No. 19-122

IN THE

Supreme Court of the United States

DAVID THOMPSON; AARON DOWNING; and JIM CRAWFORD,

Petitioners,

v.

HEATHER HEBDON in her Official Capacity as the Executive Director of the Alaska Public Offices Commission, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICI CURIAE* OF THE NATIONAL REPUBLICAN SENATORIAL COMMITTEE AND NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are national political party committees whose members' activities and methods of fundraising are impacted by the provisions of law at issue in this matter. *Amici curiae* assist their Republican members in achieving electoral victories.

The National Republican Senatorial Committee ("NRSC") is the principal national political party committee focused on electing Republican candidates to the United States Senate. Members of the NRSC include all incumbent Republican Members of the United States Senate. The Chairman of the NRSC is elected every two years by the Republican Senate caucus, and members are appointed by the Senate Republican Conference Committee. The NRSC is registered with the Federal Election Commission ("FEC") as a "political committee," and is recognized by the FEC as a national political party committee.

The National Republican Congressional Committee ("NRCC") is the principal national political party committee focused on electing Republican candidates to the United States House of Representatives. Members of the NRCC include all incumbent Republican Members of the United States House of Representatives. The NRCC is governed by a Chairman and an Executive Committee composed of Republican members of the United States House of Representatives. The NRCC is registered with the FEC as a "political committee,"

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[1] Pursuant to Fed. R. App. P. 29(a)(4), no counsel for either party authored this brief in whole or in part. No party or its counsel provided funding for this brief; no person or entity other than amici and their members made a monetary contribution to its preparation or submission. The parties received timely notice of amici intent to file this brief. Counsel for both parties have consented to the filing of this amicus brief.

and is recognized by the FEC as a national political party committee.

Amici curiae have a vital interest in the law regarding campaign finance since the financing of elections directly impacts their members, members' constituents, campaigns, elections, and their successors in office. Accordingly, any ruling concerning campaign finance, especially that of the District Court below, has widespread implications for *Amici curiae* and their members. Further, *Amici curiae* have participated in numerous campaign finance cases in the course of their respective histories. *See, e.g., McCutcheon v. FEC*, 572 U.S. 185 (2014) (as *amicus curiae*); *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001) (NRCC as *amicus curiae*); *Democratic Senatorial Campaign Comm. v. FEC*, 139 F.3d 951 (D.C. Cir. 1998) (NRSC as *amicus curiae*); *FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471 (D.C. Cir. 1992).

INTRODUCTION

Since *Buckley v. Valeo*, this Court has recognized that preventing the appearance of *quid pro quo* corruption is a government interest sufficient to uphold campaign finance regulations' restriction of protected political speech. With increasing regularity, courts have been accepting and relying on 'evidence' from public opinion polling in order to find the "appearances of corruption" sufficient to justify such regulations. The District Court in the present case considered one such opinion survey and upheld Alaska's incredibly low contribution limits because of that evidence.

Public opinion polling should not be accepted as evidence sufficient to justify the constitutionality of campaign finance contribution limitations. This Court and the other federal courts have recognized the

challenges with relying on public perception data in other constitutional contexts and have disallowed the use of such data in defending the constitutionality of other laws. In this sensitive First Amendment area, the use of public opinion polling must be viewed within the context of this Court's repeated signals that it is hesitant to rely on social science in adjudicating political cases which assess the policy preferences or voting behavior of the electorate. Further, while this Court has been clear that *quid pro quo* corruption or its appearance can justify contribution limitations, measures or studies of public perception do not accurately measure *quid pro quo* corruption. Therefore, courts should not rely on such data to prove the appearance of *quid pro quo* corruption.

The incorporation of public perception evidence into jurisprudence justifying contribution limits makes campaign finance regulations an outlier among constitutional cases, permitting greater restriction of First Amendment rights than other rights on the basis of public opinion polls. Accordingly, *Amici curiae* write separately here to urge this Court to grant Petitioners' writ of certiorari so that it can reject the district court's use of public opinion polling to provide a constitutional basis for Alaska's severe restrictions on protected speech.

ARGUMENT

In this case, the United States District Court for the District of Alaska (the "District Court") relied on public opinion research as a constitutional basis to justify Alaska's incredibly low contribution limits. Specifically, in defending its contribution limits, the state introduced at trial a study conducted by the Government Ethics Center and commissioned by the Alaska State Senate in 1990 (the "Study"). The Study

concluded "that things are not what they should be and that [t]he reputation and image of the legislature is unacceptably low." App. 55 (internal quotation marks omitted, alteration in original). The District Court found particular relevance in the Study's results demonstrating "that 24 percent of lobbyists surveyed believed that 'about half' or more of Alaska's legislators could 'be influenced to take or withhold some significant legislative action . . . by campaign contributions or other financial benefits provided by lobbyists and their employers,' and that 40 percent of legislators surveyed believe that very few members of the public had a sufficiently high degree of trust and confidence in legislators' integrity." App 55.

The District Court credited the Study and found that it was evidence of the "pervasive and persistent" appearance of *quid pro quo* corruption stemming from "large" campaign contributions in Alaska politics. App. 55, n. 19; App. 56. The District Court therefore upheld the Alaska laws forming the basis of the state's low contribution limits. The Court of Appeals for the Ninth Circuit affirmed the District Court's holdings. In doing so, the Ninth Circuit relied heavily on *Montana Right to Life Ass'n v. Eddleman*, 343 F.3d 1085 (9th Cir. 2003), where a fractured panel of the Ninth Circuit set forth its own diluted standard for upholding contribution limits.

This Court should not allow polling to guide, let alone decide or set the constitutional standards for, the important and protected constitutional inquiries into regulation of political speech. This Court, and the rest of the federal judiciary, has forcefully rejected the use of public opinion data as a basis for constitutional analysis in nearly all other subject areas except campaign finance law. This makes campaign finance—an

area implicating some of the "fullest and most urgent" First Amendment protections—an outlier among constitutional subject matters. *McCutcheon v. FEC*, 572 U.S. 185, 191-92 (2014) (plurality opinion) (citing *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)). Such basic and core fundamental rights should not be subject to less constitutional protections than other rights.

Further, polling cannot accurately measure "corruption" because attitudes towards and perceptions of campaign finance and the operations of government are nuanced. As will be demonstrated below, public perception on these kinds of issues are susceptible to differing analyses and interpretations. These differences lead to inconsistent and incorrect results.

The poor fit of public perception data to these kinds of cases, and constitutional cases generally, should also be viewed through the lens of this Court's hesitation to accept social science analysis of the behaviors and perceptions of the electorate in constitutional inquiries in cases involving regulations of political or electoral conduct. This hesitation is stems from the fact that the federal judiciary is not well situated to weigh social science evidence, such as polling, and doing so "risks basing constitutional holdings on unstable ground outside judicial expertise." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2489 (2019).

Accordingly, this Court should grant Petitioners' writ of certiorari so that it can make clear that public opinion polling should not be used as a measure of corruption or its appearance sufficient to justify campaign contribution limitations.

I. COURTS HAVE REJECTED THE USE OF PUBLIC OPINION DATA TO UPHOLD THE CONSTITUTIONALITY OF LAWS IN OTHER SUBJECT AREAS

The federal judiciary has rejected the use of public opinion data in its constitutional analyses of laws in nearly every other subject matter. There is a disconnect in legal theory when courts in cases like this one continue to credit and utilize polling as constitutional justification for upholding laws in the political speech context where "the First Amendment has its fullest and most urgent application." *McCutcheon,* 572 U.S. at 191-92 (citing *Monitor Patriot Co.,* 401 U.S. at 272). Indeed, when an individual contributes money to a candidate, or political committee, he or she exercises both political expression and political association "[t]he contribution serves as a general expression of support" for the candidate or committee and their views and "serves to affiliate a person with a candidate" or committee. *McCutcheon,* 572 U.S. at 203 (citing *Buckley*, 424 U.S. at 21-22). Such participation in the electoral debate is "integral to the operation of the system of government established by our Constitution." *Buckley*, 424 U.S. at 14. Given the immense importance of such speech, and the protections afforded by the Constitution, campaign finance jurisprudence should not be an outlier among constitutional analyses in the use of public opinion data to serve as a constitutional justification for restrictions on speech.

A. The Courts Have Prohibited the Use of Public Opinion Evidence In Other First Amendment Analyses

Even within other areas of First Amendment case law, the courts have rejected the use of public opinion surveys and studies as a basis for making Constitutional determinations.

In *Texas v. Johnson*, this Court examined the constitutionality of laws criminalizing desecration of the American flag. 491 U.S. 397 (1989). In finding that such laws were not consistent with the First Amendment, the majority stated—in terms unquestionably relevant to this brief—that "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Id*. at 414 (citing *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55-56 (1988); *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 65, 72 (1983); *Carey v. Brown*, 447 U.S. 455, 462-463 (1980); *FCC v. Pacifica Found.*, 438 U.S. 726, 745-46 (1978); *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 63-65, 67-68 (1976) (plurality opinion); *Buckley*, 424 U.S. at 16-17; *Grayned v. Rockford*, 408 U.S. 104, 115 (1972); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972); *Bachellar v. Maryland*, 397 U.S. 564, 567 (1970); *United States v. O'Brien*, 391 U.S. 367, 382 (1968); *Brown v. Louisiana*, 383 U.S. 131, 142-143 (1966); *Stromberg v. California*, 283 U.S. 359, 368-369 (1931)).

This Court noted that is has not "recognized an exception to this principle even where our flag has been involved." *Id*. Justice Kennedy issued a concur-

rence in the case, acknowledging that the Court and the Country must make decisions they do not like, but are none-the-less "right" in that "the law and the Constitution, as we see them, compel the result. And so great is our commitment to the process that, except in the rare case, we do not pause to express distaste for the result, perhaps for fear of undermining a valued principle that dictates the decision." *Id*. at 420-21. Yet, this is exactly what occurred in this case, and what is occurring in nearly all campaign finance litigation where *appearance* of corruption justifies campaign finance regulations—evidence of public perception is compelling the continued curtailment of protected political speech.

In *United States v. Alvarez*, this Court held that the Stolen Valor Act's, 18 U.S.C.S. § 704(b), penalties for falsely claiming to be a Medal of Honor recipient violated the First Amendment. 132 S. Ct. 2537 (2012). The government, in attempting to support the constitutionality of the Stolen Valor Act claimed that the public's general perception of military awards would be diluted by false claims of award receipt. *Id*. at 2549. The Court soundly rejected that contention, and held the Stolen Valor Act violated the First Amendment even if "true holders of the Medal [of Honor] might experience anger and frustration." *Id*.

In *Hustler Magazine, Inc. v. Falwell*, Jerry Falwell brought suit against Hustler Magazine for libel, slander, and intentional infliction of emotional distress arising from the publication of his caricature in an advertisement parody. 485 U.S. 46. On review, this Court found that Falwell, as a public figure, was required to show that the statements published in the parody were made with actual malice or reckless disregard of the truth. *Id*. at 52. In attempting to demonstrate this,

Falwell contended that the parody was so outrageous and offensive to society as to distinguish it from other parodies such as political cartoons. *Id*. at 55-56. The Court determined that such a standard in the area of political and social discourse is inherently subjective, which would

> allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression. [That kind of] standard thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience.

Id. at 55. *See also FCC v. Pacifica Found.*, 438 U.S. at 745-46 ("The fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection."); *Street v. New York*, 394 U.S. 576, 592 (1969) ("It is firmly settled that . . . the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."); *Young v. Am. Mini Theatres, Inc.*, 427 U.S. at 63-63 ("[S]peech [may not] be curtailed because it invites dispute, creates dissatisfaction with conditions the way they are, or even stirs people to anger." (citing *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949));

In *Montana Right to Life Association v. Eddleman*, a case relied on heavily by the Ninth Circuit below in the present case, the Ninth Circuit rejected a challenge to Montana's campaign finance reform measures based on their undue burdens on protected speech and associational rights. 343 F.3d 1085 (9th Cir. 2003). In doing so, that court relied in part on a number of public

polls demonstrating the majority of the public indicated it believed "money is synonymous with power" and "that elected officials give special treatment to individuals and businesses that make large contributions"—metrics it interpreted as being indications of an appearance of corruption sufficient to justify the campaign finance scheme. *Id*. at 1093. The dissent in that case correctly noted the concern with such reliance, stating "I question whether a poll of the constituents is sufficient evidence, or is even probative to show the existence of perceived corruption. *Issues of fundamental freedom should not be decided by majority vote, much less by a public opinion poll*; thus, the poll results here should not be considered by the panel." *Id*. at 1102-1103 (Teilborg, J. dissenting) (emphasis added). *See also Id*. (citing *FEC v. Colorado Republican Fed. Campaign Comm.*, 213 F.3d 1221, 1230 n.6 (10th Cir. 2000), *rev'd on other grounds*, 533 U.S. 431 (2001) ("newspaper articles and polls purportedly showing a public perception of corruption" are insufficient to justify a limitation on the independent expenditures of PACs) (internal citations omitted); *Id*. (citing *Stanford v. Kentucky*, 492 U.S. at 377); *Id*. n. 4 (distinguishing *Compassion in Dying v. State of Wash.*, 79 F.3d 790, *amended by* 85 F.3d 1440 (9th Cir. 1996), *cert. granted by Washington v. Glucksberg*, 518 U.S. 1057 (1996), *rev'd by* 521 U.S. 702 (1997)).

B. The Federal Judiciary has Soundly Rejected the Use of Public Opinion Evidence in Constitutional Analyses Generally

This Court, the Courts of Appeals, and federal District Courts have repeatedly affirmed the impropriety of considering public opinion evidence in their constitutional analyses generally. Only a few of many

possible examples from a variety of subject matters outside of the First Amendment are summarized here.

In *Planned Parenthood of Southeastern Pennsylvania v. Casey,* this Court considered a Pennsylvania law that required doctors to provide information about procedures, risks, and alternatives to a woman deciding whether to proceed with an abortion. 505 U.S. 881 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.) (quoting 18 Pa. Cons. Stat. § 3205 (1990)). The joint opinion discussed overruling *Roe v. Wade*, 410 U.S. 113 (1973), but eventually upheld it along with the "informed-consent requirement," adopting the "undue burden" standard. *Casey*, at 866-867, 874, 901. Chief Justice Renquist, joined by Justices White, Scalia, and Thomas concurred in part and dissented in part, taking issue, *inter alia*, with the joint opinion's discussion of overruling *Roe* based in part on its popularity or divisiveness. *Id*. at 963. Chief Justice Renquist wrote:

> Either the demise of opposition or its progression to substantial popular agreement apparently is required to allow the Court to reconsider a divisive decision. How such agreement would be ascertained, short of a public opinion poll, the joint opinion does not say. But surely even the suggestion is totally at war with the idea of "legitimacy" in whose name it is invoked. The Judicial Branch derives its legitimacy, *not from following public opinion*, but from deciding by its best lights whether legislative enactments of the popular branches of Government comport with the Constitution. The doctrine of stare decisis is an adjunct of this duty, and should

> be no more subject to the vagaries of public opinion than is the basic judicial task.

Id. (emphasis added).

In *United States v. Leichtnam*, the Court of Appeals for the Seventh Circuit reversed a defendant's conviction of drug conspiracy and firearms charges because it held that the introduction of handguns into evidence as well as certain jury instructions impermissibly amended the indictment by broadening the possible bases for conviction, in violation of the Fifth Amendment. 948 F.2d 370, 380-81 (7th Cir. 1991). The dissent in that case asserted that to upset the jury's verdict would undermine confidence in the criminal justice system in promoting a perception that "too many guilty defendants evade justice by invoking legal technicalities." *Id*. at 387. The majority took issue with this assertion, arguing that the opinion should strengthen rather than weaken public confidence in the justice system and, regardless:

> *public opinion is not properly the determinative factor in judicial decisions*. The founding fathers were well aware when they adopted the amendments constituting the Bill of Rights that their application would sometimes be unpopular. It is the responsibility of the judiciary to uphold the Constitution even when to do so may not be approved by the majority of the public.

Id. at 381, n. 4 (emphasis added).

In *Dowell v. Board of Education*, the Court of Appeals for the Tenth Circuit directed the District Court for the Western District of Oklahoma to determine the effectiveness of school desegregation plans, and then put into effect the plans it found necessary.

338 F. Supp. 1256 (W.D. Okla. 1972), *aff'd*, 10 Cir. 1972, 465 F.2d 1012, *cert. denied*, 409 U.S. 1041, 93 S. Ct. 526 (1972). The School Board rationalized its refusal to desegregate on the basis that public opinion was opposed to such desegregation. *Id*. at 1270. The Western District of Oklahoma concluded as a matter of law that such an interest is "constitutionally unsound" and is therefore not a valid reason for failure to comply with the Constitution. *Id*.

In *City of Greensboro v. Guilford County Board of Elections*, the District Court for the Middle District of North Carolina heard a suit challenging a bill of the North Carolina General Assembly that changed the Greensboro City Council from partially being elected at large to being entirely elected by districts and drew district lines for the new districts. This bill also prohibited changes to the city's government by the City Council and changes by citizen referendums and initiatives, which were otherwise available by statute to municipal citizens statewide. The legislation was subject to challenge on one-person, one-vote, partisan and racial gerrymandering, and Equal Protection grounds. *City of Greensboro v. Guilford County Board of Elections*, 251 F. Supp. 3d 935 (M.D.N.C. 2017). In attacking the bill, the Plaintiffs, inter alia, submitted evidence that Greensboro voters overwhelmingly opposed the bill. While finding for Plaintiffs, that court soundly rejected their public opinion evidence. *Id*. at 947, n. 102. That court rejected the evidence because "[t]he Constitution does not require legislatures to pass only those bills that have public support, and anecdotal evidence of public opinion is immaterial to constitutional analysis." *Id*.

II. PUBLIC OPINION IS NUANCED: "PERCEPTIONS OF CORRUPTION" ARE SKEWED BY A VARIETY OF FACTORS

Data gathered through polling of public opinion regarding appearances of corruption should not be relied upon by the federal judiciary as a constitutional basis for upholding campaign finance regulations because public perception is not an accurate measure of *quid pro quo* corruption. Since public polling cannot measure *quid pro quo* corruption, it certainly cannot measure the appearance of *quid pro quo* corruption. Political science literature has repeatedly demonstrated that public perception of "corruption" can come from a myriad of attitudes toward representative bodies and campaigns, and perception of government in general, other than the presence or appearance of actual *quid pro quo* corruption. *See generally* Shaun Bowler, Todd Donovan, *Campaign Money, Congress, and Perceptions of Corruption*, AMERICAN POLITICS RESEARCH (July 2016), https://www.researchgate.net/profile/Todd_Donovan/publication/280078383_Campaign_Money_Congress_and_Perceptions_of_Corruption/links/5ae0f6820f7e9b2859480d71/Campaign-Money-Congress-and-Perceptions-of-Corruption.pdf; Persily, Nathaniel and Lammie, Kelli, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*. Faculty Scholarship (2004), Paper 30, http://scholarship.law.upenn.edu/faculty_scholarship/30; David M. Primo, Jeffrey Milyo, *Campaign Finance Laws and Political Efficacy: Evidence From the States* (June 2005), https://mospace.umsystem.edu/xmlui/bitstream/

handle/10355/2628/CampaignFinanceLawsPoliticalEfficacy.pdf?sequence=1.[2]

Both general attitudes pertaining to campaign finance as well as trends in attitudes wholly distinct from campaign finance negatively affect perception of corruption in elected officials. Attitudes regarding campaigns, money in politics, and political spending, as well as demographics, opinions and perceptions about the current state of affairs, and social-psychological predispositions all cause people to falsely determine their government is corrupt or appears corrupt in polling.

Studies have shown that, when judging something as being "corrupt" or not, people make distinctions about sources and amounts of political money. Shaun Bowler, Todd Donovan, *Campaign Money, Congress, and Perceptions of Corruption*, AMERICAN POLITICS RESEARCH (July 2016). For example, a recent study has shown that independent expenditures by corporations and unions are seen as more corrupt than expenditures by individuals, even though independent expenditures have been repeatedly blessed by this Court as protected by the First Amendment. *Id*.; *Cf. Citizens United v. FEC*, 558 U.S. 310 (1976); *Buckley*, 424 U.S. 1 (2010). In fact, this Court has determined as a matter of law that independent expenditures do

[2] *Amicus curiae* recognize the irony in supporting their argument against courts' use of public opinion polls with studies themselves based on public opinion polls. However, the studies on which *Amicus curiae* rely are not simply polls, but are academic studies interpreting a wide variety of polling results and explaining the issues with using those results in constitutional analyses. Accordingly, the studies cited *supra* serve as better guides to this Court than any produced to support campaign finance regulations.

not create corruption or the appearance of corruption sufficient to constitutionally justify their prohibition or limitation. *See Citizens United v. FEC*, 558 U.S. 310 (2010). This same study concludes that the public may view large independent expenditures as more corrupt than smaller ones, despite this Court granting First Amendment protection to them as a matter of law regardless of size due to their lack of their corrupting influence or appearance thereof. *Id*.; *See also Citizens United*, 558 U.S. 310. Yet, extrapolating the District Court's reasoning in the present case could result in restricting the constitutionally protected right to make large independent expenditures.

Further, "campaign money" is more likely to be perceived as an indication of corruption when people were prompted in a way that suggested funds are spent on "negative" television advertisement. *Id.* The research concluded that because many people dislike political advertisements aired on television, there is a perception that the funding behind them is corrupt. *Id*. To highlight this, research shows that the public also tends to view campaign money as less corrupt when they are informed that a candidate or campaign has a "legitimate" need for it, or when provided with information about how much advertising actually costs. *Id*. Indeed, some researchers concluded that "Americans perceive campaign contributions of almost any size" as corruption, Nathaniel and Lammie, Kelli, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law* (2004), yet it is clear that this Court would never constitutionally permit a system prohibiting all private contributions or of mandatory public financing. *See Buckley*, 424 U.S. 1.

There is also statistical evidence that partisanship shapes how information about political spending affects perceptions of corruption. Bowler and Donovan found, for example, that "Democrats were far more likely to see [campaign finance] arrangements that might be assumed to advantage their party as honest (even if the practice was illegal), and they were much more likely to see arrangements that potentially benefited Republicans as corrupt." Shaun Bowler, Todd Donovan, *Campaign Money, Congress, and Perceptions of Corruption*, AMERICAN POLITICS RESEARCH (July 2016). Bowler and Donovan also found the same to be true of Republicans, in reverse. *Id*. Such evidence, and changing of views on the basis of perspective, should not be used as a constitutional basis to limit speech.

In short, "cynicism about campaign money is not monolithic; people appear to make distinctions about how corrupting campaign money is depending on how much is raised and spent, by whom, and how is it spent" not merely whether they believe *quid pro quo* corruption is occurring or is appearing to occur. Shaun Bowler, Todd Donovan, *Campaign Money, Congress, and Perceptions of Corruption*, AMERICAN POLITICS RESEARCH. (July 2016). "[M]oney in politics may be more complex than a generalized suspicion of a quid pro quo relationship where any forms of money are seen as equally corrupt." *Id*. Yet, in the campaign finance area, this Court and lower courts have used public opinion studies as a basis for justifying limitations on speech.

Demographic and political variables also cause different segments of the American population to be more or less likely to perceive corruption. Nathaniel and Lammie, Kelli, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines*

Constitutional Law (2004). These researchers concluded that, "those with lower socioeconomic status are more likely to perceive corruption" while those with greater socioeconomic status are less likely to believe corruption exists in their government. *Id*. This paper concluded that because people who are "unhappy with their position in society" are more likely to blame the government, in part, for their position and therefore deem it corrupt. *Id*. This study noted that race, education, and income are all factors that have been found to impact these perceptions. *Id*. Opinions as to the current state of affairs including general anti-government feelings, specific anti-incumbent or anti-party attitudes, and opinion as to the performance of the economy also correlate strongly with polling indications of government corruption. *Id*. There is evidence that the share of the population viewing government as corrupt rises and falls with the popularity of the incumbent representatives: declining during successful terms and periods of economic growth and surging during periods of recession and dissatisfaction. *Id*. It makes perfect sense that those people who hold negative opinions as to the state of the nation or of a state will similarly express their dissatisfaction and blame those in charge. Public perception of corruption in the political process is so skewed, in fact, that these researchers and authors implore the courts not to utilize such data in their constitutional analyses. They write, "[i]n the end, we discourage the use of any such data in litigation: if courts continue to hold that campaign finance is one of those areas of the law where, in effect, 'appearances do matter,' we hope judges will not base their decisions on a headcount of the American people." (internal citations omitted))". There is clearly a "disjuncture between public opinion and the jurisprudence on campaign finance" where otherwise legal

and non-*quid pro quo* political behavior is viewed as corruption. *Id*.

Further, despite the courts' willingness to override free speech concerns in favor of public confidence in government, the purported link between contribution limits and perceptions of government has never been established systematically. David M. Primo, Jeffrey Milyo, *Campaign Finance Laws and Political Efficacy: Evidence From the States* (June 2005), https://mospace.umsystem.edu/xmlui/bitstream/handle/10355/2628/CampaignFinanceLawsPoliticalEfficacy.pdf?sequence=1. Primo and Milyo tested whether campaign finance laws actually influence how citizens view their government by exploiting the variation in campaign finance regulations both across and within states during the last half of the 20th century. *Id*. They found, that overall "no state campaign finance laws appear to have a substantively large impact on the public's perceptions of government." *Id*. In fact, they were unable to find any evidence that most campaign finance regulations, like the individual contribution limits at issue in this case, improve political efficacy at all. *Id*. Therefore, using public perception data to justify severe contribution limits, like those at issue in this case, results in tailoring issues—the regulations proffered will not treat the problems the regulations are being proffered to address and will affect much more behavior than necessary.

Accordingly, data demonstrating public perception of the appearance of corruption should have no place in courts' constitutional analyses of campaign finance regulations.

III. THIS COURT HAS RECENTLY SIGNALED ITS HESITATION TO USE SOCIAL SCIENCE ASSESSMENTS OF THE POLITICAL AND POLICY VIEWS OF THE ELECTORATE IN POLITICAL CASES

Both the inability of public perception polling to identify *quid pro quo corruption* and the federal judiciary's general rejection of the use of public perception data in its constitutional analyses of laws in subject areas other than campaign finance should be viewed in the amplifying light of this Court's repeated hesitation to use social science regarding evidence of public opinion in cases involving political concerns.

In *Gill v. Whitford*, a partisan gerrymandering case, plaintiffs were attempting to cement a manageable judicial standard for litigating partisan gerrymandering claims using efficiency gap, median-mean, and partisan bias measures. 38 S. Ct. 1916 (2017). While this Court declined to create a standard, it did hold that those plaintiffs did not have standing to litigate their partisan gerrymandering claim and remanded to the trial court. *Id.* at 1923, 1933-34. During oral argument, however, the Chief Justice made an astute observation, calling the different means for measuring "partisan asymmetry" proffered by plaintiffs "sociological gobbledygook." *Gill v. Whitford*, No. 16-1161 (Oct. 3, 2017), Oral Argument Tr. 40:1-7.

The following term, this Court answered the question of whether partisan gerrymandering claims are justiciable in *Rucho v. Common Cause*. In finding that partisan gerrymandering claims are non-justiciable political questions, the Court noted that so many recent decisions attempting to predict future elections based on a supposedly partisan gerrymandered map turned out to be incorrect. *Rucho*, 139 S. Ct. at 2503-

04. The Court explained that these predictions were based on "flawed assumptions about voter preferences and behavior or because demographics and priorities change over time." *Id*. For those reasons, this Court held that asking judges to predict how a particular districting map will perform in future elections risks basing constitutional holdings on unstable ground outside judicial expertise." *Id*. *See also Rucho v. Common Cause*, No. 18-422, Brief *Amici curiae* of the Republican National Committee and the National Republican Congressional Committee (filed Feb. 12, 2019). In this way, asking courts to predict voter behavior is akin to asking courts to assess public opinion. It is asking judges to interpret soft data that is capable of multiple interpretations even when conducted by scholars learned in the subject matter.

Accordingly, federal courts should not be in the business of interpreting public perception data in campaign finance litigation as a constitutional justification for restrictions on speech just like they should not be in the business of predicting voter behavior based on "studies" in partisan gerrymandering cases.

CONCLUSION

For the foregoing reasons, *Amici curiae* respectfully request this Court grant Petitioners' writ of certiorari and prohibit the use of public perception data in the federal courts' constitutional analysis of campaign finance challenges.

This brief should not be construed as discounting the public's perception of government or their elected representatives, only that it should not be utilized in constitutional analyses by the courts. Public opinion forms the backbone of the American political system because it directly impacts how the political branches

of government are selected, act, and react. Public opinion polling and research allows candidates, campaigns, political organizations, and elected representatives to determine policy and put their finger on the pulse of the American people. By contrast, however, the federal judiciary is meant to be shielded from making decisions on the basis of public opinion or perceptions of public opinion. As this Court has long made clear, and in nearly every other area held, public opinion about speech should not be permitted to form the basis for restrictions on the exercise of otherwise First Amendment protected speech.

Respectfully submitted,

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