No. 17-6456

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN SCHICKEL, et al.,

Plaintiffs-Appellees,

v.

CRAIG DILGER, et al.,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
NO. 2:15-cv-00155-WOB-JGW

BRIEF OF *AMICUS CURIAE* CAMPAIGN LEGAL CENTER SUPPORTING DEFENDANTS-APPELLANTS

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 17-6456 Case Name: Schickel v. Dilger

Name of counsel: Tara Malloy, Megan P. McAllen

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s/ Tara Malloy
Tara Malloy

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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STATEMENT OF INTEREST[1]

Amicus curiae Campaign Legal Center is a nonprofit organization with expertise in the legal issues raised here, and has participated in numerous campaign finance cases relevant to this appeal, including *McCutcheon v. FEC*, 134 S. Ct. 143 (2014), and *McConnell v. FEC*, 540 U.S. 93 (2003).

INTRODUCTION

In the wake of corruption scandals in Kentucky and other states, Kentucky's General Assembly reasonably concluded that it was important to ban gifts, campaign contributions, and fundraising solicitations by legislative agents ("lobbyists"), Ky. Rev. Stat. Ann. ("KRS") §§ 6.767(2), 6.751(2), 6.811, both to remove any risk of *quid pro quo* corruption and to send a strong message to voters that their state government is not for sale.

*Amicus'*s expertise lies in the area of campaign finance law, and this brief will accordingly focus on the lobbyist contribution and solicitation restrictions ("lobbyist campaign restrictions"), with a limited discussion

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), *amicus* affirms that no party's counsel authored the brief in whole or in part, and no person—other than *amicus*—contributed money to fund the brief.

of the lobbyist gift ban, chiefly to address the distinction between gifts and campaign contributions for purposes of First Amendment review.

As an initial matter, appellees are not lobbyists and lack standing to assert the rights of lobbyists. Each party "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). As candidates, appellees' interests in maximizing their ability to collect gifts and political contributions from any source likely diverge from those of regulated lobbyists and firms. *See infra* Part I.B. This Court should not decide what interests are at stake without the participation of those directly affected.[2]

Turning to the merits, *amicus* first argues that the district court applies the wrong standard of review to the lobbyist campaign

[2] The appellees' asserted injury appears to rest entirely on vague allegations that they are "aware of" lobbyists who "would like" to make and solicit contributions, or that they "would accept" contributions from certain lobbying groups. But the record apparently lacks anything suggesting that any lobbyists would actually *provide* such support. *See* Pls.' Summ. J. Mem., R. 65-1, Page ID #3372-76. "[T]here is no reason why [appellees] could not have put forth an affidavit from a particular [lobbyist] who would have contributed" to, or solicited contributions for, their campaigns. *Tenn. Republican Party v. SEC*, 863 F.3d 507, 517 (6th Cir. 2017).

restrictions. The regulation of campaign contributions, as decades of Supreme Court precedent confirms, is not subject to strict scrutiny; nor should the regulation of contribution *solicitations* be held to this standard. Instead, restrictions on campaign contributions are analyzed under a "lesser" standard of review, under which "[e]ven a significant interference with protected rights of political association may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms." *McCutcheon*, 134 S. Ct. at 1444 (internal quotation marks omitted) (quoting *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (per curiam)).

Amicus next focuses on the scope and significance of Kentucky's anticorruption interest and the rich empirical and narrative evidence substantiating it. It is well-settled law that the state's interest in combatting *quid pro quo* corruption and the appearance thereof can sustain restrictions on contributions, *McCutcheon*, 134 S. Ct. at 1444, and the solicitation of contributions, *McConnell*, 540 U.S. at 138; *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1665 (2015), under both strict and intermediate judicial scrutiny. Kentucky's lobbyist campaign restrictions

narrowly target activity that carries a unique risk of *quid pro quo* corruption.

Finally, Kentucky's gift ban is a much-needed anticorruption measure. As this Court recognized in granting appellants' motion for stay pending appeal, leaving the legislature "without ethical rules firmly in place governing interactions between legislators and lobbyists creates opportunities for *quid pro quo* corruption and its appearance." *Amicus* will further argue that limiting *gifts* to legislators does not justify strict, or even heightened, judicial scrutiny, because although campaign-related giving has been found to implicate First Amendment interests, *gift-giving* has not.

ARGUMENT

I. The Decision Below Is Doctrinally Misconceived and Contrary to Well-Settled Standards of First Amendment Review.

The lower court's analysis of Kentucky's lobbyist campaign restrictions is irreconcilable with governing standards of First Amendment review.

As a threshold matter, it is unclear whether the court's First Amendment analysis is rooted in the rights of free expression and

association or a more particularized "right to lobby." In assessing whether the gift ban is unconstitutionally overbroad, for example, the court emphasizes that "[t]he act of lobbying is protected by the First Amendment right to petition the government." Mem. Op. & Order, R. 122, Page ID #4638. Although the Supreme Court has suggested in dicta that lobbying is protected under the First Amendment right to petition, *e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 369 (2010); *United States v. Harriss*, 347 U.S. 612, 625-27 (1954), it has not definitively resolved that question.[3] But whatever its contours, the right to petition clearly is not directly impacted by campaign contribution restrictions like the Kentucky laws challenged here.

The district court's analysis is fundamentally unsound in two other key respects:

First, the court appears to have applied strict scrutiny to all of the lobbying provisions, notwithstanding the decades of case law making clear that campaign contribution limits are subject only to intermediate,

[3] The Court's Petition Clause doctrine is underdeveloped relative to that of other First Amendment rights, and the scope of the right remains a matter of debate. *See, e.g.*, Maggie McKinley, *Lobbying and the Petition Clause*, 68 Stan. L. Rev. 1131, 1162 (2016).

"closely drawn" review. *McConnell*, 540 U.S. at 136; *FEC v. Beaumont*, 539 U.S. 146, 162 (2003).

Second, as discussed in Part III, *infra*, there is reason to question the application of any standard of heightened scrutiny to a restriction on *gifts*, which are not typically considered to have expressive or associational dimensions.

A. An Unbroken Line of Supreme Court Precedent Has Held that Campaign Contribution Limits Are Subject to "Closely Drawn"—Not Strict—Scrutiny.

Since deciding *Buckley* over forty years ago, the Supreme Court has never wavered from its position that the First Amendment permits limiting campaign contributions and that such limits are subject to lesser scrutiny than more restrictive campaign regulations, such as expenditure limitations. *Buckley* explained that expenditure limits bar individuals from "any significant use of the most effective modes of communication," and therefore represent "substantial . . . restraints on the quantity and diversity of political speech." 424 U.S. at 19-20. Contribution limits, however, "entail[ ] only a marginal restriction upon the contributor's ability to engage in free communication," because "contributions lie closer

to the edges than to the core of political expression." *Beaumont*, 539 U.S. at 161.

The Court has declined repeated invitations to reconsider this framework. As a result, a contribution limit need not meet the strict scrutiny standard of "promot[ing] a compelling interest and [being] the least restrictive means to further the articulated interest," *McCutcheon*, 134 S. Ct. at 1444, but rather "passes muster if it satisfies the lesser demand of being closely drawn to match a sufficiently important interest." *Beaumont*, 539 U.S. at 162 (internal quotation marks omitted). The district court's conclusion that Kentucky must employ the "least restrictive means" to achieve its anticorruption goal defies this line of precedent.

Kentucky's choice to *ban*, rather than limit, lobbyist contributions, does not change the level of scrutiny. A law regulating contributions is subject to "closely drawn" scrutiny regardless of whether it is a limit or a ban. *Id.* ("It 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.").

B. Barring Lobbyists from Directly Soliciting or Bundling Campaign Contributions Is Properly Understood as a Regulation of Contributions for the Purposes of First Amendment Review.

The Supreme Court's application of the "lesser" closely drawn standard to campaign contributions reflects its concern that contributions, because they involve direct transactions between candidates and contributors, pose substantial threats to the integrity of officeholders and electoral processes. The act of soliciting or bundling contributions is simply another step in the same transaction, and presents no less of a corruption risk.

The Court has recognized as much, treating laws regulating the solicitation of contributions as necessary corollaries, for First Amendment purposes, to laws limiting contributions themselves. *McConnell*, 540 U.S. at 138 (applying closely drawn scrutiny to the solicitation provisions in Title I of the Bipartisan Campaign Reform Act ("BCRA")). "[F]or purposes of determining the level of scrutiny, it is irrelevant that [the law] regulate[s] contributions on the demand rather than the supply side." *Id.*; *see also FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 208 (1982) (upholding limitation on PAC solicitations under closely drawn standard).

The Court clarified its position most recently in *Williams-Yulee*, where it applied strict scrutiny but upheld a Florida law prohibiting judicial candidates from personally soliciting campaign contributions. 135 S. Ct. at 1665. In so doing, however, the Court specifically distinguished its application of closely drawn scrutiny to the BCRA solicitation provisions upheld in *McConnell*, because those laws "operated primarily to prevent circumvention of the contribution limits, which were the subject of the 'closely drawn' test in the first place." *Id.* In other words, when a solicitation restriction works to prevent the evasion of a contribution limit, the entire regulatory scheme remains subject to *Buckley*'s "more permissive" closely drawn standard. Kentucky's solicitation restriction averts precisely this type of circumvention: it prevents lobbyists from evading the ban on their personal contributions by instead bundling the contributions of others.[4]

[4] Indeed, even as *McCutcheon* rejected an anti-circumvention rationale with respect to the federal aggregate contribution limits, it did so because it thought circumvention was "highly implausible" in that setting. 134 S. Ct. at 1453. But it is by no means "hard to believe that a rational [lobbyist] would engage in such machinations," *id.* at 1454, if given the chance. *See infra* Part II.C.

Appellees may attempt to rely on *Green Party of Conn. v. Garfield*, 616 F.3d 189 (2d Cir. 2010), to nevertheless urge the application of strict scrutiny here, but that case was decided before, and therefore without the benefit of, the Court's analysis in *Williams-Yulee*. But even under strict scrutiny, Kentucky's law still passes muster because it serves a compelling anticorruption interest and leaves open alternative avenues of association. *See* Kentucky Legislative Ethics Commission ("KLEC") Br. 42-43.

In any event, this aspect of the case is poorly framed. The appellees here are legislators and legislative candidates, not lobbyists, so even if soliciting a contribution is "speech," it is not *the appellees'* speech. To the extent there is a justiciable injury to *candidates*, it is that such a law prevents them from "amass[ing] the resources necessary for effective campaign advocacy," *Buckley*, 424 U.S. at 21. But appellees have not even attempted to show that the lobbyist solicitation restriction impinges on their campaign fundraising, let alone "render[s] political association ineffective, drive[s] the sound of [their] voice[s] below the level of notice, and render[s] contributions pointless." *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 397 (2000).

II. Kentucky's Restrictions on Lobbyist Contributions and Fundraising Advance its Vital Interests in Preventing Actual and Apparent Corruption.

In all of the Supreme Court's decisions on the subject, the substantiality of the anticorruption interest as a justification for contribution restrictions "has never been doubted." *Beaumont*, 539 U.S. at 154 (citation omitted). And as both history and scholarship confirm, the prospect of *quid pro quo* corruption is even greater in the context of *lobbyist* giving.

Kentucky's ethics laws focus narrowly on lobbyists because they have "a particularly direct financial interest in [a legislator's] policy decisions," and it follows that a lobbyist's financial support of a legislator "pose[s] a heightened risk of actual and apparent corruption, and merit[s] heightened government regulation." *Ognibene v. Parkes*, 671 F.3d 174, 188 (2d Cir. 2011). When lobbyists directly involve themselves in the campaign fundraising process, whether by making contributions themselves or soliciting and bundling the contributions of others, it "mix[es] money and politics on both ends of the equation," making the activity "that much more risky and questionable." *Id.* "This is both an important and a legitimate legislative judgment that '[c]ourts simply are

not in the position to second-guess,' especially 'where corruption is the evil feared.'" *Preston v. Leake*, 660 F.3d 726, 736 (4th Cir. 2011) (alteration in original) (citation omitted).

The lobbyist campaign restrictions were explicitly enacted to preserve the "proper operation of democratic government," which requires that "a public official be independent and impartial" and that "the public have confidence in the integrity of its government and public officials." KRS § 6.606. The General Assembly—which is uniquely positioned to know how lobbyists in Kentucky operate—reasonably concluded that campaign contributions made, solicited, or bundled by lobbyists would create an untenable risk that campaign dollars would be traded for votes, or would lead the public to believe they had been.

A. Kentucky Adopted the Restrictions in Response to Well-Documented Public Scandals Involving State Lobbyists.

"Operation BOPTROT," the infamous federal corruption sting that prompted enactment of these lobbying provisions in the first place, was fueled by the inordinately close and financially interdependent relationships that had taken hold among Kentucky legislators and lobbyists.

The scale of wrongdoing uncovered by the investigation forced Kentucky legislators to face some hard truths about "the cash-happy world of some lobbyists and legislators." KLEC Dep. Ex. 54, R. 47-57, Page ID #1427 (citing Tom Loftus & Al Cross, *Lies, Bribes and Videotape*, Courier-Journal (July 1, 1993)). Kentucky, recognizing the need to carefully regulate the financial relationships between state politicians and lobbyists, promptly convened a special legislative session, at which "the legislature endured a painful self-examination that ultimately produced some of the nation's toughest laws on legislative ethics and campaign finance." *Id.*

Public confidence in Kentucky's government plummeted in BOPTROT's wake. *See id.* (noting that General Assembly's "public standing plunged . . . to a new low in 1992 after the investigation was revealed"). Kentuckians were especially outraged that their legislators could be bought so *cheaply*; the scandal revealed that state lawmakers were willing to betray the public trust for as little as $400, and one was implicated for pocketing just $20. Martin Booe, *ETHICS: Kentuckians Amazed That $400 Can Buy a Lawmaker*, L.A. Times (Apr. 13, 1993), http://articles.latimes.com/1993-04-13/news/mn-22398_1_harness-

racing-industry; *cf.* Lowell H. Harrison & James C. Klotter, *A New History of Kentucky* 422 (1997).

Even if this evidence were less overwhelming, the Supreme Court made clear in *Shrink Missouri* that "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." 528 U.S. at 391. And "there is nothing novel or implausible about the notion" that lobbyists might offer campaign support with the expectation of receiving something valuable in return. *Wagner v. FEC*, 793 F.3d 1, 21 (D.C. Cir. 2015) (en banc). That is the very essence of what lobbyists are paid to do: use all resources at their disposal to deliver policy results for their paying clients. Therefore, even assuming a less comprehensive record, a prophylactic approach would be permissible. A state need not experience a scandal every decade to have a legitimate interest in avoiding one.

B. Experience Elsewhere Makes Clear that Kentucky's Corruption Concerns Are Well-Founded.

The district court insists that Kentucky's lobbying campaign restrictions could be sustained only if KLEC produced evidence of *recent* lobbying-related bribery scandals *within* its borders. But states may

defend such laws both by relying on the "evidence and findings accepted in *Buckley*," *Shrink Missouri*, 528 U.S. at 393, and by looking to the "experience of states with and without similar laws." *Wagner*, 793 F.3d at 14. There is no reason to think that Kentucky legislators are uniquely immune to political corruption, and the state was entitled to take reasonable steps to avoid harms afflicting other states and the federal government. *See* KLEC Br. 20-22 (recounting evidence from other states); Schaaf Dep., R. 47-1, Page ID #846 ("[T]hings happening in Washington [D.C.], we don't want them to happen in Kentucky.").

Kentucky is under no obligation to "experience the very problem it fears before taking appropriate prophylactic measures." *Ognibene*, 671 F.3d at 188.

1. Substantial evidence demonstrates that the anticorruption interest applies with particular force to justify limits on lobbyists' campaign contributions.

When Kentucky enacted its ethics code in 1993, it did so in the shadow of a national debate about the corrosive influence of lobbying. Senior members of the U.S. congressional leadership had resigned office in the late 1980s and early 1990s following high-profile scandals. The Speaker of the House, for instance, resigned when the House Ethics

Committee found that business groups, at the behest of lobbyists, had made bulk purchases of his book in order to circumvent the more tightly regulated campaign finance laws.[5] By 1992, the Senate was considering initial versions of the Lobbying Disclosure Act.[6]

A considerable body of scholarship has since developed examining our current lobbying system, particularly as it exists at the federal level, to ascertain its effects on democratic processes. One clear area of concern can be distilled from the research: the outsized role of lobbyists in campaign fundraising and the many *quid pro quo* opportunities it affords.

Research supports the proposition that lobbyists target their giving to legislators who can deliver results; for example, one group of researchers found strong evidence that "[p]owerful incumbents will raise

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[5] *See* John M. Barry, *The House of Jim Wright*, Politico (May 7, 2015), https://www.politico.com/magazine/story/2015/05/the-house-of-jim-wright-117718; Michael Oreskes, *Coelho to Resign His Seat in House in Face of Inquiry*, N.Y. Times (May 27, 1989), http://www.nytimes.com/1989/05/27/us/coelho-to-resign-his-seat-in-house-in-face-of-inquiry.html.

[6] Craig Holman, *Origins, Evolution and Structure of the Lobbying Disclosure Act*, Pub. Citizen 8 (May 11, 2006), https://www.citizen.org/sites/default/files/ldaorigins.pdf.

more money from access-oriented groups than other incumbents." Stephen Ansolabehere *et al.*, *Are PAC Contributions and Lobbying Linked? New Evidence from the 1995 Lobby Disclosure Act*, 4 Business & Pol. 131, 135 (2002). *See also* Alexander Fouirnaies & Andrew B. Hall, *The Financial Incumbency Advantage: Causes & Consequences*, 76 J. Pol. 711, 722 (2014) (noting that "financial incumbency advantage" "does not come equally from all donors" but is concentrated among "access-motivated interest groups," which "generate approximately two-thirds" of the advantage). The research indicated that "[i]ncumbents facing strong opponents will also raise more money from *access-oriented* groups than incumbents facing weak opponents. This is because of the motives of the *incumbents*. Incumbents facing competitive elections feel a greater need for campaign funds, and are therefore willing to do more to raise money." Ansolabehere *et al.*, *supra*, at 134.

What "more," specifically, are incumbents "willing to do" for lobbyist contributions during a competitive race? In exchange for the "*quid*" of ponying up campaign cash, lobbyists can expect a range of extraordinary "*quos*," including:

Legislative access and responsiveness. Lobbyist contributors enjoy unrivaled access to legislators. One study of the relationship between lobbying and campaign contributions in state legislatures found that survey responses "support[ed] the 'access' view of lobbying in which the opportunity to lobby is largely contingent on campaign donations." Lynda W. Powell, *The Influence of Campaign Contributions on the Legislative Process*, 9 Duke J. of Const. L. & Pol'y 75, 77 (2014). For example, during the 1986 tax reform, a lobbyist for homebuilders who was charged with preserving the mortgage-interest deduction on second homes explained that he had to attend a $500 per person fundraiser for the relevant House Committee's ranking member: "I couldn't go to his office without having contributed." Jeffrey H. Birnbaum & Alan S. Murray, *Showdown at Gucci Gulch: Lawmakers, Lobbyists, and the Unlikely Triumph of Tax Reform* 111 (1987). Perhaps most infamously, after Republicans won the House of Representatives in 1994, new Majority Whip Tom DeLay kept a book in his office visitors' room recording which PACs gave to Democrats and Republicans. He made clear that he would take meetings only with representatives of PACs that supported his party. *See* Robert

G. Kaiser, *So Damn Much Money: The Triumph of Lobbying and the Corrosion of American Government* 264 (2010 ed.).

That lobbyists use campaign contributions to pay for access has long been understood, but the financial underpinnings of the bargain have become increasingly overt. One former "super-lobbyist" has explained that, while it was once considered impolitic to raise policy issues at a fundraiser, now, "because Congress is so pressed for time and the need to raise huge sums of cash, it's literally become the Senator or Member going around the table, one-by-one, 'What's your issue?' " Sheila Kaplan, *Lobbyist's Progress: An Interview With Jeff Connaughton*, Harv. U. Edmond J. Safra Center for Ethics ("Safra Center") (Mar. 26, 2013), https://ethics.harvard.edu/blog/lobbyists-progress-interview-jeff-connaughton.

Shaping formative stages of legislation. Research suggests that lobbyists leverage campaign contributions to exert influence well before any floor or even committee votes. *See* Powell, *supra*, at 75 n.2. One study, which focused on formal markups in congressional committees and behind-the-scenes maneuvering, concluded that campaign contributions are designed to "*mobilize* legislative support and *demobilize* opposition,"

Richard L. Hall & Frank W. Wayman, *Buying Time: Moneyed Interests and the Mobilization of Bias in Congressional Committees*, 84 Am. Pol. Sci. R. 797, 800 (1990), and "the goal is not simply to purchase support, but to provide incentives for supporters to act as agents," *id.* at 802. The study demonstrated that campaign contributions mobilized Members of Congress to act on behalf of their donors in committee decision-making, even after controlling for different variables. *Id*. at 809-10.

Determining the legislative agenda. There is considerable evidence that the congressional agenda, "as measured by congressional hearings, is more closely correlated with the lobbying agenda than with the public agenda." Frank R. Baumgartner *et al.*, *Money, Priorities, and Stalemate: How Lobbying Affects Public Policy*, 13 Election L.J. 194, 202 (2014). Many current and former legislators have candidly described how fundraising needs drive the legislative agenda. *See, e.g.*, Olympia Snowe, *Fighting for Common Ground: How We Can Fix the Stalemate in Congress* 257 (2013) (noting that fundraising pressure "unduly influences agendas and the issues on which legislators deliberate"). This has the potential to do real damage to the integrity of political processes, as "it is in these less observable areas of legislative activity that legislators may

most easily accommodate the interests of donors." Lynda W. Powell, *The Influence of Campaign Contributions in State Legislatures* 5 (2012) ("Examining only floor votes . . . ignores all the decisions that determine the details of its substantive content, as well as those that determine whether or not a bill is ever written or comes to a vote.").

Writing final legislation. Most extraordinarily, lobbyists also shape the lawmaking process by writing legislation directly. According to one expert, it happens "all the time."[7] For example, in 2013, the *New York Times* reported that legislation approved by the House Financial Services Committee "was essentially Citigroup's," with "Citigroup's recommendations . . . reflected in more than 70 lines of the House committee's 85-line bill." Eric Lipton & Ben Protess, *Banks' Lobbyists Help in Drafting Financial Bills*, N.Y. Times (May 23, 2013), https://dealbook.nytimes.com/2013/05/23/banks-lobbyists-help-in-drafting-financial-bills. Wall Street groups did not deny the report, but defended their actions because "the practice was common in Washington." *Id.* The *Times* also reported that immediately preceding the vote, the financial

[7] Nell London, *It's Common For Lobbyists To Write Bills For Congress. Here's Why*, Colo. Pub. Radio (May 10, 2016), http://www.cpr.org/news/story/its-common-lobbyists-write-bills-congress-heres-why.

industry held a fundraiser for its sponsors at which "corporate executives and lobbyists paid up to $2,500 to dine." *Id.*

2. The public unquestionably perceives lobbyist contributions as corrupt.

Kentucky has an equally strong interest in avoiding the appearance of corruption, "because the perception of corruption, or of opportunities for corruption, threatens the public's faith in democracy." *Ognibene*, 671 F.3d at 186; *see also*, *e.g.*, *Leake*, 660 F.3d at 736-37. In jurisdictions without strong laws like Kentucky's, the relationship between lobbyists, special-interest money, and elected officials has contributed to a widespread perception of corruption and mounting disillusionment with representative democracy.

At the federal level, a small number of registered lobbyists represent a disproportionate amount of direct giving. *See* Pub. Citizen, *The Bankrollers: Lobbyists' Payments to the Lawmakers They Court, 1998-2006*, at 7, https://www.citizen.org/sites/default/files/bankrollers final.pdf (2006). Many of the most generous lobbyist-contributors give heavily to both parties. *Id.* at 19-20. Such ideologically untethered donating plainly breeds an appearance of corruption. *Ognibene*, 671 F.3d at 187, 195-96; *see also McConnell*, 540 U.S. at 148 (finding it

"[p]articularly telling" that "more than half of the top 50 soft-money donors gave substantial sums to *both* major national parties, leaving room for no other conclusion but that these donors were seeking influence, or avoiding retaliation, rather than promoting any particular ideology").

Those concerns are borne out by recent polling data. When the public is asked to name the biggest problem with its elected officials, the most common answer reflects the "influence of special interest money on elected officials." Pew Research Ctr., *Beyond Distrust: How Americans View Their Government* 74 (2015). Fewer people than ever—less than two in ten—believe that government serves the public good; more people than ever believe it is run to benefit a few powerful interests. *See* Am. Nat'l Election Studies, *The ANES Guide to Public Opinion and Electoral Behavior*, U. Mich. Ctr. for Pol. Studies (2015), http://www.electionstudies.org/nesguide/toptable/tab5a_2.htm.

C. Limiting the Degree to which Paid Lobbyists Can Participate Directly in Campaign Fundraising Is a Valid Means of Protecting the Integrity of State Political Processes.

The district court appears to believe that the only cognizable form of corruption in the campaign finance context is outright bribery.

However, as the Supreme Court acknowledged in *Buckley*, "laws making criminal the giving and taking of bribes deal with only the most blatant and specific attempts of those with money to influence governmental action." 424 U.S. at 27-28. Campaign finance laws can also target forms of *quid pro quo* corruption beyond just criminal bribery, such as that which occurs when "[e]lected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns." *FEC v. Nat'l Conservative PAC*, 470 U.S. 480, 497 (1985). The direct involvement of paid lobbyists in campaign fundraising imposes systemic harms on electoral processes and plainly carries the potential to corrupt—specifically, by creating the conditions under which legislators can be "influenced to act contrary to their obligations of office" by their need to secure ever-greater "infusions of money into their campaigns." *Id.*

In practice, lobbyists' campaign involvement is overwhelmingly transactional. Their money forms a crucial element of what some describe as a "gift economy," "relationship market," or "reciprocity economy,"[8]

[8] *See, e.g.*, Lawrence Lessig, *Republic, Lost: The Corruption of Equality and the Steps to End It* 91-96 (rev. edition, 2015); Thomas M. Susman, *Private Ethics, Public Conduct: An Essay on Ethical Lobbying,*

defined by mutual political indebtedness. Thanks in no small part to their wide-ranging fundraising efforts, federal lobbyists have extensive, durable, and deeply networked relationships with the officeholders they lobby. Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 Stan. L. Rev. 191, 221 (2012) ("Lobbyists gain access through the cultivation of relationships with legislators and staffers using a variety of tools permissible under the law, especially the raising of campaign contributions for legislators." (footnote omitted)).

Among sophisticated actors, the exchange can be accomplished with little more than a "wink or nod." *McConnell*, 540 U.S. at 221 (citation omitted). But subtlety hardly signifies the absence of *quid pro quo* corruption, and certainly does nothing to diminish the public perception of it. Former Senator Paul Douglas described this as a *process* of corruption, in which lobbyists "enticers" offer "a series of favors to put the public official under such a feeling of personal obligation that the latter gradually loses his sense of mission to the public and comes to feel that

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Campaign Contributions, Reciprocity, and the Public Good, 19 Stan. L. & Pol'y R. 1, 19 (2008); Maggie McKinley & Thomas Groll, *The Relationship Market: How Modern Lobbying Gets Done*, Safra Center (Feb. 13, 2015), https://ethics.harvard.edu/blog/relationship-market-how-modern-lobbying-gets-done.

his first loyalties are to his private benefactors and patrons." Paul H. Douglas, *Ethics in Government* 44 (1952).

Today, the necessity of raising campaign funds is at the core of this reciprocal relationship. An ABA task force on federal lobbying described the relationship between lobbyists, campaign fundraising, and politicians as "a self-reinforcing cycle of mutual financial dependency [that] has become a deeply troubling source of corruption in our government." ABA Task Force on Fed. Lobbying Laws, *Lobbying Law in the Spotlight: Challenges and Proposed Improvements* 20 (2011), https://www.americanbar.org/content/dam/aba/migrated/2011_build/administrative_law/lobbying_task_force_report_010311.authcheckdam.pdf.

This reciprocity works both ways. A legislator who performs a political favor for a lobbyist often does so with the unspoken expectation that the lobbyist will later raise funds on his or her behalf. "The tendency in Congress and in the press is to think of lobbyists as victimizers and lawmakers as victims," but in fact, "the opposite is often true"—"lawmakers themselves, in the zeal to raise ever-increasing bundles of campaign cash, regularly shake down lobbyists for money." Thomas E.

Mann & Norman J. Ornstein, *The Broken Branch: How Congress is Failing America and How to Get It Back on Track* 237 (2006).

Journalistic accounts and academic works are replete with examples of lawmakers putting the squeeze on businesses and lobbyists whose interests they oversee.[9] Indeed, when the Supreme Court was poised to strike down the federal aggregate cap on campaign contributions in the *McCutcheon* case, lobbyists were hardly jubilant—because they predicted that "ending the cap would likely increase the pressure on lobbyists to pony up." Kevin Bogardus, *Lobbyists Fear Shakedown If Supreme Court Lifts Campaign Contributions Cap*, The Hill (Feb. 26, 2013), http://thehill.com/business-a-lobbying/284817-lobbyists-fear-shakedown-if-court-lifts-campaign-cap.

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[9] In one memorable example, Del. Eleanor Holmes Norton was recorded soliciting a campaign contribution from a lobbyist after reminding him that she chaired an economic development subcommittee, and that her "major work . . . [was] essentially in [the lobbyist's] sector." *See* David Brooks & Gail Collins, *What a Voicemail Message Says About Washington*, N.Y. Times Opinionator Blog (Sept. 22, 2010), https://opinionator.blogs.nytimes.com/2010/09/22/what-a-voicemail-message-says-about-washington. *See also, e.g.*, Jack Abramoff, *Capitol Punishment: The Hard Truth About Washington Corruption From America's Most Notorious Lobbyist* 65 (2011); Lessig, *supra*, at 121-24; Peter Schweizer, *Extortion: How Politicians Extract Your Money, Buy Votes, and Line Their Own Pockets* (2013).

Against this backdrop, federal lobbyists unsurprisingly "have become prolific fundraisers and bundlers of campaign contributions for key legislators and party leaders." Hasen, *supra*, at 222. Consider Mitchell Delk, a well-heeled Freddie Mac lobbyist whose activities led to the largest fine in FEC history. From 1998 to 2006, Delk contributed over $40,000 to members of Congress, but this understates his influence. Over a three-year period, Delk hosted over 75 events for members of the House Financial Services Committee, which regulates Freddie Mac, raising nearly $3 million—90% of which benefited the Committee chairman.[10]

As is abundantly clear from the literature, lobbyists derive much of their disproportionate power over the legislative process from their fundraising prowess, which can be leveraged to obtain favorable policies on behalf of their clients—often at the expense of the public good. Kentucky considered this experience and reasonably took steps to prevent it: "[T]hat is one of the reasons for the adoption of the ban on

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[10] The investigation unearthed corporate documents "link[ing] campaign fundraising activities on behalf of candidates . . . (and, in particular, Members of the House Financial Services Committee) to Freddie Mac's strategy for achieving legislative objectives." FEC General Counsel's Report #4, at 3-4, Matter Under Review 5390 (Apr. 10, 2006), https://www.fec.gov/files/legal/murs/current/54776.pdf; *see also* Pub. Citizen, *Bankrollers*, *supra*, at 25, 41-42.

solicitation [] by lobbyists of campaign contributions, because in Washington the lobbyists are fighting each other to bring hundreds of thousands of dollars to members of Congress." Schaaf Dep., R. 47-1, Page ID #846. Kentucky's efforts to thwart this phenomenon and reinvigorate public confidence in state government is more than justifiable; indeed, "[o]ne can hardly imagine another interest more important to protecting the legitimacy of democratic government." *Leake*, 660 F.3d at 736.

III. Kentucky's Lobbyist Gift Ban Is Constitutional and Does Not Warrant Strict Scrutiny Review.

Amicus supports appellants' position that the gift ban is constitutional and that the absence of a general monetary threshold for *de minimis* gifts does not make the law overbroad. *See* KLEC Br. 28-29. As appellants have argued, the district court's concerns about a handful of hypothetical applications of the ban are purely speculative, and do nothing to undercut its facial validity and "plainly legitimate sweep." *United States v. Williams*, 553 U.S. 285, 292-93 (2008). In the unlikely event that Kentucky decides at some future date to prosecute a lawmaker for enjoying the heat in a lobbyist's office, the remedy is an as-applied challenge, not the invalidation of the law on its face.

Instead of elaborating on the insufficiency of the plaintiffs' facial challenge, which the state has done at length, KLEC Br. 28-32, 36-38, *amicus* here will discuss how the review of a restriction on *gifts*, explicitly defined here to encompass only items "the primary significance of which is economic gain," KRS § 6.611(2)(a)(14), neither implicates a protected First Amendment right nor calls for heightened scrutiny.

Since *Buckley*, the Supreme Court has recognized that campaign-related expenditures and contributions represent acts of expression and association. According to the Court, a campaign expenditure is central to political speech because "virtually every means of communicating ideas in today's mass society requires the expenditure of money." 424 U.S. at 19. A contribution also implicates the First Amendment, but to a lesser degree, because while "[a] contribution serves as a general expression of support for the candidate and his views," it does not "communicate the underlying basis for the support." *Id*. at 21.

A personal gift, by contrast, directly supports a person or subsidizes a lifestyle, and conveys little to no expressive content. An individual therefore has no "right" under the First Amendment or any other constitutional provision to make a gift to a public officeholder—and an

officeholder certainly has no right to *receive* one—and legislatures can, and often do, restrict gifts to public officials and employees. *See infra* note 13.

Nor is there any compulsion for an officeholder to accept a gift, which stands in contrast to a candidate's need to fundraise in an electoral race that must be privately financed. These distinctions were explicitly recognized by the D.C. Circuit in *United States v. Ring*, 706 F.3d 460 (D.C. Cir. 2013), in the context of a bribery case:

> [W]hereas soliciting campaign contributions may be practically 'unavoidable so long as election campaigns are financed by private . . . expenditures,' . . . accepting free dinners is certainly not. Moreover, . . . the First Amendment interest in giving hockey tickets to public officials is, at least compared to the interest in contributing to political campaigns, de minimis.

Id. at 466 (citations omitted).

Beyond improperly relying on campaign finance precedents in determining the level of review, the district court also incorrectly argues that strict scrutiny is warranted because Kentucky's ban may burden the constitutionally protected right to lobby. Op., R. 122, Page ID #4637-38. Of course the First Amendment protects political expression—and likely also protects lobbying specifically under the separate right to petition (*see supra* note 3)—but that does not mean it establishes a lobbyist's right to

give gifts, or an official's right to receive them. On the contrary, it is absurd to argue as a matter of either logic or original intent that the constitutional right to "petition" entails a right to lavish lawmakers with presents. Many historical accounts stress that delegates to the Constitutional Convention were "obsessed" with preventing corruption.[11] The First Amendment does not protect what the Framers clearly intended to proscribe.

The final shortfall of the district court's decision is its apparent ignorance of the wide array of comparable gift bans at the federal, state, and municipal levels. The district court found that the absence of a *de minimis* monetary threshold and the inclusion of an exception for widely attended events renders Kentucky's ban vague and unworkable. Op., R. 122, Page ID #4635-36. But this claim can be sustained only if one ignores federal law, which includes both of these features, and many other analogous state laws that have been in operation across the nation without apparent issue.

[11] Zephyr Teachout, *The Anti-Corruption Principle*, 94 Cornell L. Rev. 341, 348, 352 (2009); *see also* Lessig, *supra*, at 242-50.

Both the U.S. House and Senate gift rules prohibit a Member, officer, or employee from accepting *any* gift from a registered lobbyist or private entity that retains or employs registered lobbyists, subject to existing exceptions. *See* House Rule 25, cl. 5(a)(1)(A)(ii); Senate Rule 35, cl. 1(a)(2)(B). The range of exceptions is similar to those included in Kentucky's lobbyist gift ban, including narrow exceptions for *de minimis* promotional items and, importantly for this case, a longstanding "widely attended event" exception that applies to gifts from any source. *See* House Rule 25, cl. 5(a)(4)(A); Senate Rule 35, cl. 1(d)(1).

It would be extraordinary to conclude, as the district court effectively did, that the House and Senate lobbyist gift bans—which have been in effect for over a decade[12]—are somehow vague or confusing. That assertion is also belied by the experience of at least eight other states, which have lobbyist gift bans similar to Kentucky's law, *i.e.*, with no general monetary threshold limiting their application and only limited

[12] In 2007, in the wake of the scandal surrounding lobbyist Jack Abramoff, both Houses of Congress made significant amendments to their gift rules, eliminating the existing $50 monetary threshold specifically for gifts from lobbyists or entities that employ or retain lobbyists. Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81, 121 Stat. 735 (2007) ("HLOGA"); H.R. Res. 6, 110th Cong. (2007).

exceptions for *de minimis* gifts.[13] And a "widely attended event" exception is so widespread across federal and state ethics codes as to be virtually "standard" for legislative gift restrictions. *Political Activity, Lobbying Laws and Gift Rules Guide* § 18:3 (Trevor Potter & Matthew T. Sanderson eds., 3d ed. 2013) (enumerating "common exceptions" to state and local gift laws, including "[f]ood and beverage at events where all members of a legislative or component body are invited").

In short, the district court's analysis of Kentucky's gift ban proceeds under the wrong standard of review, lacks perspective on the broader context of ethics codes nationwide, and runs counter to all relevant case law.

CONCLUSION

Those parts of the district court ruling striking down Kentucky's lobbying restrictions should be reversed.

[13] Ala. Code § 36-25-5.1; Alaska Stat. § 24.60.080; Colo. Const. art. XXIX, § 3(4); Fla. Stat. § 11.045(4)(a); Iowa Code § 68B.22; Minn. Stat. § 10A.071; N.C. Gen. Stat. § 138A-32; S.C. Code § 2-17-80; Wis. Stat. § 19.45.

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6455 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 in Century Schoolbook 14 point font.

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of January, 2018, I caused the foregoing BRIEF *AMICUS CURIAE* to be filed electronically using this Court's CM/ECF System and sent via the ECF electronic notification system to all CM/ECF registered counsel of record.

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