No. 18-93

In the
Supreme Court of the United States

DONALD ZIMMERMAN,
PETITIONER,
v.
CITY OF AUSTIN, TEXAS,
RESPONDENT.

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

Brief of the Public Policy Legal Institute and Institute for Free Speech As *Amici Curiae* Supporting Petitioner

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QUESTIONS PRESENTED

The Questions Presented in the Petition are:

Whether Respondent City of Austin, Texas's $350 base limit on political campaign contributions violates the speech, association and petition protections of the First and Fourteenth Amendments to the Constitution of the United States; and

"Whether [Petitioner Donald] Zimmerman established standing to challenge Austin's aggregate limit on the total amount of campaign contributions a candidate may accept 'from sources other than natural persons eligible to vote in a postal zip code completely or partially within the Austin city limits.'" Pet. at i.

Amici curiae believe that the first Question fairly includes whether, in the absence of evidence of actual or unambiguous *quid pro quo* corruption, an "appearance of corruption" based solely on perceptions of public opinion can justify limits on campaign contributions.

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STATEMENT OF INTEREST[1]

Amicus curiae Public Policy Legal Institute ("PPLI") is a national nonprofit educational organization dedicated to protecting the right of Americans to advocate for and against public policies. http://www.publicpolicylegal.com. PPLI seeks, *inter alia,* to protect First Amendment rights of speech and association in election campaigns and other advocacy.

Amicus curiae Institute for Free Speech is a nonprofit corporation dedicated to the defense of the political rights protected by the First Amendment. As part of that mission, the Institute represents individuals and civil society organizations, *pro bono,* in cases raising First Amendment objections to burdensome regulation of core political activity.

PRELIMINARY STATEMENT

This case asks whether a government can limit political speech and association solely because those activities are unpopular, as measured by public opinion polls. The Fifth Circuit below required no more evidence than that, a decision that accords with a recent holding of the Ninth Circuit. By contrast, the

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[1] Pursuant to Rule 37.2, *amici* certify that counsel of record for all parties received notice of their 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, *amici* certify that no counsel for a party authored this brief in whole or in part, and no such counsel, party or person other than *amici* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Second, Sixth, and D.C. Circuits all require specific evidence that meets this Court's recent interpretations of the government's anticorruption interest.

The evidentiary question presented is dispositive. There was no evidence in the record below showing *actual* corruption in Austin, Texas. The ballot initiatives which created the campaign contribution limits at issue here were a "response to the public perception that large campaign contributions from land developers and those with associated interests were creating a corrupt, 'pay-to-play' system in Austin politics." App. Pet. for Cert. 2. There was, however, no evidence in the record and no finding of the lower courts that such a corrupt system *actually* existed. Austin proceeded to limit speech and association on the basis of perception alone.

This Court has identified only one legitimate governmental interest sufficient to outweigh the considerable First Amendment rights inherent in contributions to political candidates and campaigns: "preventing corruption or the appearance of corruption." *McCutcheon v. Fed. Election Comm.*, 572 U.S. 185, 206 (2014) (Roberts, C.J., controlling op.).[2] The anticorruption rationale has a long history, but it "is not boundless." *Emily's List v. Fed. Election Comm'n*, 581 F.3d 1, 6 (D.C. Cir. 2009); *cf. Buckley v. Valeo*, 424 U.S. 1, 26-27 (1976) (per curiam); *Citizens Against Rent Control/Coal. for Fair Housing v. Berkeley,* 454 U.S. 290, 297 (1981).

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[2] All citations to *McCutcheon* will be to the Chief Justice's controlling opinion unless otherwise noted.

Recently, this Court has clarified that the government's anticorruption interest is limited to preventing *quid pro quo* corruption or its appearance. *McCutcheon*, 572 U.S. at 206; *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 360 (2010). This Court has recently defined *quid pro quo* corruption as (1) a *quid* (a thing of value given to an official); (2) a *quo* (an official act); and (3) the *pro* (the unambiguous agreement connecting the *quid* to the *quo*). *McDonnell v. United States*, 579 U.S. __; 136 S. Ct. 2355, 2372 (2016). This *quid pro quo* limit applies to both corruption and the "appearance of corruption." *Citizens United*, 558 U.S. at 359 ("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.") (emphasis supplied); *McCutcheon*, 572 U.S. at 206.

Although the anticorruption rationale allows the Government to stave off the "appearance of corruption," that interest does not include deterring the "appearance of influence or access." *Citizens United*, 558 U.S. at 360 ("Ingratiation and access . . . are not corruption" and "[t]he appearance of influence or access will not cause the electorate to lose faith in this democracy."). "[G]overnment regulation may not target the general gratitude a candidate may feel toward those who support him or his allies, or the political access such support may afford." *McCutcheon*, 572 U.S. at 192.

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." *Id.* at 208.

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) (Stevens and O'Connor, JJ. for the Court), and *id.* at 297 (Kennedy, J., concurring in part and dissenting in part). In *Citizens United*, however, this Court was firm: "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." 558 U.S. at 359 (citing *McConnell*, 540 U.S. at 296-98 (Kennedy, J.)).

When the Fifth Circuit conducted its "appearance of corruption" analysis, it looked to the perceptions of the public at large to see if there is a threat to "'confidence in the system of representative Government.'" *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 Mo. Gov't PAC*, 528 U.S. 377, 390 (2000) ("[T]he cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance"). But that battle has been lost, at least for now: "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%)." Pew Research Center, *Public Trust in Government: 1958-2017* (Dec. 14, 2017).[3]

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[3] *Available at*: http://www.people-press.org/2017/12/14/public-trust-in-government-1958-2017/. Trust in government spiked to 55% following September 11, 2001, but dropped thereafter.

Moreover, in today's highly-polarized and cynical political environment,[4] 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 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." Ronald M. Levin, *Dedication: Fighting the Appearance of Corruption*, 6 Wash. U. J.L. & Pol'y 171, 178 (2001).

This bootstrapping concern is especially prominent in light of recent findings that up to 85 percent of Americans believe officeholders help donors. "Americans' Views on Money in Politics," *The New York Times/CBS News Poll* (June 2, 2015).[5] These public opinion polls show that fear of corruption already affects Americans' view of the integrity of government, making a showing of "an appearance of influence or access" almost effortless.

But, with this headwind, the polls face an almost insurmountable task in measuring sentiment only about *quid pro quo* corruption, as opposed to an

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Interestingly, this drop occurred after the passage of the Bipartisan Campaign Reform Act of 2002. *Id.*

[4] *See*, *e.g.*, "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/.

[5] *Available at*: https://www.nytimes.com/interactive/2015/06/02/us/politics/money-in-politics-poll.html.

amorphous lack of trust in government.[6] Research indicates that "[t]he public not only misunderstands the law but also overestimates the sources and amounts of congressional campaign spending." Jeffrey Milyo and David Primo, *Public Attitudes and Campaign Finance* 2 (May 17, 2017). [7]

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." *Id.* at 3. The result:

> "In [Milyo and Primo's] 2016 survey, 80% of respondents answered that Super PACs were the source of at least half of all 2016 federal campaign

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[6] *See* 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 375, 378-79, Dec. 1 2016, 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.

[7] *Available at*: https://bipartisanpolicy.org/wp-content/uploads/2018/01/Public-Attitudes-and-Campaign-Finance.-Jeffrey-D.-Milyo-David-M.-Primo.pdf.

> 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."

Id. at 8.

In other words, as shown in more detail below, the *quid pro quo* corruption evidentiary standard is based on fact-based explanations, while the "appearance of corruption" standard is based on statistical data about public opinion, or on lay opinions of a perception of whether the particular "appearance of corruption" is popular, a multi-layered and vague perception whose provenance and dimensions may not be apparent or reliable. Put bluntly, an unconstrained "public perception" can block speech because the public either does not understand the legal and constitutional niceties or does not like them.[8]

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.'" *McCutcheon*, 572 U.S. at 210 (quoting *Shrink Mo. Gov't PAC*, 528 U.S. at 392). Consequently, there is some tension in this Court's suggestion, in the context of contribution limits, that

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[8] *See e.g.,* Ronald M. Levin, *Congressional Ethics and Constituent Advocacy in an Age of Mistrust*, 95 Mich. L. Rev. 1, 100 (Oct. 1996) ("[P]opular 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.").

First Amendment freedoms can be limited in response to public opinion or even *perceptions* of public opinion.

The Fifth Circuit is not alone in failing to properly navigate this tension. Lower court decisions like the recently-decided *Lair v. Motl*, stress the "low bar" of the "mere conjecture" evidentiary standard. 873 F.3d 1170, 1172 (9th Cir. 2017) *reh'g denied* 889 F.3d 571, 572 (9th Cir. 2018), *pet. for cert. docketed sub nom. Lair v. Mangan*, U.S. No. 18-149 (Aug. 2, 2018). All that the State of Montana offered in *Lair* was allegations and innuendo—not evidence of actual corruption—which was sufficient given the Ninth Circuit's "low bar" requiring merely that the state's policy involve more than "mere conjecture." 873 F.3d at 1172, 1179-1180; *but see McCutcheon*, 572 U.S. at 192 ("[G]overnment regulation may not target the general gratitude a candidate may feel toward those who support him or his allies, or the political access such support may afford"); *id.* (citing *Citizens United*, 558 U.S. at 360, for proposition that "'[i]ngratiation and access . . . are not corruption.'")).

By ignoring the district court's factual finding that the conduct in evidence could not be *quid pro quo* corruption, the Ninth Circuit engaged in "conjecture,"[9] *see Lair v. Motl*, 189 F. Supp. 3d 1024, 1031, 1034 (D. Mont. 2016), although it preferred the term "risk" to describe its predictions of corruption sufficient to justify a public perception. *Lair*, 873 F.3d at 1172. In that case, there was no *quid*, though there

[9] Cambridge Dictionary, "Definition of 'conjecture', http://dictionary.cambridge.org/us/dictionary/english/conjecture ("an opinion or judgment that is not based on proof; a guess").

might have been a *quo*. But there was no *pro* at all—nor could there have been.

Finding corruption in other circuits after *Citizens United* requires a government to show specific examples of *quid pro quo* corruption, legislation in close proximity to the resulting scandal, or the failure of prior legislative efforts to stop specific acts of *quid pro quo* official acts. For example, in *Wagner v. Federal Election Commission*, the D.C. Circuit recounted numerous historical and detailed examples of specific *quid pro quo* corruption involving government contractors. 793 F.3d 1, 10-21 (D.C. Cir. 2015). By contrast, in *Lavin v. Husted*, the Sixth Circuit rejected a contribution limit on Medicaid providers because Ohio had "no evidence at all in support of [its] theory that [the statute] prevents actual or perceived corruption." 689 F.3d 543, 547 (6th Cir. 2012).

This case and other recent cases raise the question of how a government or a reviewing court tests an assertion of an "appearance of corruption."[10] 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?

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[10] *See, e.g., Lair*, 873 F.3d at 1172, 1180 (rejecting the district court's finding that the contribution limit was unconstitutional because no corruption had occurred – and none was possible – in favor of a "low bar" "not illusory" or not "mere conjecture" standard). Judge Bea dissented, citing, in part, the *Citizens United* "appearance of influence" vs. "appearance of corruption" distinction. 873 F.3d at 1187-1189.

It is not 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.[11] All this case requires is that the Court clarify the evidentiary standard required 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. This Court should resolve the apparent confusion creating this split of opinions in the lower courts.

SUMMARY OF ARGUMENT

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

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[11] "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. N.C.*, 582 U.S. ___, 137 S. Ct. 1730, 1736 (2017); *see also, McCutcheon,* 572 U.S. at 224:

> 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.

sufficient to limit highly-protected rights of speech and association.

The circuit courts which have reviewed this question have split in a variety of ways, but the clearest conflict is over the evidence required to substantiate a government's claim of an interest in preventing an "appearance of corruption." After *Citizens United* and *McCutcheon,* the Second, Sixth and D.C. Circuits require specific evidence of *quid pro quo* corruption. The Fifth Circuit (in this case) and the Ninth Circuit do not require such specificity.

Stated slightly differently, the conflict is whether a particular circuit believes that the evidentiary standard is controlled by recent cases such as *Citizens United* and *McCutcheon,* or older ones such as *Shrink Missouri Government PAC* and *McConnell.* These two lines of cases came to different conclusions about what constitutes evidence of corruption and an "appearance of corruption." The decision below, which did not require *any* evidence of *quid pro quo* corruption and looked solely to evidence of popular opinion, is at one edge of the "no evidence required" position.

The issue of corruption and political spending is particularly heated today, and that heat has spilled over into governmental decisions on campaign contribution limits and court challenges to those decisions. The question of the evidentiary requirements to support or reject contribution limits, already presented several times in the past, is likely to recur.

The jurisprudential danger in this case and in *Lair v. Mangan*, No. 18-149, is the possibility that some lower courts will use the "low" evidentiary bars

of older cases to eclipse the narrower *quid pro quo* evidentiary bar established in *Buckley* and recently reinforced in *Citizens United* and *McCutcheon.* The Court should grant the Petition to help legislatures establish, and the lower courts resolve disputes over, campaign contribution limits without unnecessary chill to protected speech, association and petition.

ARGUMENT

I. The Decision Below Conflicts with Other Decisions Defining and Applying the "Appearance of Corruption" Rationale for Campaign Contribution Limits.

The decision below conflicts with other circuits' decisions on the definition and application of the "appearance of corruption" doctrine. There are many ways of identifying the circuit splits, but the one with perhaps the most relevance to this case is over the evidentiary standard for showing an "appearance of corruption."[12] Another method for defining the same conflict is to look at whether the particular circuit considers the recent clarifications of corruption and "appearance of corruption" articulated in *Citizens United* and *McCutcheon* to be controlling, or whether

[12] There is also a related, but separate line of cases involving contributions set aside for independent expenditures. These circuits often require not only evidence to support the assertion of the governmental interest, but also evidence to support the mechanics and management of the sequesters of the funds. *See, e.g.*, *Ala. Democratic Conf. v. Att'y. Gen. of Ala.*, 838 F.3d 1057, 1066-69 (11th Cir. 2016) (collecting and analyzing similar cases).

it follows older decisions like *McConnell* or *Shrink Missouri Government PAC*.

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: the Second,[13] Sixth[14] and D.C.[15] Circuits. The Second Circuit, in particular, has struggled to reconcile the older and newer precedents.[16]

After *Citizens United*, finding corruption in these "specific evidence" circuits requires a

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[13] *Green Party of Conn. 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); *Ognibene v. Parkes*, 671 F.3d 174, 188-89, 189 n.15 (2nd Cir. 2011) (upholding limit on contributions by entities "doing business" with the City of New York because of historical and recent "pay-to-play" scandals).

[14] *Lavin*, 689 F.3d at 547 (rejecting ban on campaign contributions from Medicaid providers because "no evidence at all in support of [the] theory that [the statute] prevents actual or perceived corruption").

[15] *Wagner*, 793 F.3d at 10-21 (ban on contributions by government contractors justified by historical and recent examples of specific, publicized incidents of *quid pro quo* corruption).

[16] 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*, 671 F.3d at 188-89, 190 n. 15, but also cited *McConnell,* 540 U.S. at 150, 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.

government to show specific examples of improper *quid pro quo* governmental actions. For example, in *Wagner v. Federal Election Commission*, the D.C. Circuit filled 11 pages of the Federal Reporter with historical and detailed examples of specific corrupt official acts and actors to demonstrate that government contractors were in the "heartland" of concerns over *quid pro quo* corruption. 793 F.3d at 10-21, 22.

Similarly, in *Lavin v. Husted*, the Sixth Circuit rejected Ohio's "general interest in 'preventing corruption'" 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. That court noted that:

> [T]o 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.

Id. at 547 (emphases in original).

In *Green Party of Connecticut*, the Second Circuit first upheld a ban on contractors' contributions because of specific, recent, highly-publicized examples of *quid pro quo* corruption,

including some involving the 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 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, in the same case, the Second Circuit rejected a ban on lobbyists' contributions: "The 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." *Id.* 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.'" *Id.* at 206 (quoting *Citizens United*, 558 U.S. at 359-60).

In contrast, even after this Court's ruling in *Citizens United*, the Fourth,[17] Fifth and Ninth

[17] *Preston v. Leake*, 660 F.3d 726, 737 (4th Cir. 2011) (upholding a ban on campaign contributions by "lobbyists, who, experience has taught, are especially susceptible to political corruption"); *also Preston v. Leake*, 743 F. Supp. 2d 501, 508 (E.D.N.C. 2010) ("*Preston I*") ("The parties agree that limiting the corruption and appearance of corruption that may result

Circuits[18] all permit the government to prevail with little or no factual showing.

Here, 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 relied 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 v. Husted*, among others, where the Sixth Circuit said: "What *Buckley* requires is a demonstration, not a recitation." *Lavin*, 689 F.3d at 547.

Similarly, in *Lair v. Motl*, the Ninth Circuit issued a series of decisions involving Montana's campaign contribution limits and the relationship between actual corruption and the appearance of corruption, both before and after *McCutcheon*.[19] In its latest opinion, for example, the *Lair* district court noted:

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from lobbyists' campaign contributions to legislators constitutes a sufficiently important interest") (quotation marks and citation omitted).

[18] *Lair*, 873 F.3d at 1187 (reversing a district court decision holding that evidence of actual *quid pro quo* corruption was required to sustain a finding of an "appearance of corruption.").

[19] *See, e.g.*, *Lair*, 189 F. Supp. .3d at 1032 ("Defendants [Montana]…argue that the Supreme Court has never so formulaically mandated what is or is not *quid pro quo* corruption, instead contending that its presence, absence, or appearance is a sort of 'know it when you see it' question of fact.").

> Simply put, the contribution limits at issue here could never be said to focus narrowly on a constitutionally-permissible anti-corruption interest because they were expressly enacted to combat the *impermissible* interests of reducing influence and leveling the playing field.

Lair, 189 F. Supp. 3d at 1035 (emphasis in original).

The Ninth Circuit reversed, saying that "[t]he district court incorrectly cast the narrow focus test as a motive inquiry that looks at the voters' underlying intent when they enacted the limits." *Lair*, 873 F.3d at 1184. But in the Second Circuit, for example, the district court's "motive inquiry" would seem to be required to avoid penalizing an "appearance of influence or access" under *Citizens United* and *McCutcheon*. After all, where corruption is impossible, can a contribution limit "focus" on non-corrupt behavior, merely because public perception favors it?

Judge Bea, in dissent, separately analyzed the "appearance of corruption" risk in the *Lair* record and, like the district court in that case, noted that

> [N]one of the record evidence establishes the existence of any opportunity for *quid pro quo* corruption or other abuses. . . . In other words, the only reasonable inference that may be drawn from the record evidence is that there were few opportunities for abuse and, therefore, scant public awareness of such opportunities. As such, on this record the existence of actual or

> apparent *quid pro quo* corruption is, at best, "illusory" or "mere conjecture," such that defendants have not met their burden to establish a valid important state interest to justify the contribution limits at issue in this lawsuit.

873 F.3d at 1190-1191 (Bea, J., dissenting) (citation omitted).

Nevertheless, the Ninth Circuit panel reversed the district court, saying:

> Montana has shown the risk of actual or perceived *quid pro quo* corruption in Montana politics is more than "mere conjecture," the low bar it must surmount before imposing contribution limits of any amount. The state has offered evidence of attempts to purchase legislative action with campaign contributions.

Id. at 1172.

Five judges voted to rehear the appeal en banc, but a majority denied rehearing. *Lair v. Motl*, 889 F.3d 571, 572 (9th Cir. 2018). The dissent from rehearing said: "In 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." 889 F.3d at 574 (Ikuta, J. dissenting from denial of rehearing en banc). 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." *Id.* at 578 (Fisher and Murguia, JJ. responding to dissent from denial of rehearing en banc). Thus, the Ninth Circuit's position is that the mere making of "attempts" to corrupt is sufficient "risk" to justify contribution limits,[20] even in the face of judicial findings that politicians were not for sale or the supposed corruption was impossible.[21] In other words, unlike other courts looking at the *quid* or the *quo* in improper influence cases,[22] in *Lair*, the Ninth Circuit simply ignored the

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[20] *Id.* ("Montana, moreover, has presented evidence of large contributors, state legislators[,] and candidates for election attempting to enter into direct exchanges of campaign dollars for official legislative acts. This evidence is more than sufficient to demonstrate a concrete *risk* of actual *quid pro quo* corruption or its appearance") (emphasis in original, brackets supplied).

[21] The district court expressly found impossibility:

> These legislators are dyed-in-the-wool when it comes to these issues, and their positions are not, nor seemingly ever will be, for sale. Thus, the Court is simply unable to conclude that receiving National Right to Work's assistance in any way affected the candidates' voting. Viewing these circumstances, the public would more reasonably conclude that corruption is nearly absent from Montana's electoral system — the evidence shows that despite a hand-full [*sic*] of opportunities, legislators chose to keep their noses clean.

189 F. Supp. 3d at 1034.

[22] *See, e.g.*, *Wagner*, 793 F.3d at 22 ("Unlike the corruption risk when a contribution is made by a member of the general public, in the case of contracting there is a very specific *quo for which* the contribution may serve as the *quid*") (emphasis supplied).

pro – the reality of whether there was an actual transaction. This is an erroneous reading of this Court's recent interpretations.

Finally, in the Fourth Circuit, *Preston v. Leake* did not discuss the evidentiary standard as the parties below had already agreed that the ban on lobbyists' campaign contributions served a substantial governmental interest. *Preston*, 660 F.3d at 736; *Preston I*, 743 F. Supp. 2d at 508. Consequently, 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.

There are many legitimate questions posed in these cases. Does the "not illusory," or "not mere conjecture" standard require at least some evidence that the conduct considered is reasonably actual corruption? In this context, is "risk" just another name for "conjecture?" Is "influence" or "access" alone, without any link to official actions, converted into *quid pro quo* corruption if enough people believe it is corrupt, without any showing whether the believers were operating on faith or fact (or perhaps just media supposition)?

It is within this Court's purview to determine evidentiary burdens required to justify impositions on First Amendment-protected freedoms. The Court should resolve this conflict about whether governments may limit speech based solely on public perception, without evidence that the perception has some grounding in reality, both factual and legal.

II. Legislatures and the Lower Courts Need Guidance on the Definition of "Appearance of Corruption."

Divisive questions raised in this case, such as "Big Money" in political campaigns, and the influence of large donors, are increasingly prominent in American politics today.[23] At the same time, public trust of government is at historic lows.[24] Research indicates that the public wants something done about campaign finance but is "very uninformed about money in politics." Milyo, *Public Attitudes and Campaign Finance* at 1, *supra* at 6-7.

At least two circuits already have decisions on the evidentiary issue coming before this Court: the Fifth Circuit here, and the Ninth Circuit in *Lair v. Mangan*, No. 18-149.[25] In both cases, there was no

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[23] *See*, *e.g.*, Dylan Matthews, "The great money-in-politics myth," Vox, Feb. 9, 2016, https://www.vox.com/2016/2/9/10941690/campaign-finance-left; Friends of Bernie Sanders, "Getting Big Money Out of Politics and Restoring Democracy," [undated] https://berniesanders.com/issues/money-in-politics/; People for the American Way, "Fighting Big Money in Politics," [undated] http://www.pfaw.org/fighting-big-money-in-politics/; Citizens Take Action, "The Problem," [undated] https://citizenstakeaction.org/the-problem/; Scott Caselton, "It's Time for Liberals to Get Over *Citizens United*," Vox, May 7, 2018, https://www.vox.com/the-big-idea/2018/5/7/17325486/citizens-united-money-politics-dark-money-vouchers-primaries.

[24] *See Public Trust In Government: 1958-2017*, *supra* at 4.

[25] There are several other cases raising these concerns working their way through the lower courts. *See, e.g.*, *Upstate Jobs Party v. Kosinski*, No. 18-1586, 2018 U.S. App. LEXIS

evidence of actual *quid pro quo* corruption or its appearance. The only evidence provided was of an "appearance of influence or access," which is not an "appearance of corruption." That "appearance" was based on public opinion and testimony by "political consultants" about public concerns over "Big Money" or influence by the wealthy or corporations. App. to Pet. Cert. at 39-40.

This Court should help the lower courts by clarifying the definition and application of the "appearance of corruption."

Can highly-protected rights of political speech, association and petition be criminalized by ballot initiative because of an "appearance of corruption?" If so, can such a determination be made solely on the basis of public concerns about conduct that is not itself *quid pro quo* corruption under this Court's recent decisions, including "access" to decision makers, "lobbying" or "Big Money in politics?"

This case is the next logical step in this Court's careful review of constitutional rights affected by campaign finance laws. In some circuits, crediting an "appearance of corruption" is easy, compared to showing that such an appearance is well-founded: just find some testimony that a perception exists. But this approach is also an end-run around the requirement of showing "actual" *quid pro quo* corruption. In no other First Amendment context is a law's constitutionality conditioned on public opinion or

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20197 at *4-5 (2nd Cir. July 20, 2018) (discussing "appearance of corruption" rationale in the context of minor political parties while declining to "identify abuse of discretion in the denial of a preliminary injunction in the particular circumstances presented").

public perceptions about the nature of the speech at issue.

There is no support for unfounded perception evidence under *McCutcheon* and other cases holding that a showing of *quid pro quo* corruption is required for a governmental interest. Nevertheless, in this case among others, the unfounded perception swallows the *quid pro quo* requirement imposed by this Court's decisions.

In today's interconnected, vastly more transparent world, the imposition of political campaign contribution limits should be justified by actual, specific evidence of either *quid pro quo* corruption or a well-founded concern over corruption. Anything else would permit "mere conjecture," or more likely another iteration of the "influence," "access," or "level playing field" rationales for abridging protected rights that this Court has already rejected. *See*, *e.g.*, *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 750-51 (2011).

It is appropriate and necessary for the Court to speak on this point. "In drawing that line, the First Amendment requires us to err on the side of protecting political speech rather than suppressing it." *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 457 (2007) (Roberts, C. J., controlling op.). Or as more colorfully restated: "Where the First Amendment is implicated, the tie goes to the speaker, not the censor." *Id.* at 474.

The Court should grant the petition and guide the lower courts in their review, and legislatures in their drafting.

CONCLUSION

For the foregoing reasons, *Amici Curiae* Public Policy Legal Institute and Institute for Free Speech respectfully requests that this Court grant the Petition.

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