No. 21-2352

In the United States Court of Appeals for the Third Circuit

NEW JERSEY BANKERS ASSOCIATION,

Appellant / Cross-Appellee,

v.

ATTORNEY GENERAL OF NEW JERSEY,

Appellee / Cross-Appellant.

Appeal from a Judgment of the United States District Court
for the District of New Jersey, the Hon. Brian R. Martinotti
(Dist. Ct. No. 3:18-cv-15725)

BRIEF OF AMICUS CURIAE INSTITUTE FOR FREE SPEECH IN SUPPORT OF APPELLANT/CROSS-APPELLEE NEW JERSEY BANKERS ASSOCIATION

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DISCLOSURE STATEMENT

Counsel for *amicus curiae* certifies that the Institute for Free Speech is a nonprofit corporation, has no parent company, subsidiary, or affiliate, and that no publicly held company owns more than 10 percent of its stock.

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INTEREST OF AMICUS CURIAE[1]

The Institute for Free Speech ("IFS") is a nonpartisan, nonprofit organization dedicated to the protection of the First Amendment rights of speech, assembly, press, and petition. In addition to scholarly and educational work, the Institute represents individuals and civil society organizations in litigation securing their First Amendment liberties.

Challenging unconstitutional contribution bans is a core aspect of the Institute's organizational mission in fostering free speech.

SUMMARY OF ARGUMENT

Industry-specific contribution bans such as New Jersey's directly burden associational rights and are subject to exacting scrutiny, which requires narrow tailoring. The district court erred in applying intermediate scrutiny. The ban is not narrowly tailored to New Jersey's stated anti-corruption interest. A more reasonable and narrowly tailored alternative would apply the same contribution limits to banks as New Jersey already applies to other corporations and labor unions.

[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 provided written consent to the filing of this brief.

ARGUMENT

I. THE DISTRICT COURT ERRED IN APPLYING INTERMEDIATE SCRUTINY WITHOUT EITHER NARROW TAILORING OR A CLOSELY DRAWN FIT.

The district court incorrectly applied what it called "intermediate scrutiny" to evaluate the direct-contribution-ban prong of N.J. Stat. Ann. § 19:34-45, citing to a case involving content-neutral must-carry regulations for cable operators, rather than to the standard for campaign contributions or core political speech. Dist. Ct. Opinion at 18 (citing *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 213-14 (1997)). The court erred, since this case calls for a higher level of scrutiny, between intermediate and strict—one that requires that the state show its industry specific contribution-ban is narrowly tailored to prevent *quid pro quo* corruption.

Lower and appellate courts evaluating direct contribution bans have not always been consistent in nomenclature—sometimes referring to "exacting scrutiny" and sometimes to "closely-drawn scrutiny." IFS submits that these are really one standard, and in light of the Supreme Court's recent decision in *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373 (2021) *("AFPF")*, it is a test that requires more of the government than intermediate scrutiny, if less than strict scrutiny; *cf. Ezell v. City of Chicago*, 651 F.3d 684, 708 (7th Cir. 2011) (requiring "a more rigorous showing than [intermediate scrutiny], if not quite 'strict scrutiny'" in Second Amendment context). Importantly, closely drawn or

exacting scrutiny is distinguished from mere intermediate scrutiny by its emphasis on narrow tailoring.

Lower courts can be forgiven for their confusion, because the Supreme Court has itself been somewhat inconsistent in its scrutiny terminology. This confusion can be traced back to *Buckley v. Valeo,* 424 U.S. 1, 17, 44-45, 64-65 (1976) (per curiam), decided before the court's use of terms such as "strict scrutiny" and "exacting scrutiny" had hardened. Thus, in *Buckley*, the court used exacting scrutiny, across the board, to evaluate an independent expenditure cap, a direct contribution cap, and a disclosure regime.[2]

But the court interchangeably used other terms and descriptions for the scrutiny applied. "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.'" *Id.* at 25 (emphasis added). In applying this "closest scrutiny" the court required the government to "employs means *closely drawn* to avoid unnecessary abridgment of associational freedoms." And while it upheld the contribution cap, the court did so "under the rigorous standard of review established by our prior decisions[.]" *Id.* at 29.

Since then, the court has at times attempted to re-characterize *Buckley* as establishing "a lesser but still 'rigorous standard of review'"

[2] *Buckley* used the phrase "exacting scrutiny" four times. 424 U.S. at 16, 44, 64, 94.

for contribution limits. *See McCutcheon v. FEC*, 572 U.S. 185, 197 (2014) (plurality opinion; quoting *Buckley,* 424 U.S. at 24). But nowhere does *Buckley* actually state that the scrutiny for contribution limits is lesser than for expenditures or disclosure; rather, it simply found that unlike expenditure limits, the contribution limit there had a sufficient fit to the "weighty interests served[.]"

Accordingly, some five years after *Buckley,* the court flatly held "that regulation of First Amendment rights is *always* subject to *exacting* judicial review." *Citizens Against Rent Control/Coalition for Fair Hous. v. Berkeley*, 454 U.S. 290, 294 (1981) (invalidating contribution limits for ballot measures) (emphasis added). "Thus, Berkeley's ordinance cannot survive constitutional challenge unless it withstands 'exacting scrutiny.'" *Id.* at 302 (citing *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 786 (1978)) (Blackmun, J., concurring).

Similarly, when this Court, sitting *en banc,* considered a federal corporate contribution ban in *Mariani v. United States*, 212 F.3d 761, 770 (3d Cir. 2000), it applied exacting scrutiny, and did not call it intermediate scrutiny or something else. This Court explicitly held that a ban on corporate contributions "is subject to the same level of scrutiny as other regulations limiting spending for political campaigns." *Id.*

> Accordingly, in considering Mariani's challenge to [the federal ban on corporate contributions], while *we treat campaign contributions from the corporate treasury as speech and subject the ban on them …to exacting scrutiny*, we do so

> against a background principle that limits on contributions--though not necessarily bans on contributions--can withstand this scrutiny if they are 'closely drawn' to match a 'sufficiently important interest.'"

Id. at 770-71 (emphasis added).

This Court would go on to uphold the contribution ban under *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652 (1990), using the language of "narrow tailoring." *Mariani,* 212 F.3d at 772-73.[3] Thus, this Court used the concepts of "closely drawn" and "narrow tailoring" interchangeably. It follows from *Buckley, Citizens Against Rent Control,* and *Mariani,* that the standard of exacting scrutiny and closely-drawn scrutiny are one and the same. Moreover, to the extent other courts have suggested that the standards differ, or that *Buckley* suggested that they differ, that is a mistake.

The Supreme Court's latest word on exacting scrutiny came just this last term, in *AFPF.* The court corrected years of scrutiny drift, by re-emphasizing the need for narrow tailoring and clearly placing exacting scrutiny above intermediate scrutiny, but below strict scrutiny. Responding to the arguments that, on the one hand, exacting scrutiny

[3] The Supreme Court later overruled *Austin* in *Citizens United v. FEC*, 558 U.S. 310, 365-66 (2010), on the basis that the government "may not suppress political speech on the basis of the speaker's corporate identity."

always required the narrowest possible tailoring, or on the other, that a mere substantial relationship was enough, the majority explained:

> We think that *the answer lies between* those two positions. While exacting scrutiny does not require that disclosure regimes be the least restrictive means of achieving their ends, it does require that they be narrowly tailored to the government's asserted interest.

AFPF, 141 S. Ct. at 2383 (emphasis added).

Among other cases, the Supreme Court relied heavily on *McCutcheon,* which is of note here because it concerned a contribution limit case. *Id.* at 2384 ("Our more recent decisions confirm the need for tailoring"). "A substantial relation is necessary but not sufficient…Where exacting scrutiny applies, the challenged requirement *must* be narrowly tailored to the interest it promotes, even if it is not the least restrictive means of achieving that end." *Id*.

New Jersey may respond by pointing out that *AFPF* was a disclosure case, not one examining a contribution limit or ban, and therefore exacting scrutiny applied there only. But as *Buckley, Citizens Against Rent Control,* and *Mariani* illustrated, exacting scrutiny has long been applied to contribution limits. To be sure, some courts have tried to water down the standard, but to those, *AFPF* represents a course correction. Interestingly, even the *AFPF* dissent recognizes that disclosure limits require "automatic" narrow tailoring for state action

that directly affects associational rights. *AFPF,* 141 S. Ct. at 2373 (Sotomayor, J., dissenting).

To the extent there has been some confusion about the level of scrutiny, we would urge this Court to use *AFPF* as a cue to re-affirm *Mariani's* holding that exacting scrutiny applies to contribution limits, with a focus on narrow tailoring. Lower courts and parties will benefit greatly from terminological consistency in this area.

As the Supreme Court held in *AFPF,* the baseline presumption is that the "government may regulate in the [First Amendment] area only with narrow specificity[.]" *Id.* at 2384 (citing *NAACP v. Button*, 371 U.S. 415, 420 (1963), another non-disclosure case dealing with the right to associate for the purposes of *pro bono* litigation against Jim Crow laws).

But even if this Court calls it "closely drawn" scrutiny, we are not dealing with an intermediate-scrutiny type of rough, open-ended balancing test. Whether one calls it "closely drawn" or "narrow tailoring," it is apparent that fit is important. Moreover, it is questionable that *AFPF*'s import was to elevate disclosure regimes, which indirectly burden associational rights by inviting self-censorship, to a higher level of scrutiny than contribution bans, which directly burden associational rights by banning the expressive conduct of contributing to a candidate.

The Supreme Court requires contribution bans to withstand at least as much scrutiny as disclosure regimes. *AFPF's* re-affirmance of the

need for narrow tailoring creates a minimum tolerance for fit, which all burdens on associational rights must exceed. Regardless of which terminology is used, *AFPF* re-affirmed the importance of fit and raised the floor for all campaign-finance limits to pass constitutional scrutiny.

The district court's opinion did not apply exacting scrutiny, but rather mere intermediate scrutiny. Moreover, it did not adequately consider more narrowly tailored alternatives to a complete contribution ban for banks.

II. NEW JERSEY'S COMPLETE BAN ON DIRECT CONTRIBUTIONS IS NOT NARROWLY TAILORED

New Jersey's flat ban on contributions by banks is too blunt an instrument by which to advance the state's alleged anti-corruption interest, because such an interest can be more narrowly addressed through the application of existing contribution limits for non-bank corporations, labor unions, or government contractors. Moreover, such limits would comport with New Jersey's professed concerns with outsized corporate contributions, which it says motivated the bank ban.

A. The so-called historical incidents of bank corruption relied upon by the district court would involve astronomical sums in today's dollars, far exceeding limits claimed to adequately address corruption.

If any bank contribution, in any amount, were inherently corrupting, such that only a complete ban could advance the state's interests, one would expect the state's asserted incidents of corruption to involve bank

contributions at levels considered acceptable in other contexts. But that is not the case.

In upholding New Jersey's ban, the district court cited several historical instances of bank-involved corruption around the time of the adoption of N.J. Stat. Ann. § 19:34-45. Dist. Ct. Opinion at 32-33. The first involved J.P. Morgan donating $150,000 to President Roosevelt's campaign in 1904, and another similar donation by J.P. Morgan for $48,000. To the best of IFS's knowledge, the precise dates of these donations are not in the record, but if each had been made in September 1913, they would have been worth well over $4 million and $1.2 million, respectively, in September 2021 dollars. *See* CPI Inflation Calculator, U.S. BUREAU OF LABOR STATISTICS, https://bit.ly/3nvYNm2 (last visited November 18, 2021).[4] Thus, the bank contributions that, according to the district court, ostensibly motivated or buttressed the need for New Jersey's flat ban involved what are, by most measures, very large sums of money, both today and back during America's Progressive Era; and

[4] BLS's CPI Calculator only goes back to 1913, so September 1913 was used as the implied original donation date and September 2021 as the current value date. Use of an alternative calculator relying on a historical study shows that the value of 1904 dollars in 2021 would be even higher; that is, well over $4.6 million. *See* Alioth Finance, "$150,000 in 1904 → 2021 | Inflation Calculator." Official Inflation Data (Nov. 22, 2021), https://www.officialdata.org/us/inflation/1904?amount=150000. But the point remains the same: they are huge sums of money, especially when compared to the otherwise applicable donation limits.

far, far higher than the limits that the legislature has determined are necessary to prevent corruption.[5]

B. Reasonable contribution limits applicable to other corporations and unions would be much more narrowly tailored than a complete ban.

Non-bank corporations or labor unions are generally limited to direction donations of $2,600 per election to candidate committees and $37,000 per year for county political party committees. N.J. Stat. Ann. § 19:44A-11.3; Contribution Limits Chart, NEW JERSEY ELECTION LAW ENFORCEMENT COMMISSION, https://www.elec.state.nj.us/forcandidates/elect_limits.htm (last visited November 18, 2021). More stringent contribution limits (effectively $300 per candidate) apply to state contractors under New Jersey's pay-to-play law. *See* N.J. Stat. Ann. § 19:44A-20.14, -20.17.

These restrictions for non-bank corporations are more narrowly tailored alternatives that address New Jersey's interest in preventing *quid pro quo* corruption or the appearance of such corruption. Given that most New Jersey corporations (and unions) can donate directly to candidates, it should be the government's burden here to show why these reasonable limits would not suffice to address the state's anti-

[5] Similarly, the 1908 Pittsburgh city council bribery episode cited by New Jersey would similarly involve six-digit sums far exceeding donation limits. *See* ECF No. 81-1 at 10. Moreover, contributions are not tantamount to bribes.

corruption interest. *See AFPF,* 141 S. Ct. at 2386 ("[California] must instead demonstrate its need for universal production in light of any less intrusive alternatives"). It remains unclear why more modest contributions, acceptable when made by other donors, are somehow corrupting when made by banks.

And if N.J. Stat. Ann. § 19:34-45 was originally motivated by concerns over contributions in excess of $1 million in today's dollars, it would seem that those same concerns would just as easily be addressed by a $2,600 per candidate, per election limit, rather than resorting to the blunt instrument of a complete ban. A $2,600 limit is much closer to a zero dollar limit than it is to $1 million; and readily presents an incrementally less burdensome and more narrowly tailored alternative to the present regime.

The district court mistakenly applied mere intermediate scrutiny and did not apply the narrow tailoring analysis required by *AFPF*. N.J. Stat. Ann. § 19:34-45 fails narrow tailoring because an easy alternative exists: apply the same limits to banks as to almost all other corporations.

CONCLUSION

This Court should reverse the judgement of the district court as to the contribution ban due to a lack of narrow tailoring.

Dated: November 23, 2021

Respectfully submitted,

s/Endel Kolde

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CERTIFICATE OF BAR MEMBERSHIP

I, Endel Kolde, hereby certify that I am a member of the Bar of the United States Court of Appeals for the Third Circuit.

Dated: November 23, 2021

s/Endel Kolde

CERTIFICATE OF COMPLIANCE

I, Endel Kolde, hereby certify that:

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Dated: November 23, 2021

s/Endel Kolde

CERTIFICATE OF SERVICE

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