NO. 12-536

In the
Supreme Court of the United States

SHAUN MCCUTCHEON AND
REPUBLICAN NATIONAL COMMITTEE,
Plaintiffs-Appellants,
v.
FEDERAL ELECTION COMMISSION,
Defendant-Appellee.

On Appeal from the United States District Court for the District of Columbia

BRIEF FOR APPELLANT SHAUN MCCUTCHEON

Dan Backer
Paul Henry Jossey
DB CAPITOL STRATEGIES, PLLC
Suite 2109
209 Pennsylvania Ave. SE
Washington, DC 20003

Michael T. Morley
Counsel of Record
223 Pawnee Rd.
Cranford, NJ 07016
(860) 778-3883
michaelmorleyesq@hotmail.com

Jerad Wayne Najvar
NAJVAR LAW FIRM
1 Greenway Plaza, Ste. 100
Houston, TX 77046

Counsel for Plaintiff-Appellant Shaun McCutcheon

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QUESTION PRESENTED

Do the Bipartisan Campaign Reform Act's aggregate limits on the total amount that an individual may contribute to all federal candidates, political party committees, and other political committees during a two-year federal election cycle, 2 U.S.C. § 441a(a)(3)(A)-(B), violate the First Amendment?

PARTIES TO THE PROCEEDING

Appellants in this case are Shaun McCutcheon and the Republican National Committee ("RNC").

Appellee is the Federal Election Commission ("FEC").

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The opinion of the United States District Court for the District of Columbia denying Appellants' motion for a preliminary injunction and dismissing the case is reported at 893 F. Supp. 2d 133 and reproduced in the appendix to the jurisdictional statement ("JS.App.") at JS.App.1a-17a. The district court's order granting final judgment to Appellee is reproduced at JS.App.17a.

JURISDICTION

The district court entered final judgment on September 28, 2012. Appellants filed a timely notice of appeal on October 10, 2012, and a jurisdictional statement on October 26, 2012. This Court noted probable jurisdiction on February 19, 2013. This Court has jurisdiction under § 403(a)(3) of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 113-14.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution, as well as the pertinent provisions of BCRA and the Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (Feb. 7, 1972), as amended by the FECA Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (Oct. 15, 1974), and the FECA Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (May 11, 1976), are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

This case presents a constitutional challenge to aggregate limits on contributions to federal

candidates and political committees. Aggregate contribution limits restrict the total amount of money an individual may contribute to all candidates or all political committees during an election cycle. Congress enacted the first federal aggregate contribution limit in a very different regulatory era, as a way of indirectly addressing numerous avenues through which a person could circumvent the statutory limit on contributions to a single candidate. Over the past few decades, however, Congress has fundamentally altered campaign finance law, eliminating the very avenues for circumvention that aggregate limits purport to avert. In doing so, Congress has also eliminated any legitimate justification for the severe First Amendment burden that aggregate contribution limits impose.

A. Aggregate Contribution Limits Under the Federal Election Campaign Act of 1971

The Federal Election Campaign Act ("FECA") marked the federal government's first major foray into campaign finance regulation. *See* Pub. L. No. 92-225, 86 Stat. 3 (Feb. 7, 1972), as amended by the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (Oct. 15, 1974). In an effort to respond to the scandalous corruption that had surfaced in the years preceding its enactment, FECA restricted both "contributions" to candidates for federal office and "expenditures" relating to a "clearly identified candidate." 18 U.S.C. §§ 608(b)-(c) (1970 ed., Supp. IV).

As to the former, FECA prohibited any person from contributing more than $1,000 per primary or

general election to a federal candidate. *Id.* §§ 591(a)(1), 608(b)(1), (b)(5). FECA defined the term "contribution" broadly to include "anything of value," thereby covering both cash and most in-kind gifts. *Id.* § 591(e)(1). Its anti-earmarking provision clarified that the statutory limits applied to all contributions made "directly or indirectly" to a candidate, including those that were "in any way earmarked" or "directed through an intermediary or conduit to such candidate." *Id.* § 608(b)(6).

FECA also prohibited political committees from contributing more than $5,000 per election to a federal candidate. *Id.* § 608(b)(2), (b)(5).[1] FECA defined a "political committee" as any committee, club, association, or other group that raised or spent more than $1,000 in a single year in connection with one or more federal elections. *Id.* § 591(d). A political committee could be formed by a national political party (*e.g.*, the RNC); a state or local political party; a candidate (typically referred to as the candidate's "principal campaign committee"); or like-minded individuals or groups (in which case the committee was referred to colloquially as a "political action committee" or "PAC").

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[1] Although FECA generally prohibited corporations and labor unions from contributing to candidates and political committees, it allowed them to establish special affiliated political committees called "separate segregated fund[s]"—funded by voluntary contributions from corporate shareholders and executives, or union members, respectively—from which contributions could be made. 18 U.S.C. § 610 (1970 ed., Supp. IV).

Notably, FECA did not specifically limit the amount an individual could contribute to a particular political party committee or PAC, or how much a PAC could contribute to a party committee or some other PAC. Moreover, FECA did not prevent a single person or entity from establishing multiple political committees; a single entity could form an endless stream of political committees, each of which could contribute up to $5,000 to the same candidate, *see id.* § 608(b)(2). In the absence of some other statutory restriction, an individual therefore could have circumvented FECA's $1,000 per-candidate contribution limit by contributing up to $5,000 in unearmarked funds to as many such committees as he wished, which in turn could have re-contributed those funds to a particular candidate.[2]

To address the possibility that contributors might exploit these aspects of the system to circumvent the limits on contributions to candidates, FECA imposed an aggregate ceiling of $25,000 on the total amount of contributions that an individual could make in a single year to all candidates and non-candidate committees combined. *Id.* § 608(b)(3). In doing so, Congress effectively limited (albeit in a somewhat indirect way) how much an individual could contribute to a political party committee, PAC, or series of related PACs.

This Court upheld FECA's aggregate contribution ceiling in *Buckley v. Valeo*, 424 U.S. 1

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[2] Surprisingly, FECA also allowed candidates to use political contributions for personal purposes unrelated to the campaign. *See* 2 U.S.C. § 439a (1970 ed., Supp. IV) (allowing contributions to be used for "any other lawful purpose").

(1976) (per curiam). The Court recognized that the ceiling burdened core First Amendment rights by "impos[ing] an ultimate restriction upon the number of candidates and committees with which an individual may associate himself by means of financial support." *Id.* at 38. It also noted, however, that the ceiling helped prevent contributors from circumventing FECA's base contribution limits. Without the ceiling, the Court explained, a person could legally "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 [make] huge contributions to the candidate's political party." *Id.* Accordingly, although the Court emphasized that the issue had "not been separately addressed at length by the parties," it concluded that FECA's aggregate contribution ceiling could be upheld as "a corollary of the basic individual contribution limitation." *Id.*

B. Aggregate Contribution Limits and Current Campaign Finance Law

In the more than 35 years since this Court decided *Buckley*, Congress has substantially altered its regulatory scheme, most notably through the FECA Amendments of 1976 and BCRA, to foreclose the avenues *Buckley* identified for circumvention of per-candidate contribution limits. Under BCRA's intricate, multi-layered scheme of contribution limits, an individual may contribute:

- $2,600 per election to a federal candidate, 2 U.S.C. § 441a(a)(1)(A);

- $10,000 per year to a state or local political party committee, *id.* § 441a(a)(1)(D);

- $32,400 per year to a national political party committee, *id.* § 441a(a)(1)(B);[3] and

- $5,000 per year to any other political committee (PAC), *id.* § 441a(a)(1)(C).[4]

These individual limits often are referred to as "base limits."[5]

Congress also has strictly limited contributions from political party committees and PACs. National, state and local party committees, as well as multicandidate PACs, may contribute up to $5,000

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[3] The six major national party committees are the Democratic National Committee ("DNC"), Republican National Committee ("RNC"), Democratic Senatorial Campaign Committee ("DSCC"), National Republican Senatorial Committee ("NRSC"), Democratic Congressional Campaign Committee ("DCCC"), and the National Republican Congressional Committee ("NRCC").

[4] Following this Court's decision in *Citizens United v. FEC*, 558 U.S. 310 (2010), an individual's contributions to a non-candidate, non-party political committee that makes independent expenditures (commonly referred to as a "Super PAC"), are not subject to contribution limits. *SpeechNow.org v. FEC*, 599 F.3d 686, 296 (D.C. Cir. 2010); *Carey v. FEC*, 791 F. Supp. 2d 121, 135 (D.D.C. 2011).

[5] BCRA itself established base limits lower than these on contributions to candidates and national party committees, but indexed them for inflation, leading to the higher figures specified above. *See* 2 U.S.C. § 441a(c)(1)(B). Its base contribution limits to state and local parties, and to other political committees, in contrast, are not indexed. The FEC announced the most recent limits, modified based on the consumer price index, on February 6, 2013. *See* FEC, *Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold*, Notice 2013-03, 78 Fed. Reg. 8,530, 8,532 (Feb. 6, 2013).

per election to any particular candidate[6] or PAC. *Id.* § 441a(a)(2)(A), (C).[7] Additionally, a multicandidate PAC may contribute a maximum of $15,000 to a national party committee or $5,000 to a state or local party committee each year. *Id.* § 441a(a)(2)(B), (C).[8]

These restrictions are bolstered by anti-proliferation rules, enacted shortly after *Buckley* in the FECA Amendments of 1976, which prevent individuals and entities from establishing multiple

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[6] One exception to this rule is that the national party committees and corresponding national senatorial campaign committees (*i.e.* the RNC and NRSC, or the DNC and DSCC) are collectively permitted to contribute a combined total of $35,000, indexed for inflation (currently $45,400), to a Senate candidate. 2 U.S.C. § 441a(h).

[7] Base limits on contributions from PACs and political party committees generally are not indexed for inflation. Non-multicandidate PACs are subject to most of the same base contribution limits as individuals, *see* 2 U.S.C. § 441a(a)(1)(A), although the aggregate limits do not apply to them, *id.* § 441a(a)(3).

[8] Although, as noted above, BCRA limits the amount that a national, state, or local political party committee may contribute to each candidate, 2 U.S.C. § 441a(a)(2)(A), political party committees of the same party may transfer unlimited amounts of funds to each other, *id.* § 441a(a)(4). Additionally, the national committee of each political party (*i.e.*, the DNC and RNC), as well as each party's state committees, may make a certain amount of coordinated expenditures with federal candidates "who [are] affiliated with such party." *Id.* § 441a(d)(1)-(3). These coordinated expenditures do not count against that party committee's base contribution limits to those candidates. *Id.* § 441a(d)(1). The exact amount of a national or state party committee's coordinated spending authority for each of its candidates is determined by a statutory formula. *Id.* § 441a(d)(2)-(3).

PACs in order to circumvent base limits. Under these rules, all contributions made by all political committees established, financed, maintained, or controlled by the same corporation, labor union, or other person—"including any parent, subsidiary, branch, division, department, or local unit" of any such entity—are "considered to have been made by a single political committee." *Id.* § 441a(a)(5). Thus, for example, all PACs set up by the AFL-CIO and its state and local bodies, or by state and local Chambers of Commerce, now "are treated as a single political committee." H.R. Rep. No. 94-1057, at 58 (1976) (Conf. Rep.). Additionally, federal law now prohibits candidates from "convert[ing]" campaign contributions "to personal use." 2 U.S.C. § 439a(b)(1). And a person may not evade any contribution limits by making a contribution using someone else's name or funds. *Id*. § 441f.

These fundamental changes in campaign finance law have eliminated *Buckley*'s rationale for upholding FECA's aggregate contribution ceiling. Because Congress now (among other things) directly limits the amount an individual may contribute to each political party committee or PAC and treats related PACs as a single entity, a person no longer may legally "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 [make] huge contributions to the candidate's political party." *Buckley*, 424 U.S. at 38. In other words, aggregate contribution limits are no longer needed to foreclose an otherwise-lawful method of circumventing per-candidate contribution limits.

Nevertheless, rather than doing away with this relic, BCRA imposed a new, more robust set of aggregate limits *on top of* its base contribution limits. Under BCRA, an individual currently may contribute a total of $48,600 to all federal candidates combined, *see* 2 U.S.C. § 441a(a)(3)(A),[9] and a total of $74,600 to all non-candidate political committees (*i.e.*, national party committees, state and local party committees, and PACs) combined, *see id.* § 441a(a)(3)(B), in any two-year federal election cycle.[10] Of the $74,600 that an individual may give to non-candidate committees, no more than $48,600 may be contributed to state and local party committees or PACs, *id.* § 441a(a)(3)(B). BCRA thus imposes the following aggregate limits on individuals for the current federal election cycle:

[9] All of BCRA's aggregate contribution limits are indexed for inflation. *See supra* note 4.

[10] A federal election cycle "begins on January 1 of an odd-numbered year and ends on December 31 of the next even-numbered year." 2 U.S.C. § 441a(a)(3).

Total contributions to candidate committees 2 U.S.C. § 441a(a)(3)(A)	$48,600
Total contributions to non-candidate political committees 2 U.S.C. § 441a(a)(3)(B)	$74,600
Total contributions to *any* non-candidate committees 2 U.S.C. § 441a(a)(3)(B)	$48,600
Additional amount that may be contributed *only* to national party committees	$26,000
TOTAL BIENNIAL LIMITS ON POLITICAL CONTRIBUTIONS	$123,200

Congress enacted these aggregate contribution limits *in addition to* the base limits on how much a person may contribute to any particular candidate, national party committee, state or local party committee, or PAC. Aggregate limits therefore prevent people from giving an otherwise permissible amount of money that Congress did not believe raised corruption-related concerns to "too many" different candidates or committees. For instance, under BCRA, an individual may contribute up to $5,200 to a single candidate in the current federal election cycle ($2,600 for both the primary and general elections) without creating a risk of corruption or the appearance of corruption that Congress deemed necessary to combat. *See* 2 U.S.C. § 441a(a)(1)(A); 78 Fed. Reg. at 8,532 (announcing current limits based on inflation). But if a person

contributes that same amount to more than nine different candidates for federal office, she would violate BCRA's $48,600 aggregate candidate contribution limit.[11] Similarly, while BCRA ostensibly permits a person to contribute up to $32,400 to a national party committee in every election cycle, its $74,600 aggregate limit on contributions to non-candidate committees means that a person may contribute the maximum amount to only two such committees.

C. The Proceedings Below

1. Appellant Shaun McCutcheon holds firm convictions about the proper role of government and the importance of ensuring that elected officials adhere to constitutional limitations on their authority. Compl. ¶ 22 (Doc. 1). He opposes numerous "ill-conceived and overreaching laws" and wishes to both express his support for and facilitate the election of federal officeholders who share his beliefs and will seek to advance them legislatively. *Id.* ¶¶ 22-24.

As of June 18, 2012, when the complaint in this case was filed, McCutcheon had contributed a total of $33,088 during the 2012 election cycle in congressional races across the nation—$1,776 to each of 15 challengers attempting to unseat incumbents. *Id.* ¶¶ 26-27. Each contribution complied with BCRA's base candidate contribution limit. *Id.* ¶ 29.

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[11] Under FECA as originally passed, in contrast, a person could contribute the full statutory amount of $2,000 to 12 different candidates without exceeding the aggregate contribution ceiling of $25,000. *See* 18 U.S.C. § 608(b)(1), (3) (1970 ed., Supp. IV).

McCutcheon also wished to contribute $1,776 to 12 other candidates for Congress, mostly non-incumbents interested in advancing the cause of liberty. Doing so, however, would have violated the aggregate candidate contribution limit of $48,600 per election cycle. *Id.* ¶¶ 28-30. Accordingly, BCRA's aggregate contribution limit prevented McCutcheon from associating with, demonstrating his support for, and assisting numerous candidates for federal office whom he believed share his political philosophy, and whose messages he embraced. *Id.* ¶¶ 30-33.

As of June 2012, McCutcheon also had contributed $1,776 to the RNC, the NRSC, and the NRCC, and a total of $27,328 to several other non-candidate committees during the 2012 election cycle. *Id.* ¶¶ 35-36. He did not earmark these contributions in any way. *Id.* ¶ 37. McCutcheon wished and intended to make further contributions to various non-candidate committees, including an additional $25,000 to each of the three Republican national party committees, which would have been permissible under BCRA's $32,400 base limit on contributions to national parties. *Id.* ¶¶ 37-38. He was unable to do so, however, because such contributions would have violated BCRA's $74,600 aggregate limit on contributions to non-candidate political committees. *Id.*

McCutcheon presently wishes to contribute a total of more than $60,000 to candidates intending to run in the 2013-14 election cycle, as well as a total of at least $75,000 to the three Republican national party committees, but BCRA's aggregate contribution limits prohibit him from doing so. *Id.* ¶¶ 32, 33, 38.

2. Appellant RNC is a national political party committee under federal law. 2 U.S.C. § 431(14). *The Rules of the Republican Party* charge the RNC with "the general management of the Republican Party, based upon the rules adopted by the Republican National Convention." Compl. ¶ 12. The RNC also promotes issue positions and supports candidates for office, with its primary electoral emphasis on presidential elections. *Id.* ¶ 44.

Although a core part of the RNC's mission, direct support to candidates makes up a relatively small portion of the RNC's overall spending. For example, during the 2012 presidential election, the RNC spent a total of $386,180,565, of which it contributed approximately 0.07% percent to candidates, and spent approximately 5.8% for coordinated expenditures with specific candidates (97% of the RNC's coordinated spending was on behalf of the party's presidential nominee).[12] In the 2009-10 non-presidential election cycle, the RNC spent a total of $210,769,855, of which approximately 0.03% was spent on direct candidate contributions, and 0.5% was spent on coordinated expenditures.[13]

The RNC wishes to receive the contributions McCutcheon would have made, and would make in the future, but for BCRA's aggregate limit on contributions to non-candidate committees. *Id.* ¶ 41. The RNC also has had to decline or refund contributions from other individuals that were

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[12] *See supra* note 8.

[13] These figures are available at http://www.fec.gov/finance/disclosure/candcmte_info.shtml.

permissible under the base national party contribution limit, but illegal under the aggregate limits. *Id.* ¶ 40.

3. On June 22, 2012, Appellants filed a five-count complaint before a three-judge panel of the U.S. District Court for the District of Columbia, pursuant to BCRA's special judicial review provisions, *see* BCRA, § 403, 116 Stat. 113-14. They alleged, among other things, that BCRA's aggregate limits on contributions to candidates (Count 4) and non-candidate committees (Count 2) are facially unconstitutional under the First Amendment. They also alleged that BCRA's aggregate non-candidate committee contribution limit is unconstitutional as applied to national political party committees, such as the RNC (Count 1). Accordingly, Appellants sought a preliminary injunction against enforcement of the challenged provisions. The FEC moved to dismiss the case.

D. The District Court's Decision

The panel held a consolidated hearing on the cross-motions, denied the preliminary injunction, and granted the FEC's motion to dismiss the case. JS.App.1a-17a. Notwithstanding the massive changes in campaign finance law since *Buckley* that now directly prevent circumvention of the base candidate contribution limit, the court concluded that BCRA's aggregate contribution limits are a valid anti-circumvention measure. JS.App.13a.

After acknowledging the "possibility that *Citizens United* undermined the entire contribution limits scheme," the court began its analysis by stating that limits on campaign contributions are

subject to a "lower" level of constitutional scrutiny "because they primarily implicate the First Amendment rights of association, not expression, and contributors remain able to vindicate their associational rights in other ways." JS.App.8a, 16a. According to the court, Congress may abridge this core First Amendment right so long as its restrictions are "'closely drawn to match a sufficiently important interest.'" JS.App.6a (quoting *McConnell v. FEC*, 540 U.S. 93, 136 (2003) (internal quotation marks omitted), *overruled in part on other grounds by Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010)).

The court noted that Congress has an "important interest" in preventing corruption, the appearance of corruption, and "circumvention of contribution limits imposed to further [those] anticorruption interest[s]." JS.App.9a. In the court's view, Congress' interest in combating corruption is not limited to bribery or *quid pro quo* arrangements, but also extends to preventing elected officials from "acting contrary to their representative obligations." JS.App.10a.

Turning to BCRA's aggregate contribution limits, the district court acknowledged that the avenue for circumvention this Court identified in *Buckley* no longer exists, JS.App.2, but hypothesized a new, rather convoluted avenue of circumvention that aggregate limits theoretically might help to foreclose. According to the court, without aggregate limits, conniving actors might form a joint fundraising committee "comprising a party's presidential candidate, the party's national party committee, and most of the party's state party committees," and a person "might" decide to contribute a half-million

dollar check to this hypothetical entity. JS.App.12a. Since local, state, and national political party committees "may transfer unlimited amounts of money" to each other, JS.App.12a (citing 2 U.S.C. § 441a(a)(4)), the court speculated that the various individual committees comprising this hypothetical joint fundraising committee "might" decide to transfer their shares of the contribution to a single party committee. JS.App.12a. The recipient committee, in turn, "might use th[at] money for coordinated expenditures" in consultation with a candidate. JS.App.12a. And that candidate, in turn, might feel "gratitude" toward the original contributor. JS.App.12a.

The court acknowledged that this daisy chain of events is rather far-fetched, as it is "unlikely that so many separate entities would willingly serve as conduits for a single contributor's interests." JS.App.12a. But because the court could "imagine" such a situation, it concluded that BCRA's aggregate limits are constitutional. JS.App.12a.

In doing so, the court recognized the severe burden that aggregate contribution limits impose on First Amendment rights. For example, it pointed out that if a person wished to contribute to one candidate in all 468 federal races (435 House races and 33 Senate races) in 2006, "he would be limited to contributing $85.29 per candidate for the entire election cycle." JS.App.14a. The court was not troubled by the resulting burden on constitutional rights, however, because it was satisfied that "individuals remain able to volunteer, join political associations, and engage in independent

expenditures." JS.App.15a. Accordingly, the court denied Appellants' motion for a preliminary injunction and dismissed the case.

SUMMARY OF ARGUMENT

BCRA's aggregate contribution limits impose an unconstitutional burden on core First Amendment activity. Aggregate contribution limits are a relic of a past era of campaign finance regulation and should have been discarded years ago. Because the circumvention problem they were originally designed to target no longer exists, aggregate limits are now left prohibiting constitutionally protected activity for no permissible reason. They are fundamentally incompatible with the First Amendment and cannot survive any meaningful concept of rigorous scrutiny.

While all contribution limits burden core First Amendment rights, aggregate contribution limits are far more invasive than base contribution limits that limit the amount a person may contribute to a particular candidate, political party committee, or PAC. Aggregate limits operate to prevent an individual from associating with, expressing support for, and assisting "too many" candidates, political party committees, or PACs in a single election. A limit on *how many* candidates or entities someone may associate with or support is fundamentally different in kind from a limit on *how much* someone may support or associate with any particular candidate or entity. The government therefore bears a particularly heavy burden in justifying this severe infringement on core First Amendment activity.

The government has not come close to meeting that burden. As a threshold matter, the government

has failed to establish that these limits further any important interest at all. Congress already has determined the threshold amount below which a contribution to a candidate, party committee, or PAC does not raise a cognizable corruption concern. Whether a person contributes that permissible amount to one candidate or 20 candidates makes no constitutional difference, as the risk of corruption or the appearance of corruption remains the same as to each candidate: non-cognizable. Accordingly, the only conceivable justification for aggregate limits is as a method of preventing circumvention of base contribution limits.

When this Court upheld FECA's ceiling on total contributions in *Buckley*, the government could make that anti-circumvention argument, as Congress had not limited the amount an individual could contribute to a political party committee or PAC at that time. In that context, FECA's ceiling served the anti-circumvention purpose of preventing individuals from funneling massive donations to candidates through political party committees and PACs, which otherwise would have been legal under FECA. Under current campaign finance law, that is simply no longer a realistic or legitimate concern. Current law not only imposes base limits on contributions to candidates, political party committees, and PACs, but contains numerous other, much more direct anti-corruption and anti-circumvention measures. Because the circumvention route this Court identified in *Buckley* is no longer legal, it is no longer something aggregate limits are needed to address.

Recognizing as much, the government has attempted to hypothesize new avenues of circumvention that aggregate limits theoretically might help foreclose. But even the district court was forced to concede that its proposed hypothetical was unlikely to occur, and the government has presented no evidence of such transactions ever happening. The circumvention problem the aggregate limits purport to target therefore remains a hypothetical one and nothing more. Even if the government's hypothetical scenarios were at all likely to occur, any cognizable risk of *quid pro quo* corruption would be alleviated by the absence of prearrangement or coordination between the initial contributor and the candidate who ultimately received the contributed funds. Accordingly, BCRA's aggregate limits in fact serve no purpose other than to "equalize" the relative ability of individuals to participate in the political process. That kind of equalization interest has no place in this context; the government may not seek to prevent people from exercising their First Amendment rights robustly.

In any event, even if some small sliver of the contributions that aggregate limits prohibit posed a circumvention or corruption problem, those limits would not be a closely drawn means of addressing it. Congress cannot effectively limit the number of candidates or political committees with which a person may associate based on a mere hunch that a few clever contributors might violate BCRA's earmarking provision and attempt to have a party committee or PAC funnel their contributions to a particular recipient. If Congress is truly concerned about joint fundraising committees or transfers of

funds between candidates, political party committees, or PACs, then it should devise a solution closely drawn to target that specific problem.

In short, BCRA's aggregate limits do not further any legitimate anti-corruption or anti-circumvention interest. Even if they did, they would be a drastically disproportionate response to any conceivable problem they might be designed to address. Accordingly, BCRA's aggregate limits impermissibly burden core First Amendment rights and are unconstitutional.

ARGUMENT

I. AGGREGATE CONTRIBUTION LIMITS SUBSTANTIALLY BURDEN FIRST AMENDMENT RIGHTS AND ARE SUBJECT TO RIGOROUS REVIEW.

Aggregate contribution limits burden core First Amendment rights and can survive only if they satisfy a rigorous form of constitutional scrutiny. While all contribution limits infringe First Amendment rights and are subject to exacting constitutional scrutiny, aggregate limits impose an especially pernicious constitutional burden, and therefore are that much harder for the government to justify. Unlike base contribution limits, which limit *the extent* to which an individual may associate herself with a single candidate or political party committee, aggregate contribution limits preclude a person from associating with, expressing support for, or attempting to assist *too many* candidates, parties, or political committees.

By preventing a person from making "too many" otherwise legal and innocuous contributions, aggregate limits effectively penalize those who wish

to exercise their First Amendment rights robustly. And this burden cannot easily be overcome, as there is an obvious practical limit to how many different candidates, parties, or political committees one person can support through on-the-ground efforts. Accordingly, the government bears a particularly heavy burden in justifying this severe imposition on constitutionally protected rights.

A. Contribution Limits Substantially Burden Fundamental First Amendment Rights.

1. Contribution limits substantially infringe the First Amendment rights of contributors, candidates, and political parties. "[T]he right of association is a basic constitutional freedom that is closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society." *FEC v. Nat'l Right to Work Comm.* ("*Right to Work*"), 459 U.S. 197, 206-07 (1982) (quotation marks and citations omitted). In a democratic society, the ability to associate with others in the political process is at the core of this fundamental right, "'enhanc[ing]'" the "'effective advocacy of both public and private points of view.'" *Buckley*, 424 U.S. at 15 (quoting *NAACP v. Alabama*, 357 U.S. 449, 460 (1958)).

This right to "join together 'for the advancement of beliefs and ideas' is 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.'" *Buckley*, 424 U.S. at 65-66 (quoting *NAACP*, 357 U.S. at 460). "'Making a contribution, like joining a political party, serves to affiliate a person with a candidate'" in an especially

"'important'" manner, and "'enables like-minded persons to pool their resources in furtherance of common political goals.'" *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 256 (1977) (Powell, J., concurring) (quoting *Buckley*, 424 U.S. at 22).

Contribution limits "impose direct quantity restrictions on political communications and association[.] … Rather than potentially deterring or diminish[ing] the effectiveness of expressive activity, these limits stop it cold." *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2838-39 (2011) (Kagan, J., dissenting) (internal quotation marks omitted); *see also Buckley*, 424 U.S. at 14, 23 (holding that limits on contributions to candidates or political party committees "operate in an area of the most fundamental First Amendment activities" and "implicate fundamental First Amendment interests"). Thus, limits on contributions to candidates or parties entail "significant interference" with associational rights. *Nixon v. Shrink Missouri PAC*, 528 U.S. 377, 387-88 (2000).

2. Contribution limits also infringe the First Amendment right to freedom of expression. Because a contribution "serves as a general expression of support for the candidate and his views," contribution limits restrict a person's "ability to engage in free communication." *Buckley*, 424 U.S. at 20-21; *see also id.* at 21 (noting that the size of a contribution provides a "very rough index of the intensity of the contributor's support for the candidate").

Indeed, many post-*Buckley* cases have recognized that the expressive component of political

contributions is even greater than that. The "right of association [and] the right of expression" often "overlap and blend" in the context of contribution limits. *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, Cal.*, 454 U.S. 290, 300 (1981). People who contribute to a candidate or PAC "obviously like the message they are hearing … and want to add their voices to that message; otherwise they would not part with their money." *FEC v. Nat'l Conservative Political Action Comm. ("NCPAC")*, 470 U.S. 480, 495 (1985); *see also Colo. Republican Fed. Campaign Comm. v. FEC* ("*Colorado I*"), 518 U.S. 604, 636 (1996) (Thomas, J., concurring) ("When an individual donates money to a candidate or to a partisan organization, he enhances the donee's ability to communicate a message and thereby adds to political debate, just as when that individual communicates the message himself."). For all of these reasons, this Court has long recognized that political contributions are "entitled to full First Amendment protection." *NCPAC*, 470 U.S. at 495.

3. In addition, contribution limits can "harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability." *Randall v. Sorrell*, 548 U.S. 230, 249 (2006) (plurality op.). As the government itself has pointed out, such limits can have "deleterious effects" on the political process and provide a "substantial advantage for wealthy candidates," by "mak[ing] it harder for candidates who are not wealthy to raise funds." *Davis v. FEC*, 554 U.S. 724, 743 (2008) (citing Br. for Appellee FEC at 33).

B. Aggregate Contribution Limits Infringe First Amendment Rights in Especially Pernicious Ways.

1. BCRA's aggregate limits on contributions to candidates and political committees impose especially pernicious burdens on First Amendment rights. Unlike a base contribution limit, which limits how much a person may give to any one candidate or political committee, an aggregate contribution limit "impose[s] an ultimate restriction upon *the number* of candidates and committees with which an individual may associate himself by means of financial support." *Buckley*, 424 U.S. at 38 (emphasis added).

In other words, although couched as limitations on *how much* someone may contribute, these provisions actually operate to prevent a person from associating with, demonstrating support for, and assisting "too many" candidates or parties in an election cycle. Particularly if an individual wishes to contribute the full legal amount of $5,200 ($2,600 for the primary and general elections) to the candidates she supports, the aggregate candidate contribution limit of $48,600 prohibits her from exercising that right as to more than a handful of candidates. The limit thus constrains "associational opportunities at the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community." *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 216 (1986).

Unlike a burden on *how much* someone may contribute to the candidates or committees she supports, a burden on *how many* candidates or

committees a person may contribute to cannot meaningfully be overcome through alternative avenues of exercising First Amendment rights. *Cf. Buckley*, 424 U.S. at 22 (noting that base contribution limits "leave the contributor free to become a member of any political association and to assist personally in the association's efforts on behalf of candidates"). Although an individual may be able to volunteer on behalf of a few local campaigns and place bumper stickers from several candidates on her vehicle, campaign contributions are the only realistic way to meaningfully and publicly demonstrate support for, associate with, and assist a variety of candidates and state parties, particularly when they are spread across the country.[14]

Alternatively, a person may reduce the size of her contribution to various candidates to whom she would otherwise contribute the legal maximum under the base limits, but that means diminishing the extent of her association with, expression of support for, and assistance to them. Accordingly, to the extent aggregate contribution limits leave open other avenues for exercising First Amendment rights, those avenues are much "more burdensome than the one it forecloses," *FEC v. Mass. Citizens for Life, Inc.*,

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[14] Even if a person practically were able to travel throughout the nation to personally associate with and volunteer on behalf of numerous candidates, BCRA limits her ability to do so. Under BCRA, a person may spend only $1,000 for unreimbursed travel expenses on behalf of a candidate (and $2,000 on behalf of "all political committees of a political party"). 2 U.S.C. § 431(8)(B)(iv). Any unreimbursed funds over that amount count as contributions to that candidate or party, which are subject to BCRA's base contribution limits. *Id.* § 441a(a)(1).

479 U.S. 238, 255 (1986) (plurality op.), which makes aggregate limits a far more substantial infringement on First Amendment rights than base contribution limits.

2. Indeed, BCRA's aggregate contribution limits are far more burdensome than the laws this Court invalidated in *Davis* and *Bennett*, which likewise imposed special burdens and penalties on individuals who chose to exercise their First Amendment rights robustly. *Davis* involved BCRA's so-called "Millionaire's Amendment," 2 U.S.C. § 441a-1(a), a provision that was triggered when a congressional candidate spent at least $350,000 of his own funds on the race and those personal expenditures substantially exceeded the campaign contributions he received from others. *Davis*, 554 U.S. at 736. Once triggered, the amendment raised the limits on contributions to *other* candidates in the race, allowed those other candidates to accept contributions from individuals who had reached the aggregate candidate contribution limit, and permitted political party committees to make unlimited coordinated expenditures on their behalf. 2 U.S.C. § 441a-1(a). The Court concluded that the Millionaire's Amendment imposed a "special and potentially significant burden" and "an unprecedented penalty" on a candidate who "robustly exercises [her] First Amendment right" to spend personal funds in support of her candidacy. *Davis*, 554 U.S. at 738-39. As the Court explained, Congress may not "require[] a candidate to choose between the First Amendment right to engage in unfettered political speech" and avoiding "discriminatory fundraising limitations." *Id*. at 739.

Similarly, in *Bennett*, this Court struck down a state law under which, "[o]nce a privately financed candidate has raised or spent more than [$21,479], each personal dollar spent by the privately financed candidate result[ed] in an award of almost one additional dollar to his opponent[s]." 131 S. Ct. at 2818. The *Bennett* Court held that, like the law in *Davis*, this scheme imposed "'a special and potentially significant burden' [on a privately funded candidate] when choosing to exercise his First Amendment right to spend funds on behalf of his candidacy." *Id.*

The Court further emphasized the especially severe burdens that the law imposed on the First Amendment rights of third parties who wished to make independent expenditures in support of the privately financed candidate. As the Court explained, "[o]nce the spending cap is reached, an independent expenditure group that wants to support a particular candidate … can only avoid triggering matching funds" for that candidate's opponents by either "opt[ing] to change its message from one addressing the merits of the candidates to one addressing the merits of an issue, or refrain[ing] from speaking altogether." *Id.* at 2819-20. The Court concluded that "[p]resenting independent expenditure groups with such a choice makes the matching funds provision particularly burdensome" to those third parties. *Id.* at 2820.

Aggregate contribution limits burden First Amendment rights in much the same way that the Court found impermissible in *Davis* and *Bennett*. They prohibit a person from exercising her

constitutional right to make contributions to an ideologically aligned candidate, political party committee, or PAC simply because she already has made "too many" other constitutionally protected contributions to entirely distinct candidates, political party committees, or PACs. Such a blanket prohibition on supporting candidates and political committees of choice is a "special" and "significant burden" on First Amendment rights. *Davis*, 554 U.S. at 739; *accord Bennett*, 131 S. Ct. at 2819-20.

Just as in *Davis* and *Bennett*, this significant burden is triggered by a person's decision to "robustly exercise [her] First Amendment right[s]," by associating herself with, and demonstrating her support for, too many different candidates, party committees, and PACs. *Davis*, 554 U.S. at 739; *accord Bennett*, 131 S. Ct. at 2818. Aggregate limits thus force people to choose between engaging in constitutionally protected association and expression up to the legal base limit with certain candidates and parties, and retaining the right to associate with, and express support for, other candidates and parties. *Cf. Davis*, 554 U.S. at 740 (the government may not force a person to choose between "abid[ing] by a limit" on constitutionally protected activities and "endur[ing] a burden" on his First Amendment rights); *Bennett*, 131 S. Ct. at 2820 (a law may not "forc[e] [a] choice" on people regarding their First Amendment rights).

3. Aggregate contribution limits also interfere with fundamental First Amendment rights in a subtler, more perfidious way—by splintering political parties and creating a conflict of interest among each party's various candidates, state political committees,

and national political committees. *Cf. Storer v. Brown*, 415 U.S. 724, 736 (1974) ("[S]plintered parties and unrestrained factionalism may do significant damage to the fabric of government."); *accord Tashjian*, 479 U.S. at 223. Aggregate contribution limits pit a party's various federal candidates, as well as its state and national party committees, against each other for the limited dollars that a person is legally permitted to contribute during that election cycle.

To take the simplest example, in the current election cycle, a contributor such as McCutcheon may wish to contribute the legal maximum of $32,400 to each of the Republican Party's three national political committees (*i.e.*, the RNC, which focuses primarily on presidential elections and party building; the NRSC, which focuses on Senate races; and the NRCC, which focuses on House races). *See* Compl. ¶ 38. The $74,600 aggregate political committee contribution limit, however, gives each national party committee a substantial incentive to dissuade such a potential contributor from giving the maximum $32,400 to each of the others, because he then would be legally prohibited from contributing any more than approximately $10,000 to the remaining committee.

A similar conflict of interest exists between the three national party committees and the various state party committees because every dollar that a person contributes to a state committee's federal account (up to the $48,600 sub-limit) is one less dollar she may contribute to a national party

committee.[15] This conflict exists among the various state party committees as well; generous contributions to a handful of Democratic or Republican state parties will quickly reach the $48,600 sub-limit, making it impossible for that contributor to associate with, demonstrate her support for, and realistically assist other state parties.

As the complaint demonstrates, this problem further extends to individual candidates. During the last election cycle, McCutcheon's support of certain candidates made it illegal for him to contribute to the campaigns of others in a way that was especially meaningful to him (*i.e.*, contributing exactly $1,776 to each candidate). *See* Compl. ¶¶ 27, 28. This puts a party's congressional nominees in the uncomfortable position of competing against each other—rather than their true opponents from the other party—for a share of the limited funds each contributor is legally permitted to give.

This artificial and unnecessary internecine competition that aggregate limits inherently generate is likely to "color the parties' message and interfere with the parties' decisions as to the best means to promote that message." *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 n.21 (1989). It forces candidates and party

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[15] *See generally* Br. of *Amici Curiae* the National Republican Senatorial Committee and National Republican Congressional Committee (discussing the different functions served by the national party committees and the additional constraints that aggregate limits place on a donor's ability to support the national party committees).

committees to turn from the "major struggle[]" of ideas with their opponents to "intraparty feuds" over contributor funds subject to aggregate limits, *Storer*, 415 U.S. at 735, and interferes with the ability of political parties, their candidates, and members to associate together "for the advancement of common political goals and ideas," *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357 (1997).[16]

C. The Government Bears a Particularly Heavy Burden in Justifying this Substantial Restriction on Core First Amendment Rights.

Precisely because aggregate contribution limits infringe so substantially on First Amendment rights, the government bears a particularly heavy burden in attempting to justify them. "[W]hen the First Amendment is involved, [this Court's] standard of review is 'rigorous.'" *NCPAC*, 470 U.S. at 501 (quoting *Buckley*, 424 U.S. at 29). Several Justices of this Court have explained that, because the burden that contribution limits impose on First Amendment activity is not meaningfully distinct from the burden that expenditure limits impose, contribution limits

[16] Compelling individuals to pick and choose among various state parties and congressional candidates when making contribution decisions also raises serious federalism concerns. Contributing to a candidate in one state limits a donor's ability to contribute equally to a candidate in an entirely unrelated election in a different state. The Constitution suggests that congressional races in each state are independent of each other, U.S. Const. art. I, § 2, cl. 1, 4, which calls into question the legitimacy of allowing a person's support for candidates in one state to impact the extent to which he may support candidates in others.

should not survive unless they satisfy the strictest scrutiny. *See, e.g.*, *Randall*, 548 U.S.at 265 (Kennedy, J., concurring); *id*. at 265-67 (Thomas, J., concurring); *Colorado I*, 518 U.S. at 638 (Thomas, J., concurring, joined by Rehnquist, C.J., and Scalia, J.) ("A contribution is simply an indirect expenditure; though contributions and expenditures may thus differ in form, they do not differ in substance."). Nonetheless, this Court's cases "have "subjected strictures on campaign-related speech that [the Court] ha[s] found less onerous to a lower level of scrutiny," *Bennett*, 131 S. Ct. at 2817, under which the government bears the burden of proving that the restriction is "closely drawn" to further a "sufficiently important interest" and "avoid unnecessary abridgement of" First Amendment rights. *Buckley*, 424 U.S. at 25; *accord Shrink Missouri*, 528 U.S. at 387-88. Even that standard remains an "exacting" one, *Citizens Against Rent Cont.*, 454 U.S. at 298, and entails the "closest scrutiny," *Right to Work*, 459 U.S. at 206-07.

To the extent the Court is inclined to reconsider whether such gradations in the government's burden are necessary or appropriate in the campaign finance context, McCutcheon agrees that contribution limits, like all other burdens on First Amendment rights, should be subject to strict scrutiny.[17] *See generally* Brief of *Amicus Curiae* Senator Mitch McConnell.

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[17] Because no reliance interest would be meaningfully frustrated by subjecting contribution limits to strict scrutiny, *see Citizens United v. FEC*, 558 U.S. 310, 365 (2010), this Court should not feel bound to continue abiding by *Buckley*'s unsustainable dichotomy between contributions and

But whether this Court chooses to characterize its standard of review as "strict," "exacting," "close," or "rigorous," the key point in this case is that aggregate contribution limits effectively impose a "substantial burden" and "penalty" on an individual who wishes to "robustly exercise[] [her] First Amendment right[s]" by supporting too many candidates or political committees. *Davis*, 554 U.S. at 738-40. That penalty is distinct from and far more pernicious than the burden that base contribution limits impose, and the government therefore cannot justify that penalty simply by pointing to the same arguments this Court has found sufficient to support base contribution limits.

In other words, the government cannot meet its heavy burden by insisting that contribution limits *in general* serve important anti-corruption interests; rather the government must demonstrate that it has an important, constitutionally valid interest in limiting the total amount of money that a person contributes to all candidates, political party committees, or PACs in an election. If the government fails to prove that Congress sufficiently tailored BCRA's aggregate contribution limits to serve such an important and legitimate interest, then those limits are unconstitutional. *See, e.g.*, *Randall*, 548 U.S. at 247-48 (invalidating Vermont's limits on contributions to candidates because they "work[ed]

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expenditures. Moreover, *stare decisis* is at its nadir with constitutional rulings because the political branches cannot overrule them. *See Wisconsin Right to Life*, *Inc.*, 551 U.S. at 500 (Scalia, J., concurring) ("This Court has not hesitated to overrule decisions offensive to the First Amendment").

more harm to protected First Amendment interests than their anticorruption objectives could justify"); *Citizens Against Rent Cont.*, 454 U.S. at 300 (invalidating limits on contributions to committees that supported or opposed ballot measures).

II. BCRA'S AGGREGATE CONTRIBUTION LIMITS DO NOT FURTHER ANY CONSTITUTIONALLY PERMISSIBLE GOVERNMENT INTEREST.

BCRA's aggregate contribution limits are unconstitutional because they do not further a sufficiently important government interest. The only interests that this Court has recognized as sufficiently important to burden First Amendment rights in the campaign finance context are avoiding corruption and the appearance of corruption. By its very nature, a contribution to a candidate, political party committee, or PAC that is within the legal base limit—that is, a contribution below the threshold at which Congress determined that a cognizable risk of corruption arises—does not raise the specter of corruption. The fact that an individual might choose to make many such innocuous contributions does not render any of them any more troubling or likely to corrupt its recipient. So long as Congress imposes base limits on *how much* an individual may contribute to each candidate, political party committee, or PAC, it has no distinct interest in limiting *how many* candidates, parties, or PACs a person contributes to within those base limits.

If aggregate limits are to be justified, then, the government must demonstrate that they are a sufficiently tailored means of preventing

circumvention of anti-corruption measures. The *Buckley* Court upheld FECA's aggregate contribution ceiling based on such a rationale, but only because FECA did not limit the amount an individual could contribute to a political party committee or PAC. FECA's aggregate contribution ceiling, in essence, served as a substitute for those missing base limits. The current campaign-finance scheme, in contrast, contains not only an intricate, multi-layered web of base contribution limits, but numerous other provisions that eliminate entirely the circumvention problem *Buckley* identified.

Recognizing that it can no longer rely on *Buckley*'s rationale, the government hypothesizes new and far-fetched circumvention scenarios that even the district court conceded were unlikely. The government has failed to introduce any evidence, or otherwise establish, that those hypothetical problems exist, or that BCRA's aggregate limits actually target them. Accordingly, the government has failed to prove that BCRA's aggregate limits serve any interest sufficiently important to justify the onerous burden they impose on First Amendment rights; indeed, its effort to satisfy its demanding burden never even gets off the ground.

A. Aggregate Contribution Limits Do Not Directly Prevent Corruption or the Appearance of Corruption.

1. This Court has identified only two closely related interests that are sufficiently important to abridge the First Amendment rights of individuals, candidates, and political parties through contribution limits: avoiding corruption and the appearance of

corruption. *Citizens United*, 558 U.S. at 359; *Davis*, 554 U.S. at 741; *NCPAC*, 470 U.S. at 496-97 ("[P]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances."); *Buckley*, 424 U.S. at 26-28.

Because public officials in a democracy must be responsive to the preferences and demands of the electorate, including their supporters, *see McConnell*, 540 U.S. at 297 (Kennedy, J., concurring in part and dissenting in part) ("Democracy is premised on responsiveness."), this Court has construed the government's interest in preventing corruption quite narrowly. Despite broad language in some earlier opinions, *see, e.g.*, *Shrink Missouri*, 528 U.S. at 388-89; *FEC v. Colorado Republican Federal Election Comm.* ("*Colorado II*"), 533 U.S. 431, 440-41 (2001), the Court has clarified that the government's interest in preventing the actuality and appearance of corruption is "limited to *quid pro quo* corruption." *Citizens United*, 558 U.S. at 359; *see also NCPAC*, 470 U.S. at 497 (the government may limit contributions and their equivalents only to prevent "financial *quid pro quo*: dollars for political favors"); *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 478-79 (2006) (plurality op.); *Buckley*, 424 U.S. at 26-28. The fact that contributors "may have influence over or access to elected officials does not mean that those officials are corrupt." *Citizens United*, 558 U.S. at 359; *see also McConnell*, 540 U.S. at 297 (Kennedy, J.) ("It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those

policies."). Similarly, the government may not impede First Amendment activities simply because a candidate might be grateful for them. *Citizens United*, 558 U.S. at 360 ("Ingratiation and access … are not corruption.").

2. Congress does not have a distinct interest in limiting the number of candidates, political party committees, or PACs to which an individual may contribute. This Court has made clear that, if a particular type of contribution or expenditure does not create a risk of *quid pro quo* corruption, then Congress has no interest in limiting how often a person engages in it. *NCPAC*, 470 U.S. at 497 (invalidating limit on independent expenditures by political party committees because there is "no tendency in such expenditures … to corrupt or give the appearance of corruption"); *Citizens Against Rent Cont.*, 454 U.S. at 297-98 (invalidating limit on amount an individual could contribute to a committee supporting or opposing a ballot measure because such contributions did not create a risk of corruption).

Under current law, Congress has determined that contributions of $2,600 or less per election to a candidate do not create a cognizable risk of corruption. 2 U.S.C. § 441a(a)(1)(A); *see Davis*, 554 U.S. at 742-43 (treating a contribution limit as embodying "Congress' judgment" that contributions up to that amount "do not unduly imperil anticorruption interests"). Regardless of whether a contributor makes individually permissible and legally innocuous contributions to one candidate, 10 candidates, or 100 candidates, the likelihood that any

such contribution involves *quid pro quo* corruption, or its appearance, remains unchanged: so low that Congress saw no need to address it. Thus, the government has no distinct anti-corruption interest in limiting the frequency or extent to which an individual may make individually innocuous contributions to different candidates. *See, e.g.*, *Colorado I*, 518 U.S. at 617 (invalidating limit on independent expenditures by political parties because such expenditures did not create a "risk of corruption"); *Davis*, 554 U.S. at 741 (holding that, since BCRA's Millionaire's Amendment allowed non-self-financed candidates to accept contributions up to $6,900, government could not argue that allowing self-financed candidates to accept contributions in that amount "serv[ed] anticorruption goals").

The same is true with regard to political party committees and PACs. Congress already has established base limits which prohibit contributions of an amount that may implicate the appearance or actuality or corruption. 2 U.S.C. § 441a(a)(1)(C)-(D). The fact that an individual makes contributions below that amount to multiple party committees or PACs does not render any one of those contributions any more likely to be (or appear) corrupt. Therefore, aggregate contribution limits do not directly prevent the actuality or appearance of corruption.

3. Nor may the government defend aggregate contribution limits on egalitarian grounds. Congress' interest in preventing corruption and its appearance does not allow it to "restrict the speech of some elements of our society in order to enhance the relative voice of others." *Bennett*, 131 S. Ct. at 2821;

see also Citizens United, 558 U.S. at 355 ("[P]olitical speech cannot be limited based on a speaker's wealth."); *Mass. Citizens for Life*, 479 U.S. at 257 ("Political 'free trade' does not necessarily require that all who participate in the political marketplace do so with exactly equal resources."). This Court has flatly rejected the notion that Congress may seek to protect some "contributors … from the possibility that others will make larger contributions." *Citizens Against Rent Cont.*, 454 U.S. at 295; *see also Davis*, 554 U.S. at 740 n.7 ("[L]eveling electoral opportunities … cannot justify the infringement of First Amendment interests.").[18] Thus, aggregate contribution limits may not be upheld as a means of limiting disparities in the extent to which people of different economic backgrounds are able to participate in the political process and exercise their First Amendment rights.

B. BCRA's Aggregate Contribution Limits Do Not Prevent Circumvention of Anti-Corruption Measures.

BCRA's aggregate contribution limits fare no better as an indirect, prophylactic means of combating corruption by preventing contributors from circumventing base limits on contributions to

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[18] In *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 659-60 (1990), this Court held that a state could prohibit corporations from making independent expenditures with their own funds in order to prevent "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form." *Citizens United* expressly repudiated that holding, recognizing "*Austin*'s antidistortion rationale" as an "aberration." 558 U.S. at 350.

candidates. The *Buckley* Court approved FECA's aggregate contribution ceiling because it prohibited otherwise legal methods through which contributors easily could evade FECA's base candidate contribution limits. That reasoning cannot sustain BCRA's aggregate limits, however, because numerous other provisions of current campaign finance law already prohibit the various ways in which a contributor might attempt to circumvent base limits.

1. In the Years Since *Buckley*, Congress Has Eliminated the Need for Aggregate Contribution Limits as Anti-Circumvention Measures.

This Court has considered an aggregate contribution limit exactly once—in a single paragraph of *Buckley* that noted that the issue "ha[d] not been separately addressed at length by the parties." *Buckley*, 424 U.S. at 38. The Court recognized that FECA's aggregate contribution ceiling "impose[d] an ultimate restriction upon the number of candidates and committees with which an individual may associate himself by means of financial support." *Id.* It nevertheless upheld the ceiling as "no more than a corollary of the basic individual contribution limitation that we have found to be constitutionally valid." *Id.* The Court explained that FECA's ceiling served a clear anti-circumvention purpose: "prevent[ing] 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." *Id.* Absent FECA's ceiling, such transactions would have been legally permissible because FECA did not otherwise impose any direct limit on how much a person could contribute to a political party committee or PAC.

FECA's aggregate ceiling therefore acted, in effect, as a surrogate base limit on contributions to PACs and political party committees. *Buckley* upheld the ceiling only as a mechanism for preventing a person from giving *unlimited* contributions to an unlimited number of political party committees or PACs, thereby potentially allowing her to circumvent limits on how much she could contribute to each candidate. Congress has since eliminated the problem identified in *Buckley* and, with it, any plausible justification for aggregate limits as an anti-circumvention measure.

Unlike pre-*Buckley* FECA, BCRA expressly limits the amount of money an individual may contribute not only to each candidate, but to each local, state, and national political party committee and PAC. 2 U.S.C. § 441a(a)(1). Accordingly, an individual may not make the kind of "massive," "huge," *unlimited* contributions to political party committees or PACs that *Buckley* contemplated. *Buckley*, 424 U.S. at 38. Aggregate limits can no longer be considered an indirect limit on contributions to political party committees and PACs because *direct* limits on contributions to such entities now exist.

These new restrictions on contributions *to* political party committees and PACs are bolstered by

additional limits on contributions *by* political party committees and PACs. In addition to retaining FECA's base limit of $5,000 for contributions from a national, state, or local party or multicandidate PAC to a candidate,[19] BCRA prohibits those entities from contributing more than $5,000 annually to any other PAC. 2 U.S.C. § 441a(a)(2)(A), (C). A multicandidate PAC is also prohibited from contributing more than $5,000 to a state or local party committee, or $15,000 to a national political party committee. *Id.* § 441a(a)(2)(B), (C). These provisions further prevent individuals from using PACs or political party committees to funnel large amounts of money to candidates.

Congress also specifically has addressed the problem of using multiple PACs to circumvent base contribution limits. All contributions to political committees that are established, financed, maintained, or controlled by the same corporation, union, or other person—including an entity's parents, subsidiaries, branches, divisions, departments, or local units—are now "considered to have been made by a single political committee." *Id.* § 441a(a)(5). A person therefore cannot evade base contribution limits by providing money to a series of affiliated PACs that will, in turn, contribute to a particular candidate.

Likewise, a contributor may not evade base limits by channeling contributions through a PAC or political party committee to a specific candidate. All

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[19] *See also supra* notes 6, 8 (identifying other restrictions on candidate contributions and coordinated expenditures by state and national political party committees).

contributions that a person makes "either directly or indirectly, on behalf of a particular candidate, including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate," are "treated as contributions from such person to such candidate." *Id.* § 441a(a)(8). The intermediary is required to report to the FEC the contributor and the intended recipient of the contribution. *Id.*[20] These provisions collectively eliminate the circumvention problem identified in *Buckley*.

The *Buckley* Court did not approve FECA's aggregate contribution ceiling as a mechanism for preventing a person from giving too many small contributions to too many different candidates. Nor did it uphold the ceiling as a secondary measure to further regulate already illegal avenues of circumventing contribution limits, or to reinforce other existing prohibitions. Rather, this Court upheld FECA's ceiling as a second-best surrogate for base limits on contributions to political party committees and PACs, which FECA lacked. Accordingly, BCRA's aggregate limits cannot plausibly be said to serve the same anti-circumvention rationale as FECA's aggregate contribution ceiling—let alone do so in a manner "closely drawn" to "avoid unnecessary abridgement of" First Amendment rights. *Buckley*, 424 U.S. at 25.

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[20] In addition, federal law prohibits contributors from making contributions in the name of another person or with the funds of another person. 2 U.S.C. § 441f.

2. The Government's Efforts to Portray BCRA's Aggregate Limits as Anti-Circumvention Measures Rest on Pure Speculation with No Factual Support.

Because BCRA's aggregate contribution limits cannot be sustained under the same rationale as FECA's contribution ceiling, the government bore the burden of providing an independent and factually supported theory as to how these limits operate as a closely drawn means of preventing circumvention of base contribution limits, without unnecessarily abridging First Amendment rights. The government has not come close to satisfying that burden.

The government contended, and the district court agreed, that aggregate contribution limits are constitutional because they might serve a *hypothetical* anti-circumvention purpose. According to the district court, it is at least conceivable that a joint fundraising committee could be formed "comprising a party's presidential candidate, the party's national party committee, and most of the party's state committees." JS.App.12a. And it is conceivable, in this hypothetical scenario, that a person "might" give a half-a-million-dollar check to this hypothetical joint fundraising committee, that the various committees comprising this joint committee "might" decide to transfer all the funds to a single committee, that this committee in turn "might" use the money for coordinated expenditures with a candidate, and that this candidate might, in turn, feel "[g]ratitude" toward the original contributor as a result. JS.App.12a.

If that daisy chain of events sounds far-fetched, that is because it is. Neither the government nor the district court cited a single shred of evidence to support it. To the contrary, the district court readily conceded that these events were "unlikely" to occur, yet nonetheless upheld the aggregate limits because the court could "imagine" such an implausible scenario. JS.App.12a. The court did not even address the likelihood that many steps in its analysis are illegal under current law. *See* 2 U.S.C. § 441a(a)(2)(A), (d)(1)-(3) (imposing limits on contributions and coordinated expenditures by political committees to candidates); *id.* § 441a(a)(8) (imposing restrictions on earmarking); *id.* § 441f (prohibiting contributions with the funds of another).

This Court has "never accepted mere conjecture as adequate to carry a First Amendment burden," *Shrink Missouri*, 528 U.S. at 391, and it should not start doing so now. *Cf. Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 664 (1994) ("When the Government defends a regulation on speech as a means to … prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured.") (internal citation and quotation marks omitted). To carry its burden, the government must provide actual evidence that the First Amendment activity it seeks to prohibit tends to cause *quid pro quo* corruption or the appearance of such corruption, and that the restrictions at issue will help prevent it. Critically, a burden on First Amendment rights cannot rest on "a hypothetical possibility and nothing more." *NCPAC*, 470 U.S. at 498 (invalidating limit on independent expenditures by PACs where government failed to introduce any

evidence suggesting that "an exchange of political favors for uncoordinated expenditures" was likely to occur).

"The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Shrink Missouri*, 528 U.S. at 391. The Court has excused the government from presenting actual evidence to meet this burden only where it "has been long recognized," and "there is little reason to doubt," that the targeted act involves "the evil of potential corruption." *NCPAC*, 470 U.S. at 500; *Shrink Missouri*, 528 U.S. at 395.

There is nothing remotely obvious about how contributing to multiple candidates running in entirely separate elections, or to multiple state political parties (or PACs) across the country, is likely to lead to *quid pro quo* corruption or even the appearance of such corruption when base contribution limits for all of those entities already exist. Indeed, the much more obvious inference is that Congress' carefully calibrated base contribution limits eliminate any cognizable corruption risk. Speculation and guess work cannot suffice in this context. If the government wishes to demonstrate that layering aggregate limits on top of base limits is a closely drawn means of preventing circumvention of those base limits, it must provide some concrete evidence to support that unlikely contention and cannot rest—as the district court did—upon a mere "hypothetical possibility." *NCPAC*, 470 U.S. at 498.

The government's failure to meet its demanding burden is confirmed by other cases in which this Court has rejected sheer speculation as a sufficient basis for limiting core First Amendment rights. For instance, in *First National Bank of Boston v. Bellotti*, the Court refused to allow a state to restrict corporate political speech based on nothing more than "the *assumption* that such participation would exert undue influence" over the electorate. 435 U.S. 765, 789 (1978) (emphasis added). And in *Citizens Against Rent Control*, the Court struck down a contribution limit on the amount a person could give to committees supporting or opposing ballot measures where "the record … [did] not support the [lower court's] conclusion that [the limit was] needed to preserve voters' confidence in the ballot measure process." 454 U.S. at 299; *see also id.* at 302 (Marshall, J., concurring) ("I find no such evidentiary support in this record."); *id.* at 303 (Blackmun, J., and O'Connor, J., concurring) ("The city's evidentiary support in this case is equally sparse.").

Likewise, in *Colorado II*, the Court subjected FECA's limit on coordinated expenditures by political party committees to "the scrutiny appropriate for a contribution limit," because FECA treated them as the legal equivalent of campaign contributions. 533 U.S. at 46. Applying exacting scrutiny, the Court scoured the evidentiary record to determine whether "adequate evidentiary grounds exist[ed] to sustain the limit" and reviewed whether the government adequately had proven that there existed "a serious threat of abuse from unlimited coordinated party spending as the Government contend[ed]." *Id.* at 457; *see also Citizens United*, 558 U.S. at 360

(emphasizing the "scant evidence that independent expenditures" by corporations "even ingratiate" the entities making them to the candidates they are intended to assist). As these decisions underscore, when the government seeks to burden core First Amendment rights, it must start by demonstrating that the problem it purports to target *actually exists*. The government simply did not do that in this case.

3. The Aggregate Contribution Limits Do Not Prevent Any Cognizable Risk or Appearance of Corruption.

Even assuming the chain of events the government proposed and the district court accepted were more than a mere "hypothetical possibility," *NCPAC*, 470 U.S. at 98, such occurrences would not create a sufficiently cognizable risk of the appearance or actuality of corruption to justify burdening fundamental First Amendment rights.

1. The district court's hypothetical scenario does not create a constitutionally cognizable risk of actual or apparent corruption under this Court's precedents. According to the district court, a contributor might provide funds to a candidate or political party committee, which in turn might contribute those funds to another candidate to whom the original contributor already had given the legal maximum of $2,600. JS.App.12a. The court opined that this would allow that contributor to circumvent BCRA's base candidate contribution limit and obtain the "gratitude" of the ultimate recipient of the funds, raising the specter of some implicit, undefined *quid pro quo*. JS.App.12a.

This logic fails, however, because once the original candidate or political party committee receives a contributor's funds, that contributor loses all control over their disposition. Indeed, if the contributor did attempt to "earmark" the contribution for some particular recipient, then the "intermediary or conduit" would have to report it to the FEC as a direct contribution from the contributor to that ultimate recipient, 2 U.S.C. § 441a(a)(8), and the contributor would violate the base candidate contribution limit, *id*. § 441a(a)(1)(A). In the absence of such earmarking, however, a contributor has no control over whether a candidate, party, or PAC to whom she provides funds will contribute them to a particular candidate.

The absence of "prearrangement and coordination" between a contributor and a candidate "alleviates the danger" of actual and apparent corruption, and therefore eliminates any constitutionally legitimate basis for burdening First Amendment rights. *Buckley*, 424 U.S. at 47. This Court made that point in *NCPAC*, when it invalidated limits on the amount of independent expenditures that PACs could make in support of presidential candidates. Discussing the risk of corruption that such expenditures posed, the Court stated, "[i]t is of course hypothetically possible … that candidates may take notice of and reward those responsible for PAC expenditures by giving official favors to the latter in exchange for the supporting messages." *NCPAC*, 470 U.S. at 498. But because "the absence of prearrangement and coordination undermines the value of the expenditure to the candidate," the Court concluded that such

circumstances "alleviate[] the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Id.*; *see also Colorado I*, 518 U.S. at 617-18 ("[T]he constitutionally significant fact … is the lack of coordination between the candidate and the source of the expenditure. This fact prevents us from assuming … that a limitation on political parties' independent expenditures is necessary to combat a substantial danger of corruption.").

Likewise, one certainly can speculate—as the district court did—that if someone contributed money to a candidate, political party committee, or PAC, and that entity re-contributed the money to a different candidate, the ultimate recipient "might take notice of and reward" the original contributor. *NCPAC*, 470 U.S. at 98. But earmarking prohibitions prevent that kind of prearrangement and coordination concerning the disposition of the original contribution. 2 U.S.C. § 441a(a)(8). That lack of prearrangement and coordination "undermines the value ... to the candidate" of the original contribution and "alleviates the danger" that it "will be given as a quid pro quo for improper commitments from the candidate." *NCPAC*, 470 U.S. at 98; *see also Colorado I*, 518 U.S. at 617. Thus, as a matter of law, the types of otherwise legal transactions aggregate contribution limits might target do not entail a risk of actual or apparent corruption.

2. Furthermore, as a practical matter, it is highly unlikely that a candidate will receive a substantial contribution that can be traced back through another

candidate, political party committee, or PAC to a particular contributor. Many candidates, political party committees, and PACs receive donations from numerous sources. Even if an individual contributes the legal maximum to a candidate, political party committee, or PAC, that amount is likely to be only a small—potentially even miniscule—fraction of the recipient's overall assets. Consequently, if that recipient makes a contribution to another candidate, the *pro rata* share of the contribution that can be attributed to any particular contributor is likely to be negligible.

The RNC, for example, raised more than $386 million during the 2012 presidential election. *See supra* p. 13 & n.13. Even if a donor contributed the legal maximum to the RNC ($32,400), and the RNC in turn contributed the legal maximum to a candidate ($5,000), the *pro rata* share of that contribution for which the candidate could credit the original contributor would be less than one hundredth of one percent, amounting—quite literally—to pocket change. Thus, even under the government's and district court's reasoning, the aggregate limits do not prevent a cognizable risk of corruption.

3. More fundamentally, the government's basic theory of how aggregate limits prevent circumvention has no stopping point. The government's position implicitly assumes that contributing $5,200 over the course of an election cycle to each of nine candidates is not problematic, but giving the same amount to a tenth candidate (thereby putting the contributor over the aggregate limit) dramatically increases the risk

that those funds will find their way back to one of the first nine. There is no reason to assume, however, that the likelihood of the tenth candidate giving away his hard-earned contributions to one of the first nine candidates is any greater than the likelihood of the third candidate giving away his contributions to one of the first two. In other words, under the government's reasoning, the circumvention problem arises any time a person contributes to more than one candidate. Accordingly, if this Court adopts the government's theory, then there is no obvious reason why Congress could not require contributors to limit their contributions to, at most, a single candidate in any given election cycle.

It is difficult enough to ascertain the point at which a limit on *how much* someone may contribute to a single candidate crosses the line between permissibly targeting *quid pro quo* corruption and impermissibly burdening too much First Amendment activity. *Cf. Randall*, 548 U.S. at 248 (recognizing "the existence of some lower bound" on base contribution limits). But there is no meaningful way to determine the point at which an individual has contributed an otherwise permissible amount of money to *too many* candidates.

4. BCRA's structure itself underscores that the government's anti-circumvention rationale makes no sense. BCRA's base contribution limits allow an individual to contribute $2,600 per election to a particular candidate, and then contribute additional funds to a different candidate, a political party committee, or a PAC. 2 U.S.C. § 441a(a)(1). BCRA also permits that other candidate, party committee,

or PAC to re-contribute the additional funds to the first candidate (subject to earmarking provisions and other safeguards), even if the original contributor already had reached his base contribution limit for the first candidate. *Id.* § 441a(a)(2).

Rather than reflecting a devious method of circumventing base contribution limits, this is an intentional, essential part of the system BCRA established. Under BCRA, the fact that an individual has contributed the legal maximum to a particular candidate does not, and was not intended to, restrict him from contributing to other candidates, PACs, or political party committees that also may support or contribute to that candidate. The notion that the government has an important interest in preventing an individual from doing so is therefore misguided at best, and in tension with the structure of the law as a whole.

5. The government's claim that aggregate contribution limits are an important means of preventing circumvention of base contribution limits is further undermined by the fact that most states that limit contributions to candidates have not enacted such aggregate limits. *Cf. W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399 (1937) ("The adoption of similar requirements by many States evidences a deepseated conviction both as to the presence of the evil and as to the means adapted to check it."). As of 2010, of the 38 jurisdictions (including Washington, D.C.) that limited contributions to candidates, only 11 imposed additional aggregate limits on the total amount of money that a person could contribute to all

candidates in an election cycle.[21] The fact that *over 70%* of states that limit contributions to candidates concluded that aggregate limits are unnecessary to prevent circumvention discredits the notion that the government has an important interest in imposing such a burden on First Amendment rights.

At bottom, BCRA's aggregate limits do not further any government interest that this Court has found legitimate. In truth, they are designed not to target corruption or prevent improper circumvention of base contribution limits—a feat they are ill-suited to achieving—but rather to limit the extent to which any particular individual may participate in the political process. That kind of equalization interest is a patently impermissible basis for burdening core First Amendment activity. *Bennett*, 131 S. Ct. at 2821; *Davis*, 554 U.S. at 740 n.10, 741; *Mass. Citizens*

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[21] *See* Ariz. Rev. Stat. Ann. § 16-905(E) (2012);Conn. Gen. Stat. § 9-611(c) (2013); D.C. Code § 1-1163.33(b)(1); Me. Rev. Stat. Ann. tit. 21-A, § 1015(3) (2013); Md. Ann. Code § 13-226(b) (2013); Mass. Gen. Laws ch. 55, § 7A(a)(5) (2013); N.Y. Laws [Elec.] § 14-114 (2012); R.I. Gen. Laws § 17-25-10.1(a)(1) (2012); Wash. Rev. Code § 42.17A.420 (2012) (applicable only to contributions within 21 days of a general election); Wis. Stat. § 11.26(4) (2013); Wyo. Stat. Ann. § 22-25-102 (c)(ii) (2012).

The following states have enacted base contribution limits without aggregate contribution limits: Alaska, Arkansas, California, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, South Carolina, Tennessee, Vermont, and West Virginia. *See generally* National Conference of State Legislatures, *State Limits on Contributions to Candidates* (Jan. 20, 2010), *available at* www.ncsl.org/print/legismgt/ limits_candidates.pdf.

for Life, 479 U.S. at 258. Accordingly, BCRA's aggregate limits are unconstitutional.

III. EVEN ASSUMING THAT AGGREGATE CONTRIBUTION LIMITS FURTHER A LEGITIMATE INTEREST, THEY ARE NOT SUFFICIENTLY TAILORED.

Even assuming that BCRA's aggregate contribution limits further the government's interest in preventing *quid pro quo* corruption or the appearance of such corruption, they still are unconstitutional because they are not a "closely drawn" means of doing so. *Buckley*, 424 U.S. at 25. As this Court repeatedly has admonished, the government may not combat corruption through imprecise and overbroad measures that "unnecessar[ily] abridg[e]" fundamental First Amendment rights. *Id.*

1. As explained above, *see supra* Part II.A, BCRA's aggregate contribution limits do not target corruption directly, but rather are, at best, anti-circumvention measures designed to reinforce the statute's other, direct anti-corruption measures. Because that kind of prophylactic restriction intrinsically sweeps in First Amendment conduct that does not BY itself give rise to *quid pro quo* corruption or an appearance of corruption, *see Wisconsin Right to Life*, 551 U.S. at 475 (plurality op.), it will survive constitutional scrutiny only if the government establishes that the measure is closely drawn to target the circumvention of anti-corruption laws, *Shrink Missouri*, 528 U.S. at 387-88; *Buckley*, 424 U.S. at 25.

The government cannot satisfy this burden when it demonstrates only an "attenuated" relationship between the corrupt conduct it constitutionally may prevent and the additional conduct it wishes to prohibit. *Colorado I*, 518 U.S. at 616. Nor may the government prohibit a broad range of constitutionally protected conduct to reach a narrow sliver of conduct that raises the specter of *quid pro quo* corruption. *See, e.g.*, *Citizens United*, 558 U.S. at 362 (holding that government may not bar all corporations from engaging in independent expenditures as a means of "preventing foreign individuals or associations from influencing our Nation's political process"); *NCPAC*, 470 U.S. at 498 (invaliding prohibition on independent expenditures by PACs because, "[e]ven were we to determine that the large pooling of financial resources [by PACs] did pose a potential for corruption or the appearance of corruption," the challenged statute was "not limited to multimillion dollar war chests," but rather "appl[ied] equally to informal discussion groups that solicit neighborhood contributions").

For example, in *Bennett*, the state attempted to defend the penalty that its laws imposed on privately financed candidates by arguing that it would prevent corruption by inducing candidates to accept public financing. 131 S. Ct. at 2827. The Court rejected that rationale as far too attenuated, holding, "the fact that burdening constitutionally protected speech might indirectly serve the State's anticorruption interest, by encouraging candidates to take public financing, does not establish the constitutionality of the matching funds provision." *Id*.

2. Aggregate contribution limits prohibit far more protected First Amendment activity than the small sliver that conceivably might raise legitimate circumvention concerns. The vast majority of contributions to candidates or parties in excess of BCRA's aggregate contribution limits are likely to be retained by their recipients, rather than re-contributed, directly or indirectly, to another candidate. For example, during the 2012 election cycle, the RNC contributed only 0.07% of its funds to candidates, and dedicated only 5.8% to coordinated expenditures. *See supra* p. 13 & n.13. Those figures were even lower during the previous election cycle. *Id.* A contribution that complies with BCRA's base limits and is retained and ultimately used by its initial recipient—rather than transferred or re-contributed elsewhere—raises neither concerns about direct corruption nor a cognizable risk of circumvention of base contribution limits.

Moreover, because most candidates, parties, and PACs receive contributions from numerous sources, if one of those entities does make a contribution to another candidate, it is highly unlikely that any portion of that money could or would be ascribed to the original contributor. And even if the ultimate recipient were aware that certain contributors had contributed to the "intermediary" candidate or party, the *pro rata* portion of the funds for which each contributor could be deemed responsible is likely to be so small—potentially even miniscule—that there is no cognizable risk of *quid pro quo* corruption or the appearance thereof. Finally, even in the rare instance where a substantial amount of money could be traced back to a particular contributor, "few" such

contributions are likely to actually "involve [a] *quid pro quo* arrangement[]." *Citizens United*, 558 U.S. at 357.

BCRA's aggregate limits therefore impose a sweeping prohibition on innocuous, constitutionally protected conduct as a vastly overbroad means of deterring a tiny proportion of potentially improper transactions. *See id.* at 362; *NCPAC*, 470 U.S. at 498. Especially given BCRA's veritable laundry list of much more direct anti-corruption and anti-circumvention measures—including base limits on contributions from individuals to candidates, political party committees, and PACs; limits on contributions from political party committees, PACs, and candidates to other candidates; restrictions on the proliferation of multiple PACs by a single entity; strict earmarking rules; prohibition on contributions made in the name, or with the funds, of another; and exhaustive disclosure requirements (to say nothing of federal anti-bribery laws)—its aggregate contribution limits are not remotely closely tailored to achieve any important government interest. *Cf. Wisconsin Right to Life*, 551 U.S. at 479 (plurality opinion) ("a prophylaxis-upon-prophylaxis approach to regulating expression is not consistent with strict scrutiny").

3. Aggregate limits also are aimed at the wrong activity. There is nothing suspicious or troubling about making a contribution to a candidate, political party, or PAC within BCRA's base contribution limits; indeed, BCRA expressly permits such contributions. *See* 2 U.S.C. § 441a(a)(1). Rather, the government's professed anti-circumvention concerns arise only from the possibility that candidates,

political party committees, or PACs will shuffle around that contribution and ultimately channel it to an "improper" recipient. Aggregate contribution limits are a poorly tailored solution to that problem because, rather than targeting the putatively improper conduct by the recipient candidates, political party committees, and PACs, they instead restrict *the contributor's* ability to make otherwise legal contributions.

Massachusetts Citizens for Life underscores the impropriety of using aggregate limits to address such a highly attenuated anti-circumvention concern. There, this Court struck down a law that prohibited non-profit corporations formed primarily for issue advocacy from making independent expenditures in federal elections. The government argued that this prohibition prevented such groups from engaging in "massive *undisclosed* political spending" and serving as "conduits for *undisclosed* spending by business corporations and unions." 479 U.S. at 261 (emphasis added). But the Court concluded that the provision was impermissibly overbroad, emphasizing that "[t]he state interest in disclosure … can be met in a manner less restrictive," such as by requiring those entities to disclose their expenditures or the identities of anyone who contributed to them for the express purpose of influencing elections. *Id.* at 261-62; *see also Citizens Against Rent Cont.*, 454 U.S. at 299-300 (invaliding limit on individuals' contributions to political committees that supported or opposed ballot measures, because the municipality's interest in allowing voters to "identify[] the sources of support for and opposition to [those] measures … will be adequately protected" by

less intrusive disclosure requirements and a prohibition on anonymous contributions).

Just as undisclosed spending can be much more directly addressed by disclosure requirements, potential perceived problems with financial transfers and contributions among candidates, political party committees, and PACs can be much more directly addressed by measures that target those transfers themselves and impose less of a burden on First Amendment rights. Most basically, Congress could address any concern relating to joint fundraising committees—which is the only concern the district court expressly identified as a basis for aggregate limits, JS.App.10a-11a—by more closely regulating *joint fundraising committees* themselves. Ameliorating perceived problems with joint fundraising committees by imposing a flat aggregate limit on contributions an individual may make to any candidates, political party committees, and PACs—regardless of whether they even participate in a joint fundraising committee—cannot plausibly be deemed a "closely tailored" solution to this hypothetical problem. *Cf. Citizens United*, 558 U.S. at 362 (ban on all independent expenditures by corporations was not a closely tailored means of preventing contributions by foreign corporations); *NCPAC*, 470 U.S. at 498 (prohibition on independent expenditures by all PACs, regardless of their wealth, was not a closely tailored means of addressing potential corruption that may arise from "multimillion dollar war chests").

If Congress is concerned more broadly about the possibility of political party committees acting as conduits to evade base contribution limits, there are

several obvious and much more narrowly tailored solutions it may consider. For example, the most direct remedy would be to limit financial transfers among political party committees, or amend 2 U.S.C. § 441a(a)(4) to treat such interparty transfers as contributions for some or all purposes, including base contribution limits. Alternatively, Congress could address anti-circumvention concerns without unnecessarily infringing on contributors' rights by replacing the aggregate limits with an aggregate contribution threshold for individuals, and requiring entities that receive funds contributed in excess of the contributor's aggregate threshold to deposit them into segregated, non-transferrable accounts.

In short, aggregate limits on contributions to all candidates, political party committees, and PACs are a blunderbuss and highly attenuated method of furthering any legitimate anti-circumvention goal the government might have. They have no place in a campaign finance system that is already chock-full of much more direct anti-corruption and anti-circumvention measures, and are therefore nothing more than impermissible "prophylaxis upon prophylaxis." *Wisconsin Right to Life*, 551 U.S. at 479 (plurality op.). If Congress wishes to address the hypothetical problem the government and district court have posited, it must do so through measures that target that precise evil and do not unnecessarily intrude on fundamental First Amendment rights. Because BCRA's aggregate contribution limits do precisely the opposite, they impermissibly burden protected First Amendment activity and are unconstitutional.

CONCLUSION

For these reasons, the Court should reverse the decision below and remand for entry of a permanent injunction.

Respectfully submitted,

Dan Backer
Paul Henry Jossey
DB CAPITOL
STRATEGIES, PLLC
Suite 2109
209 Pennsylvania Ave. SE
Washington, DC 20003

Michael T. Morley
Counsel of Record
223 Pawnee Rd.
Cranford, NJ 07016
(860) 778-3883
michaelmorleyesq
@hotmail.com

Jerad Wayne Najvar
NAJVAR LAW FIRM
1 Greenway Plaza, Ste. 100
Houston, TX 77046

Counsel for Plaintiff-Appellant Shaun McCutcheon

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