No. 17-1297

# In The
# Supreme Court of the United States

LAURA HOLMES, et al.,

*Petitioners*,

v.

FEDERAL ELECTION COMMISSION,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit**

## BRIEF OF *AMICUS CURIAE* INSTITUTE FOR JUSTICE IN SUPPORT OF PETITIONERS

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## INTEREST OF *AMICUS CURIAE*[1]

The Institute is a nonprofit, public-interest legal center dedicated to defending the essential foundations of a free society: private property rights, economic and educational liberty, and the free exchange of ideas. As part of that mission, the Institute has litigated cases across the country challenging laws that restrict the ability of Americans to finance political speech, including representing petitioners in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011), and the plaintiffs in *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc), which struck down limits on contributions to independent expenditure committees.

The Institute is concerned about the growing disconnect between the best social-science evidence on campaign-finance laws – which shows that such laws have little or no effect on public perceptions of corruption or trust in government – and the tendency of lower courts to accept those laws uncritically. The Institute is also concerned that the decision below adds to the confusion regarding the rigor of so-called "exacting scrutiny," which is part of a broader confusion

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[1] All parties received timely notice and have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than *amicus* and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

regarding this Court's intermediate-scrutiny jurisprudence.

## SUMMARY OF THE ARGUMENT

This case provides an important opportunity for this Court to clarify the role that social-science evidence should play in campaign-finance jurisprudence. As discussed in Section I, although this Court has previously held that speculation and conjecture are never enough to carry a First Amendment burden, *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 392 (2000), when it comes to determining the constitutionality of campaign contribution limits, lower courts routinely rely on little else. Even worse, however, lower courts have consistently ignored the growing and unrebutted body of scholarly literature – summarized below – showing that contribution limits have no meaningful effect on public trust in government or perceptions of corruption.

This cavalier attitude towards social-science evidence is an unfortunate symptom of this Court's intermediate scrutiny jurisprudence, which – as discussed in Section I – has created a host of conflicting and indeterminate standards. As a result, whether a First Amendment litigant will have his case decided on the basis of meaningful evidence turns largely on the judge before which he finds himself. This, in turn, has resulted in courts reaching conflicting rulings when faced with similar, or even identical, facts.

This Court should grant the petition and use this case to send a message to lower courts that "exacting scrutiny" – no less than any other form of intermediate scrutiny – is a rigorous level of review that demands the government produce actual evidence to justify restrictions on core First Amendment activity.

## REASONS FOR GRANTING THE PETITION

### I. Federal Courts Are Consistently Relying on Anecdotal or Distorted Evidence – or No Evidence at All – in Resolving Campaign-Finance Cases.

This Court has long held that reducing the appearance or actuality of *quid pro quo* corruption is the only government interest sufficiently strong to justify restrictions on campaign financing. But advocates of campaign-finance restrictions have rarely felt compelled to marshal evidence demonstrating that campaign-finance laws improve public perceptions of government corruption, in part because federal courts have to date been content with relying on anecdote or simply faith that such a link exists. This is problematic for multiple reasons. First, it conflicts with this Court's repeated statements that "mere conjecture" is never adequate to carry a First Amendment burden.[2] Second,

[2] *Nixon*, 528 U.S. at 392; *see also Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993) (holding that, even in the commercial-speech context, "mere speculation or conjecture" are insufficient to carry a First Amendment burden).

it leads to inconsistent decisions among courts reviewing campaign-finance laws, because anecdotes supporting any position are easy to find. Finally, the common assumption that campaign-finance laws improve public perceptions of corruption conflicts with the most thorough research on the topic, which establishes that no such link exists.

Actual social-science evidence on the effects of campaign contribution limits stands in stark contrast to the picture painted by defenders of such limits. In fact, the effects of campaign contribution restrictions on perceptions of government – specifically, measures of "political efficacy" and trust – are negligible.[3] Systematic analysis of statistical evidence does *not* establish that perceptions of government are meaningfully improved by stricter campaign-finance laws.

The work of Professors David Primo and Jeffrey Milyo is particularly instructive. Professors Primo and Milyo studied the effects of state campaign-finance laws on three public-opinion questions related to "political efficacy", i.e., the belief that an individual can influence the political process. *See* David M. Primo & Jeffrey Milyo, *Campaign Finance Laws and Political Efficacy: Evidence from the States*, 5 Election L.J. 23 (2006) (hereinafter, "*Campaign Finance Laws*"). Their

[3] In the political science literature, trust and political efficacy are distinct but related concepts. Trust typically relates to faith in the government while efficacy relates to a belief that one can influence the political process. *See* Jack Citrin, *Comment: The Political Relevance of Trust in Government*, 68 Am. Pol. Sci. Rev. 973 (1974); Angus Campbell et al., The Voter Decides (1954).

analysis focused on three aspects of survey respondents' feelings of efficacy: whether people like the survey respondents have a say about what the government does; whether public officials care what people like the survey respondents think; and whether politics is too complicated for people like the survey respondents to understand.[4] Primo and Milyo studied whether responses to these questions were influenced by the presence or absence of four types of state campaign-finance regulations: disclosure requirements; limits on organizational (including corporate) contributions; limits on individual contributions; and public financing of elections. Their article was the first scholarship to use state campaign-finance laws to study the relationship between campaign-finance regimes and perceptions of government.

Primo and Milyo's research revealed that "[o]verall, no state campaign finance laws appear to have a substantively large impact on the public's perceptions of government." *Campaign Finance Laws*, 5 Election L.J. at 26. And these findings are consistent with Primo and Milyo's other findings on the effect of such limits on the related concept of trust in government. *Id.* at 37. And additional recent research by Milyo shows that state limits on contributions have a negligible impact

[4] These questions are part of a biennial survey of the American electorate, the American National Election Studies. *See* http://www.electionstudies.org (last visited April 11, 2018).

on direct measures of public trust in state government.[5]

These findings are not an outlier. The overwhelming majority of empirical studies have found virtually no relationship between trust in government and political contributions and spending. For example, as shown in Figure 1, below at page 8, a 2003 study demonstrated that the sharp decline in the public trust of government in the 1960s and 1970s preceded the significant increase in congressional campaign spending that began in the late 1970s. *See* David M. Primo, *Campaign Contributions*, *the Appearance of Corruption, and Trust in Government*, *in* Inside the Campaign Finance Battle: Court Testimony on the New Reforms, 285, 290 (A. Corrado et al. eds., 2003). Moreover, this same study found virtually no relationship between

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[5] A working paper by Dr. Milyo expands upon the methodology used by Primo and Milyo in *Campaign Finance Laws.* Dr. Milyo's new work pools the results of several national surveys of voter perceptions of state government. The findings of this new research are consistent with the findings in *Campaign Finance Laws*. *See* Jeff Milyo, *Do State Campaign Finance Reforms Increase Trust and Confidence in State Government?* (March 2016) (unpublished paper), *available at* http://web.missouri.edu/~milyoj/files/CFR%20and%20trust%20in%20state%20government_v8.pdf. A related working paper discusses the absence of systematic statistical evidence that state campaign finance laws reduce political corruption in the states. *See* Adriana Cordis & Jeff Milyo, *Do State Campaign Finance Reforms Reduce Public Corruption?*, Mercatus Center Working Paper 13-09 (April 2013), *available at* http://mercatus.org/sites/default/files/Milyo_CampaignFinanceReforms_v2.pdf.

campaign spending and trust in government during the period after 1980. *Id.*

Indeed, as shown in Figure 2, below at page 9, this study discovered that trust in government actually increased at the same time that political parties were becoming more dependent upon "soft money" – contributions to political parties that, to a large extent, came from corporations. *Id.*

A 2004 study confirmed, as shown in Figure 3, below at page 10, that, even as "soft money" contributions increased in the 1990s, public perceptions of government as corrupt were declining. *See* Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. Pa. L. Rev. 119 (2004). This study concluded that "trends in general attitudes of corruption seem unrelated to anything happening in the campaign finance system (e.g., a rise in contributions or the introduction of a particular reform)." *Id.* at 122. Instead, the study explained that the public's perception of corruption rises and falls with the popularity of the incumbent president, declining during popular wars and economic prosperity while rising during times of recession. *Id.* at 121.

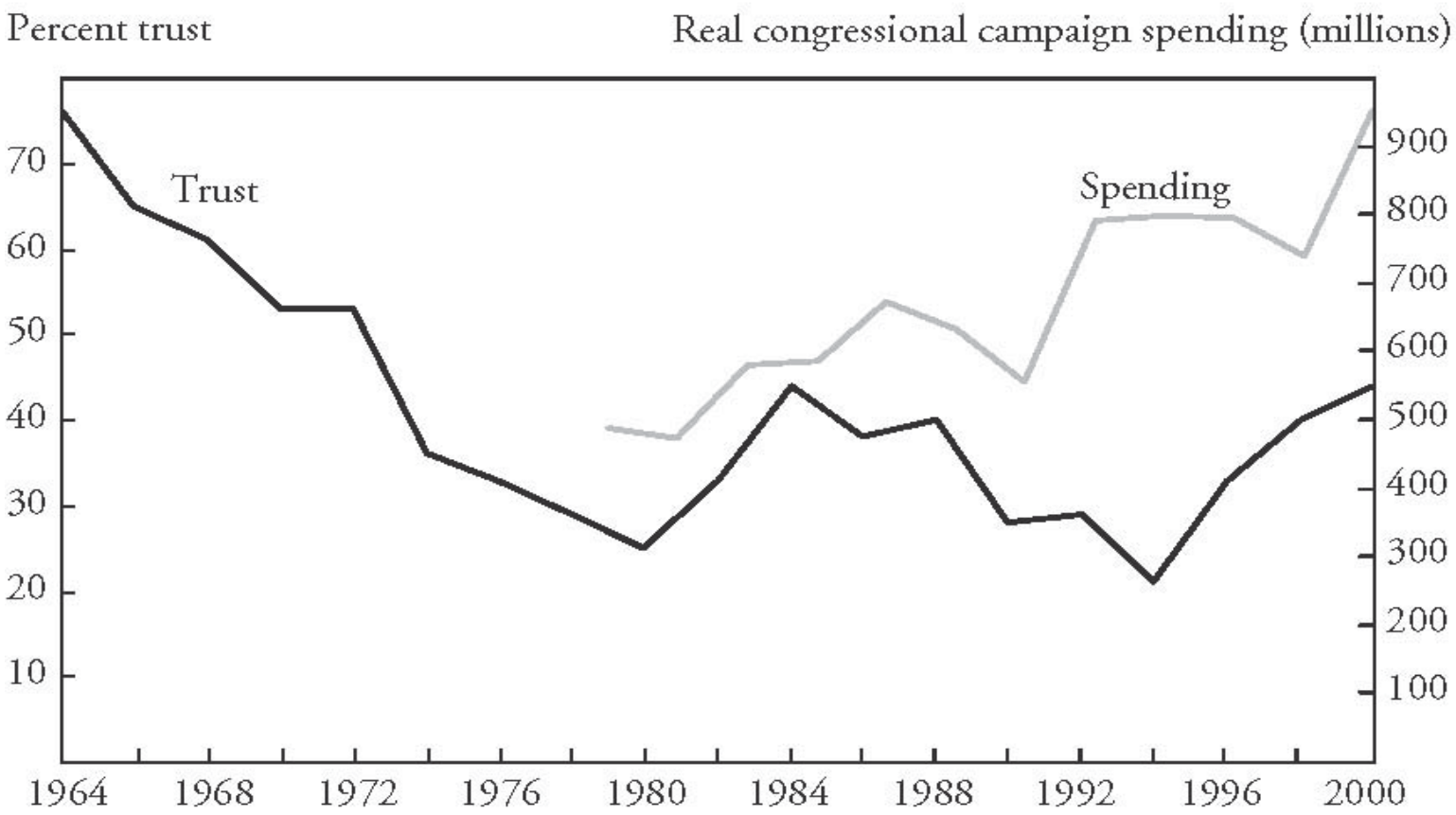


*Figure 1: The Decline in the Public's Trust in Government Preceded a Spike in Congressional Campaign Spending*

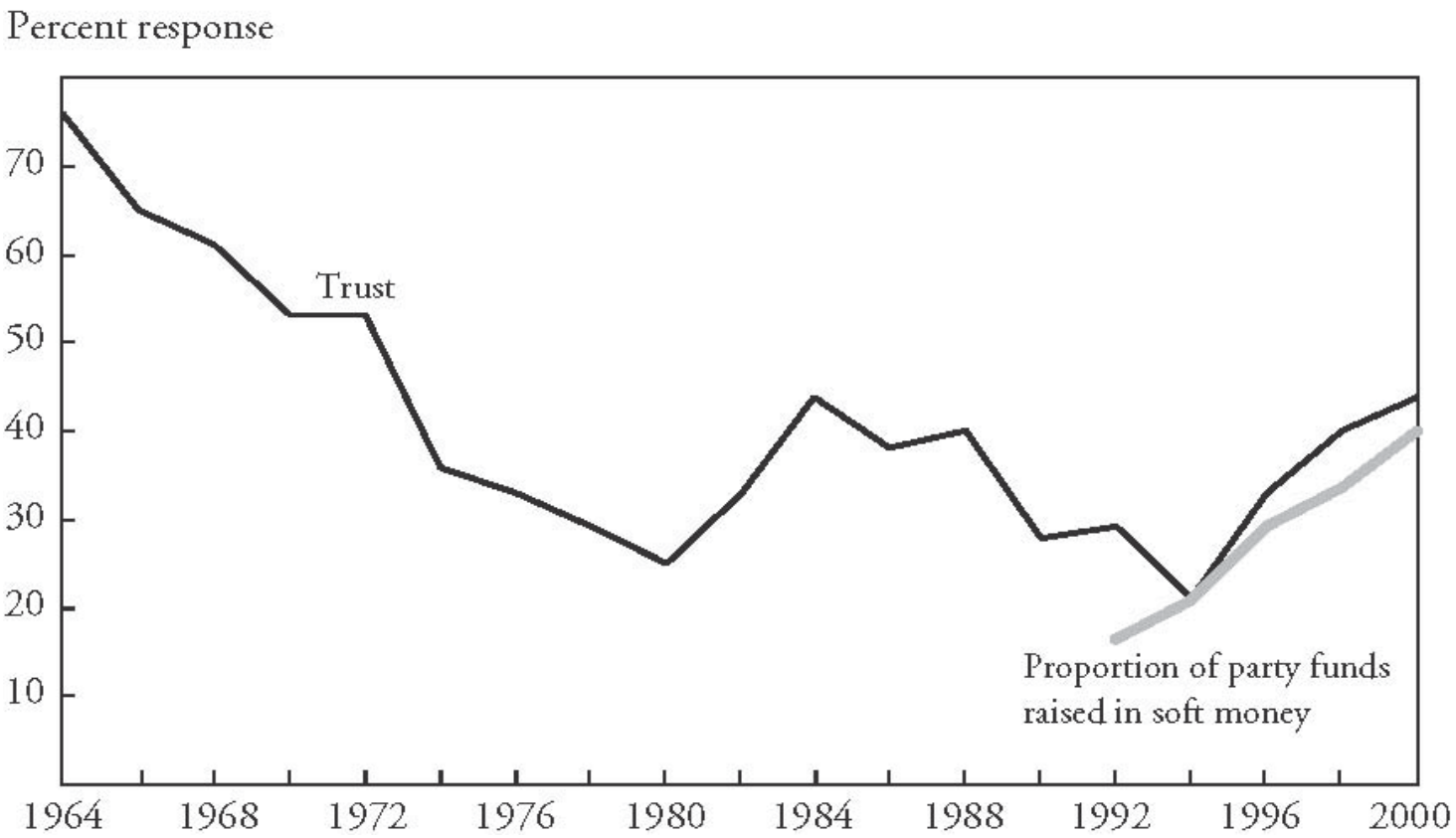


*Figure 2: As the Political Parties Became More Dependent on Soft Money, Trust in Government Increased*

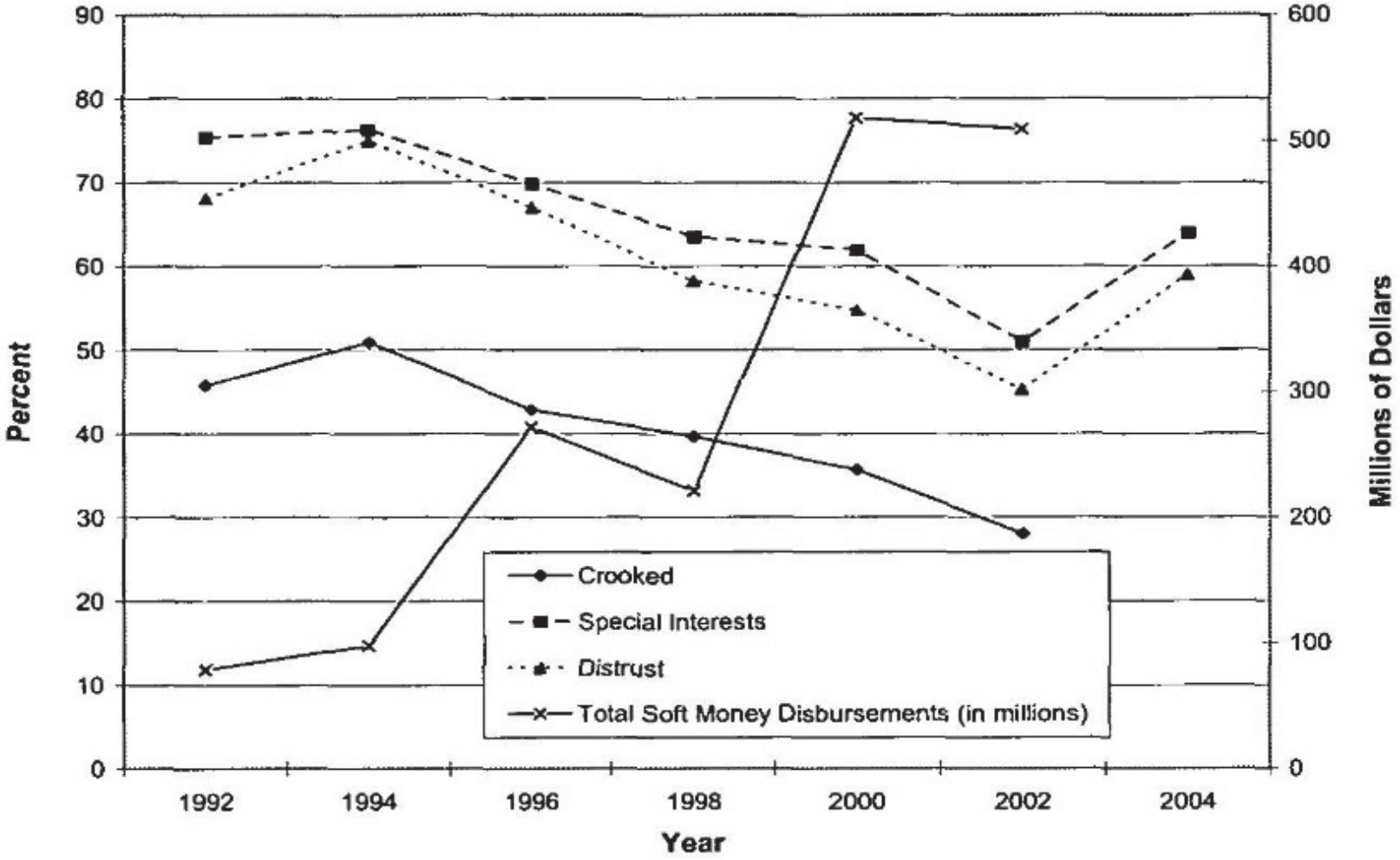


*Figure 3: As Soft Money Increased in the 1990s, Perceptions of Corruption Declined*

One would have no notion of this substantial body of academic research from reading the decision below, however. Instead, the closest the en banc court comes to examining the anti-corruption effect of the challenged per-election contribution limits is to speculate that "Congress could conceivably regard a one-time contribution of $5,200 in the general (or primary) election alone to present a greater risk of apparent or actual corruption than two distinct contributions of $2,600 in each of the primary and general elections." Pet. App. 24. But, as demonstrated above, even if Congress had believed that – and there is no reason to assume it did – that belief would lack any grounding in evidence. This Court should therefore grant certiorari to make clear that Americans' First Amendment rights are too important to be abrogated on the basis of such idle speculation.

## II. The Decision Below Highlights Widespread Problems with This Court's Intermediate-Scrutiny Jurisprudence.

That the court below ignored social-science evidence in upholding the per-election limits is, unfortunately, all too typical. Lower courts are increasingly confused about the role that evidence plays under intermediate scrutiny – a trend that is largely attributable to this Court's intermediate-scrutiny jurisprudence, which is hardly a model of clarity. Since the late 1940s, this Court has articulated over a half-dozen distinct areas of First Amendment doctrine that are subject to various forms of intermediate scrutiny. *See McCutcheon v.*

*FEC*, 134 S. Ct. 1434 (2014) (campaign-contribution limits); *Citizens United v. FEC*, 558 U.S. 310 (2010) (campaign-finance disclosure); *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002) (zoning adult-oriented businesses); *Madsen v. Women's Health Ctr.*, 512 U.S. 753 (1994) (content-neutral injunctions); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994) (regulation of mass media); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980) (regulation of commercial speech); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969) (regulation of broadcast communication); *United States v. O'Brien*, 391 U.S. 367 (1968) (content-neutral regulations that impose an incidental burden on expressive conduct); *Kovacs v. Cooper*, 336 U.S. 77 (1949) (time, place, and manner regulations).

This phenomenon began with this Court's time, place, and manner cases, which hold that certain regulations of the non-communicative elements of speech – such as its volume or the location in which it occurs – are subject to a more lenient standard of review than regulations that are aimed at (or triggered by) speech with a certain content. *See* Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. Ill. L. Rev. 783, 788-91 (2007) (describing time, place, and manner regulations as "[t]he first strand of free speech cases that eventually emerged as intermediate scrutiny"); *see also Holder v. Humanitarian Law Project*, 561 U.S. 1, 27-28 (2010) (discussing the distinction between laws aimed at non-communicative conduct, which receive intermediate scrutiny if they impose incidental

burdens on speech, and laws that are "trigger[ed]" by speech, which receive strict scrutiny). Over time, however, the scope of intermediate scrutiny has grown to the point where it is increasingly seen as "some kind of default standard." *Madsen*, 512 U.S. at 792 (Scalia, J., concurring in the judgment in part and dissenting in part).

The result of this growth is an ad hoc, patchwork body of law that has no basis in the uncompromising text of the First Amendment itself. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 532 (2009) (Thomas, J., concurring) (observing that this Court's decision in *Red Lion Broad. Co.*, 395 U.S. 367, and *FCC v. Pacifica Found.*, 438 U.S. 726 (1978), adopted "a legal rule that lacks any textual basis in the Constitution"). But besides conflicting with the terms of the First Amendment, the growth of intermediate scrutiny has also harmed speakers and made matters unnecessarily difficult for the courts that are charged with enforcing those speakers' rights.

With regard to speakers, it is increasingly the case that speech of little social value is given the full protection of strict scrutiny, while speech of high social value is given only the protection of intermediate scrutiny. Thus, burdens on wholly unpersuasive speech like animal "crush" videos, lies about having received military honors, or the offensive rantings of the Westboro Baptist Church enjoy substantially higher protection than commercial or even political speech. *Compare United States v. Stevens*, 559 U.S. 460 (2010) (applying strict scrutiny to prosecution for distributing

dog-fighting videos), *United States v. Alvarez*, 132 S. Ct. 2537 (2012) (same, violating Stolen Valor Act), *and Snyder v. Phelps*, 131 S. Ct. 1207 (2011) (same, civil liability for emotional distress caused by military-funeral protests), *with Cent. Hudson*, 447 U.S. 557 (1980) (applying intermediate scrutiny to restrictions on commercial speech) *and Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000) (same, restrictions on political contributions).

This approach turns the First Amendment on its head – it cannot be the case that speech with the greatest ability to inform or persuade the public should be entitled to the least protection. *See Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2671 (2011) ("That the State finds expression too persuasive does not permit it to quiet the speech or to burden its messengers."). Indeed, one would expect that the drafters of the First Amendment held precisely the opposite view: that speech that can change listeners' minds or move them to action is the sort of speech that is most likely to be targeted for regulation, and therefore the most deserving of robust judicial protection.

To make matters worse, the multiplicity of intermediate scrutiny standards that this Court has devised provide little guidance to the lower courts whose job it is to provide that protection. These standards are often phrased in similar, but not identical terms, which makes it difficult to tell whether decisions under one form of intermediate scrutiny have any bearing on other areas of intermediate scrutiny. *Compare, e.g.*, *Citizens United*, 558 U.S. at 366-67 (holding that

campaign-finance disclosure laws must bear a "substantial relation" to a "sufficiently important" government interest) *with Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (holding that time, place, and manner restrictions must be "narrowly tailored to serve a significant governmental interest"), *Cent. Hudson*, 447 U.S. at 566 (holding that a restriction on commercial speech must not be "more extensive than is necessary to serve [a substantial government] interest"), *and O'Brien*, 391 U.S. at 377 (holding that the incidental burdens of content-neutral regulations of conduct must be "no greater than is essential to the furtherance of [an important or substantial government] interest"). The distinctions between these standards are, at times, so ill-defined that even members of this Court have expressed exasperation in trying to untangle them. *See Madsen*, 512 U.S. at 791 (Scalia, J., concurring in the judgment in part and dissenting in part) ("The difference between [the standard used by the majority for evaluating content-neutral injunctions] and intermediate scrutiny [of the time, place, and manner variety] . . . is frankly too subtle for me to describe. . . .").

These conflicting standards have led, inevitably, to conflicting outcomes, most notably regarding the amount of evidence necessary to uphold a challenged law. While this Court has repeatedly stated that evidence is a requirement in all First Amendment cases, there are certainly areas where this Court seems to take that requirement more or less seriously. *Compare, e.g.*, *Edenfield v. Fane*, 507 U.S. 761, 771 (1993) (striking down prohibition on direct solicitation by CPAs because an

affidavit that "contain[ed] nothing more than a series of conclusory statements" about the effect of direct solicitation was insufficient evidence under intermediate scrutiny), *with Shrink Mo. Gov't PAC*, 528 U.S. at 393 (upholding state campaign contribution limits and citing, as the principal evidence in support of those limits, an affidavit from a state senator containing the bare assertion that "large contributions have 'the real potential to buy votes' ").

As a result of both this confusion and the flexibility of the various intermediate-scrutiny standards, it is easy to find cases in which lower federal courts have reached opposite conclusions on essentially identical facts. *Compare, e.g.*, *Sampson v. Buescher*, 625 F.3d 1247 (10th Cir. 2010) (striking down PAC requirements for grassroots ballot-issue advocates under intermediate scrutiny), *with Worley v. Fla. Sec'y of State*, 717 F.3d 1238 (11th Cir. 2013) (upholding materially identical restrictions under materially identical facts); *compare also Green Party of Conn. v. Garfield*, 616 F.3d 189 (2d Cir. 2010) (striking down prohibition on political contributions from lobbyists), *with Preston v. Leake*, 660 F.3d 726 (4th Cir. 2011) (upholding materially identical prohibition). And this division exists not only between circuits, but within them; in one recent en banc ruling, the United States Court of Appeals for the Sixth Circuit split 8-7 over whether a conclusory affidavit and "common sense" were sufficient evidence to satisfy intermediate scrutiny under *Central Hudson*. *Compare Pagan v. Fruchey*, 492 F.3d 766, 778 (6th Cir. 2007) (en banc) (holding that municipality had an

obligation "to provide *something* in support of its regulation," and that the court was not "free to hold that obligation has been discharged based on principles of *common sense* or *obviousness*"), *with id*. at 779 (Rogers, J., dissenting) (stating that "[t]o require a study, or testimony, or an affidavit, to demonstrate the obvious is to turn law into formalistic legalism").

These inconsistent outcomes would be bad enough if speakers could be guaranteed that they were merely the result of confusion about the proper application of this Court's intermediate-scrutiny jurisprudence. But the very indeterminacy of intermediate scrutiny provides ample room for lower courts to decide cases based on their own values, rather than a genuine attempt to discern the meaning of this Court's precedent. *See Craig v. Boren*, 429 U.S. 190, 221 (1976) (Rehnquist, J., dissenting) (arguing that the elements of intermediate scrutiny "are so diaphanous and elastic as to invite subjective judicial preferences or prejudices relating to particular types of legislation, masquerading as judgments whether such legislation is directed at 'important' objectives or, whether the relationship to those objectives is 'substantial' enough"). The result is a "jurisprudence of doubt" that is particularly toxic "in the case of speech, which is especially vulnerable to uncertainties in the law." *Minority Television Project, Inc. v. FCC*, 736 F.3d 1192, 1223 (9th Cir. 2013) (Kozinski, C.J., dissenting).

This is an ideal case in which this Court can begin to reverse this dangerous trend. The legal issues are clearly presented and the factual record is undisputed.

Moreover, this case provides multiple avenues for clarifying this Court's intermediate-scrutiny jurisprudence, either by reversing this Court's earlier decisions holding that limits on campaign contributions are subject to only intermediate scrutiny or by clarifying the role that evidence plays under intermediate scrutiny. For these reasons, the petition for certiorari should be granted. *See* Sup. Ct. R. 10(c).

## CONCLUSION

For the reasons stated above, the petition for certiorari should be granted.

Respectfully submitted,

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