No. 18-733

In the
Supreme Court of the United States

1A AUTO, INC. and 126 SELF STORAGE, INC.,
Petitioners,

v.

MICHAEL SULLIVAN, Director,
Massachusetts Office of Campaign and Political Finance
Respondent.

On Petition for Writ of Certiorari
to the Supreme Judicial Court of Massachusetts

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

In *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976), this Court held that campaign-finance laws may not "restrict the speech of some elements of society in order to enhance the relative voice of others." But a Massachusetts statute bans for-profit corporations and other business entities—but not unions and nonprofit organizations—from contributing to political candidates and committees. Mass. Gen. Laws ch. 55, § 8 (2014). And unlike federal law, the Massachusetts statute even bans businesses—but not unions and nonprofit organizations—from making political contributions indirectly through political action committees.

The lower court rejected Petitioners' First Amendment and Equal Protection Clause challenges to the ban, citing as controlling precedent *FEC v. Beaumont*, 539 U.S. 146 (2003), which upheld the federal ban on corporate contributions. The court acknowledged, however, that *Beaumont*'s reasoning conflicts with more recent campaign-finance decisions in which this Court has narrowed the purposes that campaign-finance restrictions may serve and has thus provided stronger protection for corporations' political speech and for the right to make campaign contributions.

This case therefore presents the questions:

1. Should *Beaumont* be overruled because it conflicts with more recent decisions of this Court and insufficiently protects freedom of speech and association?

2. Does Mass. Gen. Laws ch. 55, § 8 (2014) violate the First Amendment and the Equal Protection Clause by banning businesses, but not unions and nonprofit organizations, from making political contributions?

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INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) is widely recognized as the largest and most experienced nonprofit legal foundation of its kind.[1] PLF litigates matters affecting the public interest in state and federal courts nationwide. PLF advocates for limited government, individual rights, and free enterprise. PLF has litigated, both directly and as amicus curiae, on behalf of First Amendment speech rights in the contexts of campaign speech, corporate speech, and expressive associations. *See, e.g.*, *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018) (representing petitioners); *Citizens United v. FEC*, 558 U.S. 310 (2010); *FEC v. Beaumont*, 539 U.S. 146 (2003); *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003) (mem.); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000); *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998); *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990); and *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

PLF believes that the First Amendment prohibits government regulation of speech—be it political or commercial, by individuals, associations, or corporations—unless the regulation satisfies strict scrutiny. Critical to the strict scrutiny analysis is

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

identification of the compelling state interest, which PLF believes should be limited to actual evidence of individual corruption. Moreover, PLF believes that corporate speech adds value to our democratic society and should not be treated as a malignancy that the body politic rejects.

INTRODUCTION AND SUMMARY OF REASONS TO GRANT THE PETITION

Massachusetts' ban on corporate contributions, Mass. Gen. Laws ch. 55, § 8 (2014), prohibits business corporations and other profit-making entities from making contributions with respect to state or local candidates. Under this law, corporations may not make any contributions to a candidate or to a candidate's committee, may not establish or administer a political action committee (PAC), and may not contribute to a PAC that is not an independent expenditure PAC.

Because of the campaign finance law, the Petitioners—two small businesses—are prohibited from making political contributions that they otherwise would have made. They sued Michael Sullivan, the Office of Campaign and Political Finance (OCPF) director, in his official capacity, seeking declaratory and injunctive relief against the continued enforcement of Section 8. They lost in the court below, largely because of this Court's decision in *FEC v. Beaumont*, 539 U.S. 146 (2003), which upheld the federal ban on corporate contributions as justified by the government's interest in preventing corruption and the appearance of corruption. The state court noted that *Citizens United v. FEC*, 558 U.S. 310 (2010), rejected two of the four reasons underlying *Beaumont*, but accepted one of the reasons

(preventing corruption) and was silent as to the fourth (preventing individuals from funneling contributions through corporations).

In the fifteen years since *Beaumont* was decided, First Amendment law has grown more protective of political speech, even when expressed by corporations. In *McCutcheon v. FEC*, 572 U.S. 185 (2014), *Citizens United*, and other cases, the Court eroded the foundations of *Beaumont* and this case presents a strong vehicle in which to expressly overrule it, thus permitting lower courts the latitude to apply the more recent speech-protective doctrine. The case also provides the opportunity for this Court to revisit and discard the amorphous "appearance of corruption" justification for contribution restrictions. This justification, separate from actual quid pro quo corruption but otherwise defined only subjectively and applied selectively, cannot suffice to restrict otherwise protected speech.

The petition for writ of certiorari should be granted.

REASONS TO GRANT THE PETITION

I

LOWER COURTS CANNOT RECONCILE *BEAUMONT* WITH CURRENT LAW BUT MUST FOLLOW IT UNTIL THIS COURT OVERRULES IT

The law is not static. First Amendment law, in particular, has evolved over time. Legal theorists and counsel often demonstrate tenacity and a willingness to push boundaries to move legal doctrines in the desired direction. *BE & K Constr. Co. v. N.L.R.B.*, 536 U.S. 516, 518, 532 (2002) ("even unsuccessful but

reasonably based suits advance some First Amendment interest" by promoting "the evolution of the law by supporting the development of legal theories that may not gain acceptance the first time around"). *See also Boy Scouts of America and Monmouth Council v. Dale*, 530 U.S. 640, 656-57 (2000) (noting evolution and expansion of public accommodation laws); *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 581 n.4 (1980) (Stevens, J., concurring in the judgment). This case arises out of shifting First Amendment doctrine.

This Court's decision in *Beaumont* held that laws barring corporate political contributions are "consistent with the First Amendment" and are not subject to strict scrutiny. *Beaumont*, 539 U.S. at 149; *see also Citizens United*, 558 U.S. at 359 ("Citizens United has not made direct contributions to candidates, and it has not suggested that the Court should reconsider whether contribution limits should be subjected to rigorous First Amendment scrutiny."). *Beaumont* reflects an earlier stage of First Amendment law, since supplanted by the Court's renewed focus on individual rights related to speech and association. It is based on an improperly negative view of corporate political speech, describing it as presenting a "special danger" of political corruption. 539 U.S. at 146-53. *Citizens United* disavowed this rationale because restricting corporate participation impoverishes the electoral debate by "prevent[ing] their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests." *Citizens United*, 558 U.S. at 354. The decision emphasized that "[t]he First Amendment does not permit Congress to make []

categorical distinctions based on the corporate identity of the speaker." *Id.* at 364. *McCutcheon* expanded on these principles, resting its holding on three rationales mandated by the First Amendment: First, speech restrictions cannot be justified by "a generalized conception of the public good" because the whole point of the First Amendment is to protect counter-majoritarian speech. 572 U.S. at 205-06. Second, speech restrictions are invalid when they reflect a legislative or judicial determination that the speech is "useful" or is dependent on a balancing of "relative social costs and benefits." *Id.* at 206 (citation omitted). Third, while there may exist a compelling, "collective" interest in "preventing corruption," speech restrictions designed to further that interest must not unnecessarily infringe an individual's speech rights. *Id.* These decisions followed a consistent evolution in First Amendment law recognizing that the value of corporate speech is such that it should not be walled off from constitutional protection. *Cf. Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 (2014) (A corporation "is simply a form of organization used by human beings to achieve desired ends.").

The cases that *Citizens United* overruled, *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and, in part, *McConnell v. FEC*, 540 U.S. 93 (2003), were aberrations that unfairly targeted corporate speech as presenting unique harms to the body politic. Most cases both before and after those two acknowledge the important benefits of corporate speech, particularly in the context of policy decisions made via the political process. *See Bellotti*, 435 U.S. at 784 (striking down a Massachusetts law because it "amounts to an impermissible legislative prohibition of speech based on the identity of the interests that

spokesmen may represent in public debate over controversial issues"); *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 263 (1986) (nonprofit corporation has First Amendment right to issue a newsletter advocating election of specified candidates); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 481-82 (2007) (nonprofit corporation successfully challenged the federal ban on corporate expenditures for advertisements advocating a political position during an election).

McCutcheon and *Citizens United*, 558 U.S. at 352, largely dismantled the rationale underlying *Beaumont*, holding that the goal of reducing the political power of the wealthy cannot justify campaign finance restrictions. However, in neither case did this Court explicitly overrule *Beaumont*.[2] Nonetheless, the deteriorating rationale prompted some courts to hold that its precedential value rests on "shaky ground." *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 879 n.12 (8th Cir. 2012). Only this Court has the "prerogative . . . to overrule one of its precedents," *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016), and many courts are applying *Beaumont* solely because of that rule. *See, e.g.*, *King Street Patriots v. Texas Democratic Party*, 521 S.W.3d 729, 743 (Tex. 2017) ("even if *Beaumont*' s rationale is in doubt, we are bound to follow it unless and until the Supreme Court overrules it" and the continued viability of *Beaumont* "terminates our inquiry" as to whether corporate contribution restrictions violate the First Amendment); *Iowa Right to Life Comm. Inc. v. Tooker*, 717 F.3d 576, 601 (8th Cir. 2013) (noting the doubt

[2] The plurality opinion in *McCutcheon* and the majority opinion in *Citizens United* did not even cite *Beaumont*.

cast on *Beaumont* by subsequent decisions but holding that *Beaumont* "dictate[s] the outcome" of a challenge to a corporate contribution ban).

Yet other courts still view *Beaumont* as structurally sound even after *Citizens United* and subsequent decisions. *See, e.g.*, *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1124-26 (9th Cir. 2011) (holding that *Citizens United* did not disapprove of the anti-circumvention interest); *Ognibene v. Parkes*, 671 F.3d 174, 195 n.21 (2d Cir. 2011) (declining to hold that *Beaumont* was overruled by *Citizens United*, and determining that *Citizens United* preserved the anti-corruption and anti-circumvention interests); *Green Party of Conn. v. Garfield*, 616 F.3d 189, 199 (2d Cir. 2010) ("*Beaumont* . . . remain[s] good law. Indeed, in the recent *Citizens United* case, the Court . . . explicitly declined to reconsider its precedent involving campaign contributions by corporations to candidates for elected office."); *Wagner v. FEC*, 793 F.3d 1, 6 (D.C. Cir. 2015) (finding no basis to decide that *Citizens United* casts doubt on *Beaumont*).

This Court should grant the petition to resolve the question of whether *Beaumont* remains good law in light of subsequent First Amendment cases protecting corporate speech.

II

THIS COURT SHOULD ADDRESS *BEAUMONT*'S FALSE PREMISE THAT CORPORATE CONTRIBUTIONS ARE UNIQUELY HARMFUL IN AMERICAN POLITICS

A. Corporations Are Unfairly Singled Out as Potentially Causing Harm

The campaign finance limitations upheld in *Buckley v. Valeo* ushered in an era of "the nonstop pursuit of money," that is, the "fundraising treadmill." *Randall v. Sorrell*, 548 US. 230, 283 (2006) (Souter, J., dissenting); *Buckley*, 424 U.S. at 265 (White, J., concurring in part and dissenting in part). *See also* Anthony J. Gaughan, *The Forty-Year War on Money in Politics: Watergate, FECA, and the Future of Campaign Finance Reform*, 77 Ohio St. L.J. 791, 808-12 (2016) (noting *Buckley*'s central role in promoting skyrocketing campaign costs). Central to *Beaumont*'s holding is the notion that corporate contributions to political actors have uniquely corrupting influence on the political process and governance generally. *Beaumont*, 539 U.S. at 146-53 (The "special characteristics of the corporate structure" enable corporations to convert their "earnings . . . into political 'war chests'" that pose a *special danger* of political corruption. (emphasis added)). No one questions that corporate contributions have influence—as they are intended to do—but influence is not corruption. *McCutcheon*, 572 U.S. at 208. And there is scant evidence that these contributions are any different than contributions by wealthy individuals or nonprofit or trade organizations, such as unions. *See* Jane R. Bambauer & Derek E.

Bambauer, *Information Libertarianism*, 105 Calif. L. Rev. 335, 347-352 (2017) (citing multiple studies analyzing the contributions and effects of corporations, individual stockholders, and wealthy individuals, concluding that all demonstrate a "complexity of motives" and make contributions not obviously related to profit-making functions).

The only speech that courts recognize as inherently corrupting is false statements in the course of judicial proceedings. *See Clark v. United States*, 289 U.S. 1, 10 (1933) (false or incomplete testimony corrupts judicial proceedings); *United States v. Agurs*, 427 U.S. 97, 103-04 (1976) (prosecutor's knowledge of perjured testimony involved "a corruption of the truth-seeking function of the trial process"). This Court has otherwise limited the scope of what a state may consider "inherently" corrupting speech, particularly in the context of political campaigns. For example, false statements in political contests that exaggerate a candidate's accomplishments cannot be banned. *See United States v. Alvarez*, 567 U.S. 709, 713-14 (2012) (forbidding prosecution of politician who lied about being a Medal of Honor recipient).[3] This Court also rejected a state's assertion that private funding of campaigns is inherently corrupting.

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[3] Election statutes that essentially duplicate tort-based prohibitions on libel and defamation may be employed to combat fraud during electoral campaigns. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 351-52 (1995). Uncontested laws also prohibit false-name contributions, 52 U.S.C. § 30122, and restrictions on earmarking whereby contributions through an intermediary are deemed contributions from the original contributor. 52 U.S.C. § 30116(a)(8).

Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 751 (2011).

The "strictest degree of scrutiny is warranted . . . when the government . . . discriminate[s] against some persons in the exercise of that right. On this account, there is something distinct, different, and more problematic afoot when the government selectively infringes on a fundamental right." *Riddle v. Hickenlooper*, 742 F.3d 922, 931-32 (10th Cir. 2014) (Gorsuch, J., concurring). The statute at issue in this case singles out corporate contributions as being inherently corrupting, while it declines to tar other, equivalent speech with the same brush. Yet the facts on the ground do not support this distinction.

Unions' political activity should be viewed through the same lens as corporate political activity. In Massachusetts, unions are fully engaged in the political process, making both cash and in-kind contributions to political aspirants who share the unions' policy preferences (not infrequently at loggerheads with the corporate employers who employ union-represented employees).[4] Unions and non-profit organizations can give up to $15,000 to a single candidate in a year, which is 15 times the limit of an individual contribution ($1,000). Mass. Gen. Laws ch. 55; Pet. App. 32a. Alas, unions are not immune to the lure of corrupt campaign activity. *See* Andrea Estes and Matt Rocheleau, *State Police union*

[4] *See, e.g.*, Dan Glaun, *Question 1 lost, now what? Massachusetts Nurses Assoc. says it will 'evaluate all options' on failed staffing ratio measure*, Mass Live (Nov. 7, 2018) (describing political battle between nurses' union and hospitals), https://articles.masslive.com/politics/index.ssf/2018/11/question_1_nurse_union_to_eval.amp.

president Pullman resigns amid new federal probe, Boston Globe (Sept. 28, 2018)[5] ("The president of the union that represents Massachusetts State Police troopers has resigned amid a federal investigation into possible illegal reimbursement of campaign donations by union members.").

Even when engaged in legitimate activity not subject to criminal investigation, unions surely have influence comparable to—if not exceeding—that of corporate contributors. For example, like most of the country, Massachusetts has sought to break the public school monopoly on education and encourage innovation by establishing charter schools. *Doe v. Secretary of Education*, 479 Mass. 375, 377 (2018). Because commonwealth charter schools are not bound to hire teachers represented by public teachers' unions, *id.* at 378, the unions vociferously oppose establishment or expansion of charter schools. In 2016, a statewide initiative known as Question 2 would have expanded the number of charter schools allowed to operate in Massachusetts. *Id.* at 382. According to data kept by the Massachusetts Office of Campaign & Political Finance, the opposition to Question 2 generated $13.4 million, 99% of which came from national and local teachers' unions. Max

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[5] https://www.bostonglobe.com/metro/2018/09/28/state-police-union-president-pullman-resigns-amid-federal-probe/52kQYPOqFsZil9z7ap6ChN/story.html. *See also* AFL-CIO, *Legislation Endorsed by the Massachusetts AFL-CIO As of March 8th, 2017* (favoring increased minimum wages, regulation of e-commerce retailers, prevailing (union) wages, establishment of a new licensing board in the hoisting industry, and more), https://unionhall.aflcio.org/sites/default/files/general/legislation_endorsed_by_the_massachusetts_afl-cio_3_8_17.pdf (last visited Nov. 13, 2018).

Larkin, *Where the Money Comes From in the Fight Over Charter Schools*, WBUR (Oct. 27, 2016).[6] Support for the measure also generated considerable contributions from nonprofit groups such as Families for Excellent Schools and large individual donors such as a combined $2.29 million from out-of-state Walmart heirs Jim and Alice Walton, former New York mayor Michael Bloomberg, and Texan John D. Arnold. None of these contributions were illegal under Massachusetts law, though the contributions clearly sought to influence the decisions of Massachusetts voters, who ultimately rejected the initiative. *Doe*, 479 Mass. at 382 n.16.

There is an obvious partisan component at work here as well. In the November 2018 election, only 32 Republicans were elected to serve in the 160-member Massachusetts House of Representatives, compared to 127 Democrats (and one Independent).[7] The 40-member state Senate is even more skewed: voters elected 34 Democrats and only six Republicans.[8] A significant number of Democratic officeholders were reelected without any challengers,

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[6] http://www.wbur.org/edify/2016/10/27/where-the-money-comes-from-in-the-fight-over-charter-schools. "The Massachusetts Teachers Association, the largest state union, contributed $5.9 million, surpassing the $5.4 million given by the National Education Association, the nation's largest union with 2.9 million members. Smaller locals, led by the Boston Teachers Union, contributed around $300,000." *Id.*

[7] Ballotpedia, *Massachusetts House of Representatives elections 2018*, https://ballotpedia.org/Massachusetts_House_of_Representatives_elections,_2018 (last visited Nov. 8, 2018).

[8] Ballotpedia, *Massachusetts State Senate elections, 2018*, https://ballotpedia.org/Massachusetts_State_Senate_elections,_2018 (last visited Nov. 8, 2018).

yet even these legislators accepted large amounts of campaign contributions from unions. For example, Massachusetts House Speaker Robert DeLeo ran unopposed and raised $935,618. Among DeLeo's donors were the Massachusetts Health & Hospital Association, the Massachusetts Bankers Association, and at least eight unions, such as the Massachusetts Corrections Officers Federated Union. Sanya Mansoor, *et al.*, *These state lawmakers are running unopposed, but still raking in campaign cash*, USA Today (Sept. 19, 2018).[9]

The close ties between Democrat-supporting unions and the Legislature is well understood in the state. Boston-based Service Employees International Union 1199 forthrightly touts its political activism on behalf of Democrat candidates. *See* 1199SEIU, United Healthcare Workers East, *We Unleash the Purple Wave* (Aug. 20, 2018) ("[A]ctivists have been hitting the streets, knocking on doors and making calls . . . supporting the Democratic Party line.").[10] As one Massachusetts newspaper opined, "Labor money has the same kinds of strings attached, be it an understanding that calls get returned, or that votes on

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[9] https://www.usatoday.com/story/news/politics/2018/09/19/center-public-integrity-unopposed-lawmakers-collecting-campaign-donations/1352400002/.

[10] https://www.1199seiu.org/massachusetts/we-unleash-purple-wave. This article about a *Massachusetts* union details efforts to aid Democrats in New York, Maryland, and Florida. *See also* Raise Up Massachusetts, the coalition of unions and progressive political groups that organized to push for paid family leave, an increase in the state minimum wage, and an unsuccessful effort to put the so-called millionaire's tax on this fall's ballot. Raise Up Massachusetts, *Home Page*, https://www.raiseupma.org/ (last visited Nov. 12, 2018).

certain bills go the right way, or that lawmakers support pet projects and interests. If those things don't happen, the money dries up." *Our view: High court protects unfair campaign finance law*, Gloucester Daily Times (Sept. 9, 2018).[11] *See also Evans v. United States*, 504 U.S. 255, 274 (1992) (Kennedy, J., concurring in part and concurring in the judgment) (Quid pro quo corruption can be accomplished with "knowing winks and nods."). Under these circumstances, singling out corporate contributions as uniquely prone to corrupting influence makes little sense.

At bottom, there is no evidence that business corporations—as an identifiable group—are corrupt or introduce corruption into the political process, at least to any greater degree than any other group or wealthy individuals. Corruption differs from legitimately effective and persuasive speech.[12] As this Court noted in *Bellotti*, "To be sure, corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it: The Constitution 'protects expression which is eloquent no less than that which is

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[11] https://www.gloucestertimes.com/opinion/editorials/our-view-high-court-protects-unfair-campaign-finance-law/article_ac9dcfba-be2f-5429-bced-6335a1b05b0b.html.

[12] Even so, corporate contributions cannot guarantee legislation favorable to business interests. Martin H. Redish & Howard M. Wasserman, *What's Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 Geo. Wash. L. Rev. 235, 247 (1998) (New Deal and Great Society social welfare programs and federal regulation of the tobacco and drug industries enacted over the objections of corporate America).

unconvincing.'" 435 U.S. at 790 (quoting *Kingsley Int'l Pictures Corp. v. Regents*, 360 U.S. 684, 689 (1959)).

B. The "Appearance" of Corruption Is an Improperly Vague Standard for Suppressing Core Political Speech

As noted above, there is nothing particularly corrupting about corporate speech, as opposed to union or nonprofit organization speech, that justifies unique state restrictions. Yet all attempts to justify campaign finance restrictions must rest on the law's attempts to "prevent[] corruption and the appearance of corruption." *Buckley*, 424 U.S. at 25.[13] For this reason, campaign finance advocates sought to expand the definitions of corruption and appearance to "every conceivable meaning." Samuel Issacharoff, *On Political Corruption*, 124 Harv. L. Rev. 118, 121 (2010). The shifting definitions of corruption have eroded this rationale's utility over time, but setting aside the compelling interest of preventing quid pro quo corruption, *Citizens United*, 558 U.S. at 359, this case raises the broader issue of whether the "appearance" of corruption is justification for banning or restricting speech continues to be in sync with modern First Amendment doctrine. As campaign finance law has evolved, the "appearance" of corruption should no longer be presumed to be a valid justification for speech restrictions.[14]

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[13] Professor Eugene Mazo notes the collateral effect that *Buckley* "arguably made us obsessed with corruption." Eugene D. Mazo, *The Disappearance of Corruption and the New Path Forward in Campaign Finance*, 9 Duke J. Const. L. & Pub. Pol'y 259, 261 n.8 (2014).

[14] This Court already appears to be moving tentatively down this path. *McCutcheon* notes that prior cases upheld restrictions

There are several problems with the Court's reliance on public perceptions of corruption rather than evidence of actual corruption: First, it "invites regulation on too indiscriminate a basis." Ronald M. Levin, *Fighting the Appearance of Corruption*, 6 Wash. U. J.L. & Pol'y 171, 177 (2001). In rough-and-tumble politics, accusations of wrongdoing are flung at any and all candidates. All fundraising efforts result in accusations that the candidates are beholden to special interests. "The knowledge that a particular type of fund-raising has been drawn into question in an editorial or an advocacy group's press releases is not a reliable guide to deciding whether it should be suppressed." *Id*. This shift in focus allows legislators a stronger hand in election regulation, as they need only point to a disproportionate impact and identify the source to justify content-based regulation. Miriam Cytryn, Comment, *Defining the Specter of Corruption: Austin v. Michigan State Chamber of Commerce*, 57 Brooklyn L. Rev. 903, 949-50 (1991). Moreover, money is only one asset in a political campaign and "attempts to exclude a particular form of power—money—from politics only strengthen the position of those whose power comes from other, nonmonetary, sources, such as time or media access." Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 Yale L.J. 1049, 1078 (1996).[15]

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intended to combat both corruption and the appearance of corruption, per *Buckley*, 572 U.S. at 191-92, but it also says that "while preventing corruption or its appearance is a legitimate objective, Congress may target only a specific type of corruption—'*quid pro quo*' corruption." *Id.* at 207.

[15] *See also* Nicholas Confessore & Karen Yourish, *$2 Billion Worth of Free Media for Donald Trump*, The New York Times

Second, reliance on public perceptions means that advocates of "reform" can make wide-ranging accusations of corruption, and then rely on the fact that some people believe the charges as a reason to justify speech restrictions. Levin, *supra*, 6 Wash. U. J.L. & Pol'y at 178. It will "nearly always be possible for the state to point to public perceptions of corruption to justify contribution limits, . . . the public almost always perceives the political system as corrupt, and that perception does not seem to vary with the passage of various contribution limits." Richard L. Hasen, *Rethinking the Unconstitutionality of Contribution and Expenditure Limits in Ballot Measure Campaigns*, 78 S. Cal. L. Rev. 885, 918-19 (2005) (citing studies). Yet perceptions "can be messy and subjective, and they may not always be accurate." Mazo, *supra*, 9 Duke J. Const. L. & Pub. Pol'y at 275. Moreover, whether the public perceives corruption may be a result of multiple factors and biases, a complicated equation that courts have little expertise to untangle. *Id.* at 280-81; Adam Winkler, *The Corporation in Election Law*, 32 Loy. L.A. L. Rev. 1243, 1249 (1999) ("How can one prove that voters were overwhelmed by spending, rather than convinced by substantive arguments, other initiative backers, or the inept advertisements for the other

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(Mar. 15, 2016) (noting primary election candidate Donald Trump's lack of a Super PAC, minimal ground organization and field offices, and less expenditures on television advertising than any other major candidate but far and away the most unpaid airtime on television), https://www.nytimes.com/2016/03/16/upshot/measuring-donald-trumps-mammoth-advantage-in-free-media.html.

side?").[16] For this reason, permitting regulation based on appearances goes too far in restricting legitimate and harmless political behavior. D. Bruce La Pierre, *The Bipartisan Campaign Reform Act, Political Parties, and the First Amendment: Lessons from Missouri*, 80 Wash. U. L.Q. 1101, 1103 (2002) (The burden of justifying limits on contributions should be on the government, because "[a]ppearances are in the eye of the beholder, and an appearance of corruption may arise whenever an official votes or takes other actions consistent with the position of a contributor.").

Third, if perceptions of corruption suffice to impose greater regulation, then politicians and political groups will have more occasions to create distractions and undermine public trust by accusing their opponents of noncompliance.[17] This places candidates and their campaign staff members who make judgment calls on debatable issues under microscopic scrutiny—an untenable situation in real life. Levin, *supra*, 6 Wash. U. J.L. & Pol'y at 178; *see also* Bambauer & Bambauer, *supra*, 105 Calif. L. Rev. at 339 ("The speculative risks of speech can mobilize the democratic process into regulation by those who

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[16] Despite decades of campaign finance limitations, more than half the American public believes that political corruption is worse than it was in 1970 while only 10% think there is less corruption. Gaughan, *supra*, 77 Ohio St. L.J. at 824 (citing studies).

[17] The statute creating the Massachusetts Office of Campaign and Political Finance invests the Office's director with certain administrative, investigative, and rule-making powers. Mass. Gen. Laws ch. 55, § 3 (2014) (The "director shall make available to investigative, accounting and law enforcement agencies of the commonwealth all information necessary or advisable to fulfil their duties, with respect to this chapter.").

have something concrete to lose, even when risks prove illusory."); *Citizens United*, 558 U.S. at 324 (laws must not be so intricately designed that speakers are forced to retain campaign finance lawyers before daring to speak). Yet the "appearance of corruption" standard permits infringement of core political First Amendment rights based on "gossip and newspaper citations." Robert F. Bauer, *Going Nowhere, Slowly: The Long Struggle Over Campaign Finance Reform and Some Attempts at Explanation and Alternatives*, 51 Cath. U.L. Rev. 741, 758 (2002).

The Court should review this case to address the amorphous "appearance of corruption" standard.

CONCLUSION

The petition for a writ of certiorari should be granted.

DATED: January, 2019.

Respectfully submitted,

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