No. ______

In The
Supreme Court of the United States

LAURA HOLMES AND PAUL JOST,

Petitioners,

v.

FEDERAL ELECTION COMMISSION,

Respondent.

On Petition for Writ of *Certiorari* to the United States Court of Appeals for the D.C. Circuit

PETITION FOR WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED

This Court has held that political contribution limits "operate in an area of the most fundamental First Amendment activities" and are "subject to the closest scrutiny." *Buckley v. Valeo*, 424 U.S. 1, 14, 25 (1976) (*per curiam*). But it has also required deference to Congress's judgment in setting those limits, holding that courts have "no scalpel to probe" the specific caps selected. *Id*. at 30.

Congress, for its part, has determined that "it is perfectly fine"—that is, non-corrupting—"to contribute $5,200 to" a candidate for federal office. *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1451-52 (2014) (Roberts, C.J., controlling opinion). But the Federal Election Campaign Act ("FECA") requires that non-corrupting amount to be contributed in two installments: $2,600 for the primary and $2,600 for the general election.

In practice, this means that a candidate without a serious primary opponent can effectively receive, and the donor give, $5,200 for the general election. But where a donor, like Petitioners, wishes to forego a contested primary, and instead give solely to her party's eventual general election candidate, she may contribute just $2,600. The questions presented are:

(1) Whether FECA's per-election structure is subject to closely drawn scrutiny?

2) If so, does the First Amendment permit a rule requiring that Petitioners' anticipated, non-corrupting contributions be divided on a per-election basis?

PARTIES AND RULE 29.6 STATEMENT

Petitioners Laura Holmes and Paul Jost were the Plaintiffs-Appellants below. Because neither Petitioner is a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

Respondent Federal Election Commission was Defendant-Appellee below.

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OPINIONS AND ORDERS BELOW

The D.C. Circuit's judgment and opinion[1] are reproduced in the appendix ("App.") at 1-32. The district court's amended order certifying Petitioners' constitutional question to the D.C. Circuit is reproduced in the appendix at App. 33-34.

JURISDICTION

The United States District Court for the District of Columbia had jurisdiction to certify Petitioners' constitutional question under 28 U.S.C. §§ 1331 and 1343 and 52 U.S.C. § 30110. Petitioners properly invoked 52 U.S.C. § 30110 because they are eligible to vote in an election for the office of President of the United States. The district court entered an amended order certifying the constitutional question to the D.C. Circuit on June 29, 2016. *See* App. 33-34.

The D.C. Circuit had exclusive jurisdiction to hear the merits of Petitioners' constitutional question—in the first instance—under 52 U.S.C. § 30110. *See Wagner v. Fed. Election Comm'n*, 717 F.3d 1007, 1011 (D.C. Cir. 2013) ("*Wagner I*"). The D.C. Circuit entered its judgment and opinion in favor of the Federal Election Commission on November 28, 2017. App. 2; *id*. at 32.

Petitioners filed the petition for writ of *certiorari* within 90 days of the D.C. Circuit's judgment. *See*

[1] *Holmes v. Fed. Election Comm'n*, 875 F.3d 1153 (D.C. Cir. 2017) (*en banc*).

Sup. Ct. R. 13(1). This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The First Amendment to the United States Constitution states,

> Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble.

U.S. Const. amend. I.

Section 30116(a), Title 52 of the United States Code, states that "no person shall make contributions . . . with respect to any election [that], in the aggregate, exceed $2,000," adjusted for inflation. *See* 78 Fed. Reg. 8530, 8533; App. 143-44; *id*. at 146.

Under 52 U.S.C. § 30101(1)(A), the term "election" refers to "a general, special, primary, or runoff election." *See* App. 143.

Other relevant statutes and regulations are reproduced at App. 143-47.

INTRODUCTION

This petition asks the Court to provide a definitive ruling on the standard to be used in evaluating claims of unconstitutionality where political campaign contributions are concerned. As things stand now, it is unclear whether courts should closely scrutinize

the government's choice to impose a particular restriction, or instead broadly defer to legislative judgment. That confusion led the D.C. Circuit below to issue an opinion expanding judicial deference and approving a patently unreasonable result.

When this Court decided the seminal campaign finance and political association case, *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), the standards for scrutinizing laws infringing on fundamental rights were still in flux. *See* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. Rev. 1267, 1279-81, 1284-85, 1297-98 (2007). So, while scrutinizing a law that burdened First Amendment rights, the *Buckley* Court imposed what it called "exacting scrutiny" rather than referring to strict scrutiny or its modern analogues.[2] *Buckley*, 424 U.S. at 16.

In fact, the *Buckley* Court called for the "exacting scrutiny" of laws governing the full range of campaign finance regulation: expenditure limits, contribution limits, and disclosure requirements. *Id.* (contribution and independent expenditure limits), *id.* at 45 (independent expenditure limits), *id.* at 64 (disclosure requirements).

Applying this scrutiny, the Court struck down expenditure limits, *id.* at 21-23, upheld financial disclosure requirements triggered by a narrow class

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[2] The *Buckley* Court "explicitly rejected" use of the intermediate scrutiny standard for contribution limits. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 386 (2000) (citing *Buckley*, 424 U.S. at 16).

of political advocacy, and generally upheld the contribution limits as "closely drawn to avoid abridgment of associational freedoms." *Id*. at 25.

In more recent cases, however, *Buckley*'s application of exacting scrutiny against these three "buckets" of campaign finance regulation has transformed into three separate tests. Limits on independent expenditures are subject to what is now recognizable as strict scrutiny, requiring that a "regulation promote[] a compelling interest and [that it be] the least restrictive means to further the articulated interest." *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1444 (2014).[3] But the exacting scrutiny for contribution limits has been described as "a lesser" standard of review: "the 'closely drawn' test." *Id*. at 1444, 1445.[4]

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[3] The Chief Justice authored an opinion for himself and three other justices; Justice Thomas concurred in the judgment, but wrote separately to argue that *Buckley v. Valeo* ought to be overruled and contribution limits declared unconstitutional. *McCutcheon*, 134 S. Ct. at 1462-63 (Thomas, J., concurring). The Chief Justice's opinion is controlling because it provides the "narrowest grounds" for the judgment. *Gregg v. Georgia,* 428 U.S. 153, 169 n. 15 (1976). All future citations to *McCutcheon* are to the controlling opinion, unless otherwise noted.

[4] Only the exacting scrutiny applied to political disclosures has retained its original name, although there remains some dispute as to how strict that review is. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 366 (2010); *Worley v. Cruz-Bustillo*, 717 F.3d 1238, 1249 (11th Cir. 2013)*, cert. denied*, 134 S. Ct. 529 (2013) ("Though possibly less rigorous than strict scrutiny, exacting scrutiny is more than a rubber stamp" (citation omitted) (internal quotation marks omitted)); *Del.*

This case is about contribution limits, which in and of themselves "impinge on protected associational freedoms" by "limit[ing] one important means of associating with a candidate" for public office. *Buckley*, 424 U.S. at 22.

This Court has held that regulatory regimes imposing contribution limits are "subject to the closest scrutiny." *Buckley*, 424 U.S. at 25. That test requires courts to "assess the fit between the stated governmental objective and the means selected to achieve that objective." *McCutcheon*, 134 S. Ct. at 1445. But this Court has simultaneously required deference to Congress regarding contribution limits, holding that courts have "no scalpel to probe" the dollar amounts selected. *Buckley*, 424 U.S. at 30 (internal quotation marks omitted). In those cases, the government need only demonstrate that its selected limits are not "wholly without rationality." *Id*. at 83.

The distinction is not a semantic one, and is often outcome determinative. So it was here. Asked to pick which of these court-created forms of review applied to the per-election division of federal contribution limits, the D.C. Circuit held that, once this Court has generally upheld a contribution limit, there is "no scalpel to probe" the manner in which those limits are

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Strong Families v. Denn, 136 S. Ct. 2376, 2378 (2016) (Thomas, J., dissenting from denial of *certiorari*) ("By refusing to review the constitutionality of the Delaware law, the Court sends a strong message that 'exacting scrutiny' means no scrutiny at all.").

applied during an election cycle. App. 21. It did so despite this Court's most recent decision, *McCutcheon v. FEC*, which brought the full force of "closely drawn" scrutiny to bear on the aggregate limits that had been facially upheld in *Buckley*. *McCutcheon*, 134 S. Ct. at 1456.

The difference is important. While imposing a monetary limit on contributions to a particular candidate has been found to serve the government's anti-corruption interest, additional hurdles—whether the aggregate cap at issue in *McCutcheon* or the illogical structural prohibition at issue here—"do little, if anything, to address that concern, while seriously restricting participation in the democratic process." *Id.* at 1442. That fact is dispositive under heightened scrutiny because the government must "demonstrate that the recited harms are real, not merely conjectural." *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 475 (1995).

But when a court picks mere inquiry into a law's rationality, it is broadly deferential. In such cases, federal courts often, *sua sponte,* propose hypothetical situations—situations outside the record before the court, or involving relief other than what plaintiffs request—to hold that the government's interests in *those* cases is enough to defeat the cause actually before them. *See*, *e.g.*, App. 23-26 (positing that the "logic" of Petitioners' position could justify giving tens of thousands of dollars to an incumbent that had previously run in multiple election cycles); *Justice v. Hosemann*, 771 F.3d 285, 293 (5th Cir. 2014), *cert. denied*, 136 S. Ct. 1514 (2016) (converting to facial challenge instead of ruling on constitutionality of

requested relief because the court could not "find it plausible that" plaintiffs "would have capped their spending"); *Worley*, 717 F.3d at 1242 n.2 (ignoring relief requested and circumstances of case, and converting as-applied case into facial challenge, because of hypothetical asked at oral argument).

The court of appeals did this, not out of resistance to Court precedents, but rather because the relevant "cases, Januslike, point in two directions." *Van Orden v. Perry*, 545 U.S. 677, 683 (2005). Given the ramifications of a court's "pick" in contribution limit cases, this Court ought to provide a clear and final answer.

Another, related, source of confusion is the level of generality at which the scrutiny should take place. For example, should as-applied challenges always be tested against the interests served by the entire law, as in a facial challenge, or just against the interests served by a particular provision? Under the form of strict scrutiny established by the Religious Freedom Restoration Act, a court must examine the state's interests and the burdens on a party's rights at "the same case-specific level of generality: asking whether the government's particular interest in burdening this plaintiff's particular religious exercise is justified in light of the record in this case." *Yellowbear v. Lampert*, 741 F.3d 48, 57 (10th Cir. 2014) (Gorsuch, J., writing for the court).

Here, however, the D.C. Circuit refused to consider FECA's provisions at the level of Petitioners' injury: Whether requiring an installment plan for a non-corrupting contribution "itself advanced the anti-

corruption interest under the closely drawn test." App. 21. Rather, the court asked whether the government has an interest in having a "time period" at all. *Id*. at 20 (holding that it "is enough if that base limit as a whole (of which its time period is an integral element) prevents the appearance or actuality of corruption").

Confusion in the standards of scrutiny applied to laws controlling campaign contributions only serves to chill protected rights of political speech and association. Only this court can clarify and thus secure those rights.

STATEMENT OF THE CASE

Petitioners Laura Holmes and Paul Jost are a married couple residing in Miami, Florida. App. 60, ¶ 1. To defeat the Democratic incumbents in two specific races, Ms. Holmes and Mr. Jost wanted to associate with and support their Republican challengers in the 2014 general election. App. 80, ¶ 61; App. 82, ¶ 70; *see McCutcheon*, 134 S. Ct. at 1448 (noting that contributions implicate both associational and expressive rights). In both races, FECA would permit a donor to give up to $5,200 to a candidate by the end of the general election, if and only if the donor contributed in the primary election.

Ms. Holmes contributed $2,600 to Carl DeMaio, the Republican general election candidate for California's 52nd Congressional district. App. 81, ¶ 67. Mr. Jost contributed $2,600 to Dr. Mariannette Miller-Meeks, his party's general election nominee for Iowa's 2nd Congressional district. App. 82-83, ¶ 74.

But, because Ms. Holmes and Mr. Jost wanted to associate only with their party's general election nominees, and could not know who those candidates would be until after the primary election, they could not give the full amount that is non-corrupting to those general election candidates. App. 81, ¶ 68; *id.* at 83, ¶ 75. Federal law required them to give half that amount during the primary. *See* 52 U.S.C. § 30101(1)(A) (defining each part of the election cycle as a separate election); 52 U.S.C. § 30116(a)(6) (imposing contribution limits "separately with respect to each election").[5]

Neither Ms. Holmes nor Mr. Jost disputes Congress's authority to set contribution limits to prevent *quid pro quo* corruption or its appearance. Both defer to Congress's determination that total contributions up to $5,200 to a general election candidate in an election cycle do "not create a cognizable risk of corruption." *McCutcheon*, 134 S. Ct. at 1452.[6] Petitioners challenged only the *manner* in

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[5] Respondent Federal Election Commission ("FEC" or "Commission") allows individuals to write a single check for $5,200 during the primary season—where the entire amount may be used for the general election. 11 C.F.R. § 110.1(b)(5)(ii)(B). Additionally, the FEC allows individuals to write a single check for $5,200 during the general election season if part is specifically earmarked for primary election debts. *See* 11 C.F.R. § 110.1(b)(3)(i). And the Commission allows unused primary election funds to be used in the general election. 11 C.F.R. § 110.3(c)(3).

[6] Originally set at $1,000 for each election period, for a total of $2,000 for the primary and general elections, the per-election limit was doubled by Congress in 2002 and indexed for inflation. App. 63, ¶ 6; 52 U.S.C. § 30116(a)(1)(A), (c); App. 64, ¶ 9. When

which an individual must give this total, non-corrupting amount—specifically, the requirement that a donor give at least half during the primary or forego giving it altogether.

Petitioners brought suit on July 21, 2014, seeking to give $5,200 during the general election to both Mr. DeMaio and Dr. Miller-Meeks. The district court denied Petitioners' motion for a preliminary injunction, but it nonetheless certified facts and questions of constitutionality to the D.C. Circuit on November 17, 2014. App. 115-42. The FEC moved to remand the case on January 2, 2015, arguing that the district court had provided the Government insufficient opportunity to develop a factual record. FEC Motion for Remand at 17-20, *Holmes v. FEC*, No. 14-5281 (D.C. Cir. Jan. 2, 2015), ECF No. 1529989. The D.C. Circuit granted that motion on January 30, 2015. App. 113-14.

On remand, the district court made findings of fact, App. 60-83, but this time declined to certify the questions of constitutionality, App. 53-54. A panel of the D.C. Circuit reversed that decision, as to Petitioners' First Amendment question, on April 26, 2016. App. 35-36. Accordingly, on June 29, 2016, the district court certified Petitioners' First Amendment

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this case was filed, for the 2014 election, the per-election limits were $2,600 (total $5,200). Although Congress intended § 30110 cases to be heard quickly, inflation over the years has caused the per-election limit to increase to $2,700 (total $5,400). App. 64, ¶ 10. To maintain consistency with the record and prior briefing, Petitioners will use the amounts for the 2014 election.

question to the D.C. Circuit, sitting *en banc*. App. 33-34.

The D.C. Circuit, sitting *en banc*, had exclusive jurisdiction to hear the merits of the constitutional question in the first instance. *See* 52 U.S.C. § 30110; *Wagner I*, 717 F.3d at 1014 (noting that "section [30110] vests exclusive jurisdiction in the *en banc* courts of appeals").[7]

The D.C. Circuit held "that the analysis in *Buckley* ultimately governs—and compels rejecting—plaintiffs' challenge." App. 11. In particular, the court held that "[t]he contribution ceilings' per-election structure . . . is an integral part of the base limits themselves." App. 18. Accordingly, the court concluded that "it is enough if that base limit as a whole . . . prevents the appearance or actuality of corruption in a manner satisfying the closely drawn standard." App. 20. Consequently, the court held that there was no reason to consider whether the per-election structure "itself advanced the anti-corruption interest under the closely drawn test." App 21.

[7] Effective September 1, 2014, the provisions of FECA codified at 2 U.S.C. §§ 431-57 were recodified and transferred to 52 U.S.C. §§ 30101-30146.

REASONS FOR GRANTING THE WRIT

I. This Case Implicates Fundamental First Amendment Liberties Meriting This Court's Review.

"The First Amendment 'is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us.'" *McCutcheon*, 134 S. Ct. at 1448 (quoting *Cohen v. Cal.*, 403 U.S. 15, 24, (1971)). By safeguarding "individual dignity and choice," it ultimately defends the foundations "upon which our political system rests." *Id.* (internal quotation marks omitted).

Thus, FECA's "contribution . . . limitations operate" to restrict "the most fundamental" of those protected activities. *Buckley*, 424 U.S. at 14. That is because "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." *Id.* In that sphere, "[t]he First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Id.* (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)) (brackets in original).

That protection extends to "political association as well as political expression," because "[e]ffective advocacy of both public and private points of view, particular1y controversial ones, is undeniably enhanced by group association." *Id.* at 15 (quoting

NAACP v. Ala., 357 U.S. 449, 460 (1958)) (brackets in original); *see also id.* at 25 (noting "that the right of association is a basic constitutional freedom, that . . . like free speech, lies at the foundation of a free society" (citation omitted) (internal quotation marks omitted)). Nor does it matter that the associational rights surrounding campaign contributions involve money: "this Court has never suggested that the dependence [on] money . . . reduce[s] the exacting scrutiny required by the First Amendment." *Id.* at 16.

To protect the First Amendment's political rights, this Court created a distinct system of constitutional review for campaign finance laws. That system, however, is beset by internal contradictions and confusing similarities to the traditional tiers of scrutiny. Since *Buckley*, this muddled approach has failed to guide the lower courts, and in particular has failed to adequately safeguard the First Amendment interests inherent in the regulation of political speech and association. The exacting scrutiny—indeed, the judicial skepticism—*Buckley* required is often difficult to glean from the formulaic, deferential campaign finance opinions that now fill the federal reports.

This case presents a case of exceptional importance because only this Court can reconcile the conflicting elements in *Buckley*'s standards and explain how they relate to constitutional scrutiny in general. And only clarity on that point can restore the "closest scrutiny" that this court has required for the associational rights "at the foundation of a free society." *Buckley*, 424 U.S. at 25 (internal quotation marks omitted).

As the *Buckley* decision made clear, those standards may often result in the government's victory. The government's burden is heavy, but not insurmountable. But the importance of the rights at stake require that the courts put the government to that task, and they can only do that when this Court clearly articulates the relevant standards.

II. Only This Court Can Clarify The Applicability Of The Closely Drawn Standard.

1. Tension in *Buckley* has led to two completely different standards for resolving challenges to campaign contribution restrictions. One, seemingly applicable to the monetary levels chosen, is deferential. The other, applicable to everything else, is not. As this case demonstrates, however, novel questions concerning the structure of campaign contribution limits do not fit easily into either standard. Only this Court can clarify whether lower courts are to closely scrutinize contribution statutes or instead defer to the legislative branch.

2. The *Buckley* Court held that restrictions on contributions are "subject to the closest scrutiny." 424 U.S. at 25 (internal quotation marks omitted). Nonetheless, it established two contradictory standards for reviewing such restrictions.

Once a court has determined that a contribution scheme is constitutional, "a court has no scalpel to probe" the "fine tuning" of the contribution caps—that is, the specific dollar amount Congress has chosen. *Id.* at 30 (internal quotation marks omitted). The

remaining restrictions, however, are to be sustained only "if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms." *Id*. at 25.

3. The controlling opinion in *McCutcheon v. FEC* reaffirmed and clarified these standards. The *McCutcheon* Court faced no question about the specific amount of the contribution caps. The parties and the Court accepted as given both the total contribution limit of $5,200 for general election candidates and the total amount of the aggregate limits. Accordingly, with no controversy about the specific dollar amounts involved, the Court did not invoke the "no scalpel to probe" standard.

In looking at other restrictions on contributions, however, the Court stated that "fit matters," and that such restrictions must be "in proportion to the interest served," using a "means narrowly tailored to achieve the desired objective." *McCutcheon*, 134 S. Ct. at 1456-57 (internal quotation marks omitted); *see also id*. at 1445 (noting need to "assess the fit"). In other words, the Court required that "the State demonstrate[] a sufficiently important interest and employ[] means closely drawn to avoid unnecessary abridgement of associational freedoms." *Id*. at 1444 (internal quotation marks omitted).

4. As discussed below, Petitioners approached the D.C. Circuit with a brand new question, one never contemplated in *Buckley* or any other case. Petitioners do not challenge the limit Congress has determined at which total contributions in an election

cycle may become corrupting. They simply ask, given the total amount that is non-corrupting at the general election stage, that they be permitted to give that total amount at that stage. They challenge only the structure of FECA forcing them to divide a contribution that would be non-corrupting.

The D.C. Circuit was faced with a choice: either to apply the closely drawn standard or take the deferential, "no scalpel to probe" approach. The court chose the latter road, holding that, once the overall contribution limits regime is upheld under the closely drawn standard, all the constituent parts of that regime—defined as parts necessary for that particular regime to function—must be evaluated with complete deference to Congress. Here, that meant not only extending the no scalpel to probe approach from dollar amounts to the length of temporal periods, but also to the ways that the temporal periods are structured.

5. There is a mismatch between the D.C. Circuit's deferential approach to the structure of contribution limits here, and this Court's application of closely drawn scrutiny in *McCutcheon*, a case involving another limitation on non-corrupting contributions.

Put another way, the D.C. Circuit has taken the tension between *Buckley*'s closely drawn and no scalpel to probe standards and torn it wide open. When faced with a challenge to a contribution restriction, deference will no longer be limited to the dollar amounts selected. Instead of closely scrutinizing the limitation actually challenged in the context of the plaintiff's actual anticipated conduct,

courts will instead ask if the relevant provisions have previously been upheld facially, and then defer. That approach undermines the closely drawn standard generally, and makes it largely unavailable to as-applied challengers.[8]

But this Court established the "closely drawn" standard's "closest scrutiny" for a reason. Restrictions on contributions affect "the most fundamental [of] First Amendment activities," *Buckley*, 424 U.S. at 14, and "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Thus, it is a question of exceptional importance whether the closely drawn standard

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[8] The circuit courts of appeal have struggled to apply *Buckley*'s heightened scrutiny to as-applied challenges involving other aspects of campaign finance law—particularly in PAC status and disclosure cases. For example, in *Worley*, the Eleventh Circuit disregarded the as-applied challenge to Florida's "political committee" statutes, and instead converted the case to a facial challenge based on a hypothetical presented at oral argument. 717 F.3d at 1242 n.2. Recently, the Fifth Circuit went to great lengths to convert an as-applied challenge to a facial one, and then found that the challengers could not meet the more-stringent standard. *Justice*, 771 F.3d at 292-295; *id*. at 300 ("[W]e conclude that Mississippi's" disclosure laws "survive First Amendment scrutiny *at most levels* . . . ." (emphasis added)).

As Justice Thomas recently noted, this Court's failure to grant *certiorari* and clarify the standards of review in campaign finance cases "sends a strong message that 'exacting scrutiny' means no scrutiny at all." *Del. Strong Families*, 136 S. Ct. at 2378 (Thomas, J., dissenting from denial of *certiorari*). This case provides an opportunity to arrest that broader trend.

remains a tool of judicial review after a federal or state restriction has survived a facial challenge, or whether it is a one-dose vaccination against government overreach.

III. Had The Court Of Appeals Applied Closely Drawn Scrutiny To The Record Before It, Petitioners Would Have Prevailed.

1. The D.C. Circuit's failure to apply closely drawn scrutiny resulted in a diminution of Petitioners' constitutional rights to speech and association. *Buckley*, 424 U.S. at 14-15, 22. As a plurality of this Court has recognized, "Congress's selection of a $5,200 base limit indicates its belief that contributions of that amount or less do not create a cognizable risk of corruption." *McCutcheon*, 134 S. Ct. at 1452.[9] Nevertheless, Petitioners were denied the ability to contribute that amount to candidates of their choice. 11 C.F.R. § 110.1(b)(5)(ii)(B) (permitting

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[9] Of course, when the Chief Justice provided this explanation, the reference may have been "shorthand for the total contributions permitted across a primary and general election together." App. 16. But Congress has nonetheless determined that contributing a total of $5,200 does "not create a cognizable risk of corruption." *McCutcheon*, 134 S. Ct. at 1452.

This conclusion is simply the common-sense recognition that it is the total amount given to a candidate that triggers a corruption concern. To take another example, FECA only considers someone a federal candidate once her cumulative contributions or expenditures hit a certain ceiling. 52 U.S.C. § 30101(2)(A) (person becomes a candidate once she "has received contributions aggregating in excess of $5,000").

$5,200 contribution that covers two elections during the same cycle, so long as it is given during the primary); *cf. Citizens United*, 558 U.S. at 334 (noting that election in which petitioner sought to engage had come and gone by the time the Court ruled against the FEC).

Worse, this deprivation would not have occurred had the court of appeals exactingly scrutinized Petitioners' claim and the Government's assembled record. *McCutcheon*, 134 S. Ct. at 1456 ("In the First Amendment context, fit matters."); *Fed. Election Comm'n v. Nat'l Right to Work Comm.*, 459 U.S. 197, 207 (1982) ("[A]ction which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny" (internal quotation marks omitted)).

Under closely drawn scrutiny, the Commission bears the burden of proving a statute's constitutionality. *Elrod*, 427 U.S. at 362-63 ("The interest advanced must be paramount . . . and the burden is on the government to show the existence of such an interest. . . . Moreover, . . . the government must 'emplo[y] means closely drawn to avoid unnecessary abridgment.'" (quoting *Buckley*, 424 U.S. at 25) (brackets in original)). It must prove that, as-applied to Petitioners' requested conduct, FECA's contribution limits serve the anti-corruption interest. *McCutcheon*, 134 S. Ct. at 1441, 1450 (noting "only one legitimate governmental interest for restricting campaign finances" has been identified, namely avoiding "'*quid pro quo*' corruption or its appearance."); *Yamada v. Snipes*, 786 F.3d 1182, 1207 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 569 (2015) (applying closely drawn scrutiny in as-applied

challenge to government contractor contribution ban); *Wagner v. Fed. Election Comm'n*, 793 F.3d 1, 8 (D.C. Cir. 2015) (*en banc*), *cert. denied*, 136 S. Ct. 895 (2016) ("*Wagner II*") (requiring that the "FEC show[] that [the challenged statute] furthers the interest in combating quid pro quo corruption or its appearance . . . to clear the 'closely drawn' standard's first hurdle").

Closely drawn scrutiny would not permit the Commission to rely on "mere conjecture" to "carry a First Amendment burden." *Shrink Mo. Gov't PAC*, 528 U.S. at 392. Rather, the Commission should only have prevailed if it could prove that the statute "employs means closely drawn to avoid unnecessary abridgement of associational freedoms." *Buckley*, 424 U.S. at 25. After all, "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny" increases "with the novelty and plausibility of" the challenge. *Shrink Mo. Gov't PAC*, 528 U.S. at 391.

Petitioners' claim regarding FECA's contribution limit structure is entirely novel. As the D.C. Circuit acknowledged, *Buckley* involved "more than 200 pages [in its] majority opinion and dissents," "nearly 800 pages of briefs," and "28 constitutional questions" presented, but "none touched upon this subject." App. 47-48 (Randolph, J.). Neither has any case heard since.

2. The Commission was unable to make such a showing. The record it assembled contains no support for its proposition that the per-election limit combats corruption. Instead, it submitted summary materials,

and requested certified facts, consisting almost entirely of election results, state election procedures, and a rote recitation of the FEC's history and regulations. App. 60-83 (Findings of Fact). The FEC especially focused on the differences among state election procedures (*e.g.,* the fact that Louisiana does not have primary elections) and the rare instances in which run-off elections are conducted, subject to an additional contribution limit. App. 65-68, 73-80. Of the 76 facts in the record, 30—or 39%—involved either state election procedures or run-off elections. *Id*. (Facts 12, 15, 16, 19, 35-60). Put differently, the FEC relied almost entirely on the unusual circumstances where either one or three elections, rather than two, selected the eventual officeholder.

This record provided no evidence of actual or apparent corruption regarding Petitioners' requested relief, which was limited to the plain-vanilla situation where there is a primary and then a general election. Nor was there any evidence of actual or apparent corruption in a situation where contributors sought to give only in a general election that would select the eventual officeholder. Put differently, Petitioners sought only to associate with specific candidates seeking specific federal office in a specific Congress, but the FEC ignored that non-corrupting circumstance—a set of facts covering the overwhelming majority of federal election contests—and sought to instead prove its case using exotic outliers.

The Government's failure is particularly striking in light of Petitioners' modest request. Petitioners were not challenging the limit on total contributions

of $5,200 itself, but merely the temporal division "layered on top." *McCutcheon*, 134 S. Ct. at 1458. Under closely drawn scrutiny, "[t]his 'prophylaxis-upon-prophylaxis approach" required the court to "be particularly diligent in scrutinizing the law's fit." *Id.* (quoting *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 479 (2007) (Roberts, C.J., controlling op.)). The record before the district court simply missed the mark. Perhaps a different record could have shown that what Petitioners planned would have raised the risk of corruption or its appearance. But the record actually offered did not do so.[10]

3. Mistakenly deferring to Congress's structural choices, however, the court of appeals did not require the FEC to prove the statute's constitutionality. Instead, it perversely forced *Petitioners* to prove that they did not wish to undo contribution limits generally. App. 30 ("But the logic of plaintiffs' theory goes further still. Their rationale . . . has no necessary stopping point with a given election cycle."); *see also* App. 23 (shifting the burden and stating that Petitioners made "no attempt to suggest that a per-cycle approach bears some inherent structural advantage"). And while the court of appeals conceded

[10] Even on its own terms, the fact that some districts involve exotic circumstances where a contributor would, under current law, be permitted to give only $2,700, or as much as $8,100, says little about why giving those Congressionally-approved amounts in the last election—the one which actually selects the member of Congress—raises any additional risk of corruption or its appearance compared to giving it as part of a per-election installment plan.

that Petitioners did "not claim [such] an entitlement," App. 25, that court's conjecture that Petitioners' request might arc in that direction was enough for the court to scuttle their case. *See* App. 25 (stating that "their theory *could* support doing so" (emphasis added)); *compare Shrink Mo. Gov't*, 528 U.S. at 391 (rejecting "mere conjecture").

Petitioners merely sought to write a single check, made out in an amount they could legally give in identical circumstances so long as the check was delivered during the primary,[11] and instead deliver that check to the general election nominee. And they explained why: to support their party's challengers to incumbent members of the opposing party.[12] They did not ask to amalgamate contributions across election cycles,[13] and the court of appeals should not have refashioned their case into a facial challenge to contribution limits *per se. But see* App. 30-31 ("[T]he same rationale . . . could even encompass a single

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[11] *See supra* n. 5.

[12] *Compare Davis v. Fed. Election Comm'n,* 554 U.S. 742, 738 (2008) ("We have never upheld the constitutionality of a law that imposes different contribution limits for candidates who are competing against each other, and we agree . . . that this scheme impermissibly burdens [the candidate's] First Amendment right to spend his own money for campaign speech.").

[13] Indeed, Petitioners would find such relief undesirable. Aggregation across election cycles would be more likely to assist incumbents—generally only incumbents have been candidates over many election cycles. Petitioners' goal is to *defeat* members of the opposing party who have built campaign war chests across elections.

contribution of many tens of thousands of dollars to a candidate when taking into account the total amounts that could be donated to her over the course of her (potentially decades-long) political career.");[14] *cf.* *Buckley*, 424 U.S. at 12-16 (connection to money does not "reduce the exacting scrutiny required by the First Amendment").

Put simply, because Petitioners' requested relief so obviously fails to raise anti-corruption concerns, the Commission and court of appeals were forced to engage with hypotheticals outside that request. This conjectural, *reductio ad absurdum* approach cannot be squared with heightened constitutional scrutiny. *Shrink Mo. Gov't PAC*, 528 U.S. at 392 (holding that "mere conjecture" is inadequate "to carry a First Amendment burden").

Had the D.C. Circuit applied closely drawn scrutiny, and required the Commission to prove that the statute employs a "means closely drawn to avoid unnecessary abridgement of associational freedoms," legislative deference would not have swallowed the State's evidentiary burden nor the narrow contours of the certified question. *Buckley*, 424 U.S. at 25. Because the result is a diminution of First

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[14] This overwrought hypothetical fails for two reasons. Most importantly, it bears no resemblance to what Petitioners actually wanted to do. But it also ignores common sense. Evaluating a non-corrupting contribution over the full two-year election cycle makes sense in part because it is subject to an obvious temporal limit: the term of office, and the period between general elections.

Amendment liberties,[15] and because this procedural approach was adopted by the *en banc* D.C. Circuit and will inevitably be applied in future First Amendment litigation, this case raises exceptionally important questions justifying this Court's review.

IV. This Case Presents An Excellent Vehicle For The Questions Presented.

This case presents a narrow, straightforward, and novel claim with a manageable and agreed-upon record. There are no hurdles to this Court's review.

The unusual section 30110 procedure has several features. One is that the *en banc* court of appeals has exclusive merits jurisdiction, meaning that only a single court has ruled upon these claims, and it has issued a final judgment. *Wagner I*, 717 F.3d at 1011 ("[T]he plain text of section [30110] grants exclusive merits jurisdiction to the *en banc* court of appeals.").

Another feature is the district court's responsibility to review the case and develop findings of fact to guide the appellate court's decision. *Bread PAC v. Fed. Election Comm'n*, 455 U.S. 577, 580 (1982) (noting that "the District Court, as required by § [30110], first made findings of fact and then certified the case"). Without such findings, certification is inappropriate because the record lacks the clarity required to resolve a constitutional challenge.

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[15] *Elrod*, 427 U.S. at 373 ("The loss of First Amendment freedoms, for even minimal periods of time, *unquestionably* constitutes irreparable injury." (emphasis added)).

Khachaturian v. Fed. Election Comm'n, 980 F.2d 330, 331-32 (5th Cir. 1992). Consequently, since § 30110 is the only method by which a challenge to FECA's contribution limits may be heard, the district court's 76 factual findings, comprising only 24 pages of text, are the full factual universe. And because Petitioners presented an as-applied challenge, there is no reason to revisit that record.

Finally, as discussed above, the standard of review this Court imposes will resolve this case. Application of closely drawn scrutiny will vindicate Petitioners' First Amendment rights; deference to Congress will merely affirm the decision below.

For these reasons, this petition presents an excellent vehicle with which to resolve important questions of First Amendment law.

CONCLUSION

Accordingly, the petition for a writ of certiorari should be granted.

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Respectfully submitted,

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