No. 19-234

In The
Supreme Court of the United States

LIBERTARIAN NATIONAL COMMITTEE, INC.,

Petitioner,

v.

FEDERAL ELECTION COMMISSION,

Respondent.

On Petition for Writ of *Certiorari* to the United States Court of Appeals for the District of Columbia Circuit

AMICUS CURIAE BRIEF OF THE INSTITUTE FOR FREE SPEECH IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Institute for Free Speech is a nonpartisan, nonprofit organization that works to defend the rights to free speech, assembly, press, and petition. Over the last decade, the Institute has represented individuals and civil society groups in cases at the intersection of political regulation and First Amendment liberties. These efforts have included challenges to campaign finance regulations at all levels of government and have given the Institute substantial experience wrestling with the various standards of scrutiny announced by this Court and the federal courts of appeal.

SUMMARY OF THE ARGUMENT

The Libertarian National Committee ("LNC") was bequeathed an amount of money for unrestricted purposes above the limit allowed by the Federal Election Campaign Act ("FECA"). Accordingly, the LNC was forbidden by the Federal Election Commission ("FEC") from immediately accepting the full bequest. The LNC brought an as-applied First Amendment challenge against FECA's contribution limits pursuant to 52 U.S.C. § 30110.

In *McCutcheon v. Federal Election Comm'n*, 572 U.S. 185, 206-07 (2014), the Court firmly reiterated that preventing *quid pro quo* corruption or

[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amicus* or its counsel, financially contribute to preparing or submitting this brief. All Parties have consented to the filing of this brief.

its appearance is the "only [] legitimate governmental interest for restricting campaign finances." Here, all parties agree that the LNC had no knowledge of the bequest prior to the contributor's death and provided nothing in exchange for the donation. Consequently, there was no *quid pro quo* corruption or even its appearance involved in the transaction. Nevertheless, the United States Court of Appeals for the District of Columbia Circuit denied the LNC's as-applied challenge despite the absence of any evidence of corruption or its appearance.

The Petition provides the Court an opportunity to protect core First Amendment rights by establishing a bright line rule that contribution restrictions should not apply to uncoordinated bequests. It should be granted.

ARGUMENT

I. Granting the writ will provide the Court a vehicle to re-affirm *McCutcheon v. Federal Election Commission*, which has received insufficient attention from the courts of appeal.

The Chief Justice's controlling opinion in *McCutcheon* [2] recognized that making political

[2] Although the Chief Justice's opinion only commanded four votes, Justice Thomas wrote separately to urge the Court to overturn campaign finance precedents in favor of a more robust reading of the First Amendment. *McCutcheon*, 572 U.S. at 228 (Thomas, J., concurring in the judgment) ("I adhere to the view that this Court's decision in *Buckley v. Valeo* denigrates core

contributions is a basic First Amendment right. 572 U.S. at 191. Indeed, "the First Amendment safeguards an individual's right to participate in the public debate through political expression and political association." *Id.* at 203. When a person contributes money to a political committee, "he exercises both of those rights: The contribution 'serves as a general expression of support for the [committee] and [its] views and serves to affiliate a person with [the committee].'" *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 21-22 (1976) (*per curiam*)). Thus, the LNC has "full First Amendment protection and [is] entitled to receive donations and make expenditures because they offer an opportunity for ordinary citizens to band together to speak on the issue or issues most important to them." *Emily's List v. Federal Election Comm'n*, 581 F.3d 1, 11 (D.C. Cir. 2009) (Kavanaugh, J.) (internal quotation marks and citation omitted).

But the *McCutcheon* plurality also recognized "that right is not absolute" and that Congress can restrict contributions "to protect against corruption or the appearance of corruption." 572 U.S. at 191. Because contribution limits generally allow a "symbolic expression of support" without "infring[ing] the contributor's freedom to discuss candidates and issues," these laws must pass closely drawn scrutiny. *Id.* at 197; *Buckley*, 424 U.S. at 21.

Under closely drawn scrutiny, the government must show that the law serves a "sufficiently

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First Amendment speech and should be overruled.") (internal citation omitted). Accordingly, under *Marks v. United States*, 430 U.S. 188 (1977), the Chief Justice's opinion is the controlling opinion of the Court.

important interest" and employs means "closely drawn to avoid unnecessary abridgement of associational freedoms." *McCutcheon*, 572 U.S. at 197; *Buckley*, 424 U.S. at 25. The only "legitimate" governmental interest for contribution limits is "preventing corruption or the appearance of corruption." *McCutcheon*, 572 U.S. at 206. And in pursuit of this interest, the government "may target only a specific type of corruption—'*quid pro quo*' corruption."[3] *Id*. at 207. *Quid pro quo* corruption requires "the exchange of a thing of value for an 'official act.'" *McDonnell v. United States*, 579 U.S. _, _, 136 S. Ct. 2355, 2372 (2016).

Because the aggregate contribution limits at issue in *McCutcheon* did "little, if anything" to prevent *quid pro quo* corruption or its appearance they were "invalid under the First Amendment." 572 U.S. at 193.

Likewise, the contribution limits at issue here provide no protection from *quid pro quo* corruption or its appearance. During his life, Joseph Shaber donated $3,315 to the LNC over twenty-five years, *Libertarian Nat'l Comm., Inc. v. Federal Election Comm'n*, 924 F.3d 533, 536 (D.C. Cir. 2018) ("*LNC II*"), "a drop in the bucket relative to current law's annual limit." *Libertarian Nat'l Comm., Inc. v. Federal Election Comm'n*, 317 F. Supp. 3d 202, 216 (D.D.C. 2018) ("*LNC I*"). At his death, Shaber surprised the LNC with a bequest of over $235,000

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[3] A regulation cannot target ingratiation and access a contributor may receive from political actors. *McCutcheon,* 572 U.S. at 192. That embodies "a central feature of democracy." *Id.* Instead, a regulation "must" target "'*quid pro quo* corruption or its appearance.'" *Id.* (quoting *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 359 (2010)).

with no strings attached. *LNC II*, 924 F.3d at 536; *LNC I*, 317 F. Supp. 3d at 207, 250. But at the time, FECA only allowed the LNC to accept $33,400 of the bequest without restriction. *LNC II*, 924 F.3d at 536 (citing 52 U.S.C. §§ 30116(a)(1), (c); 52 U.S.C. § 30125(a)). The rest of the money was deposited in an escrow account to be disbursed annually in amounts permitted by FECA unless the LNC is successful in this as-applied challenge—then it can accept the remaining escrow balance. *Id.* at 536-37. And, indeed, the LNC should succeed.

"The facts surrounding this bequest are undisputed. Shaber neither coordinated with the LNC regarding his decision to include the party in his will nor even informed the party of that decision." *Id.* at 561 (Katsas, J., dissenting) (citing *LNC I*, 317 F. Supp. 3d at 249). Except for pursuing its ordinary political activities, the LNC "'provided nothing of value to Mr. Shaber, or to anyone else, in exchange for his bequest.'" *Id.* (quoting *LNC I*, 317 F. Supp. 3d at 251). And Shaber asked for nothing in return. *Id.* (citing *LNC I*, 317 F. Supp. 3d at 250). "[B]esides making his modest gifts, Shaber had no other relationship with the LNC during his lifetime, thus making the prospect of corruption even more unlikely." *Id.* (citing *LNC I*, 317 F. Supp. 3d at 251). Nevertheless, the FEC insists that federal contribution limits must apply to this unexpected gift—a *quid* for which no *quo* was given, or even possible. Moreover, there is no danger of future potential corruption: the facts surrounding Shaber's contribution are unchangeable because of his death.

The *LNC II* majority concedes the bequest "was not, in fact, part of a corrupt *quid pro quo* exchange." 924 F.3d at 543. And there is no appearance of

corruption if a political committee unknowingly receives a bequest from a supporter. *Id.* at 565 (Katsas, J., dissenting) (because the LNC was unaware of the bequest, no *quid pro quo* agreement could be inferred). Yet, the majority arrived at a decision for the FEC not by concentrating on the facts of this case, but by focusing instead on the possibility that other potential bequests could be used by other donors to engage in corrupt bargains with a national party committee. *Id.* at 542-44.

That is true, so far as it goes, and important to note in a facial challenge. But the LNC *did not bring a facial challenge*. This case *only* involves the specific facts of Shaber's bequest. *See Doe v. Reed*, 561 U.S. 186, 201 (2010) (an unsuccessful facial challenge does not foreclose an as-applied challenge); *Federal Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 476-82 (2007) (opinion of Roberts, C.J.) (same); *SpeechNow.org v. Federal Election Comm'n*, 599 F.3d 686, 692-96, (D.C. Cir. 2010) (en banc) (same).

Certainly, as the majority states, a bequest can be corrupt if there is a bargain before the testator's death. *LNC II*, 924 F.3d at 542. "But this cannot happen if the testator does not even tell the recipient about the planned bequest during his lifetime. In that circumstance, a *quid pro quo* exchange is impossible." *Id.* at 564 (Katsas, J., dissenting).

But the majority upheld the limit as-applied to Shaber's bequest because, "it is 'difficult to isolate suspect contributions' in the sea of legitimate donations." *Id.* at 543 (quoting *Buckley*, 424 U.S. at 30). This gives up the game. "*Buckley* did not address an as-applied challenge to the contribution limits." *LNC I*, 317 F. Supp. 3d at 206. By applying broad facial challenge principles to an as-applied case that

has no evidence of *quid pro quo* corruption or its appearance, the majority employs the "'prophylaxis-upon-prophylaxis approach'" that *McCutcheon* discourages. 572 U.S. at 221 (citing *Wis. Right to Life, Inc.*, 551 U.S. at 479 (opinion of Roberts, C.J.)). Worse still, it converted a valid as-applied challenge into a broader, facial attack on the statute. But it is not the D.C. Circuit's place to amend a plaintiff's complaint. *In re Grand Jury Subpoena*, 912 F.3d 623, 627 (D.C. Cir. 2019) ("Mindful of our obligation to avoid sweeping more broadly than we must to decide the case in front of us….").

The dead cannot ask for favors. And a political committee cannot offer them to the dearly departed. This is especially true when the deceased does not inform the beneficiary of a bequest that it exists.[4] This uncoordinated arrangement is neither corrupt nor potentially corrupting. As with independent expenditures, "'[t]he absence of prearrangement and coordination [of a bequest with a political committee] . . . alleviates the danger that [contributions] will be given as a *quid pro quo* for improper commitments from the [committee].'" *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 357 (2010) (quoting *Buckley*, 424 U.S. at 47).

Political contribution restrictions should not apply to uncoordinated bequests. "The line between coordinated and uncoordinated spending [] runs throughout campaign-finance law, and the FEC routinely must police it." *LNC II*, 924 F.3d at 565

[4] Of course, wills can always be changed. Western literature is replete with examples of would-be beneficiaries surprised by a testator's last-minute decisions. *E.g.*, Charles Dickens, *Bleak House* (Macmillan Collector's Edition). Nevertheless, *Amicus* writes only to discuss the LNC's as-applied challenge.

(Katsas, J., dissenting). The FEC has "extensive disclosure requirements and enforcement powers" at its disposal to determine whether political expenditures were coordinated or not. *Id.* During this litigation, it offered "no reason why it cannot make the same determination as to bequests." *Id.* Accordingly, finding for the LNC in this as-applied challenge does not require rewriting the law. "Because coordinated and uncoordinated bequests can be manageably distinguished, and because uncoordinated bequests are not even alleged to present any corruption risk, the contribution limits are unconstitutional at least as applied to them." *Id.*

II. The Court has multiple opportunities this Term to address the application of closely drawn scrutiny and exacting scrutiny.

The D. C. Circuit is not alone; the federal courts are struggling to apply closely drawn scrutiny and exacting scrutiny. *See* Br. of Inst. for Free Speech at 6-12, *Thompson v. Hebdon*, No. 19-122 (U.S. Aug. 26, 2019). *See also, e.g., Riddle v. Hickenlooper*, 742 F.3d 922, 930 (10th Cir. 2014) (Gorsuch, J., concurring) ("I confess some uncertainty about the level of scrutiny the Supreme Court wishes us to apply to this contribution limit challenge…."). As Justice Thomas noted, the 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 v. Denn*, 579 U.S. _, 136 S. Ct. 2376, 2378 (2016) (Thomas, J., dissenting from denial of cert.).

Accordingly, the Court should provide lower courts guidance on these important issues.

Thankfully, the Court may have as many as four opportunities this Term to clarify the level of scrutiny applied to campaign finance laws: (1) this Petition is a chance to scrutinize contribution limits in an as-applied challenge with undisputed facts[5] revealing no *quid pro quo* corruption or its appearance; (2) *Thompson v. Hebdon* provides the Court an opportunity to harmonize and clarify exacting scrutiny and closely drawn scrutiny, Pet. for Cert. of David Thompson, No. 19-122 (U.S. July 22, 2019); (3) *Americans for Prosperity Foundation v. Becerra* is an occasion to address proper tailoring for contribution disclosure laws applied to non-profit civil society groups engaging in issue advocacy, Pet. for Cert. of Americans for Prosperity Foundation, Nos. 19-251, 19-255 (U.S. Aug. 26, 2019); and (4) *Institute for Free Speech v. Becerra*[6] is a potential opportunity to address the fundamental question of whether compelled disclosure of donors to nonprofit civil society groups is a First Amendment injury in the

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[5] This Petition also presents the Court an opportunity to rule on the standard of review for district court factual findings in 52 U.S.C. § 30110 cases. One of the functions of the district court in § 30110 cases is "develop[ing] a record for appellate review by making findings of fact." *Wagner v. Federal Election Comm'n*, 717 F.3d 1007, 1009 (D.C. Cir. 2013). No court has addressed the standard of review for factual findings in § 30110 cases. Circuit courts generally review findings of fact for clear error. *See, e.g., Crossroads Grassroots Policy Strategies v. Federal Election Comm'n*, 788 F.3d 312, 316 (D.C. Cir. 2015). Granting the writ will give the Court a chance to rule on whether clear error is the proper standard for factual findings in § 30110 cases.

[6] Petition forthcoming.

first place. Mot. of Inst. for Free Speech, No. 17-17403, DN 32 (9th Cir. Aug. 23, 2019).

As stated above, this petition should be granted to uphold *McCutcheon*. But at a minimum, and as Petitioner suggests, Pet. 37, the case should be held pending the outcome of the case that the Court chooses as its vehicle for articulating the standard of scrutiny in campaign finance law.

CONCLUSION

For the foregoing reasons, the Court should grant the writ.

Respectfully submitted,

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