No. 21-50597

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JENNIFER VIRDEN,

Plaintiff-Appellant,

v.

CITY OF AUSTIN,

Defendant-Appellee,

On Appeal from the United States District Court for the Western District of Texas, The Hon. Robert Pitman, District Judge
Dist. Ct. No. 1:21-CV-271

BRIEF OF THE INSTITUTE FOR FREE SPEECH AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT SEEKING REHEARING EN BANC

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November 26, 2021

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CERTIFICATE OF INTERESTED PERSONS

Under 5th Cir. R. 28.2.1, the undersigned counsel of record certifies that all interested persons and entities who have an interest in the outcome of this case are listed in the Certificate of Interested Persons contained in the Appellant's Supplemental *En Banc* Brief, except for the following listed persons and entities:

1. Institute for Free Speech ("IFS") is a nonprofit, public-interest law firm organized under § 501(c)(3) of the Internal Revenue Code. IFS has no parent corporation and issues no publicly held stock.
2. Alan Gura and Stacy Hanson are counsel for *amicus curiae* IFS in this matter.

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INTEREST OF AMICUS CURIAE[1]

The Institute for Free Speech ("IFS") is a nonpartisan, nonprofit organization that promotes and protects the First Amendment rights to free speech, assembly, press, and petition. IFS represents individuals and civil society organizations, *pro bono*, in cases raising First Amendment objections to regulation of core political activity. It has substantial experience litigating challenges to political speech restrictions.

Amicus has an interest in this case because the government's temporal restriction on political candidates soliciting funds burdens First Amendment rights.

SUMMARY OF ARGUMENT

That the First Amendment secures a right to solicit contributions is firmly established. *See, e.g., Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 788-89 (1984). What use is the right to solicit contributions, if there is no inherent concomitant right to *accept* them?

The panel's decision rejecting the right to solicit contributions is squarely at odds with Supreme Court precedent, this Court's precedent, and D.C. Circuit precedent, in denying the enjoyment of fundamental First Amendment rights. The matter should be reheard en banc.

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[1] No counsel for a party authored this brief in whole or part, nor did any person of entity, other than amicus or its counsel, financially contribute to preparing or submitting this brief. Both parties received notice of this filing. Plaintiff-Appellant has provided written consent to the filing of this brief. Authorization for the filing of this brief is sought by motion. Fed. R. App. P. 29(b)(2).

The Supreme Court recognized that contribution limits "operate in an area of the most fundamental First Amendment activities." *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam). The Court has repeatedly implied or assumed a First Amendment speech right to receive campaign contributions by confirming that such contributions are a necessary prerequisite for engaging in political advocacy. This Court has likewise confirmed that a right to receive and speak with the money whose solicitation is itself secured by the First Amendment. And in addition to a free speech right, the D.C. Circuit acknowledged an associational right of recipients to receive contributions from donors. Recognizing that associational rights involve multiple parties, it naturally follows that each party to the association would have individual rights in the same transaction.

Indeed, in one sense, recipients' First Amendment interests in contributions outweigh those of contributors'—candidates like Ms. Virden may be more likely to challenge government overreach than are their donors. The panel's decision may, as a practical matter, help insulate unconstitutional laws from legal challenges.

Nonetheless, the panel took a different approach. Instead of erring on the side of expansive protection—after all, associational liberty needs "breathing space to survive," *NAACP v. Button*, 371 U.S. 415, 433 (1963), and must be "protected not only against heavy-handed frontal attack, but also from being stifled by more subtle government interference," *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960)—the panel confirmed a PAC's First Amendment right to receive donations while simultaneously eliminating the possibility of an individual

exercising that the same protected right. This incongruity, too, warrants a closer look.

ARGUMENT

I. THE FIRST AMENDMENT SECURES POLITICAL CANDIDATES' SPEECH AND ASSOCIATIONAL RIGHTS TO RECEIVE CONTRIBUTIONS.

A. The panel opinion conflicts with Supreme Court precedent.

"[T]he Court has acknowledged that certain unarticulated rights are implicit in enumerated guarantees . . . fundamental rights, even though not expressly guaranteed, have been recognized by the Court as indispensable to the enjoyment of rights explicitly defined." *Richmond Newspapers v. Virginia*, 448 U.S. 555, 579–80 (1980) (footnote omitted) (First Amendment right to attend criminal trial). In its seminal campaign finance case, *Buckley*, the Supreme Court acknowledged the right to receive speech-enabling money in observing that speech requires money. 424 U.S. 1, 19 (1976) (per curiam) ("[V]iturally every means of communicating ideas in today's [1976] mass society requires the expenditure of money."). Regardless of a contribution limits' impact "upon the contributor's ability to engage in free communication," *id.* at 20-21, the Court offered that "contribution restriction[s] could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy," *id.* at 21—a clear statement that contribution limits impact the *recipient*'s speech rights.

The Supreme Court may have also resolved whether a there is a First Amendment right to contributions in *McCutcheon v. FEC*, 572 U.S. 185 (2014), where the RNC prevailed alongside its donor on the

argument that it had a First Amendment right "to receive the contributions that [its donors] would make . . . ." *Id*. at 195.

B. The panel opinion conflicts with this Court's precedent.

This Court has previously confirmed a First Amendment right to accept political contributions. "[B]oth the contributing and the contributed-to party have sufficient injuries-in-fact to challenge campaign finance restrictions." *Catholic Leadership Coalition of Tex. v. Reisman*, 764 F.3d 409, 423 (5th Cir. 2014) (citation omitted); *Texans for Free Enter. v. Tex. Ethics Comm'n*, 732 F.3d 535, 537 (5th Cir. 2013) (substantial likelihood of success on claim that law "violates [political committee's] right to free speech by prohibiting it from accepting funds from corporations.").

While the case before this Court concerns a temporal restriction on campaign contributions versus a dollar limitation, the result is the same. There is only so much time a candidate can spend soliciting for donations on top of actively campaigning, and by forcing a temporal restriction on all candidates, Austin is effectively limiting the contributions that candidates may receive and thus may spend.

C. The panel opinion conflicts with D.C. Circuit precedent.

The D.C. Circuit recognizes recipients' First Amendment speech and associational rights to accept campaign contributions.

"[P]olitical contributions implicate two distinct First Amendment rights: freedom of speech and freedom of association." *Libertarian Nat'l Comm., v. FEC*, 924 F.3d 533, 539 (D.C. Cir. 2019) (en banc). "When an individual contributes money to a candidate, he exercises both of those rights . . . . [and] [t]he recipient, too, has First Amendment interests in

accepting campaign contributions." *Id.* The D.C. Circuit acknowledged that recipients require money to speak, *id.* (citing *Buckley*, 424 U.S at 19), "[a]nd, of course, just as contributors associate with candidates and parties by making donations, so, too, do recipients associate with contributors by accepting donations." *Id.* at 539-40 (citing *Buckley*, 424 U.S. at 18, 22).

"Altogether, then, in the world of political contributions the First Amendment protects two kinds of rights (speech and association) belonging to two different rights-holders (donors and recipients)." *Id.* at 540.

* * *

Notwithstanding Supreme Court, Fifth Circuit, and D.C. Circuit precedent confirming that political candidates enjoy First Amendment speech and associational rights to accept contributions, the panel dismissed Virden's arguments with little analysis. Focused on creating separation between contributors and candidates, the panel failed to consider that speech requires money, and that associational relationships are two-way streets.

Considering the fundamental rights at stake, and their critical role in our democracy, this Court should carefully consider any decision that would diverge from Supreme Court and circuit precedent, and create conflicts with the holdings of other circuits.

II. BARRING CANDIDATES FROM CHALLENGING UNCONSTITUTIONAL LAWS INSULATES SUCH LAWS FROM JUDICIAL REVIEW.

Barring candidates from challenging laws that violate their rights is not merely wrong. It may also have the effect of insulating unconstitutional laws from judicial review.

Although laws such as Austin's violate the rights of contributors and recipients alike, it is no pure accident that the plaintiff here is a candidate rather than a donor, just as Buckley and McConnell, of the cases bearing their names, were Senators. The universe of people willing to challenge any unconstitutional law is always a small subset of those whose rights are violated. And in the campaign finance realm, an impacted candidate is more likely to make a federal case of a constitutionally dubious restriction than is a disappointed donor. Knocking out of court the class of plaintiffs most likely to bring and sustain an action would have an outsized negative impact on the development of First Amendment law, and on the protection of everyone's rights.

III. THE PANEL'S STATEMENT THAT CANDIDATES ENJOY FEWER FIRST AMENDMENT RIGHTS THAN DO PACS WARRANTS EN BANC REVIEW.

The panel provided a one sentence of explanation with little to substantiate the reasoning that individuals should receive less First Amendment protection than organizations. *Slip op.* at 4 n.3. By focusing on whether the recipient of a donation was a PAC or an individual, the court endorsed two-tiered First Amendment rights, with candidates being left with no recourse if the government interferes with the association between a candidate and donor.

The panel misunderstood the crux of this Court's precedent by focusing on whether donations were given to one individual or a group of individuals, rather than on the dynamic of contributor and receiver in general. The election code at issue in *Texans for Free Enterprise* barred individuals from knowingly accepting political contributions from corporations. *See* 732 F.3d at 536. A political contribution was prohibited under the law whether it was made to a *candidate* or PAC. *Id.* While the case involved donations *to* a PAC, the panel did not explain why it considered the PAC to be a contributor, especially considering that the PAC, like a candidate, may spend the contributed money to speak. Indeed, the PAC at issue could "not make any contributions to candidates or their official committees." *Id.* at 536.

By insisting that PACs enjoy a heightened First Amendment right compared to individuals, the panel dilutes the force of First Amendment protections. A decision of this magnitude should not be made without the full court's careful consideration.

CONCLUSION

This case should be reheard en banc.

Dated: November 26, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(b)(4) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 5th Cir. Local Rule 32.2, the brief contains 1,600 words.

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

/s/ Alan Gura
Alan Gura

Date: November 26, 2021

CERTIFICATE OF SERVICE

I hereby certify that on November 26, 2021, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Fifth Circuit using the CM/ECF system, which will provide notification of such filing to all counsel of record.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this the 26th day of November, 2021.

/s/ Alan Gura
Alan Gura