No. 19-122

In The
Supreme Court of the United States

DAVID THOMPSON, AARON DOWNING and JIM CRAWFORD,

Petitioners,

v.

HEATHER HEBDON, in her official capacity as the Executive Director of the Alaska Public Offices Commission, *et al.*,

Respondents.

On Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Ninth Circuit

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions, Statutes, and Rules

Other Authorities

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

In 1976, this Court announced that campaign finance restrictions are constitutional only if they can meet the "necessary" and "strict test established by *NAACP vs. Alabama*." *Buckley v. Valeo*, 424 U.S. 1, 66 (1976) (*per curiam*). In the intervening decades, that test has becomes muddled. With the exception of expenditure limitations, which are universally understood to be subject to strict scrutiny, regulations targeting public advocacy are subject to an array of standards ranging from nearly-strict scrutiny to apparent rational basis review.

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[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.

The Ninth Circuit erred in failing to apply one of those specific tests, the plurality opinion in *Randall v. Sorrell*, 548 U.S. 230 (2006). But this error is understandable. *Randall* is a symptom of the larger problem, applying to only a small subset of campaign finance challenges and imposing a two-step, five-factor test that is unworkable in practice and has never since been invoked by this Court. Consequently, *Randall* should be set aside, and the *Buckley* standard restored.

Doing so will allow this Court to re-affirm that *Buckley* requires campaign finance measures of all types to meet the "strict test," 424 U.S. at 66, of the "closest scrutiny" announced in *NAACP v. Alabama* and *Buckley* itself. *Id.* at 25 (citation and quotation marks omitted). While perhaps not strict scrutiny as it is currently understood, that standard should be high and, more importantly, consistent.

The Petition provides this Court with an ideal vehicle for protecting core First Amendment rights while resolving substantial confusion in the circuit courts of appeal. It should be granted.

ARGUMENT

I. The writ should be granted to allow this Court to fashion a suitable replacement for *Randall v. Sorrell*'s unworkable standard.

The plurality opinion in *Randall v. Sorrell,* 548 U.S. 230 (2006), provides the controlling standard for evaluating First Amendment challenges to base campaign contribution limits. *Marks v. United States*, 430 U.S. 188, 193 (1977). Nevertheless, the Ninth

Circuit applied its own decisions to Petitioners' challenge to Alaska's contribution limits, and ruled that *Randall* was inapplicable. Pet. App. 16 n.5. This error, standing alone, justifies the invocation of this Court's supervisory authority. Pet. 25-29.

But the Ninth Circuit's confusion also points to a more fundamental issue. *Randall* has not proven useful to the lower courts, or found purchase in related decisions of this Court. This case provides an ideal vehicle for announcing a clear test that properly accounts for the fundamental First Amendment interests at stake.

Randall's two-step, five-factor analysis is an impractical test. Under *Randall* Step One, a court must first consider whether the "limits are substantially lower than both the limits [this Court has] previously upheld and comparable limits in other States." 548 U.S. at 253. If so, *Randall* Step Two, requires consideration of five "danger signs," of unknown individual weight, to be "[t]aken together" by the district court. *Id.* at 253 (emphasis removed).

The five factors are: (1) whether a challenger can mount an effective and competitive campaign; (2) whether the individual contribution limit is set at the same level for political parties; (3) whether volunteer activities count toward the contribution limit; (4) whether the contribution limit is adjusted for inflation; and (5) whether there is a valid special justification for the contribution limit. *Id.* at 548 U.S. at 256-261.

Regardless, Petitioners argue that if *Randall* were applied here, Alaska's limits arguably would fail both steps of the analysis. *Amicus* agrees. Alaska's limits are historically low, Pet. 22-24, 31, and the law

exhibits many unambiguous "danger signs." [2] *Randall*, 548 U.S. at 253.

But a narrow victory for Petitioners would be a missed opportunity to simplify and harmonize the law. The application of *Randall* is inherently subjective and fundamentally incapable of consistent application, as members of this Court observed at the time. *Id*. at 268, 272 (The plurality opinion cannot "be reduced to a workable inquiry … its discussion offers nothing resembling a rule at all") (Thomas, J., concurring in the judgment). And *Randall* "d[id] not … specify the relative weight that should be given to the factors; whether any of the five factors might be dispositive; whether all would need to be present in the same degree; whether other factors might also be relevant." Lillian R. BeVier, *Full of Surprises—And More to Come: Randall v. Sorrell, the First Amendment, and Campaign Finance Regulation*, 2006 Sup. Ct. Rev. 173, 181 (2006).

Additionally, many other questions remain unanswered after *Randall*. [3] Must a contribution

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[2] For example, at times Alaska has counted volunteer activity as a contribution. *Compare* Alaska Public Offices Commission Advisory Opinion, AO 14-09-CD (volunteer personally flying his own plane for a candidate is a contribution) *with* AO 10-11-CD (volunteer professional photographer's time and use of personal/non-business equipment is not a contribution). Nor are the limits indexed to inflation, Alaska Stat. Ann. 15.13.070, or justified with reference to some special justification beyond garden-variety anticorruption interests. Pet. App. 4.

[3] Just last Term, the Court declined to participate in political prognostication, stating that "federal courts are not equipped to apportion political power as a matter of fairness." *Rucho v. Common Cause*, 588 U.S. __; 139 S. Ct. 2484, 2499 (2019). Yet, one of the danger signs requires federal courts to do just that by

limit meet all five categories before it fails tailoring analysis? Or will four suffice? Can a state decline to peg its limit to the Consumer Price Index if its limit is over the $1,000 approved in *Buckley*? Is indexing required for lower limits? Can a State impose similar contribution limits on political parties and individuals so long as it provides an exemption for volunteer expenses?

Perhaps, then, it is unsurprising that the Court has consistently sidestepped *Randall* when reviewing contribution limits. *See Davis v. Fed. Election Comm'n*, 554 U.S. 724 (2008)*; McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185 (2014). Indeed, the Court did not rely on *Randall* in striking down FECA's aggregate contribution limit in *McCutcheon*. It is little wonder that the Ninth Circuit avoided *Randall*'s test, which was clearly fashioned to deal with the specific facts of a specific case. In short, *Randall* has proven to be "a ticket good for this day and this train only." *See N.Y. v. U.S. Dep't of Commerce*, 588 U.S. __; 139 S. Ct. 2551, 2584 (2019) (Thomas, J., dissenting in part and concurring in part); *cf. Bush v. Gore*, 531 U.S. 98, 109 (2000) ("Our consideration is limited to the present circumstances….").

Thus, as *Amicus* has previously advised, "[t]he incoherent *Randall* analysis should be formally jettisoned." Br. of Inst. for Free Speech at 15, *Lair v. Motl*, No. 18-149 (U.S. Sept. 4, 2018). The ruling has provided no "ability to contribute to the stable and orderly development of the law," and its removal

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determining the effects of a campaign finance law on party competitiveness. Accordingly, the ongoing viability of that danger sign is in question.

would permit the Court to "restor[e] its "doctrine to sounder footing." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 380 (Roberts, C.J., concurring op.).

Dispatching *Randall* is not a drastic measure. The plurality opinion is fact-bound on its face, did not command a majority of the Court, and is consistent with the Court's overall body of decision. All that is required is for the Court to affirm and clarify its analysis in *Buckley v. Valeo*: that the "closely drawn" scrutiny applied to contribution limits, and the "exacting scrutiny" applied to other elements of campaign finance law, such as contributor disclosure requirements, is the same test. 424 U.S. at 25, 64 (citation and quotation marks omitted) And that this standard requires a "State [to] demonstrate[] a sufficiently important interest and employ[] means closely drawn to avoid unnecessary abridgment of associational freedoms." *Id*. at 25.

II. *Certiorari* should be granted to resolve confusion surrounding the standard of review for campaign finance laws.

Overruling *Randall* is the right decision on the merits, but it also affords this Court an opportunity to resolve confusion over the standard of review for political regulation more generally.

First, there is confusion as to whether the "closely drawn" scrutiny derived from *Buckley*, 424 U.S. at 25, and applied against contribution limits, and the "exacting scrutiny," also derived from *Buckley*, 424 U.S. at 16, 64, and applied to other areas of campaign finance law, such as donor disclosure, are the same test. The Court should affirm that they are.

Second, since closely drawn scrutiny and exacting scrutiny are the same, the Court should take the opportunity to resolve longstanding confusion in the federal courts of appeal regarding the rigor of the exacting scrutiny analysis. At the moment, that test is being interpreted as anything from nearly-strict scrutiny, *Worley v. Cruz-Bustillo*, 717 F.3d 1238, 1249 (11th Cir. 2013), to a form of rational basis review, *Ctr. for Competitive Politics v. Harris*, 784 F.3d 1307, 1312 (9th Cir. 2015).

The Court should grant the writ so that it can re-affirm *Buckley* and provide badly needed clarity and guidance in an important area of First Amendment law. *See 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…").

A. Closely drawn scrutiny and exacting scrutiny are the same standard of review.

Since the *Buckley* decision, this Court has insisted that contribution limits can only "be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." *Buckley*, 424 U.S. at 25; *McCutcheon*, 572 U.S. at 218 ("[T]he aggregate limits violate the First Amendment because they are not 'closely drawn to avoid unnecessary abridgment of associational freedoms'") (quoting *Buckley*, 424 U.S. at 25)).

The courts of appeal, however, have begun to view this test as a freestanding form of review, "closely drawn scrutiny," that only applies when a

court reviews a contribution limit. *Schickle v. Dilger*, 925 F.3d 858, 869 (6th Cir. 2019) ("Closely drawn scrutiny requires the Commonwealth to demonstrate that each provision furthers 'a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms'") (quoting *McCutcheon*, 572 U.S. at 197); *Libertarian Nat'l Comm., Inc. v. Fed. Election Comm'n*, 924 F.3d 533, 541 (D.C. Cir. 2018) (*en banc*); *Preston v. Leake*, 660 F.3d 726, 733 (4th Cir. 2011). This is a relatively recent trend. *Compare Schickle*, 925 F.3d at 869 (applying "closely drawn scrutiny") *with Anderson v. Spear*, 356 F.3d 651, 672 (6th Cir. 2004) (finding that a contribution limit "cannot survive exacting scrutiny because it is not closely drawn to avoid unnecessary abridgment of associational freedoms"). *Amicus* submits that while this trend is mistaken, it is understandable.

How to label the standard of review for contribution limits is an important question, especially given widespread application of the "familiar tiers of scrutiny:" strict, intermediate, and rational basis. *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Rev.*, 460 U.S. 575, 585 n.7 (1983); *see also Whole Women's Health v. Hellerstedt*, 579 U.S. __; 136 S. Ct. 2292, 2327 (2016) (Thomas, J., dissenting) ("Though the tiers of scrutiny have become a ubiquitous feature of constitutional law, they are of recent vintage"). This Court should take the opportunity to return to the cornerstone case of *Buckley v. Valeo*, which quite plainly applied the same standard to, *inter alia*, contribution limits and donor disclosure.

In the intervening years, however, members of this Court and the lower courts have seized on stray

phrases in *Buckley* such as "closely drawn" or "exacting," and given those terms independent and talismanic importance. This is error. While "no two words have precisely the same meaning," Ellsworth Barnard, English for Everybody 84 (1979), the *Buckley* Court was not breaking new ground or imposing differing standards when it made efforts "to avoid clunky repetition." *Dormescar v. U.S. Att'y Gen.*, 690 F.3d 1258, 1259 n.2 (11th Cir. 2012).

The *Buckley* Court reviewed the Federal Election Campaign Act of 1974 ("FECA"), a wide-ranging campaign finance statute enacted in the aftermath of the Watergate scandal. FECA imposed expenditure bans, contribution limits, and donor disclosure requirements. In *Buckley*, the Court generally upheld the contribution limits and donor disclosure requirements but struck down the expenditure limits. 424 U.S. at 44 ("[T]he Act's expenditure limitations impose far greater restraints on the freedom of speech and association than do its contribution limitations"). While more recent cases have suggested that "closely drawn" review of contribution limits and the "exacting scrutiny" applied to disclosure and disclaimer requirements are different, a close look at *Buckley* reveals that they are, in fact, one and the same.

The *Buckley* Court relied on *NAACP v. Alabama* to apply "the closest scrutiny" to contribution limits, because "the primary First Amendment problem raised" by contribution limits "is their restriction of one aspect of the contributor's freedom of political association," which is a right that "lies at the foundation of a free society." *Buckley*, 424 U.S. at 24-25 (citation and quotation marks omitted); *id.* at 25 ("In view of the fundamental nature of the

right to associate, governmental 'action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny'"). (quoting *NAACP v. Ala.*, 357 U.S. 449, 460-461 (1958)).

The Court noted that "the closest scrutiny" was not an insurmountable barrier for governments to overcome. *Id*; *cf. Adarand Constructors v. Pena*, 515 U.S. 200, 237 (1995) ("Finally, we wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact'") (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring)).[4] Thus, under "the closest scrutiny," a contribution limit could be considered constitutional "if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." *Buckley*, 424 U.S. at 25 (citation and quotation marks omitted). The Court went on to generally find that contribution limits were constitutional.

So much for contribution limits. But when it reviewed the disclosure provisions of the federal campaign finance law before it, the Court undertook the same examination. *Free & Fair Election Fund v.*

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[4] For this proposition, the Court cited *Cousins v. Wigoda*, 419 U.S. 477 (1975), a case which also had applied *NAACP v. Alabama*'s closest scrutiny. *See Cousins*, 419 U.S. at 489. The *Cousins* Court actually ruled against the State of Illinois, finding that the government did not have a "'compelling'" and "'subordinating interest'…to justify the injunction's abridgment of the exercise by petitioners and the National Democratic Party of their constitutionally protected rights of association." *Id.* at 489 (quoting *NAACP*, 357 U.S. at 463). In the two other cases cited by the *Buckley* Court for the proposition that laws could survive the closest scrutiny, *NAACP v. Button*, 371 U.S. 415 (1963) and *Shelton v. Tucker*, 364 U.S. 479 (1960), the governments also lost.

Mo. Ethics Comm'n, 903 F.3d 759, 763 (8th Cir. 2018) ("Laws that regulate political contributions are subject to exacting scrutiny") (citation and quotation marks omitted). First, the Court determined that contributor lists were given the same level of constitutional protection as the membership information at issue in *NAACP v. Alabama*. *Buckley*, 424 U.S. at 66 (relying on "the principles of *NAACP vs. Alabama*" as articulated in this Court's similar opinion in *Bates v. City of Little Rock*, 361 U.S. 516, 518 (1960)). That is to say, the Court once again determined that the "the primary First Amendment problem raised" by donor disclosure was that it affected the freedom to associate. Thus, the Court applied "[t]he strict test established by *NAACP vs. Alabama*…because compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights." *Buckley*, 424 U.S. at 66. It also acknowledged that this standard could be overcome by "governmental interests sufficiently important to outweigh the possibility of infringement." *Id*. at 66; *cf. id.* at 25 ("if the State demonstrates a sufficiently important interest and employs means closely drawn" a contribution limit may be constitutional). Applying this standard of review, the Court read FECA to narrow the scope of donor disclosure. *Buckley*, 424 U.S. at 79-81.

Thus, the *Buckley* Court applied the "strict test," *id.* at 66, of "'closest,'" *id.* at 25 (quoting *NAACP*, 357 U.S. at 461), or "exacting scrutiny," *id*. at 16, 64, to both contribution limits and donor disclosure, relying in both instances on *NAACP v. Alabama* and requiring the government to show "sufficiently important" interests to justify those infringements on associational liberty. *Id*. at 25, 66.

The Court re-affirmed the application of exacting scrutiny to contribution limits in its very next contribution limit case, *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290 (1981) ("*Citizens Against Rent Control*"). That case involved a contribution limit of $250 imposed by the City of Berkeley for "campaigns involving both candidates and ballot measures." *Citizens Against Rent Control*, 454 U.S. at 292. The Court swiftly determined that this was "subject to exacting judicial review" and found the limit unconstitutional. *Id*. at 294.[5]

The Court should re-affirm the holdings of *Buckley* and *Citizens Against Rent Control*: campaign finance laws of all types must survive exacting scrutiny.

B. The Court should bind the lower courts to a single test for exacting scrutiny

Clarifying that exacting scrutiny is the same as so-called "closely drawn scrutiny" will also, at one fell swoop, allow the Court to resolve another significant confusion in the courts of appeal: What is the scope of the exacting scrutiny analysis?

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[5] In their concurring opinion, Justices Blackmun and O'Connor also contended that exacting scrutiny and closely drawn review were synonyms, noting that "Berkeley's ordinance cannot survive constitutional challenge unless it withstands exacting scrutiny. To meet this rigorous standard of review, Berkeley must demonstrate that its ordinance advances a sufficiently important governmental interest and employs means closely drawn to avoid unnecessary abridgment." *Citizens Against Rent Control*, 454 U.S. at 302 (Blackmun and O'Connor, JJ., concurring) (citation and quotation marks omitted)

No fewer than four different understandings exist in the appellate courts as to the "rigor" of the "strict test" necessitated by *NAACP v. Alabama* and *Buckley v. Valeo*. These circuits are confused because this Court's own jurisprudence on the exacting scrutiny analysis has hardly been a model of consistency, not merely "Januslike, point[ing] in two directions," *Van Orden v. Perry*, 545 U.S. 677, 683 (2005), but more "Cerberuslike," facing in at least three.

These divisions, which allow the courts of appeal to pick-and-choose how rigorous they wish to examine a given statute, risk results-oriented judging and ultimately means that certain First Amendment harms are treated more seriously in some courts than others.

Three circuits, for example, have recently posited that exacting scrutiny is a form of review that may be as severe as strict scrutiny, though they have expressed uncertainty on this point.[6] In *McCutcheon*

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[6] *Libertarian Party of Ohio v. Husted*, 751 F.3d 403, 414 (6th Cir. 2014) ("'Exacting scrutiny,' despite the name, does not necessarily require that kind of searching analysis that is normally called strict judicial scrutiny; although it may"); *Worley*, 717 F.3d at 1249 ("Though possibly less rigorous than strict scrutiny, exacting scrutiny is more than a rubber stamp") (citation and quotation marks omitted); *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 876 (8th Cir. 2012) (*en banc*) ("Though possibly less rigorous than strict scrutiny, and requiring the government to use the least restrictive means to accomplish its compelling interests…") (citations and quotation marks omitted); *Iowa Right to Life, Inc. v. Tooker*, 717 F.3d 576, 590 (8th Cir. 2013) (describing exacting scrutiny and strict scrutiny as separate tests, but keeping the

and *Williams-Yulee v. The Florida Bar*, 575 U.S. __; 135 S. Ct. 1656 (2015), members of this Court did in fact refer to exacting scrutiny as a synonym for strict scrutiny. *McCutcheon,* 572 U.S. at 197; *Williams-Yulee*, 135 S. Ct. at 1664-1665 (Roberts, C.J., controlling op) (using "strict scrutiny" and "exacting scrutiny" interchangeably); *id*. at 1673 (Ginsburg, J., concurring) ("I would not apply exacting scrutiny . . ."); *id.* at 1676-77 (Scalia, J., dissenting) ("We may uphold it only if the State meets its burden of showing that the Canon survives strict scrutiny . . . Canon 7C(1) fails exacting scrutiny and infringes the First Amendment").

Other circuits consider "exacting scrutiny" a form of intermediate scrutiny. [7] "To withstand

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overall question as to whether strict scrutiny can apply to a disclosure statute open by citing to *Swanson*).

[7] *Real Truth About Abortion v. Fed. Election Comm'n*, 681 F.3d 544, 549 (4th Cir. 2012) ("Accordingly, an intermediate level of scrutiny known as 'exacting scrutiny' is the appropriate standard…"); *Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 840 (7th Cir. 2014) ("Disclosure rules are reviewed under intermediate scrutiny, which though less rigorous than strict scrutiny nonetheless requires close judicial review"); *Free Speech v. Fed. Election Comm'n*, 720 F.3d 788, 793 (10th Cir. 2014) (quoting *Real Truth About Abortion v. Federal Election Commission* for the proposition that exacting scrutiny is an "intermediate level of scrutiny"); *Vt. Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 132-33 (2d Cir. 2014) (same).

This is also the understanding of the Federal Election Commission, the agency tasked with enforcement and administration of our national campaign finance laws. *E.g.* Br. of Fed. Election Comm'n at 18, *Holmes v. Fed. Election Comm'n*, 875 F.3d 1153 (D.C. Cir. 2017) ("Contribution Limits Are Subject to Intermediate Scrutiny").

intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). This Court has described exacting scrutiny using nearly identical language, stating that exacting scrutiny "'requires a substantial relation between the disclosure requirement and a 'sufficiently important' governmental interest.'" *Doe v. Reed*, 561 U.S. 186, 196 (2010) (quoting *Citizens United*, 558 U.S. at 366-367).

Still other circuits, however, seem to consider exacting scrutiny to be a different form of heightened constitutional review that floats somewhere between intermediate scrutiny and strict scrutiny. [8] In *McCutcheon*, the Chief Justice's controlling opinion appeared to apply this form of review to the challenged aggregate limit, stating that its "closely drawn" analysis was not applying strict scrutiny, yet still demanding some features of that form of analysis, such as "narrow[] tailor[ing]." *McCutcheon*, 572 U.S. at 218 (citation and quotation marks omitted).

And lastly, the Ninth Circuit has decided that exacting scrutiny is really just a form of rational basis review.[9] The Ninth Circuit arrived at this surprising conclusion by determining that *Shelton v. Tucker*, *Bates v. City of Little Rock*, and *NAACP v. Alabama* are nothing more than "a series of Civil Rights Era as-

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[8] *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 56-57 (1st Cir. 2011); *Del. Strong Families v. Att'y Gen. of Del.*, 793 F.3d 304 (3d Cir. 2015); *Justice v. Hosemann*, 771 F.3d 285, 297, 299 (5th Cir. 2014); *Nat'l Ass'n of Mfrs v. Taylor*, 582 F.3d 1, 10 (D.C. Cir. 2009).

[9] *Harris*, 784 F.3d at 1317.

applied cases," and hold little precedential value beyond their particular facts. *Harris*, 784 F.3d at 1312; *id.* at n.3.[10] But limiting those cases to their facts cannot be squared with the *Buckley* Court's embrace of all three when applying exacting scrutiny.[11]

No opinion of this Court has held that exacting scrutiny is a form of rational basis review. *See District of Columbia v. Heller*, 554 U.S. 570, 628 n.27 (2008) ("If all that was required to overcome [a constitutional right] …was a rational basis the…Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect"). However, this Court *has* suggested that exacting scrutiny is a sliding scale, holding that when a court applies *Buckley*, "[t]he quantum of empirical evidence needed to satisfy heighted judicial scrutiny…will vary up or down with the novelty and plausibility of the justification raised." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 (2000). By suggesting that exacting scrutiny is a rule of reason

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[10] *Shelton*, at least, was unambiguously a facial decision. 364 U.S. at 490 ("The statute's comprehensive interference with associational freedom goes far beyond what might be justified in the exercise of the State's legitimate inquiry into the fitness and competency of its teachers").

[11] The *Harris* court compounded this error by also misreading *Buckley v. Valeo*. It seized on a stray sentence in *Buckley* where, after the Court had already generally upheld the federal contribution limit and donor disclosure schemes under exacting scrutiny, it could not say that the specific dollar thresholds Congress had set for disclosure were, "on this bare record…wholly without rationality." *Buckley*, 424 U.S. at 83. The Ninth Circuit took this sentence as further evidence that exacting scrutiny is just a form of rational basis review. *Harris*, 784 F.3d at 1317 (quoting *Buckley*, 424 U.S. at 83).

rather than a clear test for heightened judicial scrutiny, the Court may have inadvertently greenlit the casual approach applied in the Ninth Circuit.

* * *

The standard of review applied to laws such as Alaska's should be consistent nationwide. *Certiorari* ought to be granted to resolve this confusion and bind the lower courts to a single judicial standard. It should, once again, be "firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny." *Elrod v. Burns*, 427 U.S. 347, 362 (1976) (Brennan, J., plurality op.) (citing *Buckley*, 424 U.S. at 64-65; *NAACP*, 357 U.S. at 460-461).

Specifically, the Court should hold that when a government seeks to compel disclosure or impose contribution limits:

> [The statute] must further some vital government end by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights.

Elrod, 427 U.S. at 363.[12]

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[12] In his discussion of exacting scrutiny, Justice Brennan cites or quotes, *inter alia*, *Buckley*, 424 U.S. at 25, 94, *Kusper v. Pontikes*, 414 U.S. 51, 58 (1973), *Williams v. Rhodes*, 393 U.S. 23, 31-33 (1968); *Sherbert v. Verner*, 378 U.S. 398, 406 (1963); *NAACP v. Button*, 371 U.S. at 438, 444; *Bates*, 361 U.S. at 524; *Shelton v. Tucker*, 364 U.S. at 479, *NAACP v. Ala.*, 357 U.S. at 464-466; and *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

To the extent that this standard is equivalent to strict scrutiny, rather than merely a different form of heightened review, the Court should conclusively say so. *Cf. Buckley*, 424 U.S. at 75 ("In considering this provision we must apply the same strict standard of scrutiny, for the right of associational privacy developed in *NAACP vs. Alabama* derives from the rights of the organization's members to advocate their personal points of view in the most effective way"). This is, after all, likely the best understanding of the "strict test established by *NAACP vs. Alabama*." *Buckley*, 424 U.S. at 66.

Indeed, as counsel for Petitioners once observed, perhaps "three levels of scrutiny are enough." Tr. of Oral Arg. at 79, *United States v. Windsor*, No. 12-307 (U.S. Mar. 27, 2013).

CONCLUSION

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

Respectfully submitted,

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