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 AMICUS CURIAE OF INSTITUTE FOR FREE SPEECH IN SUPPORT OF APPELLEES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

CONSTITUTION, STATUTES, AND RULES

INTEREST OF AMICUS CURIAE[1]

The **Institute for Free Speech** ("IFS") is a nonpartisan, nonprofit § 501(c)(3) organization that promotes and protects the First Amendment political 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 raising First Amendment objections to the regulation of core political activity.

SUMMARY OF ARGUMENT

This appeal presents the Court with an opportunity to remind an important audience beyond the parties to the case, through a brief memorandum opinion accompanying summary affirmance, of two fundamental principles for campaign finance. First, although the distinction between "contributions" and "expenditures" in campaign finance law may be a helpful construct, it is not an end in itself; rather, a court must maintain its focus on the real world effect of

[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.

the restriction at issue on political speech. Second, although less rigorous than strict scrutiny, closely drawn scrutiny requires that a court assiduously vet the justifications and evidence offered by the government in support of limits on campaign contributions.

These two fundamental principles were made manifest by the District Court's decision striking down the loan repayment limitation (the "Loan Repayment Limit") contained in 52 U.S.C. § 30116(j), Section 304 of the Bipartisan Campaign Reform Act of 2002. The decision should be summarily affirmed, and plenary consideration is not warranted.

However, the audience for a summary affirmance with no explanation whatsoever would likely be limited to the parties only. A brief memorandum opinion reiterating one or both of the two fundamental principles will ensure that the decision holds clear precedential value for lower courts, candidates, legislators, and others who are potential parties or otherwise interested in campaign finance law. This, in turn, will reduce the possibility of needless direct appeals to this Court in the future.

ARGUMENT

I. A brief explanation of the grounds for summary affirmance will benefit lower courts, potential litigants, and the public.

The Loan Repayment Limit was, as the District Court noted, "a somewhat obscure campaign finance

restriction." App. 6a. In addition, appellant the Federal Election Commission (the "FEC") raises issues that are insubstantial, and that neither implicate a circuit conflict, *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 392 (1988), nor raise any noteworthy issue, *American Commercial Lines, Inc. v. Louisville & N. R. Co.*, 392 U.S. 571, 574 (1968). Thus, full plenary review by this Court of the District Court's decision is not warranted, and summary affirmance is appropriate. At the same time, a brief explanation from this Court of its reasons for affirming will benefit lower courts, future litigants, and others.

"When we summarily affirm, without opinion . . . we affirm the judgment but not necessarily the reasoning by which it was reached." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (citation omitted). Summary affirmances carry some weight, but "they are not of the same precedential value as would be an opinion of this Court treating the question on the merits." *Edelman v. Jordan*, 415 U.S. 651, 671 (1974). Thus, "[a]n unexplicated summary affirmance settles the issues for the parties," but may not provide much guidance to anyone else. *Mandel*, 432 U.S. at 176 (citation omitted). Furthermore, summary affirmances must be read with care because they "extend only to 'the precise issues presented and necessarily decided' " in the actions they affirm. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 499 (1981) (quoting *Mandel*, 432 U.S. at 176).

Here, the District Court produced a well-reasoned decision that exemplifies proper application of the closely drawn scrutiny test. However, the decision and, more importantly, its reasoning, will receive less

weight from nonparties if it is summarily affirmed without at least some discussion. *Mandel*, 432 U.S. at 176 ("Because a summary affirmance is an affirmance of the judgment only, the rationale of the affirmance may not be gleaned solely from the opinion below.").

To offer clear guidance to others besides the parties, and to avoid the risk of confusing that broader audience, some explication is appropriate. A short memorandum opinion could identify the primary basis for affirming the District Court or include a case cite or two signaling which precedent dictated the outcome, thereby helping to resolve (and perhaps preempt) future campaign finance litigation. In addition, a brief opinion would help to minimize the possibility for any disconnect between campaign finance law as announced by this Court and as applied by lower courts, as the Court has observed with regard to other constitutional rights. *See*, *e.g.*, *New York State Rifle & Pistol Ass'n v. City of New York*, 140 S. Ct. 1525, 1527 (2020) (Kavanaugh, J., concurring) (expressing "concern that some federal and state courts may not be properly applying *Heller* and *MacDonald*"); *id.* at 1544 (Alito, J., dissenting) (same); *see also Thompson v. Hebdon*, 140 S. Ct. 348, 350 & n.* (2019) (per curiam) (vacating and remanding where appeals court "declined to apply" recent Supreme Court precedent for campaign finance restrictions).

II. 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 v. Valeo*, 424 U.S. 1 (1976) (per curiam), 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 distinctions may serve as useful, heuristic tools for the ultimate purpose of determining when campaign finance restrictions overcome the heavy presumption in favor of free political speech. But the distinctions are not an end in themselves, and they can even lead to confusion at times. Thus, courts should guard against an overreliance on them.

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*, 424 U.S. at 20-21. This distinction has been criticized, however, *see*, *e.g.*, *McCutcheon v. FEC*, 572 U.S. 185, 228-29 (2014) (Thomas, J., concurring), and its shortcomings are readily apparent.

For example, the Loan Repayment Limit did 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. 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. 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 did, 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* App. 12a. It recognized that in more recent decisions like *McCutcheon* and *Davis v. FEC*, 554 U.S. 724 (2008), this Court "has emphasized the central question of whether and how a challenged regulation burdens political speech." App. 13a.

Given the First Amendment's blunt text ("Congress shall make **no** law . . . "), the constitutionality of restrictions on political speech should not turn entirely on intricate judicial constructs like multifactor analyses or balancing tests. *See FEC v. Wisconsin Right to Life,*

Inc., 551 U.S. 449, 469 (2007) (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 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 actual 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.

III. A brief opinion from this Court will confirm the rigorousness of closely drawn scrutiny, as reflected in the District Court's decision.

Buckley's distinction between expenditures and contributions affects whether a regulation is subject to strict or closely drawn scrutiny, and the application of those standards can complicate the First Amendment analysis further. The District Court, however, avoided

getting lost in the weeds by applying closely drawn scrutiny in a thorough and thoughtful manner with its primary focus on the Loan Repayment Limitation's actual effect on political speech. Its decision should serve as a model for other courts presented with restrictions on contributions.

Indeed, the District Court's decision stands in useful contrast to examples of the standard's misapplication. The D.C. 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 (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 long-standing 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.*

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 v. Motl*, 873 F.3d 1170 (9th Cir. 2017), 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

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[2] Notably, the *Lair* majority stated repeatedly that to survive closely drawn scrutiny, the statutory limit need only be

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." *Id.* at 1188. 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) (emphasis original). 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 government had shown "nothing more than the trading of influence and access," which were not sufficient government interests 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." The 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.

"adequately tailored" to fit the asserted governmental interest. *Id*. at 1172, 1176, 1187.

This Court's clarification that combating quid pro quo corruption or its appearance is the only governmental interest that can justify limits on political speech, *McCutcheon*, 572 U.S. at 207-08, may have been closely drawn scrutiny's most significant development since *Buckley* first announced it. Hewing closely to *McCutcheon*'s approach, App. 10a, the District Court maintained its focus on that interest, and thus its decision is more in keeping with recent precedent than the majorities in *LNC* and *Lair*. Lower courts could use some guidance pointing out that the decision below represents the correct approach to closely drawn scrutiny. A brief memorandum opinion would also minimize the risk of confusion that sometimes arises surrounding the precedential value to be accorded an unexplicated summary affirmance. *See*, *e.g.*, *Ga. State Conf. of NAACP v. Georgia*, 269 F. Supp. 3d 1266, 1278-79 n.7 (N.D. Ga. 2017) (citing cases) (noting that in redistricting challenges, three-judge district courts may "result[] in the slow and incomplete development of a cohesive body of law in voting rights cases," and that summary affirmances may leave "gaps where we have little or incomplete guidance").

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*, 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*, 554 U.S. at 738; *see also Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 736-37 (2011).

In support of the Loan Repayment Limit's constitutionality, the FEC analogizes the measure to restrictions on gifts to public officials. FEC Jurisdictional Statement at 21. However, the analogy does not hold up. An officeholder's personal assets are never at stake when he or she receives a gift, while 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). By "narrowly focus[ing] on the repayment of the loan," the FEC "overlook[ed] the reality of how the limit function[ed]." App. 18a. In addition, unlike campaign contributions, gifts have nothing to do with activity that is encouraged by the First Amendment – namely, promoting political speech in the electoral process.

The District Court's review of the FEC's proffered evidence illustrates the proper application of the closely drawn scrutiny standard. The inquiry by the District Court – "whether experience under the present law confirms a serious threat of abuse," App. 31a – is straightforward and goes to the heart of the evidentiary matter.[3]

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[3] By contrast, the FEC's citations to the stipulated fact that appellees were keenly motivated to challenge the Loan

The specter of quid pro quo corruption that the FEC claimed unrestricted loan repayments presented simply did 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 quid pro quo corruption due to a lack of limits in those states. App., 23a-24a & n.7. The absence of examples of the corruption warned of by the FEC severely undermined 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.").

Thin evidence like that presented by the FEC in support of the Loan Repayment Limits – *e.g.*, academic articles that remain ambiguous on the factual issue relevant to campaign finance law, media conjecture, and self-serving polls commissioned by the government, App. 27a-28a – cannot hold up under close scrutiny. Similarly, 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 v. Sorrell*, 548 U.S. 230, 249 (2006); *see also Ariz. Free Enter. Club*, 564 U.S. at 753-54 (while "the wisdom of" a campaign finance

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Restriction Limit, FEC Jurisd'l Stmt. at 4, 19, have no bearing on whether the limit violates appellees' constitutional rights.

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 effects of the Loan Repayment Limit. App. 27a-28a.

As the District Court recognized, base limits on contributions already exist to prevent quid pro quo corruption. App. 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). In a brief memorandum decision, this Court should confirm that *McCutcheon* requires additional justification for "prophylaxis upon prophylaxis" regulations like the Loan Repayment Limit. App. 34a & n.10.

Closely drawn scrutiny may be somewhat "less rigorous" relative to strict scrutiny, *see McConnell v. FEC*, 540 U.S. 93, 137 (2003), but the District Court's decision illustrates that proper judicial review of contribution limits is nonetheless extremely rigorous as an objective matter. 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 Center*, 512 U.S. 753, 796 (1994), closely drawn scrutiny specifically

resembles strict scrutiny much more closely than mere rational basis review. 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. By contrast, a court need not even look to the evidentiary record for rational basis review. *See FCC v. Beach Communications, 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").

In fact, *McCutcheon* hinted that the boundaries between the standards of review for campaign finance were somewhat permeable:

> [R]egardless 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. Or to put it another way, if a law that restricts political speech does not "avoid unnecessary abridgment" of First Amendment rights, it cannot survive "rigorous" review.

572 U.S. at 199 (citations omitted). In fact, tiered levels of means-end scrutiny may not be appropriate for determining whether any fundamental constitutional rights have been violated. *See Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2328 (2016) (Thomas, J., dissenting) (recognizing "tendency [of courts] to relax

purportedly higher standards of review for less-preferred rights"); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 124 (1991) (Kennedy, J., concurring) (strict scrutiny "has no real or legitimate place when the Court considers the straightforward question [of] whether the State may enact a burdensome [content-based speech] restriction"). The Constitution itself, of course, sets forth no standards of review and, if pushed too hard, the different levels of campaign finance scrutiny collapse onto themselves. A more categorical approach that focuses on the scope of the right to political speech and compares it to the challenged restriction, may be warranted.

Although any change in this Court's campaign finance jurisprudence would require plenary consideration, which is not warranted here, summary affirmance with a brief memorandum opinion offers a relatively painless way to provide needed direction beyond the parties to this case. This Court will doubtless invest some time reviewing the FEC's jurisdictional statement, and it should take the short, additional step of sharing its findings with the public through a brief yet instructive opinion.

CONCLUSION

For the foregoing reasons, IFS respectfully requests that this Court issue a brief opinion setting

forth its reasons for summarily affirming the District Court's decision.

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Respectfully submitted,

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