No. 18-1059

IN THE

# Supreme Court of the United States

BRIDGET ANNE KELLY,

*Petitioner*,

v.

UNITED STATES OF AMERICA,

*Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

## BRIEF FOR *AMICUS CURIAE* SENATOR SHELDON WHITEHOUSE IN SUPPORT OF RESPONDENT, UNITED STATES OF AMERICA

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## STATEMENT OF INTEREST[1]

*Amicus curiae* is U.S. Senator Sheldon Whitehouse. Senator Whitehouse is a member of the Senate Judiciary Committee and a former U.S. Attorney and Rhode Island Attorney General.

*Amicus* comes to the Court as a democratically elected legislator and fellow constitutional officer of the Republic, not as an ordinary litigant. As a constitutional officer, I am steeped in the practical, political consequences of decisions that courts, including this Court, have made. I share with the Court a deep and abiding concern for the Republic's health, and I have witnessed the corrosive effect that corruption—and even the perception of corruption—can wreak upon the body politic.

A perhaps-obvious point bears emphasis: *amicus* is a public official imploring the Court to ensure that public officials are subject to, not insulated from, prosecution for crimes of corruption.

I do so because I have a strong interest in the proper functioning of our democracy. To function properly, our democracy must have tools to address corruption in the political system. The Constitution provides three primary avenues for the People to

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[1] Pursuant to Rule 37.3(a), counsel for all parties received timely notice of *amicus's* intent to file this brief and consented in writing. Pursuant to Rule 37.6, no counsel for any party authored this brief in any part, and no person or entity other than *amicus* or *amicus's* counsel made a monetary contribution to fund its preparation or submission.

punish, and thus deter, public corruption: the ballot box, impeachment, and the jury. *Amicus* respectfully urges the Court to act with due modesty and humility when addressing the rules of political engagement and, accordingly, to affirm the jury's vital role as a guardian against corruption.

## SUMMARY OF ARGUMENT

The Founders empowered the People to protect the public sphere from corruption, first through the ballot box by voting to deny office to corrupt officials. The Framers also recognized that the People may unknowingly elect a corrupt official or may elect an official who becomes corrupted. So the Framers empowered the People's representatives to protect the public sphere through impeachment. However, party or factional loyalties may disable the impeachment remedy, even in the instance of flamboyantly corrupt officials. *Cf.* Cornelius Tacitus, *The Annals and the Histories* (Franklin Library 1979) ("Crime once exposed has no refuge but in audacity."). Thus the Framers left us an additional remedy: the jury. Through juries, the People have a direct voice in determining which official acts are corrupt and condemnable.

Unfortunately, a jurisprudence has emerged at the Supreme Court that dramatically narrowed the definition of corruption in the criminal law, limiting how the public through juries can hold its elected officials accountable. At the same time, the Court's jurisprudence in campaign-finance decisions has been inattentive to the corrupting influence of unlimited spending in elections. In consequence,

citizens today face both more corruption and less ability to defend themselves from it, undermining the health of our democracy.

This case concerns acts by public officials that a jury found were corrupt: a governor's staff used public resources to punish another official (by harming that official's constituents) for withholding endorsement in the governor's reelection campaign. I urge, in responding to those facts, that the Court not further hobble the public's capacity in regulating political misdeeds, and that the Court affirm the Founders' legacy to us of a robust jury role in deterring and punishing public corruption.

## ARGUMENT

Corruption—indeed, even the perception of corruption—is a relentless plague on the Republic. Jurisprudence making it more difficult for prosecutors and juries to redress corruption leads to a loss of confidence in our public officials, in our government, and even in our democracy. The stakes are high.

The jury is an essential tool, preserved in the Constitution, for regulating political power, protecting the general public, and fighting corruption. The Founders left that tool to the People for good reason. Defining corruption narrowly undermines the jury in this important governmental role, and by limiting the number and the types of cases that juries can hear, undercuts the People's power to defend themselves against political corruption.

## I. The Founders Empowered the Public to Protect the Public Sphere Against Corruption, Including Through the Jury Box.

A persistent thread runs through history. Thrasymachus infamously argued in Plato's *Republic* that "justice is nothing else than the interest of the stronger." 1 Plato, *Republic* 12 (Benjamin Jowett trans., 2008). St. Augustine asked, "Justice being taken away, then what are kingdoms but great robberies?" 4 St. Augustine, *The City of God* 140 (Marcus Dods ed., 2014). Niccolò Machiavelli divided the polity into "two distinct parties": (a) "the nobles [who] wish to rule and oppress the people," and (b) "the people [who] do not wish to be ruled nor oppressed by the nobles." Niccolò Machiavelli, *The Prince* 20 (Coterie Classics, 2016). The persistent thread is this: powerful influencers using the institutions of government to loot the public weal.

We are not immune. American history reveals this centuries-old, elemental tension between an influencer class, which occupies itself with aggregating power and favor-seeking from government, and the general population, which wants a government that will not yield to the influencers too readily. *See* Theodore Roosevelt, New Nationalism Speech (August 31, 1910) ("The absence of effective State, and especially, national, restraint upon unfair money-getting has tended to create a small class of enormously wealthy and economically powerful men, whose chief object is to hold and increase their power."); Andrew Jackson, 1832 Veto

Message Regarding the Bank of the United States (July 10, 1832) ("It is to be regretted that the rich and powerful too often bend the acts of government to their selfish purposes . . . to make the richer and the potent more powerful, the humble members of society . . . have neither the time nor the means of securing like favors to themselves, have a right to complain of the injustice of the Government").

The influencer class and the public officials they influence persistently contort the political process to maintain power so as to feed off of public funds and goods. *E.g.*, Joshua S. Sellers, *Contributions, Bribes, and the Convergence of Political and Criminal Corruption*, 45 Fla. St. U. L. Rev. 657, 662–63 (2018); *see also* 1 *The Records of the Federal Convention of 1787*, at 578 (Max Farrand ed., 1911) ("[T]hose who have power in their hands will not give it up while they can retain it. On the contrary . . . they will always when they can . . . increase it."). That elevation of private interests above the public interest is exactly the "loss of independence and virtue" that the Founders understood as corruption. Gordon S. Wood, *The Radicalism of the American Revolution* 104 (Knopf Doubleday, 2011).

Cognizant of this historic tension between the influencers and the public, our Founders granted the People multiple weapons to fight corruption. The most obvious of those weapons, of course, is the franchise. The People's power to "vote the bums out" is a primary line of defense against corruption, though not infallible. *Cf. United States* v. *Classic*, 313 U.S. 299, 330 (1941) (Douglas, J., dissenting)

("For when corruption enters, the election is no longer free, the choice of the people is affected."). And many public officials—like the petitioner here—gain their office through appointment, not election, and are thus insulated from direct democratic accountability.

When "voting the bums out" is not a sufficient remedy, impeachment is available under the Constitution. But the Founders recognized that impeachments can churn up party and factional loyalties, which may protect the corrupt official from that remedy. *See The Federalist* No. 65, at 491 (Alexander Hamilton) (John C. Hamilton ed., 1864) ("In many cases [impeachment] will connect itself with the preexisting factions ... and in such cases there will always be the greatest danger that the decision will be regulated more by the comparative strength of parties, than by the real demonstrations of innocence or guilt."). Indeed, if the power of influencers over Congress becomes too great, the very same armamentarium of corruption, money, threats and reward that provides them their improper influence can be equally brought to bear to undermine an impeachment. The impeachment remedy can be disabled by the very corruption it is designed to remedy.

What's more, impeachment is a limited remedy. Congress holds impeachment power over only a limited cadre of federal officials—"The President, Vice President and all civil Officers of the United States." U.S. Const. art. II, § 4. A far-greater number of state and local officials are beyond

Congress's impeachment power, but still potentially subject to corrupting forces. The People need a direct check on those public officials, as well as on the federal officials potentially subject to impeachment.

Which brings us back to the jury; to the fine, hard, square corners of the jury box. The jury has a unique position in our constitutional order. Through the jury, ordinary citizens participate directly in a constitutional instrument of governance. Within the boundaries of constitutionally protected rights, the jury protects ordinary citizens not just from government but from the wealthy and powerful, providing ordinary citizens a check on the influencer class. Blackstone recognized as much over two centuries ago, noting that the jury "preserves in the hands of the people that share which they ought to have in the administration of public justice, and prevents the encroachments of the more powerful and wealthy citizens." 3 William Blackstone, *Commentaries on the Laws of England* 380 (1769).

Logic confirms Blackstone's wisdom. Random selection of jurors, their service together only once, and their dismissal at the end of the case, all insulate the jury against powerful and wealthy forces of persistent influence. An officeholder's term of office makes a ripe target window for those persistent forces; the evanescence of juries, fortified by laws against jury tampering, protects this institution better from such influence. Public corruption is perhaps the worst encroachment of powerful and wealthy citizens against the People. When public corruption is at issue, it makes the

most sense that the institution of government least amenable to corruption should have an important role within the broader constitutional system.

The Founders deliberately wove the institution of the jury into the fabric of our government and our society, through the Sixth Amendment's and Seventh Amendment's rights to jury trials in criminal and civil cases, respectively. When those Amendments were ratified, the jury trial was already over a century and a half old on this continent. Early colonial settlers imported juries from England. By 1624, juries were established in Virginia; by 1628, in Massachusetts; by 1677, in New Jersey; and by 1682, in Pennsylvania. Stephan Landsman, *The Civil Jury in America: Scenes from an Underappreciated History*, 44 Hastings L.J. 579, 592 (1993) (citations omitted). Protecting the jury was a *casus belli* of the War of Revolution. The Declaration of Independence itself listed "depriving [the colonists] in many Cases, of the Benefits of Trial by Jury" as one way in which King George had "combined with others to subject [the colonists] to a jurisdiction foreign to our Constitution, and unacknowledged by our Laws; giving his Assent to their Acts of pretended Legislation." Declaration of Independence ¶¶ 15, 20. In the battle for ratification, Alexander Hamilton emphasized the importance of juries as protectors of liberty thus:

> The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury;

> or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government.[2]

Through the jury, the Founders set ordinary people as our Constitution's watchmen against encroachments by the powerful and wealthy. *See, e.g.*, Alexis De Tocqueville, *Democracy in America* 314 (Arthur Goldhammer trans., Penguin Putnam Inc. 2004) (1838) ("The jury system as it is understood in America seems to me a consequence of the dogma of popular sovereignty just as direct and just as extreme as universal suffrage. Both are equally powerful means of ensuring that the majority reigns."). Corruption of our government by the powerful and wealthy is the most pernicious such encroachment. This Court's jurisprudence has steadily blinkered the watchmen, thereby opening broader avenues to those corrupting forces of influence.

## II. The Supreme Court Has Dramatically Narrowed the Definition of Corruption, Preventing the Public from Holding Its Elected Officials Accountable.

The Court's recent jurisprudence has degraded the People's power by weakening their ability to check corruption. Cramped definitions of corruption have whittled to a vanishing nub the jury's role,

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[2] *The Federalist* No. 83, at 614 (Alexander Hamilton) (John C. Hamilton ed., 1864).

diminishing the People's ability to regulate the political process and to hold their representatives to account. At the same time, an anemic definition of corruption in election laws has given the influencer class virtually untethered power.

### A. The Court's Recent Jurisprudence Narrows the Reach of Criminal-Corruption Statutes and Thus Limits Accountability Through the Jury Box.

The criminal justice system historically has played a central role in checking corruption and preventing oppression. Indeed, for over a century, federal criminal-fraud statutes have been considered essential in maintaining the "moral uprightness" and sanctity of public office. *Cf. Shushan* v. *United States*, 117 F.2d 110, 115 (5th Cir. 1941), *overruled on other grounds by United States* v. *Cruz*, 478 F.2d 408 (5th Cir. 1973). Courts emphasized that "[n]o trustee has more sacred duties than a public official and any scheme to obtain an advantage by corrupting such an [individual] must in the federal law be considered a scheme to defraud." *Id.* at 115. This understanding of corruption allowed the jury to hold public officials accountable; "judges, State Governors, chairmen of state political parties, state cabinet officers, city aldermen, Congressmen and many other state and federal officials [were] convicted of defrauding citizens of their right to the honest services of their government officials." *McNally* v. *United States*, 483 U.S. 350, 362 (1987) (Stevens, J., dissenting) (string

citing cases). But, as one observer noted, "[t]hose days have passed." Sellers, *supra*, at 697.

The Court has nearly eliminated the role of the jury in criminal cases regarding corruption, in several ways.[3] First, the Court capsized a century of anti-corruption doctrine by holding that the criminal statutes prohibiting fraud cover only schemes to deprive someone of money or property. *See McNally*, 483 U.S. 350. Thus, it was no longer a crime for public officials to deprive the public of its intangible right to faithful service, notwithstanding the

[3] A similar trend has emerged in civil cases, where the Court has enabled corporations to insulate themselves from juries' democratic check on their power, by opting out of the civil justice system and into the private justice system. *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333 (2011) (holding that California state contract law, which deemed class action waivers in arbitration agreements unenforceable when certain criteria are met, is preempted by the Federal Arbitration Act); *Am. Express Co.* v. *Italian Colors Restaurant*, 570 U.S. 228 (2013) (holding that the Federal Arbitration Act does not permit courts to invalidate a waiver of class or arbitration on the ground that the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery). For those cases that do make it to court, the Court's jurisprudence over the last dozen years has diminished their odds of reaching a jury. *E.g., Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009) (empowering judges to dismiss cases if they deem the allegations not "plausible"); *Bell Atl. Corp* v. *Twombly*, 550 U.S. 544 (2007) (same). Blackstone warned that the civil jury would be a thorn in the side of the wealthy and powerful, and an annoyance to those who are used to special treatment. Blackstone, *supra*, at 380. Decisions like these shield the wealthy and powerful from that thorn.

statute's "clear" language and its "longstanding construction." *Id.* at 365 (Stevens, J., dissenting).

Next, the Court hampered Congress's attempt to fix that problem. After Congress passed the honest-services statute, 18 U.S.C. § 1346, the Court limited that statute to apply only to cases involving bribery or kickback schemes. *Skilling* v. *United States*, 561 U.S. 358, 406–09 (2010). "[U]ndisclosed self-dealing by a public official" was not criminal conduct, according to the Court. *Id.* at 409 (quoting Brief for United States 2930-2931).

In similar vein, the Court restricted the definitions of "extortion" and "bribery." Now, public officials are held accountable for extortion only when there is an express quid pro quo, or an "explicit rather than implicit" understanding, *McCormick* v. *United States*, 500 U.S. 257, 282 (1991) (Stevens, J., dissenting), and they commit bribery only by selling an "official act," not by more informal uses of power. *McDonnell* v. *United States*, 136 S. Ct. 2355, 2372 (2016). This is true even though "there is no statutory requirement" that corrupt acts come in any "particular form," and even though corruption is frequently silent and "subtle." *McCormick*, 500 U.S. at 282 (Stevens, J., dissenting).

These cases are a radical departure from our history and from the Framers' understanding both of corruption and of the jury's role. They present an implausibly small definition of corruption, in effect licensing corruption done wholesale, and reserving the sanction of the law for a very narrow and rare, direct "quid pro quo," form of retail corruption. Only

a real rube will be caught in such obvious conduct; the sinuous, clever, persistent and powerful big influencers can easily work around such a hapless standard. *Buckley* v. *Valeo*, 424 U.S. 1, 27 (1976) ("Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions."); *cf.* James Madison, Speech in the Virginia Ratifying Convention on Control of the Military, June 16, 1788, 1 *History of the Virginia Federal Convention of 1788* 130 (H.B. Grigsby ed. 1890) ("There are more instances of the abridgment of the freedom of the people by gradual and silent encroachments of those in power than by violent and sudden usurpations.").

And the practical effect of this jurisprudence is apparent. It removes more and more cases from the jury's hands. Juries no longer decide whether public officials have colored outside the lines. Cases die before even reaching a jury. It is broadly recognized that "the government has been limited in its pursuit of financial crimes." Elizabeth R. Sheyn, *Criminalizing the Denial of Honest Services After* Skilling, 2011 Wis. L. Rev. 27, 43 (2011). Although federal prosecutors previously used criminal-fraud statutes to "aggressively" bring charges against "an array" of public officials, many prosecutors have elected to pursue fewer criminal-fraud convictions. Peter Lattman, *Fraud Ruling Is Reshaping Federal Cases*, N.Y. Times, Aug. 26, 2010, at B1. In addition, many convictions are being reviewed and

overturned. *E.g., Conrad Black Is Given Bail in Fraud Case*, N.Y. Times, July 20, 2010, at B8.

The cramped definition of corruption shields untold corrupt acts and corrupt actors from juries, and thus from punishment. In turn, it elevates the power of persistent influencers in the public sphere. This leaves the general public feeling powerless and overlooked, for the very good reason that they often are—at least in questions important to the big influencers. Taking the corruption question away from the jury allows avenues for forces of corruption to flourish, and increases the likelihood that corruption metastasizes in the body politic.

### B. The Court Has Also Narrowed the Definition of "Corruption" in Election Laws, Which Limits Accountability Through the Ballot Box.

Free and fair elections, much like the jury, create an essential link between the People and their government. The Court once agreed with this basic democratic tenet. Trevor Potter, Speech at the Ending Institutional Corruption Conference at Harvard University (May 7, 2015) (hereinafter "Potter, *Ending Institutional Corruption*"). It held that "corruption, the appearance of corruption, the corruption of 'influence' and 'gratitude,' even the 'appearance of influence' justifies limitations on money in politics." *Id.* It explicitly rejected the argument that anti-bribery laws provided a sufficient alternative to certain contribution limits. *Buckley*, 424 U.S. at 26–28 ("[These laws] deal only

with the most blatant and specific attempts . . . to influence government action."). And it affirmed that improper influence is not limited to basic "*quid pro quo* arrangements" but, instead, "extend[s] to the broader threat from politicians too compliant with the wishes of large contributors." *McConnell* v. *Federal Election Comm'n*, 540 U.S. 93, 143 (2003) (quoting *Shrink* v. *Missouri*, 528 U.S. 377, 389 (2000)). Indeed, the Court long stood behind the principle that "attempts to deceive" legislators "or to create or bring into operation undue influences of any kind" have no place in a democratic society. *Marshall* v. *Baltimore & Ohio R.R. Co.*, 57 U.S. 314, 335 (1853).

The Court's recent campaign-finance jurisprudence has veered from and should return to these defining principles. Potter, *Ending Institutional Corruption* (explaining that the Court has "redefine[d] how a democratic system should operate"). Rejecting "a century of history," the Court in *Citizens United* shrank the definition of corruption down to the explicit and immediate exchange of money for votes. *Citizens United* v. *Federal Election Comm'n*, 558 U.S. 310, 395 (2010) (Stevens, J., dissenting). Soon after, the Court further narrowed the definition of corruption by holding that "Congress may target only a specific type of corruption—'*quid pro quo*' corruption." *McCutcheon* v. *Federal Election Comm'n*, 572 U.S. 185, 233, 235 (2014) (Breyer, J., dissenting). The Court hung its hat on "[t]he conceit that corporations must be treated identically to natural persons" and on the notion that other campaign-finance laws were

sufficient. *Citizens United*, 558 U.S. at 396 (Stevens, J., dissenting).

The Court's assumptions have demonstrably failed the test of time. For one thing, evidence from election cycles since *Citizens United* demonstrates existing campaign-finance laws cannot provide the independence and disclosure that the ballot box requires. Weakened corruption laws have "unleashed a wave of campaign spending that by any reasonable standard is extraordinarily corrupt." Thomas B. Edsall, *After Citizens United, a Vicious Cycle of Corruption*, N.Y. Times, Dec. 6, 2018. *Citizens United* is often, accurately and pungently, described as producing a "tsunami of slime." *See, e.g.*, Joe Hagan, *The Coming Tsunami of Slime*, N.Y. Mag., Jan 22, 2012.

Regulatory filings show that much of this spending comes from shell companies, pass-through entities, and non-profit organizations.[4] These sham entities often launch negative and false attack advertisements and misinformation campaigns, and they make general threats and promises to politicians in order to advance their interests.[5]

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[4] America is approaching the tawdry milestone of a billion dollars in anonymous "dark money" political spending—on top of all the fully or somewhat disclosed spending, the vast majority of it is in the hands of big influencers. Victor Reklaitis, *Secret political spending on track to reach $1 billion milestone*, Market Watch (Nov. 26, 2019), https://www.marketwatch.com/story/secret-political-spending-ontrack-to-reach-1-billion-milestone-2018-11-20

[5] Annenberg Public Policy Center of the University of Pennsylvania, *High Percentage of Presidential Ad Dollars of*

Despite their "tsunami" impact on the democratic process, these entities conceal rather than disclose (except likely, privately, to the candidate) the true identities of the individuals and companies supporting them; and they shield purveyors of misinformation or attacks from any level of accountability for the "slime."

In sum, *Citizens United* and its progeny opened the floodgates for pernicious dark-money spending, submerged the voices of individual people under much louder anonymized corporate and influencer voices,[6] and derailed "the constitutionally necessary 'chain of communication' between the people and their representatives." *McCutcheon*, 572 U.S. at 237 (Breyer, J., dissenting). This caused democratic safeguards to rot from within, and it left the People with less voice, less power, and more cynical than

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*Top Four 501(c)(4)s Backed Ads Containing Deception Annenberg Study Finds* (June 20, 2012), http://www.annenbergpublicpolicycenter.org/high-percent-of-presidential-ad-dollars-of-top-four-501c4s-backed-ads-containing-deception-annenberg-study-finds/ ("[F]rom December 1, 2011 through June 1, 2012, 85 percent of the dollars spent on presidential ads by four top-spending third-party groups were spent on ads containing at least one claim ruled deceptive by fact-checkers. . . ."); Drew Westen, *Why Attack Ads? Because They Work*, L.A. Times, Feb. 19, 2012.

[6] *Citizens United*, 558 U.S. at 394 (Stevens, J., dissenting) ("In the context of election to public office, the distinction between corporate and human speakers is significant. Although they make enormous contributions to our society, corporations are not actually members of it. They cannot vote or run for office. Because they may be managed and controlled by nonresidents, their interests may conflict in fundamental respects with the interests of eligible voters.").

ever. The Court should not compound this problem by further narrowing the definition of corruption and thereby reducing the jury's role as a watchman against corruption.

## III. The Court Should Act With Modesty and Humility When It Addresses the Rules of Political Engagement.

### A. This Court Lacks Direct Experience With the Political Process.

In the arena of political combat, courts are generally institutional amateurs on unfamiliar terrain. Indeed, the Court recently echoed the animating principle that matters of politics are "outside judicial expertise." *See Rucho* v. *Common Cause*, 139 S. Ct. 2484, 2504, (2019) (Roberts, C.J.). Thus, the Court has customarily deferred to other branches of government in matters affecting the political process; to "refrain from directing [a] substantial intrusion into the Nation's political life." *See, e.g.*, *Vieth* v. *Jubelirer*, 541 U.S. 267, 306 (2004) (Kennedy, J., concurring).

Since Justice O'Connor retired, the Court has not had a justice with direct experience in electoral politics. Courts should tread with caution in areas where other participants have rich and practical experience. Overreaching into the political process risks "exceeding the judiciary's limited constitutional mandate and infringing on powers committed to other branches of government." *See Am. Legion* v. *Am. Humanist Ass'n*, 139 S. Ct. 2067,

2099 (2019) (Gorsuch, J., concurring in judgment only). In that respect, the Court must "exercise humility and restraint in deciding cases according to the Constitution and law." *See Obergefell* v. *Hodges*, 135 S. Ct. 2584, 2624 (2015) (Roberts, C.J., dissenting); *see also Jones* v. *Bock*, 549 U.S. 199, 216 (2007) (Roberts, C.J.) (explaining that statutory interpretation requires that "[t]he judge . . . not be read in by way of creation, but instead abide by the duty of restraint, the humility of function as merely the translator of another's command.") (citations and internal quotation marks omitted).

The Court should tread with particular caution since the factual predicates for its excursions into this field have proven at such variance from actual consequences. *Shelby County* assured us that racism was a thing of the past in politics, justifying rollback of voting protections in states with long histories of politically institutionalized voter suppression. *Shelby County, Ala.* v. *Holder*, 570 U.S. 529 (2013). That assurance was quickly followed by a surge of state voter-suppression laws in those states, targeting minorities with "surgical precision." *See N.C. State Conference of NAACP* v. *McCrory*, 831 F.3d 204, 214 (4th Cir. 2016). *Citizens United* assured us that the newly unleashed unlimited political spending would be both independent and transparent. That assurance was quickly followed by hundreds of millions of dollars spent in anonymous political "dark money," and swarms of candidate-specific super PACs run by the candidate's friends, family, allies, and former staff.

Facts are stubborn things, and events have disproven the majority's findings of political fact in both those opinions. Time and fact have not been good to this Court's predictions in political matters; the ensuing results have been harmful to the body politic; and I discern no effort by the Court to make adjustments or corrections where manifest errors become apparent. So caution is a fair watchword.

Our vibrant democracy's political system is complex, adaptive and impetuous, and it may not yield in expected ways to uninformed, rash, or abstract judicial speculation. Particularly when political consequences are unknown, courts must be prudent, making incremental decisions, and testing for damage to the institutions, balances, and processes of American government and politics. *Cf.* Richard L. Hasen, Citizens United *and the Illusion of Coherence*, 109 U. Mich L. Rev. 581, 583–84 (2011) (explaining that the Court in *Citizens United* "embraced a narrow, crabbed view of corruption," because "language [in the opinion] will force the Court to either adopt a view that no limits on money in politics are ever constitutional or, more likely, vote to sustain some limits on money in politics through doctrinal incoherence."). This is, in part, why "Congress alone has the institutional competence, democratic legitimacy, and (most importantly) constitutional authority to revise statutes in light of new social problems and preferences." *Wis. Cent. Ltd.* v. *United States*, 138 S. Ct. 2067, 2074, (2018) (Gorsuch, J.).

Narrowing the remedies granted to the People to check public corruption only widens the expanding circles of corrupting influence in society. And the Court's lack of experience or aptitude regarding the political process counsels against further disruptions.

### B. The Jury Should Remain Referees of Corruption, Consistent with the Founders' Vision.

As noted above, juries are central to the American system of self-government and to the Founders' vision for regulating the political process. *See supra* Pt. I. Consistent with these notions, "[t]his Court has repeatedly sought to guard the historic role of the jury" in assessing criminal liability. *See, e.g.*, *United States* v. *Haymond*, 139 S. Ct. 2369, 2384 (2019) (Gorsuch, J.). This is so, because safeguarding the jury's role is a cornerstone of "the people's authority over its judicial functions." *Id.* at 2375 (citing J. Adams, Diary Entry (Feb. 12, 1771), in 2 *Diary and Autobiography of John Adams* 3 (L. Butterfield ed. 1961)). Juries are especially well-suited to regulate corruption, and a robust jury role can correct for failures of elected officials to self-regulate, or failures of the electoral process to punish corruption.

Within the broader confines of the Constitution, and tethered to the elements of a crime in statutory or common law, juries had free rein to make appropriate findings. Traditionally, courts construed "corruption" broadly, thus ensuring that

more cases reached juries, in turn ensuring a healthy role for juries in regulating corruption. It's easy to see why. Jurors are the Constitution's watchmen against "encroachments of the more powerful and wealthy citizens." Blackstone, *supra*, at 380. They are well-positioned as referees of when political influence has gone too far, as they themselves are well-protected against political influence. Juries are gathered randomly from the general public, making them less likely to be compromised by the self-serving interests and worldview of big influencers or the political class. They are protected during their service by laws against jury tampering, *e.g.*, 18 U.S.C. § 1504, and by rules preventing parties from communicating with jurors. They sit together but once, and disband after making their decision in each case, which makes them difficult—if not impossible—to subject to inducement or pressure. They have nothing to gain from their verdicts, which insulates them from conflicts of interest (indeed jurors are removed for conflicts of interest). Their job is to do justice in the one case before them. Period.

Thus, in the enduring political contest between the influencer class and the general public, juries are more likely to reflect the public interest in honorable governance versus the influencers' interest in amenable governance. *See, e.g.*, *Powers* v. *Ohio*, 499 U.S. 400, 407 (1991) (Kennedy, J.) ("Indeed, with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process."). And juries are more likely to

reflect a true public standard for what is right and what is wrong in political behavior than are politically appointed judges and politically elected officials.

Retaining the jury as a public sentinel over corruption sends a powerful signal to the political class. First, it says that political accountability will be meted out by citizens with no interest in the case other than that justice be done. That makes it harder for forces of influence to fix the system. Taking cases away from juries through cramped definitions of corruption diminishes public defenses against corruption. A jury role adds a whiff of uncertainty as to what one can get away with—a healthy thing; and it affords a truer public measure than do other institutions.

Judicial lines demarcating where political actors may escape public censure can be misguided, and can subtly or not-so-subtly encourage corruption; indeed, they can provide a roadmap. For instance, after *McDonnell*, influencers have a clear pathway of influence to extract favorable results from state universities and agencies by going to powerful officials who indirectly influence outcomes without being the immediate decision maker. It doesn't take long for big, persistent influencers to figure out that sort of thing.

The results of such sanctioned pathways of influence are predictable: the People lose confidence in the health of the public sphere and become disaffected and suspicious. Ultimately, the great experiment of American democracy begins to falter.

Championing juries as the referees of corruption sends a bracingly healthy message into the political system and into the influencer class, and prevents the political system itself from gradually squeezing out political accountability.

### C. Further Limiting the Legal Understanding of Corruption Will Degrade the Health of the Public Sphere.

The danger of "corruption … of the body politic" has long been an animating concern for this and other courts.[7] "Our cases have held that Congress may regulate campaign contributions to protect against corruption or the appearance of corruption." *McCutcheon*, 572 U.S. at 191 (citing, *Buckley*, 424 U.S. at 26–27 (per curiam)).[8] To the question

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[7] *Marshall*, 57 U.S. at 335; *see also Clippinger* v. *Hepbaugh*, 5 Watts & Serg. 315, 321, 1843 WL 5037, at *5 (Pa. 1843) (noting that an action "may not corrupt all; but if it corrupts or tends to corrupt some, or if it deceives or tends to deceive or mislead some, that is sufficient to stamp its character with the seal of reprobation."); *Wood* v. *McCann*, 6 Dana 366, 366, 1838 WL 2237, at *1 (Ky. App. 1838) (indicating that the law will not "aid in enforcing any contract that is [. . .] inconsistent with public policy, a sound morality, or the integrity of the domestic, civil, or political institutions of the state"—in other words, "a contract to procure [. . .] or endeavor to procure, the passage of an act of the Legislature, by any sinister means [. . .] would be void, as being inconsistent with public policy"); *Hatzfield* v. *Gulden*, 7 Watts 152, 154, 1838 WL 3216, at *3 (Pa. 1838) (underscoring "public good or policy" issues in a case about contingent-fee and government pardon agreements).

[8] Even in the recent past, at least one sitting Justice observed this Court's recognition of "a strong governmental

whether the Court bears some responsibility for the health of the American body politic, the Court's answer was once evident in word and deed: that the Court will not be a mere bystander when corruption rears its ugly head. *See, e.g.*, *Trist* v. *Child*, 88 U.S. 441, 451 (1874) (invalidating a lobbying contract as against public policy, because "[i]f any of the great corporations of the country" sought "to procure the passage of a general law with a view to … their private interests, the moral sense of every right-minded man would instinctively denounce [it] as *steeped in corruption*.") (emphasis added).

The public is rightly skeptical of politics, believing it too often overwhelmed by forces of influence that act in their own self-interest rather than for the public good. The public sees the most apparent evidence of self-interest in the outsized influence that powerful factions have over the political branches of government. Political scientists Martin Gilens and Benjamin Page have concluded that "economic elites and organized groups representing business interests have substantial independent impacts on U.S. Government policy, while mass-based interest groups and average citizens have little or no independent influence."[9] A 2015 New York Times–CBS News poll of 1,022 adults asked whether all Americans have an equal

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interest in combating corruption and the appearance thereof." *See Emily's List* v. *Federal Election Comm'n*, 581 F.3d 1, 6 (D.C. Cir. 2009) (Kavanaugh, J.) (citations omitted).

[9] Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 Perspectives on Politics No. 3 564, 565 (Sept. 2014).

chance to influence elections or whether wealthy Americans had an advantage. Two thirds (including 55 percent of Republicans) said the wealthy have an advantage. *Americans' Views on Money in Politics*, N.Y. Times, June 2, 2015. More than half—55 percent—said that "[m]ost of the time" politicians promote policies that help those who donated to their campaigns. *Id.* And 84 percent said money has "[t]oo much influence" in our democracy. *Id.*

The Framers were justifiably concerned about the "perks of office … overwhelm[ing] the offices by creating incentives for legislators to abuse their position to reap the benefits of incumbency." *See* Zephyr Teachout, *The Anti-Corruption Principle*, 94 Cornell L. Rev. 341, 358 (2009). Some say that in a post-*Citizens United* world, money shapes elections, leading to "incumbent entrenchment." *See* Samuel Issacharoff, *On Political Corruption*, 124 Harvard L. Rev. 118, 142 (2010). In fact, it's worse than that.

*Citizens United* provided today's influencer class (well-represented among the amici in that case, by the way) massive new political weaponry to exert influence and use politics to overbear the general public. The ability to spend unlimited sums in politics, particularly to spend unlimited sums anonymously through an armada of front groups, creates the power to threaten or promise such expenditures. By giving donors the right to make unlimited contributions, the Court also gave them the power to promise or threaten to make (or not make) those contributions. This power allows large contributors another way to manipulate and

influence politicians outside the public eye. Legislators tasked with exercising independent judgment instead face uncapped spending by adverse third parties from behind anonymized front groups.[10] On issues ranging from climate change, to prescription drug pricing, to campaign finance itself, I have heard Senate colleagues lament the constraining effect of this new powerful influence.[11]

The *Citizens United* majority's assurances that independence and transparency would protect the

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[10] As an example in plain view, soon after *Citizens United*, Tim Phillips, president of the Koch-funded Americans for Prosperity (AFP), trumpeted AFP's success in making climate science "political": "What it means for candidates on the Republican side is, if you buy into green energy or you play footsie on this issue, you do so at your political peril. The vast majority of people who are involved in the [Republican] nominating process—the conventions and the primaries—are suspect of the science. And that's our influence. Groups like Americans for Prosperity have done it." Coral Davenport, *Heads in the Sand: As climate-change science moves in one direction, Republicans in Congress are moving in another. Why?*, The Atlantic, Dec. 4, 2011. *See also*, Albert R. Hunt, *Flood of Money in U.S. Elections Is a Scandal Waiting to Happen*, N.Y. Times, April 26, 2015 (discussing the primary defeat of Rep. Bob Inglis after fossil fuel-backed groups abandoned him over his efforts to address climate change).

[11] Other members of Congress have spoken publicly about the detrimental effect of super PACs and unlimited outside spending. Former Senator Evan Bayh , explaining his decision to retire from the Senate, said, "[t]he threat of unlimited amounts of negative advertising from special interest groups will only make members more beholden to their natural constituencies and more afraid of violating party orthodoxies." Evan Bayh, *Why I'm Leaving the Senate*, N.Y. Times Feb. 20, 2010.

public from corrupting interests have proven calamitously wrong. Look no further than the instantaneous collapse of bipartisan efforts to address climate change, as the fossil fuel industry weaponized its new powers of influence to stop progress in Congress. In a June 3, 2017 article, the *New York Times* examined how to "reconcile the [pre-*Citizens United*] Republican Party of 2008 with the [climate-denying] party of 2017," and its "fast journey from debating how to combat human-caused climate change to arguing that it does not exist." Coral Davenport & Eric Lipton, *How G.O.P. Leaders Came to View Climate Change as Fake Science*, N.Y. Times, June 3, 2017. The shift mostly, it reported, "is a story of big political money." *Id.*

With such added toxins coursing through the body politic, now is no time to degrade the jury as the public's agent against corrupting influence. Diminishing the jury's power to check corruption, as corruption expands, is not a prescription for a healthy democracy.

Behind interchangeable public officials lurk persistent big influencers; each era has its own equivalent of "nobles [who] wish to rule and oppress the people." Machiavelli, *supra*, at 20. Here, juries matter. When corrupting forces are too deeply entrenched, voting corrupted officials out of office will be difficult; and even if successful it may have little effect against the underlying corrupting forces. When corrupting forces are too deeply entrenched, impeachment can become just another legislative activity to be controlled by the big influencers. The

People's remedy—for prosecutors to investigate corruption and bring cases before an independent jury of citizens—can become vital to democracy's survival. The Founders left us multiple remedies to preserve a healthy body politic. We disable any one of them at our peril, but the jury is the public's last best hope against the influencers.

I write this brief not to address the factual underpinnings of this case. I write this brief to emphasize that corruption and abuse of power can taint the whole spectrum of issues that are refereed by government. Corruption is the evil that spawns other evils. History often shows powerful interests pursuing the greater evil of corruption precisely because it allows them to accomplish their own other, lesser evils. Resisting pressure from corrupting forces is essential to the preservation of our democracy, and robust juries are watchmen essential to that resistance. They operate within bounds set by the Constitution, and they are bound to the facts of the case and the elements of the offense. But within those bounds the scope should be broad. It is unfortunate that the Court's jurisprudence has persistently degraded the institution of the jury, and particularly dangerous when that jurisprudence degrades the jury's role as our sentinel against corruption.

We should have faith in a jury's ability to know corruption when it sees it. Or we should have no faith at all.

## CONCLUSION

For the reasons outlined above, the Court should forcefully reaffirm the Founders' vision that the jury box stand as a potent bulwark against tides of public corruption and improper influence.

Respectfully submitted,

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