CASE NO. 17-6456

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN SCHICKEL, in his Personal and Official Capacities, et al.,
Plaintiffs-Appellees

v.

CRAIG C. DILGER, et al.,
Defendants

and

GEORGE C. TROUTMAN, et al.,
Defendants-Appellants

Appeal from the United States District Court
for the Eastern District of Kentucky

BRIEF OF *AMICI CURIAE* KENTUCKY CHAMBER OF COMMERCE, KENTUCKY LEAGUE OF CITIES, INC., KENTUCKY COAL ASSOCIATION INC., AND KENTUCKY NONPROFIT NETWORK, INC., SUPPORTING DEFENDANTS-APPELLANTS GEORGE C. TROUTMAN, ET AL., AND REVERSAL OF THE DISTRICT COURT'S JUDGMENT

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Federal Rule of Appellate Procedure 26.1, *amici curiae* Kentucky Chamber of Commerce; Kentucky League of Cities, Inc.; Kentucky Coal Association Inc.; and Kentucky Nonprofit Network, Inc., state that they are all non-profit associations, that none of them has a corporate parent, and that no publicly held corporation has a ten percent (10%) or greater ownership interest in any *amici*.

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici curiae and their members have a strong interest in this case.[1] The Kentucky Chamber of Commerce (the "Chamber") is the premier business association in Kentucky, representing the interests and views of more than 3,800 member companies—from family-owned shops to Fortune 500 companies—that are engaged in diverse commercial, industrial, agricultural, civic, and professional activities throughout Kentucky and that employ over half of the state's workforce. The Chamber also partners with more than 80 local chambers of commerce, giving it a network of approximately 25,000 professionals. The Chamber's mission is to support a prosperous business climate in the Commonwealth of Kentucky and to work to advance Kentucky through advocacy, information, program management, and customer service in order to promote business retention and recruitment.

The Kentucky League of Cities, Inc. ("KLC"), is an association of more than 380 Kentucky cities and municipal agencies. KLC provides cities, and their leaders and employees, with a number of services, including but not limited to legislative advocacy, legal services, community consulting, training, policy development, and research. KLC's mission is to serve as the united voice of Kentucky's cities by supporting community innovation, effective leadership, and quality governance.

[1] A more detailed description of the history, membership, and mission of *amici* can be found on each of their websites: www.kychamber.com; www.klc.org; www.kentuckycoal.org; and www.kynonprofits.org.

The Kentucky Coal Association Inc. ("KCA") represents members from both Eastern and Western Kentucky operations that mine coal through surface and underground methods. KCA employs a proactive approach in dealing with elected officials, state agencies, the media, and the general public that is designed to educate the citizens of Kentucky about energy resources in general and coal in particular. KCA's mission is to provide effective leadership for the coal industry and ultimately to enhance the ability of the Kentucky coal industry to compete in domestic and world markets.

The Kentucky Nonprofit Network, Inc. ("KNN"), is Kentucky's state association of nonprofits. KNN exists to strengthen and advance the Commonwealth's nonprofit organizations because it believes nonprofits are essential to vibrant communities. KNN provides quality education, sharing of best practices and resources, technical assistance, time and money-saving member benefits, and a unified public policy voice.

Each *amicus* employs lobbyists that regularly interact with members of Kentucky's General Assembly. In fact, each is the principal voice of its collective members, and the Chamber is one of the largest employers of lobbyists in the Commonwealth. Accordingly, *amici* have both policy and pecuniary interests in the important legal issues presented in this appeal and can offer a unique perspective on the lobbying restrictions in question.

Pursuant to Federal Rule of Appellate Procedure 29(a)(3), *amici* are filing a Motion for Leave to File Brief of *Amici Curiae* concurrently with this brief. Counsel for *amici* attempted to contact counsel for the parties concerning the filing of this brief and has been advised that Defendants-Appellants consent to its filing, but was unable to reach counsel for Plaintiffs-Appellees.

STATEMENT OF AUTHORSHIP AND FUNDING

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici* state that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund the brief's preparation or submission; and no person other than *amici*, their members, or their counsel contributed money intended to fund the brief's preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Chamber, KLC, KCA, and KNN submit this brief as *amici curiae* in support of the Brief of Appellants and the validity of Kentucky's Code of Legislative Ethics (the "Ethics Code"), codified at KRS §§ 6.601 to 6.849. The Ethics Code, which was enacted nearly a quarter century ago, has made Kentucky a shining example for ethical oversight in state government, but that has not always been the case. Prior to the enactment of the Ethics Code, Kentucky's General Assembly suffered from a well-publicized crisis of conscience and credibility. In the early 1990s, a number of legislators, public officials, and lobbyists were embroiled in a corruption scandal that led to numerous federal indictments and tarnished the public perception of Kentucky's legislative process. The Ethics Code specifically addressed these problems and restored the public's confidence in the General Assembly. The Judgment and Permanent Injunction issued by the District Court, however, would annihilate the Ethics Code, invalidating key lobbying restrictions carefully designed to address the ethical issues that plagued the General Assembly in the past.

Not only has the Ethics Code restored the confidence of Kentucky's citizens in the legislative process, but it has likewise benefitted the lobbying industry as a whole. Lobbying of state government plays an important role in policymaking. Interest groups like *amici* and their members expend significant resources each

year on lobbying the General Assembly for the passage of legislation that meets their policy objectives. The close relationship developed between lobbyist and legislator through this process while valuable is also especially susceptible to abuse. Indeed, over the years, there have been numerous examples in Kentucky and around the country of corrupt legislators accepting bribes to pass or propound certain legislation. The Ethics Code levels the playing field among lobbyists, subjecting them all to the same bright-line standards for interactions with members of the General Assembly and eliminating the vulnerability for corrupt acts.

More specifically, the provisions in the Ethics Code forbidding lobbyists from giving legislators "anything of value," from making campaign contributions to legislators, and from serving as campaign treasurers or soliciting campaign contributions for legislators and forbidding lobbyists' employers from making campaign contributions to legislators during an active legislative session have purified the legislative process by discouraging the type of "pay to play" mentality that previously pervaded the lobbying business. Federal courts have repeatedly recognized the compelling interest of state governments in ensuring that their legislative branches are free from corruption or the appearance of corruption and have upheld similar ethics laws. Kentucky's General Assembly appropriately addressed this compelling interest when imposing the lobbying restrictions included in the Ethics Code, and these restrictions, which are both unambiguous

and narrowly tailored, are unquestionably constitutional.

If upheld, the Judgment and Permanent Injunction would leave Kentucky's ethics systems in shambles and open up the floodgates for lobbyists to engage in the type of actual or perceived corrupt behaviors that the law was enacted to shield against. Lobbyists would be free to inundate legislators with gifts of unlimited value—including lavish trips, fancy meals, and all kinds of valuable items—and flush their campaign funds with contributions. The District Court's reasoning rests upon several misconceptions regarding the purpose and effect of the lobbying restrictions in the Ethics Code that *amici*, as employers of lobbyists in Kentucky, are uniquely positioned to dispel. This Court should reverse and set aside the Judgment and Permanent Injunction and keep in place the ethical principles that are essential to the accountability and legitimacy of the legislative process.

ARGUMENT

I. Kentucky's Ethics Code Is Enacted In The Wake Of A Wide-Ranging Corruption Scandal.

A. Operation BOPTROT rocks Kentucky's General Assembly.

Prior to the enactment of the Ethics Code in 1993, there was little to no regulation of lobbying activities in Kentucky. Reform was spurred, however, by an FBI investigation—dubbed Operation BOPTROT for its initial focus on the activities of the Business Organizations and Professions legislative committee and the harness racing industry—that unveiled widespread corruption in the Kentucky

General Assembly. Al Cross, *Lies, bribes and videotape*, State Legislatures, July 1, 1993, *available at* RE 47-57, Page ID # 1425. That investigation led to the indictments of fifteen top state legislators, lobbyists, and other public figures, including the former Speaker of the Kentucky House and the state's most influential lobbyist, for various charges of bribery, extortion, fraud, and racketeering. *Id.*; B. Drummond Ayres, Jr., *With Leaders Leaving Office for Jail, Kentucky Works to Refurbish Image*, New York Times, Sept. 19, 1993, *available at* RE 64-4, Page ID # 3351.

Operation BOPTROT devastated the Kentucky General Assembly and the public's confidence in that institution. "Its public standing plunged from an all-time high in 1990 with the passage of landmark education reforms to a new low in 1992 after the investigation was revealed." Cross, *supra*, *available at* RE 47-57, Page ID # 1425. One of the most shocking revelations from Operation BOPTROT was how little money was needed to buy a legislator's vote. Some of the individuals involved "accept[ed] bribes as low as $400 in exchange for influencing legislation. In fact, discounting the largest bribe of $20,000 allegedly accepted by one state official, the entire operation was accomplished for a meager $15,000 in undercover money." Martin Bobe, *Kentuckians Amazed that $400 Can Buy a Lawmaker*, L.A. Times, Apr. 13, 1993, *available at* www.articles.latimes.com/1993-04-13/news/mn-22398_1_harness-racing-industry.

Several former lawmakers turned lobbyists were wrapped up in the scandal in addition to a preeminent lobbyist dubbed the "dean of the Frankfort lobbyist corp," who "had the total trust of so many top legislators." Cross, *supra*, *available at* RE 47-57, Page ID # 1426. The level of corruption in Kentucky's government had slowly grown as its General Assembly gained more power and lobbying became more prevalent. As Appellant H. John Schaaf, the Kentucky Legislative Ethics Commission's ("KLEC") Executive Director, explained, "in the 1980s when the legislature became more independent and a stronger branch of state government, the lobbyists gravitated to the third floor of the Capitol and they began lobbying legislators, and there were no laws in place on the state level to really govern that kind of interaction." Transcript of Schaaf Dep., RE 47-2, Page ID # 1016. Lobbyists and lawmakers got too cozy and corruption ensued. Indeed, lobbyists and their role in the legislative process were at the center of the BOPTROT scandal that rocked the Kentucky General Assembly and left the state with a significant problem that needed to be addressed.

B. Kentucky adopts the strong Ethics Code.

Kentucky addressed its corruption problem through the adoption of the Ethics Code. KRS § 6.606 describes the purpose of the Ethics Code as follows:

> The proper operation of democratic government requires that a public official be independent and impartial; that government policy and decisions be made through the established processes of government; that a public official not use public office to obtain private benefits;

> that a public official avoid action which creates the appearance of using public office to obtain a benefit; and that the public have confidence in the integrity of its government and public officials.

While the Ethics Code notes the importance of lobbyists to the democratic process, it likewise acknowledges that "[t]he identity and expenditures of certain persons who attempt to influence executive and legislative actions should be publicly identified and regulated to preserve and maintain the integrity of government." KRS § 6.801. In addition to the lobbying restrictions challenged by Appellees—namely, the lobbyist gift ban and definition of "anything of value" in KRS §§ 6.611(2), 6.751(2), and 6.811(4); the lobbyist contribution ban in KRS §§ 6.767(2) and 6.811(6); the lobbyist employer contribution ban in KRS §§ 6.767(3) and 6.811(7); and the lobbyist solicitation ban in KRS § 6.811(5)—the Ethics Code requires lobbyists[2] and employers of lobbyists to formally register with the KLEC and imposes certain reporting requirements on them. KRS § 6.801, et seq.

In summary, the Ethics Code specifically addressed lobbying activities that had been unregulated previously and that had led to both corruption and the

[2] The Ethics Code refers to lobbyists as "legislative agents" and defines that term as any individuals who are engaged to "promote, advocate, or oppose the passage, modification, defeat, or executive approval or veto of any legislation by direct communication with any member of the General Assembly, the Governor, the secretary of any cabinet . . ., or any member of the staff of the officials listed[.]" KRS § 6.611(23), (27). The definition excludes certain extraneous individuals, including but not limited to persons appearing only at public hearings or meetings, private citizens receiving no compensation for their actions, public servants acting in their fiduciary capacities, and persons engaged to gather or furnish news. *Id.*

appearance of corruption in Kentucky's government. In crafting the Ethics Code, Kentucky's lawmakers looked to other states that had also adopted ethics legislation in the wake of corruption scandals. In particular, "they called in people from Wisconsin, New York, South Carolina, places that had recent experiences with corruption, indictments, investigations, and convictions, and [they] took from those people recommendations for what should be included in an ethics law that would change the culture around the General Assembly[.]" Transcript of Schaaf Dep., RE 47-2, Page ID # 1009. As a result, they came up with the carefully crafted Ethics Code that Kentucky's legislators and lobbyists have operated under for nearly a quarter century.

C. Kentucky amends the Ethics Code to further strengthen lobbying restrictions and eliminate loopholes.

While the lobbyist gift ban in the Ethics Code initially included a $100-per-legislator exception for food and beverages consumed on the premises, the General Assembly later closed this loophole in 2014 through the adoption of H.B. 28, 2014 Gen. Assemb., Reg. Sess. (Ky. 2014) ("H.B. 28"). At the time of the enactment of the Ethics Code, many advocated for a complete gift ban, referred to as a "no cup of coffee rule," like those enacted in Wisconsin and South Carolina. Transcript of Schaaf Dep., RE 47-2, Page ID # 991, 1009-10. This was a topic of great debate, especially considering that part of the corruption in Frankfort stemmed from a gift-giving culture and customs like lobbyists leaving credit cards at restaurants to pay

for legislators' meals even though taxpayer money provides legislators with a per diem (currently valued at $154 per day) to cover such expenses. *Id.*, Page ID # 964, 1003. However, the legislation ultimately adopted allowed for each legislator to receive up to $100 per year in food and beverages from each lobbyist.

This exception proved problematic for legislators and lobbyists. Legislators complained about not knowing that a lobbyist had provided them with anything of value until it was included on the lobbyist's formal report to KLEC. *Id.*, Page ID # 978. For example, a legislator might have attended an event thinking that everyone in the General Assembly was invited to it and then later learn that was not the case and that the lobbyist's spending on that legislator would be reported. Legislators did not like being included on these reports and apparently wanted to eliminate the appearance of impropriety conveyed by such exchanges.

In addition, corruption scandals continued to ensnare other states that did not have strict gift laws, which threatened the integrity of all state governments. States surrounding Kentucky saw legislators convicted on charges such as bribery, extortion, and mail fraud. April 2017 KLEC Ethics Reporter, RE 47-32, Page ID # 1302. Moreover, lawmakers and lobbyists in other states exploited weak ethics laws to bestow extensive gifts and other benefits upon legislators. For example, lobbyists in Georgia had figured out a loophole in their $100 cap on gifts, which allowed them to host regular lunches for chairs of legislative committees. Kristina

Torres and Chris Joyner, *Lobbyists Asked to Sponsor Georgia Senate Lunches*, Atlanta Journal-Constitution, Feb. 4, 2013, *available at* RE 82-1, Page ID # 4168. Because Georgia's cap, like Kentucky's, allowed each and every lobbyist to spend up to $100 per year on each and every legislator, lobbyists would host these luncheons twice a week for small groups of legislators that wielded great influence in their roles as committee chairs. *Id.* Even some of Georgia's senators acknowledged that this "may not send the best message."[3] *Id.*

Kentucky's lawmakers found it best to address these issues and the continued threat of perceived corruption by amending the Ethics Code to eliminate the $100-per-legislator exception and create a more bright-line demarcation between legislator and lobbyist.[4] Other states had enacted similar bans on lobbyist gifts prior to Kentucky's amendment of the Ethics Code. For example, Tennessee and Alabama enacted absolute gift bans in response to corruption scandals

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[3] Appellants have put forward additional examples of states—including Nebraska, Missouri, Kansas, and Hawaii—where weak lobbyist restrictions were exploited, permitting lobbyists to shower legislators with food and beverages, outings, gifts, event tickets, and other extravagant items. KLEC's Motion for Summary Judgment, RE 64-2, Page ID # 3280-81; Appellants' Brief at 21-22.

[4] The District Court erroneously noted a supposed admission during Mr. Schaaf's deposition that "the reason for removing the *de minimis* exception was not problems with quid pro quo corruption or its appearance." Order, RE 122, Page ID # 17. In truth, his deposition testimony confirmed that the exception was removed because of administrative problems and because of continued problems in other states related to quid pro quo corruption or its appearance. Transcript of Schaaf Dep, RE 47-2, Page ID # 1004-05, 1013-14.

involving lobbyists and saw marked improvement in the political culture in their legislatures. *See* Chris Joyner, *Loopholes Abound in Some Lobbyist Gift Bans*, Atlanta Journal-Constitution, Oct. 14, 2012, *available at* RE 82-2, Page ID # 4186.

In addition to eliminating the $100-per-legislator exception to the gift ban, H.B. 28 amended the Ethics Code to include a prohibition on campaign contributions from employers of lobbyists during a regular session of the General Assembly and to replace the ban on lobbyists serving as a fundraiser for a candidate or legislator with a ban on lobbyists directly soliciting, controlling, or delivering a campaign contribution. *See* KRS §§ 6.611(2)(b), 6.767(2), 6.811(5), (7). This legislation passed the Kentucky House unanimously, received only one vote in opposition in the Kentucky Senate, and was signed into law by the Governor in April 2014 without much fanfare. Legislative Record for H.B. 28, *available at* www.lrc.ky.gov/record/14RS/HB28.html.

II. The Ethics Code Successfully Combats Actual And Perceived Quid Pro Quo Corruption.

Since Operation BOPTROT and the creation of the Ethics Code, Kentucky's General Assembly has remained largely free of corruption. In the twenty-four years since passage of the Ethics Code, no Kentucky legislator has been indicted in state or federal court for any sort of abuse of his or her legislative office. Transcript of Schaaf Dep., RE 47-2 Page ID # 963. While Kentucky has become an example of legislative accountability through its strong ethics laws, other states have

struggled from the pitfalls of their weak ones.

For example, states like Pennsylvania have suffered from numerous political scandals involving members of the state legislature. *See* Marianne Lavelle, *Pennsylvania gets F grade in 2015 State Integrity Investigation,* The Center for Public Integrity State Integrity 2015, Nov. 9, 2015, *available at* https://www.publicintegrity.org/2015/11/09/18507/pennsylvania-gets-f-grade-2015-state-integrity-investigation. Pennsylvania lobbyists can give almost unlimited gifts to legislators and only need to report gifts valued at over $250 and hospitality or lodging valued at over $650. *See* 65 Pa. Cons. Stat. §§ 1103, 13A03. As a result, Pennsylvania suffers from a deep culture of corruption that has plagued its legislature with both actual corruption and the appearance of it. *See* Scott Rodd, *Lobbyist Gift-Giving at Issue in More States*, The Pew Charitable Trusts Stateline July 19, 2017, *available at* http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/07/19/lobbyist-gift-giving-at-issue-in-more-states. In addition, in states like Georgia and Kansas, both of which have caps on what legislators can receive from lobbyists, lobbyists continue to receive thousands of dollars' worth of gifts, such as, in Kansas, "[f]ree University of Kansas basketball games, NASCAR races, and Disney on ice, along with countless meals, a few rounds of golf, and the occasional cigar." Brent D. Wistrom, *Who's paying to influence Kansas legislators*, Wichita Eagle, Dec. 4, 2011, *available at* RE 82-5, Page ID # 4216;

Torres and Joyner, *supra*, *available at* RE 82-1, Page ID # 4168.

The restrictions on lobbyist gifts and campaign contributions imposed by the Ethics Code were largely welcomed by lobbyists and their employers and continue to have their support today. These restrictions level the playing field among those lobbying the Legislature and eliminate the need for them to spend large amounts of money on gifts to and contributions for legislators just to gain access and influence to advocate for their interests. Such an influx of money and gifts into the one-on-one dealings between lobbyist and legislator makes the relationship especially vulnerable to corruption or abuses of power. Moreover, establishing bright-line rules for those interactions, such as through the elimination of the $100-per-legislator exception to the gift ban, provides a clear framework for everyone involved and less opportunity for the exploitation of loopholes. Now, lobbyists and legislators are freed from the compulsion to "pay to play" and can focus instead on the important work of developing policy and making legislative decisions.

Contrary to suggestions made by Appellees below, the lobbying restrictions in the Ethics Code have in no way hindered lobbyists' access to legislators or their ability to impact legitimately the legislative process. To be sure, the lobbying business has not suffered in any way from these restrictions. Rather, lobbying expenses continue to increase and lobbyists continue to do their important work without the threat of corruption or appearance of impropriety. For example,

lobbying expenses in Kentucky totaled $20,783,038 in 2016, and 711 employers and 611 lobbyists registered to lobby in Kentucky in fiscal year 2016-2017. KLEC, Annual Report for 2016-2017, *available at* https://klec.ky.gov/Reports/Annual%20 Reports/annualreport20162017.pdf. In 2017, *amici* spent $516,105.04 combined on lobbying—with the Chamber, one of the most active lobbying groups, spending $338,783.46—the vast majority of which was for compensation for the numerous lobbyists that they employ. KLEC, Employer Reporting Period Statement Totals by Employer for January 1, 2017 to December 31, 2017, *available at* https://klec.ky.gov/Reports/Reports/EmpExp2015Prior.pdf.

While they cannot take legislators out to lavish meals or contribute to their campaigns, lobbyists have continued to have an impact on the legislative process without the appearance of impropriety. Their impact could even be considered more substantial as they have been able to focus on providing lawmakers with important information and on building grassroots support for legislation as opposed to wining and dining legislators.

III. The Lobbying Restrictions In The Ethics Code Are Constitutional, And Their Invalidation Threatens Chaos In Lobbying Activities.

A. Kentucky has a compelling interest in imposing restrictions on lobbying activities to prevent actual or perceived corruption.

Kentucky's good track record is now threatened by the District Court's ruling that the lobbyist gift ban, the lobbyist contribution ban, and the lobbyist

solicitation ban are all unconstitutional.[5] By declaring these provisions unconstitutional, the District Court has broken rank with every other federal court that has directly addressed these issues. In fact, similar lobbying restrictions have been consistently upheld by other federal courts in light of the unique nature of the lobbyist-legislator relationship. *See, e.g.*, *Preston v. Leake*, 660 F.3d 726, 741 (4th Cir. 2011) (upholding ban on lobbyist contributions); *Fl. Ass'n of Lobbyists, Inc. v. Div. of Legislative Info. Servs. of the Fl. Office of Legislative Servs.*, 525 F.3d 1073, 1079 (11th Cir. 2008) (upholding ban on lobbyists giving legislators "anything of value"); *Md. Right to Life State Political Action Comm. v. Weathersbee*, 975 F. Supp. 791, 798 (D. Md. 1997) (upholding prohibition on lobbyists soliciting campaign contributions or serving as campaign treasurers). As the Fourth Circuit has explained,

> The role of a lobbyist is both legitimate and important to legislation and government decisionmaking, but by its very nature, it is prone to corruption and therefore especially susceptible to public suspicion of corruption. *Any payment* made by a lobbyist to a public official, whether a campaign contribution or simply a gift, calls into question the propriety of the relationship[.]

Preston, 660 F.3d at 737.

Given the special expertise of legislators in evaluating lobbyists' practices

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[5] The District Court properly upheld the employer contribution ban in KRS §§ 6.767(3) and 6.811(7), which forbids employers of lobbyists from contributing to legislative campaigns during a regular session of the General Assembly and is plainly narrowly tailored.

and their potential for actual or perceived corruption, courts should defer to the political process in evaluating the regulations on lobbyists in the Ethics Code. Such judicial restraint is especially warranted in cases, like this one, where the restrictions imposed do not endanger core First Amendment rights. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 20 (1976) (unlike expenditure limits, contribution limits "entail[] only a marginal restriction upon the contributor's ability to engage in free communication"). It is for this very reason that courts subject marginal speech restrictions, like the restrictions on political contributions at issue here, to an intermediate "closely drawn" standard of scrutiny, requiring only that the restrictions be closely drawn to match a sufficient government interest. *See Preston*, 660 F.3d at 732-33.

Even if a more exacting level of scrutiny were applied to the restrictions at issue, they would be justified. Courts have uniformly recognized the need to prevent actual quid pro quo corruption or the appearance of quid pro quo corruption as a vital government interest that justifies regulating lobbyists' activities. *See Ognibene v. Parkes*, 671 F.3d 174, 183 (2d Cir. 2011) (collecting cases). Given that actual corruption is so difficult to ascertain and prove and that the appearance of it can be just as damaging to the democratic process, the latter is accepted justification for restrictions on lobbying. *See id.* (citing *McCormick v. United States*, 500 U.S. 257, 272-73 (1991)) ("[B]ecause the scope of quid pro quo

corruption can never be reliably ascertained, the legislature may regulate certain indicators of such corruption or its appearance[.]"). Restrictions on lobbyists' ability to shower legislators with gifts and political contributions go straight to the heart of problems often caused by mixing money and politics, while leaving undisturbed lobbyists' ability to engage in other forms of political speech.

In fact, under Kentucky's Ethics Code, lobbyists remain free to engage in all sorts of political activities and are only prevented from taking certain specific actions involving gifts or payments to public officials. For example, a lobbyist can still have lunch or dinner with a legislator or otherwise meet in private with a legislator. In addition, a lobbyist can still volunteer or provide services, other than serving as treasurer or raising funds, for a legislative campaign, including speaking publicly in favor of the candidate, calling constituents or going door to door to campaign for the candidate, or engaging in any other myriad of voluntary campaign activities.

B. The gift ban is constitutional.

The absolute lobbyist gift ban, or "no cup of coffee rule," is sufficiently tailored to address the state's strong interest in preventing quid pro quo corruption or its appearance and is not unconstitutionally vague or overbroad. As explained above, prior to the adoption of a gift ban, Kentucky faced serious threats to the sanctity of its legislative process. Allowed to run rampant, lobbyists had become

too cozy with legislators, and this closeness ultimately resulted in actual corrupt acts taking place. While the specific acts of corruption involved in the BOPTROT scandal might not have involved gifts of less than $100, Kentuckians were still stunned by how little it actually took to buy off a legislator. Thus, *de minimis* gifts certainly can give the appearance of corruption and eliminating such an appearance is sufficient justification for the complete ban in KRS §§ 6.751(2) and 6.811(4).

1. *The gift ban is not unconstitutionally vague.*

To be considered vague, the gift ban must "fail[] to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests." *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999) (citations omitted). But the bright-line prohibition against legislators accepting "anything of value" from lobbyists does not suffer from this deficiency. Rather, the Ethics Code sets clear standards for what a legislator cannot accept and a lobbyist cannot provide, and neither has difficulty applying these standards. A statute is not vague if it gives a "person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he [or she] may act accordingly." *Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1487 (6th Cir. 1995) (internal quotation marks and citation omitted).

The District Court inappropriately relied upon fringe hypotheticals put forward by Appellees in finding the gift ban unconstitutionally vague. In particular,

it pointed to a legislator's acceptance of a bottled water, attendance at a public event hosted by an employer of lobbyists, and attendance at an event that a legislator did not know others were not invited to as questionable scenarios presenting a vagueness problem. Not only is it improper to use such marginal cases to strike down the gift ban, *see United States v. Midwest Fireworks Manufacturing Co.*, 248 F.3d 563, 568 (6th Cir. 2001), but these hypotheticals do not even present a real question as to what is and is not allowed. The law plainly forbids a lobbyist from giving and a legislator from receiving *any* item of pecuniary or compensatory value to a person, but does not prevent a legislator from attending events hosted by lobbyists or interacting with lobbyists as long as they do not receive any gifts from lobbyists in the process. *See* 6.611(2) (including a detailed listing of items falling within and outside of the definition of "anything of value").

Appellees' real complaint does not appear to be that the law is vague, but that it is burdensome on legislators, who must now exercise diligence to monitor who is offering them free gifts and to refuse receipt of gifts from lobbyists. Not only does this minor burden fail to render the gift ban unconstitutional, but this complaint is ill conceived. The Ethics Code provides various methods for legislators and lobbyists to determine if a particular expenditure falls within the gift ban. For example, they can seek an advisory opinion from KLEC as outlined in KRS § 6.681. In addition, legislators are to receive any reports of lobbyists'

expenditures on them ten days prior to their filing with KLEC and can address errors or dispute expenditures through this process. KRS § 6.827(2).

2. *The gift ban is not unconstitutionally overbroad.*

To be considered overbroad, the gift ban's "impermissible applications" must be substantial "when 'judged in relation to the statute's plainly legitimate sweep.'" *Morales*, 527 U.S. at 52. But the gift ban prohibits only those exchanges of actual gifts between lobbyists and legislators and does not impermissibly prohibit legitimate interactions between those two groups. A restriction is not unconstitutionally overbroad unless its overbreadth is both real and substantial. *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). Neither Appellees nor the District Court have pointed to any real or substantial impermissible applications of the gift ban. "The overbreadth doctrine exists to prevent the chilling of future protected expression," but there is no such threat of chilling here. *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cnty., Tenn.*, 274 F.3d 377, 387 (6th Cir. 2001). To the contrary, as set forth above, the lobbying business has thrived despite the lobbying restrictions in the Ethics Code. *See supra,* § II. Those restrictions do not prevent or discourage legislators from meeting with lobbyists or relying upon them as sources of information when crafting legislation—it merely requires them to pay their own way when they do.

Moreover, the gift ban's "plainly legitimate sweep" cannot be denied. The

gift ban prohibits a lobbyist from providing a legislator with a wide array of gifts—it not only bans a lobbyist from buying a legislator a meal here or there, but also from giving a legislator cold-hard cash, a Rolex watch, expensive tickets to the Derby, or even a luxury vehicle, for example. Forbidding such exchanges plainly addresses the desire to prevent actual or perceived quid pro quo corruption.

Appellees confusingly claim both that the gift ban is overbroad and that it is not broad enough because the definition of "anything of value" excludes the cost of attendance or participation, and of food and beverages consumed, at events to which all members of the General Assembly or of other specified joint committees, task forces, or caucuses of the legislature are invited. *See* KRS § 6.611(2). In enacting the Ethics Code, the General Assembly chose to exclude these type of events to which large groups of legislators are invited because the threat of corruption or the appearance of corruption from them is much less than that in situations where gifts are given in one-on-one exchanges between a legislator and a lobbyist. Transcript of Schaaf Dep, RE 47-2, Page ID # 959, 1010. Although these group events can be expensive because they involve large groups of people, they present a much lower risk of illicit activity. Indeed, it would be more difficult for quid pro quo arrangements to take root at a reported event to which the entire General Assembly is invited than in an undisclosed one-on-one closed door meeting where gifts or contributions are exchanged. The latter unquestionably

gives off a greater appearance of corruption than the former.

C. The campaign contribution ban is constitutional.

The lobbyist contribution ban also is sufficiently tailored to combat corruption or the appearance thereof. The Fourth Circuit upheld a similar complete ban on campaign contributions by lobbyists in *Preston v. Leake*. There, the court noted the significance of the state's interest in preventing actual or perceived corruption, stating that "[o]ne can hardly imagine another interest more important to protecting the legitimacy of democratic government." *Preston*, 660 F.3d at 737. North Carolina's lawmakers "made the rational judgment that a complete ban was necessary" to address this significant interest, and the Fourth Circuit rightly held that "[t]his 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.'" *Id.* at 736 (quoting *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 716 (4th Cir. 1999)). The same is true here.

When they enacted the Ethics Code, Kentucky lawmakers faced not only the threat of corruption, but actual corruption. They used their best judgment in light of their experience with corruption and their unique expertise with campaign finance issues to craft the Ethics Code, and, in doing so, chose to include the ban on lobbyists' campaign contributions. The District Court questioned that decision, holding that the General Assembly could have enacted contribution limits or a ban

effective only when it is in session instead of a complete ban, but such second guessing by the judiciary is inappropriate in light of the compelling interests at issue. It is understandable why the General Assembly would have believed that neither restriction would go far enough to combat actual or perceived corruption; because "[*a*]ny *payment* made by a lobbyist to a public official . . . calls into question the propriety of the relationship," it is rational to ban all such payments, including those made in the form of a campaign contribution. *Id.* at 737. Like the Fourth Circuit in *Leake*, this Court should avoid second guessing the legislative judgment that a ban on all contributions from lobbyists was the best approach.

Nevertheless, the legislative judgment to impose an outright ban, rather than a limit or ban applicable only when the General Assembly is in session, is sound. Interactions between lobbyists and members of the General Assembly are not limited to when the General Assembly is in session. Rather, these individuals have significant interactions when the General Assembly is not in session, often crafting legislation and policy during this down time. For example, interim joint committees meet regularly during the summer and lobbyists use that opportunity to meet with legislators to develop statutory language for ease of passage when session recommences. In addition, lobbyists and legislators attend similar conferences, such as the National Conference of State Legislators or the Council of State Governments' National Conference, when the General Assembly is not in

session. Because there are many other ways in which lobbyists and members of the General Assembly interact to form policy and proposed legislation outside of the time period when the General Assembly is in session, imposing a ban solely during the session would be arbitrary. The General Assembly's decision to impose an outright ban was rational.

D. The solicitation ban and the ban on lobbyists serving as campaign treasurers are constitutional.

As for the ban on lobbyists soliciting campaign contributions or serving as campaign treasurers, again, this Court should not question Kentucky lawmakers' rational judgment that such a provision is needed to prevent quid pro quo corruption or the appearance of it. The District Court ignored the decision in *Maryland Right to Life State Political Action Committee v. Weathersbee*, 975 F. Supp. 791, 798 (D. Md. 1997), which held that a similar statute was "narrowly tailored to advance a compelling governmental interest" in preventing political corruption. The court in *Weathersbee* explained that the statute at issue was "not an absolute ban on lobbyists participation in political committees; lobbyists may perform ministerial tasks for political committees." *Id.* Like Maryland's statute, KRS § 6.811(5) only prohibits a lobbyist from serving as a campaign treasurer or directly soliciting, controlling, or delivering a campaign contribution for a candidate or legislator; it does not prevent a lobbyist from otherwise participating in political campaigns. Thus, it is sufficiently tailored to a legitimate state interest.

The District Court mistakenly held that this ban could not withstand constitutional muster because Appellants failed to provide any evidence of recent corruption in Kentucky, but no such proof is necessary to justify the restrictions at issue. States are not required to suffer from the very problem they fear before taking prophylactic measures against it. *See Ognibene*, 671 F.3d at 188 (rejecting the appellants' argument that evidence of recent scandals was required to justify any campaign restriction). Such a requirement "would conflate the interest in preventing actual corruption with the separate interest in preventing apparent corruption." *Id.* Moreover, it would defy logic and prevent state governments from passing legislation to combat a number of problems that can be foretold.

Regardless, there was actual corruption when the solicitation ban initially was enacted.[6] The BOPTROT scandal presented the Kentucky General Assembly with a very real corruption problem in need of a solution. Legislators had sold their votes, exactly what is feared when money infiltrates the political process. It was not a stretch for legislators to fear lobbyists soliciting and bundling campaign contributions for candidates in similar quid pro quo arrangements. Thus, it was rational and appropriate for Kentucky lawmakers to adopt a measure geared

[6] Although KRS § 6.811(5) was amended in 2014, that amendment did not significantly change the nature of the solicitation restrictions, but instead refined them. *See* H.B. 28 (replacing the prohibition against a legislative agent serving as "fundraiser as set forth in KRS 121.170(2)" with the prohibition against a legislative agent "directly solicit[ing], control[ing], or deliver[ing] a campaign contribution").

towards preventing such acts. The lobbyist solicitation ban, like the other lobbying restrictions in the Ethics Code, is constitutional.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court reverse and set aside the District Court's Judgment and Permanent Injunction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations in Federal Rule of Appellate Procedure 29(a)(5) and 32(a)(7)(B)(i) as this brief contains 6,497 words, excluding the parts of the brief exempted by Rule 32(f). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) as this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

Dated: January 24, 2017 *<u>/s/ Barbara B. Edelman</u>*
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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of January, 2018, a true and correct copy of the foregoing Brief of *Amici Curiae* was electronically filed with the Court's electronic filing system. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's electronic filing system.

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