No. 15-

IN THE

Supreme Court of the United States

JAN MILLER,

PETITIONER,

v.

FEDERAL ELECTION COMMISSION,

RESPONDENT.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

52 U.S.C. § 30119 forbids any person seeking or holding any contract with the federal government from making a contribution in any amount to any candidate, political party, or political committee in connection with a federal election. The principal justification for the contribution ban is that it prevents quid pro quo corruption or its appearance. However, section 30119 expressly allows corporate contractors to create captive political committees to make contributions within the limits prescribed by law that the corporation cannot make. The law also permits a corporate contractor's officers and shareholders to make such contributions. In addition, individuals seeking or holding government grants are not subject to this ban, nor are federal employees or individuals who raise vast sums of money in the hope of obtaining high-level federal jobs. The question presented is:

Is the ban on contributions in 52 U.S.C. § 30119, as applied to individuals such as petitioner and the other plaintiffs, sufficiently tailored to meet the requirements of the Equal Protection component of the Fifth Amendment and the First Amendment to the Constitution?

PARTIES BELOW

In addition to the petitioner Jan Miller, Wendy Wagner and Lawrence Brown were plaintiffs in the courts below. Both Wagner and Brown held federal contracts when the case was filed, but they had completed their contracts before the court of appeals rendered its decision. The respondent Federal Election Commission was the defendant below and is the only other party in the case.

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The en banc opinion of the court of appeals in *Wagner v. Federal Election Commission*, was issued on July 7, 2015 (App.1-75) and is reported at 793 F.3d 1. The decisions of the district court denying plaintiffs' motion for a preliminary injunction and granting defendant's motion for summary judgment are reported at 854 F. Supp.2d 83 (D. D.C. 2012) and 901 F. Supp.2d 101 (D. D.C. 2012). On appeal, a panel of the court of appeals vacated both decisions, finding that the district court lacked jurisdiction. 717 F.3d 1007 (D. C. Cir. 2013). On remand from the order vacating the prior decisions, the district court certified finding of facts and proposed constitutional questions for the en banc court of appeals to decide. That order is not reported, but is set forth at App.76-93.

JURISDICTION

The original complaint in this action based jurisdiction on 2 U.S.C. § 437(h), now 52 U.S.C. § 30110, and 28 U.S.C. § 1331. The panel of the court of appeals that initially heard this case concluded that section 437(h) provided the exclusive basis for subject matter jurisdiction over the constitutional claims in this case. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

52 U.S.C. § 30119, formerly codified at 2 U.S.C. § 441c, is set forth in full in the Appendix to

this petition. App.94-95. The relevant portion is as follows:

> (a) It shall be unlawful for any person--
>
> **(1)** who enters into any contract with the United States or any department or agency thereof . . . if payment for the performance of such contract . . . is to be made in whole or in part from funds appropriated by the Congress, . . . directly or indirectly to make any contribution of money or other things of value . . . to any political party, committee, or candidate for public office or to any person for any political purpose or use; or
>
> **(2)** knowingly to solicit any such contribution from any such person for any such purpose during any such period.
>
> (b) Separate segregated funds
>
> This section does not prohibit or make unlawful the establishment or administration of, or the solicitation of contributions to, any separate segregated fund by any corporation. . . for the purpose of influencing the nomination for election, or election, of any person to Federal office. . .

INTRODUCTION

Petitioner is a retired federal employee who now works part-time as an individual contractor for his former federal agency. It is a crime for him to contribute even $1 to any federal candidate, party, or committee. The same ban applies to any

individual who has a contract with any branch of the federal government.

The bulk of the opinion below was devoted to establishing that Congress was rightly concerned that, if federal contractors were permitted to make political contributions, that might give the appearance of an improper quid pro quo, and they might be coerced into making such contributions. Plaintiffs have never asserted that those interests are not legitimate nor that the asserted concerns are not realistic. Rather, they have argued that the fit between ends and means was constitutionally inadequate under the "closely drawn" standard that the court of appeals applied to this total ban. The lack of fit is most dramatic with respect to the political committees of major corporate contractors, as well as their officers and shareholders, each of whom is free to contribute up to $3.6 million each to federal candidates and parties in every election cycle. *See McCutcheon v. FEC,* 134 S. Ct. 1434, 1473 (2014) (Breyer, J., dissenting). Similar disparities exist with respect to federal employees who often do the same kind of work as federal contractors in the same office, but are free to make whatever contributions they can afford, as can individuals holding federal grants and those who bundle contributions in the hope of being rewarded with a high federal position. Even if the "closely drawn" standard is applicable to this case, these egregious disparities, as applied to petitioner's right to make federal political contributions, are invalid under Equal Protection and the First Amendment.

STATEMENT OF THE CASE

1. The Applicable Law

In 1940, Congress heard evidence that federal contractors were making political contributions to secure federal contracts, in some cases prompted by forceful requests from those in charge of awarding the contract. In response, it enacted the predecessor of 52 U.S.C. § 30119 (section 30119), under which any person who holds, or is negotiating to obtain, a federal contract is barred from making any contribution in connection with a federal election. As applied to corporate contractors, the ban was redundant since corporations had been forbidden since 1906 from making contributions in federal elections by what is now 52 U.S.C. § 30118. The bill also placed a general limit of $5000 on all federal campaign contributions, but there was no accompanying enforcement mechanism. As authority for the ban, a leading supporter of the bill quoted the famous, but no longer valid, observation of Justice Oliver Wendell Holmes that "[t]here is nothing in the Constitution or the statute to prevent the city from attaching obedience to [a] rule as a condition to the office of policeman. . ." 86 Cong. Rec. 2563 (1940) (quoting *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220 (1892)).

With one important exception discussed below, the contribution ban has remained unchanged. In terms of federal contracts, the numbers, dollar amounts, and uses of federal contractors have exploded, App.40**,** and after World War II the entire process was revamped and made

much more regular and generally based on competitive bidding.[1] To be sure, undue influence and outright criminality can never be eliminated entirely from federal contracting, but the record and the laws establish that the federal system is now merit-based. App.90-91, ¶¶23-24 and sources cited. And most significantly for section 30119, decisions on most contracts are made by agency personnel (as they were for plaintiffs), not by elected officials who might receive campaign contributions, or even by agency heads appointed by the President, let alone by political parties and independent committees that are also covered by the ban. *See* 48 C.F.R. § 1.601(a).

The first comprehensive federal campaign finance law was enacted in the early 1970s. Once the main challenges to the law were resolved in *Buckley v. Valeo,* 424 U.S. 1 (1976), its major components included contribution limits applicable to everyone, public reporting of contributions and expenditures, no limits on candidate spending or on independent expenditures by individuals, and an agency – respondent Federal Election Commission – to enforce the law. However, a very significant change was made to section 30119 in 1976, by adding subsection (b), which permits corporate contractors to create "separate segregated funds" (PACs), that are entitled to make contributions like the PACs of non-contractors. Thus, the PACs of large federal

[1] *See, e.g.,* Armed Services Procurement Act, 10 U.S.C. § 2302 *et seq*; Federal Property and Administrative Services Act, Pub. L. 103-355, Title X; Office of Federal Procurement Policy Act of 1974, Pub. L. 93-400.

contractors like Boeing and IBM, which are controlled by officials of the contracting corporation, may make contributions to members of the relevant congressional committees and candidates for President within the limits of the law, as can their shareholders and officers, including those who negotiate and implement federal contracts. *See* 11 C.F.R. § 115.6. This change, which is at the heart of plaintiffs' case, was disregarded by the court of appeals (App.23, "essential features" of law unchanged since 1940 & App.27, ban left in place, "without change") until it first recognized those exceptions in Part V of its opinion. App.62-63.

Other individuals in comparable situations to individual federal contractors regarding their desire to obtain financial and other benefits from the federal government, have never been subject to the ban. For example, since 1939, the Hatch Act has limited the political activities of many federal officers and employees, mainly to assure that their conduct appears to be apolitical. However, Congress has never prohibited them from making contributions, although there are some restrictions that are mainly of the time, place and manner variety or that are designed to assure that contributions are freely made.[2] In addition, although today the federal government spends

[2] *See* 18 U.S.C. 603; 5 C.F.R. § 734.208(b)(4)(ii); 5 C.F.R. § 734.303(d); 5 C.F.R. § 734.302(b)(3) & 5 C.F.R. § 734.306. There are special rules in 5 C.F.R. § 734.401 for employees of seventeen sensitive agencies, such as the FEC, the FBI, and the CIA, but 5 C.F.R. § 734.404(a)(4) specifically allows even those employees to make contributions.

more money on federal grants than on federal contracts (App.85, ¶21), there is no contribution ban that applies to federal grantees. Nor does a ban or any other special rule apply to "bundlers" who raise large sums of money for candidates and in the hope of being suitably rewarded with an Ambassadorship or other high position for their efforts.

The FEC takes the position that section 30119 also forbids contractors from making independent expenditures, even after *Citizens United, v. FEC,* 558 U.S. 310 (2010). *See* FEC News Release October 5, 2011, note 1, http://www.fec.gov/press/press2011/20111006postcarey.shtml. Because none of the plaintiffs wished to make such expenditures, the legality of the FEC's position on that issue was not addressed below.

2. The Plaintiffs

The three plaintiffs who filed this case are all eligible to vote in Presidential elections and are examples of the thousands of individuals who are subject to the contribution ban. They seek to make contributions in connections with federal elections, subject to the same limits as any other individual, including the requirement that all contributions exceeding $200 be publicly disclosed. 11 C.F.R. § 104.8(a).

Lawrence Brown worked for many years at USAID, and when he retired, he returned to the agency as a contractor. In most respects, his work life was unchanged, except that he could no longer

make contributions for federal elections as he had in the past. He wrote to the FEC, asking for a ruling that, since he was essentially still an employee, he should be allowed to continue to make contributions, subject to the same restrictions as everyone else. The FEC rejected his request, and also informed him that he could not use funds obtained from sources other than his contract to make a contribution. *See* 11 C.F.R. § 115.5. Brown's contract has expired, and he is now a temporary USAID employee, free to make contributions—although he may become a contractor again, if that is what the agency wishes.

Petitioner Jan Miller is also a retired USAID employee, who has a current part-time contract through June 2017, under which he performs somewhat different duties than he did when he was an employee. He also works part-time for the Peace Corps, but there he is an employee. If his only federal position were with the Peace Corps, he would not be subject to section 30119. Both Brown and Miller were hired as contractors under the agency's standard contracting procedures, and no elected official or presidential appointee had any role in the decision to hire them or in supervising their work once hired. Other retirees who return in significant numbers as individual contractors include former FBI agents who continue to perform background investigations. App.85, ¶11.

Plaintiff Wendy Wagner is a professor of law at the University of Texas Law School. She specializes in the relation between science and administrative agency decisions. Because of her

expertise, she was approached by the staff of the Administrative Conference of the United States to prepare a report and assist with a recommendation on that subject. For her 144-page report she was paid $12,000, plus expenses, which made her subject to the contribution ban for the two plus years of her project. ACUS uses both outside consultants like Professor Wagner and its own staff to prepare reports. Paul Verkuil, ACUS's chair, was not involved in her hiring, although she did interact with him in carrying out her project. Professor Wagner also held a federal grant for $475,721 while she had her ACUS contract, App.89, ¶21, but that did not preclude her from making federal contributions. Professor Wagner has no current federal contract, but there are thousands of other individuals who are similarly situated and cannot make even a $10 contribution to a federal candidate, party, or committee. These include expert witnesses in court and agency cases; translators and interpreters; academics with special expertise in all areas in which the federal government operates; and the reporters for all the Rules Advisory Committees under the Judicial Conference.

Individual federal contractors can support federal candidates or political parties by volunteering for them or by speaking out on their behalf. *But see McCutcheon* 134 S. Ct. at 1449 (rejecting such as options as not meaningful for most individuals). More significantly, although the main purpose of the ban is to remove the appearance that a contractor obtained a contract by contributing to a candidate or a party, the law

expressly excludes from the definition of a contribution the holding of a fundraiser for a federal candidate or party, at which large contributions (within the limits of the law) can be collected by the host for the candidate or party. 52 U.S.C. § 30101(8)(B)(ii). That provision also allows the host to spend up to $1000 for food, invitations, etc., while section 30119 forbids him or her from writing a check for even $10.

3. Proceedings Below

The complaint was filed in October 2011, with subject matter jurisdiction based on 28 U.S.C. § 1331 and 2 U.S.C. § 437(h), now 52 U.S.C. § 30110. The complaint alleged that section 30119 violated both the Equal Protection component of the Fifth Amendment and the First Amendment as applied to individual contractors. The parties subsequently agreed that the case could be decided as a federal question case by the district court, with review by a panel of the court of appeals. Plaintiffs unsuccessfully sought a preliminary injunction, after which there was limited discovery. The parties cross-moved for summary judgment, largely based on an agreed set of facts, and the district court upheld the statute.

Plaintiffs appealed, but the court of appeals held that 52 U.S.C. § 30110 provided the exclusive method by which a challenge such as this could be brought and dismissed the appeal, remanding the matter to the district court to make the appropriate findings. The case was set for en banc argument in September 2013, but the court postponed

argument pending this Court's decision in *McCutcheon supra.*

After *McCutcheon* was decided, the parties filed supplemental briefs, and the case was re-set for en banc argument. However, in the interim, plaintiffs Wagner and Brown completed their contracts.

On July 7, 2015, the court of appeals unanimously upheld section 30119 in an opinion by Chief Judge Garland. Much of the opinion was devoted to showing that avoiding corruption and its appearance was the principal purpose of the ban and that the anti-corruption concern is still valid. Very little attention was given to the lack of connection between recipients of federal contributions and the contracting process, in which elected officials have no formal involvement, or to the protections now afforded under federal contracting law that were not available in 1940. Nor did the court discuss the relevance of the advent of a major new system of campaign finance regulation in the 1970s to the ban that had been enacted more than 30 years before. The opinion also supported the law by pointing to the need to prevent contractors from being coerced into contributing (App. 16, 42, 44,) even though coercion of political contributions generally, and solicitation of federal contractors specifically, are already prohibited by law. *See infra,* at 24-25. Moreover, this Court's decision in *McCutcheon*, 134 S. Ct. at 1450, which the opinion below cited more than a dozen times, specifically stated that it "has identified only one legitimate governmental

interest for restricting campaign finances: preventing corruption or the appearance of corruption." [3]

Because they were challenging a ban, not a contribution limit, plaintiffs asked the court to apply strict scrutiny, but the court of appeals rejected that request, relying on *FEC v. Beaumont*, 539 U.S. 146 (2003). The *Beaumont* Court applied the closely drawn standard in holding that a non-profit corporation, which had a PAC and could make independent expenditures, could be precluded from making contributions. The court also disagreed with plaintiffs' reliance on the portion of this Court's opinion in *McConnell v. FEC,* 540 U.S. 93, 231-32 (2003), in which it struck down a ban on contributions by individuals under the age of 18, even though, unlike plaintiffs here, those plaintiffs (and the corporation in *Beaumont)* were not eligible to vote.

The court of appeals did note that *Beaumont* stated that "[i]t is not that the difference between a ban and a limit is to be ignored; it is just that the time to consider it is when applying scrutiny at the level selected, not in selecting the standard of review itself." *Id.* at 162. There is, however, no evidence that the court carried out that mandate,

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[3] As justification for the ban, the court also cited "merit-based public administration," which it described as including assuring efficiency in government. App.15. Efficiency seems directed at an individual's job performance, but the ban mainly applies off the job. To the extent that efficiency assures that contracts are not affected by contributions, that interest merges with the corruption justification and will not be discussed further.

nor is it clear how that kind of adjustment would fit within the existing "closely drawn" standard that the court did apply. And when the court did apply that standard, it cited *McCutcheon,* even though this Court had rejected aggregate limits on contributions because of a lack of a close fit, thereby permitting the plaintiff in *McCutcheon* to make over $3 million in annual contributions, while plaintiffs here can make none.

On the question of whether the ban was closely drawn, plaintiffs offered many examples of more closely drawn limits on contributions by federal contractors, some taken from the very SEC rule and state laws that the court of appeals relied on to sustain the ban. These included excluding small dollar contracts, allowing smaller contributions only, limiting bans to contributions to officials with power to enter into contracts, excluding contractors who function like employees, and allowing contributions to independent political committees and/or minor parties and candidates who have no possible connection to the contracting process. All of these exceptions have one feature in common: they leave in place the law as applied to situations for which its rationale is strongest, while at the same time excluding from the ban contributions that cannot reasonably be thought to raise even the specter of corruption.

To the extent that the court below dealt with them, it did so mainly by finding fault with each as an alternative, without examining whether their use could significantly lessen the impact of the ban with little loss of its goals. In particular, the

plaintiffs had pointed to the SEC's nuanced regulation, sustained in *Blount v. SEC,* 61 F.3d 938 (D.C. Cir. 1995), dealing with the same problem as applied to contracts to sell municipal securities, as an example of a much more finely tuned approach (and also one that did not contain the PAC/shareholder loophole). Plaintiffs recognize that the First Amendment's closely drawn standard does not require that a law be perfectly tailored, but the court of appeals found the fit to be sufficient, relying in part on the SEC rule upheld in *Blount*.

Plaintiffs had focused much of their case on the ability of corporate contractors to create the same reality or appearance of corruption that the contractor ban is supposed to avoid, through the use of corporate PACs, which by law must bear the corporation's name. 52 U.S.C. § 30102(e) That loophole is magnified by the right of the corporation's shareholders and officers – including individuals who will be negotiating for the contract and carrying it out – to make contributions that plaintiffs are barred from making. In plaintiffs' view, these exclusions demonstrated that the ban violated their right to Equal Protection and was significantly underinclusive in violation of the First Amendment. As to the PAC exclusion, the court of appeals observed that the PAC and the contractor were legally separate entities, but failed to explain why that formality was dispositive given the close connection between the corporate contractor and its PAC. Moreover, it never sought to justify treating contractors and their PACs as unrelated in light of the asserted purpose of section

30119, which is to avoid even the appearance of undue favoritism to contractors. The court employed a similarly formalistic approach in rejecting plaintiffs' efforts to show why officers and shareholders of corporate contractors are similarly situated to individual contractors. And it also rejected plaintiffs' claims regarding federal grantees, bundlers, and employees, in each case by pointing to factual distinctions that have no apparent connection to the rationale for the ban and by stating that Congress need not address all evils at once, even though Congress has made no changes in section 30119 since it was enacted in 1940, except to create the PAC exclusion.[4]

Overall, although the opinion purported to use the "closely drawn" standard as most recently applied in *McCutcheon*, it reads much more like a decision reviewing an agency rule under the arbitrary and capricious standard of the Administrative Procedure Act or a constitutional review under the rational basis test.

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[4] The court also relied on the pre-*Buckley* decision in *United States Civil Service Comm'n v. Nat'l Ass'n of Letter Carriers,* 413 U.S. 548 (1973), upholding various restrictions on the political activities of federal employees. Because Congress has never banned federal employees from making political contributions, and because the on-the-job rules applicable to employees do not apply to plaintiffs, that decision does not undermine plaintiffs' Equal Protection claim.

REASONS FOR GRANTING THE WRIT

> There is no right more basic in our democracy than the right to participate in electing our political leaders. Citizens can exercise that right in a variety of ways: They can run for office themselves, vote, urge others to vote for a particular candidate, volunteer to work on a campaign, and contribute to a candidate's campaign. This case is about the last of those options. *McCutcheon*, 134 S. Ct. at 1440-41.

From the filing of the complaint, through their briefing to the en banc court of appeals, plaintiffs' principal objection to section 30119 was based on Equal Protection: similarly situated PACs, officers, and shareholders of corporate contractors, as well as federal employees with whom plaintiffs worked, were not subject to the ban on the "no more basic right" to contribute to federal political campaigns, that is applicable to them. The court of appeals, however, re-cast that claim as primarily one of under-inclusion – plaintiffs wanted to curtail more speech (App.57-58) – when the remedy that plaintiffs sought was to increase speech by allowing them to make like contributions within the limits allowed by law.

Instead of focusing on what was Point I of plaintiffs' brief, the court treated their Equal Protection claim as an after-thought to their First

Amendment under-inclusiveness argument. App.71. But simply because other campaign finance cases have not been decided based on discrimination among similarly situated individuals did not justify the court of appeals in devoting most of its opinion to plaintiff's secondary claim and then rejecting it as a re-dressed version of their First Amendment argument.

Although this petition is brought by only one individual, its resolution is of great importance to the thousands of former federal employees now working as federal contractors and the countless other individuals who have service contracts with the federal government who are barred from making any federal campaign contributions. App. 40 & n. 22. No other law forbids citizens who can vote in federal elections from making *any* contributions to support the candidate, party, or political cause of their choice, let alone doing so while allowing others who are similarly situated to contribute. In addition, while the holding below is not inconsistent with the holding in *McCutcheon* because McCutcheon was not a federal contractor, the outcomes – the individual plaintiff there can contribute millions of dollars in federal elections, but these plaintiffs cannot contribute a dollar – are very difficult to reconcile under most basic notions of fairness.

There are three important subsidiary questions within the question presented by the petition that have not been, but should be, decided by this Court.

- When a campaign finance law is alleged to deny Equal Protection, and the primary defense is that other persons not subject to the law are not similarly situated to the challengers, must the question of comparability be determined by focusing on the asserted purpose of the law and the connection between each group and the law?

- When Congress forbids individual citizen-voters from making any contributions in federal elections, should "strict scrutiny" rather than the "closely drawn" standard apply?

- Even if the closely drawn standard applies, what is the proper means of assessing the fit of the ban, where contractor restrictions in other laws are much less sweeping and are limited to contracts that raise concerns that form the core of the reason for the law?

1. Claims of Denial of Equal Protection Must Be Judged in Light of the Purposes of the Law Being Challenged.

Section 30119 was primarily challenged on the ground that it fails to cover others who are similarly situated, in this case, principally the PACs of corporate contractors and the contractor's officers and shareholders. The court of appeals

considered this claim as one of under-inclusion in its First Amendment analysis, not as one of discriminatory treatment in violation of Equal Protection. It then rejected that claim because it concluded that individual contractors are similarly situated only to corporations that have federal contracts. App.62-64. That conclusion requires this Court's review because it may seriously reduce the protections against unequal treatment for similarly situated individuals.

The precise question on which there is disagreement is, on what basis should courts decide whether parties are similarly situated? Plaintiffs argued below that the answer must be determined in this case by examining the asserted rationale for the ban as applied to individual contractors and asking whether that rationale also applies to the other groups that are free to make contributions within otherwise-applicable dollar limits. *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432, 454 (1985) (Stevens, J. concurring) (comparisons must be made in light of "the purpose that the challenged laws purportedly intended to serve"). In this case, the principal rationale is avoiding the reality or appearance of corruption, and that rationale applies not just to corporate contractors (who are doubly barred by the ban on all contributions by any corporation), but also to their PACs and their officers and shareholders. The court of appeals rejected these comparisons on the ground that PACs and corporate officers and shareholders are different legal entities from the corporation that holds a contract. App.63.

No one disputes that a corporation is a separate legal entity from its PAC and its officers and shareholders, but that cannot be a sufficient justification for this discrimination. Just this past Term, in *Reed v. Town of Gilbert,* 135 S. Ct. 2218 (2015), the Town had different rules for the sizes of different public signs and for the time periods they could remain displayed. Those differences were based on the messages that the signs conveyed, and this Court unanimously held that the differences violated the First Amendment. As Justice Thomas put it for the majority, focusing on the justifications of "aesthetic appeal and traffic safety," the "distinctions fall as hopelessly underinclusive." *Id.* at 2231. The Court treated the law in *Reed* as one that made content-based distinctions, because the Town preferred some categories of messages over others, a claim that plaintiffs do not make. However, the key point from *Reed* for this case, which the court below did not appreciate, is that any distinctions in treatment can be justified only based on the rationale for the rule being challenged, not on other unrelated facts. The content-based nature of the distinction may affect how closely the differences in treatment must be scrutinized, but the comparison must be based on what the challenged law seeks to achieve and how each of the groups fits into that goal.

Because the court below failed to understand how to analyze the question of whether different groups are similarly situated for Equal Protection purposes, this Court should grant review to address the issue. It is directly raised in this case because the PACs, officers and shareholders of

corporate contractors may make contributions that individual contractors may not. Indeed, the result upheld below turns upside down this Court's refusal in *Citizens United* to treat a corporate PAC as the equivalent of the corporation – there as a reason to *deny* the corporation the ability to make independent expenditures (558 U.S. at 337) – whereas here plaintiffs sought only to have the court of appeals recognize that a corporate contractor's PAC is similarly situated to individual contractors in determining whether they must be given equal rights to make campaign contributions.

The corporate PAC comparison with individual contractors is most clear because the distinction on the right to make political contributions is found in the same section that imposes the contribution ban on plaintiffs. But the officer/shareholder comparison is not far behind because it rests on the FEC's interpretation of that statute. 11 C.F.R. §115.6. Other appropriate comparisons, also rejected by the court of appeals, do not involve persons who are involved in federal contracting, but they still raise the same issue of whether excluding them is consistent with the appearance of corruption justification for the ban applicable to plaintiffs. These include individuals who receive federal grants and stand to reap at least as much financial benefit from making federal contributions as do contractors, but the ban does not cover them. The same federal law that treats contracts and grants alike also includes the recipients of federal guarantees, loans, and loan guarantees, 2 C.F.R. § 180.970, all of whom are as

likely as contractors to benefit from making contributions in federal elections.

Then there are the bundlers who have the most to gain personally from collecting large amounts of money for Presidential candidates, often with the specific goal (stated or not) of being rewarded with a high federal position. Indeed, the FEC contends that plaintiffs could lawfully become bundlers and raise tens of thousands – even millions – of dollars for candidates or political parties by hosting fundraising events because such activities, which would also allow the plaintiffs to spend up to $1000 on food and invitations, etc., are excluded by the statute from the definition of a contribution. 52 U.S.C. § 30101(8)(B)(ii). As in *Reed*, and judged by its asserted justifications, the law is "hopelessly underinclusive" in criminalizing plaintiffs for writing a check for $10, while allowing them to host a fundraiser where they can deliver checks worth $10,000 or more.

Then there are individuals like plaintiffs Miller and Brown who were formerly employees of the agency with which they have a federal contract. As employees, they were allowed to make contributions, but even if virtually every other aspect of their jobs is unchanged, they can no longer do so. The court of appeals rejected this comparison because there are different personnel rules applicable to employees and contractors, with employees having some restrictions and benefits not applicable to individual contractors and because contracts have finite terms whereas federal employees have more-or-less permanent

jobs. App.67-68. Under the court's theory, plaintiffs might make a contribution to obtain a renewal of their employment contract, whereas federal employees would have no need to do that. To be sure, federal employees do not generally have to worry about contract renewals, but they may, on the same rationale, decide to contribute in order to curry favor for other reasons, such as to obtain promotions, pay increases, or better job opportunities.

There is one other aspect of the employee vs contractor comparison that makes the differing treatment for campaign contributions indefensible. There are no rules that instruct agencies when a job will be handled by an employee or a contractor. Plaintiff Brown was an employee until he retired, then became a contractor, is now an employee, and may become a contractor again – if that is what USAID wants. Petitioner Miller is now a part-time contractor with USAID and a part-time employee with the Peace Corps, with no apparent reason for the difference that might bear on campaign contributions. At ACUS, where plaintiff Wagner was a contractor, the choice between contractors and staff employees is based on factors such as budget and expertise, which have nothing to do with the rationale for section 30119. Again, the court below rejected the comparison, without asking whether allowing employees to make contributions, while banning individuals like Miller and Brown from doing so, can be justified under Equal Protection or the closely drawn First Amendment standard. That comparative justification is particularly important given the

remote connection between a contribution to, for example, a presidential candidate and an increase in the chances of renewing a contract or gaining a promotion at ACUS or USAID. The court's rejection of the comparison confirms that the court did not understand on what basis courts should decide whether a given comparison is relevant, which is by looking to the rationale for the law being challenged and not by focusing on unrelated factual distinctions.

The court of appeals also defended section 30119 on an anti-coercion rationale. App.16. Ironically, that rationale is equally applicable to all PACs, officers and shareholders of corporate contractors who are not banned from making contributions. In many of the examples of potential or actual corruption cited by the FEC and the court below, the contributor was not the contractor but an officer or shareholder. App.30-31. It makes no sense to assert that individual contractors like plaintiff Wagner, who have full time jobs, are subject to coercion to make a federal contribution, but the head of procurement or the largest shareholder of a major defense contractor is immune. The same potential for coercion applies to potential grantees and bundlers, as well as others seeking federal benefits, often in amounts far larger than individual contractors' contracts, yet section 30119 does not apply to them.

Moreover, even if this Court in *McCutcheon* had not repeated its frequent admonition – that there is "only one legitimate governmental interest for restricting campaign finances: preventing

corruption or the appearance of corruption," 134 S. Ct. at 1450 – the proper response to coercion is to prohibit federal officials from soliciting money from persons in potentially vulnerable positions. That is exactly what the prohibitions currently in 18 U.S.C. §§ 601, 603, 606 & 610 already do. Those rules, which date back more than 130 years to the law upheld in *Ex Parte Curtis*, 106 U.S. 371 (1882), recognize that when First Amendment rights are at stake, the proper remedy is to ban the coercive conduct and not to silence the speaker. In addition, 52 U.S.C. § 30119(a)(2) already prohibits any person from soliciting federal contractors (but not their PACs, officers, and shareholders), which is a broader restriction than a prohibition on coercion. Finally, no theory of coercion can support the ban as applied to contributions to independent political committees that have no power to reward or punish any would-be contributor.

2. Strict Scrutiny Should Apply to the Ban Imposed by Section 30119.

The court of appeals applied this Court's ruling in *Beaumont* that the closely drawn standard, not strict scrutiny, applied to bans on contributions as well as contribution limits. *Beaumont* involved a corporation which had its own PAC that could make contributions and that had officers and employees who could contribute, neither of which apply to individual contractors such as plaintiffs. The closer decision to this is the ruling in *McConnell v. FEC, supra,* 540 U.S. at 231-32, striking down, under the closely drawn standard, the ban on individuals under 18 from

making any contributions, where the ban was found to be vastly over-inclusive. Although the plaintiffs in neither *McConnell* nor *Beaumont* could vote, the fact that plaintiffs (and most individual contractors) can vote makes section 30119 a greater affront to the democratic process.

This Court in *McCutcheon* expressed a particular concern over a law that was technically a limitation, not a ban. That law allowed all individuals to contribute $123,200 in an election cycle, but after plaintiff had "maxed out" by giving to 47 candidates, he could give nothing to other candidates he wished to support. The Court treated that limitation as "an outright ban on further contributions to any other candidate" (*id.* at 1448), not simply a contribution limit, and for that reason, among others, it applied greater scrutiny and struck down the aggregate limit.

Related to this aspect of the question presented is the application of this Court's statement in *Beaumont* that, although a ban did not change the standard of review, it must be taken into account at the merits, or balancing, stage. 539 U.S. at 162. This Court has never explained how that is supposed to work: does that make the standard "closely drawn plus," or is it a thumb on the scale that may alter the balance in some undetermined way? The court of appeals did not appear to factor it in at all, and it may be that, upon further consideration, the Court will conclude that there is no appropriate way to apply that part of the *Beaumont* opinion. Unlike contribution limits, which *Buckley* teaches are permissible because

they still allow speech through contributions, a ban forecloses such speech, which makes the *Beaumont* admonition confusing or difficult to apply. It also supports the conclusion that the better approach is to apply strict scrutiny to bans on contributions applicable to individual citizen-voters.

There are two other related issues that suggest the advisability of this Court considering the appropriate First Amendment standard of review for contribution bans. First, in *Citizens United*, 558 U.S. at 359, the Court expressly declined to consider whether the ban on corporate contributions must be considered under the strict scrutiny standard that the Court applied to corporate independent expenditures. That precise question, which the Court has declined to hear since *Citizens United*,[5] is an important one, although it need not be definitively answered in this case because plaintiffs are entitled to vote and corporations are not. But the fact that the Court expressly left the question open in *Citizens United* signals that the status of bans generally needs further consideration by this Court.

Second, several members of this Court have advocated the elimination of the distinction created in *Buckley* between contributions and expenditures, so that strict scrutiny would apply to restrictions on both. *See McCutcheon v. FEC, supra,* at 1462 *et seq* and cases cited therein (Thomas, J., concurring in judgment); *id.* at 1445-46, declining to revisit distinction. Again, the

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[5] *See United States v. Danielczyk,* 682 F.3d 611 (4th Cir. 2012), *cert denied,* 131 S. Ct. 1459 (2013).

Court need not resolve that question in this case to conclude that at least total contribution bans on individual voters must be treated like expenditure limits and subjected to strict scrutiny.

Throughout the case, plaintiffs have asserted Equal Protection and First Amendment claims, but the court below rejected plaintiffs' argument that strict scrutiny applied to their Equal Protection claim on the ground that it had already rejected that argument as applied to their First Amendment claim. App.70-71. However, when this Court has been asked to declare a campaign finance law unconstitutional on both First Amendment and Equal Protection grounds, it has dealt with each on its merits. Thus, in *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652, 666 (1990), the Court rejected the First Amendment defense later accepted in *Citizens United,* and then went on to reject related Equal Protection claims.

The case for applying strict scrutiny to plaintiffs' Equal Protection claim is particularly strong because, under *Buckley*, the right to make contributions is a fundamental right protected by the First Amendment. Thus, pursuant to *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973), strict scrutiny is required when a law "impinges upon a fundamental right explicitly or implicitly protected by the Constitution." *See also Kramer v. Union Free School District,* 395 U.S. 621, 626 (1969), where this Court gave a ban on voting for the school board for those who did not meet the statutory requirements "a close and

exacting examination" because the law allegedly created an "unjustified discrimination in determining who may participate in political affairs," precisely what section 30119 does to plaintiffs. Accordingly, the proper standard of scrutiny for Equal Protection claims involving bans on campaign contributions is another basis for review by this Court.

3. The Closely Drawn Standard Requires Careful Examination of Less Sweeping Alternatives.

If the closely drawn standard is appropriate, the question is, how should it be applied in cases such as this, in which there is a claim that the ban is substantially overbroad and that there are many ways in which it could be narrowed while protecting its core goal? The answer is found in *McCutcheon,* to which the court of appeals paid lip service, but disregarded its basic message that "[i]n the First Amendment context, fit matters." 134 S. Ct. at 1456. The aggregate limit statute there was overturned because it was "poorly tailored to the Government's interest in preventing circumvention of the base limits [and] impermissibly restricts participation in the political process." *Id.* at 1457. As the Second Circuit observed in striking down a ban on contributions by lobbyists, "if a contribution limit would suffice where a ban has been enacted, the ban is not closely drawn to the state's interests." *Green Party of Connecticut v. Garfield,* 616 F.3d, 189, 206, n. 14 (2010).

The principal basis for the ban in section 30119 is that it avoids the appearance that those with federal contracts have obtained them by making contributions in connection with federal elections. Two related points about the connection between contributions in federal elections and federal contracting are significant. The only elections for federal officials are for President, Vice-President, and Members of Congress, and none of those officials has any formal role in federal contracting today. Under current federal contracting law, there is an elaborate system, designed to protect against improper influence and to assure that the government receives high quality goods and services at fair prices, with specific contracting decisions made at the agency level. *See infra* at 4-5. Thus, unlike many state and local contracting systems, federal elected officials have no direct decision-making role in the award of even major contracts, let alone modest contracts of the kind that the plaintiffs and many other individual contractors have.

Plaintiffs cited a number of examples of other laws relating to contributions by contractors with narrower bans that still fully achieved their goals, precisely the process that this Court utilized in rejecting the aggregate limits in *McCutcheon*. 134 S. Ct. at 1458-59. However, the court below took them on one by one, found each to be insufficient to do the whole job, and then rejected the over-inclusiveness claim. App.51-53. But even under the closely drawn standard, when a limit rather than an absolute ban was at issue, this Court has found the fit to be wanting. *See Randall*

v. Sorrell, 548 U.S. 230 (2006). If some contribution limits, which inevitably involve line drawing, can be found to be not closely drawn, then an absolute ban on contributions should rarely, if ever, satisfy that test.

In their en banc brief, plaintiffs cited the regulation upheld in *Blount v. SEC* as an example of a carefully drawn set of rules dealing with contributions to elected state and local officials by those interested in selling the government's bonds. Among its features were (a) only contributions for the election of a person with actual responsibility for selecting the bond-seller were covered, not contributions to the official's political party; (b) contributions up to $250 were allowed to candidates for whom the individual could vote; (c) the rule applied prospectively so that the donor was not forbidden from making contributions, but was barred from obtaining future business from the recipient's agency for two years after the contribution was made; and (d) contracts subject to open competitive bidding were excluded. 61 F.3d at 940 & n.1, 944. Unlike Congress, which has left the ban applicable to plaintiffs untouched since 1940, the SEC took into account current laws and practices regarding pay-to-play at the state and local levels and carefully examined when its rule needed to apply and where there was room for a restriction less absolute than a ban. Although plaintiffs had relied on *Blount* as an example of a much more carefully drawn law, the court of appeals saw it simply as proof that there was a need for limits on the political contributions of government contractors. Plaintiffs never denied

that general proposition, but contended that the fit in section 30119 was not even reasonably close, unlike that in *Blount*.

Perhaps the clearest example of the over-inclusiveness of section 30119 is that it applies to contributions to independent political committees, which by definition are unconnected to any candidate or party. These include such entities as EMILY's List, the NRA Political Victory Fund, the Sierra Club Political Committee, the Planned Parenthood Action Fund, and the various Right to Life Committees. None of them has any role or influence over the award of federal contracts, yet plaintiffs are barred from contributing to any of them, as well as any other independent committee.[6]

Other examples were cited, but found insufficient. North Carolina banned lobbyist contributions to candidates for the legislature, but allowed contributions and recommendations to political committees, *Preston v. Leake*, 660 F.3d 726, 729-31, 740 (4th Cir. 2011), whereas section 30119 bans all PAC contributions as well. New York City's rules did not apply to small contracts, allowed modest contributions, and if they were

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[6] To the extent that the ban might be defended on the ground that Congress was concerned that money from government contracts could be seen as being used for political purposes, the FEC's letter to plaintiff Brown told him that he could not even use money from other sources to make a contribution. *See also Agency for Intern. Development v. Alliance for Open Society Intern., Inc.,* 133 S. Ct. 2321 (2013), setting aside a law that limited the use of non-government funds by a federal grantee.

exceeded, penalized the candidate rather than the donor. *Ognibene v. Parkes,* 671 F.3d 174, 179-80 (2d Cir. 2012). Those rules also do not appear to apply to former employees like Brown and Miller who became contractors. Connecticut has similar exceptions and also applied its ban only to candidates for the branch of government that approved the contract, *Green Party, supra,* 616 F.3d at 194, in contrast to the federal ban that applies regardless of whether the recipient of the contribution has any connection to the donor's contract.

Plaintiffs also cited various aspects of federal contracting regulations that suggested other ways of reducing the adverse impact of the ban, but the court found them all wanting. For example, most federal contracts are subject to competitive bidding, both to protect the federal fisc and to make the process transparent and fair. Where those rationales do not apply, or where they apply with less force, Congress and the agencies have created exceptions, such as for small contracts, with certain protections included. App.90-91, ¶24. Including such exceptions in section 30119 would help satisfy the closely drawn standard, but the court was unpersuaded that any of them was necessary.

Plaintiffs also noted that in many cases, like plaintiff Wagner's, the agency approached her with a proposed contract that she would perform, rather than her seeking out the work. No person with even the most minimal knowledge of those facts would think that any contribution she made while

carrying out the contract was either a thank you or a down payment on a future contract. Similarly, an exception is surely warranted for former employees who retire and then are asked to become contractors – like plaintiffs Miller and Brown and the FBI agents who do background checks – because their agencies knew the quality of their work and their knowledge of the agency, and not because of any contributions that they had made or might make in the future. A closely drawn statute would have included some if not most of these exceptions, but the court below sustained section 30119 even though it imposes a total prohibition on all contributions by individual contractors in federal elections.

A recent example of the Court approving a speech restriction after finding that there was a proper fit between the goal of the law and the means to achieve it is *Williams-Yulee v. The Florida Bar,* 135 S. Ct. 1656 (2015). There a candidate for judicial office was censured for personally sending a mass mailing seeking funds for her election race. This Court, applying strict scrutiny, rejected her First Amendment defense and upheld the prohibition against judicial candidates personally soliciting contributions. Although her chosen method of soliciting funds was precluded, she had a campaign committee that could lawfully raise money for her campaign, and no one suggested that it could not do the job for her. The court below cited *Williams-Yulee* more than a dozen times without recognizing that the ruling had no practical impact on the ability of future judicial candidates to raise money through their

official committees. By contrast, under section 30119 individual contractors will not be able to make contributions for candidates, political parties, or political committees by any means, not just by a means that is at most marginally inferior.[7]

The cause of the lack of fit between the stated goal of section 30119 and the expansive manner in which it operates is that Congress never focused, in 1940 or at any time thereafter, on why a total ban was necessary. Similarly, the court below focused on the appearance of corruption for contractor contributions, but never asked why the limits applicable to every other individual (or some lower limit) did not suffice. Instead, it approached the case as if the plaintiffs had the burden of establishing their right to make contributions, instead of the other way around. Having picked off each of the alternatives found in other similar laws, one at a time, the court of appeals never asked whether section 30119 was far more expansive than needed to achieve its stated objectives, let

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[7] The court also cited the ethical rule against federal judges making political contributions as support for section 30119. App.46. The provision, which is part of a broader set of rules applicable to judges' political activities, http://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges#f, is intended to assure the judge's continued neutrality, with the contribution ban as only one part. Moreover, Canon 5(A)(3) of the Code of Conduct expressly precludes judges from holding fundraising events, whereas the FEC defends the ban in section 30119 by arguing that plaintiffs are nonetheless permitted to holding fundraisers and solicit contribution from others, thereby confirming the substantial differences between the two sets of rules.

alone did it follow this Court's conclusion concluded in *McCutcheon* that the Government is required to use other available alternatives, even if their efficacy and validity are uncertain. 134 S. Ct. at 1458-59. For example, allowing individual contractors like plaintiffs to make contributions to a national party or candidate for President in a modest amount – such as $200, which never has to be publicly disclosed – would surely not create an appearance of corruption in the mind of any reasonable person, while at the same time eliminating the sting of an absolute ban.

The blanket prohibition in section 30119 is like the ban on contributions by those younger than 18 that was struck down in *McConnell v. FEC*, *supra*. The problem that Congress sought to remedy there was that parents were giving their minor children money to "make their own" contributions, when the parents had maxed out. Like section 30119, that law was inartfully drawn, and it covered contributions beyond the law-avoiding examples that prompted its enactment. So here, the goal of preventing would-be contractors from using campaign contributions to influence those who award those contracts is a proper one, but sweeps far too broadly by banning small contributions and those given to persons with no connection to the contracting process.

The cause here, of what this Court referred to in *McCutcheon* as a "substantial mismatch" (134 S. Ct. at 1446), is that Congress has never reviewed the scope of the ban since its enactment, despite massive changes in the laws governing both

campaign contributions and government contracting. *See Shelby County, Ala. v. Holder*, 133 S. Ct. 2612, 2625-28 (2013) (striking down portion of Voting Rights Act because of significant changes in minority voter registration, turnout, and elected officials since its enactment); *McCutcheon*, 134 S. Ct. at 1446, justifying re-visiting the ban on aggregate limits upheld in 1976 because "BCRA is a different statutory regime, and the aggregate limits it imposes operate against a distinct legal backdrop"; *id.* at 1447 focusing on regulations "currently in place." Accordingly, this Court should grant review so that the lower courts can be re-informed on how to conduct the over-inclusiveness inquiry when the law at issue extends far beyond the areas needed to achieve its stated goals. In contrast to the decision below, such an inquiry would support, rather than undermine, First Amendment rights.

* * *

Because section 30119 imposes a ban on the ability of eligible voters to make any contributions in federal elections, strict scrutiny should apply to this ban. Moreover, even examined under the "closely drawn" standard applicable to First Amendment challenges to limitations imposed by campaign finance laws, section 30119 cannot stand. The failure of the court of appeals to follow the teachings of this Court with respect to the three subsidiary questions outlined above was compounded by its failure to ask the overall question of why a total ban was needed and why a similar ban was not applied to others in similar

situations. Section 30119 extends to many contributions and contributors that no reasonable person could think would affect the awarding of federal contracts, while at the same time allowing the political committees of major corporate contractors, along with their officers and shareholders, as well as federal grantees and campaign bundlers, to make (or bundle) contributions that in the aggregate could exceed $3 million per contributor per election. Because the court below did not appreciate these important aspects of the operation of these laws, this Court should grant review and apply the proper standards under the Equal Protection and First Amendment to section 50119.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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