IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

PASAQUALE T. DEON, SR. and MAGGIE HARDY MAGERKO, Plaintiffs,	
v.	Civil Action No: 1:17-cv-1454
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.	Honorable Sylvia H. Rambo

BRIEF OF *AMICI CURIAE* CAMPAIGN LEGAL CENTER AND COMMON CAUSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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STATEMENT OF INTERESTS

Amicus Campaign Legal Center ("CLC") is a nonpartisan, nonprofit organization that works in the areas of campaign finance law, political disclosure, and government ethics, and has participated in numerous cases addressing state and federal campaign finance issues, including *McConnell v. FEC*, 540 U.S. 93 (2003), *Citizens United v. FEC*, 558 U.S. 310 (2010), and *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014). CLC has participated as an *amicus* in several recent cases that are directly relevant to the legal questions in this case, including *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 Conn. v. Garfield*, 616 F.3d 189 (2d Cir. 2010).

Amicus Common Cause is a nonpartisan, nonprofit democracy organization with over 1.1 million members and local organizations in 35 states, including Pennsylvania. Common Cause in Pennsylvania has over 30,000 members and followers. Since its founding by John Gardner in 1970, 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.

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 Commonwealth's regulation of the industry. *See id.* § 1513(a). This was a constitutionally permissible choice, and given the extremely important interests at stake, a necessary one.

This memorandum will focus predominantly on the weight of these anticorruption interests, and the well-settled judicial authority upholding pay-to-play restrictions as a constitutional means to advance them. Plaintiffs' arguments do nothing to undercut this consensus, and should be rejected.

First, plaintiffs' invocation of strict scrutiny is misplaced: the Supreme Court has long held that contribution restrictions warrant only

intermediate scrutiny. *Buckley v. Valeo*, 424 U.S. 1, 20-23, 25 (1976) (per curiam). The fact that Pennsylvania's law takes the form of a ban does not alter that analysis, *FEC v. Beaumont*, 539 U.S. 146, 161 (2003), nor does plaintiffs' attempt to recast their claims in equal protection terms.

Plaintiffs also ignore the broader national context in which § 1513 must be evaluated. 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 restrictions. There is nothing novel about the proposition that someone seeking to do business with the government might "pay to play," and in that setting, the risk of corruption is manifest.

The same goes for state gaming licensees. As the record in Pennsylvania and elsewhere demonstrates, the prospect of corruption in the gaming industry is not hypothetical. Many other states have reached the same conclusion, and likewise taken steps to restrict campaign contributions from those in the industry. There is a long and ignominious history demonstrating the potential for *quid pro quo* corruption when "campaign contributions and gaming . . . are intermingled," 4 Pa. C.S.

§ 1102, and Pennsylvania's interest in preventing it amply justifies § 1513 of the Act.

ARGUMENT

I. The Challenged Contribution Restrictions Are Not Subject to Strict Scrutiny.

A. Plaintiffs' Efforts to Invoke Heightened Scrutiny Are at Odds with Controlling First Amendment Precedent.

When it comes to the Supreme Court's campaign finance decisions, plaintiffs are correct about one thing: "the appropriate standard of review depends on the nature of the restriction." Deon Br. 10. But their ensuing efforts to complicate the analysis by asserting that § 1513 of the Act "implicates multiple types of restrictions," including some that require "the highest scrutiny," *id.*, are irreconcilable with relevant precedent.

Time and time again, the Supreme Court has held that contribution restrictions are subject only to intermediate, "closely drawn" scrutiny under the First Amendment. *Buckley*, 424 U.S. at 20-23, 25; *Beaumont*, 539 U.S. at 161 (upholding federal ban on corporate contributions under "relatively complaisant" closely drawn standard). Section 1513 restricts contributions, so it is reviewed under the intermediate "closely drawn" test. Pennsylvania's choice to *ban* gaming contributions does not change

the level of scrutiny: a law regulating contributions is subject to "closely drawn" scrutiny regardless of whether it is a limit or a ban. *Beaumont*, 539 U.S. at 162 ("It is not that the difference between a ban and a limit is to be ignored; it is just that the time to consider it is when applying scrutiny at the level selected, not in selecting the standard of review itself.").

Plaintiffs all but ignore this decades-old legal framework, instead asserting that § 1513 is subject to "levels" of First Amendment scrutiny—including the strict scrutiny reserved for expenditure limits—that it "unequivocally" fails to meet, at least according to plaintiffs' understanding of "modern federal law." Deon Br. 9-10. But their interpretation of the case law is fundamentally misconceived.

First, they quote passages from various Supreme Court decisions regarding *expenditure* restrictions that have no bearing on this case. Again, the 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; *see also Lodge No. 5 of Fraternal Order of Police v. City of Phila.*, 763 F.3d 358, 375 (3d Cir. 2014) ("[C]ontributions are not afforded

the same protections as direct forms of political expression—for example, campaign expenditures."). That principle applies regardless of whether a law limits contributions to candidates or to political committees, and the Court has upheld numerous contribution limits targeting the latter.

In any event, § 1513 does not bar plaintiffs from speaking *directly* about candidates or committees they support through independent expenditures. That serves to distinguish *Citizens United*. And insofar as plaintiffs contend that any limits on contributions to "independent expenditure-only" groups (or "super PACs") are subject to strict scrutiny after *Citizens United*, that contention is incorrect. None of the decisions they cite (Deon Br. 16) applied strict scrutiny to such contribution limits. Moreover, those decisions were based on the presumption that *independent* expenditures do not corrupt; the same reasoning does not extend to restrictions on participants in a highly regulated state industry, who by definition cannot be meaningfully "independent."[1]

[1] Insofar as plaintiffs now challenge the law's application to super PACs *specifically*, that issue is not properly presented. However minimal the Article III threshold might be in the First Amendment context, it requires *at a minimum* some asserted intent to engage in the specific course of conduct proscribed by statute. Plaintiffs here have not professed any particular desire to contribute to *independent expenditure-only*

Second, plaintiffs place great weight on *Davis v. FEC*, 554 U.S. 724 (2008), but their reliance is misplaced. In *Davis*, the Supreme Court reviewed the "Millionaire's Amendment," a federal provision that tripled the contribution limit for any congressional candidate whose opponent spent over $350,000 of his personal funds to support his campaign. *Id.* at 729. However, the law's defect was not that it limited contributions, but that it did so in a way that "impose[d] a substantial burden on the exercise of the First Amendment right to use *personal funds* for campaign speech." *Id*. at 740 (emphasis added). *Davis* is properly understood as a challenge to burdens on personal expenditures, not an attack on contribution limits; accordingly, strict scrutiny applied. *Id*. at 739-40. But pay-to-play restrictions do not burden personal expenditures or establish "asymmetric" contribution limits between competing candidates. Insofar as § 1513 has any "discriminatory" impact on plaintiffs, it is due to their willing participation as licensees in a multibillion-dollar state industry, and the heightened obligations that follow. *Davis* has no bearing here.

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groups, and the record is utterly bereft of any specific factual allegations on that score.

B. Plaintiffs Cannot Evade Established First Amendment Doctrine by Casting the Same Claims in the Language of Equal Protection.

Plaintiffs also attempt to heighten the applicable standard of scrutiny by casting their case as an equal protection challenge, arguing that § 1513 is unconstitutionally "discriminatory" because "people outside the gaming industry may contribute without limitation." Deon Br. 12. But plaintiffs can fare no better under the Equal Protection Clause than they do under the First Amendment, "because the substantive guarantees of the Amendment serve as the strongest protection against the limitation of these rights." *McConnell v. FEC*, 251 F. Supp. 2d 176, 709 n.180 (D.D.C. 2003) (opinion of Kollar-Kotelly, J.). Simply put: challengers cannot use the Equal Protection Clause to ratchet up the level of scrutiny already used to analyze contribution limits.

Because plaintiffs are not members of a suspect class, they must base their claim on the "fundamental rights" strand of the Equal Protection Clause, which "recognizes established constitutional rights and makes certain that those rights receive 'no less protection than the Constitution itself demands.'" *Smith ex rel. Smith v. Severn*, 129 F.3d

419, 429 (7th Cir. 1997) (citation omitted). But by the same token, it does not guarantee any greater protection than the Constitution itself provides.

The Supreme Court has already generated substantive tests for the review of alleged infringements of specific fundamental rights, many of which require less-than-strict scrutiny. And it has never used equal protection to apply strict scrutiny to claims that it has determined merit less scrutiny within their substantive doctrinal homes. *See, e.g.*, *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (holding that "reasonable, nondiscriminatory restrictions" concerning fundamental rights of voting and political association must be justified by "the State's important regulatory interests"); *Wagner*, 793 F.3d at 32 ("There is . . . no case in which the Supreme Court has employed strict scrutiny to analyze a contribution restriction under equal protection principles."). The general rule is clear: when the Court has already formulated a specific test for the review of an alleged violation of a substantive fundamental right, this test governs any equal protection challenge as well. A court, therefore, will not examine a fundamental-rights equal protection claim "shorn of what the [Supreme] Court has said about the appropriate level of

scrutiny applicable to that right in its native doctrinal environment." *Riddle v. Hickenlooper*, 742 F.3d 922, 931 (10th Cir. 2014) (Gorsuch, J., concurring).

Plaintiffs acknowledge that "[t]he points establishing" their First Amendment and equal protection claims "are essentially the same." Deon Br. 20 n.8. They cannot obtain a level of scrutiny under the Equal Protection Clause that their claims could not receive under the First Amendment itself. The Court's decisions make clear that it is "the nature and quality of the legislative action at issue"—not which constitutional amendment challengers invoke—that "determine the intensity of judicial review of intertwined equal protection, First Amendment claims." *Int'l Ass'n of Machinists & Aerospace Workers v. FEC*, 678 F.2d 1092, 1105-06 (D.C. Cir.), *aff'd*, 459 U.S. 983 (1982). This is exactly the approach the Court took in *Buckley*. Because restrictions on expenditures impose severe burdens on speech and association, they are subject to strict scrutiny. But restrictions on contributions do *not* impose such significant burdens, and therefore receive "relatively complaisant review."

Beaumont, 539 U.S. at 161. Plaintiffs cannot escape this distinction by dressing a First Amendment claim in equal protection garb.[2]

II. Section 1513 Is a Constitutional Means of Preventing Pay-To-Play Corruption.

The Pennsylvania General Assembly reasonably concluded that allowing contributions from state-sanctioned gaming monopolies and their financial stakeholders would pose an unacceptable risk of pay-to-play corruption in the gaming industry. And in *DePaul v. Commonwealth*, the Pennsylvania Supreme Court likewise recognized the validity of Pennsylvania's anticorruption interest. 969 A.2d 536, 596-97 (Pa. 2009). Nevertheless, the plaintiffs maintain that the casino contribution ban "is not and cannot be a remedy to prevent '*quid pro quo*' corruption." Deon Br. 9. Not only does that argument defy common

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[2] Section 1513 would also survive strict scrutiny. First, the Supreme Court has long sought "to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact,'" *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995), and has upheld several provisions under strict scrutiny in recent years. *See, e.g.*, *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1666 (2015). Second, Pennsylvania's anticorruption interest "may properly be labeled 'compelling,'" . . . so that the interest would satisfy even strict scrutiny." *McCutcheon*, 134 S. Ct. at 1445. And third, even under strict scrutiny, the First Amendment and the Equal Protection Clause "require[] that [a statute] be narrowly tailored, not that it be 'perfectly tailored.'" *Williams-Yulee*, 135 S. Ct. at 1671 (citation omitted).

intuition and logic, but it also lacks any foundation in the provision's legislative history, the extensive record of abuse connected with gaming activity in other jurisdictions, and endemic corruption concerns in industries "doing business" with the state.

A. Section 1513 Is Directly Analogous to Other Types of Pay-To-Play Restrictions That Are Widely Recognized as Advancing Important Anticorruption Interests.

Section 1513 is not the onerous speech burden plaintiffs portray, but rather a fairly typical restriction designed to proscribe pay-to-play schemes. At least seventeen states[3] and the federal government[4] have enacted analogous restrictions on campaign contributions from those doing business with the government, as have many municipalities.[5] For example, New York City enacted limits on contributions from an array of persons and groups with "business dealings with the city," a broad category that includes city contracts, real estate transactions, zoning approvals, concessions, grants, and economic development agreements. N.Y.C. Admin. Code § 3-702(18). And federal law bars governmental

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3 *Wagner*, 793 F.3d at 16 & n.18 (surveying laws of seventeen states).

4 52 U.S.C. § 30119.

5 *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).

contractors and prospective contractors from making any contributions to candidates, political parties, and both conventional and independent expenditure-only political committees. 52 U.S.C. § 30119; FEC MUR #7099 (Suffolk Constr.) (2017), https://www.fec.gov/data/legal/matter-under-review/7099 (finding § 30119 violation based on contractor contribution to super PAC).

More specifically, at least eight other states have laws banning or otherwise restricting campaign contributions from those in the gaming or gambling industries.[6] These laws—many of which go farther than Pennsylvania's[7]—were adopted to assuage specific concerns about corruption in the gaming context and to prevent industry efforts to manipulate the award of state gaming licenses.

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

[7] In Virginia, for example, spouses and family members of those heavily 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 such campaign contributions for the duration of their contracts and for three years after their contracts end. Neb. Rev. Stat. § 49-1476.01; Ind. Code. § 4-33-10-2.1.

New Jersey, which legalized casinos as early as 1977, banned industry campaign contributions at the recommendation of a report by the State Commission on Investigations, which warned that "contributions by casino licensees . . . give the *appearance* of attempting to 'buy' political influence and favoritism and in fact have the very real potential for causing such favoritism to occur." State Comm'n of Investigation, *Report and Recommendations on Casino Gambling* 4-I (1977), http://www.state.nj.us/sci/pdf/Casino%20Gambling.pdf. The report further highlighted that during the referendum campaign on legalizing casinos, "persons and corporations obviously in a position directly to benefit by passage of this legislation" gave huge sums of money to the campaign committee supporting the referendum, some of which was used to pay salaries to local public officials campaigning for passage. *Id.* at 4-I, 5-I.

New Jersey's decision to ban campaign contributions from casino operators was thus intended 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. And New Jersey's concerns were not illusory: shortly after the

Act's passage, 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, prompting the Governor to request the resignation of all members of the Casino Control Commission. *See* Donald Linky, *New Jersey 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. When Louisiana's Supreme Court upheld its state law banning industry campaign contributions, for example, its decision rested on the need to curb endemic public corruption associated with gambling. *Casino Ass'n of La. v. State ex rel. Foster*, 820 So.2d 494, 508 (La. 2002). Indeed, the court noted that nine states had prosecuted public officials in gaming cases in the preceding decade alone. *Id.* Given the industry's checkered past and unavoidable sensitivities, it is no wonder that the congressionally created National Gambling Impact Study Commission found "sound reasons to recommend that states adopt tight restrictions on contributions to state and local campaigns by entities . . . that have applied for or have been granted the privilege of operating gambling facilities." Nat'l Gambling Impact Study Comm'n

Final Report, Recommendation 3.5 (1999), https://govinfo.library.unt.edu/ngisc/reports/3.pdf.

Even assuming *arguendo* that some of the worst parts of that history have become "outdated" now that gambling is legal and under the state's regulatory authority, it would not change the basic attributes that make the industry and the licensing process so highly sensitive. As one scholar has noted, legalizing gambling shifts corruption "from local law enforcement to state-level legislators and bureaucrats," 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 possibility that prospective licensees might "pay to play"—or that an elected official might lean on them to do so—is clear, because the incentives are clear.

For that reason, courts have overwhelmingly accepted the validity of the anticorruption interests underlying pay-to-play laws like Pennsylvania's. Bans on gaming industry contributions, specifically,

have been upheld by courts in New Jersey and Louisiana. *See Petition of Soto*, 565 A.2d 1088, 1097 (N.J. Super. Ct. 1989) ("[T]he same fear of corruption of the political process relied upon by the Supreme Court in *Buckley* is equally present in this case. This fear of political corruption, or even the appearance of it . . . is reflected in the statutory and regulatory framework which governs every aspect of casino operations."); *Casino Ass'n of La.*, 820 So.2d at 508 ("Given the history of the gaming industry and its connection to public corruption and the appearance of public corruption, it is completely plausible, and not at all novel, for the Louisiana legislature to have concluded that it was necessary to distance gaming interests from the ability to contribute to candidates and political committees which support candidates.").

More generally, courts throughout the country have routinely upheld restrictions on campaign contributions by those with business before the government. In 2015, for example, a unanimous *en banc* D.C. Circuit upheld the federal restriction on contractor contributions, emphasizing "[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. Those principles apply equally, if not more powerfully, to the gaming context.

Courts have upheld a wide range of state and local laws barring or restricting contributions from contractors, lobbyists, licensees, and others doing business with the government. *See, e.g.*, *Yamada*, 786 F.3d at 1205-06 (upholding Hawaii ban on state contractor contributions); *Ognibene v. Parkes*, 671 F.3d 174, 190-91 (2d Cir. 2011) (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).

Plaintiffs ask the Court to disregard this voluminous case law, and instead adopt the reasoning in *Ball v. Madigan*, 245 F. Supp. 3d 1004 (N.D. Ill. 2017), a district court decision striking down Illinois's ban on campaign contributions from those in the medical cannabis industry. But

the Illinois court explicitly distinguished the medical cannabis industry from the gaming industry, so if anything, *Ball* actually supports the validity of a *gaming* contribution ban. *Id.* at 1016.

As the overwhelming majority of courts have found, when someone doing business with the government is allowed to contribute to the government officials with authority or influence over public contracting or licensing decisions, the risk of actual or apparent *quid pro quo* is significant. Therefore, even strict restrictions on a covered person's ability to make contributions—or an official's authority to accept them—have been upheld as appropriately tailored to advance the vital interest in preventing the actuality or appearance of corruption.

B. Pennsylvania Was Not Required to Substantiate Its Anticorruption Interest with "Findings" Specific to Its Licensed Gaming Industry, but the General Assembly's Concerns Were Well-Founded and Evidenced in the Record.

Plaintiffs argue that § 1513 is unconstitutional because the General Assembly has never "undertaken any fact finding or recorded any evidence of political corruption in the Commonwealth's licensed gaming industry." Deon Br. 4. But, as legislatures and courts nationwide have recognized, the risk of corruption is self-evident: there is nothing novel

about the proposition that the award of state-sanctioned monopoly licenses to casino operators could be infected by pay-to-play corruption.

Plaintiffs appear to be demanding that the legislature make extensive findings of actual political bribery connected with Pennsylvania's nascent gaming industry to support its ban. But Pennsylvania was not limited to gathering evidence of corruption within its borders. As the Supreme Court explained in *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000), states may defend their contribution limits both by relying on the "evidence and findings accepted in *Buckley*," *id.* at 393, and the "experience of states with and without similar laws." *Wagner*, 793 F.3d at 14. "The First Amendment does not require a [jurisdiction], before enacting . . . an ordinance, to conduct new studies or produce evidence independent of that already generated by other [jurisdictions], so long as whatever evidence the [jurisdiction] relies upon is reasonably believed to be relevant to the problem that the [jurisdiction] addresses." *Shrink Mo.*, 528 U.S. at 393 n.6 (citation omitted).

Indeed, the General Assembly not only noted the persuasive evidence from other states, but specifically relied upon the Pennsylvania Supreme Court's approval of those findings. Pa. Legislative Journal –

House (Oct. 5, 2009) at 2102-03 (Statement of Rep. Schroder) (recognizing that *DePaul* struck down the original § 1513 based only on the perceived mismatch between its stated intent to address *large* contributions and its imposition of a ban on *all* contributions—but that otherwise *DePaul* made clear that "a ban on contributions for the gaming industry is constitutional" and explicitly endorsed the New Jersey Supreme Court's finding that "banning political contributions furthers a compelling State interest").

In any event, the Commonwealth's own history underscores the risk of corruption or its appearance when "political campaign contributions and gaming . . . are intermingled." 4 Pa. C.S. § 1102. Plaintiffs and their *amici* attempt to explain away that record as a problem of the past. But as the General Assembly was well aware, Pennsylvania's recent experience tells a different story.

The legislative debate surrounding legalized gaming in Pennsylvania—which began long before the Gaming Act took effect in 2004 and continued through every subsequent set of amendments—has always been informed by persistent concerns about the integrity of the gaming industry. The 2004 Act was debated in the long shadow of a

scandal involving Pennsylvania Attorney General Ernest Preate, Jr., who pleaded guilty in 1995 to soliciting $20,000 in prohibited cash campaign contributions from the video poker industry, allegedly in exchange for promising lax enforcement of Pennsylvania's prohibition on video poker machines. Reportedly, a state grand jury had recommended felony indictments against multiple machine operators, but once Preate took office, he accepted no-contest pleas to lesser counts. *See* Dale Russakoff, *Pennsylvania Attorney General Pleads Guilty*, Wash. Post (June 14, 1995), https://www.washingtonpost.com/archive/politics/1995/06/14/pennsylvania-attorney-general-pleads-guilty/44bf9c3a-700d-42c1-b443-7ffb8c08e1d8.

Concerns about the industry's integrity were particularly prominent during the discussions in 2009 and 2010 surrounding Senate Bill 711 (SB 711), which restored the campaign contribution ban at issue here and was the legislature's first major overhaul of the Gaming Act.[8] Lawmakers repeatedly aired concerns about an ongoing grand jury investigation into the Gaming Board's process of awarding licenses

[8] More modest reforms were adopted in 2006. *See* Pa. Senate Bill 862 (2006).

between 2004 and 2007. For example, after the legislation evolved to include a significant expansion of state gaming, one member noted with concern:

> [I]f we are going to take up anything dealing with gaming before the grand jury investigation is concluded, it ought to be those reform measures that are very obvious to us that should be passed. . . . This legislature . . . has been skewered by the media and many of the electorate for the last [three] years based on allegations of corruption, based on indictments, based on investigations.

Pa. Legislative Journal – House (Jan. 6, 2010) at 25 (Statement of Rep. Clymer). Legislators may have disagreed about the desirability of expanding the Act to allow table games, but they were consistently of one mind when it came to "obvious" and much-needed "reform measures"—including the restored § 1513, which was in every one of the bill's drafts. *Id.* Lawmakers also repeatedly emphasized the Act's overriding, "primary objective": "protect[ing] the public" by maintaining firm regulatory control over casino licensees.

Lawmakers' concerns were corroborated by a scathing 2011 grand jury report examining the Gaming Board's operations in those early years, which had raised questions about the integrity of the licensing process and the Board's independence from the political branches. 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). First, and perhaps most troublingly, the report cited the control exercised over the Board by state elected officials, including those with direct appointment authority. These appointing authorities maintained an active role in staffing the Board's lower-level personnel, whose applications would arrive stamped with the names of their legislative sponsors. When asked whether "pressure [was] applied by members of the legislature to make certain hiring decisions," one Commissioner said "he felt *all of the Legislators* were pushing to have someone hired." *Id.* at 26 (emphasis added).

The licensing process was another area of concern. The grand jury's investigation revealed that despite considerable derogatory information turned up in background checks, "[n]o applicant was ever deemed unsuitable." *Id.* at 8. In many cases, adverse information about applicants was "scrubbed" from the final suitability reports prepared for the Board to inform its ultimate licensing decisions. With respect to one successful applicant, Presque Isle Downs, Inc., the "derogatory information" removed from the investigators' background check included:

> [C]onvictions for gambling related offenses . . . employment by known members of organized crime; diversion of money from a former employer; failing to file tax returns . . . convictions for murder and other felony offenses; arrest for theft related offenses; and, questionable political contributions.

Id. at 41.

The licensing of the Mt. Airy Casino Resort in Mt. Pocono was also marked by troubling irregularities, attracting significant media attention and stoking concerns about the industry's integrity. According to the grand jury report, multiple pages of sensitive information were omitted from the final suitability report to the Board, including information about the prior felony conviction of Mt. Airy principal Louis DeNaples, as well as other "areas of concern" identified by investigators including "a series of third-party political contributions," and DeNaples' "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. As one former Board investigator testified: "you would have to be, I guess, pretty rich or pretty sure that you were going to get a license if you were going to do that." *Id.*

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 principal owners to Pennsylvania political leaders between 2001 and 2005. *Id.* at 73. Though the contributions were legal at the time, the investigating agent "believed they may have represented an effort [by the applicant] to gain favor from Pennsylvania politicians with regard to their gaming proposal." *Id.* at 74. The agent's 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, the ranking member of the Senate Appropriations Committee. *Id.* at 76-77.

Ultimately, 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. Although it did not return any indictments, 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 statewide grand jury's investigation was still underway behind closed doors, public reports "skewer[ing]" the legislature "for corruption, for indictments, [and] for investigations" were piling up.[9] In response, the legislature was already taking steps to ensure that the privilege of operating gaming concessions in Pennsylvania would not be awarded in a way that might "erode public confidence in the system of representative government." 4 Pa. C.S. § 1102(11). This is the backdrop against which the legislature, ever mindful of the Act's overriding need to serve the best interests of Pennsylvania taxpayers, restored the political contribution ban.

In short, there was ample evidence to justify this modest effort to insulate the Board and its regulatory processes from political entanglements. As one Senator explained in support of SB 711, "[t]his is not Joe Taxpayer mortgaging his house to open up a hardware store on Main Street. This is a billion-dollar industry that operates a very limited

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[9] For example, it was widely known that there had been at least one other grand jury investigation involving the Mt. Airy license. *See, e.g.*, Matt Birkbeck, *Mount Airy Casino Owner's Brother Testifies Before Grand Jury*, The Morning Call (Dec. 28, 2007), http://www.mcall.com/all-brother122807-story.html.

monopoly under the protection and authority of a State license." Pa. Legislative Journal – Senate (Dec. 16, 2009) at 1640 (Statement of Sen. Farnese).

C. Section 1513 Is Necessary to Avoid Eroding Public Confidence in Democratic Self-Government.

In addition to preserving the integrity of the state-sanctioned gaming industry, Pennsylvania's law also prevents the "ero[sion of] public confidence in the system of representative government," as the Gaming Act explicitly enumerates among its purposes. 4 Pa. C.S. § 1102(11). Any burden that § 1513 places on the plaintiffs' First Amendment rights must accordingly be weighed against the countervailing harms that its invalidation would impose upon Pennsylvanians' First Amendment interest in democratic accountability and self-government.

"[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. This basic insight is apparent in both the structure of the Constitution, *e.g.*, U.S. Const. art. IV, § 4 ("The United

States shall guarantee to every State in this Union a Republican Form of Government."), and case law interpreting it, *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 the "maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people").

Thus, the First Amendment interests implicated here are not only plaintiffs' right 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 right by ensuring that Pennsylvanians' elected representatives remain responsive to the broad policy preferences of their constituents, instead of the narrow interests of a billion-dollar licensed industry. And indeed, that is exactly what the legislature aimed to do by passing SB 711. Pa. Legislative Journal – Senate (July 7, 2009) at 871 (Statement of Sen. Farnese) (noting that

legislation enabled him "to fulfill a campaign promise" he had made 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 regulate the political influence of the gaming industry. To this end, § 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). The ban thus ensures that the Gaming Board remains effective in fulfilling its "primary objective": fairly and effectively representing the public's interest as a common stakeholder in the financial future of the state gaming industry.

Section 1513 is also protective of gaming industry interests because it prevents licensees from being coerced to make political contributions

as part of "the cost of doing business," which drives up costs for everyone and harms the public's investment. Plaintiffs' *amicus* argues that Pennsylvania's law unfairly maligns the ethical character of gaming licensees, but the law does quite the opposite: it protects licensees who wish to operate their businesses ethically and enables them to avoid the pay-to-play pressures exerted by lawmakers constantly looking to fill campaign coffers. Individual licensees may well be ethical but the licensing process *itself* could be compromised absent § 1513.

As Pennsylvania's recent experience makes abundantly clear, the prospect that powerful gaming interests might deploy campaign contributions as a means of manipulating Board decisions, or otherwise undermining the robust regulatory system that Pennsylvanians chose, is beyond dispute. Without the strong boundaries enforced by the prohibitions in § 1513, political entanglements between elected officials and gaming interests would quickly flourish—inexorably "erod[ing] public confidence in the system of representative government." 4 Pa. C.S. § 1102(11).

CONCLUSION

The plaintiffs' motion for summary judgement should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH WORD COUNT

I, the undersigned attorney, hereby certify that the Brief of *Amici Curiae* in Opposition to Plaintiffs' Motion for Summary Judgment filed on March 16, 2018, contains 5910 words. 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.

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CERTIFICATE OF SERVICE

I, the undersigned attorney, hereby certify that on March 16, 2018, I electronically filed the foregoing Brief *Amici Curiae* with the Clerk of the Court of the United States District Court of Appeals for the Middle District of Pennsylvania by using the CM/ECF system, which will accomplish electronic notice and service for all counsel of record.

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