No. 15-428

IN THE

Supreme Court of the United States

JAN MILLER,

PETITIONER,

v.

FEDERAL ELECTION COMMISSION,

RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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The fundamental flaw in respondent's opposition is its failure to recognize that this case is not about whether there are potentials for corruption or the appearance of corruption when federal contractors make political contributions. Rather, the question is whether there is a "substantial mismatch" between the ban in 52 U.S.C. § 30119 applicable to petitioner and other individual contractors, and the absence of any restriction on campaign contributions by the political committees of corporate contractors and by others who are similarly situated to petitioner. It is the mismatch finding that this Court made in *McCutcheon v. FEC,* 134 S. Ct. 1434, 1446 (2014), that was the basis of its holding that a limit of $123,300 on the total amount that an individual could lawfully contribute in a federal election cycle was unconstitutional. Although respondent cited *McCutcheon* four times in its opposition, it never quoted the "substantial mismatch" test, let alone attempted to explain how Mr. McCutcheon could not be barred from giving more than $3 million, but petitioner cannot write a check for even $3.

The substantial mismatch in this case is most striking with respect to the differing treatment of individual federal contractors and their corporate counterparts. To be sure, the ban in section 30119 applies to corporate contractors, as well as individuals like the three plaintiffs in this case. However, in subsection 30119(b), Congress expressly authorized a corporate contractor to establish, administer, and pay for the

solicitation of contributions to its own political committee, which must bear the corporation's name. As a result, a corporate contractor can effectively nullify the ban and make the same political contributions that the law allows every other corporate political committee to make. And corporate contractors take advantage of this opportunity. For example, in the 2016 election cycle, which has barely begun, eleven defense contractors have already contributed $6,993,200, www.opensecrets.org/pacs/sector.php?txt=D01&cycle=2016 (last visited December 18, 2015), while petitioner is subject to a complete ban. In addition, all of the shareholders and officers of corporate contractors, including those who negotiate directly with federal agencies for contracts, are free from the ban.

Others who have incentives to curry favor from federal elected officers and their political parties are also excluded from the ban. The main groups in this category are would-be grantees, for whom the annual total amount now equals or exceeds that for contractors, and bundlers whose interest in raising money for candidates for federal office and their political parties is often fueled by their desire for a high level appointment in Government. And while federal employees may not have the identical financial motivations as do individual contractors, they have incentives to please their superiors, yet the ban does not apply to them. Moreover, for the thousands of retired federal employees like petitioner who were requested by their agency to return to their former jobs as contractors, the notion that any

contribution that they might make while in that job might bear on their contract renewal, is far-fetched at best.

There are other aspects of the mismatch that are almost as significant. The only federal elected officials are the President and Members of Congress, but under current procurement law, they have no direct responsibilities regarding federal contracts, which are all awarded at the agency level. Petitioner does not claim that it is impossible for elected federal officials or even political parties to have some influence over some contracts, but that the connection between a contribution by an individual contractor to any of them is so remote that it falls well below the connection necessary to avoid being a substantial mismatch. In addition, the ban in section 30119 extends to contributions to independent political committees, like those sponsored by the Right to Life Committees and Planned Parenthood, who have no conceivable authority over federal contracts.

The zero tolerance in this ban is also far broader than can be justified. Even assuming that individuals like petitioner pose some special danger of creating the appearance of corruption, there is no reason why there could not be a lower contribution limit for them, as is found in other laws. Indeed, federal law requires the public reporting of contributions as one means to expose potential corruption, but it expressly excludes a contribution of $200 or less, which would seem like a much more reasonable number than zero. Or small dollar contracts, like the one for $12,500 that

plaintiff Wagner was recruited by the Administrative Conference of the United States to perform, could also be excluded, as could those applicable to retires, such as FBI agents, returning to help out their former employer. And, unlike the law upheld in *Williams-Yulee v. The Florida Bar,* 135 S. Ct. 1656 (2015), which allowed judicial candidates to form a committee to solicit campaign contributions for their elections, there is no similar outlet for contractors like petitioner, whom the FEC has ruled cannot even spend their own, non-contract derived money to make contributions. 11 C.F.R. § 115.5.

Contrary to respondent's suggestion, these mismatches are not the result of Congress taking one step at a time and not yet getting around to fixing them. Section 30119 was originally enacted in 1940, and the ban has remained unchanged since then – except for the creation of the political committee loophole in 1976. In the interim, the worlds of campaign finance and government contracting have undergone radical changes, but Congress has never examined these anomalies and the unique and unjustifiable burden that the ban in section 30119 places on petitioner and other individual contractors. As *McCutcheon,* 134 S. Ct. at 1446, makes clear, a law's constitutionality must be assessed in light of the other laws currently in effect, not just those when it was enacted.

From the outset, petitioner has argued this case under both the First Amendment and the Equal Protection guarantee of the Fifth Amendment. Under each he has urged the

application of strict scrutiny, but after *McCutcheon* it should have been clear to the Court of Appeals and to respondent that the "closely drawn" standard, on which the "substantial mismatch" test is based, has more than enough teeth to set aside section 30119 as applied to individual contractors like petitioner.

CONCLUSION

For the foregoing reasons and those set forth in the petition, the writ of certiorari should be granted.

Respectfully submitted,

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