United States District Court
District of Columbia

Shaun McCutcheon et al., *Plaintiffs* v. **Federal Election Commission**, *Defendant*	**Civil Case No. 1:12-cv-01034-JEB** THREE-JUDGE COURT REQUESTED ORAL ARGUMENT REQUESTED

Memorandum in Support of Motion for Preliminary Injunction

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Introduction

This case challenges burdens on core political expression and association that are a forbidden "prophylaxis-on-prophylaxis," *FEC v. Wis. Right to Life*, 551 U.S. 449, 479 (2007) ("*WRTL-II*") (controlling opinion). Plaintiffs move to preliminarily enjoin the Federal Election Commission ("FEC") from enforcing the individual biennial (**a**) limits on contributions to non-candidate committees at 2 U.S.C. 441a(a)(3)(B), as applied to contributions to national party committees and facially, and (**b**) limit on contributions to candidate committees at 2 U.S.C. 441a(a)(3)(A).[1, 2] The government must justify these limits under "the closest scrutiny" because they burden core First Amendment rights. *Buckley v. Valeo*, 424 U.S. 1, 21-22, 24-25 (1976).

Facts[3]

The FEC describes how the biennial contribution limits work as follows:

As an individual, you are subject to a biennial limit on contributions made to federal candi-

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[1] This biennial-limits statute follows (2011-12, inflation-adjusted amounts in brackets):

(3) During the period which begins on January 1 of an odd-numbered year and ends on December 31 of the next even-numbered year, no individual may make contributions aggregating more than—

(A) $37,500 [$46,200], in the case of contributions to candidates and the authorized committees of candidates;

(B) $57,500 [$70,800], in the case of any other contributions, of which not more than $37,500 [$46,200] may be attributable to contributions to political committees which are not political committees of national political parties.

[2] Regarding terminology, Plaintiffs follow the FEC's use of "candidate committee," "national party committee," and "political action committee" ("PAC"). *See* FEC, *The Biennial Contribution Limit* (revised 2011). "Candidate committee" includes "candidate" because candidates (except for Vice President) must designate a principal campaign committee (and may designate additional authorized political committees), 11 C.F.R. 101.1(a)-(b), and receive any contributions as agents of their authorized committee(s), 11 C.F.R. 101.2. The cited brochure uses "state, local & district party committee," but "state party committee" will be used here to include local and district party committees, unless context contraindicates, because all share a $10,000 per calendar year combined limit. Plaintiffs do not follow the FEC's use of "biennial contribution *limit*" to refer to all limits at 2 U.S.C. 441a(a)(3) because the statute contains multiple limits.

[3] Facts are set out in greater detail in the Verified Complaint ("VC").

dates, party committees and political action committees (PACs). The limit is in effect for a two-year period beginning January 1st of the odd-numbered year and ending on December 31st of the even-numbered year. 11 CFR 110.5.

The biennial limit is indexed for inflation in odd-numbered years. The 2011-12 limit is $117,000.[4] This limit includes up to:

- $46,200 in contributions to candidate committees; and
- $70,800 in contributions to any other committees, of which no more than $46,200 of this amount may be given to committees that are not national party committees. 11 CFR 110.5(b)(1).

* * *

Moreover, within this biennial limit on total contributions, an individual may not exceed the specific limits placed on contributions to different types of committees, as illustrated in the contribution limits chart later in this brochure.

* * *

Individual Limits for 2011-2012

Recipient Federal Committee	**Limit**
Candidate Committee	$2,500* per candidate, per election[FN5]
National Party Committee	$30,800* per calendar year
State, Local & District Party Committee	$10,000 per calendar year (combined limit)[FN6]
Political Action Committee	$5,000 per calendar year

* These contribution limits are indexed for inflation in odd-numbered years. . . .

[FN5] A primary, runoff and general are each considered separate elections.

[FN6] Because local party committees are presumed to be affiliated with the party's state committee, a contribution to a local party committee counts against the contributor's limit for the state party. 11 CFR 110.3(b)(3).

FEC, *The Biennial Contribution Limit* (some footnotes omitted).

Plaintiff McCutcheon would contribute $25,000 each to the Republican National Committee ("RNC"), the National Republican Senatorial Committee ("NRSC"), and the National Republican Congressional Committee ("NRCC") before the November 2012 election but for the biennial contribution limit at 2 U.S.C. 441a(a)(3)(B) (currently $70,800). VC ¶¶ 11, 34-37. In this biennium, Mr. McCutcheon has already given $1,776 each to RNC, NRSC, and NRCC, $2,000 to a

[4] While this $117,000 limit is the sum of limits for candidate committees and non-candidate committees, those limits are statutorily *independent*, so their sum is not a separate statutory limit. Thus, there are properly biennial contribution *limits*, not a biennial contribution *limit*. If any limit is unconstitutional, this $117,000 limit lacks statutory authority and is unenforceable.

federal PAC, and $20,000 to the federal fund of a state party committee, VC ¶ 35-36, all of which count against his $70,800 biennial limit. McCutcheon challenges the limits at 2 U.S.C. 441a(a)(3)(B) as unconstitutional, as applied to contributions to national party committees and facially. He wants to express his support for, and to associate with, any non-candidate committees of his choice to the full extent permitted by the base contribution limits at 2 U.S.C. 441a(a)(1)(B)-(D) without restriction by any biennial contribution limits. VC ¶ 38.

Plaintiff McCutcheon also challenges the biennial limit on contributions to candidates at 2 U.S.C. 441a(a)(3)(A) (currently $46,200). He has already given contributions to federal candidates totaling $33,088 and verified his intent to give $21,312 in further contributions to federal candidates, for a biennial aggregate of $54,400, which he would do but for the $46,200 biennial contribution limit. VC ¶¶ 24-31. He wants to express his support for, and to associate with, any and all candidates of his choosing to the full extent permitted by the base contribution limit at 2 U.S.C. 441a(a)(1)(A) without restriction by the biennial contribution limit. VC ¶ 33.

Plaintiff RNC is a "political committee[] established and maintained by a national political party" under 2 U.S.C. 441a(a)(1)(B) and (3)(B), i.e., it is a national party committee. VC ¶ 12. RNC challenges the $70,800 biennial contribution limit on non-candidate contributions at 2 U.S.C. 441a(a)(3)(B) as unconstitutional, as applied to contributions to national party committees and facially, VC ¶¶ 39-58, because it wants to receive the speech and association of McCutcheon and other contributors to the full extent permitted by the base contribution limit at 2 U.S.C. 441a(a)(1)(B) without restriction by any biennial contribution limit. VC ¶ 39, 41.

Defendant FEC is the government agency with enforcement authority over the Federal Election Campaign Act of 1971 ("FECA"), Pub. L. No. 92-225, 86 Stat. 3 (1972), as amended, 2 U.S.C. 431 et seq., and the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No.

107-155, 116 Stat. 81 (2002).

In the future, Plaintiffs intend to do materially similar actions if not limited by the biennial contribution limits. If Plaintiffs do not obtain the requested relief, they will not proceed with their planned activities and will be deprived of their First Amendment rights and suffer irreparable harm. There is no adequate remedy at law.

Argument

The preliminary-injunction standards are as follows:

> A plaintiff seeking a preliminary injunction must establish that:
> (a) he is likely to succeed on the merits;
> (b) he is likely to suffer irreparable harm in the absence of preliminary relief;
> (c) the balance of equities tips in his favor; and
> (d) an injunction is in the public interest.

Carey v. FEC, 791 F. Supp. 2d 121, 128 (D.D.C. 2011) (citing *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008)). Though Plaintiffs establish each standard below, the *FEC* actually has the burden of justifying the limits because "the burdens at the preliminary injunction stage track the burdens at trial." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006). The government "must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broad. Sys., Inc. v. FCC,* 512 U.S. 622, 664 (1994) (internal citation omitted). In First Amendment cases, once likely merits success is established, the other standards logically follow. *See, e.g.*, *Sammartano v. First Judicial District Court, in and for County of Carson City*, 303 F.3d 959, 973-74 (9th Cir. 2002). This Court "may grant a preliminary injunction 'to preserve the relative position of the parties until trial on the merits,'" *Carey*, 791 F. Supp. at 128 (quoting *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981)). The "relative position" to preserve

is the FEC not enforcing the challenged limits against Plaintiffs. *See id.* at 125, 127-28.

I. Plaintiffs Have Likely Merits Success.

Plaintiffs have a likelihood of success on the merits. This criterion "is the most critical" in granting a preliminary injunction in this First Amendment challenge. *Id.* at 128.

A. "The Closest Scrutiny" Is Required, Any Restriction Must Be No Broader than Necessary, and Deference Is Subordinate to the Constitution.

The biennial contribution limits substantially burden core political activity protected by the First Amendment rights of free expression and association, so they must be justified by the government under "the closest scrutiny" and any restriction must "avoid unnecessary abridgement of associational freedoms." *Buckley*, 424 U.S. at 21-22, 24-25. *Buckley* held that contribution limits pose lesser First Amendment burdens than do expenditure limits and so imposed what has been interpreted as lower scrutiny on contributions. *Compare* 424 U.S. at 23 ("expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association") *with id.* at 25 (contribution limits require "sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms") *and id.* at 44-45 ("exacting scrutiny applicable to limitations on core First Amendment rights of political expression"). In *McConnell v. FEC*, 540 U.S. 93, 141 (2003), the Court said, "we apply the less rigorous scrutiny applicable to contribution limits." 540 U.S. at 141. More recently, the Court has imposed higher "strict scrutiny" on "laws that *burden* political speech," *Citizens United v. FEC*, 130 S.Ct. 876, 898 (2010) (citation omitted) (emphasis added), albeit in the context of a political speech ban. Plaintiffs challenge any lowered scrutiny of limits on campaign contributions as unconstitutional and, to the extent that *Buckley* is interpreted as imposing lowered scrutiny on contribution limits than on expenditure limits, expressly call for the reconsideration of *Buckley* on

that issue.[5] Since the base contribution limits, 2 U.S.C. 441a(a)(1), already establish *contribution* limits for contributors, added biennial contribution limits are more appropriately deemed *expenditure* limits, subject to strict scrutiny. In *Carey*, this Court applied strict scrutiny to the challenges to a base contribution limit at 2 U.S.C. 441a(a)(1)(C) ($5,000 per year to PACs) and to the biennial contribution limits at 2 U.S.C. 441a(a)(3)(B) as applied to contributions to the independent-expenditures-only account of a PAC. 791 F. Supp. 2d at 128. This Court decided that "[l]aws that burden political speech are 'subject to strict scrutiny.'" *Id.* (quoting *Citizens United*, 130 S.Ct. at 898). Strict scrutiny requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest. *Citizens United*, 130 S. Ct. at 898. Here the biennial contribution limits similarly "burden" First Amendment rights, so strict scrutiny should apply.

But even under intermediate scrutiny, Plaintiffs have likely success on the merits. In *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010), the D.C. Circuit considered whether a base contribution limit and the biennial contribution limits were constitutional as applied to an independent-expenditures-only PAC (an "IE-PAC" or "super PAC"), noting that "[p]laintiffs . . . argue that *Citizens United* stands for the proposition that 'burdensome laws trigger strict scrutiny.'" *Id.* at 695-96 (citation omitted). The court found it unnecessary to decide because, absent any cognizable interest, "[n]o matter which standard of review governs contribution limits, the limits on contributions cannot stand." *Id.* at 696. That analysis applies here.

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[5] Plaintiffs preserve this argument for the U.S. Supreme Court, whose members have debated whether lower scrutiny is proper for contribution limits and other burdens on political association. *See Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 192 n.12 (1999); *id.* at 206, 214 (Thomas, J., concurring in the judgment); *Randall v. Sorrell*, 548 U.S. 230, 242-44 (2006) (plurality); *id.* at 263 (Alito, J., concurring in part and concurring in judgment); *id.* at 264 (Kennedy, J., concurring in judgment); *id.* at 266 (Thomas, J., joined by Scalia, J., concurring in judgment).

Whatever scrutiny applies, there is a no-broader-than-necessary tailoring requirement. The controlling opinion in *California Medical Association v. FEC*, 453 U.S. 182 (1981) ("*CMA*"), required "that contributions to political committees can be limited only if those contributions implicate the governmental interest in preventing actual or potential corruption [he included derivative circumvention], and if the limitation is no broader than necessary to achieve that interest." *Id.* at 203 (Blackmun, J., concurring in part and in the judgment). This reaffirms *Buckley*'s requirement that "[a] restriction that is closely drawn must nonetheless 'avoid unnecessary abridgement of associational freedoms.'" *Wagner v. FEC*, No. 11-1841, 2012 WL 1255145, at *6 (D.D.C. April 16, 2012) (quoting *Buckley*, 424 U.S. at 25).

And whatever scrutiny applies, deference to Congress must yield to the First Amendment. In *McConnell*, 540 U.S. at 137, the Court deferred to Congress. But *Citizens United* subordinated deference to the Constitution—"When Congress finds that a problem exists, we must give that finding due deference; but Congress may not choose an unconstitutional remedy," 130 S.Ct. at 911—and limited *McConnell*'s deference to Congress's broad concept of "corruption" (e.g., access and gratitude) to the soft-money context, *see id.* at 910-11.

B. (Count 1) The Biennial Limit on Contributions to Non-Candidate Committees Lacks a Constitutionally Cognizable Interest as Applied to Contributions to National Party Committees.

RNC and Mr. McCutcheon challenge the $70,800 (currently) biennial limit on contributions to non-candidate committees at 2 U.S.C. 441a(a)(3)(B) as unconstitutional (under the First Amendment rights to free speech and association) as applied to contributions to national party committees for lacking a cognizable interest. VC ¶ 84-105 (Count 1).

1. *Buckley*'s Facial Upholding of the Now-Repealed "Overall $25,000 Ceiling" Does Not Control this Case, but *Buckley*'s Concerns Guide the Analysis.

"[FECA]'s contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities." *Buckley*, 424 U.S. at 14. The association right is protected:

> The First Amendment protects political association as well as political expression. The constitutional right of association explicated in NAACP v. Alabama, 357 U.S. 449, 460 (1958), stemmed from the Court's recognition that "(e)ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." Subsequent decisions have made clear that the First and Fourteenth Amendments guarantee "'freedom to associate with others for the common advancement of political beliefs and ideas,'" a freedom that encompasses "'(t)he right to associate with the political party of one's choice.'"

Id. at 15 (citations omitted). "Making a contribution, like joining a political party, serves to affiliate a person with a candidate [or a political party]. In addition, it enables like-minded persons to pool their resources in furtherance of common political goals." *Id.* at 22.

Despite high constitutional protection for contributions, *Buckley* rejected a facial constitutional challenge to an "overall $25,000 ceiling" on total contributions. *Id.* at 38. (The statute limited contributions per year, but treated non-election-year contributions as made in the following election year. *Id.* at 189.) This holding does not control here because: (a) that ceiling's statutory context was materially altered, *see infra*; (b) the ceiling was repealed and replaced by BCRA's multiple biennial limits, *see* 2 U.S.C. 441a(a)(3); and (c) *Buckley* was a facial holding (so inapplicable to as-applied challenges here). But the *concerns* on which *Buckley* relied to facially uphold the old ceiling control the analysis here, and those concerns were promptly eliminated by Congress. Key to the analysis is the fact that the 1974 FECA contribution-limits scheme considered in *Buckley* included only the following applicable contribution limits, then codified at 18 U.S.C. 608, *see Buckley*, 424 U.S. at 189 (contribution-limit provision quoted at VC ¶ 88 n.3):

- a $1,000 per election limit on contributions by a "person" to a candidate;
- a $5,000 per election limit on contributions by what would now be called a multi-candi-

date political committee to a candidate; and

- an individual, biennial overall $25,000 ceiling on total contributions.

That FECA scheme lacked limits on contributions *to* political committees *other than* the "overall $25,000 ceiling" on total contributions. *Without* that ceiling, individuals could give unlimited amounts to political party committees and unlimited PACs. Also missing was a restriction on the proliferation of political committees controlled by the same entities. *Buckley* upheld the ceiling facially, in that context, with this limited analysis:

> The overall $25,000 ceiling does impose an ultimate restriction upon the number of candidates and committees with which an individual may associate himself by means of financial support. But this quite modest restraint upon protected political activity serves to prevent evasion of the $1,000 contribution limitation by a person who might otherwise contribute *massive* amounts of money to a particular candidate through the use of unearmarked contributions *to political committees likely to contribute to that candidate*, or huge contributions *to the candidate's political party*. The limited, additional restriction on associational freedom imposed by the overall ceiling is thus no more than a corollary of the basic individual contribution limitation that we have found to be constitutionally valid.

Id. (emphasis added). Essential to this analysis is the Court's earlier highlighting of the political-committee-proliferation potential, which, the Court expressly noted (regarding the tailoring of the limit on contributions to candidates), left "persons free . . . to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources [FN31]." *Id.* at 28. The Court expanded on the potential for political-committee proliferation (including corporate and union "separate segregated funds," *see* 2 U.S.C. 441b(b)(2)(C)) thus:

> [FN31] While providing significant limitations on the ability of all individuals and groups to contribute large amounts of money to candidates, the Act's contribution ceilings do not foreclose the making of substantial contributions to candidates by some major special-interest groups through the combined effect of individual contributions from adherents or the *proliferation* of political funds each authorized under the Act to contribute to candidates. As a prime example, § 610 permits corporations and labor unions to establish segregated funds to solicit voluntary contributions to be utilized for political purposes. Corporate and union resources without limitation may be employed to administer these funds and to solicit contributions from employees, stockholders, and union members. Each separate fund may contribute up to $5,000 per candidate per election so long as the fund qualifies as a political committee under

> § 608(b)(2). . . .
>
> *The Act places no limit on the number of funds that may be formed through the use of subsidiaries or divisions of corporations, or of local and regional units of a national labor union. The potential for proliferation of these sources of contributions is not insignificant.* In 1972, approximately 1,824,000 active corporations filed federal income tax returns. . . . In the same year, 71,409 local unions were chartered by national unions. . . .
>
> The Act allows the maximum contribution to be made by each unit's fund provided the decision or judgment to contribute to particular candidates is made by the fund independently of control or direction by the parent corporation or the national or regional union.

Buckley, 424 U.S. at 28 n.31 (emphasis added; citations omitted).

So the analytical keys to *Buckley*'s facial upholding were the potential for *circumvention* of the base limits on contribution to candidates by *massive*[6] contributions *to the candidate's political party* and *to* a *proliferation* of *sympathetic PACs*. Congress promptly eliminated political-committee proliferation and massive contributions to political parties and PACs, removing the bases on which *Buckley* upheld the "overall $25,000 ceiling" on contributions, as discussed next.

2. Congress Fixed the Problems that *Buckley* Identified.

In response to *Buckley*, Congress quickly enacted new base contribution limits, 2 U.S.C. 441a(a)(1), limiting contributions *to* political party committees and *to* PACs to eliminate the possible circumvention risk identified by *Buckley* with "massive" contributions, as follows:

- a $1,000 per election limit on contributions by persons to a candidate;
- a (*new*) $20,000 per year limit on contributions by persons *to* a national party committee;
- a (*new*) $5,000 per year limit on contributions by persons *to* other political committees;
- limits on contributions by a "multicandidate committee"[7] as follows—
  - $5,000 per election to a candidate,
  - (*new*) $15,000 per year *to* a national party committee, and

[6] Only "large" contributions pose a cognizable risk: "To the extent that *large* contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined." *Id.* at 26-27 (emphasis added).

[7] These limits are only for *multicandidate committees*, i.e., those recognized as political committees for 6 months, receiving contributions from over 50 persons, and contributing to 5 or more candidates. 11 C.F.R. 100.5(e)(3). So a single-candidate committee, 11 C.F.R. 100.5(e)(2), or other non-multicandidate committee would be limited as any other "person."

- (*new*) $5,000 per year *to* any other political committee; and
- the "overall $25,000 ceiling" on total individual biennial contributions.

See FECA Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (1976) (quoted at VC ¶ 92 n.6). And Congress eliminated the proliferation of political committees. *See infra* at 13. While eliminating *Buckley*'s reasons for upholding the "overall $25,000 ceiling," Congress retained it.

The $5,000 per year limit on contributions *to* a PAC was upheld in *CMA*, based on a circumvention risk. 453 U.S. at 197-99 (plurality); *id.* at 203 (Blackmun, J., concurring in part and in judgment).[8] The plurality recited legislative history explaining that the 1976 amendments were to eliminate circumvention and political-committee proliferation:

> [FN18] The Conference Report on the provision in the 1976 amendments to the Act that became § 441a(a)(1)(C) specifically notes:
>
> "The conferees' decision to impose more precisely defined limitations on the amount an individual may contribute to a political committee, other than a candidate's committees, and to impose new limits on the amount a person or multicandidate committee may contribute to a political committee, other than candidates' committees, is predicated on the following considerations: first, *these limits restrict the opportunity to circumvent the $1,000 and $5,000 limits on contributions to a candidate*; second, these limits serve to assure that candidates' reports reveal the root source of the contributions the candidate has received; and third, *these limitations minimize the adverse impact on the statutory scheme caused by political committees that appear to be*

[8] *CMA* involved an enforcement action against CMA for contributing more than the permitted amount to the California Medical PAC. CMA argued that individuals and associations should be able to contribute unlimited amounts to a multicandidate PAC, to which the plurality replied:

> If appellants' position . . . is accepted, ... [s]ince multicandidate political committees may contribute up to $5,000 per year to any candidate . . . , an individual or association seeking to evade the $1,000 limit on contributions to candidates could do so by channelling funds through a multicandidate political committee. Similarly, individuals could evade the $25,000 limit on aggregate annual contributions to candidates if they were allowed to give unlimited sums to multicandidate political committees, since such committees are not limited in the aggregate amount they may contribute in any year. These concerns prompted Congress to enact § 441a(a)(1)(C), and it is clear that this provision is an appropriate means by which Congress could seek to protect the integrity of the contribution restrictions upheld . . . in *Buckley*.

CMA, 453 U.S. at 197-99 (plurality) (emphasis added; footnote omitted). This statement about the "$25,000 limit" does not control here because (a) it is not a court opinion; (b) it does not deal with the new 2002 biennial contribution limits; and (c) the ceiling's constitutionality was not at issue. And *because* the Court upheld the base limit on contributions *to* PACs to *eliminate* "circumvention," *Buckley*'s concerns in upholding the overall ceiling were eliminated.

> *separate entities pursuing their own ends, but are actually a means for advancing a candidate's campaign*."

CMA, 453 U.S. at 198 n.18 (emphasis added; citation omitted).

The Conference Report described the new anti-proliferation rules as follows:

> The anti-proliferation rules established by the conference substitute are intended to prevent corporations, labor organizations, or other persons or groups of persons from evading the contribution limits of the conference substitute. Such rules are described as follows:
>
> 1. All of the political committees set up by a single corporation and its subsidiaries are treated as a single political committee.
>
> 2. All of the political committees set up by a single international union and its local unions are treated as a single political committee.
>
> 3. All of the political committees set up by the AFL-CIO and all its State and local central bodies are treated as a single political committee.
>
> 4. All the political committees established by the Chamber of Commerce and its State and local Chambers are treated as a single political committee.
>
> 5. The anti-proliferation rules stated also apply in the case of multiple committees established by a group of persons.

H.R. Rep. No. 94-1057, at 58 (1976) (Conf. Rep.) (available on WestLaw).

Thus, Congress eliminated the concerns on which *Buckley* relied to facially uphold the old "overall $25,000 ceiling." A contributor cannot give "massive" amounts of money *to* a political committee. Political-committee proliferation is gone. There is no cognizable circumvention risk.

3. In BCRA, Congress Repealed and Replaced the "Overall $25,000 Ceiling" with Multiple Biennial Contribution Limits.

The challenged biennial contribution limits were enacted as BCRA § 307(b), 116 Stat. 102-03, amending FECA § 315(a)(3) by repealing the old "overall $25,000 ceiling" and replacing it with separate biennial contribution limits. *Supra* note 1 (text of 2 U.S.C. 441a(a)(3)). So *Buckley*'s facial upholding of the old ceiling does not control here. And the new limits are no more justified than the old ceiling after the 1976, post-*Buckley*, FECA amendments.

4. The $70,800 Biennial Contribution Limit Lacks a Cognizable Interest as Applied to Contributions to National Party Committees.

The $70,800 biennial limit on contributions to non-candidate committees at 2 U.S.C. 441a(a)(3)(B) is unconstitutional as applied to national party committees.

a. No Anti-Corruption Interest Applies.

"[P]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances." *FEC v. National Conservative PAC*, 470 U.S. 480, 496-97 (1985) ("*NCPAC*"). Corruption is strictly defined: "Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial *quid pro quo*: dollars for political favors." *Id.* at 497. *Citizens United* reaffirmed that corruption involves only quid-pro-quo corruption; it rejected influence, access, gratitude, and leveling the political playing field as cognizable corruption. 130 S.Ct. at 909-12. *See also Arizona Free Enterprise PAC v. Bennett*, 131 S.Ct. 2806, 2821 (2011) (rejecting equalizing interest); *Davis v. FEC*, 554 U.S. 724, 742 (2008) (same).

The anticorruption interest does not apply to contributions to national party committees because "'[t]his anticorruption interest is implicated by contributions to *candidates*.'" *Carey*, 791 F. Supp. 2d at 129 (quoting *EMILY's List v. FEC*, 581 F.3d 1, 6 (D.C. Cir. 2009)) (emphasis in *EMILY's List*). Cognizable quid-pro-quo corruption is based on a *financial* benefit to a *particular* candidate in such a "large" amount, *Buckley*, 424 U.S. at 26 (anticorruption interest triggered by "large contributions"), as to cause a candidate "to act contrary to [his or her] obligations of office," *Citizens United*, 130 S.Ct. at 497. National party committees are not candidates.

National party committees pose no cognizable quid-pro-quo-corruption risk to their candi-

dates as stated by three Justices in *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996) ("*Colorado-I*"), who said, "We are not aware of any special dangers of corruption associated with political parties . . . ." *Id.* at 616 ("Breyer, J., joined by O'Connor & Souter, JJ.). Another three agreed:

> As applied in the specific context of campaign funding by political parties, the anti-corruption rationale loses its force. . . . What could it mean for a party to "corrupt" its candidate or to exercise "coercive" influence over him? The very aim of a political party is to influence its candidate's stance on issues and, if the candidate takes office or is reelected, his votes. When political parties achieve that aim, that achievement does not, in my view, constitute "a subversion of the political process."

Id. at 646 (Thomas, J., joined by Rehnquist, C.J., and Scalia, J., concurring in judgment and dissenting in part) (citations omitted). Thus, in *Colorado-I* an anti-corruption interest could not be used as a basis to prohibit political-party-committee independent expenditures, and here it cannot be used to limit contributions to national party committees.

b. No Anti-Circumvention Interest Exists.

While "preventing corruption" is the only cognizable interest "for restricting campaign finances." *NCPAC*, 470 U.S. at 496-97, the Supreme Court has recognized a *prophylactic* interest in preventing *circumvention* of the contribution limits that eliminate the quid-pro-quo risk. Does an anti-circumvention interest justify the biennial contribution limits as applied to contributions to national party committees? We first consider the cognizable *scope* of "circumvention."

(1) The Anti-Circumvention Interest and Remedy Are Limited in Scope.

Just as the scope of cognizable "corruption" was strictly limited by the Supreme Court, *see Citizens United*, 130 S.Ct. at 909-10, "circumvention" is also limited. First, because the anti-circumvention interest is derivative and prophylactic, there must be a viable quid-pro-quo-corruption risk to begin with. Since *Buckley* held that only "*large* contributions" triggered a quid-pro-

quo-corruption risk, 424 U.S. at 26 (emphasis added), there is no conduit concern justifying biennial contribution limits unless it is possible to "contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party," *id.* at 38. If the ability to move "massive" funds through a conduit to a candidate is already eliminated by one prophylaxis, there remains no justification for an additional prophylaxis. This is clear from the prohibition on layering "prophylaxis-on-prophylaxis" articulated in *WRTL-II*, 551 U.S. 479 (Roberts, C.J., joined by Alito, J.) (controlling opinion). *WRTL-II* rejected the argument "that an expansive definition of 'functional equivalent' [wa]s needed to ensure that issue advocacy does not circumvent the rule against express advocacy, which in turn helps protect against circumvention of the rule against contributions." 551 U.S. at 479. *WRTL-II* held that the "prophylaxis-on-prophylaxis approach" . . . is not consistent with strict scrutiny." *Id.* Neither is it consistent with the requirement that any contribution "limitation [be] no broader than necessary to achieve th[e governmental] interest," *CMA*, 453 U.S. at 203 (controlling opinion), or that the government "avoid unnecessary abridgement of associational freedoms," *Buckley*, 424 U.S. at 25. If one prophylaxis (e.g., the limit on contributions to a candidate from a party committee) eliminates a risk, that risk cannot be used *again* to justify another prophylaxis because the risk is gone.

Second, the government must prove that asserted "harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broad. Sys.,* 512 U.S. at 664. Just as "[r]eliance on a 'generic favoritism or influence theory . . . is at odds with standard First Amendment analyses because it is unbounded and susceptible to no limiting principle,'" *Citizens United*, 130 S.Ct. at 910 (citation omitted), so also there can be no generic circumvention theory lacking a "limiting principle."

Third, *perceived* "circumvention"—based on barred contributors moving on to other political activity that remains legal—can be a reason to *overturn* restrictions, not multiply them:

> *Austin* [*v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990),] is undermined by experience since its announcement. Political speech is so ingrained in our culture that speakers find ways to *circumvent* campaign finance laws. See, e.g., *McConnell*[, 540 U.S. at] 176-177 ("Given BCRA's tighter restrictions on the raising and spending of soft money, the incentives . . . to exploit [26 U.S.C. 527] organizations will only increase[.]"). Our Nation's speech dynamic is changing, and informative voices should not have to *circumvent* onerous restrictions to exercise their First Amendment rights.

Citizens United, 130 S.Ct. at 912 (emphasis added). So if would-be contributors to national party committees are restricted by contribution limits and instead give to independent-expenditures-only PACs ("IE-PACs" or "super PACs"),[9] that "circumvention" requires careful examination of whether the contribution limits are constitutionally justified.[10]

In sum, absent a potential for *real* circumvention involving movement of *massive* sums to political committees with a potential for *contributions* thereby reaching candidates, no prophylaxis is permitted. Where one prophylaxis makes a harm noncognizable, no other prophylaxis is allowed based on the eliminated interest. Where people are forced to exercise their First Amendment rights to free speech and association in non-preferred ways because of an imposed prophylaxis, it must be eliminated if its First Amendment burdens are not strongly justified.

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[9] *See, e.g.*, Anupama Narayanswamy, "Presidential campaign donors moving to super PACs," Sunlight Reporting Group (Apr. 26, 2012), http://reporting.sunlightfoundation.com/2012/maxed-out-donors/ ("[A]fter some . . . donors hit their . . . contribution limits to President Obama's reelection campaign, they made donations to the super PAC supporting him . . . .").

[10] *Buckley* applied this "circumvention" principle in rejecting a limit on independent expenditures, holding that, because the vagueness of the "expenditure" definition required the express-advocacy construction, people would simply make permitted, non-magic-words communications, making the limit meaningless. 424 U.S. at 45. *Buckley* also noted that the independence of independent expenditures "alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate." *Id.* at 47. So "[r]ather than preventing circumvention of the contribution limitations, [the independent expenditure limit] severely restricts all independent advocacy despite its substantially diminished potential for abuse." *Id.* at 47.

(2) *Buckley* Requires Examination of the Potential for Political-Committee Proliferation, "Massive" Contributions, and Conduit Capability.

Applying these principles limiting cognizable circumvention, does a cognizable anti-circumvention interest justify the biennial contribution limit as applied to national party committees?[11] The answer requires returning to *Buckley*'s concerns in facially upholding the old "overall $25,000 ceiling." The Court said the ceiling could "prevent *evasion* [circumvention] of the $1,000 contribution limitation by a person who might otherwise contribute *massive* amounts of money to a particular candidate through the use of unearmarked contributions *to political committees likely to contribute to that candidate*, or huge contributions *to the candidate's political party*." *Id.* (emphasis added). And this analysis was premised on possible political-committee proliferation. *Id.* at 28. So in searching for a circumvention risk, *Buckley* requires us to consider three questions of the *current* campaign-finance scheme: (a) Is *political-committee proliferation* possible?; (b) Can *massive contributions* be made *to* political parties and PACs?; and (c) Are political committees *now capable of serving as conduits* for transmitting massive contributions to candidates?

(3) Congress Imposed a *Political-Committee-Proliferation* Prophylaxis.

Is it possible to move massive contributions to candidates through a *proliferation* of political committees? No. *Buckley*'s specific concern was with a proliferation of *PACs*. *See* 424 U.S. at 28 n.31,[12] but the 1976 FECA amendments implemented provisions to eliminate all political-

[11] Congress saw political parties as posing little circumvention risk because it created higher limits on contributions to them, 2 U.S.C. 441a(a)(1)(B), and provided authority for expenditures coordinated with candidates, 2 U.S.C. 441a(d), in addition to the $5,000 limit on contributions to a candidate per election. *See infra* at 19 (limits chart).

[12] As the Court put it, *id.*:

> [C]ontribution ceilings do not foreclose the making of substantial contributions to candidates by some major special-interest groups through the combined effect of individual contributions from adherents or the proliferation of political funds. . . . The Act places no limit on the number

committee proliferation, including by PACs. *See supra* at 11-12. The FEC has a lengthy regulation expanding on FECA's "political committee" definition statutes. 11 C.F.R. 100.5(g)(2)-(3).[13] These anti-proliferation rules prevent the same persons from controlling multiple PACs. Consequently, no "person . . . [can] contribute massive amounts of money to a particular candidate" by means of giving to a *proliferation* of political committees. *Buckley*, 424 U.S. at 38.

Regarding state party committees, "[a]ll contributions made by the political committees established, financed, maintained or controlled by a State party committee and by subordinate State party committees shall be presumed to be made by one political committee." 11 C.F.R. 110.3(b)(3). Regarding candidate committees, "[a]ll authorized committees of the same candidate for the same election to Federal office are affiliated." *Id.* at 100.5(g)(1). And regarding national party committees, there can be no proliferation because only three are permitted per political party. These are (1) the national committee of a political party, (2) the Senate campaign committee, and (3) the House campaign committee. *Id.* at 110.3(b)(1)-(2).[14] RNC, NRSC, and NRCC are, in fact, separate legal entities with separate histories, governing bodies, and focuses. VC ¶¶ 43-58. They have their own agendas, e.g., RNC focuses primarily on presidential elections and party matters; NRSC focuses on electing Republican senators; and NRCC focuses on electing

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> of funds that may be formed through the use of subsidiaries or divisions of corporations, or of local and regional units of a national labor union. The potential for proliferation of these sources of contributions is not insignificant.

[13] The "affiliated committee" definition establishes which committees "shar[e] a single contribution limitation." 11 C.F.R. 110.5(g)(3). All committees run by the same entities are "affiliated." *Id.* The FEC broadly defines the factors it considers in determining "affiliation," including formal and informal control, control over employees, overlapping membership, overlapping officers or employees, funding relationships, founding relationships, and patterns of contributions and contributors. *Id.* at 100.5(g)(4). These affiliation rules are repeated at 110.3.

[14] National party committees have separate limits on contributions, e.g., each may receive $30,800 per year from an individual and each may contribute $5,000 to a candidate per election. But RNC and NRSC must share the additional allowed contribution of $43,100 to a Senate candidate. *See infra* (contribution limits chart).

Republican representatives. VC ¶¶ 43-46.In sum, it is no longer possible to move massive contributions to candidates through a *proliferation* of political committees.

(4) Congress Imposed a *Massive-Contribution* Prophylaxis.

Is it possible now for an individual to make what *Buckley* called "*massive*" contributions to a political party committee or a PAC? 424 U.S. at 38. No. The system that *Buckley* considered had no limits on contributions *to* parties and PACs, but these are now limited as follows:

Chart on Contribution Limits for 2011-2012

	To each candidate or candidate committee per election	To national party committee per calendar year	To state, district & local party committee per calendar year	To any other political committee per calendar year[3]	Special Limits
Individual may give	$2,500*	$30,800*	$10,000 (combined limit)	$5,000	$117,000* overall biennial limit: • $46,200* to all candidates • $70,800* to all PACs and parties[4]
National Party Committee may give	$5,000	No limit	No limit	$5,000	$43,100* to Senate candidate per campaign[5]
State, District & Local Party Committee may give	$5,000 (combined limit)	No limit	No limit	$5,000 (combined limit)	No limit
PAC (multi-candidate)[6] may give	$5,000	$15,000	$5,000 (combined limit)	$5,000	No limit
PAC (not multi-candidate) may give	$2,500*	$30,800*	$10,000 (combined limit)	$5,000	No limit
Authorized Campaign Committee may give	$2,000[7]	No limit	No limit	$5,000	No limit

* These contribution limits are indexed for inflation in odd-numbered years.

[3] A contribution earmarked for a candidate through a political committee counts against the

original contributor's limit for that candidate. In certain circumstances, the contribution may also count against the contributor's limit to the PAC. 11 CFR 110.6. See also 11 CFR 110.1(h).

[4] No more than $46,200 of this amount may be contributed to state and local party committees and PACs.

[5] This limit is shared by the national committee and the national Senate campaign committee.

[6] A multicandidate committee is a political committee with more than 50 contributors which has been registered for at least 6 months and, with the exception of state party committees, has made contributions to 5 or more candidates for federal office. 11 CFR 100.5(e)(3).

[7] A federal candidate's authorized committee(s) may contribute no more than $2,000 per election to another federal candidate's authorized committee(s). 11 CFR 102.12(c)(2).

FEC, *Contributions Brochure* at 2 (updated Feb. 2011), www.fec.gov/pages/ brochures/contributions_brochure.pdf). Thus, individuals may currently give $30,800 per year to a national party committee; $10,000 per year to a state party committee (combined with local and district party committees); $5,000 per year to a PAC; and $2,500 to a candidate per election. *Id.* None of these is "massive," in a year or a biennium. If the approach of the FECA scheme that *Buckley* considered (*see* FECA Amendments of 1974, Pub. L. 93-443, 88 Stat. 1263 (1974)) were still in effect (without limits on contributions *to* parties and PACs), and if there were no biennial contribution ceiling, an individual could give, e.g., *$30,800,000*, to a party or PAC. Thirty million dollars would be "massive," and the "overall $25,000 ceiling" prevented such "massive" contributions, but now the base contribution limits eliminate "massive" contributions.

What guidance do we have on what the Court in *Buckley* considered "massive"? It did not consider the $25,000 massive because it said the ceiling *prevented* massive contributions. What is $25,000 worth today? The U.S. Department of Labor's CPI Inflation Calculator (www.bls.gov/data/inflation_calculator.htm) establishes that $25,000 in 1974 is worth $116,676 as of June 2012. So at a minimum, the ability to contribute $116,675.96 in a biennium currently is not "massive." But the present biennial contribution limit on individual contributions to national party committees (and state party committees and PACs) is $70,800. And even if a contributor gave

$30,800 to RNC, NRSC, and NRCC in one year (total = $92,400), or for a biennium (total = $184,800), that is still not a "massive" amount.

This inflation calculator also provides the following current equivalents for the permissible 1974 contribution limits as of June 2012. The $1,000 limit on a person's contributions to candidates upheld in *Buckley*, 424 U.S. at 23-35, is now worth $4,667, not the current $2,500 limit. The $5,000 limit on a political committee's contributions to candidates upheld in *Buckley*, *id.* at 35-37, is now worth $23,335, not the current $5,000 (for a party committee or multicandidate PAC). Using 1974 dollar values in a typical election cycle with primary and general elections, an individual should be able to contribute $9,334 to a candidate, not a mere $5,000, and a party committee or multicandidate PAC should be able to contribute $46,670 to a candidate, not a mere $10,000. Though Congress found no corruption risk below these inflation-adjusted amounts, it failed to properly adjust the limits for inflation, thereby layering on yet another prophylaxis affecting the anti-circumvention analysis. For example, even if a contributor could somehow use a national party committee as a conduit for a $5,000 contribution to a candidate, the actual level at which Congress asserted a corruption risk is now worth $23,335.

Congress made the judgment that each of these base contribution limits (especially when coupled with the anti-political-committee-proliferation prophylaxis, *see supra*) eliminates any cognizable circumvention risk as to the entity to which the limit applies, e.g. giving $30,800 per year eliminates any circumvention risk as to a contribution to RNC. *See supra* at 11 (Conference Committee Report). Doing something that poses zero risk multiple times does not increase the risk. Zero multiplied by anything equals zero. Thus, there is no anti-circumvention justification for a biennial contribution limit, i.e., if there is no cognizable circumvention risk in giving $30,800 to RNC, NRSC, or NRCC, then there is no cognizable circumvention risk in giving that

amount to all of them in a year or to each per year in a biennium.

In BCRA, Congress instituted yet another prophylaxis against moving "massive" funds through conduit political committees in the form of non-federal funds, so-called "soft money." This prophylaxis was not instituted with a base limit and biennial limits on soft money, but by a total ban. This ban was upheld in *McConnell*:

> The question for present purposes is whether large *soft-money* contributions to national party committees have a corrupting influence or give rise to the appearance of corruption. Both common sense and the ample record in these cases confirm Congress' belief that they do. . . . [T]he FEC's allocation regime has invited widespread circumvention of FECA's limits on contributions to parties for the purpose of influencing federal elections.

540 U.S. at 145. This was so, the Court said, because "[i]t is not only plausible, but likely, that candidates would feel grateful for such donations and that donors would seek to exploit that gratitude." *Id. Citizens United* rejected the notion that influence on, access to, or gratitude from candidates was cognizable as corruption or circumvention. 130 S.Ct. at 909-10. Nonetheless, Congress's ban on soft-money contributions remains in effect for candidates and political committees, providing yet another prophylaxis preventing the movement of "massive" funds to political party committees and thereby in any way benefitting candidates.

In sum, *Buckley*'s circumvention concern was based on the movement of "massive" amounts of money to candidates through political parties and PACs. 424 U.S. at 38. This is now impossible because of prophylaxes preventing it.

(5) Congress Imposed an *Anti-Conduit* Prophylaxis by Many Prophylaxes.

By eliminating political-committee "proliferation" and "massive" contributions, along with failing to properly inflation-adjust the *Buckley*-era limits and banning soft money, Congress has imposed an *anti-conduit* prophylaxis, as is further clear from the following prophylaxis layers.

A limit on contributions to candidates is *itself* a prophylactic measure, layered atop other

prophylaxes designed to eliminate quid-pro-quo corruption. There is no inherent wrong in a large contribution to a candidate. Rather, the giving of financial quids for a political quos is wrong: "The hallmark of corruption is the financial quid pro quo: dollars for political favors." *NCPAC*, 470 U.S. at 497. In *Buckley*, two existing prophylaxes were asserted by challengers as sufficient to eliminate the dollars-for-favors risk, i.e., laws criminalizing *bribery* and requiring contribution *disclosure*. *See* 424 U.S. at 27-28. The *Buckley* Court decided that the challenged contribution limits were justified as an additional prophylaxis because "laws making [bribes] criminal . . . deal with only the most blatant and specific attempts of those with money to influence governmental action." *Id.* So a contribution limit is a prophylaxis, based on the idea that large contributions *pose* a sufficient quid-pro-quo-corruption *risk* to justify banning large contributions.

Buckley added another layer of prophylaxis by saying contribution limits could be based on the "*appearance* of corruption." *Id.* at 28 (emphasis added). Of course, restricting core political speech and association based on "appearance" is problematic for lacking a limiting principle. Reliance on such an "appearance" interest resulted in the broad concept of "corruption" in *McConnell*, which considered influence, access, and gratitude legitimate theories of corruption for banning soft money. *See* 540 U.S. at 44. *Citizens United* rejected such broad theories of corruption and limited *McConnell* to its soft-money context, 130 S.Ct. at 910, but the prophylactic "appearance" of corruption yet remains as justifying a base contribution limit to candidates.

Another prophylaxis involves *earmarking* and *false-name-contribution* laws. Earmarked contributions through an intermediary are deemed contributions from the original contributor, subject to that contributor's contribution limit, and subject to reporting. 2 U.S.C. 441(a)(8). And false-name contributions are barred. 2 U.S.C. 441f. So any effort to pass contributions to a candidate committee through another political committee (or any entity) must be done in one's own

name and subject to one's own limit or the effort is illegal and subject to stiff penalties.

But can there *be* any cognizable circumvention risk from truly *un*earmarked contributions? Obviously, an *un*earmarked contribution *to* a political party committee or a PAC is not a contribution "*to* a particular candidate," as *Buckley* suggested, 424 U.S. at 38 (emphasis added), though an earmarked contribution is a contribution to a candidate.[15] Unearmarked contributions are "to" the recipient party committee or PAC, not "to" a candidate. *See, e.g., id.* at 23 n.24 ("[D]ollars given *to* another person or organization that are earmarked for political purposes are contributions under the Act." (emphasis added)). So *Buckley*'s conduit concern was that if individuals gave "massive" contributions to a proliferation of party committees, some or all of those committees *might* decide (without being required) to contribute the permissible $1,000 to a candidate and (if there were many political committees and many decided to contribute) those $1,000 contributions *might* add up to a "massive" aggregate contribution to a candidate.

This conduit concern could not be about favorable independent *expenditures* because the independence of the expenditure eliminates any cognizable benefit to a candidate as a matter of law. *See Citizens United*, 130 S.Ct. at 908 (quoting *Buckley,* 424 U.S. at 47). So giving "massive" amounts of money for the purpose of making independent expenditures, e.g., to an IE-PAC,

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[15] The FEC eliminates conduits regarding contributions to party committees as follows:

> A contribution received by a party committee may count against the contributor's contribution limit for a particular candidate if:
>
> - The contributor knows that a substantial portion of his or her contribution will be given to or spent on behalf of a particular candidate; or
> - The contributor retains control over the funds after making the contribution (for example, the contributor earmarks the contribution for a particular candidate). 110.1(h), 110.2(h) and 110.6.

FEC, *Political Party Committees* at 15 (July 2009) (FEC Campaign Guide). "On behalf of" here means something like paying a candidate's bills, not making independent expenditures supporting a candidate, because contributions to IE-PACs may be earmarked for particular independent expenditures. *See, e.g.*, FEC AO 2010-09 (Club for Growth).

is not a cognizable conduit concern. Rather, the conduit concern is whether "massive" *contributions* can be made "to" candidates in excess of the individual limits on contributions to candidates through a proliferation of political committees, all without earmarking.

Without earmarking, there is no way to *assure* that any of the money one contributes to a political committee will ever make it to a particular candidate as a contribution (or even to be spent on independent expenditures intended to support the candidate). Once an unearmarked contribution is made, a political committee is free to do with the money as it wishes. National party committees have many demands on their funds. The odds that any funds from an unearmarked contribution might flow to a particular candidate are so low as to be noncognizable—even setting aside the fact that pooled funds become fungible.

Buckley tried to address this long-odds issue (though not the fungible issue) by saying that one might contribute "unearmarked contributions to political committees *likely* to contribute to that candidate, or huge contributions to *the candidate's political party*." 424 U.S. at 38 (emphasis added). *Buckley*'s acknowledgment that the constitutionality of this ceiling "ha[d] not been separately addressed at length by the parties," *id.*, is appropriate to recall here because there was no evidence cited that giving to a political party committee or a PAC is a viable way to get contributions to a candidate absent earmarking. Especially as applied to national party committees, which support numerous candidates and have many demands on their money, any conduit concern as to unearmarked funds would be either non-existent or so minuscule as to be noncognizable. And the sort of PAC most "likely to contribute to [a] candidate," *id.*, would be a single-candidate PAC (which can only receive a contribution of $5,000 per year and can only contribute $2,500 per candidate per election) not a multi-candidate committee (which can still only receive $5,000 per year, but can contribute $5,000 per candidate per election). So trying to contribute "to" a candi-

date through a party or PAC without earmarking is uncertain, inefficient, and unlikely to succeed—impossible in any cognizable amount—making it more likely that a would-be "massive" contributor would simply spend the money on independent expenditures supporting the candidate or contribute earmarked funds to an IE-PAC for independent expenditures favorable to the candidate. *See* VC ¶¶ 59-62 (recent rapid rise in IE-PAC expenditures). *See also* Alicia Mundy & Sara Murray, *Adelson Gives $10 Million to Pro-Romney Super PAC*, Wall St. J., June 13, 2012, http://blogs.wsj.com/washwire/2012/06/13/adelson-gives-10-million-to-pro-romney-super-pac/.

Even if a contributor's unearmarked contribution to a political committee could somehow be attributed to a political-committee contribution to a candidate, it only would be *attributable on a pro-rata basis* because unearmarked contributions become a fungible part of all contributions received (which in turn are added to funds carried over from prior election cycles). Consider if a contributor gives $30,800 in 2011 and 2012 to RNC, totaling $61,600. RNC's biennial contributions received for 2011 through April 30, 2012 totaled $126,625,901.[16] As a share of these contributions, $61,600 is a minuscule share (.05%) that will shrink as the general election nears and contributions to RNC increase.[17] This sort of pro-rata share would have to be applied to any national party committee contribution to a candidate to determine the contributor's share of the contribution. And since the limits on contributions to national party committees and by them to candidates already eliminate any circumvention risk, *see supra* at 11 (Conference Committee Report), a contributor's minuscule share of any contribution to a candidate is noncognizable as a

[16] *See* VC ¶¶ 51 (2011 net contributions = $82,112,485), 52 (2012 through April 30 net contributions = $44,513,416).

[17] In the 2007-08 presidential election cycle, RNC received $286,111,959 in contributions. *See* VC ¶ 47 (2007 net contributions = $82,925,219), 48 (2008 net contributions = $202,541,855).

governmental interest justifying biennial contribution limits, which are thus meaningless prophylaxes atop existing prophylaxes.

This pro-rata analysis also applies to multicandidate PACs, which must have at least 51 contributors and must contribute to 5 or more candidates. So if 51 contributors gave $5,000 per year (total = $255,000) to a PAC that gave $5,000 to a candidate, the share per contributor (if there were only one contribution to a candidate) would be under 2%, i.e., under $100. But multicandidate PACs must contribute to at least 5 candidates, which would total $25,000 if each receives $5,000. A PAC with $255,000 is likely to make more than 5 contributions, since contributions are its reason to exist (else it would be an IE-PAC). If the PAC uses all $255,000 to make contributions to candidates in a general election, it could contribute $5,000 to 51 candidates. And a contributor's $5,000 contribution would be under 2% of the total contributions made, i.e., under $100 each when spread among 51 candidates. Even if a contributor could find multiple PACs that might be "likely" to contribute to a favored candidate, the pro-rata shares involved would be minuscule and noncognizable to support a biennial contribution limit.

Moreover, even if numerous contributors try to use a political committee as a conduit to get pro-rata contributions to a candidate, there is the barricade of the limit on contributions *to* a candidate. For example, if a $5,000 per candidate per election contribution *has already been made* by a multicandidate committee, then no matter how many contributors give in the hope of triggering a contribution to the candidate, no more can go to the candidate. The limits on contributions *to* and *by* political committees eliminate any cognizable circumvention risk.

In addition to the permitted $5,000 per candidate per election contribution limit, a political party's national committee has spending authority under 2 U.S.C. 441a(d) (the "Party Expendi-

ture Provision") for expenditures coordinated with federal candidates.[18] "The national committee may designate (in writing) the party's national Senatorial Committee or national Congressional Committee to spend its allowance with respect to a particular nominee, but those committees do not have separate spending limits." FEC, *Congressional Candidates and Committees* at 43 (2011), www.fec.gov/pdf/candgui.pdf. Thus, *Buckley*'s political-committee-proliferation concern is resolved.[19] *Buckley*'s "massive"-contribution-conduit concern is resolved by the facts that the limit of $30,800 per year on contributions to national party committees remains in effect and that the Party Expenditure Provision limits were upheld as to coordinated expenditures in *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) ("*Colorado-II*"). The Court held that parties could not engage in unlimited expenditures coordinated with their candidates but had to be restricted because "they act as agents for spending on behalf of those who seek to produce obligated officeholders." *Id.* at 452. So *Colorado-II* reiterated *Buckley*'s concern about political parties serving as conduits for circumventing contribution limits. (The dissent disputed that the evidence showed any corruption or circumvention concern. *Id.* at 475-80.) But, the Court added, "[i]t is this party role . . . that the Party Expenditure Provision targets." *Id.* This *targeting* by Congress was its cure for any possible circumvention, and it was the level at which Congress perceived a potential problem and asserted an interest. Thus, the combination of the

[18] *See* FEC, *2012 Coordinated Party Expenditure Limits*, www.fec. gov/info/charts_441ad_2012.shtml. For example, RNC, NRSC, and NRCC share a limit on coordinated spending "on behalf of Presidential, Senate and House nominees." *Id.* This Party Expenditure Limit ranges from $21,684,200 for Presidential nominees down to $45,600 for House nominees in states with more than one representative. *Id.*

[19] The same is true for the additional $43,100 (currently) per election cycle contribution authority for a national party committee to give to a Senate candidate per campaign, which must be "shared by the national committee and the national Senate campaign committee." FEC, *Contributions Brochure* at 2 n.5. *See also* 2 U.S.C. 441a(h); 11 C.F.R. 110.2(e).

base contribution limit on individual contributions to national party committees and the Party Expenditure Provision limits eliminate any "massive" contributions "to" candidates through parties and any cognizable anti-circumvention interest.

Putting these figures together, here is what would be permissible if the biennial contribution limits are held unconstitutional as applied to national party committees. An individual could give the base contribution limit of $30,800 per year per biennium per national party committee to RNC, NRSC, and NRCC for a biennial total of $184,800. This individual could then also give a biennial total of $46,200 to state-party committees and PACs. For example, this individual could give $10,000 per year per biennium to a state party committee (total = $20,000); $5,000 per year per biennium to 2 PACs (total = $20,000); and $5,000 one year and $1,200 a second year to another PAC (total = $6,200). There is no possible movement of "massive" contributions to candidates through a proliferation of parties and PACs. There are no "massive" contributions to political committees to begin with, and the contributor's pro-rata share of contribution to any political committee and of any political committee's contribution to a candidate are noncognizable as circumvention because of existing base limits absent the biennial limits.

From this review of *Buckley*'s conduit concerns as applied, it is clear that Congress has created prophylaxes on prophylaxes that have eliminated *Buckley*'s concerns. *See* 424 U.S. at 38. The 1976 Conference Report specifically said that Congress was amending FECA to eliminate these concerns. *See supra* at 11-12. Because *Buckley*'s conduit concern is already amply addressed *without* the biennial contribution limits, there remains no justification for the $70,800 biennial limit on contributions to national party committees. This limit is a vestigial appendage lacking constitutional justification. It is simply layering prophylaxis on prophylaxes without justification and in a manner that is broader than necessary to address the expressed circumvention

concern.[20]

c. The Challenged Limit Relies on an Unconstitutional Equalizing Interest.

Because the biennial contribution limit as applied is not justified by any anti-circumvention interest, it serves only to level the playing field, limiting persons who could give a biennial total of $184,800 to three national party committees (under the base contribution limits) to just $70,800. *Buckley* rejected any equalizing interest:

> [T]he concept that government may restrict the speech of some elements of our society . . . to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed "to secure 'the widest possible dissemination of information from diverse and antagonistic sources,'" and "'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"

424 U.S. at 48-49 (citations omitted). And again, "[t]he ancillary interest in equalizing the . . . resources of candidates . . . , therefore, provides the sole relevant rationale for . . . [the] expenditure ceiling. That interest is clearly not sufficient to justify the provision's infringement of fundamental First Amendment rights." *Id.* at 54. Moreover, "[i]n the free society ordained by our Constitution it is not the government, but the people individually as citizens and candidates and collectively as associations and political committees who must retain control over the quantity and range of debate on public issues in a political campaign." *Id.* at 57. *Citizens United* again rejected any equalizing interest, including the anti-distortion rationale used to ban corporate independent expenditures. 130 S.Ct. at 904. That rejected interest cannot support a biennial contribution limit.

[20] Moreover, Congress's assertion of an anti-circumvention interest is underinclusive because PACs have no biennial aggregate limit. Multi-candidate PACs, as deeply interested in legislative outcomes as individual contributors, may contribute $5,000 to as many candidates as they can afford. *Cf. Republican Party of Minnesota v. White*, 536 U.S. 765, 780 (2002) ("As a means of pursuing the objective . . . that respondents now articulate, the [challenged provision] is so woefully underinclusive as to render belief in that purpose a challenge to the credulous").

C. (Count 2) The Biennial Limits on Contributions to Non-Candidate Committees Are Facially Unconstitutional for Lacking a Cognizable Interest.

McCutcheon and RNC challenge the biennial contribution limits (currently $70,800 and $46,200) on contributions to non-candidate committees at 2 U.S.C. 441a(a)(3)(B) as facially unconstitutional under the First Amendment rights of speech and association. As noted above, the post-*Buckley*, 1976 FECA amendments eliminated the two bases on which *Buckley* relied, 424 U.S. at 38, to facially uphold the now-repealed and replaced "overall $25,000 ceiling," i.e., there can no longer be either political-committee proliferation or the risk of circumvention of contribution limits by moving "massive" amounts of money through party committees or PACs "to" candidates. *See supra* 10-12. Thus, there is no cognizable interest to justify these biennial contribution limits as applied to any non-candidate committees, so they are facially unconstitutional.

These biennial contribution limits are facially unconstitutional for being substantially overbroad under the analysis of *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). This Court is justified in "prohibiting all enforcement" of the limits because their application to protected speech and association is substantial, "not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications." *Virginia* v. *Hicks,* 539 U.S. 113, 119-20 (2003). The unconstitutional application of 2 U.S.C. 441a(a)(3)(B) to all national party committees is substantial, not only in an absolute sense, but also in a relative sense, especially because there is no "scope of . . . plainly legitimate applications" due to the lack of legitimate application to state party committees and PACs, as set out in the preceding paragraph.

Because the $46,200 sub-limit on contributions to non-national party committees is an integral part of 2 U.S.C. 441a(a)(3)(B), because Congress thereby indicated its intention that the provision operate as a unit, and because the sub-limit is dependent grammatically on the whole of

441a(a)(3)(B) for its meaning, this sub-limit must fall facially with the whole provision.

D. (Count 3) The Biennial Limits on Contributions to Non-Candidate Committees Are Unconstitutionally Too Low, as Applied and Facially.

McCutcheon and RNC challenge the limits on contributions to non-candidate committees at 2 U.S.C. 441a(a)(3)(B) as unconstitutional for being too low, as applied to national party committees and facially, under *Randall v. Sorrell*, 548 U.S. 230 (2006). *Randall*'s analysis rejects contribution limits "fail[ing] to satisfy the First Amendment's requirement of careful tailoring" by "impos[ing] burdens upon First Amendment interests that (when viewed in light of the statute's legitimate objectives) are disproportionately severe." *Id.* at 237 (plurality).

McCutcheon's contributions to non-candidate federal committees in this biennium total $27,328, and, if he is permitted to exceed the $70,800 biennial limit by contributing $25,000 each to RNC, NRSC, and NRCC, his total biennial contributions to non-candidate committees would total $97,000. The current biennial limit on contributions to non-candidate committees (including national party committees, state party committees, and PACs) is $70,800, of which no more than $46,200 may go to non-national-party committees. 2 U.S.C. 441a(a)(3)(B).

In *Randall*, the Supreme Court struck down as too low a $400 limit on contributions an individual may make, over a two-year period, to a state party committee. *Id.* at 262 (plurality opinion). The state party committee at issue in *Randall* needed funds to reach the voters in a population of 621,000, *see id.* at 250 (Vermont population in 2006). Applying *Randall*'s analysis to the current $70,800 biennial limit as applied to national party committees shows its unconstitutionality. RNC and its sister committees need funds to reach the voters in a population of over 308,000,000, *see* http://2010.census.gov/2010census/data/ (2010 United States population was 308,745,538). A ratio shows that contributions of $198,389.69 over two years to the national

committees of one political party—RNC, NRSC, and NRCC—would still be too low under *Randall.* ($400/621,000 = $198,389/308,000,000). The $30,800 per national-party committee per year that individuals are permitted to give under 2 U.S.C. 441a(a)(1)(B) would result in $184,800 to the party committees per biennium. This $184,000 is much closer to the $198,389 ratio derived from *Randall*. But the national party committees cannot accept these otherwise legal amounts because of the $70,800 biennial limit, which is far too low to be constitutional. The biennial limit frustrates an individual's right to meaningfully associate with the national committees of his political party and to fund robust political discussion.

This $70,800 biennial contribution limit is also facially unconstitutional as too low because it is substantially overbroad under *Broadrick*, 413 U.S. at 613. This $70,800 limit applies to national party committees, state party committees (also district and local party committees), and PACs. This Court is justified in "prohibiting all enforcement" of the limit because its application to protected speech and association is substantial, "not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications." *Hicks,* 539 U.S. at 119-20. Its unconstitutional application to all national party committees is substantial, not only in an absolute sense, but also in a relative sense.

Because the $46,200 sub-limit on contributions to non-national party committees is an integral part of 2 U.S.C. 441a(a)(3)(B), because Congress thereby indicated its intention that the provision operate as a unit, and because the sub-limit is dependent grammatically on the whole of 441a(a)(3)(B) for its meaning, this sub-limit must fall facially with the whole provision.

E. (Count 4) The Biennial Limit on Contributions to Candidate Committees Lacks a Constitutionally Cognizable Interest.

McCutcheon challenges the $46,200 (currently) biennial limit on contributions to candidate

committees at 2 U.S.C. 441a(a)(3)(A) as unconstitutional for lacking a constitutionally cognizable interest to justify it. This limit severely burdens McCutcheon's right to free speech and association. It is the functional equivalent of a ban on an individual associating with the candidates of his choosing because it has the effect of prohibiting contributions to "too many" candidates.

Even candidates who do not represent Mr. McCutcheon's home district or state have a direct effect on him and the implementation of his principles, such as by chairing committees or subcommittees, controlling the legislative agenda through congressional leadership, being staunch advocates for certain issues or co-sponsors of key legislation. So McCutcheon has as much interest in being involved in races outside his home district and state as within them. But this biennial limit restricts contributors' ability to do so by forcing nonsensical tradeoffs, e.g., (an arbitrary example), contributors just under their biennial limit might have to choose between their belief in a strong national defense (by donating to the ranking member of the Senate Armed Services Committee) and a free economy (by donating to the chair of the House Commerce Committee).

The biennial limit on contributions to candidate committees should be subjected to strict scrutiny because it substantially burdens McCutcheon's right to free speech and association with the candidates of his choosing. Because the base contribution limit at 2 U.S.C. 441a(a)(1)(A) already limits contributions to candidate committees, the biennial limit is effectively a limit on expenditures and should be considered under the scrutiny applicable to expenditures. Alternatively, if this Court considers the aggregate limit to be a contribution limit, though the U.S. Supreme Court has treated contributions and expenditures to different standards of scrutiny, 441a(a)(3)(A)'s serious burden on speech and association means *Buckley*'s holding that contribution limits are subject to less rigorous "exacting scrutiny," 424 U.S. at 19-23, 25, must be revisited. But under either level of scrutiny, McCutcheon should prevail.

Section 441a(a)(3)(A) fails strict scrutiny because it is not supported by a compelling government interest. *See Randall*, 548 U.S. at 267 (2006) (Thomas, J. dissenting) ("I would subject contribution limits to strict scrutiny, which they would fail"). Alternatively, under exacting scrutiny, the limit fails exacting scrutiny because it is not supported by a sufficient government interest. The U.S. Supreme Court has rejected any theory of corruption beyond actual financial quid pro quo, such as preventing candidate influence, access, or gratitude, which do not constitute corruption. *See Citizens United*, 130 S. Ct. at 909-10. The Supreme Court has expressly and thoroughly rejected the "antidistortion" rationale as a cognizable justification for contribution limits. *See, id.* at 912. *See also Davis*, 554 U.S. at 741-42 ("[T]he concept that the government may restrict the speech of some . . . to enhance the relative voice of others is wholly foreign to the First Amendment.") (quoting *Buckley*, 424 U.S. at 48-49); *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2826 (2011).

Though an anti-corruption interest may justify contribution limits, *see Citizens United*, 130 S.Ct. at 909-10; *Davis*, 554 U.S. at 741-44; *Buckley*, 424 U.S. at 26-28, it does not apply because the biennial limit does not apply to any contribution to a *particular* candidate (essential to a cognizable quid-pro-quo-corruption risk) and McCutcheon's contributions will be within the base contribution limits, which preclude any quid-pro-quo-corruption risk.

This biennial aggregate contribution limit is not supported by an anti-circumvention interest, the only cognizable interest that could support it. *Buckley* did not even suggest that the old "overall $25,000 ceiling" might be justified by the use of candidate committees as conduits. Contributions to candidate committees posed no threat that a "person . . . might . . . contribute *massive* amounts of money to a particular candidate through the use of unearmarked contributions *to political committees likely to contribute to that candidate*, or huge contributions *to the candi-*

date's political party." 424 U.S. at 38. No "massive" funds could be channeled through candidate committees because candidate committees were "persons" limited to contributing $1,000 per election to candidates or candidate's committees under the FECA scheme that *Buckley* considered. In 1980 Congress enacted a new limit of $1,000 per election on contributions from candidate committees to candidates committees, *see* Pub. L. No. 96-187, 93 Stat. 1339 (1980), codified at 42 U.S.C. 432(e)(3)(A)-(B), which was increased to $2,000 in 2004, *see* Pub. L. No. 108-447, 118 Stat. 2809 (2004). *See* 11 C.F.R. 102.12(c)(2) and 102.13(c)(2) (same). Consequently, contributions to candidate committees could not pose any possibility of circumvention by "massive" contributions to candidate committees that might somehow benefit other candidates. Even Congress itself clearly does not view contributions to candidate committees as posing a circumvention risk. *See CMA*, 453 U.S. at 198 n.18 (quoted *supra* at 11).

The fact that this biennial aggregate limit is not remotely directed at quid-pro-quo corruption or circumvention—but is directed at a noncognizable anti-distortion interest—is demonstrated by simple arithmetic. In 2006, the Supreme Court invalidated a contribution limit of $200 per election to statewide candidates passed by the Vermont legislature, holding that it was unconstitutionally low. *Randall*, 548 U.S. at 249, 262-63. Vermont's population in 2004 was 621,000, *id.* at 250, well below the population of the average congressional district, i.e., 646,947.[1] By comparison, in 2006 the biennial aggregate contribution limit was $40,000. If an individual wanted to make a contribution of equal value to one candidate of his choice in all 468 federal races that year (435 House races, 33 Senate races, and the presidential race), in order to comply with 2 U.S.C. 441a(a)(3)(A), he would have been limited to contributing only $85.29 per candidate for

[1] In 2000, the population of the average congressional district was 646,947 (dividing the U.S. population, 281,421,90, *see* http://www.census.gov/main/www/cen2000.html, by 435).

the entire 2006 election cycle, which amounts to $42.64 per election (primary and general). That is far below the $200 limit held too low in *Randall*. In the 2012 biennium, with an aggregate limit of $46,200, McCutcheon is limited to $98.71 per candidate for the entire cycle (468 races). This amounts to a mere $49.35 per election—and leaves out the fact that thirty-three of those races are statewide races for Senator, requiring candidates to reach an average of 8.7 times the number of persons needed to be reached in a congressional campaign. Aside from being too low under *Randall*, *see infra* Count 5, considering that $49.35 is $2,450.65 less than the per-candidate limit Congress itself deems permissible, it is clear—based on the math alone—that the aggregate limit has nothing to do with preventing corruption or circumvention.

Instead, the math demonstrates that this restriction furthers only the antidistortion goals, an illegitimate government purpose. *See, e.g.*, *Davis*, 554 U.S. at 741-42. To the extent the government argues that, despite appearances, the aggregate limit is actually directed at quid-pro-quo corruption or circumvention, the fact remains that this limit operates in addition to the base per-candidate limit, which McCutcheon does not challenge. The burden is on the FEC to demonstrate how an aggregate limit on contributions to candidates addresses a threat of corruption. The court should not defer to Congress's judgment on the scope of the corruption threat and the constitutionality of responses thereto because incumbents are not motivated to protect candidates challenging their hold on power. *See Randall*, 548 U.S. at 270 n.2 (Thomas, J., concurring). While prior holdings of the Supreme Court have extended deference to Congressional judgment on contribution limits, *see, e.g.*, *Davis*, 554 U.S. at 737, those holdings should be revisited, if necessary, though the Supreme Court has since clarified that deference must yield to the First Amendment. *See Citizens United*, 130 S. Ct. at 911 ("When Congress finds that a problem exists, we must give that finding due deference; but Congress may not choose an unconstitutional remedy.").

As noted, *Buckley* did not even suggest that contributions to candidates might pose the circumvention risk because there was no possibility of "massive" amounts moving through candidate committees "to" candidates. 424 U.S. at 38. And there was no candidate-committee proliferation problem because each candidate had only one principal-campaign committee, *id.* at 187, and contributions to any authorized candidate committee were deemed made to the candidate, *id.* at 189-90. So *Buckley*'s concerns in upholding the old ceiling simply did not exist with respect to individuals' contributions to candidates.

This remains true because individuals now may contribute a mere $2,500 per candidate per election and candidate committees may contribute only $2,000 per candidate per election to other candidates. *See supra* at 19. Moreover, "[a]ll authorized committees of the same candidate for the same election to Federal office are affiliated," 11 C.F.R. 100.5(g)(1), so there is no proliferation. Yet in BCRA, Congress acted as if the circumvention risk somehow had *increased* by restricting what contributors could do in three ways.

First, it failed to properly adjust for inflation from the 1974 FECA scheme that *Buckley* considered. The old $1,000 limit on a person's contribution to a candidate is now worth $4,667, not the current $2,500 limit, and an individual should be able to contribute $9,334 to a candidate for a primary- and general-election cycle, not the current mere $5,000 *See supra* at 21. And in 1974, if an individual wanted to give his whole "overall $25,000 ceiling" to candidates, that biennial ceiling is now worth $116,676, not the $46,200 biennial limit currently allowed for contributions to candidates. *See supra at* 20.

Second, BCRA decreased the number of candidates with which a contributor may associate by giving the maximum contribution. Under *Buckley*'s old "overall $25,000 ceiling" on contributions, an individual deciding to give all of his ceiling to candidates could contribute the maxi-

mum amount per election ($1,000) to 25 candidates in a biennium. Under BCRA's new $46,200 biennial limit on contributions to candidates, an individual may contribute the maximum amount per election ($2,500) to 18 candidates in a biennium (with a $1,200 contribution to another). Or if an individual gave to each candidate in both primary and general elections, a contributor giving the maximum amount under *Buckley*'s "ceiling" could give to 12 candidates (with a $1,000 contribution to another) but under BCRA could only give to 9 candidates (with $1,200 to another).

Third, Congress isolated candidate contributions in BCRA's biennial contribution limits by giving them their own limit (currently $46,200) that is not dependent on what an individual contributed to non-candidate committees. 2 U.S.C. 441a(a)(3). Thus, Congress decided that giving solely to candidates posed a circumvention interest. This is unlike the "overall $25,000 ceiling" on *all* contributions that was facially upheld in *Buckley*, *see* 424 U.S. at 38, which included contributions to candidates, party committees, and PACs in one ceiling. Thus, there can be no argument now that this biennial limit is analytically part of an anti-circumvention package with contributions to party committees and PACs. Rather, this $46,200 biennial limit must be justified solely on the basis that the government can establish a clear anti-circumvention interest as applied to individual contributions to candidate committees.

Congress has failed to justify these changes by explaining how there is a greater circumvention risk now than in 1974. Of course, there was no risk then, and there is no greater risk now, because (a) *Buckley* expressed no conduit concerns as to candidate committees, (b) there were was no conduit potential in 1974, and (c) anti-proliferation provisions and contribution limits enacted in 1976 eliminated any conduit concerns the *Buckley* Court might have had. Because there are limits on contributions to candidate committees ($1,000 when *Buckley* was decided and now $2,500 per candidate per election), there is neither a quid-pro-quo-corruption risk as to that

candidate nor any "massive" contribution to be passed along to another candidate in circumvention of the base contribution limits. Consequently, there is no cognizable interest to justify the biennial contribution limit as applied to contributions to candidates or candidate committees.

It strains credulity to suggest that officeholders desire so little the hard-money funds they receive from individuals that they would forward them on to another candidate and credit the original, individual contributor. The more likely scenario is that the officeholder would credit *himself* with the $2,000 in support and not credit the initial individual contributor at all. After all, the leadership PACs, which are non-connected committees controlled by an officeholder, exist to propel the officeholder into leadership positions, not to credit the initial, individual contributors that in turn fund leadership PAC contributions to other candidates. Bundlers of campaign contributions also exist. *See* 2 U.S.C. 441a(a)(8); 11 CFR 110.6. But bundling aggrandizes the bundler not the individuals who make $2,500 contributions via the bundler.

This is true even absent earmarking, though earmarking contributions to a candidate via another officeholder's authorized committee is already illegal, 2 U.S.C. 441a(a)(8) and 441f. Individuals even suggesting that the first officeholder forward $2,000, *see* 2 U.S.C. 432e(3)(B), of the original $2,500 contribution, *see* 2 U.S.C. 441a(a)(l)(A), to another candidate violate the earmarking prohibition. Moreover, even if candidate committees could be deemed conduits absent earmarking, the $2,000 contribution limit raises no corruption concerns. If used to support a Senate candidate running statewide, $2,000 is only five times greater than the $400 limit struck down in *Randall* six years ago as too low to further a statewide campaign in Vermont. *Randall*, 548 U.S. at 253, 261-62. And "Vermont is about one-ninth the size of Missouri." *Id.* at 251.

In sum, because the biennial aggregate limit on candidate contributions at 2 U.S.C. 441a(a)(3)(A) is unsupported by any cognizable government interest, it fails constitutional scru-

tiny at any level of review.

F. (Count 5) The Biennial Limit on Contributions to Candidate Committees Is Unconstitutionally Too Low.

McCutcheon challenges the biennial limit on contributions to candidate committees (currently $46,200 per biennium) at 2 U.S.C. 441a(a)(3)(A) as unconstitutional because it is unconstitutionally too low. The reasons set out above, *supra* at 36 (first full paragraph), demonstrate the unconstitutionality of this biennial limit. Because the biennial aggregate limit on contributions to candidates, is set at an amount that prevents Mr. McCutcheon from meaningfully associating with all the candidates of his choice, it is set too low to pass muster under the First Amendment to the United States Constitution and must be invalidated. The biennial limit at 2 U.S.C. 441a(a)(3)(A) is unconstitutional under the First Amendment guarantees of free speech and association because it is not properly tailored because it is too low.

II. Plaintiffs Have Irreparable Harm.

In First Amendment challenges, once likely merits success is established, the other preliminary injunction elements follow as a result. *See, e.g.*, *Sammartano*, 303 F.3d at 973-74. "When a party seeks a preliminary injunction on the basis of a potential First Amendment violation, the likelihood of success on the merits will often be the determinative factor." *Joelner v. Village of Washington Park*, 378 F.3d 613, 620 (7th Cir.2004) (citing *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir.1998)). "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). "Given that First Amendment rights are at stake, the likelihood of irreparable harm is presumed." *Yamada v. Kuramoto*, 744 F. Supp. 2d 1075, 1085 (D. Haw. 2010). "[A]ny post-election remedy would not compensate . . . for the loss of the freedom of speech." *Brownsburg Area Pa-*

trons Affecting Change v. Baldwin, 137 F.3d 503, 507 (7th Cir.1998).[2]

Because Plaintiffs have likely success on the claim that their First Amendment rights are being violated, they have irreparable harm. As this Court has held in finding irreparable harm in *Carey*, "political speech is at the very core of the First Amendment. The right to speak effectively would be diluted if it does not include the right to pool money through contributions, for funds are often essential if advocacy is to be truly or optimally effective." 791 F. Supp. 2d at 133-34 (citations and quotation marks omitted). Plaintiffs want to make and receive contributions without regard to the biennial contribution limits. The political season is in full swing, with primaries ongoing, conventions upcoming, and a November election looming. If Plaintiffs lose this opportunity to make and receive contributions without regard to the challenged limits and to use them for core political activity protected by the First Amendment, the opportunity will be lost forever. Plaintiffs' rights are in fact being impaired now; there is nothing speculative about their claims.

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[2] *See also Byrum v. Landreth*, 566 F.3d 442, 445 (5th Cir. 2009) ("There appears to be no dispute over the appellants' entitlement to relief under the other criteria if their First Amendment rights were violated" (citing *Elrod*, 427 U.S. at 369-73); *Jones v. Caruso*, 569 F.3d 258, 277 (6th Cir. 2010) (likely success prong is "most important . . . and often determinative in First Amendment cases"); *Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008) (likely merits success in First Amendment case established irreparable harm and favorable equities balance and public interest); 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2948.1 (2d ed. 1995) (When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable harm is necessary.").

> The violation of an individual's constitutional guarantees is intolerable and undoubtably causes irreparable injury. The Supreme Court has recognized that "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod*, 427 U.S. at 372; *see also Newson v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) ("[E]ven minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief."). If [the challenged provision] does in fact violate Plaintiffs' constitutional freedom of association or speech, allowing its continued operation would cause Plaintiffs irreparable harm.

Foster v. Dilger, No. 3:10-cv-00041, 2010 WL 3620238, at *3 (E.D. Ky. Sept. 9, 2010) (memorandum and order granting preliminary injunction).

See Chaplaincy of Full Gospel Churches v. England, 454 F.3d 290, 301 (D.C. Cir. 2006) ("Where a plaintiff alleges injury from a rule or regulation that directly limits speech, the irreparable nature of the harm may be presumed.")

While Plaintiffs are irreparably harmed right now, that harm is ongoing and increases as time passes. Any contribution that Mr. McCutcheon cannot make now dilutes the amount of speech he can make in the 2012 primary elections and subsequent elections within the same biennium. Any contributions that RNC cannot now receive cannot be used before the coming general election and the opportunity for association with would-be contributors will be lost forever.

III. The Balance of Harms Favors Plaintiffs.

The balance of harms favors Plaintiffs. "[There can be no irreparable harm to [the government] when it is prevented from enforcing an unconstitutional statute because 'it is always in the public interest to protect First Amendment liberties.'" *Joelner*, 378 F.3d at 620 (quoting *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir.1998)). "The harm and difficulty of changing a regulation cannot be said to outweigh the violation of constitutional rights it perpetuates. It would be far worse that an election continue under an unconstitutional regime than the [government agency] experience difficulty or expense in altering that regime." *Foster*, No. 3:10-cv-00041, 2010 WL 3620238, at *7. In *WRTL-II*, the Supreme Court made clear that in any conflict between First Amendment rights and regulation, courts "must give the benefit of any doubt to protecting rather than stifling speech," and that "the tie goes to the speaker, not the censor." 551 U.S. at 469, 474 (controlling opinion). Thus, while the FEC can be said to have an enforcement interest, that interest cannot trump Plaintiffs' First Amendment rights.

IV. The Public Interest Favors Plaintiffs.

The public interest favors Plaintiffs. "'It is in the public interest not to perpetuate the uncon-

stitutional application of a statute.'" *Foster*, No. 3:10-cv-00041, 2010 WL 3620238, at *7 (quoting *Martin–Marietta Corp. v. Bendix Corp.*, 690 F.2d 558, 568 (6th Cir.1982). "[I]t is always in the public interest to prevent the violation of a party's constitutional rights."). *Martin-Marietta Corp.*, 690 F.2d at 568 (citation omitted). The government may not be heard to argue that it has an enforcement interest, that duly-enacted laws must be presumed constitutional, that there will be a 'wild west' scenario shortly before an election[3] or that the status quo must be preserved[4] if the First Amendment prescribes liberty. Such interests asserted for balancing harms or determining public interest are not cognizable if they were inadequate to defeat a determination of likely success on the merits. The First Amendment trumps all such interests.

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[3] "[F]inding these laws unconstitutional will not likely result in the type of chaotic 'wild west' scenario Defendants . . . foretell. Rather, it will simply result in the dissemination of more information of precisely the kind the First Amendment was designed to protect." *Ctr. for Individual Freedom, Inc. v. Ireland*, 613 F. Supp. 2d 777, 807 (S.D. W. Va. 2009) ("*CFIF*").

[4] The notion that a free speech and association plaintiff cannot get preliminary injunctive relief because of the status quo was recently rejected by a federal court:

> The purpose of a preliminary injunction is to preserve the status quo between the parties pending a final determination on the merits. *Merrill Lynch, Pierce, Fenner & Smith v. Grall*, 836 F. Supp. 428, 431-432 (W.D. Mich. 1993) (*citing University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981)). In this case, the status quo is the operation and enforcement of [the challenged contribution limit]. It could be argued that enjoining enforcement of the statute would be improper because doing so would disrupt the status quo rather than preserve it. However, the Sixth Circuit has held that "[t]oo much concern with the status quo may lead a court into error." *Stenberg v. Cheker Oil Co.*, 573 F.2d 921, 925 (6th Cir. 1978). There is no "particular magic" in the phrase "status quo." *Id.* "The purpose of a preliminary injunction is always to prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits." *Id.* If the current status quo is the cause of the irreparable injury, the Court should alter the status quo to prevent the injury. *Id.* In doing so, the Court returns to the "last uncontested status quo between the parties." *Id.* (*citing Ross-Whitney Corp. v. Smith Kline & French Laboratories*, 207 F.2d 190 (9th Cir. 1953)). Here, there is no bar to the Court granting a preliminary injunction because it would disrupt the "status quo."

Foster, No. 3:10-cv-00041, 2010 WL 3620238, at *2.

Conclusion

For the reasons shown, this Court should grant the requested preliminary injunction. And the Court should waive the bond requirement, Fed. R. Civ. P. 65(c), which is discretionary and appropriate to waive in constitutional challenges. *See Cobell v. Norton*, 225 F.R.D. 41, 50 n.4 (D.D.C. 2004); *Ogden v. Marendt*, 264 F. Supp. 2d 785, 795 (S.D. Ind. 2003).

Respectfully submitted,

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Certificate of Service

I hereby certify that the foregoing document was served on June 22, 2012 on the following persons by this Court's electronic case filing service ("ECF") (as applicable), by First Class U.S. Mail, and by a courtesy copy to Anthony Herman at aherman@fec.gov and Adav Noti at anoti@fec.gov:

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