

No. 19-1398

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In The  
**Supreme Court of the United States**

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REPRESENTATIVE TED LIEU, et al.,

*Petitioners,*

v.

FEDERAL ELECTION COMMISSION,

*Respondent.*

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

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**BRIEF FOR AMICI CURIAE  
CHRISTOPHER T. ROBERTSON, KELLY  
BERGSTRAND, AND D. ALEXANDER WINKELMAN  
IN SUPPORT OF PETITIONERS**

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**INTEREST OF *AMICI CURIAE***<sup>1</sup>

*Amici* are scholars who have conducted empirical research about the appearance of *quid pro quo* corruption in the campaign finance context. *Amici* have no personal interest in the outcome of this case. Rather, *Amici* have a substantial professional interest in seeing that courts take account of relevant empirical research when evaluating the legality of campaign finance regulation.

Christopher Robertson conducted this work while Associate Dean for Research and Innovation and Professor of Law at the University of Arizona; he is now N. Neal Pike Scholar and Professor of Law at Boston University.<sup>1</sup> He is affiliated faculty with the Petrie Flom Center for Health Care Policy, Bioethics and Biotechnology at Harvard University, and conducted this work with the support of the Institutional Corruption Lab of the Edmond J. Safra Center for Ethics at Harvard University.<sup>2</sup>

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<sup>1</sup> In accordance with Supreme Court Rule 37, *amici curiae* state that no counsel for a party authored this brief, in whole or in part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *amici curiae* and their counsel made any monetary contribution to its preparation and submission. Pursuant to Supreme Court Rule 37.2, counsel of record for all parties received timely notice of *amici curiae*'s intent to file and have consented to the filing of this brief.

<sup>2</sup> Institutional affiliations are provided for identification purposes only. *Amici* write in their individual capacities; their views are not necessarily held by their employers.

Kelly Bergstrand is an Assistant Professor of Sociology at the University of Texas at Arlington and earned masters and doctoral degrees in sociology from the University of Arizona.

D. Alexander Winkelman graduated from the James E. Rogers College of Law at the University of Arizona and contributed to the scholarly work discussed in this brief while a fellow there. He is now an attorney in private practice.

This brief is based on *Amici's* prior work appearing in the *Journal of Legal Analysis*, a peer-reviewed journal published by Oxford University Press and edited at Harvard Law School.<sup>3</sup>



## INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Petitioners asked the D.C. Circuit to reconsider its decision in *SpeechNow.org v. Federal Election Commission*, 599 F.3d 686 (D.C. Cir. 2010), which gave rise to Super PACs and similar independent expenditure organizations. The Court in *SpeechNow* recognized that the “appearance of corruption” could justify campaign finance regulation under Supreme Court precedent. *Id.* at 692. But the Court went on to state that, “[i]n light of the [Supreme] Court’s holding as a

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<sup>3</sup> Christopher Robertson, D. Alexander Winkelman, Kelly Bergstrand, and Darren Modzelewski, “The Appearance and the Reality of Quid Pro Quo Corruption: An Empirical Investigation,” *Journal of Legal Analysis* 375-438 (2018).

matter of law that independent expenditures do not corrupt or create the appearance of *quid pro quo* corruption, contributions to groups that make only independent expenditures”—like SuperPACs—“also cannot corrupt or create the appearance of corruption.” *Id.* at 694. *Amici*’s empirical research strongly suggests otherwise. In two studies with complementary methodologies, *Amici* found that contributions to organizations that make only independent expenditures may in fact create the appearance of *quid pro quo* corruption. In light of this empirical research, the Court should grant certiorari so that the Court may consider whether the Court of Appeals correctly decided *Speech-Now*.

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## ARGUMENT

### I. STUDY DESIGN AND RESULTS<sup>4</sup>

The Supreme Court has long recognized in the campaign finance context that the government has a strong interest in avoiding the appearance of *quid pro quo* corruption because “the avoidance of the appearance of improper influence is . . . critical if confidence in the system of representative Government is not to be eroded to a disastrous extent.” *Buckley v. Valeo*, 424 U.S. 1, 27 (1976) (internal brackets and quotation

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<sup>4</sup> This summary description of *Amici*’s study design and findings is necessarily incomplete. For a complete overview of study design, results, caveats, and conclusions, see Robertson, et al., “The Appearance and the Reality of Quid Pro Quo Corruption: An Empirical Investigation.”

marks omitted). At the heart of this case is an empirical question: whether contributions to independent expenditure organizations give rise to an appearance of *quid pro quo* corruption. Whether or not a particular practice creates an “appearance” of corruption is a question that can only be answered by analyzing evidence of how the practice is actually perceived by informed citizens. This Court has “never accepted mere conjecture as adequate to carry a First Amendment burden.” *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 392 (2000). Furthermore, “[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised.” *Id.* at 391.<sup>5</sup> Until now, however, this Court has not had reason to receive empirical evidence of the extent to which large contributions to independent expenditure organizations are perceived as corrupt.

Through two investigations, *Amici* have developed a systematic and reliable approach to analyzing the relationship between contributions to independent

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<sup>5</sup> Treating this as an empirical question is consistent with this Court’s treatment of independent expenditure limits. This Court has long policed a distinction between expenditures and contributions. *Compare Buckley*, 424 U.S. at 27 (relying on empirical evidence of the risk of *quid pro quo* corruption and its appearance to uphold contribution limits); *with id.* at 45-46 (holding that independent expenditures do not give rise to corruption or its appearance); *see also SpeechNow*, 599 F.3d at 694 (noting that the Court’s independent expenditure decisions have relied on a lack of “evidence” that independent expenditures “lead to, or create the appearance of, *quid pro quo* corruption” (emphasis added)).

expenditure organizations and the appearance of corruption. These investigations reveal that large contributions to Super PACs do give rise to the appearance of an illegal *quid pro quo* arrangement.

In both investigations, mock jurors were asked to determine whether various campaign finance fact patterns met the standard for *quid pro quo* corruption under the federal bribery statutes, *see* 18 U.S.C. §§ 201, 371.<sup>6</sup> Investigations of this sort are called vignette-based experiments, meaning that respondents are asked to imagine themselves in a certain role (here, as grand or petit jurors) and then to decide what they would do in that role (here, whether to indict or convict). This method has become a common tool in a range of scientific and practical fields including

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<sup>6</sup> Bribery is the classic example of a “*quid pro quo*” arrangement. *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 404–05 (1999) (“[F]or bribery there must be a *quid pro quo*—a specific intent to give or receive something of value *in exchange* for an official act.”). “But laws making criminal the giving and taking of bribes deal with only the most blatant and specific attempts of those with money to influence governmental action.” *Buckley v. Valeo*, 424 U.S. at 27-28. Because the “interests of preventing corruption and the appearance of it” which underlie the bribery statutes are the very same interests that animate campaign finance laws, *Nixon v. Shrink Missouri Gov’t PAC*, 528 U.S. 377, 390 (2000), campaign contributions that are perceived by the public as violating the federal bribery statutes—whether those contributions are made directly to candidates or to Super PACs, which in turn spend the money to support candidates—unquestionably give “the appearance of corruption.”

sociology, psychology, business, and health sciences.<sup>7</sup> Vignette-based experiments are now published in leading scientific journals and are regularly used to predict real-world behaviors.<sup>8</sup>

The first investigation—the “Grand Jury Simulation”—depicted a case typical to everyday politics in the United States, in which a corporation sought to have a deregulatory rider added to a major piece of legislation, and a U.S. representative sought support for his re-election. After the corporation’s CEO authorized a \$50,000 contribution to a 501(c)(4) organization—an independent expenditure organization similar to a SuperPAC—that was supportive of the representative’s re-election, the representative expressed a willingness to study and promote the company’s interests, and the representative ultimately sponsored the deregulatory rider. Subsequently, both the corporation’s CEO and the representative were charged under the

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<sup>7</sup> See generally Michael S. Lewis-Beck, et al., “Vignette Technique,” *The Sage Encyclopedia of Social Science Research Methods* (2004); Jessica L. Collett and Ellen Childs, “Minding The Gap: Meaning, Affect, and the Potential Shortcomings of Vignettes,” *40 Social Science Research* 513 (2011) (listing these fields in particular); see also Geert M.J. Rutte, “Measuring physiotherapists’ guideline adherence by means of clinical vignettes: a validation study,” *12 Journal of Evaluation in Clinical Practice* 491 (2006) (concluding that vignettes are of acceptable validity for predicting real-world behavior); D. Alexander Winkelman, et al., “An Empirical Method for Harmless Error,” *46 Ariz. St. L.J.* 1405 (2015) (summarizing this and other literature).

<sup>8</sup> See, e.g., Aaron Kesselheim, Christopher Robertson, et al., “A Randomized Study of How Physicians Interpret Research Funding Disclosures,” *369 New England Journal of Medicine* 1119 (Sept. 20, 2012).

federal bribery statute. The simulation materials included a recorded charge from a federal judge, excerpts from the federal grand juror manual, and realistic indictments and true bill forms. An experienced prosecutor presented the case along with live actors portraying the witnesses, and study participants were allowed to question the witnesses live.

After being exposed to this stimulus, the group of 45 mock jurors were broken into three grand juries of fifteen each. The study left it to the jurors to determine whether the indirect expenditure was a cause of the representative's newfound interest in the deregulatory legislation, and whether, if so, this connection satisfied the *quid pro quo* elements of the federal bribery statute. Across all 45 grand jurors, 73% voted to indict the defendants.<sup>9</sup> Put differently, a majority of these grand jurors determined that a contribution to an independent expenditure organization could support federal bribery charges, even where the defendants had never met in person, and even where there was no direct evidence of an explicit agreement to make a *quid pro quo* exchange.

To more systematically investigate these questions, *Amici* also conducted a much larger experiment—the “Online Experiment”—which used a national online sample to review participants’ responses to variations on the same basic fact pattern as in the Grand Jury

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<sup>9</sup> Confidence Interval: 58%-85%

Simulation.<sup>10</sup> Each survey participant was presented with a short stimulus based on one of five variations. The stimulus included a welcome and preliminary instructions by a judge, a statement of undisputed facts, closing arguments by both the prosecutor and the defense attorney, and jury instructions adapted from the pattern jury instructions for the federal crime of bribery. After reading this stimulus, respondents were asked to fill out a verdict form that posed a binary choice of guilty or not guilty on the charge of bribery for each defendant. Respondents were then asked about their degree of confidence in their verdict, as well as a battery of other questions about the specific variation the respondent had reviewed, for example, whether the respondent had found an explicit or implicit agreement.

Three factual variations are particularly relevant to this case. In the first relevant variation (the “PRO-WEAK condition”), the representative and CEO simply had background knowledge about their reciprocal interests and acted accordingly, without any direct or indirect contact between the parties. The representative introduced the rider, and the CEO made a direct contribution to the candidate’s campaign or leadership PAC.

In the second relevant variation (the “PRO-LOBBY condition”), a lobbyist engaged the two parties

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<sup>10</sup> The sample consisted of 1276 jury-eligible respondents from an online sample provided by Qualtrics, balanced to be representative of the United States census population on gender, age, and political affiliation.

and persuaded them to act in accordance with each other's interests. In particular, the lobbyist suggested to both parties that he believed that "the Representative would push through the amendment if" the CEO gave some *quid*, and that the CEO would be "more likely to act favorably if the Representative proposed the hospital equipment amendment." Importantly, these were the lobbyist's predictions about the likely effects of each party's behavior on the other's behavior, not the parties' commitments to each other. In this variation, the company gave a \$250,000 contribution to an independent 501(c)(4) organization that was working to support the representative's re-election, and the representative sponsored the rider.

Finally, in the third relevant variation (the "PRO-STRONG condition"), the parties met and discussed their mutual interests, and explicitly agreed that the company would make a direct contribution in exchange for the official action. This condition was intended as a benchmark for what is indisputably *quid pro quo* corruption.

In the PRO-WEAK condition, 43% of respondents were willing to convict at least one of the defendants, and about half of the respondents agreed (*i.e.*, selected somewhat agree, agree or strongly agree) that the representative and CEO had corrupt intent. Six-in-ten (59%) thought that money influenced the representative's decision to introduce the rider, while about half thought that what occurred is (44%) or should be (58%) a crime. Further, even with no direct or indirect contact between the CEO and representative, 39% of

respondents thought there was an agreement, and 35% believed the agreement was explicit.

In the PRO-LOBBY condition, more than three quarters (77%) of respondents voted to convict, which was dramatically higher than in the PRO-WEAK condition. Strikingly, the conviction rate in the PRO-LOBBY condition was close to the 84% rate in the benchmark PRO-STRONG condition—indeed, there was no statistically significant difference ( $p=.48$ ) between the likelihood that participants in each of these conditions would vote to convict. Thus, participants were nearly as likely to convict where the parties' relationship was through an intermediary and the contribution was indirect—as in the PRO-LOBBY condition—compared to where the relationship and contribution were both direct, as in the PRO-STRONG condition. Additionally, in the PRO-LOBBY condition, three quarters (78%/79%, respectively) of respondents agreed that the representative and CEO had corrupt intent, 81% of respondents felt that the contribution influenced the representative, and overwhelming majorities thought that what occurred is (77%) or should be (83%) a crime. Thus, a strong majority of respondents condemned the type of exchange described in the PRO-LOBBY condition, even though it involved a contribution to an independent expenditure organization and no direct communication between the parties.<sup>11</sup>

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<sup>11</sup> Even with the lobbyist as a go-between, 70% believed that the representative and CEO had reached an agreement, with 57% viewing the agreement as explicit.

The Grand Jury Simulation’s rich stimulus and extensive in-person deliberations contrast with the Online Experiment’s large and representative base of participants and varied fact patterns, creating what scientists call “convergent validity.” And the two experiments tell a coherent story. Both found strong evidence that contributions to independent expenditure organizations are perceived as supporting federal bribery charges. In other words, they give rise to an appearance of corruption. Potentially more significant, the Online Experiment found evidence that it made little difference whether the “quid” was a direct contribution to a campaign or a contribution to an independent expenditure organization like a SuperPAC—in both versions, the contribution gave rise to the appearance of an illegal *quid pro quo* arrangement.

## **II. POTENTIAL IMPLICATIONS FOR CAMPAIGN FINANCE LAW.**

These results call the D.C. Circuit’s decision in *SpeechNow* into substantial question. If, as appears to be the case, a contribution to a SuperPAC can give rise to the same appearance of corruption as a direct contribution to a campaign account, then this Court’s longstanding “appearance of corruption” rationale for campaign finance regulation would appear to justify regulation of contributions to independent expenditure organizations as well as regulation of direct contributions to candidates and candidate leadership PACs. Importantly, the “appearance of corruption” rationale does not depend on whether a court agrees with

the assessments of the grand and petit jurors that the facts as presented in *Amici*'s experiments constitute bribery. What matters for purposes of this rationale is public perception, and the protection of democratic legitimacy. Based on the results described above, contributions to independent expenditure organizations may substantially threaten these interests—even if, as this Court has held, independent expenditures themselves do not.

Moreover, these results have potentially concerning implications for the interaction between federal criminal law and campaign finance regulation. If jurors are willing to indict and convict based on the facts described above, then politically motivated, selective prosecutions might take the place of reasoned campaign finance policymaking. This concern is far from hypothetical. Former Alabama Governor Don Siegelman went to prison for, among other things, soliciting a contribution to an independent political group that was advocating for the establishment of a state lottery to fund an education initiative, in exchange for a political appointment to a state board. *United States v. Siegelman*, 640 F.3d 1159, 1169-70 (11th Cir. 2011). This behavior is not unlike what many other politicians likely do on a regular basis: donors to SuperPACs and similar groups routinely expect that politicians will pay particular attention to their discrete interests. Rather than relying on the criminal law to weed out the most extreme *quid pro quos*—with likely inequitable results—states and the federal government should be permitted to regulate the indirect

contributions that create the appearance of *quid pro quo* corruption in the first place.

In sum, almost a decade after the *SpeechNow* decision, the influence of independent expenditure organizations on American politics is impossible to ignore. Given the overwhelming evidence—including the empirical evidence described in this brief—that contributions to independent expenditure organizations give rise to corruption and its appearance, the Court should grant a writ of certiorari and entertain Petitioners’ challenge to *SpeechNow*.

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## CONCLUSION

For the foregoing reasons, as well as the reasons outlined in the Petition for a Writ of Certiorari, *Amici* respectfully request that the Court grant the writ sought by the Petitioners.

July 21, 2020

Respectfully submitted,

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