No. 21-2352

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NEW JERSEY BANKERS ASSOCIATION,
Appellant/Cross-Appellee,
v.

ATTORNEY GENERAL OF NEW JERSEY,
Appellee/Cross-Appellant.

Appeal from the United States District Court
for the District of New Jersey, No. 3:18-cv-15725 (Martinotti, J.)

BRIEF FOR AMICUS CURIAE CAMPAIGN LEGAL CENTER IN SUPPORT OF APPELLEE/CROSS-APPELLANT

PAUL M. SMITH
ERIN CHLOPAK
SAM HORAN*
CAMPAIGN LEGAL CENTER
1101 14th Street NW
Suite 400
Washington, DC 20005
(202) 736-2200

*Licensed to practice in Massachusetts only; application for admission to the D.C. bar pending; supervised by Erin Chlopak, member of the D.C. Bar.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for *amicus curiae* Campaign Legal Center ("CLC") certifies that CLC is a nonprofit, nonpartisan corporation working in the areas of campaign finance reform, voting rights, and election law. CLC has no parent corporation and no publicly held corporation has any form of ownership interest in CLC.

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Campaign Legal Center ("CLC") is a nonpartisan, nonprofit organization dedicated to advancing democracy through law by advocating for and defending effective campaign finance and ethics laws at the federal, state, and local levels. CLC participated in the proceedings below and has participated in every major U.S. Supreme Court campaign finance case since *McConnell v. FEC*, 540 U.S. 93 (2003), including *Citizens United v. FEC*, 558 U.S. 310 (2010), and *McCutcheon v. FEC*, 572 U.S. 185 (2014). CLC has also participated in several recent cases discussed by the parties here: *Deon v. Barasch*, 960 F.3d 152 (3d Cir. 2020), *Wagner v. FEC*, 793 F.3d 1 (D.C. Cir. 2015) (en banc), *Yamada v. Snipes*, 786 F.3d 1182 (9th Cir. 2015), and *Green Party of Conn. v. Garfield*, 616 F.3d 189 (2d Cir. 2010).

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[1] All parties have consented to the filing of this brief. No party's counsel or other person except *amicus* and its counsel authored this brief or contributed money to fund its preparation or submission.

SUMMARY OF ARGUMENT

The district court properly rejected Appellant New Jersey Bankers Association's ("Bankers Association") challenge to New Jersey's century-old law prohibiting banks and certain other corporations from making contributions to state candidates and political parties. *See* N.J.S.A. § 19:34-45. The challenged provision aligns with similar federal and state laws, which courts have overwhelmingly upheld against First Amendment challenges.

As the district court recognized, the banking industry is "by its nature . . . susceptible to corruption," J.A. 47, and there is a long record of public corruption scandals and enforcement actions confirming the reality of that risk, J.A. 39-41, 48-49. Empirical studies bolster this evidence by showing that political contributions from banks and financial institutions affect the allocation of government investments. These studies indicate that firms selected by government officials based on contributions often achieve worse results and are more likely to receive bail outs, and perhaps in recognition of that likelihood, banks engaged in substantial campaign spending engage in riskier lending activity than their less politically active peers. In other words, these studies show that

political contributions from the banking sector pose a unique risk of corruption that may lead to tangible economic consequences for states.

The district court's constitutional analysis was also correct. The court appropriately adhered to the Supreme Court's decades-old decision upholding the federal corporate contribution ban, which has a much broader sweep than New Jersey's law. In *FEC v. Beaumont*, 539 U.S. 146 (2003), the Supreme Court recognized that the federal ban on all corporate contributions advances critical anticorruption interests. As numerous other courts have recognized, *Beaumont* remains the law of the land; it also controls here.

The district court's finding that New Jersey's law satisfies First Amendment scrutiny is likewise consistent with decisions from a variety of federal courts of appeals upholding other federal and state contribution bans, including laws similar in scope to N.J.S.A. § 19:34-45 and others that, like the federal law, apply much more broadly.

Finally, beyond addressing crucial anticorruption interests, laws like N.J.S.A. § 19:34-45 promote core First Amendment interests by helping to preserve and strengthen public confidence in our system of democratic self-government.

The district court correctly upheld New Jersey's longstanding prohibition against bank contributions in state campaigns. CLC respectfully urges this Court to affirm that decision.

ARGUMENT

I. Contribution Restrictions Like N.J.S.A. § 19:34-45 Are a Common Tool for Preventing Quid Pro Quo Corruption and Its Appearance.

The district court correctly found that, contrary to Bankers Association's claims, New Jersey's longstanding ban on banks' campaign contributions advances important anticorruption interests in accordance with "modern First Amendment law," Appellant's Br. 25, and "is not an outlier compared to other states' restrictions on political contributions." J.A. 49. Indeed, many state and local jurisdictions, along with the federal government, similarly prohibit campaign contributions by banks, other closely regulated entities, or corporations generally, due to "a real risk of *quid pro quo* corruption and its appearance" within those sectors that persists to the present day. J.A. 29.

In addition to the federal ban on all corporate contributions and contributions "by any national bank," 52 U.S.C. § 30118(a), at least 23 states, and numerous localities, currently proscribe corporate

contributions to candidates.[2] Some of those states include banks and financial institutions in broadly applicable laws prohibiting contributions by any corporation,[3] while Iowa, Massachusetts, and Pennsylvania have enacted specific prohibitions against bank contributions similar to N.J.S.A. § 19:34-45.[4]

Many states and localities also impose "pay-to-play" restrictions on contributions from highly regulated industries and professions, such as public utility companies, government contractors, gaming licensees, and

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[2] *See* Alaska Stat. § 15.13.074(f); Ariz. Rev. Stat. § 16-916(A); Ark. Code Ann. § 7-6-203(a)(1)(B); Colo. Const. art. 28, § 3(4); Conn. Gen. Stat. § 9-613(a); Iowa Code Ann. § 68A.503(1); Ky. Rev. Stat. Ann. § 121.025; Mass. Gen. Laws ch. 55, § 8; Mich. Comp. Laws Ann. 169.254(1); Minn. Stat. Ann. § 211B.15 subd. 2; Mo. Const. art. 8, § 23(3); Mont. Code Ann. 13-35-227; N.C. Gen. Stat. Ann. § 163-278.15(a); N.D. Cent. Code § 16.1-08.1-03.5; Ohio Rev. Code § 3599.03(A); Okla. Stat. Ann. tit. 21, § 187.2(A); 25 Pa. Stat. § 3253(a); R.I. Gen. Laws § 17-25-10.1; Tex. Elec. Code Ann. § 253.094(a); Wash. Rev. Code § 42.17A.405(12); W. Va. Code Ann. § 3-8-8(a); Wis. Stat. Ann. 11.1112; Wyo. Stat. Ann. § 22-25-102; *see also, e.g.*, N.Y.C. Admin. Code § 3-703(1)(l); S.F., Cal., Campaign & Governmental Conduct Code § 1.114(b).

[3] *See, e.g.*, Colo. Const. art. 28, § 3(4); Ohio Rev. Code § 3599.03(A); W. Va. Code Ann. § 3-8-8(a).

[4] Iowa Code Ann. § 68A.503(1); Mass. Gen. Laws ch. 55, § 8; 25 Pa. Stat. § 3253(a). Like N.J.S.A. § 19:34-45, Iowa's and Massachusetts's statutes also bar campaign contributions from insurance companies and other financial institutions. Iowa Code Ann. § 68A.503(1); Mass. Gen. Laws ch. 55, § 8.

lobbyists. New Jersey itself has adopted an assortment of pay-to-play laws, which entail special contribution limitations and disclosure obligations, for businesses that have or seek contracts with a state, legislative, county, or municipal government agency.[5] New York City law includes special, lower limits on contributions for any person having "business dealings with the city," a comprehensive classification that covers city contracts, real estate or land use transactions, economic development agreements, and more. N.Y.C. Admin. Code §§ 3-702(18), 3-703(1-a). Some pay-to-play statutes prohibit contributions not only to candidates but also to political parties and political committees (commonly known as "PACs"). Under federal law, for example, current or prospective government contractors may not contribute money or anything else of value to any federal candidate, political party, or PAC, including a "super PAC."[6] 52 U.S.C. § 30119; 11 C.F.R. § 115.2.

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[5] N.J.S.A. §§ 19:44A-20.3 to 19:44A-20.27. Likewise, many counties and cities in New Jersey have adopted their own pay-to-play rules for local government contractors. *See, e.g.*, Camden, N.J. Code § 33-19; Essex Ct., N.J., Code § 2-54; Trenton, N.J., Code § 57-4.

[6] A "super PAC" is a PAC that makes only independent expenditures—not contributions to candidates—and thus may accept unlimited contributions from individuals, corporations, labor organizations, and other PACs. *See, e.g.*, *Stop This Insanity, Inc. Employee Leadership Fund*

These various federal, state, and local laws all share with N.J.S.A. § 19:34-45 the common purpose of limiting opportunities for actual and apparent political corruption in circumstances where there is "a very specific quo for which the contribution may serve as the quid." *Wagner v. FEC*, 793 F.3d 1, 22 (D.C. Cir. 2015) (en banc) (upholding federal ban on contributions from federal contractors). They also demonstrate that the anticorruption interest underlying N.J.S.A. § 19:34-45 is neither novel nor implausible. *See Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 (2000) (explaining that the volume of empirical evidence necessary to satisfy judicial scrutiny "will vary up or down with the novelty and plausibility of the justification raised").

II. N.J.S.A. § 19:34-45 Addresses the Heightened Risk of Actual and Apparent Corruption Posed by Contributions from the Banking Industry.

A. Historical and present-day scandals and enforcement actions demonstrate the risk of quid pro quo corruption involving the banking and financial services industries.

In general, "no smoking gun is needed" for a statute to survive constitutional scrutiny "where, as here, . . . the likelihood of stealth [is]

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v. FEC, 902 F. Supp. 2d 23, 37 (D.D.C. 2012), *aff'd*, 761 F.3d 10 (D.C. Cir. 2014).

great, and the legislative purpose [is] prophylactic." *Blount v. SEC*, 61 F.3d 938, 945 (D.C. Cir. 1995). Here, however, there is ample concrete evidence of the corruption risk addressed by N.J.S.A. § 19:34-45. The district court documented an array of historical and present-day scandals involving campaign contributions by financial institutions. *See* J.A. 39-41, 48-49. As the district court noted, these examples are "more than conjectural"—they are "actual cases of legal enforcement" that demonstrate the state's compelling interest in enforcing its contribution ban. J.A. 41.

Additional examples of pay-to-play violations involving the financial sector further support the district court's findings. Indeed, despite the difficulty of detecting such illicit schemes, examples of pay-to-play scandals involving banks and other financial institutions are far from rare, and they exist across the country. In 2018, for example, the Securities and Exchange Commission ("SEC") fined three investment advisors for pay-to-play violations involving contributions to politicians who oversaw public pension funds. *See* Investment Advisers Releases Nos. 4958-4960 (July 10, 2018), https://www.sec.gov/litigation/admin/adminarchive/adminarc2018.shtml. The previous year, the agency

initiated ten similar enforcement actions. *See* Press Release, SEC, 10 Firms Violated Pay-to-Play Rule by Accepting Pension Fund Fees Following Campaign Contributions (Jan. 17, 2017), https://www.sec.gov/news/pressrelease/2017-15.html. Banks, in particular, have frequently been the subject of this type of enforcement action. *See, e.g.*, Press Release, SEC, SEC Charges State Street for Pay-to-Play Scheme (Jan. 14, 2016), https://www.sec.gov/news/pressrelease/2016-8.html (announcing $12 million settlement arising from pay-to-play scheme by State Street involving Ohio pensions); Press Release, SEC, SEC Charges Goldman Sachs and Former Vice President in Pay-to-Play Probe Involving Contributions to Former Massachusetts State Treasurer (Sept. 27, 2012), https://www.sec.gov/news/press-release/2012-2012-199htm (describing settlement with Goldman Sachs for illegal campaign contributions to then- Massachusetts state treasurer); Press Release, SEC, J.P. Morgan Settles SEC Charges in Jefferson County, Ala. Illegal Payments Scheme (Nov. 4, 2009), https://www.sec.gov/news/press/2009/2009-232.htm (documenting $722 million settlement with J.P. Morgan arising from pay-to-play scheme involving municipal bonds).

State authorities have also charged financial institutions with violating anticorruption laws through pay-to-play schemes. In 2010, for example, Bank of America agreed to pay $137 million to twenty states and several federal agencies for its involvement in a scheme to rig bidding processes for municipal business. *See* Martin Z. Braun & Jeff Bliss, *Bank of America Deal in Muni Case May Be "Tip of the Iceberg,"* Bloomberg (Dec. 7, 2010), https://www.bloomberg.com/news/articles/2010-12-08/bank-of-america-deal-in-muni-case-may-be-tip-of-the-iceberg-. The following year, JPMorgan Chase and UBS paid $211 million and $150 million, respectively, to settle charges arising from similar scandals. Eric Dash, *JPMorgan Settles Bond Bid-Rigging Case for $211 Million*, N.Y. Times (July 7, 2011), https://www.nytimes.com/2011/07/08/business/jpmorgan-settles-bond-bid-rigging-case-for-211-million.html.

Additional examples of similar practices abound; as the district court observed, the evidence of actual corruption involving the banking industry is "substantial." J.A. 41; *see, e.g.*, Steve Terrell, *Richardson Pay-to-Play Scandal Haunts Dem Seeking Arizona's Top State Job*, Santa Fe New Mexican (Sept. 30, 2014), https://www.santafenewmexican.com/news/local_news/richardson-pay-to-play-scandal-haunts-dem-seeking-

arizona-s-top-state-job/article_5ea71ce7-2b9b-5a9e-b1ae-2fd5c7efa350.html (describing arrangement where financial firm that contributed to PACs supporting New Mexico's Governor received "nearly $1.5 million in state contracts").[7] This long history of enforcement actions, as well as the other evidence discussed in the decision below, *see, e.g.*, J.A. 39-41, amply justifies the district court's finding of a "real risk of *quid pro quo* corruption in New Jersey's banking sector." J.A. 41; *see Nixon*, 528 U.S. at 393 (explaining that evidence introduced in litigation or cited by lower courts is adequate to show that the corruption concerns underlying *Buckley* also justify Missouri's contribution restriction); *Wagner*, 793 F.3d at 14 (noting the relevance of evidence from other states).

[7] *See also, e.g.*, Mike Gallagher, *NM Investment Scandal Winds Down*, Albuquerque J. (Oct. 18, 2020), https://www.abqjournal.com/1508279/nm-investment-scandal-winds-down.html; Gary Rivlin, *The Whistleblower: How a Gang of Hedge Funders Strip-Mined Kentucky's Public Pensions*, The Intercept (Oct. 21, 2018), https://theintercept.com/2018/10/21/kentucky-pensions-crisis-hedge-funds; *Sacramento Utility Accuses Banks of Rigging Sales of Municipal Derivatives*, N.Y. Times (Nov. 17, 2009), https://www.nytimes.com/2009/11/18/business/18muni.html; Michael J. de la Merced, *4 Firms Agree to Settlement in New York Pension Fund Inquiry*, N.Y. Times (Sept. 17, 2009), https://www.nytimes.com/2009/09/18/business/18pension.html.

B. The banking industry implicates special corruption concerns.

Beyond the litany of enforcement actions described above, a rich empirical literature confirms the unique corruption risks posed by political contributions from banks and other financial institutions. Research shows that these contributions significantly affect core government functions, that the relationship between contributions and government action is stronger in jurisdictions with histories of public corruption, and that more politically active banks and financial firms underperform in contrast to their less politically active peers. In other words, the data show measurable risks of actual corruption, and certainly the appearance thereof, associated with political contributions from banks and the financial sector.

Numerous studies demonstrate that political contributions from financial institutions affect politicians' allocation of government investments. *See* Aleksandar Andonov et al., *Political Representation & Governance: Evidence from the Investment Decisions of Public Pension Funds*, 73 J. Finance 2041, 2044, 2079-81 (2018) (concluding that inclusion of elected officials on public asset management boards results in worse performance because financial firms' contributions influence

politicians' investment decisions); William Beggs & Thuong Harvison, Pay to Play in Investment Management 3-7, 30-31 (Jan. 15, 2021) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3446357 (showing causal relationship between financial firms' contributions and acquisition of public investments); Yael V. Hochberg & Joshua D. Rauh, *Local Overweighting and Underperformance: Evidence from Limited Partner Private Equity Investments*, 26 Rev. Fin. Stud. 403, 405-06, 437 (2013) (finding bias in public pension investing toward home-state funds, with stronger bias in states with histories of political corruption). One paper, for example, concluded that institutions "whose owners and officers have made recent campaign contributions to influential state level officials tend to procure more public pension clients," and that this relationship is causal. Beggs & Harvison, *supra*, at 30-31. Importantly, this research also shows that firms selected on this basis achieve worse results—illustrating tangible economic harm resulting from these corrupt arrangements, *see* Andonov et al., *supra*, at 2044, 2079-81—and that political influence plays a stronger role in states with more extensive histories of political corruption, *see* Hochberg &

Rauh, *supra*, at 405-06, 437. Banks' political contributions thus pose a unique risk of corruption that affects the state fisc.

Research further indicates that political contributions from the banking sector influence elected officials' willingness to regulate or bail out firms. *See* Ran Duchin & Denis Sosyura, *The Politics of Government Investment*, 106 J. Fin. Econ. 24, 32-34, 39, 43 (2012) (finding that larger contributions by banks were associated with greater likelihood of receiving a bailout after 2008 financial crisis); Deniz Igan & Prachi Mishra, *Wall Street, Capitol Hill, and K Street: Political Influence and Financial Regulation*, 57 J. L. & Econ. 1063, 1065, 1075-83 (2014) (showing association between financial firms' 1996-2006 contributions and legislators' changing positions to favor deregulation before the financial crisis); Atif Mian et al., *The Political Economy of the US Mortgage Default Crisis*, 100 Am. Econ. Rev. 1967, 1969-70, 1997 (2010) (finding strong association between financial-sector contributions and congressmembers' voting for bank bailouts).[8] Studies have found, for

[8] *See also, e.g.*, Jeff Stein, *As Bank Profits Soar, Wall Street's Political Spending Hits New High*, Wash. Post (Apr. 30, 2019), https://www.washingtonpost.com/business/2019/04/30/bank-profits-soar-wall-streets-political-spending-hits-new-high (linking contributions by banks to Congressmembers' votes to loosen financial regulations).

example, that lobbying efforts by financial firms "were associated with whether legislators switched their stance in favor of" bills relaxing regulations in the years prior to the 2008 financial crisis, Igan & Mishra, *supra*, at 1082, and whether they subsequently supported bank bailouts, *see* Mian et al., *supra*, at 1997. The firms benefited by those bailouts again underperformed their peers, ruling out merit-based explanations for the benefits they accrued. Duchin & Sosyura, *supra*, at 43.

Empirical evidence also shows that political contributions and influence by banks and other financial actors are likely to decrease the probability and severity of government enforcement actions. *See* Maria M. Correia, *Political Connections and SEC Enforcement*, 57 J. Acct. & Econ. 241 *passim* (2014); Thomas Lambert, *Lobbying on Regulatory Enforcement Actions: Evidence from U.S. Commercial and Savings Banks*, 65 Mgmt. Sci. 2545, 2546 (2019); Panagiota Papadimitri et al., *Does Political Influence Distort Banking Regulation? Evidence from the US*, 53 J. Fin. Stability, article no. 100835, at 2, 21 (2021). Once more, this relationship is stronger in states with higher past levels of corruption, Papadimitri et al., *supra*, at 2, 18, and again the politically connected firms that benefit produce worse returns and engage in riskier

behavior, Lambert, *supra*, at 2546. Taken together, the data show that political contributions by banks, and the associated risk of corruption, uniquely threaten the effectiveness of the complex regulatory system governing the banking sector.

These risks have significant real-world consequences. Scholars have found that banks engaged in more campaign spending make riskier loans than and underperform their less politically active peers. *See* Deniz Igan et al., *A Fistful of Dollars: Lobbying and the Financial Crisis*, 26 NBER Macroeconomics Ann. 195, 195-97 (2012), https://www.journals.uchicago.edu/doi/pdf/10.1086/663992; Lambert, *supra*, at 2546. After observing these trends in banks' behavior in the years prior to the Great Recession, one group of scholars found the data to "suggest that the political influence of the financial industry played a role in the accumulation of risks, and hence, contributed to the financial crisis." Igan et al., *supra*, at 197.

Given the banking industry's status as "one of the longest regulated and most closely supervised of public callings," *United States v. Winstar Corp.*, 518 U.S. 839, 844 (1996) (plurality opinion) (quoting *Fahey v. Mallonee*, 332 U.S. 245, 250 (1947)), the decision below was correct to

recognize New Jersey's compelling interest in preventing the heightened corruption risk posed by contributions from the banking industry. *See* J.A. 47-49.

C. N.J.S.A § 19:34-45 limits the appearance of corruption.

The district court also correctly concluded that N.J.S.A § 19:34-45 limits the appearance of corruption, which is "[o]f almost equal concern as the danger of actual quid pro quo arrangements." *Buckley v. Valeo*, 424 U.S. 1, 27 (1976) (per curiam); *see* J.A. 39-41. The risk of apparent corruption is clear from the public's awareness of banks' prodigious spending on federal campaigns. According to the Center for Responsive Politics, the financial sector contributed nearly $2 billion to candidates, parties, and outside groups during the 2020 election cycle, making it "far and away the largest source of [federal] campaign contributions."[9] Banks provided tens of millions of that spending through contributions to congressional Republicans and Democrats alike[10]—a pattern that the

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[9] *See Finance/Insurance/Real Estate*, Open Secrets, https://www.opensecrets.org/industries/totals.php?cycle=2020&ind=F (last visited Feb. 6, 2022).

[10] *See, e.g.*, *Commercial Banks*, Open Secrets, https://www.opensecrets.org/industries/contrib.php?cycle=2020&ind=F03 (last visited Feb. 6, 2022); *see also, e.g.*, Brian Schwartz, *Wall Street Execs, Employees Spent $2.9 Billion on Campaigns, Lobbying During*

Supreme Court has explained "leav[es] room for no other conclusion but that these donors were seeking influence, . . . rather than promoting any particular ideology." *McConnell v. FEC*, 540 U.S. 93, 148 (2003). At the same time, a broad bipartisan majority of Americans perceive that elected officials give preferential treatment to large donors at the expense of other constituencies.[11] This perception, along with the substantial evidence of *actual* corruption detailed above, amply supports the district court's determination that New Jersey has a legitimate interest in preventing the appearance of corruption created by political contributions from banks.

Comments from lawmakers reinforce the seriousness of this concern. Even in the midst of Congress's reform efforts following the 2008 financial crisis, Senator Dick Durbin acknowledged that "banks . . . are

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2020 Election, Study Shows, CNBC (Apr. 15, 2021), https://www.cnbc.com/2021/04/15/wall-street-spent-2point9-billion-to-influence-washington-during-2020-election.html.

[11] *See, e.g.*, Pew Rsch. Ctr., *In Views of U.S. Democracy, Widening Partisan Divides over Freedom to Peacefully Protest* 9 (2020), https://www.pewresearch.org/politics/wp-content/uploads/sites/4/2020/09/PP_2020.09.02_Democracy_FINAL.pdf; Voice of the People & Program for Pub. Consultation, *Americans Evaluate Campaign Finance Reform* 4 (2018), https://www.publicconsultation.org/wp-content/uploads/2018/05/Campaign_Finance_Report.pdf.

still the most powerful lobby on Capitol Hill. And they frankly own the place." Ryan Grim, *Dick Durbin: Banks "Frankly Own the Place,"* HuffPost (May 30, 2009), https://www.huffpost.com/entry/dick-durbin-banks-frankly_n_193010. Five years later, Senator Bernie Sanders similarly observed that "[a]nyone who thinks that Congress regulates Wall Street has got it backwards. The reality is that Wall Street, with their incredible wealth and lobbying capabilities and campaign contributions, regulates the United States Congress." 160 Cong. Rec. S6720 (daily ed. Dec. 12, 2014). In 2018, Senator Sherrod Brown agreed that the financial sector "can always find Members in [Congress] who are fueled by lots of Wall Street contributions . . . to do [its] bidding." 164 Cong. Rec. S1351 (daily ed. Mar. 6, 2018).

Observations like these from elected representatives reflect the public perception that contributions from banks and other financial institutions fuel corruption. If left unanswered, "the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance." *Nixon*, 528 U.S. at 390. After all, "[d]emocracy works 'only if the people have faith in those who govern, and that faith is bound to be shattered when high officials . . . engage in

activities which arouse suspicions of . . . corruption.'" *Id.* (quoting *United States v. Miss. Valley Generating Co.,* 364 U.S. 520, 562 (1961)). N.J.S.A. § 19:34-45 thus not only limits opportunities for actual and apparent corruption; it correspondingly protects the integrity of New Jersey's democratic process.

III. The District Court's Constitutional Analysis Is Correct.

In addition to properly recognizing New Jersey's compelling anticorruption interest, the decision below follows the approach of the Supreme Court and numerous courts of appeals, which collectively have upheld a wide range of laws prohibiting contributions by certain closely regulated entities and all corporations as "'closely drawn' to match a 'sufficiently important interest.'" *Randall v. Sorrell*, 548 U.S. 230, 247 (2006) (quoting *Buckley*, 424 U.S. at 25).

A. The district court correctly declined Bankers Association's improper invitation to disregard *FEC v. Beaumont*, which controls this case.

Bankers Association "'acknowledge[d in the district court] that *Beaumont* has not been overruled,'" J.A. 47 n.6, but now essentially reverses course, arguing that *Beaumont* can provide "no guidance" beyond the relevant standard of review after the Supreme Court's

intervening decision in *Citizens United*, Appellant's Br. 40. But this Court, like every other appellate court presented with the question, has recognized that *Beaumont* remains binding precedent. *Deon v. Barasch*, 960 F.3d 152, 159 & nn.28-29 (3d Cir. 2020); *see also, e.g.*, *Green Party of Conn. v. Garfield*, 616 F.3d 189, 192-93, 198-99 (2d Cir. 2010) ("*Beaumont* and other cases applying the closely drawn standard to contribution limits remain good law [after *Citizens United*]."); *United States v. Danielczyk*, 683 F.3d 611, 615-19 (4th Cir. 2012) ("*Beaumont* clearly supports the constitutionality [of FECA's corporate contribution ban] and *Citizens United* . . . does not undermine *Beaumont*'s reasoning on this point."); *Cath. Leadership Coal. of Tex. v. Reisman*, 764 F.3d 409, 442-43, 443 n.46 (5th Cir. 2014) (upholding Texas's corporate contribution ban under *Beaumont* and noting that *Citizens United* does not change the analysis for contribution limits); *Iowa Right to Life Comm., Inc. v. Tooker*, 717 F.3d 576, 601 (8th Cir. 2013) ("*Beaumont* and [Eighth Circuit precedent following *Beaumont* after *Citizens United*] dictate the outcome [of a challenge to Iowa's corporate contribution ban]."); *Yamada v. Snipes*, 786 F.3d 1182, 1205 n.17 (9th Cir. 2015) ("*Beaumont* and other cases applying the closely drawn standard to

contribution limits remained good law after *Citizens United*. This remains true after *McCutcheon*." (citation omitted)); *Wagner*, 793 F.3d at 6 (rejecting claim that *Citizens United* "casts doubt" on *Beaumont*); *see also United States v. Emmons*, 8 F.4th 454, 469-70 (6th Cir. 2021) (applying *Beaumont* to uphold FECA's corporate contribution ban notwithstanding *Citizens United*); Appellee's Br. 33-35.

Massachusetts's Supreme Judicial Court thus observed that "every Federal circuit court that has considered" *Beaumont*'s status after *Citizens United* has concluded that the decision remains "controlling precedent." *1A Auto, Inc. v. Dir. of the Off. of Campaign & Pol. Fin.*, 105 N.E.3d 1175, 1185 (Mass. 2018) (collecting cases); *see also, e.g.*, *King St. Patriots v. Tex. Democratic Party*, 521 S.W.3d 729, 742-43 (Tex. 2017).

Nor has *Citizens United* or any other case invalidated *Beaumont*'s anticorruption reasoning. While *Beaumont* discussed the since-invalidated anti-distortion and shareholder-protection purposes, Appellant's Br. 7-8, 40, Bankers Association ignores that the decision was rooted in two interests that current First Amendment doctrine still recognizes as compelling. *See* 539 U.S. at 152-56. First, the Court found that the ban and other contribution limits addressed corruption and its

appearance, including quid pro quo corruption. *Id.* at 155-56. Second, it recognized that the federal corporate contribution ban advances an interest, "[q]uite aside from war-chest corruption" and shareholder protection, in preventing individuals from circumventing contribution limits by funneling funds through corporations. *Id.* at 155. This anti-circumvention interest is a necessary corollary of the anticorruption interest (because easily circumvented contribution limits cannot prevent quid pro quo exchanges) and remains an important justification for campaign finance laws; neither *Citizens United* nor *McCutcheon* altered this analysis. *See McCutcheon*, 572 U.S. at 200-02, 210 (plurality opinion); *FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 456 (2001) (recognizing that "circumvention is a valid theory of corruption").[12]

[12] Lower courts have explicitly recognized that *Citizens United* preserved the anti-circumvention interest. *E.g.*, *Ognibene v. Parkes*, 671 F.3d 174, 195 n. 21 (2d Cir. 2011); *Danielczyk*, 683 F.3d at 618; *see also Thalheimer v. City of San Diego*, 645 F.3d 1109, 1124 (9th Cir. 2011) (recognizing, post-*Citizens United*, that anti-circumvention is "part of the familiar anti-corruption rationale") *overruled on other grounds*, *Bd. of Trs. of the Glazing Health & Welfare Tr. v. Chambers*, 941 F.3d 1195 (9th Cir. 2019).

Recognizing the continuing validity of the Supreme Court's reasoning, lower courts routinely cite *Beaumont* not only for its standard of review but also for its substantive analysis and holding. *See, e.g.*, *Emmons*, 8 F.4th at 469-70; *Tooker*, 717 F.3d at 601 (concluding that "*Beaumont* . . . dictate[d] the outcome," not just the standard of review).

Bankers Association's efforts to distinguish *Beaumont* are no more availing. Contrary to its argument, *e.g.*, Appellant's Br. 28-29, 41-42, closely drawn scrutiny does not require that N.J.S.A. § 19:34-45 permit covered entities to create corporate PACs. *Beaumont* reasoned that the plaintiffs had failed to show that the federal statute, including the option to establish corporate PACs, was not closely drawn, but the decision nowhere indicated that the PAC option was necessary to that conclusion or that the statute would have been unconstitutional without it. *See* 539 U.S. at 162-63. Indeed, other courts have since applied *Beaumont* to uphold state and municipal bans that do not offer this option. *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1125-26 (9th Cir. 2011), *overruled on other grounds*, *Bd. of Trs. of the Glazing Health & Welfare Tr. v. Chambers*, 941 F.3d 1195 (9th Cir. 2019); *1A Auto*, 105 N.E.3d at 1187-88.

Moreover, notwithstanding their inability to establish PACs, banks and other corporate entities covered by New Jersey's statute enjoy significantly *more* freedom to participate financially in politics than did the *Beaumont* plaintiffs. Unlike those plaintiffs, who were then subject to a ban on corporate independent expenditures later invalidated in *Citizens United*, *see* 558 U.S. at 365-66, Bankers Association and its members can make unlimited independent expenditures in support of their preferred candidates and causes.[13] In contrast, the *Beaumont* plaintiffs could participate politically only through a separate fund connected to the corporation commonly known as a corporate PAC. *See Beaumont*, 539 U.S. at 149. The Supreme Court has since found this form of participation through a distinct legal entity to be an inferior, "burdensome alternative[]" to direct corporate independent expenditures. *Citizens United*, 558 U.S. at 337-39 (finding that corporate PACs "do[] not allow corporations to speak").

[13] Although the parties here disagree on whether N.J.S.A. § 19:34-45 purports to prohibit independent expenditures by banks, all agree that such expenditures are ultimately permitted, either because the statute does not regulate them or because it cannot constitutionally do so. *See, e.g.*, J.A. 12-14.

Bankers Association's attempt to escape *Beaumont* based on the federal statute's allowing corporate PAC contributions, *see* Appellant's Br. 27, 41-42, thus ignores a key advantage enjoyed by New Jersey banks over the *Beaumont* plaintiffs. In fact, because alternative avenues for political spending—such as independent expenditures—are available to banks, New Jersey's statute stands on even firmer constitutional ground. *See 1A Auto*, 105 N.E.3d at 1187-88 (following the same logic in rejecting a challenge to Massachusetts' corporate contribution ban).

Beaumont clearly controls this case, and the district court properly applied this binding precedent to uphold N.J.S.A. § 19:34-45.

B. The decision below is consistent with numerous federal appellate decisions upholding both broader and similarly targeted contribution bans.

The district court's ruling also aligns with a substantial body of precedent from federal courts of appeals upholding contribution restrictions for corporations and highly regulated industries, including some laws that, like the federal corporate contribution ban, are much broader than N.J.S.A. § 19:34-45.

Indeed, in the twelve years since the *Citizens United* Court recognized the right of corporations to make unlimited independent

expenditures, federal courts of appeals have repeatedly rejected First Amendment challenges to various state and local laws that categorically ban corporate contributions. *See Tooker*, 717 F.3d at 601 (rejecting challenge to Iowa statute prohibiting contributions by corporations, banks, insurance companies, savings associations, and credit unions); *Danielczyk*, 683 F.3d at 615-19 (rejecting First Amendment defense of individuals prosecuted for illegally reimbursing individuals' contributions with corporate funds); *Minn. Citizens Concerned for Life v. Swanson*, 692 F.3d 864, 877-80 (8th Cir. 2012) (finding challenge to Minnesota's corporate contribution ban unlikely to succeed "[i]n light of *Beaumont*"); *Ognibene*, 671 F.3d at 194-97 (upholding New York City's coverage of LLCs, LLPs, and partnerships under its amended corporate contribution ban); *Thalheimer*, 645 F.3d at 1124-26 (holding challenge to city ordinance banning campaign contributions from non-individual entities was unlikely to succeed). State supreme courts have followed suit. *See, e.g.*, *1A Auto, Inc.*, 105 N.E.3d at 1185 (following the unanimous precedent of "every Federal circuit court" and upholding Massachusetts's comprehensive ban on corporate contributions); *King St. Patriots*, 521 S.W.3d at 742-43 (upholding Texas's ban on corporate contributions).

Federal courts of appeals have also overwhelmingly upheld comparable restrictions that target contributions from certain closely regulated groups, including financial services professionals, government contractors, and lobbyists. *See N.Y. Republican State Comm. v. SEC*, 927 F.3d 499, 501 (D.C. Cir. 2019) (upholding SEC rule barring members of the Financial Industry Regulatory Authority who previously made contributions from conducting business with public officials); *Schickel v. Dilger*, 925 F.3d 858, 871 (6th Cir. 2019) (upholding Kentucky's prohibition against lobbyist contributions); *Wagner*, 793 F.3d at 3 (upholding federal ban on government contractor contributions); *Yamada*, 786 F.3d at 1204-07 (upholding Hawaii's contribution ban for government contractors); *Ognibene*, 671 F.3d at 181, 190-91 (upholding New York City's lower contribution limits for persons "having business dealings with city"); *Preston v. Leake*, 660 F.3d 726, 729-30, 736 (4th Cir. 2011) (upholding North Carolina's ban on lobbyist contributions); *Green Party of Conn.*, 616 F.3d at 198-205 (upholding Connecticut's prohibition against government contractor contributions); *Blount*, 61 F.3d at 939-40 (upholding rule prohibiting municipal securities professionals who

previously gave contributions from conducting business with public officials).

These decisions collectively belie Bankers Association's suggestion, Appellant's Br. 25, that N.J.S.A. § 19:34-45 is inconsistent with "modern First Amendment law," as the district court correctly explained, J.A. 49-50. They also confirm that the record here is more than adequate to support New Jersey's law.

For example, in *Blount*, the D.C. Circuit upheld a Municipal Securities Rulemaking Board regulation that prohibited municipal securities professionals from doing business with public officials involved in municipal bond issuances if those professionals had made campaign contributions to the public officials during the preceding two years. 61 F.3d at 939-40. Even without a record of specific examples of quid pro quo exchanges in the municipal bond market, the court was satisfied that contributions by municipal securities professionals "self-evidently create a conflict of interest," and engendered the risk that municipal contracts would be awarded based on their benefit to public officials' "campaign chests." *Id.* at 944-45.

The D.C. Circuit reaffirmed *Blount* in 2019, upholding a similar SEC rule that prohibited contributions by members of the Financial Industry Regulatory Authority who act as "placement agents," *i.e.*, individuals and firms that investment advisers hire to help them secure contracts advising a governmental entity. *N.Y. Republican State Comm.*, 927 F.3d at 501. The court found that "[a] contribution is corrupting even if it cannot be traced to the subsequent award of a contract for advisory services because in this market 'a contribution brings the donor merely a chance to be seriously considered, not the assurance of a contract.'" *Id.* at 509 (quoting *Blount*, 61 F.3d at 945). Thus, "it would make no sense to require the SEC to show that quid pro quo arrangements are . . . 'rampant.'" *Id.* Other courts have concurred. *See Ognibene*, 671 F.3d at 188 (declining to require evidence of actual scandals, which "would conflate the interest in preventing actual corruption with the separate interest in preventing apparent corruption"); *Schickel*, 925 F.3d at 870 (same).

These decisions confirm the propriety of the district court's decision here, where the record is more than adequate to support New Jersey's law. Indeed, the district court relied on specific historical and "modern

day incidents of *quid pro quo* corruption or its appearance in New Jersey's banking sector," J.A. 40; *see* J.A. 39-41, and those are just some examples of the very real corruption concerns addressed by N.J.S.A. § 19:34-45. *See supra* at 8-20; Appellee's Br. 9-12.

C. Bankers Association's authorities fail to negate the law or evidence supporting the decision below.

Bankers Association's attempt to rely on *McCutcheon* and *Deon* is misplaced, *see* Appellant's Br. 28, because those cases involved laws that are materially different from N.J.S.A. § 19:34-45. In *McCutcheon*, the Supreme Court invalidated federal law's aggregate cap on a single donor's contributions to all political committees and candidates for federal office, which was layered on top of existing base limits; the Court found that the aggregate cap did not effectively guard against the circumvention of those base limits and that the potential circumvention schemes posited by the government were "highly implausible." 572 U.S. at 213 (plurality opinion). Thus, *McCutcheon* is "inapplicable" because that case did not address the targeted kind of contribution prohibition at issue here, nor did it "question the constitutionality of contribution

restrictions generally or alter the relevant analytical framework." J.A. 45.

The district court also properly distinguished *Deon*, which concerned a recently enacted Pennsylvania ban on contributions by certain gaming industry participants—a law that was nearly identical to one that had been invalidated by Pennsylvania's state supreme court and subsequently reenacted without significant amendment or legislative fact-finding. *See* J.A. 45, 49. Importantly, Pennsylvania's law, which was relatively new, lacked a legislative record comparable to that of New Jersey's century-old prohibition against bank contributions. J.A. 45; *see* Appellee's Br. 39-41.

McNesby also does not advance Bankers Association's argument here. In *McNesby*, this Court invalidated a Philadelphia ban on police contributions where the "evidence of recent politically-orchestrated harm [wa]s non-existent," and the "only showing of present-day police corruption consist[ed] of articles about 'dirty cops' and corrupt politicians." *Lodge No. 5 of the Fraternal Order of Police ex rel. McNesby v. City of Philadelphia*, 763 F.3d 358, 373 (3d Cir. 2014). That is a far cry from this case, where there is a substantial record of the risk and

consequences of actual and apparent corruption in the banking sector, *see supra* at 8-20; Appellee's Br. 9-12. The district court thus correctly recognized that the evidence here "represent[s] more than [the] conjectural harm of corruption" presented to the court in *McNesby*. J.A. 41; *see* Appellee's Br. 41.

IV. N.J.S.A. § 19:34-45 Promotes Public Confidence in Democratic Self-Government.

In addition to preventing quid pro quo corruption and its appearance, N.J.S.A. § 19:34-45 fosters public confidence in New Jersey's democratic system, an interest that is rooted in the First Amendment itself. The First Amendment protects a democratic system that depends on "the great body of the people," and "not [on] an inconsiderable proportion, or a favored class of it." Federalist No. 39, at 209 (James Madison); *see also* J.A. 29. The Supreme Court likewise has made clear that "representative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political process of his State's legislative bodies." *Reynolds v. Sims*, 377 U.S. 533, 565 (1964).

New Jersey's statute therefore should be viewed as protecting the First Amendment interests of New Jersey citizens to "participate in and contribute to our republican system of self-government," *Globe Newspaper Co. v. Superior Court of Norfolk Cty.*, 457 U.S. 596, 604 (1982), so that "government may be responsive to the will of the people," *Stromberg v. California*, 283 U.S. 359, 369 (1931). This constitutional principle, which underlies our entire framework of democracy, is negated when "officeholders . . . decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions by the officeholder." *McConnell*, 540 U.S. at 153. When the public comes to believe its elected representatives favor big donors, at the expense of "the great body of the people," it generates cynicism and distrust in the political system and subverts a foundational tenet of our democratic system. Federalist No. 39, at 209 (James Madison).

Rules to preserve electoral integrity and responsiveness in government are an antidote to this malaise and can augment the public's faith in the political process. Strong campaign finance laws like N.J.S.A. § 19:34-45 operate in service of our constitutional system of

representative self-government, particularly given the real risk of corruption inherent in privately financed campaigns.

New Jersey's law helps to ensure public confidence in our democratic system by shutting off a direct channel for banking institutions to manipulate and control politics for their own narrow interests. That objective is just as critical today as it was when New Jersey first adopted its prohibition against bank contributions.

CONCLUSION

The district court's decision upholding N.J.S.A. § 19:34-45's contribution ban should be affirmed.

Dated: February 9, 2022

Respectfully submitted,

/s/ Paul M. Smith
Paul M. Smith
Erin Chlopak
Sam Horan*
CAMPAIGN LEGAL CENTER
1101 14th Street NW
Washington, DC 20005

Attorneys for *Amicus Curiae*

*Licensed to practice in Massachusetts only; application for admission to the D.C. bar pending; supervised by Erin Chlopak, member of the D.C. Bar.

CERTIFICATE OF COMPLIANCE

I, Paul M. Smith, the undersigned attorney, hereby certify:

1. I am a member of the Bar of the United States Court of Appeals for the Third Circuit.

2. The electronic version of this Brief of Amicus Curiae in Support of Appellants is identical to the text of the paper copies.

3. This file was scanned using Webroot SecureAnywhere CE 22.1 virus detection software and no virus was detected.

4. This brief contains 6,379 words exclusive of the portions exempted by Fed. R. App. P. 32(f). In making this certification, I have relied on the word count feature of Microsoft Word for Microsoft Office 365. This brief has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft Office 365 in 14-point Century Schoolbook font.

Dated: February 9, 2022

/s/ Paul M. Smith

CERTIFICATE OF SERVICE

I, the undersigned attorney, hereby certify that on February 9, 2022, I electronically filed the foregoing Brief of Amici Curiae with the Clerk of the Court of the United States Court of Appeals for the Third Circuit by using the CM/ECF system, which will accomplish electronic notice and service for all counsel of record. I further certify that on the date of this filing, seven paper copies are being dispatched for delivery to the Clerk of the Court, and one paper copy each is being dispatched for delivery to counsel of record for the parties.

Dated: February 9, 2022

/s/ Paul M. Smith