholding limits on contributions by out-of-state donors based partly on affidavits from former governors that "contributions from outside the state create serious loyalty problems" with no evidence of "special corruption caused by out-of-state contributions" and upholding general contribution limits based on affidavits from officeholders regarding their purported uncertainty about their motivations for voting for or against donors' interests). Of course this evidence is hardly reliable—it is the stuff of rational-basis review, at best, and reliance on it amounts to allowing government officials to authorize their own violations of First Amendment rights.

Along similar lines, some courts have considered voters' approval of a ballot measure imposing contribution limits as evidence that contributions create the appearance of corruption in voters' minds, which justifies the limits. *See*, *e.g.*, *Zimmerman v. City of Austin*, 881 F.3d 378, 386 (5th Cir. 2016), *cert. denied*, 139 S. Ct. 639 (2018) (citing "the fact that 72% of voters voted in favor of the base limit" as evidence that contributions exceeding the limit create the appearance of corruption); *Ognibene v. Parkes*, 671 F.3d 174, 190 (2d Cir. 2011) ("The fact that City voters passed . . . these reforms speaks powerfully to the public perception that further regulation of campaign contributions . . . is needed."). That not only is circular—allowing campaign-finance measures to justify themselves through their own existence—it also contradicts "the whole point of the First Amendment," which "is to

protect speakers against unjustified government restrictions on speech, even when those restrictions reflect the will of the majority." *Bennett*, 564 U.S. at 754; *see also McCutcheon*, 572 U.S. at 191 (Though "[m]any people . . . would be delighted to see fewer [campaign] television commercials . . . [and m]oney in politics may at times seem repugnant to some, . . . the First Amendment . . . surely protects political campaign speech despite popular opposition.").

Sometimes, courts upholding campaign finance restrictions even cite newspaper articles alleging or implying that campaign contributions are a source of corruption as if these were evidence. *See*, *e.g.*, *Minn. Citizens Concerned for Life, Inc. v. Kelley*, 427 F.3d 1106, 1114–15 (8th Cir. 2005) (upholding aggregate contribution limit based on "newspaper articles detailing special interest contributions and perceived corruption"); *Daggett v. Comm'n on Govt'l Ethics & Election Practices*, 205 F.3d 445, 457 (1st Cir. 2000) (citing "news stories and editorial comment"); Nathan Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. Pa. L. Rev. 119, 129 (2004) (describing newspaper evidence *Daggett* relied on as "both typical and typically vacuous"). In such cases, "[e]ditorials and opinion pieces swim alongside news reports of shady deals and influence peddling, with each journalist's account or editorial board's outrage used to build a case of apparent corruption." *Id.* at 130.

Courts' reliance on these sources as sufficient "evidence" of corruption "means that the most zealous and

aggressive advocates of restriction can make accusations, whether well founded in fact or not, and then use the very fact that some people believe the charges as a reason to justify the regulation." Ronald M. Levin, *Fighting the Appearance of Corruption*, 6 Wash. U. J.L. & Pol'y 171, 178 (2001). True, the lower courts accepting this evidence purport to follow *Nixon*, which cited newspaper reports as evidence of corruption justifying Missouri's scheme of campaign contributions. 528 U.S. at 393. But *Nixon* concluded that Missouri's limits bore a "striking resemblance" to federal limits the Court had already upheld in *Buckley*, and it acknowledged that more novel or less plausible justifications would require more evidence. *Id*. at 391, 395.

In any event, whatever the merits of the evidence used in *Nixon*, courts' acceptance of mere allegations in news stories as sufficient evidence to justify campaign contributions is inconsistent with the rigorous scrutiny the Court has called for in more recent campaign-finance decisions. If people's *reported* belief that contributions give rise to corruption can justify contribution limits without regard to whether those beliefs are well-founded, then "the requirement of proof of need for restrictions might as well be rescinded entirely," because "[t]he public *always* believes this," and virtually nothing would be off-limits. Levin, *supra*, at 177 (emphasis added).

In other cases, courts have relied on evidence of activities having nothing to do with corrupt campaign contributions. *See Lair*, 873 F.3d at 1189–90 (Bea, J., dissenting) (noting that supposed instances of

corruption cited to justify restriction did not "involve[] bribery or the improper trading of official acts . . . for monetary contributions"); *1A Auto*, 105 N.E.3d at 1186 (upholding ban on business contributions, citing instances of bribery not involving campaign contributions); *Casino Ass'n of La. v. State*, 820 So.2d 494, 504–08 (La. 2002) (upholding ban on contributions by casino industry, citing general association of gambling with vice and corruption).

Finally, in some cases, courts have upheld limits based on nothing but conjecture, analogy to previous cases upholding different limits, or an apparent presumption that the government acted with a proper purpose. *See Ill. Liberty PAC*, 904 F.3d at 469–71 (upholding limits allowing corporations and other associations to give double the contributions individuals could give after the district court "dismissed this claim on the pleadings without putting the defendants to [any] evidentiary burden"); *Holmes v. FEC*, 875 F.3d 1153, 1164 (D.C. Cir. 2017), *cert. denied*, 138 S. Ct. 2018 (2018) (upholding separate $2,600 limits for primary and general elections, noting that "Congress *could conceivably* regard a one-time contribution of $5,200 in the general (or primary) election alone to present a greater risk of . . . corruption than two distinct contributions of $2,600 in each of the primary and general elections") (emphasis added); *Frank v. City of Akron*, 290 F.3d 813 (6th Cir. 2002) (upholding municipal contribution limits without citing evidence); *Ky. Right to Life, Inc. v. Terry*, 108 F.3d 637 (6th Cir. 1997) (upholding state contribution limits without citing evidence). Yet it is supposed to be one of the definitive

characteristics of First Amendment scrutiny that no presumption of constitutionality applies, and that the *government* bears the burden of justifying restrictions on such rights. *United States v. Alvarez*, 567 U.S. 709, 715–17 (2012).

None of the approaches currently being employed by lower courts—in contravention to this Court's repeated instructions—is sufficient to avoid abridgements of First Amendment rights and to prevent undue government interference with the political process. The Court should take this opportunity to clarify the government's burden to justify its decisions and the courts' responsibility to safeguard fundamental constitutional rights.

CONCLUSION

The petition for certiorari should be *granted*.

Respectfully submitted,

TIMOTHY SANDEFUR
JACOB HUEBERT*
SCHARF-NORTON CENTER FOR
CONSTITUTIONAL LITIGATION
AT THE GOLDWATER INSTITUTE
500 E. Coronado Rd.
Phoenix, AZ 85004
(602) 462-5000
litigation@goldwaterinstitute.org

**Counsel of Record*

Counsel for Amicus Curiae Goldwater Institute