No. 18-3325

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PASQUALE T. DEON, SR. AND MAGGIE HARDY MAGERKO,

Plaintiffs-Appellees,

v.

DAVID M. BARASCH, KEVIN F. O'TOOLE, RICHARD G. JEWELL, SEAN LOGAN, KATHY M. MANDERINO, MERRITT C. REITZEL, WILLIAM H. RYAN, JR., DANTE SANTONI JR., PAUL MAURO, CYRUS PITRE AND JOSH SHAPIRO,

Defendants-Appellants.

On Appeal from the United States District Court
for the Middle District of Pennsylvania, No. 1:17-cv-1454 (Rambo, J.)

BRIEF FOR *AMICI CURIAE* CAMPAIGN LEGAL CENTER AND COMMON CAUSE IN SUPPORT OF DEFENDANTS-APPELLANTS

PAUL M. SMITH
TARA MALLOY
MEGAN P. MCALLEN
CAMPAIGN LEGAL CENTER
1411 K Street NW
Washington, DC 20005

WILLIAM W. WARREN, JR.
K. WESLEY MISHOE
SAUL EWING ARNSTEIN & LEHR LLP
2 North Second Street | 7th Floor
Harrisburg, Pennsylvania 17101
(717) 238-7698

January 22, 2019

CORPORATE DISCLOSURE STATEMENT OF *AMICI CURIAE* CAMPAIGN LEGAL CENTER AND COMMON CAUSE

Pursuant to Federal Rule of Appellate Procedure 26.1, *amici curiae* Campaign Legal Center and Common Cause make the following disclosure regarding their corporate status:

Campaign Legal Center ("CLC") is a nonprofit, nonpartisan corporation working in the areas of campaign finance reform, voting rights and election law. CLC has no parent corporation and no publicly held corporation has any form of ownership interest in CLC.

Common Cause is a nonprofit, nonpartisan corporation dedicated to ensuring fair elections and making government at all levels more representative, open, and responsive to the interests of ordinary people. Common Cause has no parent corporation and no publicly held corporation has any form of ownership interest in Common Cause.

Dated: January 22, 2019

SAUL EWING ARNSTEIN & LEHR LLP

/s/ William W. Warren, Jr
William W. Warren, Jr., Esq. (#23716)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Pennsylvania Statutes and Legislative Materials:

Federal, State, and Municipal Statutes:

Additional Materials:

STATEMENT OF INTEREST[1]

Amicus Campaign Legal Center ("CLC") is a nonpartisan, nonprofit organization that works to strengthen and defend campaign finance law. CLC has been involved in every major U.S. Supreme Court campaign finance case since *McConnell v. FEC*, 540 U.S. 93 (2003), including *Citizens United v. FEC*, 558 U.S. 310 (2010), and *McCutcheon v. FEC*, 572 U.S. 185 (2014), and participated in several recent cases with direct relevance here: *Wagner v. FEC*, 793 F.3d 1 (D.C. Cir. 2015) (en banc), *Yamada v. Snipes*, 786 F.3d 1182 (9th Cir. 2015), and *Green Party of Connecticut v. Garfield*, 616 F.3d 189 (2d Cir. 2010).

Amicus Common Cause is a nonpartisan, nonprofit democracy organization with over 1.2 million members and local organizations in 35 states. Common Cause in Pennsylvania has over 30,000 members and followers. Since its 1970 founding, Common Cause has been dedicated to fair elections and making government at all levels more representative, open, and responsive to the interests of ordinary people.

Both *amici* participated in summary judgment proceedings below.

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[1] All parties have consented to the filing of this brief. No party's counsel or other person except *amici* and their counsel authored this brief or contributed money to fund its preparation or submission.

SUMMARY OF ARGUMENT

When the General Assembly approved the Pennsylvania Horse Race Development and Gaming Act, 4 Pa. C.S. § 1101 *et seq.* ("Gaming Act" or "Act") in 2004, it understood that the industry would require careful oversight to prevent *quid pro quo* corruption or its appearance from taking root in the Commonwealth. Pennsylvania looked to laws and experiences across the country and determined that prohibiting gaming licensees from making campaign contributions would address these corruption concerns and reinforce public confidence in the integrity of state government. *See id.* § 1513(a). This was a constitutionally permissible choice, and given the extremely important interests at stake, an appropriate one.

This *amicus* brief will focus predominantly on the weight of Pennsylvania's anticorruption interests, and the substantial judicial authority approving analogous laws as a constitutional means of targeting pay-to-play corruption. There is nothing novel about the proposition that someone seeking business or individualized benefits from the government—like a state gaming licensee—might "pay to

play." Courts and legislatures nationwide have recognized that the risk of corruption in this context is manifest.

The district court chose to disregard this consensus, and in doing so, made two fundamental errors in its application of controlling precedent:

First, notwithstanding the "relatively complaisant" intermediate standard of scrutiny it was bound to apply, *Buckley v. Valeo*, 424 U.S. 1, 20-23, 25 (1976) (per curiam), the court imposed a stringent level of review—tantamount to strict scrutiny—in assessing the Act's constitutionality. It justified this approach on the grounds that the law bans, rather than limits, contributions, and extends to individuals who are only "tangentially related" to the gaming industry, A14—but neither justifies strict scrutiny under the Supreme Court's precedents. *FEC v. Beaumont*, 539 U.S. 146, 161 (2003). The court essentially subjected the law to a "least restrictive means" test, a hallmark of strict scrutiny review that was inappropriate for the intermediate scrutiny applied to contribution limits.

Second, the district court devised a new, "heightened" standard for the legislative record necessary to sustain the contribution restriction at

issue here. It demanded that the Commonwealth produce evidence of "pervasive" corruption specific to Pennsylvania's nascent gaming industry, A14, and ignored the evidence from other jurisdictions it was obliged to consider under *Nixon v. Shrink Mo. Gov't PAC,* 528 U.S. 377 (2000). Indeed, the district court required actual proof of continuing large-scale *quid pro quo* corruption involving gaming licensee contributions—although such contributions had been banned at virtually all times since the Gaming Act passed in 2004, and, "[a]s the Supreme Court has recognized, 'no data can be marshaled to capture perfectly the counterfactual world in which' an existing campaign finance restriction 'do[es] not exist.'" *See Wagner*, 793 F.3d at 14 (citing *McCutcheon*, 572 U.S. at 219)).

At a minimum, this case should be remanded so it can be reviewed under a proper application of the relevant standard. Better still, this Court should join the overwhelming majority of others in recognizing the self-evident risk of *quid pro quo* when someone seeking business or individualized benefits from the government is allowed to contribute to the campaigns of officials with authority over discretionary public contracting or licensing decisions. Even strict restrictions on

contributions in this context have been upheld as appropriately tailored to advance the vital interest in preventing the actuality or appearance of corruption. This consensus cannot just be dismissed, as the district court did, because it draws from the experiences of other jurisdictions. Nor can it be waved away because some of these laws "do not deal with licensees." A15. Pennsylvania's law was owed a fuller consideration.

ARGUMENT

I. The Decision Below Is At Odds With Well-Settled Standards of First Amendment Review.

A. Contribution restrictions are subject to "closely drawn"—not strict—scrutiny.

"[B]ecause contributions lie closer to the edges than to the core of political expression," they are "subject to relatively complaisant review under the First Amendment." *Beaumont*, 539 U.S. at 161. Since *Buckley*, the Supreme Court has consistently subjected contribution restrictions to only intermediate, "closely drawn" scrutiny. *See, e.g.*, *McCutcheon*, 572 at 218 (applying closely drawn scrutiny to aggregate limit); *Beaumont*, 539 U.S. at 161 (upholding federal corporate contribution ban under closely drawn standard); *Buckley*, 424 U.S. at 20-23, 25; *see also Lodge No. 5 of Fraternal Order of Police v. City of*

Philadelphia, 763 F.3d 358, 375 (3d Cir. 2014) ("[C]ontributions are not afforded the same protections as direct forms of political expression.").

The district court purported to apply this framework. But its stringent demand that Pennsylvania satisfy "heightened" standards to meet its burden—as to both the law's justification and its tailoring—was more consonant with strict scrutiny review than the "relatively complaisant" test the court was bound to apply.

According to the district court, this "heightened" approach was necessary because the law imposes a ban rather than a limit and covers licensees "tangentially related to the industry," making Pennsylvania's anticorruption interest "more novel." A15. This turns the tailoring test on its head: "the time to consider" the difference between a ban and a limit "is when applying scrutiny at the level selected, not in selecting the standard of review itself." *Beaumont*, 539 U.S. at 161-62. And a law's breadth does not make the government's interest "more novel"; at most, it suggests the law is less closely tailored to achieve the interest.[2]

[2] Insofar as these concerns were rooted in the court's belief that *these plaintiffs* are only "tangentially connected" to licensed gaming entities, the record does not support that hypothesis. *See infra* at 24-25 & n.10.

In a similar vein, the court improperly imposed least-restrictive-means and underinclusiveness requirements. Neither is compatible with the "relatively complaisant review" applicable here. Under closely drawn scrutiny, Pennsylvania need not prove that other "less restrictive measures have been inadequate." A32. And under any level of scrutiny, "the First Amendment imposes no freestanding 'underinclusiveness limitation'" requiring states to "address all aspects of a problem in one fell swoop; policymakers may focus on their most pressing concerns." *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1668 (2015). Whether or not "other state-licensed industries" also pose pay-to-play concerns, A32, Pennsylvania "is surely not prohibited from fighting such problems in one sector unless it fights them in all." *Wagner*, 793 F.3d at 31. Pennsylvania legislators were free to address their "most pressing" concern—especially where it involved an industry that, as even the district court acknowledged, "has historically been more prone to corruption than other state-regulated industries." A15.

The court also relied heavily on *McCutcheon* and *Citizens United*, but neither has any direct application here. Unlike the *expenditure* prohibition reviewed in *Citizens United*, 558 U.S. at 359, Section 1513

does not bar anyone from speaking directly about candidates or committees through independent expenditures.[3] And although *McCutcheon* involved a contribution limit, it was a distinct type of limit: an aggregate cap layered on top of existing *base* limits, which the Court found unnecessary to reduce circumvention of the valid base limits. *See, e.g.*, 572 U.S. at 200. *McCutcheon* did not address the validity of contribution restrictions generally, or alter the framework for their review.

Finally, the district court proceeded as though restricting contributions to non-candidate committees *of any kind* is equivalent to restricting *independent expenditures*. *See* A11-12, A33. This was a clear misunderstanding of precedent: states can unquestionably regulate

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[3] The court's confusion on this point may trace to its misguided belief that *Citizens United* invalidated the federal corporate *contribution* prohibition. *See* A24. Although that decision struck down then-section 441b(a)'s application to *expenditures*, the federal contribution ban remains intact, and its constitutionality has since been reaffirmed. *United States v. Danielczyk*, 683 F.3d 611, 616 (4th Cir. 2012), *cert. denied*, 568 U.S. 1193 (2013).

Many states have similar prohibitions, including Pennsylvania, 25 Pa. Stat. § 3253, and these too have been upheld. *See 1A Auto, Inc. v. Sullivan*, 105 N.E.3d 1175, 1182 n.4, 1185 (Mass. 2018) (surveying state laws and collecting cases), *petition for cert. filed*, No. 18-733 (U.S. Dec. 5, 2018).

contributions to committees that contribute directly to candidates and parties. *See McConnell*, 540 U.S. at 156 (upholding soft-money ban); *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 464-65 (2001); *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 197-99 (1981). Again, the Supreme Court has consistently subjected contribution limits to lesser scrutiny because "the transformation of contributions into political debate involves speech by someone other than the contributor." *Buckley*, 424 U.S. at 21. That principle applies regardless of whether a law limits contributions to candidates or to political committees.[4]

B. Pennsylvania was not required to allow "pervasive corruption" within its gaming industry before taking steps to prevent it.

There is nothing novel about the proposition that participants in a state-sanctioned monopoly industry could be vulnerable to pay-to-play corruption. As legislatures and courts nationwide have recognized, the risk of corruption in this context is self-evident. *See infra* Part II.A.

[4] It is unclear how Section 1513 would apply to *independent expenditure-only committees* (or "super PACs"), but that issue was not properly presented. However minimal the Article III threshold might be in the First Amendment context, it requires at least some asserted intent to engage in the specific course of conduct arguably proscribed by statute. Plaintiffs here did not allege any particular desire to contribute to independent expenditure-only groups.

Indeed, the district court accepted that whether restricting gaming industry contributions prevents political corruption was "beyond reasonable debate." A14. Nevertheless, it found the Commonwealth's pay-to-play concerns insufficient to support a ban, concluding that, under *Nixon v. Shrink Mo. Gov't PAC,* 528 U.S. 377 (2000), Pennsylvania had failed to proffer "real evidence" of political corruption specific to its licensed gaming industry. A14. This misunderstands *Nixon* and other authorities.

In all of the Supreme Court's decisions involving contribution limits, "[t]he importance of the governmental interest in preventing [corruption] has never been doubted." *Beaumont*, 539 U.S. at 154 (citation omitted) (second alteration in original). That interest has been held sufficient to justify not only limits on direct giving to candidates, but also laws restricting individual contributions to political parties and PACs, *see supra* at 8-9, and laws prohibiting corporate contributions entirely, including the federal ban originally enacted in 1907 and still in effect today. *See Beaumont*, 539 U.S. at 149, 152-53.

In *Nixon*, the Supreme Court *rejected* the argument that Missouri had failed to show "empirical evidence of actual[ ] corrupt[ion]." 528

U.S. at 390. The Court explained that "[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. Because Missouri's justification—avoiding corruption—was neither new nor implausible, the Court declined to impose "a new requirement that governments enacting contribution limits must 'demonstrate that the recited harms are real, not merely conjectural.'" *Id.* at 391-92 (citations omitted).

Here, however, the district court demanded that the legislature make extensive findings of actual political bribery connected with Pennsylvania's nascent gaming industry to support its anticorruption concerns. That "heightened" standard cannot be squared with *Nixon*, and would essentially "require the legislature to experience the very problem it fears before taking appropriate prophylactic measures." *Ognibene v. Parkes*, 671 F.3d 174, 188 (2d Cir. 2011).

Nor was the Commonwealth limited to gathering evidence of corruption within its borders. States may defend their contribution limits both by relying on the "evidence and findings accepted in *Buckley*," *Nixon*, 528 U.S. at 393, and by pointing to the "experience of

states with and without similar laws." *Wagner*, 793 F.3d at 14. "The First Amendment does not require . . . conduct[ing] new studies or produc[ing] evidence independent of that already generated by other [jurisdictions]." *Nixon*, 528 U.S. at 393 n.6 (citation omitted). Determining whether campaign contributions pose a risk of corruption is a question of legislative fact, and courts tasked with answering it should consult the full range of relevant sources, including controlling precedent, the records in other cases, and available empirical studies and recorded experience. *See, e.g.*, *Ognibene v. Parkes*, 599 F. Supp. 2d 434, 448 (S.D.N.Y. 2009) ("[L]egislative facts" are to be considered "in determining whether a reasonable person would believe that corruption or the potential for corruption exists"), *aff'd*, 671 F.3d 174 (2d Cir. 2011).

Legislatures are also fully entitled to take a prophylactic approach when political corruption is "neither easily detected nor practical to criminalize." *McConnell*, 540 U.S. at 153; *see also Blount v. SEC*, 61 F.3d 938, 945 (D.C. Cir. 1995) ("Although the record contains only allegations, no smoking gun is needed where, as here, the conflict of

interest is apparent, the likelihood of stealth great, and the legislative purpose prophylactic.").

The strict evidentiary demands imposed below ran counter to this authority. The district court dismissed Pennsylvania's judgment that gaming industry contributions pose an unacceptable risk of corruption, finding the legislature's concerns unsupported by "real evidence." A14. But that required ignoring the extensive extra-jurisdictional record of abuse connected with gaming interests and others "doing business" with the government.

And the court went further still: it did not merely insist that the Commonwealth describe "actual instances of corruption in Pennsylvania," produce "studies done to determine if pervasive corruption exists," and explain why its interests could not be served by other, less restrictive regulations. A14. It demanded that all of those things appear *in the law's legislative history*, without which its "legislative purpose"—encompassing both the legislature's "actual goal" and the law's "actual effect," A35—could not be sustained. A14. This transforms the tailoring inquiry into an "intent" test, and goes well beyond the commands of "closely drawn" scrutiny. *Cf. Lair v. Motl*, 873

F.3d 1170, 1184 (9th Cir. 2017) (declining to invalidate contribution limits enacted with "impermissible motive"), *cert. denied*, 2019 WL 177593 (U.S. Jan. 14, 2019). Even so, the legislative history of Section 1513 *does* speak to those topics. *See infra* Part II.C. But the court should have looked beyond that narrow context.

II. Section 1513 Is Supported by Compelling Anticorruption Interests that the District Court Ignored.

A. Contribution restrictions are a critical feature of laws targeting pay-to-play corruption and have been widely upheld on that basis.

Section 1513 is typical of efforts to proscribe pay-to-play schemes in highly regulated industries. A multitude of federal, state, and local laws prohibit or otherwise restrict campaign contributions from licensees and others doing business with the government, and courts routinely uphold such measures. At least seventeen states[5] and the federal government[6] have enacted analogous limits on campaign contributions from those doing business with the government, as have many municipalities.[7]

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[5] *Wagner*, 793 F.3d at 16 & n.18 (surveying laws).

[6] 52 U.S.C. § 30119.

[7] *See, e.g.*, N.Y.C. Admin. Code §§ 3-702(18), 3-703(1-a), (1-b); L.A., Cal., City Charter § 470(c)(12).

For example, New York City limits contributions from an array of persons and groups with "business dealings with the city"—a broad category that includes not only city contracts (as the district court suggests, A16), but also real estate transactions, zoning approvals, concessions, grants, and economic development agreements. N.Y.C. Admin. Code § 3-702(18). And federal law bars active and prospective government contractors from contributing to candidates, parties, and political committees (including conventional *and* independent expenditure-only committees). *See* 52 U.S.C. § 30119; FEC MUR 7099 (Suffolk Constr.) (2017), https://www.fec.gov/data/legal/matter-under-review/7099.

Courts have upheld a wide range of these laws, including those barring or restricting contributions from contractors, lobbyists, licensees, and others doing business with the government. In 2015, for example, a unanimous en banc D.C. Circuit upheld the federal contractor contribution ban, emphasizing that "[t]here is nothing novel or implausible about the notion that contractors may make political contributions as a *quid pro quo* for government contracts, that officials may steer government contracts in return for such contributions, and

that the making of contributions and the awarding of contracts to contributors fosters the appearance of such *quid pro quo* corruption." *Wagner*, 793 F.3d at 21; *see also, e.g.*, *Yamada*, 786 F.3d at 1205-06 (upholding Hawaii ban on state contractor contributions); *Ognibene*, 671 F.3d at 190-91 (upholding contribution limits on those "doing business" with New York City); *Preston v. Leake*, 660 F.3d 726, 741 (4th Cir. 2011) (upholding North Carolina ban on lobbyist contributions); *Green Party*, 616 F.3d at 205 (upholding Connecticut ban on contractor contributions); *Schiller Park Colonial Inn, Inc. v. Berz*, 349 N.E.2d 61, 69 (Ill. 1976) (upholding Illinois ban on liquor licensee contributions).

More specifically, at least nine other states ban or otherwise restrict campaign contributions from the gaming industry.[8] These laws—many of which go farther than Pennsylvania's[9]—were adopted to

[8] Ind. Code § 4-33-10-2.1; Iowa Code § 99F.6(4)(a); La. Stat. Ann. § 18:1505.2(L); Mass. Gen. Laws ch. 23K, § 46; Md. Code Ann, Elec. Law § 13-237; Mich. Comp. Law § 432.207b(4)-(5); Neb. Rev. Stat. § 49-1476.01; N.J. Stat. Ann. § 5:12-138; Va. Code Ann. §§ 59.1-375, 59.1-376(D).

[9] In Virginia, family members of those involved in the horse racing industry are prohibited from making campaign contributions. Va. Code Ann. § 59.1-376(D). In Nebraska and Indiana, lottery contractors and riverboat gambling licensees, respectively, are prohibited from making campaign contributions for the duration of their contracts and for three

assuage corruption concerns specific to the gaming context and to prevent industry efforts to manipulate licensing decisions.

When New Jersey became the second state to legalize commercial casinos in 1977, it banned campaign contributions after its State Commission on Investigations warned that "contributions by casino licensees" create the appearance of corruption and give rise to the "very real potential" for *quid pro quos*. State Comm'n of Investigation, *Report and Recommendations on Casino Gambling* 4-I (1977), http://www.state.nj.us/sci/pdf/Casino%20Gambling.pdf. New Jersey thus sought to bolster "public confidence and trust in the credibility and integrity of the regulatory process and of casino operations," N.J. Stat. Ann. § 5:12-1(b)(6), and to prevent pay-to-play schemes. Its fears were not illusory: shortly thereafter, a state senator was convicted in the Abscam scandal after telling undercover FBI agents that he could help them get a gaming license in exchange for a bribe. *See* Donald Linky, *New Jersey*

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years *after* their contracts end. Neb. Rev. Stat. § 49-1476.01; Ind. Code § 4-33-10-2.1.

Michigan's law is broader still: it bars prospective, current, and former licensees, and their family members, from making contributions for the time period beginning one year before applying for a license through three years after the license is terminated. Mich. Comp. Law § 432.207b(4)-(5).

Governor Brendan Byrne: The Man Who Couldn't Be Bought 192-93 (2014).

That states would choose to regulate campaign contributions from the gaming industry is unsurprising given the industry's history. When Louisiana's prohibition was upheld, the state Supreme Court observed that nine states had prosecuted public officials in gaming cases in the preceding decade alone. *Casino Ass'n of La. v. State ex rel. Foster*, 820 So.2d 494, 508 (La. 2002). And in 1999, the congressionally-created National Gambling Impact Study Commission ("NGISC") "recommend[ed] that states adopt tight restrictions on contributions to state and local campaigns by entities—corporate, private, or tribal—that have applied for or have been granted the privilege of operating gambling facilities." NGISC Final Report, Recommendation 3.5 (1999), https://govinfo.library.unt.edu/ngisc/reports/3.pdf ("NGISC Report").

Corruption concerns specific to legal gaming are also borne out in the empirical literature. *See, e.g.*, Douglas M. Walker & Peter T. Calcagno, *Casinos and Political Corruption in the United States: A Granger Causality Analysis*, 45 Applied Econ. 4781 (2013) (finding that legalized gaming leads to greater incidence of public corruption

convictions). The gaming sector's development into a sophisticated global industry does not obviate the risks. Even assuming *arguendo* that the industry's historic ties to organized crime have become "outdated" now that gambling is legal, it would not change the basic attributes that make the industry so highly sensitive.

As one scholar recently summarized, three factors underscore the ongoing "need for vigilance in the casino industry (and in all legalized gambling)": *first*, the "long history (and current data) documenting organized crime involvement in illegal gambling," which can bleed into legal gaming; *second*, "the speed at which [casinos] accumulate cash," which makes them inherently more vulnerable to criminal activities like money-laundering; and *third*, the considerable "rent-seeking opportunities for public officials and the potential for regulatory capture" created by legalization, especially as to "[c]asino vendors, labor unions, and government officials and regulatory bodies . . . [which] are the most vulnerable remaining avenues for organized crime infiltration." Jay S. Albanese, *Creating Legal Versus Illegal Gambling Businesses: How Proper Government Regulation Makes a Difference*, *in* Dual Markets 305, 317 (E. Savona *et al.*, eds. 2017).

Others have likewise observed that legalizing gambling shifts corruption "from local law enforcement to state-level legislators," so that bribes "slipped into the pockets of corrupt police officers will decline, replaced by campaign contributions and promises of future benefits to licensing officials and other regulators." Stephanie A. Martz, Note, *Legalized Gambling and Public Corruption: Removing the Incentive to Act Corruptly, or, Teaching an Old Dog New Tricks*, 13 J.L. & Pol. 453, 463-64 (1997). Put differently, the highly regulated environment creates just as many opportunities for corrupt *quid pro quos* as were present with illegal gambling, and may actually sharpen the possibility that campaign contributions will serve as the "quid" in a pay-to-play exchange.

And that is why courts have found that laws like Pennsylvania's serve especially important anticorruption interests. *See Casino Ass'n of La.*, 820 So.2d at 508 (finding it "completely plausible, and not at all novel" for Louisiana "to distance gaming interests from the ability to contribute to candidates and political committees" given the industry's history "and its connection to public corruption"); *Petition of Soto*, 565 A.2d 1088, 1097 (N.J. Super. Ct. App. Div. 1989) (noting that "the same

fear of corruption of the political process relied upon by the Supreme Court in *Buckley*" was "equally present" in New Jersey's gaming industry and "reflected in the statutory and regulatory framework which governs every aspect of casino operations").

The district court was unpersuaded by these authorities, relying instead on *DePaul v. Commonwealth*, 969 A.2d 536 (Pa. 2009)—without acknowledging that *DePaul* applied *strict scrutiny*, *id.* at 547-48, or that *DePaul* found the anticorruption interests supporting Section 1513 not merely "legitimate" (A19) but "compelling." 969 A.2d at 552. What "matter[ed] most" to the *DePaul* Court was the mismatch between the law's stated intent to address *large* contributions and its imposition of a ban on *all* contributions, *id.*, which did not satisfy the narrow tailoring needed under strict scrutiny. The law's articulated interest is now compatible with a ban, and more importantly, strict scrutiny does not apply.

The district court also leaned heavily on *Ball v. Madigan*, 245 F. Supp. 3d 1004 (N.D. Ill. 2017), but that case explicitly distinguished the gaming industry—which had a long history of corruption—from the medical cannabis industry, which had none. *Id.* at 1016.

B. The prospect of pay-to-play corruption in the monopoly gaming industry is no less acute because participants are termed "licensees."

The notion that gaming licensees are categorically distinct from contractors and lobbyists does not withstand scrutiny. Pennsylvania is "not just a State that has gaming, but [is] a business partner with the gaming industry. . . . This is a billion-dollar industry that operates a very limited monopoly under the protection and authority of a State license." S. Legis. Journal, 193rd Assemb., 2009 Sess. 1640 (Pa. Dec. 16, 2009) (Sen. Farnese).

Legislators thus recognized the special considerations posed by the tight relationship between the state and the gaming monopolies it regulates. Given the long history of pay-to-play abuse associated with similar regulatory arrangements—and with gaming interests specifically—Pennsylvania reasonably concluded that allowing contributions from gaming entities and their stakeholders would pose an unacceptable risk of corruption.

But the district court disagreed. It decided, in just two sentences, that casino licensees are not analogous to contractors, "who do business directly with the government," or lobbyists, "whose business it is to

influence government officials," A15—and that therefore, the acknowledged potential for pay-to-play corruption in the context of government contracting and lobbying could not be credited here.

The court did not explain why this terminological distinction should be dispositive, or make the opportunities for abuse any less substantial. To be sure, some kinds of licensees might raise lesser concerns than some kinds of contractors and lobbyists. But courts uphold pay-to-play restrictions on those with business before the government based not on how the government classifies that business relationship, but on whether the relationship "sharpens the risk of corruption and its appearance." *Wagner*, 793 F.3d at 22. As the D.C. Circuit explained: "Unlike the corruption risk when a contribution is made by a member of the general public, in the case of contracting there is a very specific *quo* for which the contribution may serve as the *quid*: the grant or retention of the contract." *Id.*

That reasoning applies equally, if not more powerfully, here. Whereas the vast majority of federal government contractors can seek business elsewhere, a would-be casino operator in Pennsylvania is much more constrained: gambling is illegal by default, so state licenses are

the only game in town. More importantly, the number of gaming licenses is strictly limited by statute, 4 Pa. C.S. § 1307 (authorizing fourteen commercial casinos and ten "satellite" casinos), and the Board retains "sole discretion" to "issue, renew, condition or deny" licenses based on its assessment of broadly discretionary "suitability" criteria," *see id.* §§ 1202(b)(20), 1325(a).

Once secured, a gaming license confers a lucrative monopoly, and all of the rent-seeking incentives that follow. *See* William N. Thompson & Catherine Prentice, *Should Casinos Exist as Monopolies or Should Casinos Be In Open Markets?*, 4 UNLV Gaming L.J. 39, 63 (2013) (finding Pennsylvania's casino licensing regime the second-most monopolistic among states with legalized gaming). The heightened obligations placed on casino licensees are proportionate to the heightened risks posed by their monopoly "business partner[ship]" with the state.

And insofar as the court drew this distinction because it found Ms. Magerko's stake in a resort casino "attenuated" because she holds it through a trust, A36, that finding was not reasonable. Holding an asset indirectly through a complicated or opaque ownership structure does

not extinguish the underlying beneficial owner's interest in or control over the asset. Indeed, Magerko personally appeared at Nemacolin's initial licensure hearing and touted her "day-to-day" involvement as part of its pitch.[10] This degree of personal and capital investment surely qualifies as a "close connection" to a gaming entity. A37.

C. The pay-to-play corruption concerns targeted by Section 1513 are well-founded and evidenced in the record.

Section 1513 was built on rich evidence distilled from long experience—in Pennsylvania and elsewhere—demonstrating how corruption can take hold when "political campaign contributions and gaming . . . are intermingled," 4 Pa. C.S. § 1102(10.2). In 2010, legislators adjusted the law as instructed in *DePaul*. But they did not read *DePaul* as undermining the basic rationale for Section 1513, or requiring a wholesale revision of the record supporting it. Nor were they obliged to, because *DePaul* expressly acknowledged the "obvious and

[10] Nemacolin representatives emphasized that the resort would make a deserving licensee "because of the day-to-day involvement and leadership of Maggie Hardy Magerko, [its] president and owner, and Mr. Joe Hardy, [its] founder," who "not only put lots of money into th[e] resort, but . . . put their life into it, their emotion, their creativity, and most importantly, their vision." *Woodlands Fayette, LLC (Nemacolin): Hearing Before the Gaming Control Board*, at 12 (Sept. 8, 2010), https://gamingcontrolboard.pa.gov/files/meetings/Meeting_Transcript_20100908_Public_Input_Hearing_Woodlands_Fayette_LLC.pdf.

inherent reasons" that Pennsylvania's anticorruption interests were "compelling." 969 A.2d at 550-52; A252-53.

Rather than deferring to this legislative choice, the district court discounted it as based "entirely on historical assumptions." A14. Not so. The debate surrounding legalized gaming in Pennsylvania has always been informed by the industry's inherent and continuing vulnerability to abuse, as corroborated by experience in Pennsylvania and elsewhere. Then, as now, there was ample evidence that gaming posed particularized risk of corruption, and Section 1513 was a reasonable response to that threat.

The original prohibition was adopted in the wake of recurrent gambling-related scandals reaching the state's highest offices. *See generally* Appellant's Br. at 14 n.9. Pennsylvania was undoubtedly also influenced by parallel developments at the national level. Just as the NGISC was recommending "tight restrictions" on gaming contributions, *see* NGISC Report, *supra*, the U.S. Senate Committee on Governmental Affairs was investigating campaign finance issues in the 1996 elections, including "the role of campaign contributions on the approval of off-reservation Indian casinos." S. Rep. No. 105-167, at 8 (1998).

Documents reviewed by the Committee "reveal[ed] just how heavily the DNC focused on raising money in the Indian gaming community," and why:

> [T]he law has also created a perfect recipe for the solicitation of political contributions because the federal government is a *sine qua non* participant in Indian gambling. Tribes frequently need federal government action to open new casinos or expand existing ones. Moreover, tribes with existing gaming operations possess what amount to franchises, and the federal government . . . can protect or harm those franchises.

Id. at 3073. Pennsylvania's gaming industry is built around an analogous regulatory relationship, and poses equivalent risks.

Concerns about the industry's integrity remained at the forefront during discussions of Senate Bill 711 ("SB 711") in 2009-10, which restored the contribution ban and marked the first major overhaul of the Act.[11] As Senator Earll, SB 711's chief sponsor, later observed: "Unlike other industries, (gambling interests) live and die in the political arena, and as a result, they're willing to pay for that." Joseph Ryan & Bill Ruthhart, *Gambling Interests Cover Their Bets with Campaign Contributions*, Chi. Trib. (July 24, 2011), https://www.

[11] More modest reforms were adopted in 2006. *See* S. 862, 190th Leg., 2005 Sess. (Pa. 2006).

chicagotribune.com/news/ct-met-gambling-money-20110724-story.html. Throughout the debate, lawmakers accordingly emphasized the Act's overriding, "primary objective": "protect[ing] the public" by maintaining firm regulatory control over casino licensees. 4 Pa. C.S. § 1102(1).

They also aired concerns about an ongoing grand jury investigation into the Board's operations, which had raised questions about the integrity of the licensing process and the Board's independence from political branches. Their fears were validated by the grand jury's 2011 report, which highlighted the licensing process as a key area of concern. *See* Grand Jury Report No. 1, *In Re* Thirty-First Statewide Investigating Grand Jury, No. CP-02-MD-1124-2009 (Pa. C.P. Allegheny Cnty.) (May 19, 2011). The grand jury's investigation revealed that even when background checks turned up considerable derogatory information about prospective licensees, "[n]o [gaming] applicant was ever deemed unsuitable." *Id.* at 8. In many cases, adverse information was "scrubbed" from final suitability reports prepared for the Board; with respect to one successful applicant, the "derogatory information" removed included "convictions for gambling-related offenses; . . . employment by known members of organized

crime; . . . convictions for murder and other felony offenses; . . . and, questionable political contributions." *Id.* at 41.

The licensing of Mt. Airy Casino Resort, for instance, was marked by troubling irregularities, stoking public concerns about the industry's integrity. According to the grand jury, multiple pages of sensitive information were omitted from the Board's final suitability report, including information about the prior felony conviction of Mt. Airy principal Louis DeNaples, as well as other "areas of concern," *id.* at 79, including "a series of third-party political contributions" and "potential ties to organized crime," *id.* at 80. Despite this, DeNaples was so confident in his ability to obtain a license that he "created a company for property he did not own and then began building a casino for which he did not yet have a license." *Id.* at 53.

The report also raised questions about attempts by prospective licensees to procure political influence. It flagged one applicant for "the volume and frequency of political contributions" made by its principals between 2001 and 2005, which the investigating agent saw as a possible effort "to gain favor from Pennsylvania politicians with regard to their gaming proposal." *Id.* at 73-74. The report detailed numerous

contributions made "to those politicians spearheading the Act and ultimately having appointing authority to the Board," including two $10,000 contributions made on March 29, 2004—just seven days after the Act passed the House and went to the Senate for approval—to Rep. John Perzel, then House Speaker, and Senator Vincent Fumo, then ranking member of the Senate Appropriations Committee. *Id.* at 76-77.[12]

The grand jury concluded that the Board, in its first few years of existence, had not fully satisfied its "fiduciary duty to foster and protect this [34%] taxpayer stake in a multibillion dollar industry." *Id.* at 6. It issued a series of recommendations, which for the most part the General Assembly and the Board took swift steps to implement. But even before then, as the investigation was still underway behind closed doors, public reports were piling up "skewer[ing]" the legislature "based on allegations of corruption, based on indictments, [and] based on

[12] Around the same time, then-Governor Ed Rendell returned a large contribution from the "Hardy-Magerko PAC" after it attracted public scrutiny, calling "Mr. Hardy's interest in the gaming industry" "reason enough" to return money. Bill Toland, *Rendell Gets Big Jump in 2nd Term Bid*, Pitt. Post-Gazette (June 18, 2005), https://www.post-gazette.com/news/politics-state/2005/06/18/Rendell-gets-big-jump-in-2nd-term-bid/stories/200506180162.

investigations." H. Leg. Journal, 194th Assemb., 2010 Sess. 25 (Pa. Jan. 6, 2010) (Rep. Metcalfe).

This is the backdrop against which the legislature re-enacted Section 1513. Alongside SB 711's other reforms, it was designed to ensure that Pennsylvania gaming concessions would not be awarded or overseen in a manner that "erode[s] public confidence in the system of representative government." 4 Pa. C.S. § 1102(11). The long list of Pennsylvania lawmakers implicated in other forms of pay-to-play corruption is further cause for vigilance.[13] And in the gambling context specifically, the Attorney General's "Operation Pork Chop" probe recently secured guilty pleas from multiple participants in an illegal multimillion-dollar video gambling ring, including that of former state

[13] *See generally* Appellant's Br. at 14 n.9; *see also, e.g.*, Angela Couloumbis, *Ex-Official pleads Guilty in Turnpike Scandal*, Phil. Inquirer (Nov. 13, 2014), http://www.philly.com/philly/news/20141114_Rubin_pleads_guilty_in_turnpike_scandal_and_avoids_jail_time.html; Mark Scolforo, *Ex-Treasurer Gets Prison in Campaign Donor Extortion Case*, U.S. News (Aug. 28, 2018), https://www.usnews.com/news/best-states/pennsylvania/articles/2018-08-28/ex-pennsylvania-treasurer-sentenced-to-2-years-in-prison.

representative Marc Gergely, who in 2017 pleaded guilty to violations of state gaming and campaign finance laws.[14]

Recent experience thus undercuts the assumption that gaming—legal or illegal—no longer poses any particularized risk of abuse. Under a proper standard, there was more than enough evidence to sustain Pennsylvania's law.

III. Section 1513 Is Independently Justified by Pennsylvania's Interest in Preventing the Appearance of Corruption and Preserving Public Confidence in Democratic Self-Government.

Pennsylvania's law also prevents the "ero[sion of] public confidence in the system of representative government," as the Act explicitly enumerates among its purposes. 4 Pa. C.S. § 1102(11). Any burden that it places on the plaintiffs' First Amendment rights must accordingly be weighed against the countervailing harms that its invalidation would impose on Pennsylvanians' First Amendment interest in democratic accountability and self-government.

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[14] *See* Kate Giammarise, *Ex-State Legislator Marc Gergely Sentenced to 18 Months House Arrest Stemming from Gambling Probe*, Pitt. Post-Gazette (Dec. 11, 2017), https://www.post-gazette.com/news/politics-state/2017/12/11/Marc-Gergely-sentenced-Pennsylvania-legislature-house-representative-conspiracy-gambling-white-oak-democrat-Ronald-Porky-Melocchi/stories/201712110105.

"[U]ninhibited, robust, and wide-open" public debate is a central aim of the First Amendment. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). But that uninhibited debate does not exist in a vacuum: at its core, the First Amendment protects speech as a mechanism to ensure effective self-government. *See, e.g.*, *Citizens United*, 558 U.S. at 339 ("The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it."); *Stromberg v. California*, 283 U.S. 359, 369 (1931) (noting that "a fundamental principle of our constitutional system" is maintaining "the opportunity for free political discussion" so "government may be responsive to the will of the people").

Thus, the First Amendment interests implicated here are not only plaintiffs' rights of political association, but also Pennsylvanians' "inalienable right to full and effective participation in the political processes of [their] State's legislative bodies." *Reynolds v. Sims*, 377 U.S. 533, 565 (1964). Section 1513 vindicates the latter by ensuring that Pennsylvanians' elected representatives remain responsive to the broad interests of their constituents, instead of the narrow interests of a

single industry. And indeed, that is exactly what the legislature aimed to do by passing SB 711. *See, e.g.*, A126-27 (Sen. Farnese) (noting that legislation enabled him "to fulfill a campaign promise" to "do everything [he] possibly could to reform the Gaming Act" and to give his constituents "a voice that they so desperately need").

Just as campaign contributions from individuals affiliated with highly regulated industries pose a uniquely acute risk of corruption or its appearance, so too do they pose an acute risk to true self-governance. Pennsylvanians, through their representatives, have chosen to legalize certain forms of gaming, but simultaneously to use the Commonwealth's constitutionally protected police powers to strictly regulate the gaming industry.

To this end, Section 1513 removes one of the most obvious avenues for corrupt *quid pro quos*—and, critically, insulates the regulatory process from the dispiriting *appearance* of corruption that would otherwise take root if "campaign contributions and gaming . . . are intermingled." 4 Pa. C.S. § 1102(10.2). "This interest exists even where there is no actual corruption, because the perception of corruption, or of opportunities for corruption, threatens the public's faith in democracy."

Ognibene, 671 F.3d at 186. The ban ensures that the Board remains effective in fulfilling its "primary objective": fairly representing the public's interest as a common stakeholder in the state gaming industry.

Without the strong boundaries enforced by Section 1513, political entanglements between elected officials and gaming interests would freely multiply—at the expense of the robust regulatory system Pennsylvanians chose and "public confidence in the system of representative government." 4 Pa. C.S. § 1102(11).

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

SAUL EWING ARNSTEIN & LEHR LLP

By: /s/ William W. Warren, Jr
William W. Warren, Jr., Esq. (#23716)
2 North Second Street | 7th Floor
Harrisburg, Pennsylvania 17101
william.warren@saul.com | (717) 238-7698

Of Counsel: K. Wesley Mishoe, Esq. (#321983)
SAUL EWING ARNSTEIN & LEHR LLP
2 North Second Street | 7th Floor
Harrisburg, Pennsylvania 17101
wes.mishoe@saul.com | (717) 257-7552

Paul M. Smith
Tara Malloy
Megan P. McAllen
CAMPAIGN LEGAL CENTER
1411 K Street NW
Washington, DC 20005

Attorneys for *Amici Curiae*

Dated: January 22, 2019

CERTIFICATE OF COMPLIANCE

I, William W. Warren, Jr., the undersigned attorney, hereby certify:

1. I am a member of the bar of this Court.

2. The electronic version of this Brief of *Amici Curiae* in Support of Appellants is identical to the text of the paper copies.

3. A virus detection program was run on the file and no virus was detected.

4. The brief contains 6432 words within the meaning of Fed. R. App. Proc. 32(a)(7)(B). In making this certificate, I have relied on the word count of the word-processing system used to prepare the brief. This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Century Schoolbook font.

Dated: January 22, 2019

SAUL EWING ARNSTEIN & LEHR LLP

/s/ William W. Warren, Jr.
William W. Warren, Jr., Esq. (#23716)
william.warren@saul.com

CERTIFICATE OF CONCURRENCE TO FILE BRIEF

I certify that all parties have consented to the filing of this Brief by Amici Curiae.

Dated: January 22, 2019

SAUL EWING ARNSTEIN & LEHR LLP

/s/ William W. Warren, Jr.
William W. Warren, Jr., Esq. (#23716)

CERTIFICATE OF SERVICE

I, the undersigned attorney, hereby certify that on January 22, 2019, I electronically filed the foregoing Brief of *Amici Curiae* with the Clerk of the Court of the United States Court of Appeals for the Third Circuit by using the CM/ECF system, which will accomplish electronic notice and service for all counsel of record.

Dated: January 22, 2019

SAUL EWING ARNSTEIN & LEHR LLP

/s/ William W. Warren, Jr.
William W. Warren, Jr., Esq. (#23716)