No. 18-755

In The
Supreme Court of the United States

ILLINOIS LIBERTY PAC, et al.,

Petitioners,

v.

LISA MADIGAN,
Attorney General of the State of Illinois, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF AMICUS CURIAE OF GOLDWATER INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

"[T]he First Amendment stands against . . . restrictions distinguishing among different speakers, allowing speech by some but not others." *Citizens United v. FEC*, 558 U.S. 310, 340 (2010). Should the courts therefore subject political contribution limits that impose different limits on different classes of donors, such as those Illinois has enacted, to strict scrutiny—or at least a form of scrutiny that requires the government to justify its discrimination?

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

The Goldwater Institute was established in 1988 as a nonpartisan public policy and research foundation devoted to advancing the principles of limited government, individual freedom, and constitutional protections through litigation, research, policy briefings, and advocacy. Through its Scharf-Norton Center for Constitutional Litigation, the Institute litigates cases and files amicus briefs when its or its clients' objectives are directly implicated.

The Institute devotes substantial resources to defending the vital constitutional principle of freedom of speech. The Institute has litigated and won cases challenging unconstitutional campaign-finance restrictions, including *Arizona Free Enterprise Club's Freedom PAC v. Bennett*, 546 U.S. 721 (2011) (matching-funds provision violated First Amendment) and *Protect My Check, Inc. v. Dilger*, 176 F. Supp. 3d 685 (E.D. Ky. 2016) (scheme imposing different limits on different classes of donors violated Equal Protection Clause).

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[1] Pursuant to Supreme Court Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Pursuant to Supreme Court Rule 37.6, counsel for amicus curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity, other than Amicus, their members, or counsel, made a monetary contribution to the preparation or submission of this brief.

The Institute currently represents petitioners currently seeking a writ of certiorari from this Court in *1A Auto, Inc. v. Sullivan*, No. 18-733. Those petitioners, like the petitioners in this case, are asking the Court to decide, among other questions, whether campaign contribution limits that treat some donors more favorably than others should receive strict scrutiny rather than the highly deferential review lower courts have given them.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case asks the Court to address an important constitutional problem: lower courts are not giving meaningful First Amendment scrutiny to campaign contribution limits that give some donors favorable treatment that is denied to others.

Although the First Amendment demands that the government treat speakers equally, and this Court has broadly condemned laws that stifle or privilege select voices in the political process, the Court has not specifically addressed how courts should analyze First Amendment challenges to discriminatory contribution limits. As a result, courts are "uncertain [] about the level of scrutiny the Supreme Court wishes [them] to apply" in such cases. *Riddle v. Hickenlooper*, 842 F.3d 922, 930 (10th Cir. 2014) (Gorsuch, J., concurring).

This lack of guidance has led some courts, including the lower court here, to apply minimal scrutiny

when reviewing contribution limits that treat some donors less favorably than others—even though, in light of the fundamental First Amendment interests at stake, such limits should receive the *highest* scrutiny, or at least a form of scrutiny that requires the government to justify its discriminatory treatment of different donors. The Court should therefore grant certiorari to clarify the law and ensure that courts sufficiently protect First Amendment rights.

ARGUMENT

The Court should grant certiorari to ensure that lower courts give discriminatory contribution limits meaningful First Amendment scrutiny.

"[T]he First Amendment stands against . . . restrictions distinguishing among different speakers, allowing speech by some but not others." *Citizens United*, 558 U.S. at 340. The primary reason for this is because "speech restrictions based on the identity of the speaker are all too often simply a means to control content." *Id.* And the First Amendment prohibits content-based restrictions on speech "above all else" because they "completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95–96 (1972).

In addition, laws that "identif[y] certain preferred speakers" may cause First Amendment harm even

"apart from the purpose or effect of regulating content." *Citizens United*, 558 U.S. at 340. "By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice." *Id.* at 340–41. Restricting some speakers, but not others, also "deprive[s] the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration." *Id.* at 341.

Further, the First Amendment prohibits government attempts to control "the relative ability of individuals and groups to influence the outcome of elections." *Id.* at 380. Under the First Amendment and our system of government, voters, not elected officials, should "evaluate the strengths of candidates competing for office," and the government must not enact laws "making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election." *Davis v. FEC*, 554 U.S. 724, 742 (2008); *see also Knox v. SEIU Local 1000*, 567 U.S. 298, 322 (2012) ("The First Amendment creates a forum in which all may seek, without hindrance or aid from the State, to move public opinion and achieve their political goals."). In other words, in this country, "those who govern should be the *last* people to help decide who *should* govern." *McCutcheon v. FEC*, 572 U.S. 185, 192 (2014) (plurality opinion).

In light of these principles, one might expect courts to require the government to carry a heavy burden to justify campaign contribution limits that

impose lower limits on some donors than on others. After all, contribution limits "intrude on . . . a citizen's ability to exercise 'the most fundamental First Amendment activities' " related to "participat[ing] in the public debate through political expression and political association," and even non-discriminatory limits receive "rigorous" First Amendment scrutiny, under which the government must show that its limits are closely drawn to serve the government's interest in preventing actual or apparent *quid pro quo* corruption. *Id.* at 199, 203, 227.

Yet lower courts often do not require the government to justify its decisions to discriminate *at all*.

The lower court here did not, for one. Petitioners challenged Illinois's statutes that place different contributions on different classes of donors, arguing that the differing limits were not justified by differences in the potential for corruption inherent in those classes' contributions. *See* App. 7a-9a, 48a. Yet the Seventh Circuit did not deem it necessary even to consider whether the state had any good reason for restricting some donors more than others. Rather, it said that Petitioners could not simply "allege that a law restricts too little of *another person's* speech," but could prevail under an underinclusiveness theory only if they showed "that Illinois was not *actually* concerned about corruption" when it enacted the limits that apply to Petitioners. App. 13a-14a. And, because Petitioners did not make that showing, and because the contribution limits the state imposed on various donors, considered

separately, served the state's anti-corruption interest, it upheld the scheme. App. 11a-14a.

The Massachusetts Supreme Judicial Court recently took the same approach in rejecting a First Amendment and Equal Protection Clause challenge to a statute that banned for-profit business entities, but not unions and nonprofits, from making political contributions in *1A Auto, Inc. v. Sullivan*, 105 N.E.3d 1175 (Mass. 2018). That decision focused, not on the statute's unfavorable treatment of businesses relative to unions and nonprofits, but on whether the ban on business contributions would tend to prevent corruption that could arise from such contributions. *Id.* at 1189–90. Like the lower court in this case, the Massachusetts court considered the statute's more favorable treatment of other donors to be *irrelevant* in the absence of evidence that the legislature actually *intended* to silence some donors to benefit others, *id.*, even though First Amendment analysis does not hinge on the censorious motives of the legislature, *see Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2228 (2015).

Similarly, the District of Columbia Circuit has held that if a ban on contributions by a given class of donors, considered by itself, survives First Amendment scrutiny, then the government's failure to similarly limit other donors cannot violate the Equal Protection Clause. *Wagner v. FEC*, 793 F.3d 1, 32–33 (D.C. Cir. 2015). And the Eighth Circuit summarily rejected an Equal Protection Clause challenge to a discriminatory contribution ban after concluding that the ban on corporate contributions, considered by itself, did not

violate the First Amendment. *Iowa Right to Life v. Tooker*, 717 F.3d 576, 601–03 & n.11 (8th Cir. 2013).

The approach these courts have taken is insufficient to protect First Amendment rights. It completely disregards the fundamental First Amendment principles requiring equal treatment of political speakers discussed above. It disregards the need for content-, identity-, and motive-neutrality with regard to free speech, and disregards one of the most important reasons why contribution limits in general must be closely drawn to serve the government's interest in preventing *quid pro quo* corruption and no other purpose: to ensure that the government does not "impermissibly inject [itself] 'into the debate over who should govern.'" *McCutcheon*, 572 U.S. at 192 (quoting *Bennett*, 564 U.S. at 750).

Indeed, discriminatory limits such as those Petitioners challenge threaten to distort the outcome of elections. When the government imposes lower contribution limits (or no limits) on one select group of donors, it is "making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election," which the First Amendment does not allow. *Davis*, 554 U.S. at 742. With the contribution limits that Petitioners challenge, Illinois has effectively determined that support from current political party leaders should be allowed to contribute to a candidate's success much more than support from other entities—entities that likely do not share the same political perspective as those incumbents—such as a PAC that seeks to challenge to the current party

leadership. And Illinois's limits also inevitably have the effect of supporting the speech and ideas of established party leaders over the speech and ideas of outsiders.

The lower courts' lack of concern over the discrimination in cases like this and *1A Auto* apparently stems in part from their improper reliance on *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1565 (2015). *See* App. 13a, 19a-20a, 54a-56a; *1A Auto*, 150 N.E. 3d at 1189. *Williams-Yulee* is inapposite because it involved a First Amendment challenge to a ban on personal solicitation of campaign contributions by judges, not a challenge to discriminatory contribution limits. 135 S. Ct. at 1663–64. The plaintiff in that case argued, among other things, that the ban was fatally underinclusive because it did not "restrict other speech equally damaging to judicial integrity and its appearance," such as solicitation by a judge's campaign committee (run by others) and notes from a judge thanking donors for their contributions *Id.* at 1668.

Williams-Yulee's solicitation ban is not comparable to discriminatory contribution limits like those at issue here and in *1A Auto*, because, among other reasons, the solicitation ban there did not impose different restrictions on competing participants in the political process but rather "applie[d] evenhandedly to all judges and judicial candidates." *Id.* Thus, unlike discriminatory contribution limits, the solicitation ban posed no threat of undue government intrusion into the political process.

Where that threat is absent, it may make sense to say, as *Williams-Yulee* did, that a restriction on speech "need not address all aspects of a problem in one fell swoop" and may instead "focus on [legislators'] most pressing concerns." 135 S. Ct. at 1668. But that makes no sense where, as with discriminatory contribution limits, restricting the speech of one political group will benefit competing groups and distort the political process. *Cf.* App. 54a-56a (quoting the *Williams-Yulee* language to uphold Illinois's limits); *1A Auto*, 150 N.E.3d at 1190 (quoting the same language to uphold Massachusetts's ban on business contributions). To simply shrug off limits that restrict some donors but not others as "addressing one problem at a time" is to ignore the important First Amendment harm such discriminatory limits cause.

Further, contrary to the lower courts' view, it does not matter whether the legislators who enacted discriminatory limits specifically intended to silence some political speakers to benefit others. The Court has repeatedly made clear that a statute can violate First Amendment rights regardless of whether the government acts with an improper motive; "discriminatory treatment is [not] suspect under the First Amendment only when the legislature intends to suppress certain ideas." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993) (internal marks and citation omitted). Indeed, this Court has gone out of its way to repudiate a motive-based analysis in cases where government treats some speakers differently from others. In *Reed*, 135 S. Ct. at 2228, for example, it firmly

rejected the proposition that "the government's benign motive" or its "lack of 'animus'" should lighten the degree of scrutiny applied to laws that burden some speech more than others (quoting *Discovery Network*, 507 U.S. at 429). That is for good reason: regardless of lawmakers' subjective intentions, which may vary from legislator to legislator and are difficult or impossible to know, the injury to the disfavored speakers' fundamental First Amendment rights is the same. *Cf. McCutcheon*, 572 U.S. at 227 (scrutiny of campaign contribution limits "ensure[s] that the Government's efforts [to combat corruption] do not have the *effect* of restricting the First Amendment right of citizens to choose who shall govern them") (emphasis added).

Therefore, contrary to the lower courts' view, plaintiffs challenging discriminatory limits should not have a burden to present evidence that the government acted with improper intent. Rather, the government should have to justify its discrimination, just as it always "bears the burden of proving the constitutionality of its actions" when it restricts speech, including campaign contributions. *McCutcheon*, 572 U.S. at 210; *cf. Plyler v. Doe*, 457 U.S. 202, 216–17 (1982) (under Equal Protection Clause, a statutory classification that "impinge[s] upon the exercise of a 'fundamental right'" is "presumptively invidious" and obligates "the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest").

To ignore the harm caused by the government's discrimination in favor of some political donors and

against others, as the lower courts have, is to tolerate and encourage exactly the sort of abuse the First Amendment exists to prevent. As long as courts do not require governments to justify their discrimination, legislators will know that they may use contribution limits to play favorites and influence the outcomes of elections, virtually without limitation. One might hope that public servants could be trusted to resist the urge to engage in such improper meddling in politics, but of course the First Amendment exists precisely because they cannot be trusted to do so. *See Citizens United*, 558 U.S. at 340 (noting that the First Amendment is "[p]remised on mistrust of governmental power").

Therefore, to adequately protect First Amendment rights, courts must, as Petitioners urge, subject discriminatory limits to strict scrutiny—or at least rigorous scrutiny that requires the government to specifically justify its decision to discriminate by showing that its differing contribution limits are tailored to address differences in the potential to corrupt following from particular classes' contributions. (*See* Petition at 9–13.) But, as this case illustrates, courts will not do so consistently until this Court provides them with specific direction they currently lack. The Court should grant certiorari in this case to provide that guidance.

CONCLUSION

The petition for certiorari should be *granted*.

Respectfully submitted,

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