ORAL ARGUMENT NOT YET SCHEDULED

Case No. 12-5379

In the United States Court of Appeals For the District of Columbia Circuit

ERIK AUTOR, ET AL.,

Appellants,

v.

CAMERON F. KERRY, ET AL.,

Appellees.

On Appeal from the U.S. District Court
for the District of Columbia
Case No. 1:11-cv-01593-ABJ (Jackson, J.)

REPLY BRIEF FOR APPELLANTS (CORRECTED)

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SUMMARY OF ARGUMENT

A. The government is incorrect in contending that this case is governed by the understanding, stated in *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), that the First Amendment does not require policymakers to listen to individual views on matters of policy. The claim here is *not* that plaintiffs have a constitutional right to participate in government policymaking (or, for that matter, to serve on an ITAC); it is that plaintiffs may not be denied the benefit of ITAC service as punishment for having exercised their constitutional right to petition the government. This case accordingly is governed by the principle that, even though an individual may have no constitutional right to receive a government benefit in the first instance, the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

The government's related arguments are equally defective. Although the government observes that ITAC members serve as government advisers, the President may no more use unconstitutional criteria in staffing advisory commissions than he may in hiring line

employees at the Department of Commerce. And the government has failed even to attempt to make a serious showing that the exclusion of registered lobbyists from ITACs relates "to the purposes and efficacy of the ITACs as advisers to the federal government" on the theory that registered lobbyists are more "actively engaged in the political and administrative process" than are non-lobbyists. Gov't Br. 16-17. Given that ITAC members are designated by their respective industries and serve in a representative capacity to present private-sector views to the government, this rationale for excluding registered lobbyists from ITACs is, we respectfully submit, barely intelligible.

B. The government makes no attempt to refute our showing that ITAC membership is a desirable government benefit of the sort that triggers application of the unconstitutional conditions doctrine. And its invocation of *Lyng v. International Union*, 485 U.S. 360 (1988), in support of its contention that the denial of eligibility for ITAC membership is not "coercive," is insupportable. *Lyng* applied a special rule regarding denial of government monetary subsidies that has no application here. Even if that were not so, the government's "lack-of-coercion" argument could have no bearing where, as here, plaintiffs

have been penalized for engaging in constitutionally protected activity. And coming on a motion to dismiss, the government's argument is, in any event, premature; *Lyng* was decided on summary judgment after discovery, and the Supreme Court relied for its holding on the factual record in the case. Here, the only relevant allegation in the complaint is that individuals *have* been coerced into deregistering as lobbyists by the Lobbying Ban.

C. The Lobbying Ban is not saved by the availability of alternative venues for petitioning activity. That plaintiffs may seek to advance their clients' interests in ways other than ITAC membership is no answer to their demonstration that they have been denied a desirable government benefit because they exercised their constitutional right—and that is especially so because ITAC membership offers an especially effective way to affect government policy.

D. The government offers no answer at all to our equal protection argument. For the reasons we have demonstrated, the Lobbying Ban burdens plaintiffs' First Amendment rights; the distinctions drawn by the ban therefore must be subjected to heightened scrutiny. But the government does not, and could not, suggest that the exceedingly

imprecise classifications established by the ban survive such scrutiny. The decision below therefore should be reversed.

ARGUMENT

The government's brief is notable for what it does not say. For one thing, it makes no attempt at all to defend most of the district court's reasoning. As we showed in our opening brief, the district court premised its holding, in large part, on its view that ITAC membership is not a "valuable government benefit" within the meaning of the unconstitutional conditions doctrine; that lobbying involves the right of petition rather than of speech; that the Lobbying Ban does not discriminate on the basis of content; and that ITAC membership can be equated with a government subsidy. *See* Opening Br. 11-12. The government, however, does not defend the Lobbying Ban on *any* of these grounds. This attempt to reboot the case at the appellate level suggests, at a minimum, that the government's current position should be viewed with considerable skepticism.

For another, the government does not take issue with many of the central points advanced in our opening brief. It does not contest our characterization of the unconstitutional conditions doctrine. *See*

Opening Br. 17-19. It does not deny that ITAC membership in fact *does* provide valuable benefits within the meaning of that doctrine. *See id.* at 19-26. It evidently recognizes that plaintiffs have been denied those benefits simply because they engage in constitutionally protected petitioning activity of a specified type and amount. And it does not suggest that plaintiffs could structure their activities so as to remain eligible for ITAC membership while continuing to engage in the same level of constitutionally protected lobbying.

Against this background, the little that the government does say cannot save the Lobbying Ban as it is applied to ITAC membership, for the reasons we explain below.

A. This Case Is Not Governed By *Knight*.

1. The government's principle defense of the Lobbying Ban is its assertion, based on *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), that "'[n]othing in the First Amendment * * * suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals' communications on public issues.'" Gov't Br. 12 (quoting *Knight*, 465 U.S. at 285 (ellipses inserted by the government)). Thus, the

government continues, "[t]he First Amendment does not impede the 'government's freedom to choose its advisers'" (*id*. at 13 (quoting *Knight*, 465 U.S. at 288)), and "'[t]o recognize a constitutional right to participate directly in government policymaking would work a revolution in existing government practices.'" *Id*. at 15 (quoting *Knight*, 465 U.S. at 284).

All of this is doubtless true. But as we showed in some detail in our opening brief (at 36-39), it also is wholly beside the point here. *Knight* did not involve application of the unconstitutional conditions doctrine, which was neither advanced by the parties nor addressed by the Court in that case. Instead, as the Court made painfully and repetitively clear in *Knight*, the plaintiffs' "principal claim [in that case was] that they ha[d] a right to force officers of the state acting in an official policymaking capacity to listen to them in a particular formal setting." 465 U.S. at 282. *See* Opening Br. 37-38 & n.12. The Court in *Knight* rejected that claim because the plaintiffs had "no constitutional right * * * to a government audience for their policy views" and "no special constitutional right to a voice in the making of policy by their government employer." 465 U.S. at 286.

Knight's holding, however, has no application to the claims in *this* case. Here, as we have explained, plaintiffs do not (in the government's words) assert an affirmative "constitutional right to participate directly in government policymaking," as did the *Knight* plaintiffs; our very different argument is that plaintiffs here may not be denied the benefit of serving on an ITAC as punishment for having exercised a constitutional right. *See* Opening Br. 38-39.

It would seem obvious that these claims are very different in character. Individuals generally have no constitutional right to government employment, or to receive government benefits, or to participate in myriad government programs; but it is fundamental that, "even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). No one has a constitutional right to a government job, but the government may not "condition public employment on a basis that infringes the employee's constitutionally

protected interest in freedom of expression." *Connick v. Myers*, 461 U.S. 138, 142 (1983).

That principle governs here. We assume the government would agree that, even though no one has a free-floating constitutional right to a government audience for his or her policy views, the government could not categorically exclude individuals from ITAC service (or from any government board or advisory committee) because they are Jewish, or Latino, or voted in the last federal election—or engaged in any specified constitutionally protected activity. That is the doctrine that underlies the claim in this case. Although we made this point in our opening brief (at 36-38), the government makes no response at all.

2. The closest the government comes to grappling with this issue is its brief observation that the Supreme Court rejected the claim that the challenged policy in *Knight* infringed associational rights, a claim that the government regards as analogous to the one in this case. Gov't Br. 15. But we explained in our opening brief (at 39-40) why that is not so.

Knight involved a state law that required state officials to "meet and confer" with representatives of public employee unions; public

employees who wanted to "meet and confer" with state officials but who were not union members challenged the law on the ground (as we have explained) that they had a First Amendment right to participate in "meet-and-confer" audiences with state policymakers. 465 U.S. at 274-75. In the course of rejecting that argument, the Court noted that the state rule did not unconstitutionally pressure the *Knight* plaintiffs to surrender their associational rights by joining the union so that they could join the "meet and confer" audience. The Court explained that the plaintiffs "may well feel some pressure to join the exclusive representative in order to give them the opportunity to serve on the 'meet and confer' committees or to give them a voice in the representative's adoption of positions on particular issues. * * * [But] the pressure is no different from the pressure to join a majority party that persons in the minority always feel. Such pressure is inherent in our system of government." *Id.* at 289-90.

That claim, however, was quite different from the one in this case. In *Knight*, the State wanted to hear from the public-employee union, and the State did not violate the associational rights of non-union employees because the *union* chose only its members to meet and confer

with state policymakers. Here, the United States wants to hear from various private-sector industries through the ITACs (as the State wanted to hear from the union in *Knight*), and ITAC membership must be sponsored by private industry (as, in *Knight*, participants on meet-and-confer committees were selected by the union); as we explained in our opening brief (at 40), a claim parallel to the one rejected in *Knight* therefore would be one by an individual who wants to serve on an ITAC but cannot find sponsorship by an industry group. Such a claim, like the one in *Knight*, would be a challenge to the government's decision to seek advice from only a limited number of people—and would *not* be, like the one here, that a person was excluded *by the government* from participation in a government program *because* that person exercised his or her constitutional rights. *Knight* thus simply did not involve the consideration that is crucial in this case. We made this observation in our opening brief, but the government offers no reply.

3. Although the government's position is in some respects obscure, it may mean to contend that there are no constitutional limits on its ability to select its advisers. Gov't Br. 13-14. If that is the government's contention, it is incorrect. No doubt, the President has

near absolute discretion in the selection of principal Officers of the United States and of his immediate staff. *See, e.g.*, *Edmond v. United States*, 520 U.S. 651, 659 (1997); *Morrison v. Olson*, 487 U.S. 654, 670, 690 (1988); *Buckley v. Valeo*, 424 U.S. 1, 132 (1976). But it would seem obvious that the selection of more than 300 ITAC members, as well as the members of other boards, commissions, and committees across the Executive Branch, is of a very different nature. *See Morrison*, 487 U.S. at 690 & n.29; *cf. In re Sealed Case*, 121 F.3d 729, 752 (D.C. Cir. 1997) ("Not every person who plays a role in the development of presidential advice, no matter how remote and removed from the President, can qualify for the [presidential communications] privilege. In particular, the privilege should not extend to staff outside the White House in executive branch agencies.").

ITACs were created specifically to offer a mechanism for the private sector to express *its* views on specified matters to executive branch decision-makers; objective qualifications have been established for ITAC service (*see* Int'l Trade Admin., Industry Trade Advisory Center, *Become An Advisor*, *available at* http://www.ita.doc.gov/itac/become-an-advisor.asp); and individuals are

sponsored for ITAC membership in the first instance by private-sector organizations (*see id.* ("[E]ach member must also serve, directly or indirectly, as the representative of a U.S. entity that trades internationally and is engaged in the manufacture of a product or the provision of a service (including retailing and other distribution services), or an association of such entities. This entity will generally be the member's employer or company, but may also be his or her client.")). In such circumstances, the President may no more impose unconstitutional conditions on the selection of ITAC members than he may on the hiring of line staffers at the Department of Commerce. The government offers no reasoned argument to the contrary.

4. Finally, the government may be trying to suggest, in a backhanded way, that the Lobbying Ban is defensible under the doctrine of *Pickering v. Board of Education*, 391 U.S. 563 (1968), because "the decision to exclude registered lobbyists from ITAC membership directly relates to the purposes and efficacy of ITACs as advisers to the federal government." Gov't Br. 16. The government did not make such an argument below and advances it here, if at all, only in

elliptical and abbreviated form. But if this is the government's position, it is insubstantial.

The government's *only* explanation for why it is permissible to exclude registered lobbyists from ITACs is that "[i]t is entirely reasonable to structure the ITACs to enable the government to listen to individuals who have experience in the industry but who are not registered lobbyists, and thus are not as actively engaged in the political and administrative process." Gov't Br. 16-17. Given that ITAC members are designated by their respective industries and serve in a representative capacity to "'present[] the views and interests of a U.S. entity or U.S. organization and its subsector in their respective industry sectors'" (Gov't Br. 4 (quoting JA 31)), this rationale is, we respectfully submit, barely intelligible.

And it surely does not satisfy the requirements of the *Pickering* doctrine. *Pickering* "requires a case-by-case assessment of the government's and the [employee or] contractor's interests." *Bd. of Cnty. Comm'rs, Wabaunsee Cnty., Kan. v. Umbehr,* 518 U.S. 668, 702 (1996) (Scalia, J., dissenting). But the Lobbying Ban is a broad, generally applicable rule, and "the sweep of [this rule] makes the Government's

burden [to justify it] heavy." *See United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 466, 468 (1995) ("The widespread impact of the honoraria ban, however, gives rise to far more serious concerns than could any single supervisory decision. In addition, unlike an adverse action taken in response to actual speech, this ban chills potential speech before it happens. For these reasons, the Government's burden is greater with respect to this statutory restriction on expression than with respect to an isolated disciplinary action." (internal citations omitted)); *see also Weaver v. U.S. Info. Agency*, 87 F.3d 1429, 1439 (D.C. Cir. 1996) ("Where a restraint is accomplished through a generally applicable statute or regulation, as opposed to a particularized disciplinary action, we must also make sure that the regulation's sweep is 'reasonably necessary to protect the efficiency of the public service.'").

That burden is not satisfied here. The government's blanket rule plainly is not tailored to the interest it seeks to address, if it relates to that interest at all. The government thus very notably makes no attempt to explain *how* it enhances the "efficacy of ITACs as advisers to the federal government" by excluding from their membership persons who have experience expressing the views of industry to government

officials (*i.e.*, lobbyists)—when the whole point of the ITAC *is* to express the views of industry to government officials. This is surely not a situation where "the government's interest in efficient and effective operation" (Gov't Br. 16) justifies the burden it seeks to impose on First Amendment rights.

B. The Lobbying Ban Is An Unconstitutional Condition.

Beyond its invocation of *Knight*, the government makes no attempt to engage the affirmative arguments that we advance in our opening brief. Thus, although the government ticks off immaterial distinctions between the decisions cited in that brief and this case (Gov't Br. 16), it does not deny that ITAC membership qualifies as the sort of benefit that triggers application of the unconstitutional conditions doctrine. *See* Opening Br. 19-25.[1]

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[1] The government notes that the restriction imposed in *Cuffley v. Mickes*, 208 F.3d 702 (8th Cir. 2000), involved viewpoint discrimination. But as we explained in our opening brief (at 25 n.9), the Eighth Circuit did not hinge (and, under controlling Supreme Court authority, could not have hinged) application of the unconstitutional conditions doctrine on that consideration. The government makes no response. The government also observes that the Ninth Circuit in *Hyland v. Wonder*, 972 F.2d 1129 (9th Cir. 1992), applied the *Pickering* test to the termination of a volunteer position. That is correct, but proves our point: the Ninth Circuit applied *Pickering because* that court held, as a

Invoking *Lyng v. International Union*, 485 U.S. 360 (1988), the government does contend that denial of ITAC membership "could not, in any event, be thought to constitute significant pressure to give up one's status as a paid registered lobbyist." Gov't Br. 17. But the government's reliance on *Lyng* fails, for two reasons.

First, *Lyng*—which involved a challenge to a rule denying food stamp assistance to striking workers—turned on what the Supreme Court regarded as the unique character of monetary benefits. Relying on its prior decision in *Regan v. Taxation With Representation of Washington,* 461 U.S. 540 (1983), the Supreme Court reasoned that "this Court has explicitly stated that even where the Constitution prohibits coercive governmental interference with specific individual rights, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom." *Lyng*, 485 U.S. at 369 (internal quotation marks omitted). *See id*. at 368. Accordingly, the Court emphasized that "our review of distinctions that Congress draws in order to make allocations from a finite pool of resources must

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threshold matter, that the unconstitutional conditions doctrine applies to the deprivation of volunteer positions. *See id*. at 1134.

be deferential, for the discretion about how best to spend money to improve the general welfare is lodged in Congress rather than the courts." *Id.* at 373.[2] We explained in our opening brief (at 33) why this subsidy rationale has no application in this case; the government makes no reply.[3]

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[2] The Court has long held that special rules apply to government subsidies in the First Amendment context (as well as in other rights contexts): "It is hardly lack of due process for the Government to regulate that which it subsidizes." *Wickard v. Filburn*, 317 U.S. 111, 131 (1942). *See also Regan*, 461 U.S. at 546 ("We again reject the 'notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State.'" (quoting *Cammarano v. United States*, 358 U.S. 498, 515 (1959) (Douglas, J., concurring))); *DKT Mem'l Fund Ltd. v. Agency for Int'l Dev.*, 887 F.2d 275, 293 (D.C. Cir. 1989) ("[A] whole line of Supreme Court cases teaches us that the refusal to subsidize the exercise of a constitutionally protected right is not tantamount to an infringement of that right."). This is at least partly because "Constitutional concerns are greatest when the State attempts to impose its will by force of law; the State's power to encourage actions deemed to be in the public interest is necessarily far broader." *Maher v. Roe*, 432 U.S. 464, 476 (1977). Even so, the government's power to condition distribution of subsidies is not unlimited. "[E]ven in the provision of subsidies, the Government may not ai[m] at the suppression of dangerous ideas, and if a subsidy were 'manipulated' to have a 'coercive effect,' then relief could be appropriate." *Nat'l Endowment for Arts v. Finley*, 524 U.S. 569, 587 (1998) (internal citations omitted).

[3] The district court relied principally on *Regan* and not on *Lyng* (*see* JA 69, 86-87, 89), and the government's argument below relied heavily on *Regan* (*see* JA 108-110, 112, 145-146). Before this Court, however, the

Second, the government's contention that ineligibility for appointment to an ITAC could not "be thought to constitute significant pressure to give up one's status as a paid registered lobbyist" (Gov't Br. 17) is, in any event, both immaterial and one that plainly cannot prevail at the motion-to-dismiss stage of the litigation. It is immaterial because, even if the government's factual contention about the coercive effect of the Lobbying Ban were correct, the undeniable fact is that plaintiffs here *have been penalized* for engaging in constitutionally protected petitioning activity; they have been "den[ied a benefit] * * * on a basis that infringes [their] constitutionally protected interests." *Perry*, 408 U.S. at 597.

And if the coercion argument ever could have legal merit, it is premature here because it requires factual development. *Lyng* itself, the foundation for the government's argument, was decided on summary judgment after discovery (*see* 485 U.S. at 363-64), and the Court relied for its holding on the factual record in the case (*see id*. at 365 n.3, 367 n.5). Here, the government's factual contention is, on its face, dubious: a

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government has entirely abandoned its reliance on *Regan*, which is not cited in its brief.

great many individuals have in fact been coerced into deregistering as lobbyists in response to the Lobbying Ban. *See* Opening Br. 9. The government's motion to dismiss cannot be granted on this record.

C. The Lobbying Ban Is Not Saved By The Availability Of Alternative Venues For Petitioning Activity.

The government gets no further with its observation that plaintiffs "remain free to present their clients' views on issues of trade policy in a variety of alternative settings" and that "their clients remain free to petition the government in any manner they wish." Gov't Br. 18. Although plaintiffs petition on behalf of their clients, we showed in our opening brief (at 20-21 n.6)—and the government does not deny—that the First Amendment right they assert here is their own: "a speaker is no less a speaker because he or she is paid to speak." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 801 (1988). That plaintiffs may advance their clients' interest in other ways after they have been excluded from ITAC membership therefore is no answer to their demonstration that they are being improperly denied a desirable government benefit because they exercised their constitutional rights.

Moreover, there can be no doubt that participation on an ITAC offers an especially effective way to affect government policy. In such

circumstances, plaintiffs' right to communicate with government officials *outside* the ITAC setting "does not ameliorate significantly the disabilities imposed by the President's action. [The Court is] not free to disregard the practical realities." *Healy v. James*, 408 U.S. 169, 183 (1972). Because the Lobbying Ban attaches adverse consequences to the exercise of constitutionally protected rights, the government's motion to dismiss the complaint should have been denied.

D. The Lobbying Ban Violates Equal Protection Principles.

Finally, the government has virtually nothing to say about the equal protection question in the case. Here, too, the government does not defend the district court's rationale. The district court reasoned that the Lobbying Ban draws distinctions based not on petitioning activity but on status as a registered lobbyist. *See* JA 89. We explained in our opening brief (at 41) why that holding is insupportable—after all, the requirement to register as a lobbyist is triggered by engaging in lobbying activity of a specified type and amount—and the government has now abandoned it.

Instead, all the government has to say on the subject is the conclusory assertion that the Lobbying Ban "is fully consistent with the

First Amendment" and therefore has no impact on the exercise of fundamental rights. Gov't Br. 20. We already have explained why that contention is incorrect. Because the distinctions drawn by the ban *do* burden fundamental rights, heightened scrutiny is warranted. Yet the government fails even to suggest that the Lobbying Ban can survive such review. For this reason as well, the decision below should be reversed.

CONCLUSION

The district court's order dismissing plaintiffs' complaint for failure to state a claim should be reversed.

Respectfully submitted,

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June 20, 2013

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 32(a)(7)(B) because it contains 4222 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirement of Rule 32(a)(6) because it was been prepared in a proportionately spaced typeface using Microsoft Word 2007 in Century Schoolbook 14-point type for text and footnotes.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on June 20, 2013, I filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system and by causing an original and eight copies to be delivered to the Clerk's office. I further certify that two copies were sent via overnight delivery to the following counsel:

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