No. _____

In The
Supreme Court of the United States

Iowa Right to Life Committee, Inc.,
Petitioner

v.

Megan Tooker et al., *Respondents*

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

Petition for a Writ of Certiorari

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September 27, 2013

Questions Presented

In *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), this Court rejected an equal-protection challenge to Michigan's ban on corporate, but not union, independent expenditures (express-advocacy communications) because corporations were not similarly situated to unions due to a newly recognized corporate-form, antidistortion interest. *Id.* at 666. In *Citizens United v. FEC*, 558 U.S. 310 (2010), this Court rejected this antidistortion interest, said government may not treat groups assuming corporate form differently from other associations regarding political activity, and overruled *Austin*. *Id.* at 349-356, 365. Iowa Right Life Committee, Inc. ("IRTL") presents two questions:

1. Whether Iowa's ban on political contributions by corporations (and enumerated business entities), but not by unions, violates Fourteenth Amendment equal protection. *See* Iowa Code 68A.503.

2. Whether this corporate-contribution ban violates the First Amendment. *See id.*

Parties to the Proceeding Below

IRTL was plaintiff-appellant below. Defendants-appellees below were: Megan Tooker, in her official capacity as Iowa Ethics and Campaign Disclosure Board Executive Director; James Albert, John Walsh, Patricia Harper, Gerald Sullivan, Saima Zafar, and Carole Tillotson, in their official capacities as Iowa Ethics and Campaign Disclosure Board Members.

Corporate Disclosure

IRTL, a corporation, has no parent corporation and is a *non*-stock corporation, so no publicly held company owns 10 percent or more of its stock.

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Petition

IRTL requests review of *Iowa Right to Life Committee v. Tooker,* 717 F.3d 576 (8th Cir. 2013) ("*IRTL*").

Opinions and Orders Below

The opinions and orders below are:

IRTL v. Smithson, 750 F. Supp. 2d 1020 (S.D. Iowa 2010) (denying preliminary injunction) (App.54a);

IRTL v. Tooker, 795 F. Supp. 2d 852 (S.D. Iowa 2011) (partially deciding summary judgment and certifying questions to Iowa Supreme Court) (App.110a);

IRTL v. Tooker, 808 N.W.2d 417 (Iowa 2011) (answering certified questions) (App.151a);

IRTL v. Tooker, 844 F. Supp. 2d 946 (S.D. Iowa 2012) (deciding remaining summary judgment issues) (App.179a);

IRTL v. Tooker, 717 F.3d 576 (8th Cir. 2013) (App.1a); and

Order (8th Cir. July 19, 2013) (denying rehearing and rehearing en banc) (unreported) (App.188a).

Jurisdiction

The decision below and judgment were filed June 13, 2013. IRTL's motion for rehearing and rehearing en banc was denied July 19, 2013. Jurisdiction is invoked under 28 U.S.C. 1254(1).

Constitutions, Statutes & Regulations

Appended are relevant parts of the First and Fourteenth Amendments (App.189a) and Iowa Code 68A. 503 (App.190a).

Statement of the Case

As set out in the Verified Complaint, IRTL is a nonstock, nonprofit (26 U.S.C. 501(c)(4)), ideological corporation. Respondents are officials with enforcement authority over Iowa campaign-finance laws.

In 2010, IRTL wanted to contribute $100 to Brenna Findley, candidate for Iowa Attorney General. IRTL was prohibited from making its intended contribution because Iowa Code 68A.503 (App.190a) bans corporations (and listed business entities), but not unions, from making political contributions. Iowa Code 68A.503(1) provides:

> Except as provided . . . , an insurance company, savings and loan association, bank, credit union, or corporation shall not make a monetary or in-kind contribution to a candidate or committee except for a ballot issue committee.[1]

IRTL intends to do materially similar future activity, if permitted. Absent the requested relief, it will be deprived of its constitutional rights. There is no adequate remedy at law.

On September 7, 2010, IRTL challenged Iowa's corporate-contribution ban, facially and as applied to IRTL and its intended activities, for violating First Amendment free speech and association guarantees and Fourteenth Amendment equal protection.

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[1] The ban at 68A.503 is called the "corporate-contribution ban" here with the understanding that it also reaches the other listed business entities. The analysis focuses on the corporate-union disparate treatment with the understanding that Iowa also allows non-enumerated, non-corporate business entities to make political contributions.

IRTL moved for preliminary injunction, which was denied on October 20, 2010. App.54a.

On June 29, 2011, the district court decided some challenges on summary judgment and certified questions to the Iowa Supreme Court concerning another. App.110a.[2] The district court upheld the corporate-contribution ban. App.94-103a.

The *IRTL* appeal was held in abeyance until the Eighth Circuit decided *Minnesota Citizens Concerned for Life v. Swanson*, 692 F.3d 864 (8th Cir. 2012) (en banc) ("*MCCL*"), a preliminary injunction appeal dealing with similar issues. Key to the equal-protection challenge here is *MCCL*'s *en banc* opinion regarding an equal-protection challenge to Minnesota's ban on corporate political contributions:

> We agree . . . that *Citizens United*[, 558 U.S. 310,] did not explicitly overrule the Supreme Court's equal protection analysis in *Austin*, 494 U.S. at 666-68.
>
> This does not mean . . . *Austin* controls . . . appellants' challenge. Under *Austin*, "statutory classifications impinging upon [the fundamental right to engage in political expression] must be narrowly tailored to serve a compelling governmental interest." *Id.* at 666; *see also Dallman v. Ritter*, 225 P.3d 610, 634-35 (Colo. 2010) (holding a state law allowing corporations to contribute to candidates, but forbidding labor unions from doing the same, violated the Equal Protection Clause of the Fourteenth Amendment). We express no opinion as to the likelihood Minne-

[2] The certified questions were answered on December 30. App.151a. On February 7, 2012, the district court decided outstanding summary-judgment issues. App.179a.

> sota will meet this heavy burden in light of the Supreme Court's rejection of the so-called anti-distortion rationale relied upon in *Austin*. *See Citizens United*, [558 U.S. at 347-56, 362-66].

MCCL, 692 F.3d at 879-80 (bracketed "fundamental right" phrase added by Eighth Circuit).

Despite *MCCL*'s statement that *Austin* does *not* control a corporate-contribution-ban challenge, on June 13, 2013, the Eighth Circuit *IRTL* panel decided that *Austin does* control IRTL's equal-protection challenge. App.45a. It also decided that IRTL's First Amendment challenge is controlled by *FEC v. Beaumont*, 539 U.S. 146 (2003), which upheld a ban on corporate contributions. App.42a. So the panel upheld the district court's rejection of both challenges to Iowa's corporate-contribution ban. App.41-45a.

On July 19, 2013, the Eighth Circuit denied a petition for rehearing and rehearing en banc. App.188a.

The district court had jurisdiction, 28 U.S.C. 1331, 1343(a), as did the appellate court, 28 U.S.C. 1291.

Reasons to Grant the Petition

I.

Banning Corporate, But Not Union, Political Contributions Violates Equal Protection.

Iowa bans "an insurance company, savings and loan association, bank, credit union, or corporation . . . [from] mak[ing] a monetary or in-kind contribution to a candidate or committee except for a ballot issue committee." Iowa Code 68A.503A(1). The corporate-contribution ban[3] does not prohibit unions from making political contributions.

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[3] *See supra* note1 (re "corporate-contribution ban" use).

IRTL challenges this ban, facially and as applied to IRTL and its intended activities, for violating the Fourteenth Amendment equal-protection right[4] by disparate treatment of similarly situated entities. This is an important federal question, involving infringement of the highly protected constitutional right to engage equally in core political activity. The decision below conflicts with key decisions of this Court, the Colorado Supreme Court, and the Eighth Circuit's own prior en banc decision.[5]

This question does not address whether government may ban *both* corporate and union contributions, only whether allowing *labor-union* contributions while banning *corporate* contributions violates equal protection.

A. The Decision Below, *IRTL*, Conflicts with this Court's *Austin* and *Citizens United* Decisions.

As shown in I.A, the Eighth Circuit's erroneous claim that *Austin*, 494 U.S. 652, controls this case conflicts with the Eighth Circuit's own en banc analysis in *MCCL*, 692 F.3d 864, and with *Austin* as modified by *Citizens United*, 558 U.S. 310.

1. *IRTL* Says *Austin* Controls, Conflicting with the Eighth Circuit's *MCCL* Decision.

IRTL notes the Colorado Supreme Court's holding that banning union, but not corporate, contributions to candidates violates equal protection. App.45a (citing *Dallman*, 225 P.3d at 634-35). Then the court says *Citizens United* "reject[ed] 'the so-called anti-distortion ra-

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[4] "No State shall . . . deny to any person . . . the equal protection of the laws." U.S. Const. amend. XIV, § 1.

[5] The decision below conflicts with *Austin*, 494 U.S. 652, *Citizens United*, 558 U.S. 310, *Dallman*, 225 P.3d 610, and *MCCL*, 692 F.3d at 879-80.

tionale relied upon in *Austin*' to uphold a contribution ban[6] against a Fourteenth Amendment challenge." App.45a (quoting *MCCL*, 692 F.3d at 880 (citing *Citizens United*, 558 U.S. at 347-57)). Then the panel quotes the en banc *MCCL* court's observation that *Citizens United* "'did not explicitly overrule [*Austin*'s] equal protection analysis.'" App.45a (quoting *MCCL*, 692 F.3d at 879). On that basis, it holds that *Austin* controls and "[t]he contribution ban does not violate the Fourteenth Amendment." App.45a.

But that holding conflicts with the en banc *MCCL* court's express assertion that *Austin*, 494 U.S. 652, does *not* control and that a state bears a heavy, strict-scrutiny burden to justify a ban absent the antidistortion interest:

> This does not mean . . . *Austin* controls . . . appellants' challenge. Under *Austin*, "statutory classifications impinging upon [the fundamental right to engage in political expression] must be narrowly tailored to serve a compelling governmental interest." *Id.* at 666; *see also Dallman v. Ritter*, 225 P.3d 610, 634-35 (Colo. 2010) (holding a state law allowing corporations to contribute to candidates, but forbidding labor unions from doing the same, violated the Equal Protec-

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[6] The panel erroneously identifies a "*contribution* ban" as at issue in *Austin*'s rejection of an equal-protection challenge, but *Austin* addressed a corporate *independent-expenditure* ban. *See Austin*, 494 U.S. at 654. Perhaps the panel's error played a part in its assertion that *Austin* controls this case. Anyway, *Austin*'s equal-protection analysis turned on the antidistortion interest rejected in *Citizens United*. *See* I.A.2. And that *Austin-Citizens United* analysis is transferable to this equal-protection analysis.

> tion Clause of the Fourteenth Amendment). We express no opinion as to the likelihood Minnesota will meet this heavy burden in light of the Supreme Court's rejection of the so-called anti-distortion rationale relied upon in *Austin*.

MCCL, 692 F.3d at 879-80 (citation omitted).

The *IRTL* panel says it is "not deciding whether corporations and labor unions are similarly situated," App.45 n.11,[7] but *Austin* treated them as similarly situated, *see* I.A.2. The panel says it is not deciding whether an anti-corruption interest justifies the ban, App.45 n.11, but any anti-corruption interest is addressed by contribution *limits*, to which corporations may be subject like any other entity.

Though petitioner IRTL reiterated the arguments here in seeking rehearing, the Eighth Circuit denied rehearing en banc. App.188a. This leaves an unresolved *intra*-circuit split between the correct *MCCL* decision (en banc) and the erroneous *IRTL* decision.

2. *IRTL* Conflicts with *Austin*'s Analysis as Modified by *Citizens United*.

IRTL says *Austin* controls and requires rejection of this equal-protection challenge. App.45a. But *Austin* cannot control this case because *Citizens United* rejected the antidistortion interest on which *Austin* relied. *See* I.A.3. Nevertheless, *Austin*'s *equal-protection analysis*—as modified by *Citizen United*'s rejection of the antidistortion interest—should guide this analysis.

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[7] *IRTL* did recognize that corporations are similarly situated to *all other organizations* in finding an equal-protection violation where Iowa required only corporations to have advance, same-year board approval of independent expenditures (express-advocacy communications). App.50a-51a.

The decision below conflicts with *Austin* by not following that analysis as informed by *Citizens United*.

Austin upheld "prohibit[ing] corporations from using corporate treasury funds for independent expenditures in support of, or in opposition to, any candidate." 494 U.S. at 654. That ban was challenged on First and Fourteenth Amendment grounds.

On the *First Amendment* claim, *Austin* held that the ban was narrowly tailored to the compelling antidistortion interest, *id.* at 657-61, i.e., an interest in preventing "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas," *id.* at 660.

On the *equal-protection* challenge, *Austin* applied strict scrutiny: "Because the right to engage in political expression is fundamental to our constitutional system, statutory classifications impinging upon that right must be narrowly tailored to serve a compelling governmental interest." *Id.* at 666. *Austin* held that, "even under such strict scrutiny, the statute's classifications pass[ed] muster under the Equal Protection Clause," because "the State's decision to regulate only corporations [was] precisely tailored to serve the compelling state interest of eliminating from the political process the corrosive effect of political 'war chests' amassed with the aid of the legal advantages given to corporations." *Id.* So *Austin*'s equal-protection holding was based *solely* on the now-rejected antidistortion interest. *See Citizens United*, 558 U.S. at 356-60. And because this Court *applied* equal-protection analysis, it *necessarily* decided that corporations and unions were *similarly situated* for purposes of making independent ex-

penditures.[8]

Thus, *Austin*'s equal-protection analysis, as modified by *Citizens United* requires starting with the premises that (a) corporations and unions are similarly situated with respect to the relevant desire to engage in core political activity and (b) that only a now-rejected antidistortion interest justifies treating them differently. The decision below conflicts with these fundamental premises of *Austin* and *Citizens United*.

3. *IRTL* Conflicts with *Citizens United*, Which Rejected the Antidistortion Interest and Overruled *Austin*.

The *IRTL* panel's holding that *Austin* controls this case and requires rejection of the equal-protection challenge, App.45a, conflicts with *Citizens United*, 558 U.S. 310, which expressly rejected the antidistortion interest that had justified different treatment of corporations, *id.* at 349-56, and overruled *Austin*, *id.* at 365. That antidistortion interest was the sole basis of *Austin*'s rejection of the equal-protection challenge. *Austin*, 494 U.S. at 666. In *Citizens United*, this Court rejected the notion that First Amendment rights must be forfeited by groups taking corporate form: "'It is rudimentary that the State cannot exact as the price of those special advantages the forfeiture of First Amendment

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[8] *Austin* did identify a difference between corporations and unions, but that does not affect the equal-protection analysis. First, the difference was stated in the analysis of the *free-speech*, underinclusiveness challenge. *Id.* at 665-66. Second, in that analysis, *Austin* said that "labor unions differ from corporations," *id.* at 665, because of the now-rejected *antidistortion* interest, *id.* at 666. Third, *Austin*'s *equal-protection* analysis treated corporations and unions as similarly situated.

rights.'" 558 U.S. at 351 (citation omitted).

B. *IRTL* Conflicts with the Colorado Supreme Court's *Dallman* Decision.

The *IRTL* panel's decision conflicts with *Dallman*, 225 P.3d 610. In *Dallman*, the Colorado Supreme Court held that allowing *corporate* PACs, but not *union* PACs, to make political contributions violated equal protection. *Id.* at 634-35. Colorado banned certain entities holding government contracts from making contributions, and since labor union contracts were considered government contracts, neither unions nor their PACs could contribute. *Id.* at 634.

Having recognized disparate treatment, *Dallman* turned to whether corporations and unions are similarly situated. *Dallman* rejected the state's identification of mere "structural differences," holding that the question must focus on "whether 'reasonable differences' between the two can justify a law's differential treatment." *Id.* at 634 (citation omitted).

> In other words, the "similarly situated" inquiry turns not on whether two entities are superficially alike, but on whether the two are situated or positioned similarly, thereby allowing one law to affect them differently. If the definition of similarly situated were not tethered to how persons are affected by the law, any law that could demonstrate a facial difference between two groups would escape scrutiny and pass constitutional muster, completely eviscerating the Equal Protection Clause.

Id. (footnote omitted). The court concluded that "[a]lthough unions and corporations are structurally dissimilar, both are similarly situated under [the prohibition's] auspices." *Id.* In other words, as related to what

the law proscribed and their interest in advocating views by contributions, they are similarly situated.

The *Dallman* court applied strict scrutiny because "'[t]he Equal Protection Clause requires that statutes affecting First Amendment interests be narrowly tailored to their legitimate objectives.'" *Id.* at 634-35 (quoting *Police Department v. Mosley*, 408 U.S. 92, 101 (1972) (citing *Williams v. Rhodes*, 393 U.S. 23, 69 (1968); *Carey v. Brown*, 447 U.S. 455, 461-62 (1980))). It held the provision violated equal protection. *Id.* at 635. *IRTL* conflicts with this analysis and holding.

C. *IRTL*'s Holding that the Ban Is Not Content Based Conflicts with Holdings of this Court and the Ninth Circuit.

Though the foregoing disparate-treatment analysis suffices for this Court to accept review of the equal-protection question, the *IRTL* decision also conflicts with decisions of this court and of the Ninth Circuit holding that similar provisions are content based.[9]

Content-based burdens require strict scrutiny, as *IRTL* acknowledges, App.44a, though it finds the corporate-contribution ban "content neutral." App.44a.

IRTL says content neutrality exists unless govern-

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[9] Regarding content-based restrictions, *IRTL* conflicts with the following decisions of this Court: *Citizens United*, 558 U.S. 310; *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530 (1980); *Burson v. Freeman*, 504 U.S. 191, 197 (1992), and with the Ninth Circuit decision in *Arizona Right to Life PAC v. Bayless,* 320 F.3d. 1002 (9th Cir. 2003). Regarding whether available alternatives justify restrictions on First Amendment rights, *IRTL* conflicts with *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007) (controlling opinion of Roberts, C.J., joined by Alito, J.) ("*WRTL-II*"), and *Citizens United*, 558 U.S. 310.

ment "'disagree[s] with the message.'" App.43a (citation omitted). It relies primarily on an Eighth Circuit decision finding an unsolicited-fax-ad ban content neutral because it targeted a fax's effect, not contents, and because the ban left other options. App.44a. Applying that analysis to the present corporate-contribution ban, *IRTL* says that "the contribution ban serves the purpose of preventing quid pro quo corruption," App.44a,[10] so it is not aimed at the content of the contribution's message—"'I support candidate X'"—but at "the corrupting effect that the act of communicating through contributions may have on recipients of those contributions." App.44a (citations omitted). "The ban is also not complete," *IRTL* adds, because corporations "may contribute through PACs." App.44a (citation omitted).

IRTL's analysis is wrong in three key ways. First, its fax-ad-ban model is inapposite. The fax-ad ban did not allow unsolicited *political* fax ads from everyone (especially unions) except for *corporations*. Nor did it even permit all ads except for *political* ads, or all ads except for *corporate* ads. Such other models would have come closer to Iowa's corporate-contribution ban, but *IRTL*'s fax-ad-ban model fails analytically.

Second, *IRTL*'s view of what constitutes a content-based restriction is erroneous. Justice Kennedy's *Austin* dissent identified Michigan's ban on corporate, but not union, independent expenditures as a "content-based law." 494 U.S. at 695 (Kennedy, J., joined by O'Connor & Scalia, JJ., dissenting). "[T]he [Michigan

[10] This conflicts with *IRTL*'s statement that it "is not deciding . . . whether . . . preventing quid pro quo corruption justified the contribution ban." App.45a n.11. Of course, an anti-corruption interest is satisfied by the contribution *limit* to which corporations may be subject like any other entity.

ban] prohibits corporations from speaking on a particular subject, the subject of candidate elections. It is a basic precept that the State may not confine speech to certain subjects." *Id.* at 699.

In *McConnell v. FEC*, 540 U.S. 93 (2003), Justice Kennedy reiterated that *Austin* "made the impermissible content-based judgment that commentary on candidates is less deserving of First Amendment protection than discussions of policy." *Id.* at 328 (Kennedy, J., joined by Rehnquist, C.J., & Scalia, J.) (concurring & dissenting in part).

Justice Kennedy followed that analysis for the Court in *Citizens United*, 558 U.S. at 336-66. As *Citizens United* held: "[T]he First Amendment stands against attempts to disfavor certain subjects or viewpoints." *Id.* at 340. "Speech restrictions based on the identity of the speaker are all too often simply a means to control content."

In *Consolidated Edison*, 447 U.S. 530, this Court held that the "First Amendment's hostility to content-based regulation" does not depend on whether the provision "favor[s] either side of a political controversy," *id.* at 537. That decision conflicts with *IRTL*'s idea that the government must disfavor one view to constitute a content-based restriction, as does the following case.

In *Burson*, 504 U.S. at197, this Court held that prohibiting political speech near a polling place was content based for regulating only political speech. The government was not disfavoring one side or another of those who might speak near the polls, only restricting political speech, which was content based.

Third, *IRTL*'s notion that a corporation "speaks" through a PAC is asserted as if *Citizens United*, 558 U.S. at 337, never said the contrary. Preliminarily, the

availability of alternatives has been insufficient to justify First Amendment restrictions at least since *WRTL-II*, 551 U.S. 449 (controlling opinion), rejected the idea that alternatives might justify First Amendment burdens, *id.* at 477 n.9. And *Citizens United* expressly held that "[a] PAC is a separate association from the corporation. So [a] PAC . . . does not allow corporations to speak. Even if a PAC could somehow allow a corporation to speak—and it does not—the option to form PACs does not alleviate the First Amendment problems . . . . PACs are burdensome alternatives . . . ." 558 U.S. at 337.

Moreover, *IRTL* conflicts with *Bayless,* 320 F.3d. 1002, in which the Ninth Circuit held that a requirement that PACs give 24-hour notice to candidates before running express-advocacy communications supporting or opposing the candidate was content based, *id.* at 1009-10. The Ninth Circuit cited the *Burson* and *Consolidated Edison* holdings that merely regulating *political speech* constituted content-based regulation, *see supra* at 13-14, and held that the notice requirement was "content-based regulation" because "it applie[d] only to independent expenditures which 'expressly advocate[] the election or defeat of a clearly identified candidate," 320 F.3d at 1009. PACs could do any other type of communication without such regulation, so the provision "depends entirely on the content of the communication." *Id.* Thus, the Ninth Circuit applied strict scrutiny and struck the provision. *Id.* at 1010, 1014.

In the present case, only *political* contributions by corporations (and other business entities) are banned. Corporations may make non-political contributions without restrictions. This makes Iowa's corporate-con-

tribution ban content based.

D. Iowa's Disparate Treatment Is Unjustified.

Corporations and unions are similarly situated regarding their interest in making political contributions. Yet in Iowa, corporations, but not unions, are banned from making political contributions. Iowa must justify this disparate treatment.[11] And Iowa must do so under strict scrutiny, both because fundamental rights are involved and because the corporate-contribution ban is content based.

The Eighth Circuit's *IRTL* decision did not hold Iowa to its burden. And there is no justification for the disparate treatment. No antidistortion interest justifies different treatment of corporations and unions. And any anticorruption interest is dealt with by base limits on contribution amounts that may apply to all entities permitted to make political contributions.

In sum, the issue of whether Iowa's corporate-contribution ban violates equal protection raises an important federal question involving infringement of the highly protected constitutional right to engage equally in core political activity. And the decision below conflicts with key decisions of this Court and a state supreme court. Certiorari should be granted.

II.

Banning Corporate Political Contributions Violates the First Amendment.

IRTL also challenges Iowa's corporate-contribution ban, Iowa Code 68A.503A, for violating First Amend-

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[11] Similarly, a corporation (or listed business entity) is similarly situated to a *general partnership* that engages in business with respect to an interest in making political contributions, yet they are unjustifiably, disparately treated.

ment rights to free speech and association,[12] facially and as applied to IRTL and its intended activities. This important federal question involves infringement of the right to engage in core political activity. And the decision below conflicts with *Citizens United*, 558 U.S. 310.[13]

Though Iowa bans only corporations (and other business entities) from making contributions, the analysis here would also protect unions prohibited from making contributions. *Cf.* 2 U.S.C. 441b(a) (banning both corporate and union contributions).[14]

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[12] "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const. amend. I. *See Bates v. Little Rock* 361 U.S. 516, 523 (1960) (association protected).

[13] There is no circuit split here; circuits say this Court must reverse its own precedent. *See IRTL,* 717 F.3d at 601; *MCCL,* 692 F.3d at 879 & n.12; *United States v. Danielczyk*, 683 F.3d 611, 615-19 (4th Cir. 2012), *cert. denied,* 133 S.Ct. 1459 (2013).

However, a federal district court recently struck a city ban on corporate (and any "similar business entity") contributions, holding that the First Amendment prohibits the government from banning corporate contributions absent proof of a cognizable governmental interest. *Giant Cab Co. v. Bailey,* No. 13-cv-426, slip op. at 8 (D.N.M. Sept. 4, 2013) (Findings of Fact and Conclusions of Law), *available at* http://www.nmcourt.fed.us/Drs-Web/view-file?unique-identifier=0005525024-0000000000.

[14] Corporate or union contributions to super-PACs (independent-expenditure-only PACs) or to ballot-measure committees are not at issue here because these are already permitted. *See, e.g.*, *EMILY's List v. FEC,* 581 F.3d 1, 12 (D.C. Cir. 2009) (super-PACs); *Citizens Against Rent Control v. City of Berkeley,* 454 U.S. 290, 297-98 (1981) (ballot-mea-

(continued...)

If a decision by this Court permits contributions by corporations and the other listed business entities, Iowa is free to impose reasonable contribution limits to address any proven concerns about quid-pro-quo corruption or circumvention of valid contribution limits.[15] These are the tailored solutions to any proven corruption or circumvention concerns. *Cf. Buckley*, 424 U.S. at 25 (contribution limits must be tailored to "avoid unnecessary abridgment of associational freedoms").[16]

A. *Beaumont* Does Not Control this Case.

In *Agostini v. Felton*, 521 U.S. 203 (1997), this Court said lower courts should follow this Court's decisions that "directly control," not deciding themselves which decisions have been "overruled" by implication, *id.* at 237. But the binding "precedent" of a case is that

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[14] (...continued)
sure committees).

[15] Iowa currently imposes contribution *limits* on *no one*, though limits on contributions to *candidates* are the recognized cure for any perceived quid-pro-quo-corruption risk, *Buckley v. Valeo*, 424 U.S. 1, 26 (1976), and limits on contributions to *political committees* are the recognized cure for circumvention concerns, *California Med. Ass'n v. FEC*, 453 U.S. 182, 197-99 (1981). Any limits on enumerated business entities would need to be equivalent to those on non-enumerated business entities and on unions.

[16] In *McConnell*, this Court applied "heightened scrutiny," 540 U.S. at 231, to a ban on contributions by minors, and held that ban unconstitutional because absent convincing evidence the asserted interest was "too attenuated," *id.* at 232, and, even if there were an interest, the ban was "overinclusive" since "[t]he States have adopted a variety of more tailored approaches," *id.* Here, too, the scrutiny requires consideration of better-tailored options.

holding necessary to the issue presented. *See, e.g.*, *Carroll v. Carroll's Lessee*, 57 U.S. 275, 286 (1853). Court statements unnecessary to deciding the issue presented are nonbinding dicta, not binding holdings.

Beaumont did not hold that the corporate-contribution ban is facially constitutional, only that, where a ban on corporate contributions applies, *MCFL*-corporations[17] need not be exempted. So *Beaumont* does not "directly control" this case (which will be developed further in merits briefing), though *Citizens United* does control. *See* II.C.

B. *IRTL* Says *Beaumont* and *MCCL* Control.

IRTL says this question is controlled by *Beaumont*, 539 U.S. 146, and upholds the corporate-contribution ban against the First Amendment challenge. App. 42a.[18]

In *MCCL*, the en banc Eighth Circuit held that the district court below did not abuse its discretion in denying a preliminary injunction in a First Amendment challenge to Minnesota's ban on corporate contributions. 692 F.3d at 877-79. But *MCCL* noted that *Beaumont* is on "shaky ground" in light of *Citizens United*:

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[17] *MCFL*-corporations were nonstock, nonprofit, ideological corporations receiving no corporate contributions that were held to pose no corporate-form corruption with regard to express-advocacy independent expenditures in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 263-64 (1986) ("*MCFL*").

[18] *IRTL* applies the exacting ("closely drawn") scrutiny this Court applies to contribution limits. App.41a. The contribution/expenditure scrutiny dichotomy established in *Buckley*, 424 U.S. 1, should be overruled, *see* II.D, though strict scrutiny should apply here because the provision is (a) a *ban*, not a *limit*, and (b) content based, *see* I.C, II.D, II.E.

> *Citizens United*'s outright rejection of the government's anti-distortion rationale, *see Citizens United,* 558 U.S. at 349, as well as the Court's admonition "that the State cannot exact as the price of [state-conferred corporate] advantages the forfeiture of First Amendment rights," *id.* at 351 (quoting *Austin v. Mich. Chamber of Commerce,* 494 U.S. 652 (1990) (Scalia, J., dissenting)) (internal quotation marks omitted), casts doubt on *Beaumont,* leaving its precedential value on shaky ground. *See also Beaumont,* 539 U.S. at 164-65 (Thomas, J., dissenting) (explaining his belief that all campaign finance laws are subject to strict scrutiny and the federal ban on corporate contributions was "not narrowly tailored to meet any relevant compelling interest"); *id.* at 164 (Kennedy, J., concurring) ("Were we presented with a case in which the distinction between contributions and expenditures under the whole scheme of campaign finance regulation were under review, I might join Justice Thomas' dissenting opinion.").

Id. at 879 n.12.

IRTL recites *MCCL*'s "shaky ground" comment, with the reasons therefor, but invites this Court to Act: "This Court '"leav[es] to th[e] [Supreme] Court the prerogative of overruling its own decisions."' App.42a (citations omitted). Because of the importance of this issue, the Court should accept *IRTL*'s invitation.

C. *Citizens United* Undercuts the Foundations of *Beaumont*, Which Should Be Reversed.

In *Beaumont*, this Court upheld a ban on corporate contributions as applied to *MCFL*-corporations. But as Bob Bauer comments on the recent *Giant Cab* decision

striking a city ban on corporate (and other business) contributions, *see supra* note 13, *Beaumont* compares "poorly" to *Citizens United*:

> Reading *Beaumont* today, one is struck by a jurisprudence that measures up poorly to the tone and substance of *Citizens United*. . . . [*Beaumont*] upheld a contributions ban with emphasis on the "special characteristics of the corporate structure." *Id.* at 153, quoting *National Right to Work Committee v. [FEC]*, 457 U.S. 197[,] 209 (1982). Ten times, [Justice] Souter cited *Austin* . . . , and in upholding legislative authority to impose a complete contributions ban, he specifically cites the anti-distortion rationale of *Austin* that the *Citizens United* majority has rejected. *Beaumont* at 158 (the corporations enjoying the "special benefits conferred by the corporate structure . . . present the potential for distorting the political process.")[.] Souter also relied heavily on *National Right to Work Committee*, which rested largely on a view of the particular dangers posed by corporations of any and all sizes to the political process. *Beaumont* at 156 ("*National Right to Work* all but decided the issue" before the Court).

Robert Bauer, *Breaking Bad in Albuquerque? Or: the Question of Corporate Contributions After Citizens United*, More Soft Money Hard Law, Sept. 12, 2013, http://www.moresoftmoneyhardlaw.com/2013/09/breaking-bad-in-albuquerque-or-the-question-of-corporate-contributions-after-citizens-united/.

Beaumont's rationale (though most is dicta, *see* II.A) is undercut by *Citizens United* in at least seven ways.

First, the antidistortion rationale and interest

heavily relied on in *Beaumont,* 539 U.S. at 152-54, 160, is invalid after *Citizens United,* 558 U.S. at 349-56.

Second, *Beaumont* looks beyond preventing quid-pro-quo corruption to preventing corruption defined to include "undue influence" (and its "appearance"), 539 U.S. at 156 (citation omitted), but after *Citizens United,* the only cognizable interest is quid-pro-quo corruption (and its appearance), 558 U.S. at 356-60.

Third, *Beaumont* looks to the dissenting-shareholder-protection rationale, 539 U.S. at 154-55, which is invalid after *Citizens United,* 558 U.S. at 361-62.

Fourth, *Beaumont*'s assertion that First Amendment burdens of a corporate ban are diminished because "individual members of corporations" are "free to make their own contributions," 539 U.S. at 161 n.8, is inconsistent with *WRTL-II*, 551 U.S. at 477 n.9 (2007) (controlling opinion), which held that alternatives do not fix First Amendment problems with preferred activity. Suggesting alternatives is like telling Cohen to wear another jacket. *Id.* (citing *Cohen v. California,* 403 U.S. 15 (1971)). And banning joint activity because individual activity is available vitiates the right of "like-minded persons to pool their resources in furtherance of common political goals," *Buckley*, 424 U.S. at 22, both in an incorporated association and with a chosen candidate or political committee.

Fifth, *Beaumont* suggests that "[t]he PAC option allows corporate political participation." 539 U.S. at 163. And it says that what a successful plaintiff "would have to demonstrate"—i.e., the *core* of *Beaumont*'s analysis—is "that the [corporate-contribution ban] violated the First Amendment in allowing contributions to be made only through its PAC and subject to a PAC's administrative burdens." *Id.* That statement

was absolutely undercut by *Citizens United*'s holding that

> [a] PAC is a separate association from the corporation. So the PAC exemption from [2 U.S.C.] § 441b's expenditure ban, § 441b(b)(2), does not allow corporations to speak. Even if a PAC could somehow allow a corporation to speak—and it does not—the option to form PACs does not alleviate the First Amendment problems with § 441b. PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations.

558 U.S. at 337. So *Beaumont*'s requirement that a plaintiff prove "that the [corporate contribution ban] violate[s] the First Amendment in allowing contributions to be made only through its PAC," must be rephrased to require that the *government* prove that a contribution ban (as opposed to a limit) does *not* violate the First Amendment rights to speak, associate, and pool resources to advance common political goals in light of the fact that a PAC *does not* allow those involved in an incorporated association to do so *through* a PAC (because they are different associations and the PAC association does not speak for the corporate association).

Sixth, as for preventing circumvention of valid contribution limits, *Beaumont,* 539 U.S. at 155, 160, Iowa has *no* contribution limits, only the corporate (and business) ban,[19] so it cannot assert an anti-circumvention

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[19] *See, e.g.*, Iowa Ethics & Campaign Disclosure Board, *Things to Know When Making a Contribution in Iowa*, http://www.iowa.gov/ethics/campaigns/making_contributions.htm ("Iowa is NOT a state that imposes contribution (continued...)

interest. There are no limits to circumvent. Moreover, even if Iowa could assert such an interest, it has shown no evidence of circumvention, and there is "a variety of more tailored approaches" to address this if it were proven to exist. *McConnell,* 540 U.S. at 231-32 (rejecting ban on contributions by minors, under "heightened scrutiny," due to lack of evidence and "overinclusive-[ness]" due to better-tailored options).

Seventh, *Beaumont* expressly stated its deference to Congress. 539 U.S. at 157, 159, 162 n.9. But *Citizens United* declared that First Amendment protections override deference: "When Congress finds that a problem exists, we must give that finding due deference; but Congress may not choose an unconstitutional remedy." 558 U.S. at 361.[20]

In light of the changes from *Beaumont* to *Citizens United*, the *Giant Cab* district court, *see supra* note 13, recently held a municipal ban on corporate (and "similar business entity") political contributions unconstitutional under the First Amendment. It did so because the government had not met its evidentiary burden of showing that the contribution ban was closely drawn

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[19] (...continued)
limits (a limit on the amount of money that a campaign may receive from any one donor).").

[20] Also, though *Citizens United* did not address contribution limits, which were not at issue, 558 U.S. at 359, it held that "Government may not suppress political speech on the basis of the speaker's corporate identity," *id.* at 365. This Court holds that contributions involve both association and *speech*. *See, e.g.*, *Buckley*, 424 U.S. at 14; *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 386-88 (2000); *Beaumont*, 539 U.S. at 147-48; *McConnell*, 540 U.S. at 134-37; *Randall v. Sorrell*, 548 U.S. 230, 246 (2006).

to cognizable interests. *Giant Cab*, No. 13-cv-426, slip op. at 7-8. The *Giant Cab* court identified interests in preventing "pay to play" corruption (i.e., quid-pro-quo corruption) and circumvention of valid contribution limits. *Id.* at 7. The court noted that *Citizens United* had eliminated the antidistortion interest, but found that "[t]he Court cannot determine whether [those who enacted the ban] were motivated by the constitutionally permissible interest in eliminating or reducing *quid pro quo* corruption, . . . as opposed to the constitutionally infirm desire to single out corporate political speech for less favorable treatment based on the speaker's corporate identity." *Id.* at 5.[21]

Beaumont did not require the FEC to meet such an evidentiary burden, even though the Fourth Circuit had held that as applied to the *MCFL*-corporation[22] involved, the corporate-contribution ban was unconstitutional. *See Beaumont*, 539 U.S. at 151. When the unique features of *MCFL*-corporations were recited, the *Beaumont* Court rejected them based on the now-rejected antidistortion interest—because such corporations also enjoyed "'state-created advantages"'and had the potential for "amass[ing] substantial 'political "war chests."'" *Id.* at 160 (citations omitted).

Beaumont also said that *Austin* had said that nonprofit corporations could "serv[e] as a conduit for corporate political spending." *Id.* at 160. But *Austin* said that about a *specific* nonprofit, the Michigan Chamber of Commerce, because "more than three-quarters of the

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[21] The constitutionally permissible cure for quid-pro-quo corruption is a contribution *limit*, not a ban. *See, e.g.*, *Buckley*, 424 U.S. at 26 (limit on contributions to candidates justified by quid-pro-quo-corruption risk).

[22] *See supra* at note17 (re *MCFL*-corporations).

Chamber's members [we]re business corporations, whose political contributions and expenditures can constitutionally be regulated by the State." 494 U.S. at 664. That was not true of the *Beaumont* plaintiff, North Carolina Right to Life ("NCRL"), which (as an *MCFL*-corporation) received *no* corporate contributions, so *Beaumont*'s use of *Austin* was inapposite. But far more importantly, please note that the foregoing turned on the now-rejected antidistortion interest.[23]

Moreover, NCRL argued that earmarking rules preclude such conduits, which *Beaumont* rejected, citing a prior holding regarding earmarking. 539 U.S. at 160 n.7 (citing *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) ("*Colorado-II*"). But in *Colorado-II*, the solution was *limits* (in that case, on coordinated party expenditures), which were upheld in that case and which are the better tailored solution than bans.

The foregoing shows that *Beaumont* is on shaky precedential ground in the light of *Citizens United*. For

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[23] *Beaumont* could not rely on *Buckley*'s reasoning because central to *Buckley*'s holding that upheld *limits* on *large* contributions was the fact that limiting large contributions still "permit[ted] the symbolic expression of support evidenced by a contribution," *Buckley*, 424 U.S. at 21. So *Beaumont* purported to find support in *National Right to Work Committee*, 459 U.S. 197 ("*NRWC*"). *Beaumont*'s reliance on *NRWC* was misplaced because *NRWC* dealt with a law that imposed certain restrictions on corporate solicitation of contributions to a corporate-established PAC. The law did not prevent or limit the making of contributions, but merely placed some restrictions on their solicitation. While *NRWC* upheld the restrictions on corporate *solicitation* of contributions, it does not follow that the government can prohibit contributions.

reasons shown here and for reasons that will be shown more fully in merits briefing, this Court should reconsider and overrule *Beaumont* as part of considering the First Amendment challenge to the corporate-contribution ban.

D. *Buckley*'s Expenditure/Contribution Scrutiny Dichotomy Should Be Reversed.

In accepting and considering the First Amendment challenge to the corporate-contribution ban, this Court should reverse *Buckley*'s expenditure/contribution scrutiny dichotomy, under which contribution limits receive lower scrutiny than do expenditure limits. *Compare Buckley*, 424 U.S. at 25 (For contributions, "State [must] demonstrate[] a sufficiently important interest and employ[] means closely drawn to avoid unnecessary abridgment of associational freedoms.") *with Citizens United*, 558 U.S. at 340 ("Laws that burden political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" (citation omitted)).

In *Buckley*, this Court said that "contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities." 424 U.S. at 15. But it decided that expenditure limits would receive stricter scrutiny, while contribution limits would receive heightened, but lower, scrutiny because a contribution

> entails only a marginal restriction upon the contributor's ability to engage in free communication. A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication

> by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate. A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues. While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor.

424 U.S. at 21-22 (footnote omitted).

In recent briefing before this Court in *McCutcheon v. FEC*, No. 12-536, merits[24] and amici briefs[25] called for reversing *Buckley*'s scrutiny dichotomy and explained why it is appropriate. That extensive briefing cannot be reproduced in this certiorari petition, but will be provided in merits briefing.

For present, it suffices to note that from the beginning, members of this Court disagreed with *Buckley*'s scrutiny dichotomy. Chief Justice Burger rejected the

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[24] *See* Republican National Committee Br. at 11; McCutcheon Br. at 32 n.17.

[25] *See* Cato Inst. Br. at 9-24; Downsize DC Foundation et al. Br. at 4-12; Sen. McConnell Br. at 4-22; Wisconsin Institute for Law & Liberty Br.

distinction, *Buckley*, 424 U.S. at 243 (concurring in part and dissenting in part) ("the contribution limitations will, in specific instances, limit exactly the same political activity that the expenditure ceilings limit"), as did Justice Blackmun, *id.* at 290 (concurring in part and dissenting in part) ("no principled distinction" between contribution and expenditure limits). Others have since disagreed with, or questioned, the scrutiny dichotomy. In *Colorado-II*, 533 U.S. 431, Justice Thomas, joined by Justice Scalia, called for the overruling of *Buckley*'s contribution/expenditure scrutiny dichotomy because strict scrutiny should extend to all core political activity, i.e., "the core speech and associational rights that our Founders sought to defend," *id.* at 465-66 (dissenting) (collecting cases).[26]

This is a proper case to reverse *Buckley*'s scrutiny dichotomy and extend full protection to "doing politics." *See* Robert Bauer, *The Right to "Do Politics" and Not Just to Speak: Thinking about the Constitutional Protections for Political Action*, More Soft Money Hard Law, Apr. 26, 2013, www.moresoftmoneyhardlaw.com/2013/04/duke-law-speech. This is a proper case to reconsider both *Beaumont* and *Buckley* because it is specifically about a contribution ban and the decision below expressly cited *Beaumont* as requiring "'relatively complaisant'" review, App.41a (citation omitted), for which *Beaumont* cited *Buckley*'s scrutiny dichotomy,

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[26] *See also Buckley v. American Const. Law Found.*, 525 U.S. 182, 192 n.12 (1999) ("*ACLF*"); *id.* at 206, 214 (Thomas, J., concurring in the judgment). *See also Randall*, 548 U.S. at 242-44 (2006) (plurality); *id.* at 263 (Alito, J., concurring in part and concurring in judgment); *id.* at 264 (Kennedy, J., concurring in judgment); *id.* at 266 (Thomas, J., joined by Scalia, J., concurring in judgment).

539 U.S. at 161-62 (citing *Buckley*, 424 U.S. at 20-21).

E. Iowa's Corporate-Contribution Ban Violates the First Amendment.

IRTL's upholding of Iowa's corporate-contribution ban against a First Amendment challenge is erroneous on multiple levels.

It relied on *Beaumont*, without taking into account the fact that *Citizens United* undercut *Beaumont*'s analysis, e.g., *Beaumont* heavily relied on the notion that a PAC allows corporations to speak and associate, which *Citizens United* rejected, 558 U.S. at 337.

IRTL relied on *Buckley*'s scrutiny dichotomy, which should be overruled but which applied to a contribution *limit*, while what is at issue here is Iowa's contribution-*ban*. The limit/ban distinction is constitutionally significant.

Iowa's outright *ban* on contributions imposes a *severe burden* on IRTL's freedoms of speech and association and so requires strict scrutiny. *See, e.g., Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 451 (2008); *Clingman v. Beaver*, 544 U.S. 581, 586 (2005); *California Democratic Party v. Jones*, 530 U.S. 567, 582 (2000); *ACLF*, 525 U.S. 182, 192 n.12 (1999); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *see also Citizens United*, 558 U.S. at 339-40 (applying strict scrutiny to "outright ban" on corporate independent expenditures).[27, 28]

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[27] Strict scrutiny should also apply because Iowa's corporate-contribution ban is content based. *See supra* at I.C. A statute that singles out political speech as a general category is content based even though it does not single out

(continued...)

In *Buckley*, this Court sustained a $1,000 *limit* on contributions to candidates, 424 U.S. at 25. *Buckley*'s conclusion that contribution limits impose only "marginal" restrictions on speech rested on two premises. First, limits on "large contributions" still allow a "person or group" to contribute *something*, thereby engaging in *some* level of speech and association. *Id.* at 21. Second, "the transformation of contributions into political debate involves speech by someone other than the contributor." *Id.*

The first premise evaporates with a *ban*, which forbids speech or association in *any* amount. The second

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[27] (...continued)
particular political views, and even if it applies to all political speech and "does not favor either side of a political controversy," *Consol. Edison Co.*, 447 U.S. at 537. *See also Burson*, 504 U.S. at 197 (speech restriction on all campaign-related speech was content based); *Carey*, 447 U.S. at 460-61 (speech restriction that permitted labor-dispute information to be freely disseminated but restricted discussion of all other issues was content based); *Mosley*, 408 U.S. at 94 (speech restriction that permitted labor picketing but not other peaceful picketing was content based); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (statute restricting speech about crime was content based). *See also Iowa Right to Life, Inc. v. Williams*, 187 F.3d 963, 967 (8th Cir. 1999).

[28] The ban also impermissibly singles out certain speakers. The First Amendment prohibits speaker-based restrictions on speech, in part because "[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content." *Citizens United*,558 U.S. at 340; *see also id.* at 349-56 (government may not ban political speech "simply because the speaker is an association that has taken on the corporate form").

premise hinges on the indefensible notion that speech merits less protection merely because communicating that speech to the public "involves speech by someone other than the contributor," *Buckley*, 424 U.S. at 21. But *Buckley* itself acknowledged the right of "like-minded persons to *pool* their resources in furtherance of common political goals," *Buckley*, 424 U.S. at 22 (emphasis added), both with each other and with a chosen candidate or political committee. And *independent expenditures* also nearly always involve speech by someone other than the "speaker" (e.g., where ads are done by a professional spokesperson or where a "speaker" contributes to a super-PAC that speaks on the contributor's behalf), but constitutional protection is not eroded on that account.

In *FEC v. National Conservative PAC*, 470 U.S. 480, 493-94 (1985) ("*NCPAC*"), this Court recognized that, in the context of independent expenditures, speech does not lose its protection merely because a centralized group accepts donations and converts those donations into independent expenditures. It rejected the argument that such contributions did not constitute individual speech "but merely 'speech by proxy.'" *Id.* at 495. It said donors "obviously like[d] the message they [were] hearing from these organizations and want[ed] to add their voices to that message; otherwise they would not part with their money." *Id.* Contributors to a candidate also "obviously like" the candidate's message and "want to add their voices to that message."

Beaumont disregarded the fact that bans on contributions reduce the overall quantum of speech. Political contributions enable a candidate to speak, and reducing contributions necessarily reduces the amount of political speech a candidate is able to make. Further-

more, in our representative system, voters express themselves through candidates. *See Anderson v. Celebrezze*, 460 U.S. 780, 787-88 (1983) ("[V]oters can assert their preferences only through candidates or parties or both. . . . [A]n election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying-point for like-minded citizens."). Political contributions to candidates literally represent the contributor's desire to help the candidate engage in *more political speech*. *See NCPAC*, 470 U.S. at 495 (contributors "want to add voices" to messages). A contribution ban prevents that speech from taking place and thus has the inevitable effect of reducing the "quantity of expression" during an election "by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached," *Buckley*, 424 U.S. at 19.

And it is no answer that would-be contributors "remain free" to make independent expenditures and therefore they could speak on their own (or volunteer) instead of making contributions because the burden particular regulations impose is not lessened because the regulation leaves options. The proper analysis in assessing the severity of burdens on speech focuses on *what is restricted*, not what is unrestricted. *See, e.g.*, *Citizens United*, 558 U.S. at 340 ("Even if a PAC could somehow allow a corporation to speak—and it does not—the option to form PACs does not alleviate the First Amendment problems with [the statute]."); *Meyer v. Grant*, 486 U.S. 414, 424 (1988) (fact that law burdened protected speech and association but left people "free" to pursue other "'more burdensome' avenues of communication, d[id] not relieve its burden on First Amendment expression"); *ACLF*, 525 U.S. at 195 (observing, in the context of Colorado's requirement that

petition circulators be registered voters, that "the ease with which qualified voters may register to vote . . . does not lift the burden on speech at petition circulation time").

There is increased power when a group pools its resources to advocate for change, and this Court has refused to reduce the level of First Amendment protection afforded to groups of people who "pool[] their resources to amplify their voices." *NCPAC*, 470 U.S. at 495. In the context of a contribution ban, the option to pool resources with a candidate and other supporters of the candidate is simply foreclosed. This alone is enough to recognize that a contribution ban imposes a severe burden on speech and associational rights.

Iowa's contribution ban is unconstitutional, under either exacting or strict scrutiny. The state must prove that the ban is suitably tailored to a cognizable interest under either scrutiny. *Citizens United* held that only the interest in preventing quid-pro-quo corruption can possibly justify limiting political speech and association, rejecting any "corruption" theories based on anti-distortion, equalizing, influence, access, or shareholder protection.[29, 30]

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[29] *McConnell* upheld limits on contributions to political parties because they might purchase "access" or "influence" with officeholders. 540 U.S. at 154. But *Citizens United* explicitly rejected these interests as neither compelling nor cognizable. 558 U.S. at 359-60 ("'Favoritism and influence are not . . . avoidable in representative politics. . . . Ingratiation and access, in any event, are not corruption.'" (citation omitted)).

[30] It does no good to say that *Citizens United* cannot apply to contribution limits because they were not before

(continued...)

Regardless of whether Iowa has a cognizable interest in preventing quid-pro-quo corruption, the ban is not properly tailored to that interest. *Buckley* held that *limits* on "large" contributions were constitutional because *large* contributions give rise to the possibility of quid-pro-quo corruption. *Buckley*, 424 U.S. at 23-29. *Accord Citizens United*, 558 U.S. at 345 ("[*Buckley*'s] concern [was] that large contributions could be given 'to secure a political *quid pro quo*.'" (*quoting Buckley*, 424 U.S. at 26)). *See also McConnell*, 540 U.S. at 136 ("large financial contributions" can lead to corruption and its appearance (citation and internal quotation marks omitted)); *Nixon*, 528 U.S. at 395 ("sometimes large contributions will work actual corruption"). The law at issue here, however, is not merely a limit on large contributions, but an outright ban.

An outright ban on contributions is simply not tailored to any Iowa interest in preventing quid-pro-quo corruption.[31] There is no realistic possibility that candidates will be corrupted by small contributions (resulting from compliance with a valid limit, if Iowa enacts one), and an outright ban prevents contributions large and small. Though Iowa may address problems it can prove, it "may not choose an unconstitutional remedy," and "[a]n outright ban on corporate political speech during the critical preelection period is not a permissi-

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[30] (...continued)
the Court. *Citizens United* held that bans on *speech* are unconstitutional. Contributions are association and *speech*.

[31] Iowa has no contributions *limits* and therefore has not asserted any anti-quid-pro-quo corruption interest permissibly, and lacking limits it has no interest in preventing circumvention of limits.

ble remedy." *Citizens United*, 585 U.S. at 361.[32]

Government may not single out particular speakers. No cognizable interest is advanced by targeting corporations (and other businesses) with Iowa's corporate-contribution ban. The $100 contribution that IRTL verified its desire to make is no more likely to produce quid-pro-quo corruption than the same contribution from an individual or a general partnership.[33]

In sum, certiorari should be granted on this issue.

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[32] If Iowa wants to assert an anti-quid-pro-quo corruption interest, it may do with valid contribution *limits*. "[C]ontributions within [constitutional limits] do not create a risk of *quid pro quo* corruption or its appearance—indeed, that is the point of the limits." *United States v. Danielczyk,* 791 F. Supp. 2d 513, 515 (E.D. Va. 2011) (citing *Buckley,* 424 U.S. at 25), *rev'd*, 683 F.3d 611 (4th Cir. 2012). "If human beings can directly contribute *within FECA limits* without risking *quid pro quo* corruption or its appearance, and if 'the First Amendment does not allow political speech restrictions based on a speaker's corporate identity,' *Citizens United,* [558 U.S. at 347], then corporations . . . must be able to do the same." *Danielczyk,* 791 F. Supp. 2d at 515 (emphasis in original), *rev'd*, 684 F.3d 611.

[33] If there were any proof, and there is none, that corporations were being multiplied to facilitate circumvention of contribution limits (nonexistent in Iowa), the tailored remedy would be to impose the sort of anti-proliferation rules that were imposed after *Buckley* to prevent political-committee proliferation. *See* House Conference Report No. 94-1057, at 58 (1976) ("anti-proliferation rules . . . are intended to prevent . . . persons or groups . . . from evading the contribution limits"). *See also* 11 C.F.R. 100.5(g) (anti-proliferation "affiliation" rules).

Conclusion

For the reasons stated, this Court should grant this petition.

Respectfully submitted,

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September 27, 2013