No. 18-755

IN THE

Supreme Court of the United States

ILLINOIS LIBERTY PAC, POLITICAL ACTION COMMITTEE REGISTERED WITH THE ILLINOIS STATE BOARD OF ELECTIONS, EDGAR BACHRACH, AND KYLE MCCARTER,

PETITIONERS,

V.

LISA MADIGAN, ATTORNEY GENERAL OF THE STATE OF ILLINOIS, *ET AL.*,

RESPONDENTS.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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Cong. Research Serv., *Supreme Court Decisions Overruled by Subsequent Decision* (1992)............. 19

David M. Rabban, *Free Speech in Its Forgotten Years* (1997).. 7

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Geoffrey R. Stone, "Is Money Speech?," Huffington Post, Feb. 5, 2012, https://bit.ly/1hHxWvS 7

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Ilya Shapiro & Nicholas Mosvick*,* Stare Decisis *after* Citizens United*: When Should Courts Overturn Precedent*, 16 Nexus: Chap. J. Pub. Pol'y 121 (2011) 18

James Kent, 1 *Commentaries on American Law* (12th ed. 1989) (O.W. Holmes, Jr. ed. 1873) 16

John Coleman and Paul F. Manna, *Congressional Campaign Spending and the Quality of Democracy*, 62 J. Pol. 757 (2002) 14

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John J. Coleman, "The Benefits of Campaign Spending," Cato Institute Briefing Paper No. 84 (September 4, 2003) 14, 15

John Samples, "Move to Defend: The Case against the Constitutional Amendments Seeking to Overturn *Citizens United*," Cato Institute Policy Analysis No. 724 (Apr. 23, 2013) 5

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation dedicated to advancing individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies promotes the principles of limited constitutional government that are the foundation of liberty. To those ends, Cato conducts conferences and publishes books, studies, and the annual *Cato Supreme Court Review*. This case concerns Cato because it involves arbitrary and unjustified restrictions on political speech, the protection of which is at the core of the First Amendment.

INTRODUCTION AND SUMMARY OF ARGUMENT

The First Amendment broadly protects political expression to "assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957). Campaign contributions and expenditures facilitate such interchanges and are thus vital to our democracy. Yet Illinois's campaign finance restraints unconstitutionally stifle political speech and inhibit the unfettered interchange of ideas.

Illinois's regulatory scheme was designed to disproportionately favor certain types of political donors and restrict political speech for everyone else. While legislative committees can spend unlimited amounts to support candidates, individuals and other organizations are hampered by contribution limits that were upheld in *Buckley v. Valeo*, 424 U.S. 1 (1976).

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[1] Rule 37 statement: All parties were notified of and consented to the filing of this brief. No party's counsel authored any of this brief; *amicus* alone funded its preparation and submission.

Buckley correctly held that spending money, whether in the form of contributions or expenditures, is a form of speech protected by the First Amendment. *Id.* at 21. The Court, however, treated only caps on campaign expenditures—and not on contributions—as direct restrictions of political speech, reasoning that "while contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor." *Id.* The Court has since abandoned the concept of "speech by proxy" generally, yet the distinction between contributions and expenditures remains. That distinction has been the target of persistent, cogent criticism and its underlying logic repudiated in subsequent decisions.

Perhaps most concerning, the *Buckley* distinction allows states to infringe on individuals' constitutionally protected liberty to engage in unobstructed political speech and expression. Limits on the money an individual can contribute to the political party, committee, or candidate of his or her choice unconstitutionally restrains the freedom of political speech. There is "practically universal agreement" that the central purpose of the Speech and Press Clauses of the First Amendment was "to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). Since speech is intimately related to money, contribution limits effectively allow speech but only up to a government-approved amount.

In *Buckley* itself, Chief Justice Burger argued that contributions and expenditures are both core political speech and "two sides of the same First Amendment

coin." *Buckley*, 424 U.S. at 241 (Burger, C.J., concurring in part and dissenting in part). Restrictions on both violate the Constitution. *Id.* at 241–42. Justice Thomas has repeatedly noted that the distinction is illogical and argued that both contribution and expenditure limits implicate core First Amendment values. Money contributes to the political debate whether it is spent independently or through a candidate or political party. *Colo. Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 636–67 (1996) (Thomas, J., concurring in part and dissenting in part). Justice Thomas asserted that *Buckley*'s framework should be abandoned and replaced with strict scrutiny of both contributions and expenditure limits. *Id.* at 639. He advanced the same argument in *McCutcheon v. FEC*, where the plurality heightened the level of scrutiny for contribution limits yet did not reach strict scrutiny. 572 U.S. 185, 228–32 (2014) (Thomas, J., concurring in judgment). While *McCutcheon* chipped away at the *Buckley* decision, it fell short of doing away with the largely semantic distinction between contributions and expenditures.

This Court, in maintaining the *Buckley* distinction, has given states carte blanche to reduce political speech. Illinois's law manages to both limit individual speech and favor legislative committees, neither of which comports with the First Amendment. The court below relied on the *Buckley* distinction, failing to sufficiently scrutinize the Illinois law. To avoid such results in future, the Court should apply strict scrutiny to restrictions on both contributions and expenditures.

Buckley's contribution/expenditure distinction also leads to bizarre results that do little to reduce corruption. Instead, money has been pushed away from political parties and advocacy groups, toward entrenched

legislative committees, leaving political parties, PACs, and other groups with a distinct lack of "resources necessary for effective advocacy." *Buckley*, 424 U.S. at 21.

Nor does s*tare decisis* require contribution limits to be preserved, including the discriminatory limits challenged here. The *Buckley* distinction is of relatively recent constitutional vintage and has produced an arbitrary, irrational, and increasingly unworkable campaign finance system with no apparent advantages. *Stare decisis* is an important principle vital to our legal system but it is not a command for courts to abide by all past decisions, even erroneous ones. Instead, it is a prudential policy that—especially in the context of constitutional interpretation—allows the Court to overturn decisions offensive to the First Amendment.

Free speech fosters political change, holds officials accountable, and otherwise sustains a healthy democracy. Limits on individual donations impede robust political speech. *Amicus* respectfully submits that the *Buckley* distinction was made in error and that the Court now has a chance to liberate political speech. The Court should establish that states cannot hinder political speech for individuals and PACs to favor preferred groups like legislative committees. Not only would this energize our democracy and reduce corruption, it is also what the First Amendment requires.

ARGUMENT

I. THE FIRST AMENDMENT BROADLY PROTECTS POLITICAL SPEECH

"[T]he central purpose of the Speech and Press Clauses was to assure a society in which 'uninhibited, robust, and wide-open' public debate concerning matters of public interest would thrive, for only in such a

society can a healthy representative democracy flourish." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Free speech "is needed for republican government" and "informs voters about the conduct of elected officials, thereby helping voters to hold officials responsible at election time." John Samples, "Move to Defend: The Case against the Constitutional Amendments Seeking to Overturn *Citizens United*," Cato Institute Policy Analysis No. 724 (Apr. 23, 2013), at 2. "Officials in power have every reason to fear speech. It fosters change, not least in elections. Elected officials have strong reasons to find acceptable ways to suppress free speech." *Id.* at 3.

Moreover, the First Amendment protects political speech regardless of the nature or identity of the speaker. People don't lose their rights upon coming together and forming associations, be they unions, nonprofit advocacy groups, private clubs, for-profit corporations, or any other group. *See, e.g.*, Ilya Shapiro & Caitlyn W. McCarthy, *So What If Corporations Aren't People?*, 44 J. Marshall L. Rev. 701, 707-08 (2011). Restrictions on campaign donations—particularly based on legislative committee status—impede robust political speech and thus rob our democracy of the vibrancy and dynamism it would otherwise have.

Indeed, restricting the liberty to engage in political campaigns because such engagement somehow injures the political system is fundamentally contrary to the constitutional structure of rights and powers. As James Madison said, "it could not be less folly to abolish liberty, which is essential to political life, because it nourishes faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency." *The*

Federalist No. 10, at 51–52 (Madison) (Garry Wills ed., 2003). And as this Court held in a landmark decision, "[i]f the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech." *Citizens United v. FEC*, 558 U.S. 310, 313 (2010). Monetary contributions to parties and campaigns are a form of political speech, so they too are protected by the First Amendment. Illinois's strange system chills political speech and should be strictly scrutinized.

A. The Founders Envisioned Campaigns with Open Debate and Uninhibited Political Expression

The Founders believed that elections are the principal means of controlling government. *See*, *e.g.*, *The Federalist* No. 51, at 316 (Madison) (Garry Wills ed., 2003) ("A dependence on the people is no doubt the primary control on the government."). Elections keep politicians accountable to voters, which in turn constrains the government's power. If electoral competition ceases to exist, the Madisonian nightmare of government without restraint becomes possible. That's why a "major purpose" of the First Amendment is "to protect the free discussion of governmental affairs," *Mills*, 384 U.S. at 218, by limiting the government's interference with the marketplace of ideas, especially political ideas. Free and open debate is "integral to the operation of the system of government established by our Constitution." *Buckley*, 424 U.S. at 15.

While states have the authority to regulate their own elections, that regulation must be consistent with the Constitution. Illinois's scheme runs counter to the foundational principle that free and robust political debate is essential to our democracy. The Founders

wrote the First Amendment to protect such speech. They didn't want speech to be restricted by artificial limits on financial support, which provides the means for political debate. *See generally* David. M. Rabban, *Free Speech in Its Forgotten Years* (1997). Accordingly, the Court has repeatedly held that campaign contributions and expenditures are protected speech.

B. *Buckley* Correctly Held That Campaign Spending Is a Form of Speech Protected by the First Amendment and Foresaw the Dangers of Even Those Contribution Limits It Approved

It is impossible to separate speech from the money that facilitates it. *See*, *e.g.*, *Citizens United*, 558 U.S. 310 (2010) (Roberts, C.J., concurring) ("The First Amendment protects more than just the individual on a soapbox and the lonely pamphleteer."). "Not a single justice of the United States Supreme Court who has voted in any of the more than a dozen cases involving the constitutionality of campaign finance regulations, regardless of which way he or she came out in the case, has *ever* embraced the position that money is not speech." Geoffrey R. Stone, "Is Money Speech?," Huffington Post, Feb. 5, 2012, https://bit.ly/1hHxWvS. Accordingly, this Court correctly held in *Buckley* that the spending of money, whether in the form of contributions or expenditures, is a form of speech protected by the First Amendment. 424 U.S. at 21. Candidates need funding to amplify and effectively disseminate their message to the electorate. *Id.* Restricting political contributions and expenditures "necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Id.* at 19. Contributions

and expenditures facilitate this interchange of ideas and cannot be regulated as "mere" conduct unrelated to the underlying communicative act of making a contribution or expenditure. *Id.* at 24.

Moreover, as the Court underlined in *McCutcheon,* the government cannot merely assert that political speech in the form of financial contributions is a proxy for corruption: "Any regulation must instead target what we have called *'quid pro quo'* corruption or its appearance." 572 U.S. at 192. *Quid pro quo* is simply defined as "dollars for political favors." *Id.* (quoting *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985)). *Quid pro quo* corruption does not necessarily arise from contributions; in fact, the Court has maintained the opposite—the government "may not regulate contributions simply to reduce the amount of money in politics." *McCutcheon*, 572 U.S. at 191. Even *quid pro quo* corruption is a very narrow set of circumstances—after all, people may contribute to campaigns, yet "government regulation may not target . . . the political access such support may afford. 'Ingratiation and access . . . are not corruption.'" *Id.* at 192, citing *Citizens United*, 558 U.S. at 360. Consequently, laws like Illinois's cannot be justified by the unscrutinized claim that political speech inevitably leads to corruption, an idea that is both mistaken and out of pace with this Court's jurisprudence.

Further, the Court in *McCutcheon* said it was impermissible for the government "to restrict the political participation of some in order to enhance the relative influence of others." 572 U.S. at 191. In bifurcating the rights of legislative committees and individuals, to the benefit of the former and detriment of the

latter, Illinois's law does precisely that. For no articulable reason, it regards individuals and PACs as hazardous to democracy but legislative committees as benign, distributing rights according to a flawed, idiosyncratic threat analysis.

While the *Buckley* Court allowed certain restrictions on contributions—though not expenditures—it cautioned that they "could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy." 424 U.S. 21. Technology has evolved rapidly in the decades since *Buckley*, and political candidates have adapted to it, rendering the advocacy of yesterday obsolete and revealing that old restrictions are likewise dated. Campaigns are fundamentally different than they were nearly a half-century ago, and this changing landscape sheds new light on the many constitutional problems with the *Buckley* restrictions. The Court should recognize that and rethink those restrictions.

II. *BUCKLEY*'S DISTINCTION BETWEEN CONTRIBUTIONS AND EXPENDITURES IS UNWORKABLE AND DOES NOT SOLVE THE PROBLEM OF CORRUPTION

A. The *Buckley* Distinction Is Untenable and Unworkable

In *Buckley*, the Court decided to treat caps on campaign expenditures, but not campaign contributions, as direct restrictions upon political speech, reasoning that, "while contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by

someone other than the contributor." *Id.* at 21. Expenditure limits, by contrast, "represent substantial rather than merely theoretical restraints on the quality and diversity of political speech." *Id.* at 19. Accordingly, it declined to apply strict scrutiny to contribution limits. A later Court plurality described contributions as "speech by proxy" that are "not entitled to full First Amendment protection." *Calif. Medical Assn. v. FEC*, 453 U.S. 182, 196 (1981). Yet the impact on the amount and diversity of political speech coming from contributions and expenditures is identical:

> [T]here is no real difference between the First Amendment value of a contribution and an expenditure. A contribution is a quintessential act of political association just as an expenditure is an act of expression. Nor is there much difference between the real-world potential for corruption posed by each."

Burt Neuborne, *The Supreme Court and Free Speech*, 42 St. Louis U. L.J. 789, 795 (1998).

Contributions, like expenditures, are protected political speech. Restrictions on political speech are typically held to strict scrutiny: the restriction must be narrowly tailored to further a compelling government interest. *Mills*, 384 U.S. at 218. The Court rightly holds restrictions on expenditures to strict scrutiny, but the *Buckley* distinction prevents it from doing the same for restrictions on contributions. Lower courts are confused by this dynamic: they uphold Illinois's speech-chilling scheme while scrutinizing and striking down expenditure caps that likewise chill speech. The *Buckley* distinction should be eliminated and replaced with a strict scrutiny standard for both contributions and expenditures to avoid inconsistent results.

Even in *Buckley* itself, several justices questioned the viability of the contribution-expenditure distinction. Chief Justice Burger, for example, stated that "contributions and expenditures are two sides of the same First Amendment coin." *Buckley*, 424 U.S. at 241 (Burger, C.J., concurring in part and dissenting in part). Restrictions on both violate the Constitution. *Id.* at 241–42. Any attempt to distinguish the two can be characterized as mere semantics—playing "word games," as Chief Justice Burger put it—because both types of political disbursements have sufficient communicative content to require that laws infringing them be struck down. *Id.* at 244.

Chief Justice Burger added that contribution restrictions unconstitutionally hamper candidates and political activity in the same way as restrictions on independent expenditures. *Id.* at 244. He pointed out that "contribution limitations . . . limit exactly the same political activity that the expenditure ceilings limit," *id.* at 243, specifically, by limiting the amount of funds that can later be spent. The result is "an effective ceiling on the amount of political activity and debate that the Government will permit to take place." *Id.* at 242. Yet the ability to project speech is *as important* as the ability to say it. A political writer would hardly be comforted if told that the First Amendment protects his words but not his access to the Internet.

Justice Scalia, dissenting in relevant part in *McConnell v. FEC*, appealed to history, observing that "repressive regimes have . . . attack[ed] all levels of the production and dissemination of ideas." 540 U.S. 93 at 251 (2006) (Scalia, J., concurring in part and dissenting in part). He also traced some of the absurd consequences of the distinction: "What good is the right to

print books without a right to buy works from authors? Or the right to publish newspapers without the right to pay deliverymen?" *Id.* at 252.

Over time, several justices have criticized *Buckley*'s expenditure/contribution distinction. Justice Thomas is one of its most outspoken critics. *See*, *e.g.*, *Colo. Republican Fed. Campaign Comm.*, 518 U.S. at 635–44 (Thomas, J., concurring in judgment and dissenting in part); *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 410–29 (2000) (Thomas, J., dissenting); *McConnell*, 540 U.S. at 265–86 (Thomas, J., concurring in part and dissenting in part); *McCutcheon*, 572 U.S. at 228–32 (Thomas, J., concurring in judgment). Justice Thomas has written that the *Buckley* distinction lacks in "constitutional significance." *Colo. Republican Fed. Campaign Comm.*, 518 U.S. at 636. And suggested that *Buckley*'s framework be replaced with a strict scrutiny test to be applied to both contribution and expenditure limits. *Id.* at 639. He also noted that contributions and expenditures both implicate core First Amendment values because they both facilitate political debate. Whether political money is spent independently or through a candidate or political party is irrelevant. *Id.* at 636–67.

Justice Thomas likewise took issue with the plurality opinion in *McCutcheon*, which heightened the level of scrutiny for contribution limits. In his opinion, the *McCutcheon* plurality did not go far enough; "although purporting not to overrule *Buckley*, [it] continues to chip away at its footings. In sum, what remains of *Buckley* is a rule without a rationale." 572 U.S. at 231 (Thomas, J., concurring in judgment). Instead, the Court should have adopted "a standard that is faithful

to the First Amendment." *Id.* at 232. He went on to invoke Chief Justice Burger's argument that "Contributions and expenditures are simply 'two sides of the same First Amendment coin,'" and likewise characterized the distinction as mere semantics. *Id.* at 231–32 (quoting *Buckley*, 424 U.S. 1 at 241) (Burger, C.J., concurring in part and dissenting in part).

Numerous academics have also criticized the *Buckley* distinction. Prof. Lillian BeVier has argued that both contributions and expenditures implicate significant First Amendment values, and so they should be treated the same way. *See* BeVier, *Money and Politics: The First Amendment and Campaign Finance Reform*, 73 Cal. L. Rev. 1045, 1063 (1985). She argues that the distinction is merely semantic because contribution limits and expenditure limits restrict the same type of activity. *Id.* BeVier would also subject both contributions and expenditures to heightened scrutiny. *Id.* at 1090. Cato's John Samples has noted that "[s]pending on elections by candidates and parties depends on spending by contributors. If candidates and parties do not raise money, they cannot spend it." John Samples, *The Fallacy of Campaign Finance Reform* 34 (2006).

The *Buckley* distinction also reveals itself to be unworkable in practice. Here, the lower court failed to scrutinize Illinois's discriminatory contribution system, relying on the distinction between contributions and expenditures. But if Illinois's contribution limits were held to strict scrutiny—like expenditure caps—they would likely be struck down as unconstitutional.

Having long been the target of persistent, cogent criticism, and with its underlying logic repudiated in subsequent rulings like *McCutcheon*, the Court should abandon the contribution-expenditure distinction.

B. Eliminating the *Buckley* Distinction Would Both Energize Our Democracy and Reduce Corruption

Our democracy would be energized if freed from contribution limits. More political speech leads to better informed voters, and the kind of speech fostered by campaign contributions tends to educate voters who are less inclined to search out information on their own. *See* John J. Coleman, "The Benefits of Campaign Spending," Cato Institute Briefing Paper No. 84 (September 4, 2003). *See also* John Coleman and Paul F. Manna, *Congressional Campaign Spending and the Quality of Democracy*, 62 J. Pol. 757 (2002) (showing that campaign spending increases public knowledge, including the ability to place candidates on ideological and issues scales); John Coleman, *The Distribution of Campaign Spending Benefits across Groups*, 63 J. Pol. 916 (2001) (arguing that campaign spending improves public trust and engagement and improves the accuracy of perceptions about candidates, particularly among socially disadvantaged groups). In other words, the speech facilitated by campaign contributions has a greater effect on those who, but for campaign spending, would be ignorant of electoral issues.

Further, informing voters fosters electoral competition by facilitating more criticism of incumbents and creating more name recognition for challengers. Coleman, "The Benefits of Campaign Spending," at 4-5. As mentioned above, "absent contribution limits, challengers could raise money quickly and easily from a small number of donors, if they wished." Dhammika Dharmapala and Filip Palda, *Are Campaigns Contributions a Form of Speech? Evidence from Recent U.S. House Elections*, 112 Pub. Choice 81, 87 (July 2002).

Treating contributions the same as expenditures would not only be consistent with the Constitution, but would solve the problems *Buckley* brought into being and also lessen corruption and the appearance thereof.

Contrary to what critics charge, "studies indicate that campaign spending does not diminish trust, efficacy, and involvement." Coleman, "The Benefits of Campaign Spending," at 8. That's because "spending increases public knowledge of the candidates, across essentially all groups in the population. Less spending on campaigns is not likely to increase public trust, involvement, or attention." *Id.* Moreover, "a deregulated system of campaign finance should be expected to increase electoral competition." Samples, *The Fallacy of Campaign Finance Reform* 186. This competition would also reduce the power of incumbency and the corruption that can flow from it.

Further, the *Buckley* distinction actually *increases* the power of incumbents. States are able to impose severe spending caps on individuals and PACs, while legislative committees with deep-rooted interests have no limit on spending. Illinois's system benefits career politicians with connections to these committees at the expense of lesser-known candidates with fewer established connections. If the goal is to halt corruption, this is surely a poor means of achieving it.

III. *STARE DECISIS* SHOULD NOT SAVE THE *BUCKLEY* DISTINCTION

A. *Stare Decisis* Means Following the Law, Not Preserving Every Precedent or Maintaining Erroneous Decisions

Stare decisis reflects the common law's declaratory view of precedent. Precedents are not law themselves,

but instead are evidence of the law. *See, e.g.*, Matthew Hale, *The History of the Common Law of England* 45 (Charles M. Gray ed., 1971) (1820) ("the Decisions of Courts of Justice . . . do not make a Law . . . yet they have a great Weight and Authority in Expounding, Publishing, and Declaring what the Law of this Kingdom is."). As William Blackstone explained, *stare decisis* does not require courts to extend or preserve an earlier decision that misstated or misapplied the law:

> [A judge is] not delegated to pronounce a new law, but to maintain and expound the old one. Yet this rule admits of exception, where the former determination is most evidently contrary to reason; much more if it be contrary to the divine law. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was bad law, but that it was not law; that is, that it is not the established custom of the realm as has been erroneously determined.

1 *Commentaries* 69–70 (U. Chicago Press 1979) (1765).

Blackstone concluded that "*the law*, and the *opinion of the judge* are not always convertible terms, or one and the same thing; since it sometimes may happen that the judge may *mistake* the law." *Id.* at 71. Precedent is binding "unless it can be shown that the law was misunderstood or misapplied in that particular case." James Kent, 1 *Commentaries on American Law* 475, 477 (12th ed. 1989) (O.W. Holmes, Jr. ed. 1873).

Stare decisis also derives from practical considerations of doctrinal stability to "keep the scale of justice even and steady." Blackstone, 1 *Commentaries* 69. It is appropriate in many cases because "[i]t is by the notoriety and stability of such rules that professional men can give safe advice . . . and people in general can venture with confidence to buy and trust, and to deal with one another." Kent, 1 *Commentaries* 476. From its origins, *stare decisis* was intended to balance reliance on doctrinal stability with the countervailing interest in clarification when in an earlier case "the judge may *mistake* the law." Blackstone, 1 *Commentaries* 71. The doctrine of *stare decisis* is basic and vital to our legal system, yet we maintain important differences in our application of this traditional principle.

In the United States, *stare decisis* does not mechanically preserve every precedent. While the doctrine plays an important part in the Court's decision making, it is not "an inexorable command." *Payne v. Tennessee*, 501 U.S. 808, 827–28 (1991) ("[R]ather, it is a principle of policy and not a mechanical formula of adherence to the latest decision."). Underlying *stare decisis* is the idea that courts do not make the law, but rather declare what it is. *See, e.g.*, *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (although "judges in a real sense 'make' law . . . they make it *as judges make it*, which is to say *as though* they were 'finding' it—discerning what the law *is*, rather than decreeing what it is today *changed to*, or what it will tomorrow be.") (Scalia, J., concurring in the judgment). Consequently, "precedents are not sacrosanct." *Patterson v. McClean Credit Union*, 491 U.S. 164, 172 (1989).

In other words, *stare decisis* is not "a binding principle by which a court—the U.S. Supreme Court or otherwise—never overrules its own precedent. Indeed, if precedent could never be reversed then *Plessy v. Ferguson* and *Bowers v. Hardwick* could never have yielded to *Brown v. Board of Education* and *Lawrence v. Texas*, respectively." Ilya Shapiro & Nicholas Mosvick, Stare Decisis *after* Citizens United*: When Should Courts Overturn Precedent*, 16 Nexus: Chap. J. Pub. Pol'y 121, 123–24 (2011).

This Court recognizes the importance of having settled rules of law. *See Agostini v. Felton*, 521 U.S. 203, 235 (1997). But *stare decisis* is a prudential policy rooted in the declaratory view of precedent and its underlying interests are not equally compelling for all areas of law. *See Payne*, 501 U.S. at 828 ("Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved"); *Patterson*, 491 U.S. at 172–73 ("Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done.").

Not surprisingly, *stare decisis* is most flexible in constitutional cases, where Congress cannot "fix" an undesired legal interpretation:

> *Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right…But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions.

Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406–07, 410 (1932) (Brandeis, J., dissenting).

Indeed, this "policy is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions." *Agostini*, 521 U.S. at 235. Moreover, "overruling a constitutional case decided just a few years earlier is far from unprecedented." *FEC v. Wisc. Right to Life, Inc.* ("*WRTL II*"), 551 U.S. 449, 501 (2007) (Scalia, J., concurring in part and in the judgment) (collecting cases). For example, in the 50 years from 1942 to 1992, this Court reversed itself 141 times. Cong. Research Serv., *Supreme Court Decisions Overruled by Subsequent Decision* (1992).

The Court has further explained *stare decisis* as follows:

> [W]hen convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment, and not upon legislative action, this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions.

Smith v. Allwright, 321 U.S. 649, 665 (1944).

The present case turns on the proper interpretation of the First Amendment, of course, not on statutory construction or on property or contract rights. "This Court has not hesitated to overrule decisions offensive to the First Amendment (a 'fixed star in our constitutional constellation,' if there is one)—and to do so promptly where fundamental error was apparent." *WRTL II*, 551 U.S. at 500 (Scalia, J., concurring in part and in the judgment) (cleaned up). Courts should not,

and cannot, give as much judicial deference to constitutional decisions as they would to common law cases or statutes. *Stare decisis* is thus at its apogee here.

B Abandoning the *Buckley* Distinction Would Be Consistent with *Stare Decisis*

In *Janus v. AFSCME*, the Court articulated five principles for when it should or should not follow *stare decisis*: (1) the quality of the reasoning; (2) the workability of the rule; (3) its consistency with other related decisions; (4) developments since the decision; and (5) reliance upon the decision. 138 S. Ct. 2448, 2478–82 (2018). The *Buckley* distinction does not survive scrutiny under these factors.

The distinction between expenditures and contributions is poorly reasoned and unworkable. As stated above, it has been the target of much criticism over the nearly half-century since it was created. Justice Thomas especially has reproached the distinction, arguing that it should be replaced with a strict scrutiny for both expenditures and contributions. This makes a great deal of sense, because, as it stands, laws that set expenditure limits are subject to strict scrutiny, while those that cap contributions are evaluated by a lesser standard—even as both equally implicate the freedom of speech. "Arbitrary" is perhaps too charitable a word to describe this distinction. It has rightly been characterized as playing "word games," and thus it should not continue to stand. *Buckley*, 424 U.S. at 244 (Burger, C.J., concurring in part and dissenting in part).

Nor has the Court applied the distinction consistently, instead chipping away at it in subsequent decisions. "Those who apply the rule to particular cases, must of necessity expound and interpret that rule."

Marbury v. Madison, 5 U.S. 137, 177 (1803). Instead of applying the *Buckley* distinction and expounding on it in a clear manner, the Court tried and failed to convincingly sustain it in *McCutcheon*. The Court has slowly inched at what seems to be an inevitable result: overturning *Buckley*. The distinction has effectively been sentenced to death by a thousand cuts, and the Court should put it to rest once and for all.

The contribution-expenditure distinction, controversial and confusing in its own day, has not engendered the kind of reliance interests that *stare decisis* contemplates protecting. On the contrary, restrictions on contributions have had a chilling effect on the exercise of constitutionally protected free speech rights.

In fact, the only entities "relying" on the *Buckley* distinction are legislative committees with deep-rooted interests and political connections. The Illinois law favors these committees at the expense of individuals, parties, and PACs. Yet it would be antithetical to the spirit of the Bill of Rights to say that one group is "relying" on the First Amendment rights of another group being extinguished. The Court should not uphold a distinction that allows states to prefer one type of speaker over all others. Further, the Court must recognize the danger of maintaining distinctions that micromanage and silence political speech, the cornerstone of our democracy.

As Chief Justice Roberts wrote in *Citizens United*, "when fidelity to any particular precedent does more to damage this constitutional ideal [the rule of law] than to advance it, we must be more willing to depart from that precedent." 558 U.S. at 378 (Roberts, J., concurring). *Stare decisis* does not require preserving or extending precedents that misstate the law. It does not

shield the distinction created in *Buckley* from being reexamined and overturned.

CONCLUSION

The Illinois law at issue here relies on *Buckley v. Valeo*'s dubious distinction between contribution limits and expenditure limits—and even then represents a First Amendment violation. This Court should grant the petition and reexamine this area of law.

Respectfully submitted,

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