No. 18-149

In the
Supreme Court of the United States

DOUG LAIR, *ET AL.*,
PETITIONERS,
V.
JEFF MANGAN, *ET AL.*,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Brief of the Public Policy Legal Institute As *Amicus Curiae* Supporting Petitioner

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QUESTIONS PRESENTED

The Questions Presented in the Petition are:

Montana law imposes two types of candidate campaign contribution limits per election, which are among the lowest in the Nation. The *Base Limits* restrict individual or political committee candidate contributions to the following: governor and lieutenant governor ($680), other statewide office ($340), and all other candidates ($180), and the *Aggregate Limits* restrict candidate contributions from all political party entities in aggregate to the following: governor and lieutenant governor ($24,500), other statewide office ($8,850), public service commission ($3,550), senate ($1,450), and all other candidates ($900).

Petitioners present two questions:

1. Whether Montana's base candidate contribution limits on individual and political committees are unconstitutional under the First Amendment.

2. Whether Montana's aggregate candidate contribution limits from all political party entities are unconstitutional under the First Amendment.

Amicus curiae Public Policy Legal Institute believes that the Questions fairly include the question of whether an "appearance of corruption" based solely on public opinion can justify the limit on campaign contributions.

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STATEMENT OF INTEREST

Amicus curiae Public Policy Legal Institute ("PPLI") is a national non-profit educational organization dedicated to protecting the right of Americans to advocate for and against public policies.[1] PUBLIC POLICY LEGAL INSTITUTE, https://publicpolicylegal.com/about/ (last visited Aug. 9, 2018). PPLI seeks, *inter alia,* to protect First Amendment rights of free speech and association in election campaigns and other advocacy. PPLI agrees with the Petition, but writes separately to highlight the specific issue of whether an "appearance of corruption" can be found absent some evidence of actual *quid pro quo* corruption.

PRELIMINARY STATEMENT

For more than forty years, this Court has struggled with the constitutionality of limits on contributions to election campaigns and political parties.[2] In 1974, this Court determined that

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[1] Pursuant to Rule 37.2, *amicus* certifies that counsel of record for all parties received notice of its intention to file this brief more than ten days prior to its due date, and that counsel of record for all parties have consented to the filing of this brief. Pursuant to Rule 37.6, *amicus* certifies that no counsel for a party authored this brief in whole or in part, and no such counsel, party or person other than the *amicus* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] *McCutcheon v. Fed. Election Comm'n.*, 572 U.S. __, 134 S. Ct. 1434, 1461 (2014):

> For the past 40 years, our campaign finance jurisprudence has focused on the need to preserve authority for the Government to combat corruption, without at the same time compromising the political

contribution limits were a permissible restriction on First Amendment-protected rights.[3] Today, contribution limits are obsolete, ineffective, counter-productive and irrational. There is a simple and widely-accepted alternative: disclosure.[4]

Contribution limits have not prevented corruption or the appearance of corruption. For example, only five years after Arizona enacted contribution limits, it suffered "Azscam," one of the worst *quid pro quo* corruption scandals in American history.[5] Similarly, Mexico's prohibition on private campaign contributions (that is, a contribution limit of zero) does not seem to have eliminated *quid pro quo* corruption either.[6]

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responsiveness at the heart of the democratic process, or allowing the Government to favor some participants in that process over others.

[3] *Buckley v. Valeo*, 424 U.S. 1 (1976).

[4] *McCutcheon*, 134 S.Ct. at 1460:

> In 1976, the Court observed that Congress could regard disclosure as "only a partial measure." *Buckley*, 424 U. S., at 28. That perception was understandable in a world in which information about campaign contributions was filed at FEC offices and was therefore virtually inaccessible to the average member of the public. … Because massive quantities of information can be accessed at the click of a mouse, disclosure is effective to a degree not possible at the time *Buckley*, or even *McConnell*, was decided.

[5] *Ariz. Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 761 (2011) (Kagan, dissenting) ("In that scandal, known as "AzScam," nearly 10% of the State's legislators were caught accepting campaign contributions or bribes in exchange for supporting a piece of legislation.")

[6] Christopher Sherman, *Mexican electoral campaign flush with illegal funding*, ASSOCIATED PRESS NEWS (May 29,

Nor have contribution limits diminished the public's concern about "corruption": "In a rare show of unity, Americans, regardless of their political affiliation, agree that money has too much influence on elections, the wealthy have more influence on elections, and candidates who win office promote policies that help their donors."[7]

Contribution limits have also not leveled the playing field in elections. Today, for the first time, most Members of Congress are millionaires.[8] Donald Trump's success at parlaying minor celebrity status, "Big Data" precision targeting, and social media wizardry has many major celebrities considering public office.[9]

2018), https://www.apnews.com/ecc35f7943794330b763a81776ea64c7.

[7] THE NEW YORK TIMES/CBS NEWS POLL, *Americans' Views on Money in Politics* (June 2, 2015), https://www.nytimes.com/interactive/2015/06/02/us/politics/money-in-politics-poll.html. 84% of Americans believe there is too much money in political campaigns and 85% believe that officeholders enact policies that benefit campaign contributors.

[8] Russ Choma, *Millionaires' Club: For First Time, Most Lawmakers are Worth $1 Million-Plus*, CTR. FOR RESPONSIVE POL. (Jan. 9, 2014), https://www.opensecrets.org/news/2014/01/millionaires-club-for-first-time-most-lawmakers-are-worth-1-million-plus/; Alan Rappeport, *Making It Rain: Members of Congress Are Mostly Millionaires*, N.Y. TIMES (Jan. 12, 2015), https://www.nytimes.com/politics/first-draft/2015/01/12/making-it-rain-members-of-congress-are-mostly-millionaires/.

[9] Lisa Hagen, *The 43 People Who Might Run Against Trump in 2020*, THE HILL (May 8, 2017), http://thehill.com/homenews/campaign/332156-the-43-people-who-might-run-against-trump-in-2020; James B. Stewart, *With*

Nor have contribution limits removed "Big Money" from politics. Even accounting for inflation, presidential campaign costs were four times higher in 2008 than in 1972.[10] "[I]n 2000 the presidential and congressional campaigns cost a then-record amount of $3.8 billion; by 2008 they rose to a new high of $5.9 billion dollars; and in 2016 they amounted to $6.4 billion dollars."[11] Congressional special elections in 2017 and 2018 included the most expensive in history, with one open seat race consuming more than $55 million.[12]

Instead of preventing the wealthy from influencing federal election campaigns, contribution limits created new influencers: "bundlers" with the ability to raise large amounts of small dollar contributions.[13] "Bundlers are a hot commodity because campaign spending has outstripped the

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Trump in White House, Some Executives Ask, Why Not Me?, N.Y. TIMES (Mar. 9, 2017), https://www.nytimes.com/2017/03/09/business/bloomberg-iger-business-executives-president.html.

[10] Anthony J. Gaughan, *Trump, Twitter and the Russians: The Growing Obsolescence of Federal Campaign Finance Law,* 27 S. CAL. INTERDISC. L.J. 79, 92 (2017).

[11] *Id.*, citations omitted.

[12] Alicia Parlapiano & Rachel Shorey, *Who Financed the Georgia Sixth, the Most Expensive House Election Ever*, N.Y. TIMES (June 20, 2017), https://www.nytimes.com/interactive/2017/06/20/us/politics/georgia-6th-most-expensive-house-election.html.

[13] C. Simon Davidson, *Bundling Campaign Contributions is Legal, But Carries Risks*, ROLL CALL (Feb. 3, 2015), https://www.rollcall.com/news/harvey-whittemore-bundling-campaign-contributions.

traditional ways of raising money."[14] With the rise of bundlers came the greater potential for the crime of "contribution in the name of another."[15] But the rewards from bundling are high: "A study of President Obama's top-tier fundraisers in 2008 showed that 80% received 'key administration posts' as defined by the White House."[16] There is no legal requirement that bundlers be disclosed unless they are registered lobbyists.[17]

Contribution limits also have warped the political system by making fundraising an all-encompassing obsession of candidates and officeholders alike. Prior to 1972,[18] many candidates raised money from large contributions,[19] and

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[14] Peter Overby, *Explainer: What is a Bundler?*, NPR (Sept. 14, 2007), https://www.npr.org/templates/story/story.php?storyId=14434721.

[15] *United States v. Whittemore*, 776 F.3d 1074 (9th Cir. 2015).

[16] CENTER FOR RESPONSIVE POLITICS, *Disclosure of Bundlers*, OPEN SECRETS, https://www.opensecrets.org/action/issues/disclosure-campaign-bundlers/ (last visited Aug. 22, 2018).

[17] CENTER FOR RESPONSIVE POLITICS, *Hillary Clinton's Bundlers*, OPEN SECRETS, https://www.opensecrets.org/pres16/bundlers (last visited Aug. 22, 2018) ("The Trump campaign has released no information about its bundlers whatsoever.").

[18] Federal Election Campaign Act of 1971, Pub.L. 92–225, 86 Stat. 3, enacted February 7, 1972, 52 U.S.C. § 30101 *et seq*.

[19] Clifford W. Brown, Jr. *et al.*, SERIOUS MONEY: FUNDRAISING AND CONTRIBUTING IN PRESIDENTIAL NOMINATION CAMPAIGNS 19, 24 (1995) (observing that prior to 1972

Members of Congress generally did not raise money in non-election years; by the 1990's, non-election year fundraising averaged about seven thousand dollars per week.[20] Today, Members of Congress must spend 20 hours per week fundraising.[21]

Contribution limits push contributions away from the control of political parties and candidates[22] and toward unlimited independent expenditure

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amendments, federal candidates "received much, and in many cases most, of their revenues from very large contributions"); Frank Sorauf, INSIDE CAMPAIGN FINANCE: MYTHS AND REALITIES 3 (1992).

[20] Anthony Corrado, *Running Backward: The Congressional Money Chase*, THE PERMANENT CAMPAIGN AND ITS FUTURE 77, 80 (Norman J. Ornstein & Thomas E. Mann, eds., 2000).

[21] Norah O'Donnell, *Are Members of Congress Becoming Telemarketers?*, CBS NEWS (Apr. 24, 2016), http://www.cbsnews.com/news/60-minutes-are-members-of-congress-becoming-telemarketers/ (quoting Rep. Rick Nolan: "30 hours a week, that's a lot of telemarketing. Probably more than most telemarketers do."); Ezra Klein, *The Most Depressing Graphic for Members of Congress*, WASH. POST (Jan. 14, 2013), https://www.washingtonpost.com/news/wonk/wp/2013/01/14/the-most-depressing-graphic-for-members-of-congress.

[22] *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010); Robert Kelner & Raymond La Raja, *McCain-Feingold's Devastating Legacy*, WASH. POST, Apr. 11, 2014, available at http://www.washingtonpost.com/opinions/mccain-feingoldsdevastating-legacy/2014/04/11/14a528e2-c18f-11e3-bcec-b71ee10e9bc3_story.html; Marc E. Elias & Jonathan S. Berkon, *Comment, After McCutcheon*, 127 HARV. L. REV. F. 373, 378 (2014) ("The McCain-Feingold law and subsequent court decisions have created a severe imbalance in the current system.").

organizations.[23] By providing additional donors and funds to political parties, *McCutcheon* partially remedied that structural fundraising imbalance.[24]

Raising or removing contribution limits, on the other hand, helps challengers or newcomers. The most important example may be Barack Obama's use of the short-lived "Millionaire's Amendment" to raise the federal contribution limit from $2,000 to $12,000 for his first Senate race in 2004.[25] That temporary increase in the contribution limit allowed the future President to collect enough large contributions to win the Senate seat which gave him a national political presence.[26]

The Court should review the standards for demonstrating the anticorruption interests assertedly protected by contribution limits.

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[23] Contributions made to organizations which are independent of, and not coordinated with, candidates and parties are not limited. FED. ELECTION COMM'N, *Coordinated Communications and Independent Expenditures*, http://www.fec.gov/pages/brochures/indexp.shtml (last accessed Aug. 22, 2018).

[24] Anthony Gaughan, *In Defense of McCutcheon v. Federal Election Commission*, 24:2 KAN. J.L. & PUB. POL. 221, 224 (2015); Ray La Raja, *The McCutcheon Decision Could Be Good News After All*, WASH. POST (Apr. 3, 2014), http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/04/03/the-mccutcheon-decision-could-be-good-news-after-all/.

[25] Kate Shaw, *The Lost History of the Millionaire's Amendment*, 16 ELECTION L.J. 1, 174-75 (2017).

[26] *Id.*, at 175; Gaughan, *supra*, n. 10, at 114.

SUMMARY OF ARGUMENT

In addition to the arguments presented in the Petition, this case asks whether, in the absence of evidence of actual, specific *quid pro quo* corruption, a public perception about "corruption," "influence," "access," or large campaign contributions alone is sufficient to limit highly-protected rights of speech and association. The jurisprudential danger in this case and in *Zimmerman v. City of Austin, Texas,* No. 18-93, is that some lower courts will use the "low" evidentiary bars of older cases to eclipse the more precise *quid pro quo* evidentiary bar established in *Buckley* and recently reinforced in *Citizens United* and *McCutcheon.*

The Circuits are split over whether the evidentiary standard is controlled by recent cases such as *Citizens United* and *McCutcheon,* or older ones such as *Shrink Missouri Gov't PAC* and *McConnell.* These two lines of cases differ on how to demonstrate an "appearance of corruption."

The Ninth Circuit here was highly divided on this question. For example, one major debate at both the panel and consideration of rehearing en banc levels was whether a "risk" of corruption, even by permissible campaign contributions, was enough to support a finding of an "appearance of corruption" or whether some evidence of actual *quid pro quo* corruption had to be shown.

Other Circuits which have reviewed this question in some fashion have similarly split over the evidence required to substantiate a government's claim of an interest in preventing an "appearance of corruption." The Sixth and D.C. Circuits require specific evidence of *quid pro quo* corruption; the

First, Fifth and Eighth Circuits do not. Sometimes the Second Circuit does, but says it doesn't need to.

The Court should grant the Petition to help legislatures establish, and the lower courts resolve disputes over, campaign contribution limits without unnecessary chills on protected speech, association and petition.

ARGUMENT

I. The Lower Courts Need Guidance to Implement This Court's Recent Interpretations About An "Appearance of Corruption:"

In addition to the Arguments presented in the Petition, this is a case about the "appearance of corruption." This case asks whether the evidentiary standard for "appearance of corruption" used in Circuits such as the Second, Sixth and D.C. Circuits (which might be characterized as "evidence of actual *quid pro quo* corruption and a public perception of that corruption") is preferable to the evidentiary standard used in the Ninth and other Circuits ("public perception alone").

A. An "Appearance of Corruption" Must Be An Appearance of *Quid Pro Quo* Corruption, Not An "Appearance of Influence or Access:"

This Court has identified only one governmental interest sufficient to outweigh the considerable First Amendment rights of speech, association and petition inherent in contributions to political candidates and campaigns: "preventing corruption or the appearance of corruption."[27] The

[27] *McCutcheon*, 134 S.Ct. at 1450.

anticorruption rationale has a long history,[28] but it "is not boundless."[29]

Recently this Court has clarified that the government's anticorruption interest is limited to preventing *quid pro quo* corruption or its appearance.[30] *Quid pro quo* corruption is 1) a *quid* (thing of value given to an official); 2) a *pro* (the unambiguous agreement connecting the *quid* to the *quo*); and 3) a *quo* (an official act).[31]

This *quid pro quo* requirement applies to **both** corruption and the "appearance of corruption." "When *Buckley* identified a sufficiently important governmental interest in preventing corruption **or** the appearance of corruption, that interest was limited to *quid pro quo* corruption."[32]

Although the anticorruption rationale includes the "appearance of corruption," it does not include the "appearance of influence or access."[33] "[G]overnment regulation may not target the general gratitude a candidate may feel toward those who

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[28] *Buckley v. Valeo*, 424 U.S. 1, 26-27 (1976); *Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley,* 454 U.S. 290, 297 (1981).

[29] *Emily's List v. Fed. Election Comm'n*, 581 F.3d 1, 6 (D.C. Cir. 2009).

[30] *McCutcheon*, 134 S.Ct. at 1450-51; *Citizens United*, 558 U.S. at 360.

[31] *McDonnell v. U.S.*, 136 S. Ct. 2355, 2372 (2016).

[32] *Citizens United*, 558 U.S. at 359 (emphasis added); *McCutcheon*, 134 S.Ct. at 1450 (same).

[33] *Citizens United*, 558 U.S. at 360 ("Ingratiation and access . . . are not corruption").

support him or his allies, or the political access such support may afford."[34]

Nor does the anticorruption rationale include a concern about "Big Money" in politics: "Spending large sums of money in connection with elections, but not in connection with an effort to control the exercise of an officeholder's official duties, does not give rise to . . . *quid pro quo* corruption."[35]

The Court's path to this narrowing construction has not been without debate. *See, e.g., McConnell v. Fed. Election Comm'n,* 540 U. S. 93, 153-54 (2003), and *id.,* 540 U.S. at 297 (Kennedy, J., concurring in judgment in part and dissenting in part). In *Citizens United*, the pendulum swung back to Justice Kennedy's position: "When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption." *Citizens United*, 558 U.S. at 359, *citing* 540 U.S. at 296-98.

The "appearance of corruption" looks at the perceptions of the public at large to see if there is a threat to "'confidence in the system of representative Government.'"[36] But even with campaign

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[34] *McCutcheon*, 134 S.Ct. at 1441; *Citizens United*, 558 U.S. at 359 ("The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt.").

[35] *Id.* at 1450.

[36] *Buckley*, 424 U.S. at 27, *quoting U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973); *Nixon v. Shrink Missouri Government PAC*, 528 U. S. 377, 390 (2000) ("[T]he cynical assumption that large donors

contribution limits, that battle has been lost: "Only 18% of Americans today say they can trust the government in Washington to do what is right 'just about always' (3%) or 'most of the time' (15%)."[37]

B. It is Easy to Show an "Appearance of Influence or Access" But Difficult to Demonstrate a Legitimate "Appearance of Corruption:"

The "appearance of influence or access will not cause the electorate to lose faith in this democracy",[38] and thus should not cause an "appearance of corruption." But, as this case and others like it demonstrate, an "appearance of influence or access" is easy to show in court. If it is shown, in some Circuits, it is treated as corruption.

In today's highly-polarized and cynical political environment,[39] relying solely on public perceptions opens the door to mischief:

> The "appearance" rationale for contribution limits "means that the most zealous and aggressive advocates of restriction can make

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call the tune could jeopardize the willingness of voters to take part in democratic governance").

[37] PEW RESEARCH CENTER, *Public Trust in Government: 1958-2017*, http://www.people-press.org/2017/12/14/public-trust-in-government-1958-2017/ (last accessed Aug. 22, 2018). Trust in government spiked to 55% following September 11, 2001, but then fell sharply. *Id.*

[38] *Citizens United*, 558 U.S. at 360.

[39] "Political polarization – the vast and growing gap between liberals and conservatives, Republicans and Democrats – is a defining feature of American politics today." PEW RESEARCH CENTER, *Political Polarization*, http://www.pewresearch.org/packages/political-polarization/ (last accessed Aug. 22, 2018).

> accusations, whether well founded in fact or not, and then use the very fact that some people believe the charges as a reason to justify regulation."[40]

This bootstrapping concern is especially prominent in light of recent findings that up to 85% of Americans believe officeholders help donors.[41] These 85% public opinion polls show that fear of corruption already affects Americans' view of the integrity of government, meaning that demonstrating "an appearance of influence or access" is almost effortless.

This 85% public opinion headwind also means pollsters face an almost insurmountable task in measuring sentiment only about *quid pro quo* corruption.[42] Research indicates that "The public not only misunderstands the law but also overestimates

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[40] Ronald M. Levin, *Fighting the Appearance of Corruption*, 6 WASH. U. J.L. & POL'Y 171, 178 (2001).

[41] "Americans' Views on Money in Politics," *supra*, n. 7.

[42] Christopher Robinson, D. Alex Winkelman, Kelly Bergstrand, and Darren Modzelewski, *"The Appearance And The Reality Of Quid Pro Quo Corruption: An Empirical Investigation*," 8 J. LEGAL ANALYSIS, Winter 2016, 378-79, https://academic.oup.com/jla/article-abstract/8/2/375/2502553

> A simple poll asking whether money has too much influence in politics, or whether politicians are now "corrupt," will clearly not suffice, because the Supreme Court has insisted that "*quid pro quo*" corruption is a peculiar legal concept, to be distinguished from ingratiation, access, or other more capacious notions of corruption. Furthermore, it is not clear that a poll-respondent has sufficient information, the serious and earnest demeanor, and the opportunity to deliberate—all of which are required to give a meaningful response on this question.

the sources and amounts of congressional campaign spending."[43]

A likely contributing factor is media coverage, which "overemphasizes PAC contributions relative to individual contributions in news stories, and the races they focus on tend to involve more spending than the typical race."[44] The result: "In [a] 2016 survey, 80% of respondents answered that Super PACs were the source of at least half of all 2016 federal campaign spending. While the precise answer depends on the data sources, how spending is defined, and other details, the answer is clearly in the 0-24% range."[45]

Put bluntly, an unconstrained "public perception" can block speech because the public either doesn't understand the legal niceties or doesn't like it.[46] In other words, the *quid pro quo* corruption evidentiary standard is based on fact-based explanations, while the "appearance of corruption" standard is based on a multi-layered and

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[43] Jeffrey Milyo and David Primo, *Public Attitudes and Campaign Finance*, Report Prepared for the Campaign Finance Task Force (May 17, 2017), https://bipartisanpolicy.org/wp-content/uploads/2018/01/Public-Attitudes-and-Campaign-Finance.-Jeffrey-D.-Milyo-David-M.-Primo.pdf.

[44] *Id.*, at 3.

[45] *Id.*, at 8.

[46] *See e.g.,* Ronald M. Levin, *Congressional Ethics and Constituent Advocacy in an Age of Mistrust*, 95 MICH. L. REV. 1, 100 (1996) ("popular attitudes toward Congress often suffer from misinformation, unrealistic expectations, and failure to appreciate the tradeoffs that legislators must make among their constituents' many incompatible demands").

vague perception, the provenance and dimensions of which may not be apparent or reliable.

C. The Lower Courts Need Guidance on How To Test An "Appearance of Corruption:"

An "appearance of corruption" is one of the few areas in which this Court has suggested that First Amendment freedoms can be limited in response to public opinion or even *perceptions* of public opinion. Therefore, in determining whether the government has demonstrated a legitimate interest in preventing *quid pro quo* corruption or its appearance, a court cannot "accept[] mere conjecture as adequate to carry a First Amendment burden."[47]

This case and other recent cases[48] raise the question of how a government or a reviewing court tests an assertion of an "appearance of corruption?" Do those tests separate an "appearance of influence or access" from an "appearance of corruption?" Do the testing instruments or witness analyses speculate without a foundation or with a foundation that is biased or suspect?

As shown below, the Circuits are split on how to apply the *quid pro quo* standard for an "appearance of corruption." At least some of these conflicts turn on whether the particular Circuit will use "appearance of influence or access" to find "appearance of corruption."

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[47] *McCutcheon*, 134 S.Ct. at 1452.

[48] *See, e.g., Zimmerman v. City of Austin, Texas*, No. 18-93 (finding an "appearance of corruption" sufficient to justify campaign contribution limits without any evidence of actual *quid pro quo* corruption).

In this case there is a particularly stark intra-Circuit conflict on this point, especially when the panel majority below avoids using the term "conjecture" by substituting the word "risk":

> We further disagree that Montana failed to establish even a risk of *quid pro quo* corruption or its appearance, because the state's evidence shows only "influence and access." Dissent at 11. Montana's evidence, which shows attempts by contributors, lawmakers and candidates to exchange campaign contributions for official legislative acts, plainly demonstrates a risk of *quid pro quo* arrangements that Montana was constitutionally permitted to legislate to prevent.

App. to Pet. Cert., 90a, 97a (Fisher and Murguia, Judges, responding to the dissent from the denial of rehearing en banc).

> In short, the majority applies a legal standard inconsistent with *Citizens United* and *McCutcheon*, and as a result, relies on evidence of access or influence that cannot prove Montana's state interest in restricting contribution limits. As Judge Bea explains in dissent, "[w]hile the panel majority's opinion pays lip service" to *Citizens United* and *McCutcheon*'s shift, its analysis utterly fails "to account substantively for this change." *Motl*, [App. to Pet. Cert. 93a] 873 F.3d at 1191 (Bea, J., dissenting). Rather than follow *Citizens United* and *McCutcheon*, the majority undermines them. I would follow the Supreme Court and require Montana to

> present evidence of actual or apparent *quid pro quo* corruption.

App. to Pet. Cert., 87a (Ikuta, Callahan, Bea, M. Smith, and N.R. Smith, Judges, dissenting from denial of rehearing en banc).

It isn't necessary for the Court to use this case to update all aspects of the "appearance of corruption" standard to reflect today's conditions, as opposed to those of 1976.[49] All this case requires is that the Court clarify the evidentiary requirements for a government to demonstrate that its claim of the "appearance of corruption" is not "mere conjecture" and poses an actual risk to public confidence in the democratic system.

The Court should grant the Petition and help resolve this confusion over how to interpret its recent decisions and provide guidance to legislatures and the lower courts as to what may constitute "appearance of corruption."

II. The Decision Below Conflicts with Other Decisions on the "Appearance of Corruption."

The decision below conflicts with other Circuits' decisions on the definition and application of "appearance of corruption." The Circuit split with perhaps the most relevance to this case involves the evidentiary standard for showing an "appearance of corruption." This conflict looks at whether the

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[49] "The forces and directions of the Internet are so new, so protean, and so far reaching that courts must be conscious that what they say today might be obsolete tomorrow." *Packingham v. No. Carolina*, 582 U.S. ___, 137 S.Ct. 1730, 1736 (2017).

particular Circuit considers the recent clarifications of corruption and "appearance of corruption" articulated in *Citizens United* and *McCutcheon* to be controlling, or whether it follows older decisions like *McConnell* or *Shrink Missouri Government PAC*.

The Petition details the long history of the Ninth Circuit's decisions in this case. Pet. Cert., 13-21. Montana produced no evidence of actual *quid pro quo* corruption, only a "risk" (or conjecture) that there might be some. Pet. Cert., 19-21. The "risk" finding required the Ninth Circuit to ignore not only evidence that Montana had an impermissible purpose in enacting the contribution limits (intending to limit "Big Money"), but also express findings by the district court that actual *quid pro quo* corruption was impossible.[50]

Five judges voted to rehear the appeal en banc, but a majority denied rehearing. App. to Pet. Cert., 73a. The dissent from rehearing said "[i]n light of the Supreme Court's clarification, a state can justify imposing regulations limiting individuals' political speech (via limiting political contributions) only by producing evidence that it has a real problem in combating actual or apparent *quid pro quo* corruption."[51] Two of the original panel judges wrote separately to defend the "not illusory" standard of the older cases: "The evidentiary burden the dissent proposes, however, has never been adopted by the Supreme Court or this court."[52]

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[50] App. to Pet. Cert. 59a-63a.

[51] App. to Pet. Cert. 79a.

[52] App. to Pet. Cert. 88a.

Since *Citizens United,* three Circuits have at least once required specific evidence of highly-publicized *quid pro quo* corruption in order to demonstrate a cognizable public perception of an "appearance of corruption:" the Second,[53] Sixth[54] and D.C.[55] Circuits. The Second Circuit, in particular, has struggled to reconcile the older and newer precedents.[56]

After *Citizens United,* finding corruption in these "specific evidence" Circuits requires a government to show specific examples of *quid pro quo* impropriety. For example, in *Wagner v. Federal Election Comm'n*, 793 F.3d 1 (D.C. Cir. 2015), the D.C. Circuit filled 12 pages of the FEDERAL

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[53] *Green Party of Connecticut v. Garfield*, 616 F.3d 189 (2nd Cir. 2010) (upholding ban on government contractor campaign contributions based on specific, recent scandal, but striking ban on lobbyists' contributions because no evidence that lobbyists were involved in scandal).

[54] *Lavin v. Husted*, 689 F.3d 543 (6th Cir. 2012) (rejecting ban on campaign contributions from Medicaid providers because "no evidence at all in support of his theory that [the statute] prevents actual or perceived corruption").

[55] *Wagner v. Federal Election Comm'n*, 793 F.3d 1, 22 (D.C. Cir. 2015) (en banc) (ban on contributions by government contractors justified by historical and recent examples of specific, publicized incidents of *quid pro quo* corruption).

[56] In addition to *Green Party, supra*, the Second Circuit later upheld contribution limits on entities "doing business with" the City of New York because of "direct evidence" of a public perception based on historical and recent "pay-to-play" scandals, *Ognibene v. Parkes*, 671 F.3d 174, 188-89, 190 n. 15, (2nd Cir. 2011), but also cited *McConnell* for the proposition that "[i]t is not necessary to produce evidence of actual corruption to demonstrate the sufficiently important interest in preventing the appearance of corruption." 671 F.3d at 183.

REPORTER with historical and detailed examples of specific corrupt official acts and actors to demonstrate that government contractors were at the "heartland" of concerns over *quid pro quo* corruption. 793 F.3d at 10-21, 22.

Similarly, in *Lavin v. Husted*, 689 F.3d 543 (6th Cir. 2012), the Sixth Circuit rejected Ohio's "general interest in 'preventing corruption'"[57] because the State had "no evidence at all in support of [its] theory that [the statute] prevents actual or perceived corruption." 689 F.3d at 547.

> But to demonstrate that a contribution limit furthers an interest important enough to suppress "the freedoms of political expression and political association[,]" *Randall* [*v. Sorrell*], 548 U.S. [230,] 246 [2006], a state must do more than merely *recite* a general interest in preventing corruption. What *Buckley* requires is a demonstration, not a recitation. … What the state must do, instead, is demonstrate *how* its contribution ban furthers a sufficiently important interest.

Lavin, 689 F.3d at 547 (emphases in original).

In *Green Party of Connecticut v. Garfield*, 616 F.3d 189 (2nd Cir. 2010), the Second Circuit first upheld a ban on contractors' contributions because of specific, recent, highly-publicized examples of *quid pro quo* corruption, including at least one instance involving a sitting governor. "There is sufficient evidence in the record of actual corruption stemming from contractor contributions, and in light of the widespread media coverage of Connecticut's recent

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[57] *Lavin*, 689 F.3d at 546.

corruption scandals, the General Assembly also faced a manifest need to curtail the appearance of corruption created by contractor contributions." 616 F.3d at 200.

Then the Second Circuit invalidated the ban on lobbyists' contributions saying "[t]he recent corruption scandals had nothing to do with lobbyists, … and thus there is insufficient evidence to infer that *all* contributions made by state lobbyists give rise to an appearance of corruption." 616 F.3d at 206 (citation omitted, emphasis in original). The Second Circuit expressly rejected an "appearance of influence or access" concern that "many members of the public generally distrust lobbyists and the "special attention" they are believed to receive from elected officials" because "the anticorruption interest recognized by *Buckley* and other cases is 'limited to *quid pro quo* corruption', and does not encompass efforts to limit '[f]avoritism and influence' or the 'appearance of influence or access.'" 616 F.3d at 206-07, *quoting, Citizens United*, 558 U.S. at 359-60.

Some circuits also require specific evidence to justify limits on contributions set aside specifically for independent expenditures.[58] These Circuits often require not only evidence to support the assertion of the governmental interest, but also to show how the funds were sequestered. *See, e.g.*, *The Alabama Democratic Conference v. Attorney General, State of Alabama*, 838 F.3d 1057, 1063-69 (11th Cir. 2016) (collecting and analyzing similar cases).

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[58] Independent expenditures are those "expenditures for express advocacy of candidates made totally independently of the candidate and his campaign." *Buckley*, 424 U.S. at 47.

In contrast, three other Circuits – the Fourth,[59] Fifth[60] and Ninth Circuits[61] – do not require specific examples of recent *quid pro quo* scandals, even after *Citizens United*.

In *Zimmerman v. City of Austin, Texas*, 881 F.3d 378 (5th Cir. 2018), *petition for cert.* filed July 20, 2018, No. 18-93, the Fifth Circuit required no evidence in the record below of actual corruption in Austin, Texas. Instead, the court relied only on evidence of a public perception of "corruption," including land developers' campaign contributions. Because the Fifth Circuit showed only a perception of corruption, it found an "appearance of corruption" without showing whether the perception was based on *quid pro quo* corruption. This finding conflicts with *Lavin*, among others, where the Sixth Circuit said: "What *Buckley* requires is a demonstration, not a recitation." *Lavin*, 689 F.3d at 547.

In the Fourth Circuit, *Preston v. Leake* didn't discuss the evidentiary standard because the parties agreed that the ban on lobbyists' campaign contributions was a substantial governmental

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[59] *Preston v. Leake*, 660 F.3d 726 (4th Cir. 2011) (upholding a ban on campaign contributions by "lobbyists, who, experience has taught, are especially susceptible to political corruption"). "The parties agree that limiting the corruption and appearance of corruption that may result from lobbyists' campaign contributions to legislators constitutes a 'sufficiently important interest.'" 660 F.3d at 508.

[60] *Zimmerman v. City of Austin, Texas,* 881 F.3d 378 (5th Cir. 2018), *petition for cert.* filed July 20, 2018, No. 18-93.

[61] App. to Pet. Cert. 1a, *Lair v. Motl*, 873 F.3d 1170 (9th Cir. 2017) (reversing a District Court decision that held that evidence of actual *quid pro quo* corruption was required to sustain a finding of an "appearance of corruption.").

interest. 660 F.3d at 508. The court did not require anything in the record to show the existence of either *quid pro quo* corruption or a public perception of corruption.

In short, does the "not illusory," "not mere conjecture" standard require at least some evidence that the regulated conduct is reasonably likely to result in corruption? It is within this Court's purview to determine evidentiary burdens required to justify impositions on First Amendment-protected freedoms. Otherwise, states and cities in some Circuits may believe that they need not provide evidence that meets the standards clarified in *Citizens United* and *McCutcheon.*

The Court should resolve the conflict of whether governments may limit speech based *solely* on public perception.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* Public Policy Legal Institute respectfully requests that this Court grant the Petition.

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