No. 24-5783

# In the United States Court of Appeals for the Sixth Circuit

BOONE COUNTY REPUBLICAN PARTY EXECUTIVE COMMITTEE, *et al.*,

*Plaintiffs-Appellants*

v.

H. DAVID WALLACE, *et al.*,

*Defendants-Appellees*

On appeal from the United States District Court for the Eastern District of Kentucky (Dist. Ct. No. 3:24-cv-49)

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BRIEF OF INSTITUTE FOR FREE SPEECH AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS' PETITION FOR REHEARING EN BANC

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## DISCLOSURE STATEMENT

Counsel for *amicus curiae* Institute for Free Speech, Brett R. Nolan, certifies that the Institute is not a subsidiary or affiliate of a publicly owned corporation and no publicly owned corporation has a substantial interest in the outcome of this litigation.

/s/ Brett R. Nolan

TABLE OF CONTENTS

TABLE OF AUTHORITIES

**Cases**



**Other Authorities**

**Rules**

## INTEREST OF *AMICUS CURIAE*[1]

The Institute for Free Speech is a nonpartisan, nonprofit organization dedicated to protecting the First Amendment rights of speech, assembly, petition, and press. Along with scholarly and educational work, IFS represents individuals and organizations in litigation securing their First Amendment liberties. IFS has an interest here because the panel's decision erodes *Citizens United v. FEC*, 558 U.S. 310 (2010), and, if left in place, will undermine the First Amendment rights of organizations for years to come.

[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus curiae* or its counsel, financially contribute to preparing or submitting this brief.

## INTRODUCTION AND SUMMARY OF ARGUMENT

In *Citizens United v. FEC*, the Supreme Court held that the government cannot ban organizations from "using general treasury funds" to speak about political issues based on the speaker's identity. 558 U.S. 310, 350 (2010). This dramatically reshaped campaign-finance law—overturning two decades of precedent in the process. *Id.* at 365–66. But the effect of the panel's decision—which upholds a Kentucky law banning political parties from using their general funds to talk about ballot issues—is "to read [*Citizens United*] . . . to mean precisely nothing." *Walker v. United States*, 931 F.3d 467, 470 (6th Cir. 2019) (Kethledge, J., dissenting from the denial of rehearing en banc). It carves a gaping loophole in the most important campaign-finance decision of this century. And in doing so, the panel hands every government in this circuit a roadmap to maneuver around the First Amendment.

This is not just a case about an obscure campaign-finance regulation in Kentucky. The panel's "precedent-setting error of exceptional public importance," 6 Cir. I.O.P. 40(e), "will continue to matter for years to come," *United States v. Carpenter*, 80 F.4th 790, 795 (6th Cir. 2023)

(Griffin, J., dissenting from the denial of rehearing en banc). If the government can limit the source of funds an organization uses for political speech because doing so makes reporting expenditures more convenient, the line between a speech restriction and a disclosure rule no longer exists. And that is precisely what the panel's decision allows.

"This case is a textbook example of the rare case that deserves the full court's attention." *Id.* at 797 (Bloomekatz, J., dissenting from the denial of rehearing en banc). The Court should grant rehearing en banc.

## ARGUMENT

### I. THE PANEL'S DECISION EVISCERATES DECADES OF SUPREME COURT PRECEDENT.

According to Kentucky's campaign-finance enforcer, the Registry of Election Finance, Kentucky law restricts the type of speech for which a political party can use its general funds. *See, e.g.*, Appellees' Br. at 43. It bans parties from speaking about ballot issues unless they form a separate committee and use a separate account with money raised exclusively for that reason. *Id.*; Slip Op. at 19. So a party's general donations—contributions not earmarked for a specific purpose—are off limits for issue advocacy. Even the panel majority acknowledged this restriction when it explained "the governing body of a political party"

can only talk about ballot questions using "funds that [it] collected for the purpose of supporting or opposing the issue." Slip Op. at 17, 20–21.

Yet the panel held that this restriction on how parties spend their general funds for political speech is not a restriction at all—it's a disclosure rule. That conclusion makes sense only if "the majority stumbled through the looking glass and into an Alice-in-Wonderland world where words have no meaning." *Small v. Memphis Light, Gas & Water*, 952 F.3d 821, 829 (6th Cir. 2020) (Thapar, J., concurring) (cleaned up). Because *of course* a law that restricts how an organization can spend its money on political speech is a restriction on political speech. The Supreme Court has said exactly that—over and over again. *See, e.g.*, *FEC v. Ted Cruz for Senate*, 596 U.S. 289, 302–03, 305 (2022); *Citizens United*, 558 U.S. at 351; *Davis v. FEC*, 554 U.S. 724, 738–39 (2008); *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 785–86 (1978); *Buckley v. Valeo*, 424 U.S. 1, 18–19 (1976).

The panel's conclusion otherwise does not just get the law wrong. It strips cases like *Citizens United* of any meaning whatsoever. And if not corrected, the decision threatens to undermine the First Amendment right to political speech in all sorts of other contexts.

A. The entire point of *Citizens United* is that the government cannot ban an organization from using its own money for political speech.

*Citizens United* held that a law preventing "corporations and unions from using their general treasury funds" for electioneering violated the First Amendment. 558 U.S. at 318–19. It didn't matter that the organizations could create political action committees to speak on their behalf. *Id.* at 337. Those committees were "separate association[s] from the corporation." *Id.* And they relied on a "separate segregated fund" for political communications, which could not draw from the corporation's "general treasury funds." *Id.* at 320–21. So even though the political action committee could speak, the corporation or union could not. *Id.* at 337. And that violated the First Amendment.

These simple rules should have resolved this case. Kentucky does not allow political parties to use their general funds to talk about ballot issues. Slip Op. at 19–21. Instead, a party must form a separate committee, with "a separate bank account," and raise separate donations exclusively for "the purpose of supporting or opposing the issue." *Id.* But its general funds are off limits.

What does *Citizens United* mean if not that this bizarre campaign-finance scheme violates the First Amendment? Kentucky law, like the law in *Citizens United*, restricts how some organizations use their general funds for political speech. The details of that restriction may differ. And the restriction may not be as severe as the federal ban on corporate expenditures. But none of that matters. *See Cruz*, 596 U.S. at 305. Both laws prevent organizations from spending their own money on a topic the government says is off limits. And that was the fundamental flaw that led *Citizens United* to overturn two decades of precedent and declare the federal law unconstitutional.

### B. Treating the speech restriction here as a "disclosure rule" distorts one Supreme Court decision after another.

The panel distinguished *Citizens United* because the rules for an issues committee in Kentucky are more permissive than a federal political action committee. Unlike a federal PAC, a Kentucky issues committee can accept unlimited donations, and it can collect those donations from a wider variety of contributors. As the panel saw it, that means Kentucky does not put a "ceiling" on expenditures, "nor does it

prevent anyone from speaking." Slip Op. at 19. And so, reasoned the panel, it's not a speech restriction at all. *Id.*

But even before *Citizens United*, the Supreme Court made clear that a law can restrict speech even if it "does not impose a cap on [expenditures]" or prevent anyone from speaking outright. *See Davis*, 554 U.S. at 738–39. One way to do that is by "restricting the sources of funds" available for political speech. *Cruz*, 596 U.S. at 302–03. And that's what Kentucky does here. It prevents political parties from accessing their main source of funding—general contributions that donors did not earmark for a specific purpose. To call this anything other than a speech restriction "fundamentally misunderstands the First Amendment" and how it protects "the right to spend funds in support of [one's] political views." Slip Op. at 35 (Griffin, J., dissenting).

Nor is the restriction hypothetical. Take one of the plaintiffs as an example. The Boone County Republican Party ended the year 2023 with a little more than $50,000 in its general fund. *See* Boone Cnty. Republican Exec. Comm. 12/31/2023 Financial Statement, https://perma.cc/KVX2-YZ2Y. The party raised that money before either of the proposed constitutional amendments were even added to the

ballot in 2024. *See* H.B. 2, 2024 Reg. Sess. (Ky. 2024), https://perma.cc/5L2A-5KTD; S.B. 143, 2024 Reg. Sess. (Ky. 2024), https://perma.cc/C5UC-EXBL. So under Kentucky law, the party couldn't use one dollar of that money to talk about either issue because it did not raise the money specifically to do so.

Instead, the party would have to persuade donors to give *even more* money with the caveat that the new donations could be used for only one purpose. That's a harder sell. What about those who support the Republican Party and want it to allocate resources among candidates and issues as needed during the election? Their contributions cannot be used for issue advocacy. Or what about donors who support the Republican Party but can't afford to give beyond what they already contributed in 2023, before the ballot question even existed? Their contributions cannot be used for issue advocacy.

The law thus prevents the party from using its "own money to facilitate political speech." *Cruz*, 596 U.S. at 304. And that means it's a speech restriction—not a disclosure rule. To say otherwise not only distorts *Citizens United*, it ignores what cases like *Davis* and *Cruz* say about restricting political speech.

C. The government cannot avoid *Citizens United* by pretending that an organization's general funds have been earmarked for a specific purpose.

The way the panel evaded *Citizens United* is as troubling as its bottom line. The decision never states that Kentucky can restrict how a political party uses its general funds—that's just the effect. What the panel instead holds is that political parties have no right to use funds earmarked for one purpose (supporting party nominees) for something else (supporting a ballot issue). *See* Slip Op. at 20–21. But that framing is the root of the problem.

Contrary to the panel's suggestion, the plaintiffs did not ask to use funds collected exclusively "to support party nominees" to advocate for a ballot issue instead. *Id.* at 21. Rather, the Kentucky Registry of Election Finance has interpreted Kentucky law to categorically deem *all* of a party's general funds as earmarked for only one purpose—even when a donor never states such a preference. *Id.* at 5; Appellees' Br. at 12. The Registry even went through the Republican Party's bylaws to decide whether issue advocacy was specifically authorized. Appellees' Br. at 12. Then after concluding it wasn't, the Registry declared that Kentucky law prohibits political parties from using any of their money

for issue advocacy *unless* it was raised specifically for that reason (and transferred to a separate committee). *Id.* at 43.

The panel accepted this bizarre conclusion and then held that "[n]othing in the Constitution" grants parties the right "to spend money supporting a proposed state constitutional amendment when that money was collected to support party nominees." Slip Op. at 21. But the money was not "collected to support party nominees"—at least not exclusively. It was collected to provide general support for the party.

Still, the panel's conclusion is too clever by half. If *Citizens United* does not allow the government to ban an organization from using its general funds for political speech, it certainly doesn't allow the government to redefine an organization's general funds as earmarked for a specific purpose—and then ban them from using that money for anything else.

### D. The First Amendment does not allow the government to dictate political strategy through campaign-finance regulations.

Even if Kentucky's political parties had to limit their expenditures to speech that promoted their candidates' interests, that still would not allow the government to prohibit issue advocacy. As others have pointed

out, issue advocacy goes hand in hand with promoting a party's nominees. *See* Ky. Amicus, Dkt.27, 4–7. Candidates (especially incumbents) are intimately tied to public issues involving legislative proposals and constitutional amendments. For the government to declare otherwise would give it unprecedented control over a party's political strategy. But "[t]he First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise." *Buckley*, 424 U.S. at 57.

Consider the 2004 election. Ballot issues "banning same-sex marriage" in Ohio and Kentucky "increased the turnout of socially conservative voters," helping "Republican candidates including President Bush in Ohio and Senator Jim Bunning in Kentucky." James Dao, *Same-Sex Marriage Issue Key to Some G.O.P. Races*, N.Y. Times (Nov. 4, 2004), https://nyti.ms/3RmmVWx. Yet Kentucky would ban the Republican Party from using its general funds to promote a ballot issue that materially benefited its candidate's election.

Or how about "states with abortion ballot measures" in 2022 that saw the "Republican vote margin decrease[] by" several percentage points relative to the national average? *See* G. Gardner, K. McCrary, &

M.K. Spencer, *Abortion ballot measures affect election outcomes*, 247 Economics Letters 112182, 1 (2025). Kentucky was one of those states. *Id.* But its local Democratic Party could not have capitalized on that synergy to promote an issue that would generate more votes for its candidates.

The panel held that "[n]othing in the Constitution" prevents this kind of meddling in the "uninhibited marketplace of ideas" that define American elections. *See Citizens United*, 558 U.S. at 335 (quotation omitted). Only the full Court can correct that "precedent-setting error of exceptional public importance." 6 Cir. I.O.P. 40(e).

## II. THE DECISION'S DAMAGE EXTENDS BEYOND AN OBSCURE CAMPAIGN-FINANCE REGULATION IN KENTUCKY.

The panel's decision damages the First Amendment far beyond the facts here. It opens the door for governments in this circuit to bypass *Citizens United* and restrict political speech in all sorts of new and clever ways.

To see why, just imagine applying the panel's creative reading of *Citizens United* to *Citizens United* itself. Suppose that federal law banned corporate expenditures on electioneering just as it used to, but it allowed corporations to set up a segregated account that could receive

unlimited donations from anyone—except the corporation's general treasury. That law would do exactly what the law here does. It allows the organization to speak, so long as it does so with money collected exclusively for electioneering. And so, according to the panel, it's not a speech restriction because it "does not put any 'ceiling' on the [corporation's] expenditures, nor does it 'prevent anyone from speaking.'" Slip Op. at 19. With one tweak, the landmark decision in *Citizens United* reduces to a footnote in the United States Reporter.

But take it a step further. If Kentucky can decide that a party's general funds "must be used to support candidates," Appellees' Br. at 43, why couldn't Delaware decide that the general revenue of a public company "must be used" to support shareholders? And why couldn't Delaware decide that political speech does not fit that state-mandated purpose? After all, "[n]othing in the Constitution requires [the government] to allow [a public corporation] to spend money supporting a proposed state constitutional amendment when that money was collected to support [shareholders]."

Or what about labor unions? If Tennessee decides that a union's general funds "must be used" to support union members, does

"[n]othing in the Constitution" protect that union's right "to spend money supporting a proposed state constitutional amendment" because the government has decided that doing so does not adequately "support" its members? Or what if Ohio enacts a law declaring that a newspaper's general revenue "must be used" to support news gathering and reporting? Does "[n]othing in the Constitution" prevent the Governor from deciding that political advocacy does not fulfill that purpose?

Of course not. But "[i]f a legislature may direct [parties] to 'stick to [candidates],' it may also limit other corporations -- religious, charitable, or civic -- to their respective 'business' when addressing the public." *Bellotti*, 435 U.S. at 785. That kind of "power in government" is "unacceptable under the First Amendment," *id.*—yet it's exactly what the panel's decision here allows.

## CONCLUSION

The Court should grant rehearing en banc.

April 22, 2025

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## CERTIFICATE OF COMPLIANCE

As required by Federal Rule of Appellate Procedure 32(g) and 6th Cir. R. 32, I certify that this brief complies with the type-volume limitation in Fed. R. App. P. 29(b)(4) because it contains 2,586 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 6th Cir. R. 32(b)(1).

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 it has been prepared in a proportionally spaced Serif typeface, Century Schoolbook, in 14-point font using Microsoft Word.

/s/ Brett R. Nolan

## CERTIFICATE OF SERVICE

I certify that on April 22, 2025, I electronically filed this brief with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit using the CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Brett R. Nolan