No. 13-407

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

Reply Brief

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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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Reasons to Grant Certiorari

In its Petition ("Pet."), IRTL provided a substantive analysis of the constitutional flaws of Iowa's corporate-contribution ban[1] and why this case meets the criteria for certiorari review. *See* Sup. Ct. R. 10(a), (c).

Respondents ("Iowa") provide little substantive response. However, Iowa does (1) obfuscate the Questions Presented, (2) recite irrelevant procedural and legislative history, and (3) rely on rhetorical flourishes. These latter three are addressed first.

(1) IRTL stated the Questions Presented concisely, neutrally, and in the proper order for consideration. Pet. i. But Iowa reverses the order and asserts that the ban "does not explicitly ban union contributions," Opposition ("Opp'n") i, implying that Iowa's corporate-contribution ban *implicitly* bans union contributions. It does not. Iowa admits that "Iowa Code section 68A.503 does not ban union contributions," Opp'n 8, but notes that Iowa Code 20.26 bans contributions by public-employee unions, Opp'n 8. Section 20.26 does not fix the corporate-contribution ban's equal-protection problem as to *other* unions. And 20.26 does not fix the problem that corporations and business entities listed in the ban (68A.503) are treated differently from non-listed business entities, such as general partnerships. *See* Pet. 15 n.11, 35. Also, restriction of political activities of *public employees* is based on interests not involved in deciding the constitutionality of 68A.503. *Cf.* 5 U.S.C. §§ 7321-7326 (Hatch Act, limiting federal em-

[1] *See* Pet. 2 n.1 regarding use of "corporate-contribution ban" (Iowa Code 68A.503 also bans contributions by listed business entities).

ployees' political activities). So Iowa still imposes disparate treatment that Iowa must justify under equal-protection analysis.

(2) Iowa says there were other claims below, Opp'n 2-3, which is irrelevant to the two questions presented. It says Iowa quickly responded to *Citizens United v. FEC*, 558 U.S. 310 (2010), by making statutory changes, Opp'n 2, which is irrelevant to whether those changes are constitutional. Iowa says corporate contributions have been banned for some time, Opp'n 3, but the length of time a law has been in effect does not make it constitutional. *See, e.g.*, *Citizens United*, 558 U.S. at 365 (overruling *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990)); *Brown v. Board of Education*, 347 U.S. 483 (1954) (rejecting longstanding separate-but-equal doctrine). Moreover, in reciting *Buckley*'s well-known contribution/expenditure distinction, Opp'n 4 (citing *Buckley v. Valeo*, 424 U.S. 1, 20 (1976)), Iowa needed to explain why *Citizens United* does not *change* the constitutional analysis.

(3) Iowa's argument by rhetorical flourish is seen, e.g., in "end-run" and "boot-strap," Opp'n 3, and in "attempt to bolster," "manufactures," and "engages in legal gymnastics," Opp'n 4. Iowa also declares IRTL's "failure," Opp'n 6, without proving that IRTL's argument "failed," Opp'n 4,7. It is one thing to assign labels. It is another thing to assert the law.

We now turn to Iowa's more substantive assertions, following the Petition's outline.

I.

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

IRTL said that the *equal-protection* "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." Pet. 5. (The *First Amendment* question addresses whether Iowa may ban *both* corporate and union contributions, but this case could be decided on the equal-protection question without reaching the First Amendment question.)

Iowa responds that "[i]f the constitutional infirmity in Iowa law can be ameliorated simply by [banning union contributions], no important federal question exists." Opp'n 8. Iowa thus asserts that if it had enacted a law that does not violate equal protection—instead of this one that does—there would be no equal-protection question. But constitutional challenges deal with the law that *exists*, not a law a state *might* have enacted.

So the truth remains that "[t]his is an important federal question, involving infringement of the highly protected constitutional right to engage equally in core political activity." Pet. 5.

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

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

IRTL explained how the Eighth Circuit's decision in *IRTL* (App. 1a) conflicts with the Eighth Circuit's en banc decision in *Minnesota Citizens Concerned for Life v. Swanson*, 692 F.3d 864 (8th Cir. 2012) ("*MCCL*"). Pet. 5-7.

Specifically, *MCCL* held that *Austin*, 494 U.S. 652, does *not* control an equal-protection challenge to a ban on corporate (but not union) contributions. Pet. 6 (citing *MCCL*, 692 F.3d at 879-80 ("This does not mean . . . *Austin* controls . . . ."). But *IRTL* held that *Austin does* control. Pet. 6 (citing App. 45a).

In trying to prove that *MCCL* and *IRTL* do not conflict, Iowa lists common features of the cases' analyses but *omits* the crucial difference—whether *Austin* controls. Opp'n 5. Iowa also argues that the Eighth Circuit denied en banc rehearing. Opp'n 5. That does not mean there is no conflict over whether *Austin* controls, but it does indicate the need for this Court to grant certiorari and resolve this vital federal question.

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

Iowa does not respond to IRTL's demonstration that *IRTL* conflicts with *Austin*'s equal-protection analysis as modified by *Citizens United*. Pet. 7-9.

In *Citizens United*, this Court underscored a similar failure to defend: "[T]he Government notes the antidistortion rationale on which *Austin* and its progeny rest in part, yet it all but abandons reliance upon it." 558 U.S. at 348. "As for *Austin*'s antidistortion rationale, the Government does little to defend it." *Id.* at 349.

As in *Citizens United*, so here the government's non-defense reveals it has none. Since *Austin*'s equal-protection analysis should control—as modified by rejection of the antidistortion interest on which *Austin* relied—Iowa's non-defense concedes that the lower court did not follow this key decision of the Court.

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

Iowa admits that "*Citizens United* did overturn *Austin*'s antidistortion analysis," Opp'n 5, but provides no legal analysis showing how the corporate-contribution ban survives an equal-protection (or First Amendment) challenge absent the antidistortion interest. Thus, Iowa does not show that *IRTL* (App. 1a) is consistent with this Court's *Citizens United* decision.

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

Iowa does make an effort to show that there is no conflict between *IRTL* and *Dallman v. Ritter*, 225 P.3d 610, 634 (Colo. 2010). Opp'n 5-6. But its two key arguments are flawed.

First, Iowa argues that Colorado's scheme involved a "unique circumstance," so that the "issue" in the two cases is "substantively different." Opp'n 6. But Iowa's more extended description of Colorado's scheme does not alter the bedrock fact that, as IRTL stated it, Colorado "allow[ed] *corporate* PACs, but not *union* PACs, to make political contributions." Pet. 10.[2] Here, unions may contribute, but corporations may not. The situations are materially similar. Iowa's attempt to distin-

[2] This formulation comports with how *Dallman* stated the core fact: "Thus, the fact that a corporation can advocate its views through a PAC . . . while a union cannot represents disparate treatment . . . ." *Dallman*, 225 P.3d at 634 n.41. *Dallman* acknowledged that *Citizens United* held that PACs don't *actually* speak for corporations. *Id.*; *see Citizens United*, 558 U.S. at 337 (holding that a corporation does not "speak" through a PAC).

guish the *Dallman* holding so as to make it inapplicable is akin to the practice—which *Dallman* rejected—of not finding entities similarly situated based on "superficial differences," which would "completely eviscerat[e] the Equal Protection Clause" due to some "facial difference." 225 P.3d at 634.

Second, Iowa recasts *Dallman*'s equal-protection holding as though it turned on whether Colorado's scheme "directly contravened the express purpose of the amendment." Opp'n 6 (citing *Dallman*, 225 P.3d at 635). *Dallman* did say, "While we acknowledge that the *stated purpose* of Amendment 54 is legitimate in other contexts, that governmental interest fails to justify the disparate treatment of labor unions and other types of sole source contractors." 225 P.3d at 635 (emphasis added). But it struck Act 54, not because it was beyond statutory authority (as Iowa's wording implies), but because the "stated purpose"—which it defined as "preventing corruption in contracting," *id.*— did not justify the disparate corporate/union treatment under strict scrutiny in a Fourteenth Amendment equal-protection analysis. *Id.*

Thus, there remains a conflict between *IRTL* and *Dallman*, so certiorari should be granted.[3]

[3] Iowa suggests that, because there are no *other* conflicts, there is no "entrenched national split" warranting review. Opp'n 7. That is not this Court's certiorari-review test, under which the conflict between *IRTL* and *Dallman* and between *IRTL* and this Court's decisions suffice for certiorari review. *See* S. Ct. R. 10.

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

Iowa makes no effort to refute IRTL's argument that strict scrutiny should apply because fundamental constitutional rights are at issue and because the corporate-contribution ban is content based. Pet. 11-15. Nor does Iowa address the conflicts IRTL identifies regarding content-based restrictions and whether available alternatives justify First Amendment burdens. Pet. 11 n.9 (collecting cases).

D. Iowa's Disparate Treatment Is Unjustified.

Though full merits argument awaits merits briefing, Iowa's disparate treatment is unjustified under equal-protection analysis.

Applying *Austin*'s equal-protection analysis establishes that corporations and unions are similarly situated for purposes of wanting to engage in core political activity. Pet. 8-9. *See also Dallman*, 225 P.3d at 634-35 (same). And *IRTL* itself recognized that corporations are similarly situated to *all other organizations* regarding Iowa's requirement of prior board approval of independent expenditures. Pet. 7 n.7 (citing App. 50a-51a) (Iowa does not respond to this argument.).

Though the antidistortion interest sufficed in *Austin* to justify the similar disparate treatment there, Pet. 8, that interest may not be asserted after *Citizens United*. Pet. 8 (citing 558 U.S. at 356-60). Yet Iowa's ban[4] focuses precisely on entities Iowa perceives as

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[4] Iowa Code 68A.503(1) provides:

> Except as provided . . . , an insurance company, savings and loan association, bank, credit union, or cor-

(continued...)

posing a distorting influence on politics, i.e., *corporations* and *business* entities.[5] Thus, Iowa's ban plainly asserts the forbidden antidistortion interest by the terms of the statute. But this antidistortion interest cannot support the ban because it is an impermissible interest for government to assert as to corporations. *Citizens United*, 558 U.S. at 365. And if government may not assert an antidistortion interest as to corporations, then *a fortiori* Iowa may not assert it as to unincorporated businesses.

Is there another justifying interest? Iowa only mentions an anti-corruption interest (once), Opp'n 6, but makes no effort to show how preventing corruption justifies banning contributions by corporations (and other listed business entities), but not by unions (or non-listed business entities, e.g., general partnerships). Nor does Iowa attempt to refute IRTL's observation that this Court's cure for quid-pro-quo corruption is contribution *limits*, not bans. Pet. 17 n.15. No anti-circumvention interest may be asserted because Iowa has

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[4] (...continued)
poration shall not make a monetary or in-kind contribution to a candidate or committee except for a ballot issue committee.

[5] *Citizens United* defined the antidistortion interest as follows: "*Austin* sought to defend the antidistortion rationale as a means to prevent corporations from obtaining an unfair advantage in the political marketplace by using resources amassed in the economic marketplace." 558 U.S. at 350 (citations and internal quotation marks omitted). This definition omits the idea that the market success is based on the corporate form, indicating that any antidistortion interest based on *market success* is forbidden, regardless of whether the business entity is incorporated.

no contribution limits to circumvent. Pet. 22-23, 34 n.31. And *Citizens United* rejected an anti-corruption interest framed as gratitude, influence, and access, along with any shareholder-protection interest. 558 U.S. at 359-62. So Iowa does not, and *can* not, show an interest to justify its disparate treatment, let alone show that a broad anti-business ban is properly *tailored* to some arguable interest.

Iowa concludes with two arguments under a heading pronouncing its ban "[o]therwise [u]nique."

First, Iowa says that what Petitioners call the "corporate-contribution ban" "is not triggered on the corporate identity alone." Opp'n 7. That does not help Iowa. It hurts Iowa's defense. From the beginning, IRTL has made clear that "corporate-contribution ban" is used as a term of art (for ease of discussion) "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." Pet. 2 n.1. *See also* Pet. 15 n.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."). Iowa's argument, that a business-entity ban (plainly based on the rejected antidistortion interest) is permissible because it sweeps beyond corporate businesses, cannot save the ban.

Second, Iowa suggests IRTL has not shown a "significant national impact," so there is no "compelling *federal* question." Opp'n 7. IRTL had no duty in a certiorari petition to provide citations for jurisdictions

banning corporate contributions to prove a "federal question." Such a list might be compiled by an amicus in merits briefing, but the test for "federal question" does not turn on list creation. *See* Sup. Ct. R. 10. It is sufficient to note that IRTL showed that federal law also bans corporate contributions, Pet. 17 (citing 2 U.S.C. 441b(a)), and that issues turning on First and Fourteenth Amendment rights regarding core political activity are inherently important federal questions.

In sum, certiorari should be granted on Question 1.

II.

Banning Corporate Political Contributions Violates the First Amendment.

Because Iowa focuses on the equal-protection question, it practically ignores the First Amendment question. So only a minimal reply is needed.

Iowa's briefing on this question is comprised of two elements.

First, it simply makes passing references to *FEC v. Beaumont*, 539 U.S. 146 (2003), without offering a constitutional analysis of *Beaumont*'s relation to *Citizens United*, 558 U.S. 310. Opp'n 3, 5. This is addressed further below.

Second, Iowa argues generally that (a) Iowa's law (68A.503) also bans *other* business entities and (b) IRTL didn't list the many other jurisdictions banning corporate contributions. Opp'n 7. These general arguments have already been addressed. *See supra* at 9-10.

A. *Beaumont* Does Not Control this Case.

IRTL explained why *Beaumont*, 539 U.S. 146, does not control this case under *Agostini v. Felton*, 521 U.S. 203, 237 (1997). Pet. 17-18. Iowa makes no response.

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

IRTL noted that *MCCL* said that *Citizens United* "casts doubt on *Beaumont*, leaving its precedential value on shaky ground," *MCCL,* 692 F.3d at 879 n.12, and that *IRTL* echoed that quote. Pet. 19 (citing App. 42a). But *IRTL* said it was up to this Court to overrule its own precedent. App. 42a.

Iowa makes no response to the "shaky ground" statements, declining to address the implications of *Citizens United* in its Opposition.

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

IRTL showed specifically how *Citizens United* undercuts *Beaumont*, which should be overruled (if indeed it has any bearing here, *see supra* II.A). Pet. 19-26. Iowa makes no response.

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

IRTL argued that the expenditure/contribution scrutiny dichotomy in *Buckley*, 424 U.S. 1, should be overruled. Pet. 26-29.[6] Iowa makes no response.

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[6] *See* Pet. 27 & nn. 25, 25 (citing briefing in *McCutcheon v. FEC* (No. 12-536), now before this Court after oral argument on October 8, 2013).

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

IRTL provided an extensive constitutional analysis, explaining why the corporate-contribution ban violates the First Amendment. Pet. 29-35. Iowa offers no defense, other than to ask the Court not to accept this case for reasons stated and answered elsewhere.

For example, IRTL explained the constitutional significance of *Citizens United*'s holding that a PAC does *not* allow a corporation to speak and associate, though *Beaumont* relied heavily on the notion that a PAC *does* speak and associate for a corporation. Pet. 29. IRTL argued that Iowa's choice to *ban*, rather than *limit*, corporate (and other business) contributions is constitutionally significant, as to both the scrutiny level and *Buckley*'s analysis of the burden imposed by a contribution limit. Pet. 29-32. IRTL cited recent precedents establishing that First Amendment burdens are not justified by the availability of other options. Pet. 32-33. IRTL noted the strong constitutional protection for pooling resources with candidates and other supporters, which is what contributions allow. Pet. 33. IRTL showed that Iowa's corporate-contribution ban fails under either exacting or strict scrutiny due to absent interests and inadequate tailoring. Pet. 33-35.

Iowa makes no response.

In sum, certiorari should be granted on Question 2.

Conclusion

IRTL, a small, issue-advocacy, nonprofit corporation, wanted to contribute $100 to a candidate. Iowa's corporate-contribution ban prevented the contribution.

Iowa bans contributions by corporations and businesses, but not unions.

Iowa does not, *can* not, justify its disparate treatment. This Court should accept and decide this case on equal-protection grounds.

Iowa does not, *can* not, justify its ban on First Amendment grounds in light of this Court's rejection of the antidistortion interest in *Citizens United* and the lack of other interests (or any proper tailoring). This Court should also accept and decide this case on First Amendment grounds.

Both Questions Presented raise important federal questions that were decided below in a way that conflicts with decisions of this Court and with a state supreme Court. The Court should grant certiorari.

Respectfully submitted,

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