Nos. 21-2352, -2433

IN THE

United States Court of Appeals for the Third Circuit

NEW JERSEY BANKERS ASSOCIATION,

Appellant/Cross-Appellee,

v.

ATTORNEY GENERAL NEW JERSEY,

Appellee/Cross-Appellant.

Appeal from the United States District Court
for the District of New Jersey
in Case No. 18-15725 (BRM-DEA), Judge Brian R. Martinotti

BRIEF FOR *AMICI CURIAE* INDEPENDENT COMMUNITY BANKERS OF AMERICA AND AMERICAN BANKERS ASSOCIATION IN SUPPORT OF APPELLANT AND REVERSAL IN PART

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel for *amici curiae* states that the American Bankers Association and Independent Community Bankers of America are non-profit corporations. They have no parent companies and have issued no stock.

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INTEREST OF *AMICI CURIAE*[1]

The Independent Community Bankers of America ("ICBA") represents the nation's community banks and gives voice to the interests of the community banking industry, including through effective advocacy in the public sphere. ICBA members operate nearly 50,000 locations nationwide, employ more than 700,000 Americans, and are the only physical banking presence in one in three U.S. counties. ICBA's members hold more than $5.8 trillion in assets, $4.8 trillion in deposits, and $3.5 trillion in loans to customers, small businesses, and the agricultural community. Many of ICBA's members engage in political speech through campaign contributions and other means.

The American Bankers Association ("ABA") is the principal national trade association of the financial services industry in the United States. Founded in 1875, ABA is the voice for the nation's $13 trillion banking industry and its more than one million employees. ABA members provide banking services in each of

[1] *Amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel has made any monetary contributions intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E). Both parties were notified in advance of *amici*'s intent to file this brief and have consented to its filing.

the fifty States and the District of Columbia. Among them are financial institutions of all sizes and types, including many that engage in political speech through campaign contributions and other means. ABA frequently submits *amicus curiae* briefs in state and federal courts in matters that significantly affect its members and the business of banking.

Amici and their members have a significant interest in this case because, in addition to the other constitutional infirmities appellant/cross-appellee the New Jersey Bankers Association ("NJBA") identifies, the challenged statute contravenes the First Amendment by disfavoring the protected political speech of banks (in addition to other specifically targeted industries) without justification.

INTRODUCTION

"There is no right more basic in our democracy than the right to participate in electing our political leaders," which includes the entitlement to "contribute to a candidate's campaign." *McCutcheon v. FEC*, 572 U.S. 185, 191 (2014). Although that right is not "absolute"—like other fundamental rights, it may be regulated through narrowly tailored laws enacted to serve compelling governmental interests—the Supreme Court has "made clear" that states "may ***not*** regulate contributions simply to reduce the amount of money in politics, or to restrict the political participation of some in order to enhance the relative influence of others."

Id. (emphasis added) (citing *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 749-50 (2011)).

That is precisely what the New Jersey statute challenged in this case (N.J. Stat. Ann. § 19:34-45) does, both by design and in effect. Indeed, New Jersey's statute is uniquely pernicious. ***Alone*** among the states, New Jersey has completely barred political contributions by banks and certain other specific industries, prohibiting entities in those industries—and ***only*** those industries—from contributing to any political campaigns through any means whatsoever. New Jersey attempted to justify its ban by invoking an interest in preventing "*quid pro quo*" corruption. But both the historical record and the State's own admissions in formal Attorney General opinions compel the conclusion—which the district court did not deny—that the statute was in fact enacted for the unconstitutional purpose of reducing the "influence" the targeted industries are able to exercise through legitimate, First Amendment-protected political activity. JA217-18. New Jersey's ban, moreover, is extraordinarily draconian: as stated in one of those formal opinions, the statute not only bans all political contributions from banks and the other targeted industries, but also "preclude[s] the use of [a] bank's own monies to establish and administer a political action committee ["PAC"], and/or to solicit contributions from its employees." JA216. Because the statute thus seeks to

"distinguish[] among different speakers, allowing speech by some but not others," *Citizens United v. FEC*, 558 U.S. 310, 340 (2010), it is facially unconstitutional.

Moreover, even setting aside the unconstitutional purpose for which the statute was enacted, New Jersey has failed to offer any basis to believe that banks are any more susceptible to *quid pro quo* corruption than other, non-targeted industries and entities. As this Court has explained, the "power to regulate political expression does not automatically trigger the 'lesser included authority' to ban speech by certain groups." *Lodge No. 5 of Fraternal Order of Police ex rel. McNesby v. City of Phila.* ("*McNesby*"), 763 F.3d 358, 380 (3d Cir. 2014). Accordingly, where the government restricts the speech of some speakers but not others, its "selectivity itself must pass constitutional muster." *Id.* (quoting *Latino Officer's Ass'n v. City of New York*, 196 F.3d 458, 468 (2d Cir. 1999)).

Yet New Jersey has made no showing that would distinguish banks from other similarly situated but non-targeted industries—for example, non-bank financial institutions or government contractors—as would be necessary (though still insufficient) to support the State's non-neutral ban. *See id.* Nor could such a showing be made. The State routinely experiences *quid pro quo* corruption involving other industries while continuing to permit participants in those industries to contribute to campaigns, both directly and through PACs. And there is no evidence that either New Jersey or the thirty-three states that permit

contributions from banks have suffered any of the purported problems with which New Jersey claims to be concerned.

For those reasons, in addition to the others set forth in the brief of the New Jersey Bankers Association, the district court's decision on Count Two should be reversed.[2] New Jersey's rationale of preventing purported "*quid pro quo* corruption," which the district court improperly accepted, is merely a pretext for its unconstitutional preference for some speakers over others. The State did not prove that its unique-in-the-nation decision to target banks is constitutionally warranted. The district court concluded otherwise only by ignoring the fundamental First Amendment principle that government cannot "inject" itself "into the debate over who should govern," *McCutcheon*, 572 U.S. at 192-93 (quoting *Bennett*, 564 U.S. at 750), by "taking the right to speak from some and giving it to others," *Citizens United*, 558 U.S. at 340-41.

ARGUMENT

I. THE CHALLENGED STATUTE IS UNIQUE IN THE NATION IN SELECTIVELY BANNING POLITICAL CONTRIBUTIONS FROM BANKS.

On its face and in effect, New Jersey's statute prohibits certain industries—including the banking industry—from making political contributions, while

[2] This brief supports the appeal of appellant/cross-appellee NJBA and does not address the cross-appeal filed by the Attorney General of New Jersey.

permitting others to do so (subject to generally-applicable and unchallenged limits). *See* N.J. Stat. Ann. § 19:34-45; *see also* N.J. Stat. Ann. §§ 19:34-32, 5:12-138 (additionally banning contributions from insurance and casino industries). ***No other state*** has enacted such a ban. Thirty-three states permit political contributions from all corporations, including banks.[3] Sixteen states (and the federal government) prohibit political contributions from ***all*** corporations.[4] New Jersey's ban is thus one-of-a-kind insofar as it entirely bans contributions by banks while permitting them to be made by corporate participants in other industries.

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[3] *See* Ala. Code §§ 17-5-1 et seq.; Ariz. Rev. Stat §§ 16-916(B); Ark. Code Ann. §§ 7-6-203, -201(14)(A); Cal. Gov't Code §§ 85300 et seq.; Del. Code Ann tit. 15 §§ 8010, 8012, 8002(17); Fla. Stat §§ 106.08, .011(14); Ga. Code Ann. § 21-5-41; Haw. Rev. Stat. § 11-357; Idaho Code § 67-6610A; 10 Ill. Comp. Stat. 5/9-8.5(a); Ind. Code §§ 3-9-2-3, -4; Kan. Stat. Ann. §§ 25-4153, -4143(j); La. Stat. Ann. §§ 18:1505.2, 18:1483(13); Me. Stat. tit. 21-A § 1015(2); Md. Code Ann. § 13-226(e); Miss. Code Ann. § 97-13-15; Neb. Rev. Stat. § 49-1469(1)(b); Mo. Rev. Stat. § 130.029(1); Nev. Rev. Stat. § 294A.100; N.H. Rev. Stat. Ann. § 664:4(V); N.M. Stat. Ann. §§ 1-19-34.7(A)(1), -26(P); N.Y. Elec. Law §§ 14-114, -116; N.D. Cent. Code § 16.1-08.1-03.3(1); Or. Rev. Stat. §§ 260.049, .076, .083, .005(16); S.C. Code Ann. §§ 8-13-1314, -1300(25); S.D. Codified Laws §§ 12-27-7, -8; Tenn. Code Ann. § 2-10-302; Tex. Elec. Code Ann. § 253.097; Utah Code Ann. §§ 20A-11-101 et seq., 20A-11-705; 17 Vt. Stat. Ann. § 2941; Va. Code Ann. §§ 24.2-945 et seq.; Wash. Rev. Code §§ 42.17A.440 et seq.; W. Va. Admin. Code § 146-3-5.3.1.

[4] Alaska Stat. § 15.13.074(a), (f); Colo. Const. Art. XXVIII § 3(4)(a); Conn. Gen. Stat. § 9–613(a); Iowa Code § 68A.503(1); Ky. Rev. Stat. Ann. § 121.025; Mass. Gen. Laws Ann. Ch. 55 § 8; Mich. Comp. Laws § 169.254(1); Minn. Stat. § 211B; Mont. Code Ann. § 13–35–227(1); N.C. Gen. Stat. § 163–278.15(a); Ohio Rev. Code Ann. § 3599.03(A)(1); Okla. Stat. tit. 21, § 187.2(A)(1); 25 Pa. Stat. Ann. § 3253(a); R.I. Gen. Laws § 17–25–10.1(h)(1); Wis. Stat. § 11.1112; Wyo. Stat. Ann. § 22–25–102(a); 52 U.S.C. § 30118.

This Court has struck down such bans before. In *Deon v. Barasch*, 960 F.3d 152 (3d Cir. 2020), the Court invalidated a Pennsylvania statute that banned political contributions from a specific industry—there, gambling—because the state failed to show that its prohibition was "closely drawn" to achieve the state's asserted interest in combating political corruption. *Id*. at 160, 164. In so holding, the Court relied extensively on the fact that the experience of nineteen other states with similar legalized gambling "has not generated a similar legislative judgment." *Id*. at 164. Noting that these other states "place less of a burden on First Amendment rights," Pennsylvania "had the burden of showing" why the experiences of three outlier states with similar bans—including New Jersey—"provide[d] a better basis to assess the proportionality" of the challenged statute than the many states without them. *Id*. The Court rejected Pennsylvania's "appeal to 'common sense' as a surrogate for evidence in support of its far-reaching regulatory scheme . . . particularly in light of the approach taken by most other similarly situated states." *Id*.

The statute at issue here is even more of an outlier than the one struck down in *Deon*. In that case, three other states had similar bans directed specifically against the gambling industry. Here, ***no*** other state has made the same supposed "legislative judgment," *cf. Deon*, 960 F.3d at 164, as New Jersey. In the district court, New Jersey suggested that six other states have statutes like its own. But

that argument is wrong. Three of the states New Jersey pointed to as historically banning contributions from banks—Alabama, Kansas, and Nevada, *cf.* Dkt. 81-1 at 31—have repealed their prior bans or permitted them to lapse, such that, unlike New Jersey, each of those three states now allows contributions from banks. *See supra* n.3 (citing current statutes). The remaining three—Massachusetts, Iowa, and Pennsylvania, *cf.* Dkt. 81-1 at 31 n.7—never singled out banks for disfavored treatment in the first place. Although those three states' corporate-contribution restrictions mention banks, they do so only in the context of banning contributions from ***all*** corporations across the board. *See* Iowa Code § 68A.503(1) (prohibiting contributions from "an insurance company, savings association, bank, credit union, ***or corporation***") (emphasis added); Mass. Gen. Laws Ann. Ch. 55 § 8 (prohibiting contributions from ***all*** "business or professional corporation[s]"); 25 Pa. Stat. Ann. § 3253(a) ("It is unlawful for any National or State bank, ***or any corporation***, … to make a contribution ….") (emphasis added). The statutes therefore do not discriminate based on the speaker's identity, as New Jersey's statute does.

Moreover, the district court's statement that "eighteen other states currently adopt a contribution ban with a scope similar to ***or wider than*** N.J. Stat. Ann. § 19:34-45," JA49 (emphasis added), simply ignores the First Amendment's prohibition on speaker-based discrimination. ***No*** other state has a ban with a scope like New Jersey's, and the fact that other states bar contributions from ***all***

corporations, without regard to the identity of the speaker, cannot justify New Jersey's one-of-a-kind, speaker-discriminatory ban.

Accordingly, even more so than in *Deon*, the fact that New Jersey is completely alone in specifically banning political contributions by banks—even going so far as to prohibit them from soliciting voluntary contributions through PACs—is powerful evidence that New Jersey "falls well short of its burden to show that [Section 19:34-45] is closely drawn" to combat a demonstrated anti-corruption interest that would apply specifically to banks. 960 F.3d at 164. Indeed, as next shown, the record evidence leads to the undeniable conclusion that New Jersey has unconstitutionally infringed banks' political speech by completely banning their contributions while allowing such speech by other, similarly-situated industries, without any permissible justification for that speaker-based distinction.

II. THE DISTRICT COURT ERRED IN UPHOLDING NEW JERSEY'S UNCONSTITUTIONAL SPEAKER-BASED DISCRIMINATION.

As explained above, a government's "general power to regulate political expression does not automatically trigger the 'lesser included authority' to ban speech by certain groups," as New Jersey does. *McNesby*, 763 F.3d at 380; *see also, e.g.*, *Citizens United*, 558 U.S. at 340-41 ("There is no basis for the proposition that, in the political speech context, the Government may impose restrictions on certain disfavored speakers."). Instead, the government's "selectivity must itself pass constitutional muster." *McNesby*, 763 F.3d at 380

(quoting *Latino Officer's*, 196 F.3d at 468). Both by design and in practice, New Jersey's statute violates that bedrock principle by singling out specific groups and silencing them alone while allowing others to speak, without any justification for the distinction other than the wholly impermissible aim of reducing the legitimate, First Amendment-protected influence of particular speakers.

A. The District Court Erroneously Disregarded Evidence—And The State's Own Admissions—That The Statute Was Enacted Largely To Serve The Unconstitutional Purpose Of Restricting The Legitimate Political Influence Of Certain Industries.

Both this Court and the Supreme Court have unambiguously held that a state cannot "restrict the political participation of some" for the purpose of "enhanc[ing] the relative influence of others." *McCutcheon*, 572 U.S. at 191 (quoting *Bennett*, 564 U.S. at 741); *McNesby*, 763 F.3d at 380. The record contains extensive evidence—and New Jersey has repeatedly admitted—that the statute was enacted to do precisely that. As noted, in 1979, New Jersey's Attorney General issued a Formal Opinion proclaiming that the statute's purpose was to limit the legitimate political influence of wealthy segments of society. JA217-18. Four years later, the Attorney General again confirmed, in another Formal Opinion, that the statute was enacted to address "corporate influence over government officials," even going so far as to deem such influence "evil," without any suggestion that this epithet was limited to *quid pro quo* corruption. JA221.

Those admissions regarding the statute's unlawful purpose are confirmed by the historical record NJBA established below, which demonstrates that the statute was enacted, at least in part, in pursuit of the State's desire to restrict the influence of "aggregated money" in politics. Dkt. 81-1 at 7. That desire is a quintessential example of a motivation that ***cannot*** justify the regulation of political speech or activity. As the Supreme Court has held, the "***only*** … legitimate governmental interest for restricting campaign finances" is to target *quid pro quo* corruption or the appearance thereof. *McCutcheon*, 572 U.S. at 206-07 (emphasis added). And, as the Court has further held, the mere tendency of large contributions to "garner influence over or access to elected officials or political parties … ***does not*** … give rise to" that concern. *Id.* at 208 (emphasis added).

Faced with those clear holdings, as well as extensive evidence and open admissions of the State's unconstitutional motive, the district court refused to distinguish between the statute's impermissible impetus (a so-called "antidistortion" rationale) and the sometimes-acceptable aim of combating *quid pro quo* corruption. *Cf.* JA37. But the court's failure to acknowledge that distinction—on the ground that the two purposes are supposedly "closely related," *id.*—is irreconcilable with binding Supreme Court precedent. As that Court has made clear, "it is not legitimate for the government to attempt to equalize" political power through campaign-finance restrictions, *Bennett*, 564 U.S. at 749-50,

especially when it seeks to do so by imposing restrictions on some speakers and not others, *see, e.g.*, *Citizens United*, 558 U.S. at 340-41. To faithfully apply those binding holdings, a court therefore must scrutinize whether a state acted in pursuit of so-called "antidistortion" aims, particularly where, as here, that argument is squarely before the court. *See, e.g.*, Dkt. 82-1 at 6-8 (noting that "it was not bribes" that motivated the statute, but instead fear of "influence or access"). The district court failed to apply that precedent and therefore erred.

If the district court had conducted the required analysis, it would unavoidably have concluded that New Jersey's statute exhibits even graver constitutional flaws than the one this Court invalidated in *McNesby*. *See* 763 F.3d at 358. There, the Court examined a provision prohibiting political contributions from police officers, which the state sought to justify by reference to an anticorruption rationale like the one New Jersey advances here. *Id.* at 380-81. The Court accepted the importance of that interest. Nevertheless, it concluded that the proffered interest would have warranted a ban on contributions from ***all*** city employees, not just police officers, and thus could not justify "second-class treatment of the police." *Id.* The Court therefore held that the prohibition discriminated among speakers without a compelling interest for doing so and, accordingly, contravened the First Amendment. *Id.*

The same constitutional infirmity exists here. Indeed, the unconstitutionality of New Jersey's ban is even more clear given that, as explained above, the record contains express evidence and admissions that the legislature was motivated by a specific, unconstitutional desire not just to reduce the influence of money in politics (which alone would suffice to invalidate the statute), but to do so by targeting the particular industries the statute singles out. Accordingly, it is clear that New Jersey's "selective restriction of speech" was based on a desire to disfavor particular industries, and that any reliance on a purported need to combat *quid pro quo* corruption is nothing more than a "pretextual motive." *Cf. Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 448 (2015).

Such a motive cannot be invoked to justify New Jersey's decision to silence the targeted industries alone. *McNesby*, 763 F.3d at 380-81; *see also, e.g.*, *Wagner v. FEC*, 793 F.3d 1, 28-30 (D.C. Cir. 2015) (upholding federal ban on contributions from government contractors, but noting that the plaintiffs "d[id] not contend … that [the legislature's] true interest was to favor" certain speakers over others, and that such "invidious[] discriminat[ion]" would be impermissible). Indeed, the principal purpose of "examin[ing] campaign finance classifications" under the tiers of scrutiny is "to determine whether they are invidious," *Wagner*, 793 F.3d at 33, and "seek to suppress a disfavored message," *Sorrell v. IMS Health*

Inc., 564 U.S. 552, 572 (2011).[5] Yet notwithstanding *McNesby*'s clear dictate, the district court cited four out-of-circuit cases supposedly establishing that, as long as New Jersey's legislature was motivated ***in part*** by a desire to combat *quid pro quo* corruption, the fact that the statute ***is*** invidious, and ***was*** enacted with the aim of suppressing a disfavored message, is irrelevant. JA38. But none of those cases so hold. Indeed, none of them involved evidence (to say nothing of admissions) of an impermissible legislative motive, much less one that manifested as a ban singling out particular, statutorily identified groups for disfavored treatment.[6] Where, as here, a state has flatly admitted that its speaker-based distinction was enacted for the purpose of speaker-based discrimination, it is irrelevant that the state was motivated ***in part*** by some other, sometimes-permissible rationale. The district court therefore erred by ignoring the State's unconstitutional motives. And it further erred by repeatedly deferring to the State's supposed "legislative choice[s]"

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5 *See also, e.g.*, *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002) (critical question is the "credibility of the government's" stated "rationale") (quoting *City of Ladue v. Gilleo*, 512 U.S. 43, 52-53 (1994)).

6 *See Ognibene v. Parkes*, 671 F.3d 174 (2d Cir. 2011) (challenge to law expanding corporate contribution ban to other similar entities); *Protect My Check, Inc. v. Dilger*, 176 F. Supp. 3d 685 (E.D. Ky. 2016) (challenge to ban on all corporate contributions); *Stop This Insanity, Inc. v. FEC*, 902 F. Supp. 2d 23 (D.D.C. 2012) (challenge to law limiting contributions to political committees connected to any corporations); *Shrink Mo. Gov't PAC v. Maupin*, 922 F. Supp. 1413, 1420 (E.D. Mo. 1996) (***striking down*** prohibition on contributions for state's failure to show nexus to anti-corruption rationale).

about how best to combat *quid pro quo* corruption. JA46, 50, 52-54. Although the district court recognized that the State "must show the state legislature enacted N.J. Stat. Ann. § 19:34-45 with a *genuine* intent to address quid pro quo corruption and its appearance," JA30 (emphasis added), the court did not consider whether the State's asserted rationales were genuine or merely pretext.

B. Regardless of Its Motivation, New Jersey's Decision To Target Banks' Political Speech Still Cannot Pass Constitutional Muster.

In addition to, and independent of, the statute's improper purpose, New Jersey's decision to distinguish among speakers obligates it to justify not only its decision to silence banks, but also its decision to do so while letting members of other similarly-situated industries exercise their rights to political speech through contributions. As the Court held in *McNesby*, the government's "selectivity must itself pass constitutional muster." 763 F.3d at 380 (quoting *Latino Officer's Ass'n*, 196 F.3d at 468). The district court committed legal error by failing to require the showing *McNesby* demands. *See id.* Nor can New Jersey make that showing. Indeed, the state has failed to offer ***any*** evidence that banks pose a threat of *quid pro quo* corruption or its appearance that is not shared by industries or business sectors the state has declined to target. That failure clearly demonstrates that the State's purported concern with *quid pro quo* corruption lacks credibility.[7]

[7] To be clear, *amici* do not argue that a state cannot impose targeted restrictions to address its most pressing issues. But where, as here, the restrictions

Experience from both within and outside New Jersey confirms the point. Within New Jersey, numerous industry sectors pose risks of *quid pro quo* corruption, yet are still permitted to make contributions. To take but one wide-ranging example, cases of *quid pro quo* corruption involving government contractors are far more common and better-documented than those involving banks, and such cases have routinely arisen in New Jersey. For instance, an official in Orange, New Jersey was recently indicted for taking bribes and perpetrating fraud to conceal a kickback scheme involving a construction firm that contracted with the State. *Former Business Administrator Indicted on Corruption, Fraud, and Tax Charges*, Mortgage Fraud Blog (July 8, 2020) (https://tinyurl.com/4n6tn7jw). And in 2017, this Court affirmed a major corruption conviction in the case of a Bergen County party chair based on "payments he took from a particular vendor … in exchange for recommending to certain officials that their towns hire [the vendor]'s firm" to provide services to the "local governments" for which they worked. *United States v. Ferriero*, 866 F.3d 107, 110 (3d Cir. 2017).

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involve core political speech, the State must justify its speaker-based regulations and demonstrate that its concerns about those pressing issues are credible by presenting evidence that the targeted industry poses a risk that necessitates selective regulation over similarly situated industries. Because New Jersey failed to offer any evidence that banks are inherently more susceptible to *quid pro quo* corruption or its appearance than their unregulated counterparts—and the record in fact demonstrates the opposite—N.J. Stat. Ann. § 19:34-45 is unconstitutional.

That is quintessential *quid pro quo* corruption. Yet entities that contract with New Jersey's state and local governments are permitted to, and routinely do, make political contributions, *see, e.g.*, Christian Hetrick, *Campaign Contributions From NJ Contractors Were Up 4 Percent In 2017*, Observer.com (Apr. 9, 2018), ("Contractors gave nearly $9.4 million to candidates and committees [in 2016].") (https://tinyurl.com/3y26ncuy); *see also* Matt Friedman, *Assembly Campaign Donations to Union County Official Expose Pay-to-Play Loophole*, Politico New Jersey (May 19, 2021) (reporting on "one of many loopholes" in New Jersey's pay-to-play laws) (https://tinyurl.com/y2hbhpku). Although New Jersey imposes limits on such contributions, New Jersey has not subjected government contractors to an outright ban, as it has done to banks. Moreover, other businesses that are similarly situated to banks, such as mortgage companies and other non-bank participants in the financial services industry, are permitted to contribute, even though there is no evidence distinguishing banks from those similarly situated industries. *See* N.J. Stat. Ann. § 19:34-45 (as applied to banks, statutory ban bars contributions only from a "bank, savings bank, co-operative bank, trust, trustee, savings indemnity [or] safe deposit … company").

Furthermore, notwithstanding the district court's *ipse dixit* suggestion, there is nothing in the "nature" of banking that renders it particularly susceptible to *quid pro quo* corruption in the way that certain other industries, such as lobbying and

government contracting, might be. *Cf.* JA47-48.[8] To the contrary, given New Jersey's extensive history of *quid pro quo* political corruption, it is overwhelmingly likely that the meager showing of historical corruption the district court deemed sufficient to warrant silencing banks, JA39-41, 48, could equally be made for a broad array of other industries within the state.[9] The most recent attorney general of New Jersey admitted as much, opining in 2019 that "[t]o say we have a long and sordid history of corruption in this state would be understating it." *See* Gold, *supra* n.9.

Experience from outside New Jersey further bolsters the point. As noted above, in *Deon*, 960 F.3d at 162-64, this Court recognized that a state's decision to target certain speakers is particularly improper where other states have not deemed it necessary to do so, especially when those other states have not suffered as a

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8 *See also* NJBA Br. 25, 31-32 (explaining that "[t]here is no evidence that bankers are somehow inherently susceptible to *quid pro quo* corruption," and that industry-specific "bans for government contractors and lobbyists," as well gambling entities, "reflect the unique nature of those industries," which is not shared by banks); *id*. at 3, 31-32, 38-39.

9 *See, e.g.*, Michael Gold, *$10,000 in a Coffee Cup: 8 Swept Up in N.J. Political Corruption Cases*, N.Y. Times (Dec. 24, 2019) ("*$10,000 in a Coffee Cup*") (detailing "entrenched small-time corruption" in New Jersey local governments) (https://tinyurl.com/veydf96c); David M. Halbfinger, *44 Charged by U.S. in New Jersey Corruption Sweep*, N.Y. Times (July 23, 2009) (quoting description of New Jersey as an "ethics-free zone" in which politicians routinely accept bribes from real estate developers and others) (https://tinyurl.com/4a4ca7y6).

result. Again, the statute here presents an *a fortiori* case. Thirty-three states permit political contributions from banks, *see supra* n.3, and New Jersey can point to bank-specific *quid pro quo* corruption issues in none of them. Nor has the State even attempted to explain how circumstances in New Jersey might be different, such that those other states' experience would be less instructive than it might initially appear. That dearth of evidence regarding the experience of other states confirms that "the real world that [New Jersey] faces" does not support the discriminatory ban it is seeking to defend. *Id.* at 164. The crux of the district court's opinion—its unsupported statement that banking "by its nature" gives rise to a risk of *quid pro quo* corruption not present in other industries, JA47-48—is precisely the sort of "implicit appeal" to supposed "'common sense' as a surrogate for evidence in support of [a] far-reaching regulatory scheme[,]" which *Deon* held could not satisfy the required "evidence-based inquiry, particularly in light of the approach taken by most other similarly situated states." 960 F.3d at 164.

The district court simply ignored the First Amendment's prohibition on speaker-based discrimination recognized and applied in *McNesby*, reasoning that because *FEC v. Beaumont*, 539 U.S. 146, 154 (2003), validated the federal ban on ***all*** corporate contributions, the supposedly lesser step of a speaker-specific ban must be constitutional. JA53 (quoting *Buckley v. Valeo*, 424 U.S. 1, 105 (1976), and opining that "[a] statute is not invalid under the Constitution because it might

have gone farther than it did"). But *McNesby* rejects precisely that reasoning. Even where a state possesses the "power to regulate political expression," that power "does ***not*** automatically trigger the 'lesser included authority' to ban speech by certain groups." 763 F.3d at 380 (emphasis added).

Thus, even assuming *arguendo* that *Beaumont* could support an across-the-board ban—and, as NJBA explains, it cannot, *see* NJBA Br. 39-43—*Beaumont* has no application to a speaker-discriminatory ban like New Jersey's.[10] In *Beaumont*, the Supreme Court justified a total ban on corporate contributions based primarily on the "special characteristics of the corporate structure," 539 U.S. at 153, 155 (quoting *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 209 (1982)). Even setting aside that *Beaumont*'s continuing validity is doubtful, *see*, *e.g.*, *McNesby*, 763 F.3d at 373 (noting that *Beaumont* was "abrogated" by *Citizens United*), that holding that the "special characteristics" of corporations justified a ban on ***all*** corporate contributions has no relevance to a law like New Jersey's, which specifically singles out banks, banning their political speech while permitting such speech by other, indistinguishable corporations. On ***that*** issue,

10 As NJBA notes, *Beaumont* is also easily distinguished on other grounds, such as that the statute there at issue provided outlets for contributions through corporate-sponsored PACs. 539 U.S. at 149, 152.

McNesby and the many other precedents prohibiting speaker-based bans on speech (and especially political speech) control.[11]

Further, although *amici* agree that *Buckley*, *supra*, remains good law for analyzing the constitutionality of a generally applicable campaign finance regulation, that case expressly recognizes that the state must "demonstrate[] a sufficiently important interest and employ[] means closely drawn to avoid unnecessary abridgment of associational freedoms." 424 U.S. at 25. Here, as explained above, New Jersey's statute is not generally applicable and instead constitutes unjustified speaker-based discrimination that is not closely drawn to meet New Jersey's purported interest in combatting *quid pro quo* corruption. The relevant rules of decision here—that a state cannot enact laws aimed at silencing the political speech of certain groups, *e.g.*, *McCutcheon*, 572 U.S. at 191, and must justify any decision to distinguish among speakers, *e.g.*, *McNesby*, 763 F.3d at 380—are well-established. And neither *Beaumont* nor *Buckley* casts doubt on them. Because New Jersey has failed to justify its decision to target banks while

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11 *See also* Dkt. 82-1 at 31-32 (NJBA argument below that *Beaumont* is inapplicable because New Jersey "fail[ed] to establish that banks present a heightened risk of political corruption" that could warrant regulating them "more strictly than others"); Dkt. 92 at 13-14 (NJBA argument below that, at most, *Beaumont* can validate only "blanket corporate contribution bans" and "bans targeting government contractors, lobbyists, and gambling," because, unlike banks, those "industries are particularly susceptible to an appearance of corruption"); *id.* at 22-23 ("Neither the State nor *amicus* cites any case in which a court relied on *Beaumont* to uphold an industry contribution ban.").

leaving other, similarly situated industries unregulated, and because that decision was made for an improper purpose, the statute is invalid, and the district court's decision with respect to Count Two of the complaint should be reversed.

CONCLUSION

For the foregoing reasons and those in the NJBA's brief, the Court should reverse the judgment with respect to Count Two.

Respectfully submitted,

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November 24, 2021

CERTIFICATE OF BAR MEMBERSHIP

Pursuant to Third Circuit Local Appellate Rule 46.1, I, Jonathan S. Franklin, hereby certify that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

/s/ Jonathan S. Franklin
Jonathan S. Franklin

November 24, 2021

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) and Fed. R. App. P. 29(a)(5).

1. In compliance with Fed. R. App. P. 32(a)(5) & (6) and Fed. R. App. P. 29(a)(5), the brief has been prepared in proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman font.
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I also certify that, pursuant to Fed. R. App. P. 25(a)(2)(B), Third Circuit Local Appellate Rules 30.1(b), 31.1, and 113.1(a), and this Court's Order dated April 29, 2013, seven copies of this document are being dispatched to the Clerk's

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/s/ Jonathan S. Franklin
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November 24, 2021

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I hereby certify that on this 24th day of November, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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