No. 12-536

In The Supreme Court of the United States

SHAUN MCCUTCHEON, ET AL.,

Appellants,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

On Appeal From The United States District Court For The District Of Columbia

BRIEF OF THE INSTITUTE FOR JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

INSTITUTE FOR JUSTICE
WILLIAM H. MELLOR
PAUL M. SHERMAN*
901 North Glebe Road
Suite 900
Arlington, VA 22203
(703) 682-9320
psherman@ij.org

INSTITUTE FOR JUSTICE
FLORIDA CHAPTER
CLAUDIA MURRAY
999 Brickell Avenue
Suite 720
Miami, FL 33131
(305) 721-1600

**Counsel of Record*

Counsel for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

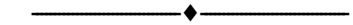
TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

INTEREST OF THE *AMICUS*

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*, 131 S. Ct. 2806 (2011). The Institute has also filed *amicus curiae* briefs in several campaign-finance cases before this Court, including *Citizens United v. FEC*, 558 U.S. 310 (2010); *Davenport v. Washington Education Association*, 551 U.S. 177 (2007); *Randall v. Sorrell*, 548 U.S. 230 (2006); *Wisconsin Right to Life, Inc. v. FEC*, 546 U.S. 410 (2006); and *McConnell v. FEC*, 540 U.S. 93 (2003). The Institute believes that its legal perspective will provide this Court with valuable insights regarding the burdens that the biennial aggregate contribution limits impose on First Amendment rights.[1]



[1] All parties have consented to the filing of this brief. The Institute affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

SUMMARY OF ARGUMENT

In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court held that restrictions on the financing of political speech could be justified by a government interest in preventing not just political corruption, but also the appearance of such corruption. Since then, this Court and lower courts have repeatedly invoked the twin concerns of "corruption or its appearance" as a justification for campaign-finance laws. But while these interests are generally invoked together, it is clear that, from *Buckley* to the present, courts upholding campaign-finance laws have allowed the "appearance of corruption" to do virtually all of the heavy lifting, and have rarely inquired into whether such laws were justified by any record of genuine corruption. *See*, *e.g.*, Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. Pa. L. Rev. 119, 135 (2004) (noting that "few campaign finance regulations would pass constitutional scrutiny" if their defenders had to demonstrate actual corruption).

This case is no different; the government invokes the "interests in combating corruption and its appearance" as a basis for upholding the federal biennial aggregate contribution limits. Mot. to Dismiss or Affirm at 17. But despite the fact that a majority of states do not have aggregate contribution limits, the government below did not identify even a single incident of corruption related to large aggregations of contributions that were otherwise legal. Instead, this

is yet another case in which the government expects the hypothetical and unquantifiable risk of the "appearance of corruption" to do all the work necessary to justify restrictions on political contributions.

This brief challenges that expectation, and argues, to the contrary, that the appearance-of-corruption standard is an insufficient basis for upholding any campaign-finance law, including the biennial aggregate limits under review in this case. As this brief will explain, the notion that the government has an important or compelling interest in preventing the supposed appearance of corruption is incompatible with basic notions of representative government. In many cases, the alleged appearance of corruption is indistinguishable from the appearance of partisanship or political bias, both features of our representative system that are not merely unavoidable, but are in fact desirable. Further, regulations aimed at preventing the mere appearance of corruption among elected officials – even when they target the appearance of *quid pro quo* corruption – have had the practical effect of depriving citizens of important information about the state of their government.

The appearance-of-corruption standard is also incompatible with First Amendment values. The First Amendment demands tolerance for speech that upsets people, yet the appearance-of-corruption standard allows the suppression of peaceful modes of expression simply because people find it upsetting. The First Amendment demands objectivity in regulation, yet the appearance-of-corruption standard is subjective

and malleable. And the First Amendment demands that government produce evidence to justify its restrictions on speech, yet the appearance-of-corruption standard has relieved government of this burden, permitting regulation based on anecdote, speculation, and conjecture.

These fundamental flaws justify abandoning the appearance-of-corruption standard. Doing so will not only simplify the resolution of this case, it will provide much-needed clarification to lower courts that, 37 years after *Buckley*, are still struggling to determine just how much peaceful political activity the government may ban in its seemingly never-ending quest to eradicate the alleged appearance of corruption.

ARGUMENT

Warnings against reaching judgments based on appearances stretch back to antiquity. *See*, *e.g.*, Aesop, *The Wolf in Sheep's Clothing* (circa 550 B.C.); *John* 7:24 (King James) ("Judge not according to the appearance, but judge righteous judgment."). Equally ancient – and well known to the Founding generation – are warnings against placing uncritical trust in government. *See*, *e.g.*, Cato, *Letter VII* (1787), *reprinted in The Anti-Federalist Papers* 321, 324 (Ralph Ketcham ed. 2003) (quoting Demosthenes' second Philippic oration, "[T]here is one common bulwark with which men of prudence are naturally provided,

the guard and security of all people, particularly of free states, against the assaults of tyrants – What is this? Distrust."). In keeping with these warnings, "[t]he American political tradition is . . . based in large measure on a healthy mistrust of the state." Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L.J. 637, 656 (1989). *See also* James Madison, *James Madison's Notes of the Constitutional Convention* (July 11, 1787), *available at* http://www.consource.org/document/james-madisons-notes-of-the-constitutional-convention-1787-7-11/ ("[A]ll men having power ought to be distrusted to a certain degree.").

Nevertheless, in *Buckley v. Valeo*, this Court concluded that the government had an important interest in preventing not only *quid pro quo* corruption, but even the appearance of such corruption, due to the risk that such appearances might ultimately lead to distrust in government. 424 U.S. 1, at 26-27 (1976). Since then, the appearance-of-corruption standard has spawned confusion and contradictory rulings both in this Court and lower courts, and it has done so at great cost to the marketplace of political ideas. The result has been a "never-ending and self-justifying process" of greater and greater regulation of peaceful political activity. *McConnell v. FEC*, 540 U.S. 93, 269 (2003) (Thomas, J., dissenting).

This case presents an opportunity to take a different tack and provide much-needed clarity to campaign-finance jurisprudence. It is an opportunity that this Court should seize. As explained below, the government has neither a "compelling"

nor an "important" interest in combatting the mere appearance of corruption. Indeed, the appearance-of-corruption standard is inconsistent with representative government and with multiple, basic First Amendment principles. It is time that it be abandoned.

I. The Appearance-of-Corruption Standard Is Inconsistent with Representative Government.

The appearance-of-corruption standard is most strongly associated with this Court's ruling in *Buckley v. Valeo*. As explained below, however, that standard actually originated with earlier codes of ethics for judges and executive-branch employees that focused not on *quid pro quo* corruption, but on more generic bias and favoritism. *Buckley* extended that standard beyond these contexts, into the realm of electoral politics. In doing so, the Court ignored the difference between bureaucrats and judges, who are expected to neutrally administer the law, and elected representatives, who are expected – indeed, elected – to behave as biased partisans. But the appearance-of-corruption standard does not merely misconceive the role of elected representatives in our constitutional system, it empowers these incumbent politicians to deprive voters of critical information about the state of their government and to do so in a way that serves both to insulate them from electoral challenge and to perpetuate the abuse of government power.

A. The modern appearance-of-corruption standard is an unwarranted expansion of conflict-of-interest rules for judges and federal employees that has no proper application to elected representatives.

Buckley was not the first case to discuss "appearances" as they relate to the activities of government officials. Early efforts to regulate the "appearance of impropriety" can be traced back to 1924, when, in the wake of the Black Sox scandal, the American Bar Association instructed judges acting in their official capacity to avoid "the appearance of impropriety." *See* Peter W. Morgan, *The Appearance of Propriety: Ethics Reform and the Blifil Paradoxes*, 44 Stan. L. Rev. 593, 597-98 (1992). This standard was later extended to federal conflict-of-interest rules that regulated the conduct of executive-branch employees. *Id.* at 598-603. The Kennedy administration, for example, issued regulations directing federal employees to avoid even the appearance of financial conflicts of interest, *id.* at 599-600, and President Johnson issued an executive order directing federal employees to avoid any action which "might . . . affect[ ] adversely the confidence of the public in the integrity of Government." Exec. Order No. 11,222, 3 C.F.R. 306 (1964-1965), *revoked* Exec. Order No. 12,674, 3 C.F.R. 215 (1990).

This Court considered these sorts of regulations in *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520 (1961), which appears to be the first case in which this Court acknowledged something

like the appearance-of-corruption standard for federal employees. *Mississippi Valley* involved a claim for damages for the cancellation of a government contract. The Government defended by arguing that the contract was unenforceable because a government employee involved in the negotiations had a conflict of interest in violation of a federal conflict-of-interest statute. In holding the contract unenforceable, the Court cited the concern that the public's "faith in those who govern" might be "shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption." *Id.* at 562.

Mississippi Valley was not a First Amendment case and was not cited in *Buckley v. Valeo*, but the case that ultimately was cited in *Buckley* to support the appearance-of-corruption standard says much the same thing. That case, *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548 (1973), dealt with the constitutionality of regulations adopted under the Hatch Act. Those regulations provided that "[t]he head of an agency may prohibit or limit the participation of an employee or class of employees of his agency in [certain partisan political activities], if participation in the activity would interfere with the efficient performance of official duties, or create a conflict or *apparent* conflict of interests." *Id.* at 576 n.21 (emphasis added). In upholding those regulations, this Court held that "it is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the

public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent." *Id.* at 565.

In *Buckley v. Valeo*, this Court extended the principles announced in *Letter Carriers* to the realm of partisan elections. 424 U.S. at 27. But in doing so this Court failed to consider the very different roles played by civil servants and judges, on one hand, and elected representatives, on the other. Civil servants' and judges' primary duty is to the law, which they are expected – and in many cases constitutionally required – to administer neutrally, without bias or favoritism. *See Letter Carriers*, 413 U.S. at 564-655 ("[E]mployees in the Executive Branch of the Government, or those working for any of its agencies . . . are expected to enforce the law and execute the programs of the Government without bias or favoritism for or against any political party or group or the members thereof."); *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868, 891 (2009) (Roberts, C.J., dissenting) ("All judges take an oath to uphold the Constitution and apply the law impartially[.]"). Elected representatives, by contrast, are not expected to be impartial or apolitical. Indeed, our entire system of partisan elections is premised on the notion that, once in office, elected representatives are expected to behave as partisans and represent the various constituencies that helped them get elected.

This Court's recognition of these different roles is well illustrated by this Court's recent decisions in *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868

(2009), and *Citizens United v. FEC*, 558 U.S. 310 (2010). Both cases involved independent political expenditures. In *Caperton*, this Court held that, in some circumstances, large independent expenditures in support of judicial candidates may require those candidates to recuse themselves from cases involving litigants who funded the expenditures. But this Court saw no similar danger from independent expenditures in *Citizens United* precisely because of the nature of representative politics:

> Favoritism and influence are not . . . avoidable in representative politics. It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters *and contributors* who support those policies. It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, *or to make a contribution to*, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness.

Citizens United, 558 U.S. at 359 (quoting *McConnell*, 540 U.S. at 297 (opinion of Kennedy, J.)) (emphasis added).

As *Citizens United* also makes clear, another difference between campaign-finance laws and judicial-recusal standards is the impact of the regulations on non-government actors. Campaign-finance laws like the biennial aggregate limit impose broad

prophylactic restrictions and they do so on people who are not government actors. This includes not only campaign contributors, but also non-incumbent candidates. Conflict-of-interest rules and judicial-recusal standards, by contrast, are substantially narrower; they are remedial, rather than prophylactic, and they limit only the behavior of government actors. *See Citizens United*, 558 U.S. at 360 ("*Caperton*'s holding was limited to the rule that the judge must be recused, not that the litigant's political speech could be banned."); *cf. Nev. Comm'n on Ethics v. Carrigan*, 131 S. Ct. 2343, 2347-50 & n.3 (2011) (discussing the history of legislative- and judicial-recusal rules, and noting that "restrictions on . . . speech during elections are a different matter").

In short, *Buckley*'s extension of the appearance-of-corruption standard from federal employees and judges to elected officials was too hasty. It has tended to hold elected officials to an appearance of impartiality that is not applicable to elected representatives, and it has ignored the fact that the burdens of campaign-finance laws are not borne by representatives alone, but are also borne by the contributors who are prevented from associating with the candidates of their choice.

B. When applied to elected representatives, the appearance-of-corruption standard deprives the public of important information about the state of the government.

As discussed above, much of what proponents of campaign-finance restrictions deride as the "appearance of corruption" is nothing more than the generic favoritism and influence that is at the heart of representative politics. But even to the extent the public is upset by what it believes to be the appearance of *quid pro quo* corruption, that problem is less about campaign financing and more about the unchecked ability of politicians to reward powerful supporters. *See* Steven M. Simpson, *Judicial Abdication and the Rise of Special Interests*, 6 Chap. L. Rev. 173, 173 (2003) ("[M]odern government has a lot to offer, and its constituents are increasingly all too eager to pursue it."). Some of those supporters will be financial backers, but others will be heads of civic or advocacy groups, prominent politicians, celebrities, or other sources of election-year support. Financial supporters are surely the most easily identified members of this cohort, but there is absolutely no reason to believe they are its *only* members. Restrictions on campaign financing designed to eliminate the "appearance of corruption" do not address the core problem of seemingly corrupt favoritism – they simply cover up its most visible manifestation, allowing the rest to continue unobserved.

Covering up the potential for abuse of government power in order to lull the public into a false sense of trust is not a legitimate use of government power. To the contrary, as explained below, the suspicion engendered by the appearance of corruption is a healthy part of our constitutional system; it makes citizens alert to opportunities for abuse and enables voters to respond at the ballot box. Government efforts to short-circuit this process by stamping out the appearance of corruption deprive voters of necessary information, and, not coincidentally, make it more difficult to remove incumbents from office.

It is important to note, first, that the appearance-of-corruption standard only does work when the underlying activities are not *actually* corrupt. "If the campaign finance system leads to actual corruption, then that may be a constitutionally sufficient justification for the state to infringe on free speech rights, in which case the 'appearance of corruption' basis is superfluous." Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 Yale L.J. 1049, 1067 n.113 (1996). Thus, the question raised by the appearance-of-corruption standard is whether the government has a compelling or important interest in prohibiting peaceful political activity that is not, in fact, corrupt, but that nevertheless raises the public's suspicions.

The answer to that question is surely no. The appearance of *quid pro quo* corruption does not arise in a vacuum; it arises where there are opportunities to abuse government power for private gain.

Antecedent to this, however, is government power itself, which carries with it the opportunity for such abuse. *See* Letter from John Emerich Edward Dalberg, Lord Acton, to Bishop Mandell Creighton (Apr. 5, 1887) ("Power tends to corrupt, and absolute power corrupts absolutely."), *available at* http://oll.libertyfund.org/title/2201/203934; Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *in James Madison: Writings*, at 418, 421 (Jack N. Rakove ed. 1999) ("Wherever there is an interest and power to do wrong, wrong will generally be done. . . ."). For this very reason, if voters believe that political contributions appear corrupt, they have received an important signal; they have been reminded of the dangers that are inherent in whatever amount of power has been delegated to the government. *Cf.* Stephen Ansolabehere & James M. Snyder, Jr., *Money and Institutional Power*, 77 Tex. L. Rev. 1673, 1673 (1999) (arguing that political money will tend to follow institutional power).

Because government power in the United States is supposed to be constrained by constitutional limits, the public has an interest in monitoring the appearance of corruption. If the appearance of corruption is on the rise, it suggests that government power has exceeded those limits. And, indeed, "the abandonment of limitations on federal power has led to greater special-interest pressure in no small part simply because it has made the federal government more attractive to lobby." Peter W. Morgan & Glenn H. Reynolds, *The Appearance of Impropriety: How the*

Ethics Wars Have Undermined American Government, Business, and Society 193 (1997). *See also* John R. Lott, Jr., *A Simple Explanation for Why Campaign Expenditures Are Increasing: The Government Is Getting Bigger*, 43 J.L. & Econ. 359 (2000) (arguing that growth in campaign spending is attributable, in significant part, to growth in the federal budget). This, in turn, "has caused many Americans to fear, rightly, that many federal programs are simply disguised ways for the well-connected to pick their pockets, or otherwise push them around." Morgan & Reynolds, *supra*, at 193.

If the public believes that government has exceeded its constitutional limits and that public power is routinely being used to serve private ends, the public may well be motivated to take political action to restore those limits. Thus, the appearance of *quid pro quo* corruption might be thought of as the canary in the constitutional coal mine. Just as coal miners would understandably be alarmed to see their canary looking unwell, Americans are understandably alarmed by what they believe to be the appearance of *quid pro quo* corruption. But what the appearance-of-corruption standard ignores is that these are situations in which people *should* be alarmed. The government is no more justified in eliminating the appearance of corruption to improve public confidence in democracy than a mine foreman would be justified in removing an unwell canary to improve employee confidence in safety conditions. In either case, the underlying danger – be it unchecked government

power to dispense political favors or toxic gas – remains. The only difference is that those who stand to be harmed have been made unaware of that danger.

In such a situation, one cannot help but question Congress's motives in attempting to eliminate the appearance of corruption. And, indeed, the debates surrounding the enactment of the Federal Election Campaign Act, which first imposed biennial aggregate limits on contributions to federal candidates, suggest that the harm most feared by many of its supporters was not an abstract harm to democracy, but rather the harm to their own reputations that would be caused by their ability to dispense political favors:

- Senator George McGovern: "[T]hose of us who run for office can profess that the campaign contributions we receive do not in any way control our votes, but I venture to say that not many believe it." 120 Cong. Rec. S4553 (daily ed. Mar. 27, 1974).
- Senator Hugh Scott: "Regardless of the motives of the donor, or the intentions of the recipient candidate, there appears to be an appearance of impropriety. I regret that this is so, because such charges are usually unfounded, but like the proverbial wife of Julius Caesar, we must be above and beyond reproach." *Hearings on S. 1103, S. 1954, S. 2417, & S.3 Before the Subcomm. on Privileges & Elections*

of the S. Comm. on Rules & Admin., 93d Cong. 33 (1973).

- Senator James Abourezk: "It is really the appearance of corruption that harms *us*, I think, more than any corruption that does go on, because there are certain controversial amendments up today that I would like to vote for, but because I received contributions from dairy farmers around the country, I am almost afraid to vote for them because it is set up now in the press that anybody who does vote for them who has taken money from the dairy farmers has been bought off." *Hearings on S. 372 Before the Subcomm. on Privileges & Elections of the S. Comm. on Rules & Admin.*, 93d Cong. 207 (1973) (emphasis added).

- Senator Philip Hart: "I like to think that I have never been influenced by a political contribution. But I am darn sure that there are many people in Michigan who believe I have been. I am just certain that when they look at my returns and see substantial labor contributions that they say, 'That is why he votes the way he does.'" *Federal Election Campaign Act of 1973: Hearings on S. 372 Before the Subcomm. on Commc'ns of the S. Comm. on Commerce*, 93d Cong. 78 (1973).

To be sure, elected officials may well prefer to wield government power without fear that voters will

become suspicious of them. *See* John Samples, *The Fallacy of Campaign Finance Reform* 112 (2006) (observing that, under the appearance-of-corruption standard, "[t]he presumption of liberty becomes . . . a concern of public relations."). But it seems unlikely that the Founders would have considered promoting this sort of trust to be a sufficient basis for restricting individual liberty. Indeed, the Founders were well aware that government power could be used to benefit favored political factions but wisely rejected restrictions on liberty as a means of addressing that problem:

> Liberty is to faction what air is to fire, an aliment without which it instantly expires. But it could not be a less folly to abolish liberty, which is essential to political life, because it nourishes faction than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency.

The Federalist No. 10, at 73 (James Madison) (Clinton Rossiter ed., 1961).

It may be the case that the appearance of corruption is an unavoidable symptom of having an expansive government that wields enormous power to dispense political favors or punishment. But unpleasant symptoms, while distressing to those who suffer from them, also make those people more acutely aware of underlying problems and, in turn, allow them to take action to address those problems. *Cf.* William Manchester, *The Last Lion: Winston Spencer*

Churchill, Visions of Glory 1874-1932, 348 (1983) (quoting Churchill, "Criticism may not be agreeable, but it is necessary. It fulfills the same function as pain in the human body. It calls attention to an unhealthy state of things."). The appearance-of-corruption standard has allowed government to cut off this process in the political realm, undermining the ability of the People to monitor the growth of government power and the dangers that attend it. It is doubtful that those who wrote and ratified the Constitution would have considered the concealment of evidence of the expansion of government from the public to be even a legitimate interest – let alone an "important" or "compelling" one.

II. The Appearance-of-Corruption Standard Conflicts with Basic First Amendment Principles.

In addition to undermining the ability of Americans to monitor the growth of government power, the appearance-of-corruption standard conflicts with several fundamental First Amendment principles. As discussed below, the appearance-of-corruption standard encourages the prohibition of modes of political expression based entirely on public opinion, is inherently subjective, and invites reliance on unreliable evidence (or even pure speculation and conjecture). In short, the appearance-of-corruption standard provides none of the protection that the First Amendment demands.

A. The appearance-of-corruption standard permits the prohibition of modes of speech and association merely because the public does not like them.

There are few propositions more fundamental in First Amendment law than that political speech and association cannot be restricted merely because they are upsetting or unpopular. *See*, *e.g.*, *Snyder v. Phelps*, 131 S. Ct. 1207, 1220 (2011) ("As a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate."); *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2828 (2011) ("[T]he whole point of the First Amendment is to protect speakers against unjustified government restrictions on speech, even when those restrictions reflect the will of the majority."); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 660 (2000) ("The First Amendment protects expression, be it of the popular variety or not."). The appearance-of-corruption standard turns this fundamental principle on its head by allowing speech and association to be restricted based exclusively on the fact that the public – or the subset of the public vocal enough to capture the attention of legislators – does not care for it.

As discussed above, *supra* I.B., the appearance-of-corruption standard only does work when the underlying activities are not demonstrably corrupt. And it is no answer to say that the appearance-of-corruption standard is necessary because genuine corruption is difficult to detect. This Court has, in contexts far removed from the political speech that

lies at the core of First Amendment protection, squarely rejected the notion that "[p]rotected speech . . . become[s] unprotected merely because it resembles the latter." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255 (2002) (rejecting argument that prohibition on virtual child pornography was necessary because of the difficulty of distinguishing it from actual child pornography). Thus, regulating appearances cannot be justified as a prophylaxis against actual corruption.

Instead, the appearance-of-corruption standard is premised on the notion that some modes of peaceful political speech and association – such as the making of political contributions – may be prohibited based purely on the fact that the public is disturbed by those modes of speech and association. But this, too, runs headlong into well established First Amendment precedent, most notably, *Texas v. Johnson*, 491 U.S. 397 (1989), and *United States v. Eichman*, 496 U.S. 310 (1990).

In *Texas v. Johnson*, this Court considered the constitutionality of a Texas law that prohibited flag desecration. Texas defended the law by arguing, in part, that the law did not seek to prohibit all words or expressive conduct critical of the flag or national unity, but rather that the law merely prohibited a particularly offensive mode of expressive conduct that, if left unchecked, may threaten national unity. 491 U.S. at 416. This Court rejected that argument, observing that the "enduring lesson [of this Court's decisions] that the government may not prohibit

expression simply because it disagrees with its message, is not dependent on the particular mode in which one chooses to express an idea." *Id.* at 416.

This Court reaffirmed that lesson the following term, when, in *Eichman*, it invalidated a similar federal prohibition on flag desecration. As the Court noted, while government may seek to foster "[n]ational unity . . . by persuasion and example," it may not do so by proscribing otherwise peaceful political speech and association because of its "likely communicative impact." 496 U.S. at 318 (quotation marks and citations omitted).

The appearance-of-corruption standard cannot be reconciled with the principles announced in these cases. If expressive conduct cannot be prohibited on the grounds that it will undermine "national unity," then surely it cannot be prohibited on the virtually identical grounds that it will lead to "cynical assumption[s]" about government. *Compare Johnson*, 491 U.S. at 413, *with Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 390 (2000). Nevertheless, that is the aberrant holding of this Court's campaign-finance cases. As in *Eichman*, it is a holding that is "foreign to the First Amendment." 496 U.S. at 318.[2]

---

[2] To make matters worse, this holding is also in conflict with the overwhelming majority of empirical studies, which have found virtually no relationship between trust in government or political efficacy and political contributions or spending. *See*, *e.g.*, David M. Primo & Jeffrey Milyo, *Campaign Finance Laws and Political Efficacy: Evidence From the States*, 5 Election L.J.

(Continued on following page)

B. The appearance-of-corruption standard lacks objectivity and has created confusion in lower courts.

The danger that political activity will be banned merely because it is unpopular is exacerbated by the fact that the appearance-of-corruption standard is wholly indeterminate. If the decades-long debate over campaign-finance law has proved anything, it is that the "appearance of corruption" is entirely in the eye of the beholder. For some observers – including this *amicus* – political contributions are a venerable form of political association. Others – some of whom will undoubtedly file *amicus* briefs defending the constitutionality of the biennial aggregate contribution limits – denigrate political contributions as little more than "legalized bribery." *See*, *e.g.*, Fred Wertheimer, *Supreme Court Could Create System of Legalized Bribery in Washington Depending on Its Decision in McCutcheon Case*, The Huffington Post (Feb. 21, 2013 5:02 p.m.), http://www.huffingtonpost.

---

23 (2006) (finding no significant effect of campaign-contribution limits on political efficacy); Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. Pa. L. Rev. 119, 122 (2004) (concluding that "trends in general attitudes of corruption seem unrelated to anything happening in the campaign finance system"); David M. Primo, *Campaign Contributions, and Appearances of Corruption, and Trust in Government*, *in Inside the Campaign Battle: Court Testimony on the New Reforms*, 285, 290 (A. Corrado *et al.* eds., 2003) (finding virtually no relationship between campaign spending and trust in government during the period after 1980).

com/fred-wertheimer/campaign-finance-supreme-court_b_2734007.html.

These disagreements are not surprising. The members of this very Court, after all, have long disagreed on what constitutes *actual* corruption. *Compare*, *e.g.*, *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 659-60 (1990) (holding that "distortion" caused by corporate political spending is a form of corruption) *with Citizens United*, 558 U.S. 310, 364 (2010) (rejecting the anti-distortion theory of corruption). The even more amorphous concept of the "appearance of corruption" is even less susceptible to objective evaluation.

The inherent subjectivity of the appearance-of-corruption standard makes it incompatible with the First Amendment. This Court has repeatedly stressed the importance of objective standards when First Amendment rights are at stake. *See*, *e.g.*, *Snyder*, 131 S. Ct. at 1219 ("'Outrageousness,' however, is a highly malleable standard with 'an inherent subjectiveness about it 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.'" (citing *Hustler Magazine v. Falwell*, 485 U.S. 46, 55 (1988))); *Ward v. Rock Against Racism*, 491 U.S. 781, 793 (1989) ("Any governmental attempt to serve purely esthetic goals by imposing subjective standards of acceptable sound mix on performers would raise serious First Amendment concerns. . . ."); *Boos v. Barry*, 485 U.S. 312, 322 (1988) ("A 'dignity' standard . . . is so inherently subjective that it would

be inconsistent with 'our longstanding refusal to [punish speech] because the speech in question may have an adverse emotional impact on the audience.' "). Indeed, the importance of objectivity in regulation has been expressly noted in the campaign-finance context. *See FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 468 (2006) (plurality opinion) ("To safeguard th[e] liberty [protected by the First Amendment], the proper standard for an as-applied challenge to BCRA § 203 must be objective, focusing on the substance of the communication rather than amorphous considerations of intent and *effect*." (emphasis added)).

Without objective standards against which to evaluate restrictions on political speech and association, lower courts can reach opposite conclusions even when cases involve virtually identical laws. And, indeed, this is precisely what has happened under the appearance-of-corruption standard. The decisions of the Second and Fourth Circuits in *Green Party of Connecticut v. Garfield*, 616 F.3d 189 (2d Cir. 2010), and *Preston v. Leake*, 660 F.3d 726 (4th Cir. 2011), are illustrative. Both cases involved total prohibitions on political contributions from registered lobbyists. The Second Circuit concluded that "there is insufficient evidence to demonstrate that all lobbyist contributions give rise to an appearance of corruption," *Green Party of Conn.*, 616 F.3d at 207, and thus struck down Connecticut's prohibition. The Fourth Circuit, by contrast, concluded that "[*a*]*ny payment* made by a lobbyist to a public official, whether a campaign contribution or simply a gift, calls into question the

propriety of the relationship, and therefore North Carolina could rationally adjudge that it should ban *all* payments." *Preston*, 660 F.3d at 737.

This is not the only instance in which federal courts, attempting to apply the appearance-of-corruption standard to campaign-finance laws, have reached divergent outcomes. This Court in *Arizona Free Enterprise Club*, 131 S. Ct. 2806, was forced to resolve a similar circuit split regarding the constitutionality of public-financing "matching funds" programs. *Compare McComish v. Bennett*, 611 F.3d 510, 526 (9th Cir. 2010) (upholding system of public-financing matching funds because "it is clear that the Act's anticorruption interest is further promoted by" incentivizing participation in the public-financing system) *with Scott v. Roberts*, 612 F.3d 1279, 1292 (11th Cir. 2010) (striking down system of public-financing matching funds where "[t]he parties ha[d] not sufficiently explained how the Florida public financing system further[ed] the anticorruption interest"). And in *Randall v. Sorrell*, this Court was forced to reverse a ruling by the Second Circuit, which had concluded, in conflict with decades of precedent, that limits on campaign expenditures were a permissible means of combatting the appearance of corruption. *See* 548 U.S. 230, 244 (2006) (plurality opinion), *rev'g Landell v. Sorrell*, 382 F.3d 91 (2d Cir. 2002).

Federal courts operating in good faith will, of course, sometimes disagree about the constitutionality of laws that restrict speech and association. But the

risk of their doing so is increased – and their task made unnecessarily difficult – when the legal standards they are instructed to apply are by their very nature indeterminate. The appearance-of-corruption standard, which provides insufficient guidance to be applied predictably or objectively, is just such a standard.

C. The appearance-of-corruption standard invites reliance on unreliable evidence, or on no evidence at all.

Because the appearance-of-corruption standard is itself indeterminate, it should come as no surprise that courts attempting to determine the presence or absence of the appearance of corruption are often at sea when it comes to what evidence can or should be considered. And although this Court has stated in other contexts that the government's burden in First Amendment cases cannot be carried "by mere speculation or conjecture," *Edenfield v. Fane*, 507 U.S. 761, 770 (1993), that is precisely the effect that the appearance-of-corruption standard has had.

The evidence-free nature of the appearance-of-corruption standard can be seen in the procedural posture of this case, which was appealed to this Court from a motion to dismiss, and in the government's own briefing, which does not cite even a single incident of actual corruption associated with large *aggregate* contributions. Because a majority of states do not have aggregate contribution limits, such evidence would

presumably be easy to demonstrate if it existed. But under the appearance-of-corruption standard, such showings are almost never required.

This is well illustrated by federal courts' reliance on anecdotal reports in newspapers to establish the appearance of corruption. This occurred most notably in *Nixon v. Shrink Missouri Government PAC*, in which this Court upheld Missouri's campaign-contribution limits largely on the basis of newspaper clippings. 528 U.S. 377, 393-94 (2000). "Whether the newspaper clippings were accurate or inaccurate, well-balanced or cockeyed, apparently did not matter, because they at least showed what people *believed* [about the role of money in politics]." Ronald M. Levin, *Fighting the Appearance of Corruption*, 6 Wash. U. J.L. & Pol'y 171, 176 (2001). *See also* Persily & Lammie, *supra* n.2, at 129-30 (describing the "typical and typically vacuous" newspaper articles submitted as evidence of the appearance of corruption in *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445 (1st Cir. 2000)).

Nixon's reliance on newspaper reports highlights another troubling aspect of the appearance-of-corruption standard: the danger that proponents of campaign-finance restrictions can, in effect, invent evidence through their own advocacy. "[T]he most zealous and aggressive advocates of restriction can make accusations, whether well founded in fact or not, and then use the very fact that some people believe the charges as a reason to justify regulation."

Levin, *supra*, at 178. In other words, "[p]olitical combat can create its own appearances." *Id.*

Nixon also demonstrates that the claim that a law combats the appearance of corruption is largely immune to being falsified. When the plaintiffs in *Nixon* "relied on political science studies to attack the law, Justice Souter did not examine them at any length, in part because of 'the absence of any reason to think that public perception has been influenced by the studies.'" *Id*. at 177 (quoting *Nixon*, 528 U.S. at 395). As one scholar has noted, this approach makes evidence virtually irrelevant under the appearance-of-corruption standard:

> If limits on contributions are permissible only in times and places where wide segments of the public believe that special interests exert too much influence over politics, then they are permissible in all times and places. The public always believes this, and it always will. Unless the Court modifies its language, the requirement of proof of need for restrictions might as well be rescinded entirely.

Id. at 178.

The absence of any serious evidentiary requirement under the appearance-of-corruption standard has, in other cases, led to inexplicable legal conclusions. In *Illinois Liberty PAC v. Madigan*, for example, the federal district court for the Northern District of Illinois concluded that it was likely constitutional for Illinois to impose a system of differential contribution

limits under which individual contributors could contribute only half the amount to political candidates that corporations were permitted to contribute. *See* No. 12 C 5811, 2012 U.S. Dist. LEXIS 144259 (N.D. Ill. Oct. 5, 2012) (denying motion for preliminary injunction). There was no evidence that individual contributions appeared more corrupt than corporate contributions; indeed, the court does not appear to have even paused to consider the question. Such is constitutional scrutiny under the appearance-of-corruption standard.

CONCLUSION

"[W]hen governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.'" *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (quoting *Smith v. Allwright*, 321 U.S. 649, 655 (1994)). *Buckley v. Valeo*, to the extent it held that the government has a compelling interest in restricting peaceful political activity to combat the mere appearance of corruption, is just such a decision. By any measure, the appearance-of-corruption standard announced in *Buckley* has failed to deliver on any of the promises put forth by proponents of restrictive campaign-finance laws. It has given the government virtually a free hand to regulate or entirely ban peaceful political activity based on only the flimsiest evidence, in any at all. In exchange, Americans have received nothing – after more than 35 years of legislative attempts to outlaw the

appearance of corruption, Americans' trust in government "remains mired near a historic low." Pew Research Ctr. For People & the Press, *Majority Says the Federal Government Threatens Their Personal Rights* (Jan. 31, 2013), http://www.people-press.org/2013/01/31/majority-says-the-federal-government-threatens-their-personal-rights/. This Court can undo this pointless damage to Americans' First Amendment rights by holding that combating the mere appearance of corruption is not a compelling or important government interest, and that the federal biennial aggregate limits therefore cannot survive either strict or intermediate scrutiny.

Respectfully submitted,

INSTITUTE FOR JUSTICE
WILLIAM H. MELLOR
PAUL M. SHERMAN*
901 North Glebe Road
Suite 900
Arlington, VA 22203
(703) 682-9320
psherman@ij.org

INSTITUTE FOR JUSTICE
FLORIDA CHAPTER
CLAUDIA MURRAY
999 Brickell Avenue
Suite 720
Miami, FL 33131
(305) 721-1600

**Counsel of Record*

Counsel for Amicus Curiae