No. 15-428

In the Supreme Court of the United States

JAN MILLER, PETITIONER

v.

FEDERAL ELECTION COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly rejected petitioner's constitutional challenges to 52 U.S.C. 30119, which prohibits federal contractors from making political contributions during the time period when they are negotiating and performing federal contracts.

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1-75) is reported at 793 F.3d 1. The certification order of the district court (Pet. App. 76-93) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 2015. The petition for a writ of certiorari was filed on October 2, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Federal law prohibits individuals and firms from making campaign contributions in connection with federal elections during the time period when they are negotiating and performing federal contracts. 52 U.S.C. 30119. Section 30119 is the current manifesta-

tion of Congress's longstanding efforts to ensure merit-based, corruption-free government administration.

1. For more than a century, Congress has enacted legislation to establish a merit-based government workface, insulated from coercive political activity. See generally *United States Civil Serv. Comm'n* v. *National Ass'n of Letter Carriers, AFL-CIO*, 413 U.S. 548, 557-563 (1973). Beginning in the 1870s, Congress barred certain federal employees from making campaign contributions in order "to promote efficiency and integrity in the discharge of official duties" and to protect federal workers "from being compelled to make contributions for [political] purposes through fear of dismissal if they refused." *Ex parte Curtis*, 106 U.S. 371, 373-374 (1882). In 1883, Congress made it a crime for Members to solicit political contributions from federal workers, including "the various government contractors of the era." Pet. App. 19 n.9. Congress also steadily expanded the civil service system, "imposing limitations on political activity by employees and implementing merit-based hiring rules." *Id.* at 20.

Despite those early reforms, "notorious abuses" involving government contractors "occurred during the 1936 and 1938 election campaigns." Pet. App. 20. In the "Democratic campaign book scandal," Democratic National Committee representatives visited government contractors and coerced them into purchasing souvenir convention books at an exorbitant price "in proportion to [each contractor's] amount of [g]overnment business." *Id.* at 22 (internal quotation marks omitted) (quoting 84 Cong. Rec. 9598-9599 (1939) (statement of Rep. Taylor)). Larger contractors were also solicited to buy advertising in the campaign book,

with the threat of being blacklisted from future government business if they resisted. *Id.* at 22-23 & n.11; Gov't C.A. Br. 8.

In 1940, Congress addressed the exploitation of government contractors by prohibiting any "person or firm entering into any contract with the United States * * * if payment * * * is to be made in whole or in part from funds appropriated by the Congress" from making any "contribution[] to a[] political party, committee, or candidate for public office or to any person for any political purpose or use." Act of July 19, 1940, ch. 640, § 5(a), 54 Stat. 772. As Senator Harry Byrd explained in support of the provision, "those who are making money out of governmental contracts" should not be allowed to make campaign contributions because such contributions "may be considered in some instances as bribery in order to secure governmental contracts." 86 Cong. Rec. 2982 (1940).

Congress strengthened the contractor contribution ban in the 1970s after evidence surfaced that pay-to-play corruption in government contracting persisted. In 1974, the Senate Watergate Committee issued a report chronicling "disturbing examples" of "efforts to channel government contracts to President Nixon's political supporters and to exact contributions from existing contractors." Pet. App. 24 (citing *Final Report of the Senate Select Comm. on Presidential Campaign Activities*, S. Rep. No. 981, 93d Cong., 2d Sess. 368 (1974)). The report summarized "evidence of *quid pro quos* for the contracts from four cabinet departments and six agencies," and "evidence that campaign officials were participating in the selection process for the awards of [General Services Administration] architectural and engineering design con-

tracts." *Id.* at 24-25 (citation and internal quotation marks omitted). In response to those scandals, Congress increased the fines for violating the contractor contribution ban, moved the ban with minor modifications to the Federal Election Campaign Act of 1971 (FECA), 52 U.S.C. 30101 *et seq.*, and authorized the Federal Election Commission (FEC or Commission) to initiate civil enforcement of the provision. See Pet. App. 26.

Although the contractor contribution ban has helped to prevent "large-scale quid pro quo corruption or coercion" in the contracting context, recent examples of pay-to-play corruption schemes demonstrate that "individuals and firms continue to test the limits of the current laws." Pet. App. 28-29 (brackets, citation, and internal quotation marks omitted). In 2005, for example, Representative Randy Cunningham pleaded guilty to taking bribes from contractors in exchange for influencing contracts awarded by the Department of Defense. *Id.* at 30 (observing that the defense contractor who bribed Representative Cunningham admitted that he had made illegal contributions to other Members of Congress in hopes that they would request appropriations funding to benefit his firm). Similarly in 2006, Representative Robert Ney pleaded guilty to criminal charges after he influenced the award of a multi-million dollar contract to a client of lobbyist Jack Abramoff in a quid pro quo scheme. *Ibid.*; see Gov't C.A. Br. 15 (summarizing additional examples).

The contractor contribution ban, which is currently codified at 52 U.S.C. 30119, has "retained its essential features since" Congress first enacted the provision in 1940. Pet. App. 23. The statute prohibits "any per-

son" who "enters into any contract with the United States or any department or agency thereof" from making a contribution to any political party, political committee, or candidate for federal office. 52 U.S.C. 30119(a). "[P]erson" is defined in FECA to include "an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons" other than the federal government. 52 U.S.C. 30101(11). FECA defines "contribution" as "any gift, subscription, loan, advance, or deposit of money or anything of value made * * * for the purpose of influencing any election for Federal office." 52 U.S.C. 30101(8)(A)(i).

Section 30119's contribution ban applies during the time "between the commencement of negotiations for and the later of (A) the completion of performance under; or (B) the termination of negotiations for" a federal contract. 52 U.S.C. 30119(a)(1). Although Section 30119 bars the entity or individual who enters into a federal contract from making campaign contributions during the pendency of the contracting relationship, the prohibition does not apply to spouses of federal contractors if they make contributions in their own names. 11 C.F.R. 115.5. Federal law also does not prohibit corporations from establishing separate segregated funds (commonly referred to as political action committees or PACs), which may make contributions with money voluntarily contributed by persons affiliated with the corporation. 52 U.S.C. 30118(a) and (b)(2)(C), 30119(b). Section 30119 "does not apply to contributions or expenditures in connection with State or local elections." 11 C.F.R. 115.2(a).

2. The FEC is vested with exclusive statutory authority over the administration, interpretation, and

civil enforcement of FECA and other federal campaign-finance statutes. The Commission is empowered to "formulate policy" with respect to FECA, 52 U.S.C. 30106(b)(1); "to make, amend, and repeal such rules * * * as are necessary to carry out the provisions of [FECA]," 52 U.S.C. 30107(a)(8), 30111(a)(8); to issue advisory opinions concerning the application of FECA and the Commission's regulations to proposed transactions or activities, 52 U.S.C. 30108; and to civilly enforce FECA, 52 U.S.C. 30109.

3. Petitioner is an individual who retired from full-time employment in 2003 and has subsequently worked on and off for the United States Agency for International Development (USAID) pursuant to personal-services consulting contracts. Pet. App. 3; *id.* at 84. From June 2010 to June 2015, petitioner worked part-time for USAID pursuant to a contract with a budgeted value of $884,151. *Id.* at 84.[1] Petitioner's current contract with USAID will expire in June 2017. Pet. 8.

4. a. Petitioner filed this lawsuit in district court against the FEC, asserting that he wishes to make contributions to federal candidates and their political parties but is barred from doing so by 52 U.S.C. 30119. Pet. App. 6.[2] Petitioner alleged that Section

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[1] The district court's certification order erroneously stated that the contract would end in June 2016. Pet. App. 84. The contract lists June 26, 2015 as the estimated completion date. 11-cv-01841 Docket entry No. 25-3 (Mar. 1, 2012).

[2] The complaint was filed on behalf of three individual contractors, but two of the plaintiffs subsequently completed their contracts. Pet. App. 5. Because those individuals are "once again free to make campaign contributions," the court of appeals held that their claims were moot. *Ibid.* Those plaintiffs have not challenged the court's mootness holding.

30119 violates the free speech guarantee of the First Amendment and the equal protection guarantee of the Fifth Amendment as applied to individual contractors who wish to make contributions to a federal candidate or political party. *Id.* at 6-7.

b. Pursuant to 52 U.S.C. 30110, the district court made factual findings and certified to the en banc court of appeals the question whether Section 30119 violates the First or Fifth Amendment. Pet. App. 76-93.[3]

c. The en banc court of appeals unanimously rejected petitioner's First and Fifth Amendment challenges to 52 U.S.C. 30119. Pet. App. 1-75.

The court of appeals observed that laws that regulate campaign contributions are subject to "closely drawn" scrutiny to determine whether a challenged law serves a "sufficiently important interest" and is "closely drawn to avoid unnecessary abridgment of associational freedoms." Pet. App. 8 (emphasis omitted) (quoting *McCutcheon* v. *FEC*, 134 S. Ct. 1434, 1444 (2014) (plurality opinion)).[4] The court rejected

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[3] The district court initially concluded that it had federal-question jurisdiction under 28 U.S.C. 1331 to decide the merits of the case, and it granted summary judgment to the FEC. Pet. App. 4; see *Wagner* v. *FEC*, 901 F. Supp. 2d 101 (D.D.C. 2012). On appeal, a three-judge panel of the court of appeals held that 52 U.S.C. 30110 "grants exclusive merits jurisdiction to the *en banc* court of appeals" to resolve constitutional challenges to provisions of FECA brought by individual voters. *Wagner* v. *FEC*, 717 F.3d 1007, 1011 (D.C. Cir. 2013). The court of appeals accordingly vacated the district court's summary-judgment ruling and remanded the case for findings of fact and certification of constitutional questions pursuant to Section 30110. *Id.* at 1017.

[4] Because "Section 30119 is a restriction on First Amendment activity aimed only at those who choose to work for the federal

petitioner's argument that Section 30119 should instead be subject to strict scrutiny because it "does not merely limit contributions, but bans them entirely." *Id.* at 9. That argument, the court explained, was "expressly rejected" in *FEC* v. *Beaumont*, 539 U.S. 146, 161-163 (2003), which held that "both limits and bans on contributions are subject to the same 'closely drawn' standard." Pet. App. 9.

Applying the first prong of "closely drawn" scrutiny, the court of appeals identified two important governmental interests underlying Section 30119: "(1) protection against quid pro quo corruption and its appearance, and (2) protection against interference with merit-based public administration." Pet. App. 13-14. In light of the historical evidence of contractor-related government corruption, the court concluded that Congress was "motivated by concerns over corruption and merit protection" when it enacted the contribution ban. *Id.* at 28. The court further found that contractor corruption and coercion remain a threat today. *Id.* at 29 (emphasizing that "the government's fear of the consequences of removing the current ban is not unwarranted"). The court described many recent examples of pay-to-play con-

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government," the court of appeals noted that the provision arguably should be subject to a more deferential standard of review. Pet. App. 10-11. The court explained that this Court "has 'consistently given greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large.'" *Ibid.* (quoting *Board of Cnty. Comm'rs* v. *Umbehr*, 518 U.S. 668, 676 (1996)). The court found it unnecessary to analyze Section 30119 under a more deferential standard, however, because it concluded that the provision survives "closely drawn" scrutiny. *Id.* at 12-13, 75.

tracting scandals at both the federal and state level, which demonstrated that "the risk of quid pro quo corruption and its appearance, and of interference with merit-based administration, has not dissipated." *Id.* at 37. The court concluded that "the interests supporting the contractor contribution statute are legally sufficient, and the dangers it seeks to combat are real and supported by the historical and factual record." *Id.* at 44.

Turning to the second prong of the constitutional inquiry, the court of appeals held that Section 30119 is closely drawn to the important governmental interests that underlie the statute. The court recognized that "the total ban on federal contributions by contractors is a significant restriction," but it found a ban, as opposed to a limit, justified by the "contracting context," which "greatly sharpens" both "the risk of corruption and its appearance" and "the risk of interference with merit-based public administration." Pet. App. 46-48. The court explained that, "[u]nlike the corruption risk when a contribution is made by a member of the general public, in the case of contracting there is a very specific quo for which the contribution may serve as the quid: the grant or retention of the contract." *Id.* at 47. "[I]f there is an area that can be described as the 'heartland' of such concerns," the court stated, "the contracting process is it." *Ibid.* The court further explained that, "because of that sharpened focus, the appearance problem is also greater: a contribution made while negotiating or performing a contract looks like a quid pro quo, whether or not it truly is." *Id.* at 48. The court also observed that, "[b]ecause a contractor's need for government contracts is generally more focused than a member of the

general public's need for other official acts," a contractor's "susceptibility to coercion is concomitantly greater," to the detriment of merit-based government administration. *Ibid.* Based on those features of the contracting context, the court concluded that "a flat prohibition is closely drawn to the important goals that § 30119 serves." *Id.* at 49.

In reaching that conclusion, the court of appeals emphasized "how much the statute leaves untouched." Pet. App. 54. The court observed that federal contractors "are free to volunteer for candidates, parties, or political committees; to speak in their favor; and to host fundraisers and solicit contributions from others." *Ibid.* The court further explained that "even the contribution ban itself is limited to the period between commencement of negotiations and completion of contract performance." *Id.* at 55. Accordingly, the court found that Section 30119 "avoids unnecessary abridgment of First Amendment rights." *Id.* at 54 (internal quotation marks omitted).

The court of appeals rejected petitioner's arguments that Section 30119 is overinclusive. The court analyzed the various ways in which petitioner alleged that the statute could be made less restrictive, but it found that each proposal would undermine the important goals furthered by the contribution ban. Pet. App. 45-54. The court observed, for example, that if contributions by federal contractors were limited rather than barred, such contributions could still give rise to the appearance of corruption, and that "coercing a contractor to contribute, even if limited by a contribution ceiling, is still coercion." *Id.* at 48-49. The court likewise found that Congress was not required to restrict the ban to high-value contracts

given the historical record demonstrating "that corrupt and coercive patronage regimes can take root even when relatively small amounts of money are at stake." *Id.* at 53. The court also rejected petitioner's claim that Section 30119 should not apply to sole-source contracts awarded outside the competitive bidding process, noting that the argument was contrary to petitioner's claim "that it is the rise of competitive bidding—not the private placement of sole-source contracts—that has eliminated the risk of pay-to-play." *Id.* at 51-52. The court concluded that, "[a]lthough Congress could have narrowed its aim even further," Section 30119 is closely drawn because "[i]t strikes at the dangers Congress most feared while preserving contractors' freedom to engage in many other forms of political expression." *Id.* at 56.

The court of appeals also rejected petitioner's claim that Section 30119 is impermissibly underinclusive because it does not bar contributions by three categories of individuals and entities that petitioner claimed could also be tempted to engage in quid pro quo corruption. Pet. App. 57-70.[5] First, the court concluded that Congress was not required to bar contributions by all "entities and individuals associated with corporations that have government contracts." *Id.* at 62. The court observed that, like individual contractors, corporations that contract with the federal government are subject to Section 30119's prohibition. *Ibid.* Congress was not required to prohibit contributions

[5] The court of appeals observed that underinclusiveness arguments are generally made to demonstrate that a law was not actually motivated by, or does not in fact serve, a proffered state interest. Pet. App. 59-62. Petitioner, however, did "not challenge § 30119 on these grounds." *Id.* at 60.

by a corporate contractor's PAC, the court explained, because a PAC "is a separate legal entity" and contributions made by it may "present markedly different appearances to the public." *Id.* at 63-64 (quoting *Williams-Yulee* v. *Florida Bar*, 135 S. Ct. 1656, 1669 (2015)). The court also noted that Congress could reasonably have concluded that prohibiting contributions by "all those associated with corporate contractors would go too far at too great a First Amendment cost." *Id.* at 65.

The court of appeals rejected petitioner's contention that government employees are similarly situated to contractors and should be subject to a contribution ban. Pet. App. 67-68. The court observed that employee contributions "carr[y] less risk of corruption or its appearance" because "regular employees do not generally need new contracts or renewals with the frequency required by outside contractors." *Id.* at 68. The court further explained that federal employees "are subject to other restrictions" pursuant to the Hatch Political Activity Act (Hatch Act), 5 U.S.C. 7321 *et seq.*, "and enjoy other protections * * * that do not apply to contractors" pursuant to the Civil Service Reform Act of 1978, 5 U.S.C. 1501 *et seq.* Pet. App. 67. Thus, "Congress could reasonably have thought that the difference in status of the two kinds of workers warrants this difference in treatment." *Id.* at 67-68.

The court of appeals also rejected petitioner's reliance on a comparison between contractors and "other individuals who seek government benefits or positions," such as those who seek federal grants or ambassadorships. Pet. App. 69. The court emphasized that Section 30119 "'aims squarely at the conduct

most likely to undermine' the important interests that underlie it," and it declined to "punish [Congress] for leaving open more, rather than fewer, avenues of expression, especially when there is no indication that the selective restriction of speech reflects a pretextual motive." *Id.* at 70 (brackets in original) (quoting *Williams-Yulee*, 135 S. Ct. at 1668-1669).

Finally, the court of appeals rejected petitioner's equal protection claim, which was premised on the same allegations of underinclusiveness. Pet. App. 70-74. The court declined petitioner's request that it apply strict scrutiny to evaluate the equal protection challenge, characterizing the argument for strict scrutiny as a "doctrinal gambit" designed to avoid the First Amendment "closely drawn" standard of review. *Id.* at 71 (internal quotation marks omitted). The court concluded that, "in a case like this one, in which there is no doubt that the interests invoked in support of the challenged legislative classification are legitimate, and no doubt that the classification was designed to vindicate those interests rather than disfavor a particular speaker or viewpoint," petitioner could "fare no better under the Equal Protection Clause than under the First Amendment itself." *Id.* at 73 (citation omitted). The court accordingly applied "closely drawn" scrutiny and rejected the equal protection challenge "[f]or the [same] reasons" the First Amendment claim failed. *Id.* at 74.

ARGUMENT

The en banc court of appeals correctly rejected petitioner's First and Fifth Amendment challenges to 52 U.S.C. 30119. The court's unanimous decision reflects a straightforward application of this Court's precedents, and it is consistent with the decisions of all

courts of appeals that have considered similar constitutional challenges to state and municipal restrictions on contributions by government contractors. Further review is not warranted.

1. For 75 years, the prohibition on campaign contributions by federal contractors has deterred corruption and its appearance, and it has limited the patronage and coercive political activity that had previously tainted federal contracting. The court of appeals correctly held that Section 30119 does not violate the Constitution because it serves "a sufficiently important [government] interest" and is "closely drawn to avoid unnecessary abridgment of associational freedoms." *Buckley* v. *Valeo*, 424 U.S. 1, 25 (1976) (per curiam). Petitioner's objections to the court's analysis lack merit.

a. Petitioner contends (Pet. 25-29) that strict scrutiny should apply to the contractor contribution ban. That contention is unfounded. Since *Buckley*, this Court has consistently held that laws that restrict contributions are subject to "closely drawn" scrutiny rather than strict scrutiny "because contributions lie closer to the edges than to the core of political expression." *FEC* v. *Beaumont*, 539 U.S. 146, 161 (2003); see, *e.g.*, *McCutcheon* v. *FEC*, 134 S. Ct. 1434, 1446-1462 (2014) (plurality opinion); *Randall* v. *Sorrell*, 548 U.S. 230, 246-263 (2006) (plurality opinion); *McConnell* v. *FEC*, 540 U.S. 93, 231-232 (2003), overruled in part by *Citizens United* v. *FEC*, 558 U.S. 310 (2010); *FEC* v. *Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 456-465 (2001); *Nixon* v. *Shrink Mo. Gov't PAC*, 528 U.S. 377, 386-395 (2000); *California Med. Ass'n* v. *FEC*, 453 U.S. 182, 196-199 (1981) (plurality opinion). As the Court in *Buckley* explained,

"[w]hile contributions may result in political expression if spent by a candidate or an association[,] * * * the transformation of contributions into political debate involves speech by someone other than the contributor." 424 U.S. at 21. Thus, compared to activities such as speaking or volunteering on a candidate's behalf, the expressive value of a contribution—which funds someone else's speech—is limited. See, *e.g.*, *McConnell*, 540 U.S. at 135.

Petitioner maintains (Pet. 25-26) that strict scrutiny is appropriate because Section 30119 bans, rather than limits, contributions during the time period when it applies. But this Court in *Beaumont* rejected a distinction between contribution limits and contribution bans, reasoning that such a distinction "overlooks the basic premise" that, "in setting First Amendment standards for reviewing political financial restrictions[,] * * * the level of scrutiny is based on the importance of the political activity at issue to effective speech or political association." 539 U.S. at 161 (citation and internal quotation marks omitted) (applying closely drawn scrutiny to uphold what is now 52 U.S.C. 30118, which bans contributions by corporations and unions); see *McConnell*, 540 U.S. at 231-232 (applying closely drawn scrutiny to a law banning contributions by minors).[6] Thus, while "the

[6] Petitioner suggests (Pet. 25-26) that bans on contributions by individuals could be subject to more demanding scrutiny than bans on contributions by corporations. That argument ignores the established principle that the "degree of scrutiny turns on the nature of the activity regulated," *Beaumont*, 539 U.S. at 162, rather than on the identity of the regulated party. Petitioner's argument is also inconsistent with this Court's decision in *McConnell*, which applied "closely drawn" scrutiny to a ban on contributions by individuals. See 540 U.S. at 231-232.

difference between a ban and a limit" should not "be ignored," "the time to consider [the difference] is when applying scrutiny at the level selected, not in selecting the standard of review itself." *Beaumont*, 539 U.S. at 162.[7] Petitioner offers no special justification to overrule *Beaumont*'s holding that contribution bans are subject to "closely drawn" scrutiny. See *Dickerson* v. *United States*, 530 U.S. 428, 443 (2000) (observing that, although "*stare decisis* is not an inexorable command, * * * even in constitutional cases, the doctrine carries such persuasive force that [the Court has] always required a departure from precedent to be supported by some special justification") (citations and internal quotation marks omitted).

Petitioner also suggests (Pet. 27) that this Court could consider "eliminat[ing] * * * the distinction created in *Buckley* between contributions and expenditures, so that strict scrutiny would apply to restrictions on both." But in the four decades since *Buckley* was decided, this Court has consistently reaffirmed

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[7] Petitioner expresses confusion (Pet. 26-27) about how to analyze a contribution ban under "closely drawn" scrutiny. But courts have had no trouble taking the nature of a ban into account when assessing a law's constitutionality. The court of appeals in this case, for example, recognized that "the total ban on federal contributions by contractors is a significant restriction," but it found that Congress's decision to impose a ban rather than a limit is closely drawn because "the contracting context greatly sharpens the risk of corruption and its appearance" and "also greatly sharpens the risk of interference with merit-based public administration." Pet. App. 46-48; see, *e.g.*, *Green Party of Conn.* v. *Garfield*, 616 F.3d 189, 204-205 (2d Cir. 2010) (emphasizing the need to carefully review a law banning contractor contributions, but ultimately holding that the law survived "closely drawn" scrutiny because it responded to "incidents that have created a strong appearance of corruption with respect to all contractor contributions").

the foundational distinction between laws that restrict expenditures and laws that restrict contributions. See, *e.g.*, *McCutcheon*, 134 S. Ct. at 1444-1445 (discussing the history of the distinction and its consistent application over time). The rationale for that distinction is as sound now as it was when *Buckley* was decided. And overruling *Buckley* now would severely disrupt the considerable reliance interests that have accrued over the past forty years, casting a number of this Court's campaign-finance precedents into doubt. Petitioner identifies no justification for such massive upheaval in this important area of law.

Petitioner also argues (Pet. 28) that his equal protection challenge to Section 30119 should trigger strict scrutiny because, he asserts, "the right to make contributions is a fundamental right protected by the First Amendment." As the court of appeals recognized, however, it would be anomalous to apply a higher level of scrutiny under the equal protection guarantee than would apply under the First Amendment itself, given that petitioner seeks to vindicate a First Amendment right. Pet. App. 71 (rejecting petitioner's argument as a "doctrinal gambit, which would require strict scrutiny notwithstanding the Supreme Court's determination that the 'closely drawn' standard is the appropriate one under the First Amendment"); see, *e.g.*, *Hill* v. *City of Scranton*, 411 F.3d 118, 126 (3d Cir. 2005) ("It is generally unnecessary to analyze laws which burden the exercise of First Amendment rights by a class of persons under the equal protection guarantee, because the substantive guarantees of the Amendment serve as the strongest protection against the limitation of these rights.") (brackets omitted) (quoting 3 Ronald D. Rotunda &

John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure* § 18.40, at 796 (3d ed. 1999)). Indeed, petitioner acknowledged below that he knew of "no case in *any* court in which an equal-protection challenge to contribution limits succeeded where a First Amendment one did not." Pet. App. 72 (citation and internal quotation marks omitted). The court of appeals correctly held that petitioner's challenge to Section 30119 could "fare no better under the Equal Protection Clause than under the First Amendment itself." *Id.* at 73 (quoting *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 55 n.4 (1986)).

b. Petitioner contends (Pet. 29-37) that Section 30119 cannot survive "closely drawn" scrutiny. That argument is unavailing.

Petitioner does not seriously dispute that the governmental interests furthered by Section 30119—prevention of quid pro quo corruption and its appearance, and protection against interference with merit-based government administration—are "sufficiently important" to justify restrictions on contractor contributions. See, *e.g.*, *McCutcheon*, 134 S. Ct. at 1445 (observing that an effort to limit quid pro quo corruption and its appearance is not only a sufficiently important governmental interest, but may also "properly be labeled 'compelling'"). Petitioner states (Pet. 30) that "federal elected officials have no direct decision-making role in the award" of federal contracts and that federal law is "designed to protect against improper influences." As the court of appeals observed, however, recent examples of corruption in the contracting context "speak for themselves" and show that, even today, the award of government contracts is not "immune from political interference." Pet. App.

38; see *id.* at 36-37 (concluding based on an extensive review of the evidence that, "if the dam barring contributions were broken, more money in exchange for contracts would flow through the same channels already on display").[8]

Petitioner principally argues (Pet. 30-37) that Section 30119 is not "closely drawn" to the important interests that underlie it because, in petitioner's view, the law could be less restrictive.[9] Although petitioner faults the court of appeals for analyzing his proposed alternatives "one by one" and concluding that none demonstrates a lack of fit between Section 30119 and its objectives, Pet. 30, petitioner does not identify any specific error in the court's substantive analysis of his claims. The court gave due consideration to petitioner's arguments that Section 30119 could be narrowed by excluding certain contracts (*e.g.*, low-value con-

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[8] The record thus refutes petitioner's suggestion (Pet. 36-37) that "massive changes in the laws governing both campaign contributions and government contracting" have rendered Section 30119 unnecessary. Although petitioner derides Congress for failing to alter "the scope of the ban since its enactment," Pet. 36, "[j]udicial deference is particularly warranted where, as here, [the Court] deal[s] with a congressional judgment that has remained essentially unchanged throughout a century of careful legislative adjustment." *Beaumont*, 539 U.S. at 162 n.9 (citation and internal quotation marks omitted).

[9] Petitioner contends (Pet. 32) that "the clearest example of the overinclusiveness of [S]ection 30119 is that it applies to contributions to independent political committees, which by definition are unconnected to any candidate or party." But the court of appeals held that petitioner lacked standing to challenge the statute on that basis because he wishes to contribute only to candidates and their political parties. Pet. App. 52; see *id.* at 6. Any argument that Section 30119 should exclude contributions made to PACs therefore is not properly before this Court.

tracts), certain individuals (*e.g.*, former employees or those hired through sole-source contracts), or certain contributions (*e.g.*, small contributions). Pet. App. 45-54. But the court found that each of petitioner's proposed limitations on Section 30119's scope could hinder the achievement of Congress's objectives. *Ibid.* The court emphasized that the contracting context "greatly sharpens" the risk of corruption and coercion because "there is a very specific quo for which the contribution may serve as the quid," and because "a contractor's need for government contracts is generally more focused than a member of the general public's need for other official acts." *Id.* at 47-48. Those risks, the court concluded, justified Section 30119's "significant restriction." *Id.* at 46.

Petitioner's argument further ignores the limitations that Congress built into Section 30119 to prevent unnecessary restriction of First Amendment activity. Section 30119 "is limited to the period between commencement of negotiations and completion of contract performance." Pet. App. 55.[10] And even during the time the ban applies, Section 30119 leaves open "other forms of political engagement," such as speaking about candidates, volunteering for campaigns, and raising funds for candidates or parties. *Id.* at 54-55; see *Buckley*, 424 U.S. at 28 (finding contribution re-

[10] Two of the three original plaintiffs in this case no longer have contracts with the government and so are once again free to make campaign contributions. Pet. App. 5; see note 2, *supra*. Beginning in 2017, petitioner likewise will be able to make contributions unless he enters (or negotiates to enter) into a new contract with the government. Section 30119's temporal limitation makes the statute less restrictive than laws or ethical rules prohibiting campaign contributions by certain other classes of individuals, such as foreign nationals and federal judges. Pet. App. 46.

striction closely drawn in part because it left "persons free to engage in independent political expression" and "to associate actively through volunteering their services"). Section 30119 focuses narrowly on the activity that Congress deemed most likely to lead to coercion and corruption, while leaving contractors a broad range of alternative means of political expression. Considering the statutory scheme as a whole, the court of appeals correctly found that Section 30119's "scope is in proportion to the interest[s] served." *Board of Trs. of State Univ. of N.Y.* v. *Fox*, 492 U.S. 469, 480 (1989) (citation and internal quotation marks omitted).

c. Petitioner also contends (Pet. 18-25) that Section 30119 is impermissibly underinclusive because it does not bar contributions made by three groups: (1) entities and individuals affiliated with corporate contractors; (2) federal employees; and (3) individuals who seek government benefits, such as grants, loans, or ambassadorships. That claim lacks merit.

"It is always somewhat counterintuitive to argue that a law violates the First Amendment by abridging *too little* speech." *Williams-Yulee* v. *Florida Bar*, 135 S. Ct. 1656, 1668 (2015). Although "underinclusiveness can raise doubts about whether the government is in fact pursuing the interests it invokes, rather than disfavoring a particular speaker or viewpoint," *ibid.* (citation and internal quotation marks omitted), petitioner conceded below that Section 30119 was genuinely motivated by and intended to advance the government's anti-corruption and anti-coercion interests. See Pet. App. 60. Petitioner's argument that Section 30119 should nevertheless sweep more broadly runs counter to this Court's recognition that "policymakers

may focus on their most pressing concerns" without "address[ing] all aspects of a problem in one fell swoop." *Williams-Yulee*, 135 S. Ct. at 1668 (noting that, even when strict scrutiny applies, the Court has upheld laws "that conceivably could have restricted even greater amounts of speech in service of their stated interests"); see, *e.g.*, *Buckley*, 424 U.S. at 105 (rejecting a claim of invidious discrimination by invoking "the familiar principles that a statute is not invalid under the Constitution because it might have gone further than it did [and] that a legislature need not strike at all evils at the same time") (citations and internal quotation marks omitted).

In any event, the court of appeals correctly recognized that federal contractors are not similarly situated to the other groups petitioner identifies. Petitioner suggests (Pet. 19-21) that Section 30119 should prohibit contributions by a corporate contractor's PAC, officers, and shareholders. But those entities and individuals are not the actual contracting party and have a separate legal identity from the corporation with which they are affiliated. See Pet. App. 62-65. Congress could reasonably determine that contributions by persons other than the contractor are less likely to cause the harms at which Section 30119 is directed, and that a ban on contributions by such persons would trench unduly on political activity. See *Williams-Yulee*, 135 S. Ct. at 1669 (rejecting underinclusiveness argument because, "[h]owever similar the two solicitations may be in substance, a State may conclude that they present markedly different appearances to the public"); Pet. App. 65 ("Congress could reasonably have concluded that banning contributions by all those associated with corporate contrac-

tors would go too far at too great a First Amendment cost.").

There is likewise no sound basis for petitioner's contention (Pet. 22-24) that Congress's failure to ban contributions by federal employees renders Section 30119 unconstitutional. Because "employees do not generally need new contracts or renewals with the frequency required by outside contractors," "permitting them to make contributions carries less risk of corruption or its appearance." Pet. App. 68. And while Section 30119 does not apply to federal employees, Congress has enacted other measures to further its anti-corruption and anti-coercion objectives in this distinct sphere, by subjecting employees to the restrictions of the Hatch Act and by affording them the protections of the Civil Service Reform Act. *Id.* at 67-68. Petitioner offers no reason to "overturn[] Congress' decision about how to calibrate these different restrictions." *Id.* at 68.

Petitioner likewise cannot show (Pet. 21-22) that Section 30119 is constitutionally infirm because it fails to cover other individuals who receive government benefits, such as recipients of federal grants and loans. Petitioner cites no history of corruption and coercion in that context that is comparable to the history of contractor corruption and coercion that prompted Congress to enact Section 30119. As the court of appeals observed, moreover, "there is no basis for a claim that Congress invidiously discriminated against contractors and in favor of others," and no "reason to believe that permitting contributions by these other individuals defeats § 30119's purpose of protecting against corruption and interference with merit-based administration." Pet. App. 69. "Congress

is surely not prohibited from fighting such problems in one sector unless it fights them in all." *Ibid.*

Petitioner contends (Pet. 19) that, to "decide whether parties are similarly situated," the court of appeals was required to "examin[e] the asserted rationale for the ban as applied to individual contractors and ask[] whether that rationale also applies to the other groups that are free to make contributions." But as the foregoing discussion demonstrates, the court followed exactly that approach and concluded that Congress could reasonably distinguish between contractors and the other groups that petitioner has identified. Based on that analysis, the court correctly rejected petitioner's claim that Section 30119's alleged underinclusiveness causes it to violate the Constitution's free speech and equal protection guarantees.

2. "At least seventeen [S]tates now limit or prohibit campaign contributions from some or all state contractors or licensees." Pet. App. 32-33 & n.18. Many of those state laws have been challenged based on constitutional theories similar to those asserted here, and the courts of appeals have uniformly upheld the laws. See *Yamada* v. *Snipes*, 786 F.3d 1182, 1205 (9th Cir.) (upholding Hawaii's prohibition on campaign contributions by state contractors), cert. denied, No. 15-215 (Nov. 30, 2015); *Ognibene* v. *Parkes*, 671 F.3d 174, 189-190 & n.15 (2d Cir.) (upholding New York City's restrictions on campaign contributions by those doing business with the City), cert. denied, 133 S. Ct. 28 (2012); *Green Party of Conn.* v. *Garfield*, 616 F.3d 213, 219 (2d Cir. 2010) (upholding Connecticut's ban on campaign contributions by government contractors), cert. denied, 131 S. Ct. 3090 (2011); see also *Preston* v. *Leake*, 660 F.3d 726, 735 (4th Cir. 2011)

(upholding North Carolina law prohibiting contributions from registered lobbyists); *Blount* v. *SEC*, 61 F.3d 938, 944-948 (D.C. Cir. 1995) (upholding regulation barring contributions by finance professionals to state officials with whom they do business), cert. denied, 517 U.S. 1119 (1996). Given the absence of any division of authority concerning the constitutionality of government-contractor contribution restrictions, this Court's review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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