No. 18-755

In the
Supreme Court of the United States

ILLINOIS LIBERTY PAC, et al.,
Petitioners,

v.

LISA MADIGAN, Attorney General
of the State of Illinois, et al.,
Respondents.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Should political contribution limits that favor one type of speaker over another receive strict scrutiny?

2. Should the holding in *Buckley v. Valeo*, 424 U.S. 1 (1976), applying a "closely drawn" test to all political contribution limits, be overruled in favor of applying strict scrutiny?

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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, 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. Fed. Election Comm'n*, 558 U.S. 310 (2010); *Fed. Election Comm'n 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) (representing petitioners); 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.

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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.

INTRODUCTION AND SUMMARY OF REASONS TO GRANT THE PETITION

The Illinois Disclosure and Regulation of Campaign Contributions and Expenditures Act creates a hierarchy of political campaign contribution limits. Among other things, it places greater restrictions on some speakers than on others, which translates into political advantages for those speakers who have greater freedom to support their preferred candidates. As with most campaign restrictions, those who enjoy the greatest advantages are incumbent officeholders. So it is here: the law expanded the definition of "political party committee" to include "legislative caucus committees" and these committees may make unlimited contributions to a candidate's campaign. Meanwhile, individuals are limited to $5,000; corporations, labor organizations, and associations are limited to $10,000; and political action committees and other candidate committees are limited to $50,000. 10 Ill. Comp. Stat. 5/9-8.5.

The Illinois Liberty PAC and an individual contributor who seek to make contributions exceeding the limits and a state senator who wishes to receive contributions that exceed the limit challenged the law on the grounds that favoring some speakers over others violates the Free Speech Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. The district court upheld the law and the Seventh Circuit affirmed, applying intermediate scrutiny. Pet. App. 4a-5a, 11a (challenges to contribution limits are reviewed using intermediate scrutiny).

The Court should accept this case to hold that the restriction of core First Amendment political

speech rights inherent in campaign contributions must be subject to strict scrutiny. This Court elided this point in *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 199 (2014), which declined to determine whether strict scrutiny or *Buckley*'s "closely drawn" test applies. The unduly flexible "closely drawn" test is insufficiently protective of political speech rights. The language of the First Amendment and its application to core political speech require consistent application of strict scrutiny.

Moreover, the law in this case inverts the usual justification for campaign restrictions by favoring those who are most prone to corruption—incumbent politicians. Special, favored treatment for legislative caucus committees controlled by political bosses creates opportunities for corruption and incumbency protection, completely contrary to the stated objectives of campaign finance regulation. Under the challenged Illinois law, the only beneficiaries of unrestricted legislative caucus committees are legislative leaders (House Speaker and Minority Leader; Senate President and Minority Leader) or associations of five or more state senators or ten or more state representatives.

REASONS TO GRANT THE PETITION

I

BUCKLEY V. VALEO HAS ILL-SERVED AMERICANS' POLITICAL SPEECH RIGHTS

Political speech is "central to the meaning and purpose of the First Amendment." *Citizens United*, 558 U.S. at 329; *Morse v. Frederick*, 551 U.S. 393, 403 (2007) (political speech is "at the core of what the First Amendment is designed to protect") (quoting *Virginia*

v. Black, 538 U.S. 343, 365 (2003)); *R.A.V. v. St. Paul*, 505 U.S. 377, 422 (1992) (Stevens, J., concurring in judgment) ("Core political speech occupies the highest, most protected position" in First Amendment jurisprudence.). For this reason, political speech is entitled to the "fullest and most urgent application" of the First Amendment. *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976) (per curiam).

The intersection of this Court's jurisprudence regarding the regulation of political speech during election campaigns and its jurisprudence reflecting wariness of potential "corruption or the appearance of corruption" has created an untenable situation in which First Amendment rights are based on fine distinctions applied on an almost ad hoc basis. Specifically, in *Buckley*, this Court held that "contribution . . . limitations operate in an area of the most fundamental First Amendment activities," and such limitations "impinge on protected associational freedoms." 424 U.S. at 14, 22. Therefore, burdens on contributions may be sustained only if the state demonstrates "a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." *Id.* at 25.

There are distinctions between contributions and expenditures (*Buckley*); between contributions to candidates and to ballot propositions (*Bellotti*); between direct and indirect corporate campaign contributions (*Beaumont*); between issue advocacy advertisements and express advocacy/functional equivalent advertisements (*Fed. Election Comm'n v. Wis. Right to Life, Inc. (WRTL)*, 551 U.S. 449 (2007); *McConnell*); between individuals and unions, corporations, or similar organizations (*Fed. Election*

Comm'n v. Nat'l Right to Work Comm. (*NRWC*), 459 U.S. 197, 210-11 (1982)); and between business interests and "advocacy groups" (*Fed. Election Comm'n v. Mass. Citizens for Life, Inc. (MCFL)*, 479 U.S. 238 (1986)).

In the decades since *Buckley*, the distinctions have grown more numerous and more fine. The parsing and hairsplitting have rendered this area of the law a patchwork of contradictory opinions impacting political speech rights at the core of the First Amendment. Relatively early on, Justice White noted that *Buckley*'s distinction between contributions and independent expenditures had caused the Federal Election Campaign Act's regulations to become a "nonsensical, loophole-ridden patchwork." *Fed. Election Comm'n v. Nat'l Conservative Political Action Comm. (NCPAC)*, 470 U.S. 480, 518 (1985).

Thirty years ago, upon reviewing the Court's decisions since *Buckley*, D.C. Circuit Judge Patricia M. Wald presciently questioned whether the rulings "have any real roots in the values enshrined in the first amendment? Do these fine distinctions contribute more to freedom of association or to mass cynicism about how the electoral system works?" Patricia M. Wald, *Two Unsolved Constitutional Problems*, 49 U. Pitt. L. Rev. 753, 758 (1988). Subsequent years have done little to resolve these questions. The Court's attempt to graft laws restricting political speech in the name of campaign finance reform has seen our precious free speech rights moving further from the strong trunk at the center of the First Amendment to a precarious balance on the outermost branches and leaves. Currently, the law of campaign finance exists mostly as a series of

distinctions in which the First Amendment protection of free speech grows ever more attenuated. By granting certiorari in this case, this Court may both greatly simplify this area of the law and reinvigorate the core political speech protections of our democracy.

II

INCUMBENCY PROTECTION IS INCOMPATIBLE WITH PREVENTION OF CORRUPTION

A. "Evidence" of Non-Quid Pro Quo Corruption Tied to Contributions Tends to Be Anecdotal at Best

Buckley presumed that political contributions can cause corruption or a public perception of corruption, even though no evidence to that effect had been adduced. *See* Thomas W. Joo, *The Modern Corporation and Campaign Finance: Incorporating Corporate Governance Analysis into First Amendment Jurisprudence*, 79 Wash. U. L.Q. 1, 18 & n.84 (2001). This presumption allows courts to elude questions as to the amount and kind of evidence required to support an allegation of corruption or the appearance of corruption. *See* David Schultz, *Proving Political Corruption: Documenting the Evidence Required to Sustain Campaign Finance Reform Laws*, 18 Rev. Litig. 85, 98-99 (1999).

In fact, courts consider sketchy, if any, evidence that particular contributions are tied to corruption. *See, e.g.*, *Lair v. Motl*, 873 F.3d 1170, 1178-79 (9th Cir. 2017) ("Montana need not show any instances of actual quid pro quo corruption" to justify contribution limits and need only show that corruption concerns

are "not illusory.").[2] Anything more than "mere conjecture" will do. *Nixon*, 528 U.S. at 391-92. Some courts are willing to regulate free political speech based on nothing more than public opinion polls that suggest a significant agreement with the premise that "special interest groups" or "corporate" money has a corrosive impact on the political process. *See, e.g.*, *Zimmerman v. City of Austin, Texas*, 881 F.3d 378, 385 (5th Cir. 2018) (permitting political speech regulations based on "a perception of corruption"); *see also* Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. Pa. L. Rev. 119, 121-23 (2004) (data demonstrating multiple reasons why people may view government officials as corrupt, only a fraction of which relate to campaign finance). This does a disservice to the Constitution. *See Lair*, 873 F.3d at 1191 ("[T]he presence of a subjective sense that there is a risk of such corruption or its appearance does not justify a limit on campaign contributions. Restrictions on speech must be based on fact, not conjecture.") (Bea, J., dissenting); Martin H. Redish, *Free Speech and the Flawed Postulates of Campaign Finance Reform*, 3 U. Pa. J. Const. L. 783, 815 (2001) ("[I]n no other case of speech regulation has the Court been willing to accept evidence of public perception of a compelling interest, rather than existence of the interest itself, to justify restrictions on expression.").

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[2] Illinois state courts will enforce mandatory provisions of the Election Code even when there is no knowledge or evidence of fraud or corruption. *DeFabio v. Gummersheimer*, 192 Ill. 2d 63, 66 (2000).

What the studies *do* show is that the many and varied intangibles influencing any election make it extremely difficult to identify a specific causal relationship between contributions and electoral or legislative events. "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 side?" Adam Winkler, *Election Law as Its Own Field of Study: The Corporation in Election Law*, 32 Loy. L.A. L. Rev. 1243, 1249 (1999); Erik S. Jaffe, McConnell v. FEC: *Rationing Speech to Prevent "Undue" Influence*, 2004 Cato Sup. Ct. Rev. 245, 289 ("Money only buys speech, which will be effective or not depending on whether voters are persuaded by the message."). Indeed, popular candidates are likely to amass both contributions and votes, rendering it impossible to determine whether candidate strength or financial backing pushed the candidate to victory. *See* Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 Yale L.J. 1049, 1065 (1996) ("Generally speaking, the same attributes that attract voters to a candidate will attract donations, and those that attract donations will attract voters.").

B. The Extraordinary Power of Illinois Incumbents Makes Speech Regulation Favoring Them an Invitation to Corruption and Abuse

Many courts are "reluctant or unable to draw a bright line between actions that constitute partisan electioneering and those that amount to appropriate official decision-making." Patrick T. Roath, Note, *The Abuse of Incumbency on Trial: Limits on Legalizing*

Politics, 47 Colum. J.L. & Soc. Probs. 285, 287 (2014). In fact, the two frequently are intertwined, which is why incumbent Illinois legislators created their own organizations (the legislative caucus committees) to contribute to political races in the first place. Any speech restriction that favors incumbents "tends toward entrenching the current ruling party, and blocks the paths of political change." Abner S. Greene, *Government of the Good*, 53 Vand. L. Rev. 1, 38-39 (2000). An interest in incumbent protection is not a compelling one that justifies direct intrusions on the First Amendment. *Cf. Gill v. Whitford*, 138 S. Ct. 1916, 1940 (2018) (Kagan, J., concurring) (noting the associational injury that can accompany "burdens on a disfavored party") (citation omitted).

The potentially corrupting power of incumbency has long been understood by judges and political scientists alike. *See, e.g.*, *6th Congressional Dist. Republican Comm. v. Alcorn*, No. 18-1111, 2019 WL 138678, at *6 (4th Cir. Jan. 9, 2019) (striking down Virginia's "Incumbent Protection Act" as violating the First Amendment and noting that incumbents "are already blessed with myriad de facto advantages in the electoral arena" including "easier access to donors"); *Emison v. Catalano*, 951 F. Supp. 714, 723 (E.D. Tenn. 1996) ("[N]onincumbents [] are not subject to corrupting *quid pro quo* arrangements in the same way as are sitting legislators . . . . [I]ncumbents [have the] advantage of 'virtually unlimited access to the press and free publicity merely by virtue of the public forum they are privileged to occupy.'"); *Emily's List v. Fed. Election Comm'n*, 581 F.3d 1, 40 (D.C. Cir. 2009) (Brown, J., concurring) ("The government has unlimited resources, public and private, for touting its policy agenda. Those on the

outside—whether voices of opposition, encouragement, or innovation—must rely on private wealth to make their voices heard."); *Landell v. Sorrell*, 406 F.3d 159, 163 (2d Cir. 2005) (Calabresi, J., concurring in denial of petition for rehearing en banc) ("[T]he guise of controlling corruption may be used to protect incumbents."); Robert P. Beard, Note, *Whacking the Political Money "Mole" Without Whacking Speech: Accounting for Congressional Self-Dealing In Campaign Finance Reform After Wisconsin Right To Life*, 2008 U. Ill. L. Rev. 731, 761 (Campaign finance "restrictions do little (if anything) to eliminate money's place in the political process. They do, however, produce undesirable consequences, such as further entrenching incumbents against serious electoral challenge."). Joel M. Gora, who argued *Buckley*, laments that "incumbent-protective campaign finance rules are just another form of corruption, like grossly gerrymandered districts." Joel M. Gora, *Free Speech, Fair Elections, and Campaign Finance Laws: Can They Co-Exist?*, 56 How. L.J. 763, 792 (2013).

The powers of incumbency—exacerbated by incumbent-favorable campaign finance laws—are on full display in Illinois. As the Seventh Circuit acknowledged in *Empress Casino Joliet Corp. v. Johnston*, 763 F.3d 723, 725 (7th Cir. 2014), "[d]eals are the stuff of legislating" and "[a]lthough logrolling may appear unseemly," it is not illegal. Unfortunately, in that case, which involved riverboat casino gambling taxes, the particular "shenanigans in the Illinois General Assembly and governor's office crossed the line from the merely unseemly to the unlawful." *Id.* Alas, this was no aberration. The United States Department of Justice has determined that Illinois is

one of the most corrupt states in the nation. Dick Simpson, *et al.*, *Chicago and Illinois, Leading the Pack in Corruption*, U. Ill. Chi. Inst. for Gov't & Pub. Aff. 2 (Feb. 15, 2012).[3] *See also* Alyssa Harmon, Comment and Note, *Illinois's Freedom of Information Act: More Access or More Hurdles?*, 33 N. Ill. U. L. Rev. 601, 621-22 (2013) (noting Illinois's "reputation for dishonesty, greed, and secrecy").

Michael Madigan, Illinois House of Representatives Speaker since 1983, personifies this problem.[4] Madigan has implemented legislative rules that give him unprecedented power to orchestrate legislative and political outcomes. Ted Dabrowski & Joe Tabor, *Madigan's rules: How Illinois gives its House speaker power to manipulate and control the legislative process*, Illinois Policy Institute, 3 (Winter 2017).[5] He determines who is on committees, swaps out members for "temporary" members when necessary to get a desired vote, schedules votes without a published calendar, and can kill any bill—regardless of its support—by staffing the Rules Committee that has the power to sit on any proposed legislation indefinitely. *Id.* at 5-14. Madigan's central

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[3] http://www.chicagomag.com/images/2012/0612/C201206-UIC-SIMPSON-REPORT.pdf.

[4] Michael Madigan is the father of Respondent Illinois Attorney General Lisa Madigan. James Ylisela Jr., *Michael Madigan is the King of Illinois*, Chicago Magazine (Nov. 20, 2013), https://www.chicagomag.com/Chicago-Magazine/December-2013/michael-madigan/ ("[N]o one has been a bigger supporter of Lisa's career than her father. And no one has more power to help her.").

[5] https://files.illinoispolicy.org/wp-content/uploads/2017/01/Madigan-Rules_Report_rev.pdf.

role[6] inevitably means that all who are interested in public policy—lawmakers, special interest groups, individual citizens—are expected to offer "favors, patronage, or political contributions." Ylisela, *supra*. The Illinois Policy Institute study concludes: "Compared with legislative leaders in other states, Illinois' speaker has unprecedented power to control the legislative and political agenda. This power overshadows the will of the people and effectively silences their voice if it happens to disagree with the speaker." Dabrowski, *supra*, at 14. Democratic state representative Scott Drury sought a special counsel investigation against Madigan for seeking campaign contributions in exchange for advancing legislation proposed by Drury. Greg Bishop, *Corruption expert: Claims against Madigan warrant investigation at Illinois capitol*, Illinois News Network (Mar. 15, 2018).[7] However, no such investigation ensued.

There is a certain irony that the very same incumbents who are perceived as vulnerable to corruption are tasked with writing the laws that regulate political speech. *See Personal PAC v. McGuffage*, 858 F. Supp. 2d 963, 967-68 (E.D. Ill. 2012) (defendant Illinois officials argued that Illinois' specific "history of corruption" justified the state's speech limitations on political action committees). The special treatment that Illinois granted to itself via

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[6] Madigan also serves as the chairman of the Democratic Party of Illinois. *See* Democratic Party of Illinois, *Chairman Madigan's Priorities* https://democraticpartyofillinois.com/message-from-the-chair/ (last visited Jan. 23, 2019).

[7] https://www.ilnews.org/news/justice/corruption-expert-claims-against-madigan-warrant-investigation-at-illinois-capitol/article_9e82cc42-27c3-11e8-b5da-5fab19eaa9ed.html.

unlimited contributions by legislative caucus committees violates the First and Fourteenth Amendments.

CONCLUSION

Distinctions between political speakers, whatever may be their respective tendencies toward corruption, cannot justify this Court's continued acceptance of a campaign finance regulatory regime that has utterly failed to achieve its stated ends. By reviewing the decision below, this Court can revive "the absolutely central truth of the First Amendment: that government cannot be trusted to assure, through censorship, the 'fairness' of political debate." *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 679-80 (1990) (Scalia, J., dissenting).

The petition for a writ of certiorari should be granted.

DATED: February, 2019.

Respectfully submitted,

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