No. 21-12

# In The
# Supreme Court of the United States

FEDERAL ELECTION COMMISSION,

*Appellant,*

v.

TED CRUZ FOR SENATE and
RAFAEL EDWARD "TED" CRUZ,

*Appellees.*

**On Appeal From The United States District Court For The District Of Columbia**

## BRIEF OF INSTITUTE FOR FREE SPEECH AS AMICUS CURIAE IN SUPPORT OF APPELLEES

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## INTEREST OF AMICUS CURIAE[1]

The Institute for Free Speech ("IFS") is a nonpartisan, nonprofit organization that promotes and protects the First Amendment rights to speech, assembly, press, and petition. In particular, IFS has substantial experience litigating challenges to political speech restrictions, and it represents individuals and civil society organizations, pro bono, in cases defending core First Amendment political freedoms from objectionable regulation.

## SUMMARY OF ARGUMENT

Lower courts do not always appreciate that heightened scrutiny of campaign contribution restrictions requires an examination as rigorous as that performed by the District Court below. This Court should clarify the level of proof needed to show not just actual, but also the appearance of, quid pro quo corruption, and emphasize the need for judicial engagement, not deference, when faced with claims that First Amendment rights are being infringed. Lastly,

[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus curiae certifies that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party, or any other person besides amicus curiae, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties participating in this litigation have received over ten days' notice of the filing of this brief, and have granted written consent to the filing of this brief directly to counsel for amicus curiae.

*Buckley's* distinction between "contribution" and "expenditures" in campaign finance law has served as a useful construct, but lower courts should be well-cautioned not to become overly reliant on it.

Although less rigorous than strict scrutiny, closely drawn scrutiny requires that a court thoroughly vet the justifications offered by the government for limits on political campaign contributions. In striking down the loan repayment limitation (the "Loan Repayment Limitation") of 52 U.S.C. § 30116(j), the District Court's decision demonstrated the correct approach, hewing to this Court's approach in *McCutcheon v. FEC*, 572 U.S. 185 (2014). Thin evidence like that presented by the FEC in support of the Loan Repayment Limits—e.g., academic articles that remain ambiguous on relevant factual issues, media conjecture, and self-serving government polls, J.S. App. 27a-28a—cannot hold up under close scrutiny. At the same time, examples of lax scrutiny in cases from other circuits show that guidance from this Court is warranted.

The FEC asserts that the record establishes that post-election contributions pose a "special risk" in that they are more likely to corrupt than pre-election contributions, and that using them to repay loans by a candidate exacerbates that risk. This assertion depends heavily on the FEC's contention that repaying a loan is functionally equivalent to giving a gift, and that such repayment increases a candidate's personal wealth. The analogy fails. Except to the extent of any interest charged (which is capped at a commercially-reasonable rate), repayment of a loan does not put new

money in the recipient's pocket, but simply replaces money taken out of that pocket earlier.

The FEC also tries to leverage (purported) evidence of the appearance of influence and access into the appearance of quid pro quo corruption. With this case, the Court can continue to make clear that influence and access are vital to a representative democracy, and not allow misguided public concern about them to substitute for evidence of a legitimate governmental interest.

To make up for evidentiary shortcomings, the FEC urges this Court to defer to Congress' judgment regarding the Loan Repayment Limit. The constitutional rationale for doing so is that the separation of basic governmental functions among the three branches means that courts lack the authority or legitimacy to second-guess legislative actions. However, like much of the Bill of Rights, the First Amendment removes certain issues from the political arena, and the free speech rights of individuals are not subject to the whims of the majority. Thus, the judiciary must independently assess claims that such fundamental rights are being violated, even when such violations are tolerated (or even favored) by political majorities.

Finally, *Buckley*'s contribution/expenditure distinction has, over time, become so overlayered with conflicting caselaw that its utility has greatly diminished. Lower courts would be helped by a reminder that they must focus on the real world effects of restrictions

on political speech, and avoid getting lost in the weeds of this legal construct.

## ARGUMENT

### I. THE DISTRICT COURT'S DECISION REFLECTS THE RIGOR THAT CLOSELY DRAWN SCRUTINY REQUIRES.

The District Court's decision illustrates that, done properly, closely drawn review of contribution limits is extremely rigorous, even if it is less so than strict scrutiny. Although this Court has described intermediate scrutiny generally as "midway between the 'strict scrutiny' demanded for content-based regulation of speech and the 'rational basis' standard that is applied . . . to government regulation of nonspeech activities," *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 796 (1994) (Scalia, J., concurring in part), closely drawn scrutiny specifically resembles strict scrutiny much more closely than mere rational basis review, *see Riddle v. Hickenlooper*, 742 F.3d 922, 931 (10th Cir. 2014) (strict and closely drawn scrutiny are "pretty close but not quite the same thing") (Gorsuch, J. concurring) (citation omitted). Both strict and closely drawn scrutiny can only be justified by a governmental interest in preventing quid pro quo corruption, and both turn on the fact-intensive issue of whether a restriction "fits" the asserted risk. *McCutcheon*, 572 U.S. at 199 ("regardless whether we apply strict scrutiny or *Buckley*'s 'closely drawn' test, we must assess the fit between the stated governmental objective and the

means selected to achieve that objective") (citations omitted). By contrast, a court need not even look to the evidentiary record for rational basis review. *See FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993) ("a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data").

The inquiry by the District Court—"whether experience under the present law confirms a serious threat of abuse," J.S. App. 31a—is straightforward, and goes to the heart of the evidentiary matter. The specter of quid pro quo corruption that the FEC claims is presented by unrestricted loan repayments simply does not comport with the record. For example, the District Court noted that although many states impose no loan repayment limits whatsoever, the FEC could not identify a single instance of actual quid pro quo corruption due to a lack of limits in those states. J.S. App. 23a-24a & n.7. The absence of examples of the specific kind of corruption that the FEC warns about severely undermines its position. *See McCutcheon*, 572 U.S. at 209 n.7 ("The Government presents no evidence concerning the circumvention of base limits from the 30 States with base limits but no aggregate limits.").

The District Court recognized that loans by candidates to their own campaigns are a form of self-financing, and the First Amendment allows candidates to self-finance without monetary limits. App. 7a. As in *Davis v. FEC*, 554 U.S. 724 (2008), any governmental interest in "leveling the playing field" between wealthier candidates who can more easily lend to their

campaigns and their less wealthy opponents did not justify the Loan Repayment Limit. This Court has "soundly rejected a cap on a candidate's expenditure of personal funds to finance campaign speech." *Davis v. FEC*, 554 U.S. 724, 738 (2008); *see also Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 736-37 (2011).

### A. The purported analogy between the Loan Repayment Limit and gift bans does not support an additional layer of contribution restrictions.

Citing *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377 (2000), the FEC argues that repayment of a loan is the functional equivalent of a gift, which eases the government's evidentiary burden. FEC Br. at 43-44. In *Shrink Missouri*, the Court stated that it had "never accepted mere conjecture as adequate to carry a First Amendment burden," but that the "quantum of empirical evidence needed to satisfy a heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justifications raised." *Shrink Missouri*, 528 U.S. at 391–92.

Deterring corruption arising out of contributions made in the promise of a quid pro quo is neither novel nor implausible but, as the District Court recognized, that interest is already addressed by base limits on contributions generally. J.S. App. at 34a. Any additional layer of contribution limits on top of base limits must be justified with a separate showing of how it

"'serve[s] the interest in preventing the appearance or actuality of corruption.'" *Id.* (quoting *Holmes v. FEC*, 875 F.3d 1153, 1161 (D.C. Cir. 2017) (en banc) (cleaned up)). Furthermore, such a "prophylaxis-upon-prophylaxis" approach requires that a court "be particularly diligent in scrutinizing the law's fit." J.S. App. 34a & n.10 (quoting *McCutcheon*, 572 U.S. at 221 (cleaned up)).

For the additional, separate interest served by the Loan Repayment Limit, the FEC also relies on the claimed equivalency between helping to repay a loan and giving a gift: "Contributions that repay a candidate's personal loans pose a heightened risk of corruption because, like gifts, and unlike routine contributions, they add to the recipient's personal wealth." FEC Br. at 10; *see also id.* at 34-35, 42. The FEC considers the loan in hindsight only, after the political speech it finances has occurred and all that remains is repayment. *See*, *e.g.*, FEC Br. at 36. As the District Court observed, however, by "narrowly focus[ing] on the repayment of the loan," the FEC "overlooks the reality of how the limit functions." J.S. App. 18a.

An ex ante analysis of the Loan Repayment Limit is more appropriate under the First Amendment because campaign expenditures and other protected activity occur *before* an election, when the loan is made. Thus, for example, the FEC's claim that the base limits are inadequate to counter the "heightened risk" because they only address "the more typical circumstances where the contributions will be used for

campaign-related activities," FEC Br. at 41, ignores the pre-election activity financed by the loan.

Another fundamental difference between the Loan Repayment Limit and gift bans is that while an officeholder's personal assets are never at stake when he or she receives a gift, candidates risk their own money when they lend it to their campaigns, as there is no guarantee that they will ever be repaid (let alone win the election). In addition, gifts have little-to-nothing to do with activity that is encouraged by the First Amendment—namely, promoting political speech in the electoral process. *See United States v. Ring*, 706 F.3d 460, 466 (D.C. Cir. 2013) ("The First Amendment interest in giving hockey tickets to public officials is, at least compared to the interest in contributing to political campaigns, de minimis.").

The FEC contends that repaying a loan enriches the lender regardless whether the contribution is made before or after the election, and that "[t]he post-election context magnifies that risk of corruption." FEC Br. at 10; *see also id.* at 47 (a "pre-election contribution usually will not add to the candidate's personal wealth; a post-election contribution that repays personal loans will"). This misunderstands the nature of candidate loans.

A candidate may make loans from personal funds to his or her campaign committee on an interest-bearing or interest-free basis and subject to FEC reporting requirements. *See* FEC Adv. Op., No. 1986–45, 3 (1987). If a candidate chooses not to charge interest, he or she

loses the time value of their money, even if the loan is fully repaid. If a candidate charges interest, the rate cannot exceed a commercially reasonable rate and must be otherwise lawful under state usury laws and similar statutes. *See id.* at 4 n.7. Thus, any return on a loan has a reasonable ceiling, and there is no evidence that candidates increase rates after an election.

Even assuming post-election contributions have some greater non-monetary impact, as the FEC contends, there is no evidence that they pose "a special risk of *corruption*," as the FEC also contends. FEC Br. 39 (emphasis added). It seems equally plausible that candidates may have less regard for "fair weather fans" who only donate after they have already been elected, reducing the influence of those contributions.

Notwithstanding a few media anecdotes to the contrary, *see* FEC Br. at 37, it is highly doubtful that candidates for political office anticipate making a profit off of personal loans to their campaigns, or that such a practice is breeding real corruption. Rather, the Loan Repayment Limit is a restriction on constitutional rights still in search of some valid, non-redundant justification.

### B. Lacking evidence of actual quid pro quo corruption, the FEC improperly rests on a showing of its appearance.

Despite being recited alongside actual quid pro quo corruption since *Buckley*, the interest in deterring the appearance of such corruption is much less defined.

Most notably, the line between the appearance of influence over or access to elected representatives, which is constitutionally protected and vital to a democracy, *see Citizens United v. FEC*, 558 U.S. 310, 359 (2010); *McConnell v. FEC*, 540 U.S. 93, 296-97 (2003) (Kennedy, J., concurring in part), and the appearance of corruption, is murky. In fact, politicians who make themselves accessible to constituents and are open to their concerns may well be more likely to win elections, and in any event, such responsiveness should not be discouraged. It would seem virtually impossible to distinguish between the appearance of quid pro quo corruption and the appearance of influence over or access to elected representatives.

Furthermore, the appearance standard means that First Amendment rights can be restricted even where no corruption in fact exists, merely some widely-held (mis)perception that it does. This real possibility for actual, unjustified infringement should be troubling, and supports exhaustive judicial scrutiny of any limitation based on public perception. At the least, the government should not be able to leverage the appearance of constitutionally-protected activity into an appearance of unprotected activity, as the FEC seeks to do here.

Because of its lack of definition, courts struggle with how appearance of corruption can be established as an evidentiary matter, and circuits use different standards. Some require a robust record of actual quid pro quo corruption and a reasonably-justified public perception of that corruption, *see*, *e.g.*, *Wagner v. FEC*, 793 F.3d 1, 10-21 (D.C. Cir. 2015) (upholding ban on

contributions by government contractors after comprehensive review of relevant federal regulatory history, current state statutes, and concrete examples of targeted corruption); *Green Party of Connecticut v. Garfield*, 616 F.3d 189, 200-07 (2d Cir. 2010) (upholding ban on contributions by government contractors after recent series of bribes-for-contracts scandals, but striking down similar ban on lobbyists, which industry had nothing to do with scandals), while others allow the mere risk that a perception of influence or access exists to justify limitations, *see*, *e.g.*, *Lair v. Motl*, 873 F.3d 1170, 1177-80 (9th Cir. 2017) (reversing district court decision, which held that appearance could not be present where evidence only showed quids that were either rejected or unlikely to have any effect). The District of Columbia and Second Circuits better protect against misleading evidence of appearance, and should set the standard followed in all circuits.

Consistent with *Wagner*, the District Court scrutinized the FEC's evidence here, which primarily consisted of a YouGov poll commissioned by the FEC. FEC Br. at 42-44. The poll is weak, and indicative of the government's evidence generally.

The poll "showed that 81% of respondents stated that they considered it 'likely' or 'very likely' that a person who donates money to a campaign after the election expects a political favor in return." FEC Br. at 39 (citing J.A. 351). The poll asked only three questions, drafted by the FEC itself; none asked whether respondents believed actual corruption was occurring, and two sought only their beliefs about contributors'

expectations of "political favors." J.S. App. 27a-28a. Even the pollster who conducted the survey conflated access to elected representatives with corruption and opined at her deposition that respondents would do similarly, testifying that "this whole topic is incredibly complex for the average American." J.A. 355. Significantly, there is no indication that as a result of their perceptions about the effect of post-election contributions, the 81% stopped voting or otherwise lost faith in American democracy, which is the ultimate harm targeted by the interest in deterring an appearance of corruption. *See Citizens United*, 558 U.S. at 360; *McConnell*, 540 U.S. at 144.

The District Court properly gave the FEC's poll no weight, stating that its "generic questions do not get at the specific problem of quid pro quo corruption the government asserts this statute combats." J.S. App. 28a. Other courts should follow the District Court's lead when faced with feeble evidence of an appearance of corruption.

Poll questions about "political favors" do little to establish the appearance of "a direct exchange of an official act for money." *McCutcheon*, 572 U.S. at 192 (citing *McCormick v. United States*, 500 U.S. 257, 266 (1991)); *see also Green Party*, 616 F.3d at 206-07 (rejecting finding of appearance based on "evidence suggesting that many members of the public generally distrust lobbyists and the 'special attention' they are believed to receive from elected officials"). Like, for example, "dark money," "political favors" is a loose, nebulous term that partisans wield against their opponents

in political debate, but it should not be the legal basis for shutting down that debate.

In their methodology, sampling decisions, and phrasing, polls can easily be designed to elicit support for a particular position. The FEC here was no less interested in achieving a particular result than are parties that commission such skewed polls generally. This Court should view with appropriate skepticism the government's practice of commissioning polls to develop evidentiary support for restricting fundamental rights. The fact that the FEC believed it needed to commission a poll admits its lack of faith in the adequacy of its evidence to satisfy constitutional scrutiny.

### C. Some lower courts fail to apply closely drawn scrutiny with the same rigor as the District Court.

The District Court's decision stands in useful contrast to examples of the closely drawn standard's misapplication, and serves as a model for other courts presented with limitations on campaign contributions.

The District of Columbia Circuit's decision in *Libertarian Nat'l Comm., Inc. v. FEC* ("*LNC*"), 924 F.3d 533 (D.C. Cir.) (en banc), *cert. denied*, 140 S. Ct. 569 (2019), provides one such example. In *LNC*, the court held that, inter alia, a two-tiered contribution scheme created by the Federal Election Campaign Act—which set separate limits on annual contributions to political parties for general purposes and for specified purposes (e.g., presidential nominating conventions), which were to

be kept segregated—did not violate the First Amendment because the limits were closely drawn to the government's anticorruption interest. However, two forceful dissents raised serious questions about the majority's application of closely drawn scrutiny.

Dissenting in part, Judge Griffith wrote that to show alleged corruption-related differences between general and segregated contributions justifying the separate limits, the government had presented only "an ambivalent record." *Id.* at 554 (Griffith, J., concurring in part and dissenting in part) (citing *McCutcheon*, 572 U.S. at 217). For example, the majority had drawn inferences in favor of the government that lacked evidentiary support and had relied on self-serving assertions in the legislative history by representatives of the two major parties. *Id.* at 554-55. Thus, he concluded, "the government has not carried its burden of showing that the two-tiered scheme is closely drawn to serve anticorruption interests." *Id.* at 556.

In a separate partial dissent, Judge Katsas (joined by Judge Henderson) observed that in *McCutcheon*, "the plurality sought to minimize the differences between strict and closely drawn scrutiny . . . in the face of a continuing call for strict scrutiny" of contribution limits by several Justices dating back to *Buckley* itself. *Id.* at 559 (citations omitted). "Given this longstanding debate over whether closely drawn scrutiny sets the bar too low, it is quite a stretch to posit that, here, it sets the bar too high," as the government argued. *Id.*

Like the District Court here, both dissents closely followed *McCutcheon*, with Judge Griffith emphasizing the need for close scrutiny of the evidence presented to support restrictions on political speech, and Judge Katsas pointing out that contribution limits were not subject to "less-than-intermediate scrutiny" and, if anything, closely drawn scrutiny was similar in rigor to strict scrutiny. *Id.*

Another example of the closely drawn standard's misapplication comes from *Lair*, where the court held that Montana's campaign contribution limits were closely drawn to further the state's interest in preventing quid pro quo corruption.[2] Dissenting, Judge Bea explained that the majority failed to recognize that this Court had "narrowed what can constitute a valid important state interest . . . to only the state's interest in eliminating or reducing quid pro quo corruption or its appearance." *Lair*, 873 F.3d at 1188 (Bea, J., dissenting). Thus, "[t]he mere prevention of influence on legislators by contributors is now *not* a valid important state interest that could justify campaign contribution limits." *Id.* (citations omitted). Further, on close examination of the record, Judge Bea found no "evidence of exchanges of dollars for political favors—much less for any actions contrary to legislators' obligations of office—or any reason to believe the appearance of such exchanges will develop in the future." *Id*. at 1189. The

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[2] Notably, the *Lair* majority stated repeatedly that to survive closely drawn scrutiny, the statutory limit need only be "adequately tailored" to fit the asserted governmental interest. *Id*. at 1172, 1176, 1187.

government had shown "nothing more than the trading of influence and access," which were not a sufficient government interest and, in fact, were "critical mechanisms through which our political system responds to the needs of constituents." *Id*.

The dissents in *LNC* and *Lair* took a hard, clear-eyed look at whether the government had carried its evidentiary burden, and did not resort to generalized concerns about "money in politics" or "unequal electoral playing fields." Like the District Court decision, these dissents reflect the high level of scrutiny that must be employed in determining whether restrictions on campaign contributions violate the First Amendment rights of donors or recipients. In affirming the decision here, this Court should contrast the District Court's correct approach with the insufficient scrutiny applied elsewhere.

## II. JUDICIAL DEFERENCE TO CONGRESS DOES NOT SAVE THE LOAN REPAYMENT LIMIT.

The FEC asserts that regardless whether the evidentiary record establishes an interest justifying the Loan Repayment Limit, "this Court owes deference to the legislative judgment that the practices targeted by the loan-repayment limit pose a special risk of corruption." FEC Br. 39. Citing *Turner Broad. Sys. Inc. v. FCC*, 520 U.S. 180 (1997) ("*Turner II*"), the FEC contends, "[e]ven in First Amendment cases, a court owes 'substantial deference to the predictive judgments of

Congress.'" The FEC goes on to say, "That deference rests in part on 'respect' for Congress as a coordinate branch of government, and in part on the understanding that Congress 'is far better equipped than the judiciary to "amass and evaluate the vast amounts of data" bearing upon' legislative questions.'" FEC Br. 40 (citing *Turner II*, 520 U.S. at 195-96 (citation omitted)). The FEC states that "[d]eference is especially appropriate in the context of campaign finance, 'an area in which [Congress] enjoys particular expertise.'" FEC Br. 40 (citing *McConnell v. FEC*, 540 U.S. 93, 137 (2003)).

Contrary to the FEC's assertion, however, the judicial obligation to defer to Congress recedes when constitutionally-protected rights are at issue. *See*, *e.g.*, *Gonzalez v. Carhart*, 550 U.S. 124, 165 (2007) ("The Court retains an independent constitutional duty to review [Congress'] factual findings where constitutional rights are at stake.") (citing *Crowell v. Benson*, 285 U.S. 22, 60 (1932)); *Randall v. Sorrell*, 548 U.S. 230, 248 (2006) (noting that despite state legislators' expertise regarding "the costs and nature of running for office," courts must conduct an independent review of the factual record to determine whether campaign contribution limits violate First Amendment); *Sable Commc'ns of California, Inc. v. FCC*, 492 U.S. 115, 129 (1989) ("deference to a legislative finding cannot limit judicial inquiry when First Amendments rights are at stake") (citing *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978))). As the District Court recognized in rejecting this argument, "courts

cannot rubber stamp congressional preferences when important First Amendment interests are at stake." J.S. App. 36a.

Certainly, when Congress exercises its Article I authority over, for example, national defense or military affairs, the need for judicial deference is "at its apogee." *City of Boerne v. Flores*, 521 U.S. 507, 531–32 (1997). However, judicial *engagement*, not restraint, is essential when actions by Congress (or the Executive) raise real constitutional concerns.

Although courts "extend[ ] a measure of deference to the judgment of the legislative body that enacted the law" limiting contributions, *Davis*, 554 U.S. at 737, they should not remain supine in the face of the legislative record, and have "no alternative to the exercise of independent judicial judgment as a statute reaches [the] outer limits" of permissible regulation, *Randall*, 548 U.S. at 249; *see also Ariz. Free Enter. Club*, 564 U.S. at 753-54 (while "the wisdom of" a campaign finance statute "is not our business[,] . . . determining whether laws governing campaign finance violate the First Amendment is very much our business"). Considering the dearth of meaningful evidence, the District Court properly gave little weight to senatorial suppositions in the legislative history about the hypothetical effects of the Loan Repayment Limit. J.S. App. at 27a-28a.

In avoiding infringement on free speech, the government should "err on the side of caution" not merely out of prudence, but because the Constitution requires it to do so; when the political branches transgress such

constitutional boundaries, the judiciary must enforce them. The First Amendment largely removes decisions about free speech from the political arena. It is the role of the judicial branch to assess independently claims that such fundamental rights are being violated, regardless whether the violations are accepted (or even favored) by political majorities. Any "tie" between a legislative goal and a constitutional imperative goes in favor of the latter. *See FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 469 (2007) (Roberts, C.J., controlling opinion) (citation omitted).

Finally, *Turner II* does not support judicial restraint here. That decision must be considered in conjunction with the case's first iteration, *Turner Broad. Sys. Inc. v. FCC*, 512 U.S. 622 (1994) ("*Turner I*"). *Turner I* and *II* arose out of litigation over the "must carry" provisions of the 1992 Cable Television Consumer Protection and Competition Act, which required cable television providers to devote a certain number of their channels to local broadcast stations. Neither case involved political speech; rather, the First Amendment issues centered on whether provisions of the Act were content-neutral as between broadcasters and the cable operators who brought the challenge, and the competing economic interests of the two groups.

*Turner I* applied an intermediate level of scrutiny and, rather than passively deferring, cautioned,

> That Congress's predictive judgments are entitled to substantial deference does not mean, however, that they are insulated from

> meaningful judicial review altogether. On the contrary, we have stressed in First Amendment cases that the deference afforded to legislative findings does "not foreclose our independent judgment of the facts bearing on an issue of constitutional law."

512 U.S. at 666 (plurality) (citations omitted). Finding that the record failed to establish that Congress could reasonably infer that the must carry provisions were narrowly tailored, *Turner I* remanded the case.

Unlike the *Turner* cases, the instant one involves limitations on speech at the core of the First Amendment. And even in *Turner II*, deference was only given after the record was more fully developed on remand and several more years of judicial fact-finding.

## III. THIS COURT SHOULD CAUTION AGAINST OVERRELIANCE ON *BUCKLEY*'S SOFT DISTINCTIONS AND EMPHASIZE THAT A COURT MUST FOCUS PRIMARILY ON THE REAL WORLD EFFECT ON POLITICAL SPEECH.

Since *Buckley*, campaign finance caselaw has relied heavily on that decision's distinction between contributions and expenditures, and the differences in how restrictions on each regulatory target are treated under the First Amendment. *Buckley*'s distinction may serve as a useful, heuristic tool for the ultimate purpose of determining when campaign finance restrictions overcome the heavy presumption in favor of free political speech. But the distinction is not an end

in itself, and can even lead to confusion at times. Indeed, in an appropriate case, this artificial distinction should be reconsidered. *See McCutcheon*, 572 U.S. at 228 (Thomas, J., concurring). In the meanwhile, courts should guard against an overreliance on the contribution/expenditure distinction.

*Buckley* constructed an elaborate theory based on the notion that the speech interests inherent in contributions were weaker than those in expenditures, because contributions were only symbolic "speech by proxy" and the contributor was merely expressing his or her political support; a specific dollar limit did not prevent the contributor from achieving this form of expression. *Buckley v. Valeo*, 424 U.S. 1, 20-21 (1976). This distinction's shortcomings, *see McCutcheon*, 572 U.S. at 228-32 (Thomas, J., concurring), are readily apparent in the context of this case.

For example, the Loan Repayment Limit does in fact affect political speech, which should be the bottom line in any constitutional analysis. Contributions to a political campaign promote more expenditures by that campaign, which results in more political speech. *See* J.S. App. 19a (acknowledging the "reality that contributions and expenditures are often 'two sides of the same First Amendment coin'") (quoting *Buckley*, 424 U.S. at 241 (Burger, C.J., concurring in part and dissenting in part)). The District Court recognized that, associational rights aside, laws that disincentivize candidates from loaning money to their campaigns will result in less political speech. J.S. App. 19a; *see also Republican Nat'l Comm. v. FEC*, 698 F. Supp. 2d

150, 156 (D.D.C.) ("To be sure, every limit on contributions logically reduces the total amount that the recipient of the contributions otherwise could spend."), *aff'd without opn.*, 561 U.S. 1040 (2010). Simply because a restriction may reduce political speech only indirectly, like the Loan Repayment Limit does, does not mean that rigorous First Amendment scrutiny is not required.

The District Court acknowledged the limitations of *Buckley*'s distinctions and focused "on speech interests more generally." *See* J.S. App. 12a. It recognized that in more recent decisions like *McCutcheon* and *Davis*, this Court "has emphasized the central question of whether and how a challenged regulation burdens political speech." J.S. App. at 13a.

The constitutionality of restrictions on political speech should not turn entirely on intricate judicial constructs like multifactor analyses or balancing tests. *See Wisconsin Right to Life*, 551 U.S. at 469 (citation omitted) (standard of review for challenge to free speech restriction "must eschew 'the open-ended rough-and-tumble of factors,' which 'invit[es] complex argument in a trial court and a virtually inevitable appeal'"). The First Amendment, traditionally understood, provides the lodestar for courts to follow—namely, political speech must be largely unfettered by regulation—and any analysis must begin with that premise before delving into whether the challenged regulation relates to contributions or expenditures.

Lastly, emphasizing the primacy of a regulation's effect on political speech over difficult distinctions between contributions and expenditures helps to simplify the analysis. As with *McCutcheon*'s confirmation that quid pro quo corruption or its appearance is the sole interest that justifies contribution limits consistent with the First Amendment, *McCutcheon*, 572 U.S. at 207-08, clarifying the complex law of campaign finance whenever feasible will help to improve its understanding by lower courts, potential litigants, political candidates, and legislators.

## CONCLUSION

For the foregoing reasons, this Court should affirm the District Court's decision.

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Respectfully submitted,

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