No. 18-149

In The Supreme Court of the United States

DOUG LAIR, *et al.*,

Petitioners,

v.

JEFF MANGAN, in his official capacity as the Montana Commissioner of Political Practices, *et al.*,

Respondents.

On Appeal from the United States District Court for the Western District of Wisconsin

BRIEF OF *AMICUS CURIAE* THE LEGACY FOUNDATION IN SUPPORT OF PETITIONERS

Jason Torchinsky
Counsel of Record
Shawn Toomey Sheehy
Dennis W. Polio
Holtzman Vogel Josefiak Torchinsky PLLC
45 North Hill Drive
Suite 100
Warrenton, VA 20186
(540) 341-8808
(540) 341-8809
Jtorchinsky@hvjt.law

Counsel for Amicus Curiae

September 4, 2018

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae The Legacy Foundation is a non-profit corporation incorporated in Iowa and organized under Internal Revenue Code 501(c)(3).[1] The Legacy Foundation is a non-partisan organization that engages in independent research concerning, *inter alia*, civil rights policy and voting. The Legacy Foundation is also dedicated to promoting a limited and accountable government. These efforts include supporting redistricting litigation involving partisan gerrymandering claims. *See, e.g.*, *Fletcher v. Lamone*, 831 F. Supp. 2d 887 (D. Md. 2011), *sum. aff'd*, 567 U.S. 930 (2012). More recently, The Legacy Foundation provided funding for an amicus brief submitted by the National Black Chamber of Commerce and the Hispanic Leadership Fund. *See Bethune-Hill v. Virginia State Board of Elections*, No. 15-680, br. of *amici curiae* National Black Chamber of Commerce, et al. (*filed* Oct. 24, 2016).[2]

---

[1] No party's counsel authored any part of this brief. No person other than the *amicus curiae* made a monetary contribution intended to fund the preparation or submission of this brief. On August 21, undersigned counsel notified Petitioners' counsel and Respondent's counsel of The Legacy Foundation's intent to file an amicus brief. On that same day, Petitioners' counsel consented to the filing of this brief. Six days later, on August 27, counsel for Respondent consented to the filing of this brief.

[2] The decision in *Bethune-Hill* is reported at *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788 (2017).

Furthermore, one of The Legacy Foundation's programs is the Military Voter Protection Project. This program "is dedicated to promoting and protecting our military members' right to vote and ensuring that their votes are counted on Election Day."[3]

Finally, The Legacy Foundation has sponsored educational communications around the country for several years. These advertisements focus on issues important to The Legacy Foundation.

SUMMARY OF THE ARGUMENT

In addition to the questions presented in the Petition, this case asks whether the government must present sufficient evidence that contribution limits it establishes are first necessary to prevent corruption or the appearance thereof, and second, the contribution limits actually address the corruption it seeks to prevent. The precedent from this Court answers that question in the affirmative, however, the Ninth Circuit below was divided on the question and erroneously upheld Montana's contribution limits without such evidence. Other Circuits that have touched on this question are similarly split.

Accordingly, amicus curiae respectfully requests that this Court grant the Petition to assist state governments and federal courts in resolving

---

[3] *See* Military Voter Protection Project, http://mvpproject.org/ (last visited July 31, 2018).

these questions and ease the confusion and resulting infringement on political speech.

ARGUMENT

I. THIS COURT'S PRECEDENT DEMONSTRATES THAT RECORD EVIDENCE IS REQUIRED TO SUPPORT CONTRIBUTION LIMITS.

This Court has repeatedly made clear that the government, in meeting its burdens under the First Amendment, must support the operation of contribution limits with evidence in the record that the enacted campaign finance limitations actually address quid pro quo corruption. This Court first demonstrated this in *Buckley v. Valeo* when it cited actual evidence of quid pro quo corruption and its appearance in upholding the Federal Election Campaign Act of 1971's ("FECA") contribution limits. 424 U.S. 1, 26-27.

> It is unnecessary to look beyond [FECA's] primary purpose . . . in order to find a constitutionally sufficient justification for the $ 1,000 contribution limitation. . . . The increasing importance of the communications media and sophisticated mass-mailing and polling operations to effective campaigning make the raising of large sums of money an ever more essential ingredient of an effective candidacy. To the extent that large contributions are given to secure political quid pro quo's from current and potential office holders, the integrity of our system of

> representative democracy is undermined. Although the scope of such pernicious practices can never be reliably ascertained, the deeply disturbing examples surfacing after the 1972 election demonstrate that the problem is not an illusory one.

Id. See also id. at n. 28. This Court has continued to require an evidentiary record demonstrating quid pro quo corruption, or its appearance, as requisite to maintenance of contribution limits as recently as *McCutcheon v. FEC*, 572 U.S. 185, 210-21, 224-27 (2014).

> In light of the various statutes and regulations currently in effect, *Buckley's* fear that an individual might contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to entities likely to support the candidate is far too speculative. And—importantly—we have never accepted mere conjecture as adequate to carry a First Amendment burden.

McCutcheon, 572 U.S. at 210 (internal citations and quotation marks omitted)

In the present case, the District Court correctly determined that evidence of corruption or the appearance thereof sufficient to overcome the First Amendment burdens included only "those actual or apparent arrangements which pose a real harm to the election process or to the public's interest in the election process." App. 56a-57a. Nonetheless, Montana introduced no specific

examples of corruption or its appearance, but rather only that of opinion and instances of attempted acts.[4] App. 59a-62a. First, Montana introduced portions of the record from *Montana Right to Life Association v. Eddleman*, 343 F.3d 1085 (9th Cir. 2003) that included testimony from a state representative explaining what he thought influenced elected officials, along with evidence of a letter sent to Republican senators in the early 1980's purportedly containing an implicit offer to exchange votes for campaign contributions. App. 59a-60a. There was no evidence that the representative's opinion was correct or that the decades old letter was at all successful. Montana also presented a declaration of a state senator who claimed to have been offered $100,000 by a group in exchange for introducing and voting on a bill. App. 60a. The state senator expressly rejected the offer. *Id*.

Second, Montana cited the Commissioner of Political Practices'[5] opinion that several candidates engaged in quid pro quo corruption by pledging "100% support" for particular groups' legislative agenda in exchange for the groups orchestrating a

---

[4] Many of the attempted acts described before the district court might have already been prohibited under existing state or federal bribery laws. *See* App. 40a-41a; Mont. Code Ann. §§ 45-7-101 *et seq*.; 18 U.S.C. §§ 1346 *et seq*.

[5] Then Commissioner of Political Practices John Motl is a longtime "attorney and campaign reform activist" as described by the District Court in *Montana Right to Life v. Eddleman*, 2000 U.S. Dist. LEXIS 23161 (2000). His opinion must be understood as tainted by his decades of activism.

large-scale campaign plan on behalf of those that made the pledge. *Id*. The court found that these candidates were likely to have supported the groups' agenda regardless, since the groups identified candidates friendly to their cause through surveys prior to making any kind offer.

Because Montana only introduced evidence of the "quids" without the requisite "pro quos," the district court correctly found that the evidence was unhelpful to its First Amendment analysis. *Id*.

It cannot be said that what is essentially dicta from *Nixon v. Shrink Mo. Gov't Pac*, 528 U.S. 377, 391-92 (2000) supports a contrary conclusion. Specifically, the Court in that case stated "respondents are wrong in arguing that in the years since *Buckley* came down we have supplemented its holding with a new requirement that governments enacting contribution limits must demonstrate that the recited harms are real, not merely conjectural" *id*. (internal quotation marks and citations omitted), while simultaneously stating "[the Court] has never accepted mere conjecture as adequate to carry a First Amendment burden." *Id*. at 392. Nonetheless, the record was replete with evidence of corruption or the appearance of corruption—so much so, in fact, that the Court stated that, regardless of the level of the State's evidentiary obligation, the case did not even "present a close call"—and the Court cited that evidence in upholding the law. *Id*. at 393-94. Accordingly, the Court ultimately accepted the sufficiency of the state's evidence but did not set out any particularized standard. *Id*. at 391-92. *See also Towbin v. Antonacci*, 885 F. Supp. 2d 1274, 1287

(S.D. Fla. 2012). In the end, *Nixon* did not settle what the government's evidentiary burden should be in defending contribution limits, it merely decided that there was sufficient evidence before the Court *in that case* to uphold the limitations enacted there.

Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604 (1996) presents a scenario much more akin to the issue in this case. While that case did not concern governments' burden to justify contribution limits, it did concern a related First Amendment issue—governments' burden to justify limits on independent expenditures by political parties. In that case, just as in this case, "[t]he Government [did] not point to record evidence or legislative findings suggesting any special corruption problem in respect to [the regulated conduct.]" *Id*. at 618. Accordingly, the Court held that the First Amendment prohibited the application of FECA's campaign contribution limitation provisions to party independent expenditures. While *Colo. Republican Fed. Campaign Comm.* unquestionably involved the regulation of different conduct from the present case, which may have been less directly related to preventing corruption than direct contributions are, *see id*. at 615; *Shrink Mo. Gov't Pac*, 518 U.S. at 392, it is applicable here because in both cases the government offered *no credible evidence whatsoever* in the record of corruption or the appearance thereof when that evidence was *necessary* to, or justified, upholding limits under the First Amendment.

In this way, *Citizens United v. FEC*, 558 U.S. 310 (2010) echoes identical concerns. In that case, the Court declared independent expenditure limits

unconstitutional because there was no evidence in the record of corruption with the making of independent expenditures. *Id*. at 360-61. Specifically, the Court noted that the record in *McConnell*, a previous challenge to the Bipartisan Campaign Reform Act of 2002 ("BCRA"), yielded absolutely no direct examples of corruption relating to independent expenditures despite a record of over 100,000 pages. *Id*. at 360. *Cf. McConnell v. FEC*, 540 U.S. 93, 125, 130-131, 146-152 (2003) (upholding restriction of "soft money" donations to political parties because there was ample record evidence of corruption or the appearance thereof); *McConnell v. FEC*, 251 F. Supp. 2d 176, 471-481, 491-506 (D.D.C. 2003) (opinion of Kollar-Kotelly, J.); *id*. at 842-843, 858-859 (opinion of Leon, J.) (same).

In fact, amicus curiae is unable to locate *any* recent case from this Court upholding contribution limits without credible evidence in the record that the regulation will address the complained of "evils," as in this case.

In *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001), this Court invalidated a number of restrictions on tobacco advertising as violating the First Amendment. The Court did so, at least in part, because the government failed to adduce evidence that those regulations actually furthered its stated interest—namely preventing underage tobacco use. *See also Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994):

> When the Government defends a regulation on speech as a means to redress past harms or

> prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.

(internal citations and quotation marks omitted).

If the government must adduce evidence that a restriction of speech actually furthers a government interest in the *commercial speech setting*, surely the government must do so in political speech settings, where the First Amendment is at "its fullest and most urgent application . . . ." *Citizens United*, 558 U.S. at 339-40.

II. THERE IS TENSION IN THE CIRCUITS CONCERNING WHETHER EVIDENCE IS NEEDED.

Various courts have misinterpreted *Buckley*'s language to signify that evidence of actual corruption or its appearance is not required to uphold contribution limits so long as the threat of corruption is not merely illusory. Other courts, however, have interpreted *Buckley* and *McCutcheon* as requiring evidence of corruption or its appearance in other to uphold those same limits.

In *Lair v. Motl*, 889 F.3d 571 (9th Cir. 2018), the Ninth Circuit denied a petition for rehearing en banc, after it upheld Montana's contribution limits. In a dissent from that denial, a portion of the court

noted that the majority upheld those contribution limits without any evidence of actual or apparent quid pro quo corruption and therefore was inconsistent with this Court's decision in *McCutcheon* and *Citizens United*. *Id.* at 572. Judges Fisher and Murguia, members of the majority responding to that dissent, stated that the government may meet its burden by merely "showing a risk of quid pro quo corruption or its appearance that is neither conjectural nor illusory." *Id.* at 579. In doing so, this response demonstrates that the majority misinterpreted *Buckley*'s "illusory" comment, relied on dicta from *Shrink PAC*, and misinterpreted *McCutcheon*, *Citizens United*, and other precedent from this Court.

In *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274 (4th Cir. 2008), the Fourth Circuit invalidated contribution limits to independent expenditure political committees. That court held that the state failed to proffer sufficient evidence demonstrating the danger of corruption due to the regulated contributions. *Id.* at 293.

In *Zimmerman v. City of Austin*, 881 F.3d 378 (5th Cir. 2018), the Fifth Circuit required the City of Austin, Texas to justify their contribution limits with "some evidence showing that [it] face[d] a problem of either actual corruption or its appearance. *Id.* at 386. Austin met this burden and the Fifth Circuit upheld its contributions limits. The plaintiff in that case has petitioned this Court for a writ of certiorari and the Court has requested a response from the Respondent due September 13, 2018. *Zimmerman*, 881 F.3d 378, *petition for cert.*

filed, (U.S. Jul. 17, 2018) (No. 18-93).

In *Lavin v. Husted*, 689 F.3d 543 (6th Cir. 2012), the Sixth Circuit declared unconstitutional a statute that makes it a crime for candidates for certain state offices to accept campaign contributions from Medicaid providers or any person with an ownership interest in a Medicaid provider. In doing so, the court required the state to actually demonstrate how the contribution restriction furthers the state's interest in preventing corruption, rather than merely recite its general interest in preventing corruption. *Id.* at 547-48.

In *Horina v. City of Granite City*, 538 F.3d 624, 633-634 (7th Cir. 2008), the Seventh Circuit affirmed the district court's judgment invalidating a city ordinance that prohibited indiscriminate handbilling because it was unconstitutional under the First Amendment. In affirming that decision, the Seventh Circuit held that the city's failure to proffer any evidence outside of its pleadings showing that handbilling caused any of the evils the city had a sufficient interest in preventing with the ordinance, was fatal to the ordinance's survival under constitutional scrutiny. *Id.* at 633-37.

In *281 Care Comm. v. Arneson*, 766 F.3d 774 (8th Cir. 2014), the Eighth Circuit reversed the district court's grant of summary judgment dismissing a challenge to a law prohibiting false political speech regarding ballot initiatives. The government argued that this law was actually necessary to preserve fair and honest elections, but did not confirm by any kind of empirical evidence

that there was "an actual, serious threat of individuals disseminating knowingly false statements concerning ballot initiatives" or "that the use of false statements impacts voters' understanding, influences votes and ultimately changes elections . . . ." *Id*. at 787, 790. Requiring the government to justify its regulation of political speech with empirical evidence to "establish *a direct* causal link between [the law] and an interest in preserving fair and honest elections," the Eighth Circuit found that merely relying on "common sense" is not enough. *Id*. at 790-91 (emphasis added).

In *Towbin*, 885 F. Supp. 2d 1274, the United States District Court for the Southern District of Florida enjoined a statute limiting direct campaign contributions by minors. The government contended that the legislature enacted the law because it felt that corruption was a threat, without citing any legislative history, and relied upon a state grand jury report finding that Florida had the most corruption convictions of public officials in the country including violations of campaign finance limitations. *Id*. at 1278. The grand jury report, like the other evidence cited by the government, only spoke of corruption generally and anecdotally and did not comment on the harms posed by contributions by minors. *Id*. The court therefore held that the government failed to meet its evidentiary burden under the First Amendment. *Id*. at 1285-89.

So differing are courts' treatment of this issue that the tension occurs not only *between* the courts but *within* them. This has occurred not only between the majority and dissenting members of *Lair v.*

Motl's Ninth Circuit panel and the Ninth Circuit Panel in the present case, but also in the Second Circuit. In *Ognibene v. Parkes*, 671 F.3d 174, 183 (2d Cir. 2011), the Second Circuit upheld restrictions on campaign contributions under First Amendment scrutiny. That court held that it is "not necessary to produce evidence of actual corruption to demonstrate the sufficiently important interest in preventing the appearance of corruption" so long as the evidence is not "mere conjecture." *Id*. Just as occurred in *Lair v. Motl*, a member of the panel broke with the majority to point out the lack of evidence in the record pertaining to quid pro quo corruption. "[T]here is little record evidence of any quid pro quo corruption involving a New York City official since the enactment of the generally applicable limits over 20 years ago." *Id*. at 207 (Livingston, J., concurring).

> The majority relies in part on the "objective[] reasonable [ness]" of "the connection between money and municipal action" to uphold the strict limits New York City's law places upon the free speech and associational rights of those "doing business." Maj. Op. at 31. The Supreme Court has stated, however, that "[w]hen the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994) (plurality opinion) (citation omitted) (internal quotation marks omitted); *see also Colo. Republican Fed.*

> *Campaign Comm. v. FEC*, 518 U.S. 604, 618, 116 S. Ct. 2309, 135 L. Ed. 2d 795 (1996) (opinion of Breyer, J.) (applying *Turner* in the campaign finance context); *Shrink Mo.*, 528 U.S. at 392 ("We have never accepted mere conjecture as adequate to carry a First Amendment burden. . . ."). Requiring the City to point to evidence demonstrating its anticorruption concern, moreover, does not amount to "giving every corruptor at least one chance to corrupt." Maj. Op. at 27. Reports of recent scandals are one form of evidence that tends to show corruption or its appearance, *see, e.g., Green Party*, 616 F.3d at 200, but so do other forms of evidence, including, *inter alia*, testimony by those familiar with the political life of the community, *see Shrink Mo.*, 528 U.S. at 393, and surveys of the populace, *see id.* at 394.

Ognibene, 671 F.3d at 207 (Livingston, J., concurring).

However, unlike the majority in *Ognibene v. Parkes*, the court in *Green Party of Conn. v. Garfield*, 616 F.3d 189 (2d Cir. 2010), invalidated a restriction on lobbyist contributions because the government failed to provide evidence that such contributions result in actual corruption or its appearance. *Id.* at 206-07. This represents yet another intra-circuit split concerning the necessary evidentiary burdens when examining corruption or its appearance.

So, in keeping score, the Ninth Circuit—depending on the makeup of the panel—generally holds evidence of corruption or its appearance is not

required to uphold contribution limits so long as the threat of corruption is not merely illusory, which misinterprets the precedent from this Court, the Second Circuit is split on the matter, while the Fourth, Fifth, Sixth, Seventh, and Eighth Circuits, along with the Southern District of Florida, correctly hold that evidence that the regulation will address actual corruption or its appearance is required to justify campaign finance restrictions. This chaos cannot last. Accordingly, this Court should grant petitioners petition for certiorari and settle the tension plaguing the circuits.

III. THE PROPER APPLICATION OF EXACTING SCRUTINY REQUIRES STATES TO ADDUCE EVIDENCE.

"Premised on mistrust of governmental power" the First Amendment is at "its fullest and most urgent application to speech uttered during a campaign for political office." *Citizens United*, 558 U.S. at 339-40 (2010). Speech concerning salient political issues is especially protected under our Constitution because it is "the type of speech [that is] indispensable to decision making in a democracy[.]" *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 776-77 (1978).

Included within the First Amendment's free speech and associational rights is the making and receiving of campaign contributions. *See McCutcheon*, 134 S. Ct. at 1440-41. Although not absolute, Montana may limit campaign contributions *only* to prevent corruption or the appearance thereof. *Id.* at 1441. Montana cannot "regulate contributions

simply to reduce the amount of money in politics, or to restrict the political participation of some in order to enhance the relative influence of others." *Id.*

Contribution limits impose "significant First Amendment costs" on individual citizens, and accordingly, the only governmental interest that this Court has recognized as sufficiently important to justify them is the prevention of corruption or the appearance thereof. *McCutcheon*, 134 S. Ct. at 1450. Accordingly, Montana must adduce sufficient evidence that its severely low contribution limits are intended to prevent corruption or the appearance thereof. *Id.* at 1452 (citing *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. at 816). The limits at issue are so low, in fact, that they constitute the lowest limits in the nation, nearly constituting an outright ban. App. i, 12.

Even so, this zone of regulation is narrow. Montana can target only quid pro quo corruption—the "direct exchange of an official act for money." *Id.* at 1441; *see also id.* at 1450. Montana may also target the appearance of corruption "stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions to particular candidates." *Id.* Access and ingratiation cannot constitute corruption and Montana may not impose contribution limits to prevent or limit those incidents. *See id.* at 1442. Montana is prohibited from enacting campaign contribution limits for any other reason other than corruption prevention because to do so would "impermissibly inject" the legislature "into the debate over who should govern." *Id.* at 1441. "And

those who govern should be the *last* people to help decide who should govern." *Id*. at 1441-42 (emphasis in the original).

A. Montana Must Adduce Evidence To Demonstrate Its Contribution Limits Are Necessary To Prevent Corruption Or The Appearance Thereof.

In this case, Montana was required to adduce sufficient evidence that punitively low contribution limits are *necessary* to address an actual problem of corruption or its appearance, particularly corruption or the appearance thereof related to direct contributions from individuals, committees, and parties to candidates for Montana state elective office. *See Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 618 (1996) (requiring that the FEC must "point to record evidence or legislative findings suggesting any special corruption problem."); *McCutcheon*, 134 S. Ct. at 1450, 1452 (requiring that the Government justify its actions and present evidence that large campaign contributions were made "to control the exercise of an officeholder's official duties.").

Contrary to the position of the Ninth Circuit below, App. 4a, it is necessary for the government to adduce credible evidence of the problem it seeks to address through the challenged restrictions. *See Buckley*, 424 U.S. at 27. If evidence of the problem the state seeks to address must be "real" in the context of commercial speech restrictions, *Lorillard Tobacco Co.*, 533 U.S. at 555, certainly the same

must be so in the political speech arena, where the First Amendment is at "its fullest and most urgent application . . . ." *Citizens United*, 558 U.S. at 339-40. Accordingly, this Court must require that Montana provide evidence that there is an actual or apparent problem of corruption with contributions to Montana candidates, something the State failed to do in this case. *See McCutcheon*, 134 S. Ct. at 1450.

In *Lavin,* 689 F.3d 543, the Sixth Circuit declared unconstitutional a contribution restriction, in part, because it determined that it was not closely drawn to the asserted government interest. Specifically, the contribution restrictions affected all 93,000 persons, only 0.003% of who were at all implicated in Medicaid fraud. *Id*. at 548. *See also Upstate Jobs Party v. Kosinski*, 2018 U.S. App. LEXIS 20197, *4 (2nd Cir. 2018) (noting that the existing record raises questions as to whether the challenged statutes related to financing of minor party committees employ means closely drawn to avoid unnecessary abridgment of associational freedoms.) (quoting *McCutcheon*, 134 S. Ct. at 1444) (alterations and quotation marks omitted).

Here, Montana simply failed to show by any credible evidence that the contribution limits at issue address corruption or the appearance thereof, while simultaneously affecting *all* citizens of Montana including every candidate and political organization therein. App. 59a-63a.

> 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 of opportunities, legislators chose to keep their noses clean. In short, none of Defendants' examples demonstrate a real harm to the election process or to the public's interest in that process, as is required by the Ninth Circuit.

Id. at 63a. *See also id.* ("the Court *finds* that Defendants have failed to prove that Montana's campaign contribution limits further the important state interest of combating quid pro quo corruption or its appearance") (emphasis added). The Ninth Circuit improperly reversed the District Court, despite the District Court's clear, correct, and controlling findings of fact that there was insufficient evidence that the contribution limits were essential to prevent quid pro quo corruption or the appearance thereof. App. 35a-43a (Bea J., dissenting).

B. Montana Must Have Adduced Evidence To Demonstrate That Its Contribution Limits Are Closely Drawn.

Even if the contribution limits at issue were established to prevent corruption or the appearance thereof (they were not), they must be closely drawn in order to avoid unnecessary infringement on First Amendment rights. *McCutcheon*, 134 S. Ct. at 1446. The fit between the interest asserted and the means used to achieve that interest do not need to be perfect but must be "in proportion to the interest served." *Id.* at 1456. In short, the means Montana uses to achieve its interest in preventing corruption

or its appearance must be "narrowly tailored to achieve the desired objective." *Id*. at 1457.

Accordingly, intermediate scrutiny of campaign finance provisions is "rigorous" requiring courts to be "particularly diligent in scrutinizing the law's fit." *Id*. at 1446-58. Although this fit between preventing corruption and the appearance thereof need not be perfect, the limitation cannot survive if the contribution limitation unnecessarily abridges First Amendment rights. *Id*. at 1446. *Cf. Preston v. Leake*, 660 F.3d 726 (4th Cir. 2011) (upholding lobbyist contribution ban because it was supported by evidence that it prevented corruption or the appearance thereof and was closely drawn to accomplish that purpose.).

Here, Montana did not provide sufficient evidence to prove that its especially onerous campaign finance regime is justified. *See* App. 63a-64a. This regime imposes the most severe and the lowest contribution limits in the nation. Even if these limits were in some way justified, there is no evidence that the means used to achieve Montana's asserted interest do not unnecessarily infringe on constitutional rights or permit candidates to amass sufficient resources to wage effective campaigns. *See* App. 64a-68a.

Similarly, this Court has recently determined that restrictions of First Amendment rights in grave criminal contexts must be narrowly tailored as well, even where the government's asserted interest is much higher than in the present case. *See Packingham v. North Carolina*, 137 S. Ct. 1730 (2017) (prohibition against criminally convicted sex offenders from using social media was not narrowly

tailored). If those laws were found to be too broad given the gravity of the state interests involved, certainly, restricting political speech in the context of this case is also too broad.

Accordingly, this Court should grant petitioners petition for certiorari so it can correct the erroneous decision of the Ninth Circuit and determine that Appellants are likely to succeed on the merits of their claim.

CONCLUSION

For the foregoing reasons, Amicus Curiae Legacy Foundation respectfully requests that this Court grant the Petition.

Respectfully submitted,

Jason Torchinsky
Counsel of Record
Shawn Toomey Sheehy
Dennis W. Polio
Holtzman Vogel Josefiak Torchinsky PLLC
45 North Hill Drive
Suite 100
Warrenton, VA 20186
(540) 341-8808
(540) 341-8809
Jtorchinsky@hvjt.law

September 4, 2018