NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 19-5072

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPRESENTATIVE TED LIEU, *et al.*,

Plaintiffs-Appellants,

v.

FEDERAL ELECTION COMMISSION,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
No. 1:16-cv-02201-EGS

BRIEF FOR *AMICI CURIAE* CHRISTOPHER T. ROBERTSON, KELLY BERGSTRAND, AND D. ALEXANDER WINKELMAN IN SUPPORT OF APPELLANTS' PETITION FOR REHEARING EN BANC

November 22, 2019

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES PURSUANT TO CIRCUIT RULE 28(a)(1)

(A) Parties and Amici. All parties, intervenors, and amici appearing before the district court and in this Court are listed in the Certificate as to Parties, Rulings and Related Cases filed by Appellants.

(B) Rulings Under Review. References to the rulings at issue appear in the Certificate as to Parties, Rulings and Related Cases filed by Appellants.

(C) Related Cases. This case was not previously before this Court or any other court, other than the district court. Counsel for Amici is not aware of any related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C) currently pending in this Court or in any other court.

STATEMENT REGARDING SEPARATE BRIEFING

All parties consent to the filing of this brief.*

Pursuant to Circuit Rule 29(d), Amici certify that a separate brief is necessary because Amici seek to present the results of their own study, which may be of significant value to the Court in deciding whether to grant Appellants' petition for rehearing en banc. No party or other amicus is capable of providing this unique contribution.

* No counsel for a party authored this brief in whole or in part, and no person other than Amici and their counsel made a monetary contribution to its preparation or submission. *See* Fed. R. App. P. 29(a)(4)(E).

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INTEREST OF AMICI CURIAE

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 is Associate Dean for Research and Innovation and Professor of Law at the University of Arizona.[1] He is affiliated faculty with the Petrie Flom Center for Health Care Policy, Bioethics and Biotechnology at Harvard University and is a reporter for the Health Law Monitoring Committee of the Uniform Law Commission.

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 a now an attorney in private practice.

This brief is based on Amici's prior work appearing in the *Journal of Legal*

[1] Institutional affiliations are provided for identification purposes only. Amici write in their individual capacities; their views are not necessarily held by their employers.

Analysis, a peer-reviewed journal published by Oxford University Press and edited at Harvard Law School.[2]

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs-Appellants have asked the Court to reconsider its decision in *SpeechNow.org v. Federal Election Commission*, 599 F.3d 686 (D.C. Cir. 2010), which gave rise to so-called Super PACs and similar independent expenditure organizations.[3] 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 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

[2] 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).

[3] The factual and regulatory background of this case is fully laid out in Plaintiffs'-Appellants' petition for rehearing en banc.

corruption. In light of this empirical research, the Court should grant rehearing en banc and reconsider its decision in *Speechnow*, which rests on an incorrect premise.

ARGUMENT

I. STUDY DESIGN AND RESULTS[4]

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 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. *See Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 392 (2000) (stating in the campaign finance context that "[w]e have never accepted mere conjecture as adequate to carry a First Amendment burden").[5] Through two investigations, Amici have developed a

[4] 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."

[5] Treating this as an empirical question is consistent with the Supreme Court's treatment of independent expenditure limits. The Supreme Court has long policed a distinction between expenditures and contributions. *Compare Buckley*, 424 U.S.

systematic and reliable approach to answering this question, and the answer appears to be yes.

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. 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 sociology, psychology, business, and health sciences.[6] Vignette-based

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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 Supreme 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)).

[6] *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).

experiments are now published in leading scientific journals and are regularly used to predict real-world behaviors.[7]

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 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

[7] *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).

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.[8] 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 Simulation.[9] 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

[8] Confidence Interval: 58%-85%

[9] The sample consisted of 1276 jury-eligible respondents from a random online sample provided by Qualtrics, balanced to be representative of the United States census population on gender, age, and political affiliation.

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 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 (44%/58%, respectively) thought that what occurred is or should be 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 77%/83%, respectively, thought that what occurred is or should be 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.[10]

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

[10] 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.

evidence that contributions to independent expenditure organizations could support federal bribery charges, suggesting that such contributions can 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 Court'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 the 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 the 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. *See supra* at 3. Based on the results described above, contributions to independent expenditure

organizations may substantially threaten these interests—even if, as the Supreme 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 rehearing en banc and reconsider *SpeechNow*.

CONCLUSION

For the foregoing reasons, as well as the reasons outlined in Plaintiffs-Appellants' petition for rehearing en banc, Amici respectfully request that the Court grant rehearing en banc in this case.

November 22, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the length limitation set forth in Fed. R. App. P. 29(b)(4) because this brief contains 2,584 words, excluding those parts of the brief exempted by Fed. R. App. P. 32(f). I further certify that the brief complies with the typeface requirements of Fed. R. App. 32(a)(5) and the style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface, 14-point Times New Roman, using Microsoft Word.

Dated: November 22, 2019

/s/ Joshua J. Bone
Joshua J. Bone

CERTIFICATE OF SERVICE

I, Joshua J. Bone, hereby certify that on November 22, 2019, I caused the foregoing brief to be filed electronically with the United States Court of Appeals for the District of Columbia Circuit using the CM/ECF system. I certify that all counsel of record are registered as ECF Filers and they will be served by the CM/ECF system.

/s/ Joshua J. Bone
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