No. 12-536

In The
Supreme Court of the United States

Shaun McCutcheon and Republican National Committee, *Plaintiffs-Appellants*

v.

Federal Election Commission

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

Brief on the Merits for Appellant Republican National Committee

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Questions Presented

Federal law imposes two types of limits on political contributions by individuals. *Base limits* restrict the amount an individual may contribute to a particular candidate committee ($2,600 per election); national party committee ($32,400 per calendar year); state, district, and local party committee ($10,000 per calendar year (combined limit)); and political action committee ("PAC") ($5,000 per calendar year). 2 U.S.C. 441a (a)(1) (with current limits added here). *See* Merits Brief Appendix ("MB-App.") 3a, 17a.

Aggregate limits restrict the total contributions an individual may make in a biennial election cycle as follows: $48,600 to candidate committees and $74,600 to non-candidate committees, of which no more than $48,600 may go to non-national party committees (i.e., state, district, and local party committees (combined) and PACs). 2 U.S.C. 441a(a)(3) (with current limits added here). *See* MB-App. 4a, 17a.

Appellant presents these questions:

1. Whether the $74,600 aggregate limit on contributions to non-candidate committees, 2 U.S.C. 441a(a)(3)(B), is unconstitutional as applied to contributions to national party committees.

2. Whether the $74,600 aggregate limit on contributions to non-candidate committees, 2 U.S.C. 441a(a)(3)(B), is unconstitutional facially.

3. Whether the $48,600 aggregate sub-limit on contributions to non-national party committees, 2 U.S.C. 441a(a)(3)(B), is severable.

4. Whether the $48,600 aggregate limit on contributions to candidate committees, 2 U.S.C. 441a(a)(3)(A), is unconstitutional.

Corporate Disclosure

The Republican National Committee ("RNC") is an unincorporated association, so no corporations are involved.

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The Memorandum Opinion is in the Jurisdictional Statement Appendix ("JS-App."), at 1a, and at 893 F. Supp. 2d 133. The Order and Final Judgment is at JS-App. 17a.

Jurisdiction

On September 28, 2012, the lower court entered final judgment for the FEC. JS-App. 17a. Appellants noticed appeal October 10. JS-App. 18a. This Court has appellate jurisdiction under Bipartisan Campaign Reform Act ("BCRA") § 403(a)(3) (JS-App. 21a).

Constitution, Statutes & Regulations

Appended hereto are U.S. Constitution, Amendment I; 18 U.S.C. 608(b) (1974); 2 U.S.C. 441a(a)(1)-(5), (8); 2 U.S.C. 441f; 11 C.F.R. 100.5(g); 11 C.F.R. 110.4(b); 11 C.F.R. 110.5(a)-(b); and 11 C.F.R. 110.6.

Statement of the Case

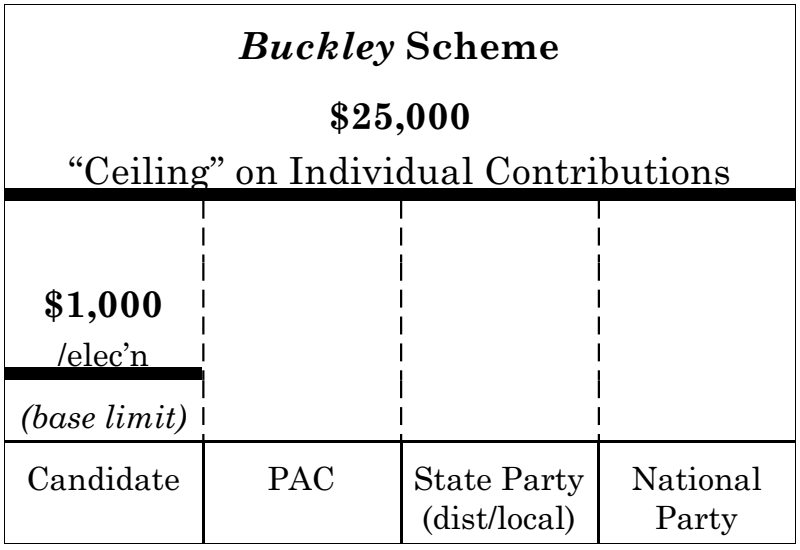
Base limits restrict contributions to candidates, political parties, and PACs. 2 U.S.C. 441a(a)(1). *Aggregate limits* restrict individuals' aggregate biennial contributions to these entities. 2 U.S.C. 441a(a)(3). *See* MB-App. 17a (FEC, *Contribution Limits for 2013-2014*).

In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court facially upheld an "overall $25,000 ceiling" on an individual's aggregate contributions because it

> serve[d] to prevent *evasion* of the $1,000 [base] *contribution limitation* [on a contribution to a candidate] by a person who might otherwise contribute massive amounts of money *to a particular candidate* through the use of unearmarked contributions to political committees

> likely to contribute to that candidate, or huge contributions to the candidate's political party.

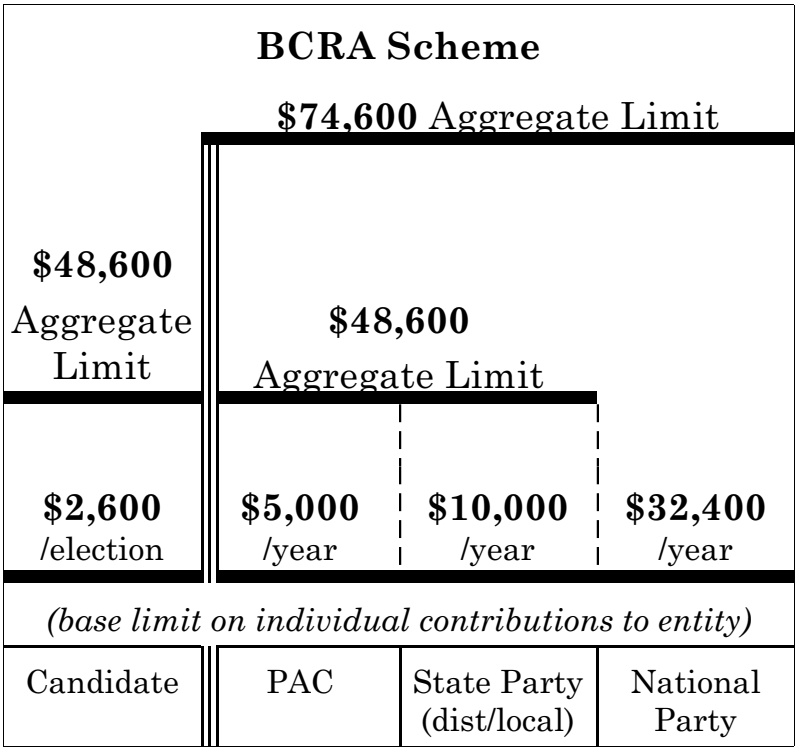
Id. (emphasis added). This anti-*circumvention* concern is in contrast to the anti-*corruption* interest on which *Buckley* upheld the $1,000 base limit. *Id.* at 26. Crucially, *Buckley* posited a circumvention *mechanism* for a conduit-contribution,[1] i.e., a "huge" contribution to a political party or PAC, resulting in "massive" contributions to a "particular candidate." This mechanism resulted from the Federal Election Campaign Act ("FECA") (2 U.S.C. 431 et seq.) scheme then in effect.



[1] "Conduit-contribution" is used herein to refer to a contribution to a particular, intended candidate, resulting from an *unearmarked* contribution to another entity that results in the contribution to the candidate, without violating earmarking and name-of-another contribution laws. *Earmarked* contributions to candidates through intermediaries are legal if all base limit and reporting requirements are followed. *See* 11 C.F.R. 110.6 ("Earmarked contributions"). MB-App. 12a.

See Buckley, 424 U.S. at 189-90 (1974 FECA text).

The *Buckley*-Scheme Chart, *supra* at 2, shows that the scheme *Buckley* considered only had a base limit on a contribution to a *candidate*. As *Buckley* noted, absent the "ceiling" a "huge" contribution *could* go to a political party or PAC. 424 U.S. at 38. The "ceiling" was also a *base* limit for contributions to PACs and political parties—in which sense *Buckley* described it as a "corollary" of the base limits. *Id.*



See MB-App. 17a.

Soon after *Buckley*, Congress eliminated *Buckley*'s conduit-contribution mechanism by, inter alia, setting base limits on contributions to PACs and political parties. *See* Part II.B. BCRA made further changes, result-

ing in the scheme in the BCRA-Scheme Chart, *supra* at 3. *See also* MB-App. 18a (side-by-side *Buckley*- and BCRA-Scheme Charts). Base limits are in place for contributions to all types of political committees, with aggregate limits layered atop those.

In upholding the challenged aggregate limits, the lower court ignored this elimination of *Buckley*'s mechanism. The court did posit a *mechanism*, as *Buckley*'s analysis requires, but it was not the *conduit-contribution* mechanism required by *Buckley*'s analysis, and it was based on the forbidden *gratitude* theory of corruption.[2]

As set out in the Verified Complaint, McCutcheon challenges the $74,600 (currently) aggregate limit on contributions to non-candidate committees, 2 U.S.C. 441a(a)(3)(B), as unconstitutional—as applied to contributions to national party committees and facially. He wants to express support for, and associate with, non-candidate committees as permitted by the base limits without an aggregate limit. But for this aggregate limit, McCutcheon would have contributed $25,000 each to the Republican National Committee ("RNC"), National Republican Senatorial Committee ("NRSC"), and National Republican Congressional Committee ("NRCC") before the November 2012 election. When this case was brought, he had given $1,776

[2] The lower court acknowledged that "[g]ratitude . . . is not itself a constitutionally-cognizable form of corruption," but it simultaneously relied on a candidate "know[ing] precisely where to lay the wreath of *gratitude*" in the court's hypothetical circumvention mechanism. JS-App. 12a (emphasis added). *See Citizens United v. FEC*, 130 S. Ct. 876, 909 (2010) ("Ingratiation and access . . . are not corruption.").

each to RNC, NRSC, and NRCC, $2,000 to a PAC, and $20,000 to a state party committee's federal fund.

McCutcheon also challenges the now-$48,600 aggregate limit on contributions to candidate committees, 2 U.S.C. 441a(a)(3)(A), as unconstitutional. He wants to express support for, and associate with, candidates as permitted by the base limits without an aggregate limit. When this case was filed, he had contributed $33,088 to federal candidates and intended to contribute $21,312 more to federal candidates. But for this aggregate limit, McCutcheon would have contributed $54,400 to candidates.

RNC, a national party committee, also challenges the $74,600 aggregate limit on contributions to non-candidate committees, 2 U.S.C. 441a(a)(B)—as applied to contributions to national party committees and facially. RNC wants to receive the speech and association of McCutcheon (and other contributors) as permitted by the base limits without an aggregate limit.

FEC is the agency with enforcement authority over FECA and BCRA.

Appellants intend materially similar future actions if not limited by aggregate limits. Absent relief, they will not act and so will be deprived of constitutional rights and will be irreparably harmed without an adequate legal remedy.

On June 22, 2012, Appellants filed their Verified Complaint. FEC moved for dismissal. On September 28, the lower court dismissed, entering judgment for FEC. JS-App. 1a, 17a. On October 10, Appellants noticed appeal. JS-App. 18a.

Summary of the Argument

The challenged limits are unconstitutional under the exacting scrutiny employed by the lower court, but strict scrutiny should apply because aggregate limits differ in kind from base limits, imposing greater burdens. Furthermore, the contribution/expenditure scrutiny dichotomy in *Buckley*, 424 U.S. at 25, 39-49, should be overruled, modified, or held inapplicable to aggregate limits.

The $74,600 aggregate limit on contributions to *non-candidate committees*, 2 U.S.C. 441a(a)(3)(B), is unconstitutional *as applied* to national party committees. *Buckley*'s facial upholding of the old "ceiling" does not control this case, but this Court's conduit-contribution analysis in *Buckley* should be followed. 424 U.S. at 38. *Buckley* based its conduit-contribution mechanism on (a) political-committee proliferation by the same persons, (b) "huge" contributions to political party committees (or PACs), and (c) "massive" conduit-contributions. Post-*Buckley* FECA amendments eliminated these elements of the mechanism. Under BCRA's changes, *Buckley*'s posited mechanism remains impossible, eliminating any conduit-contribution risk.

The $74,600 limit is *facially* unconstitutional due to substantial overbreadth.

The $48,600 sub-limit on contributions to non-national party committees, 441a(a)(3)(B), should be struck as non-severable.

The $48,600 aggregate limit on contributions to *candidates*, 2 U.S.C. 441a(a)(3)(A), is also unconstitutional. Under *Buckley*'s required conduit-contribution analysis, candidate committees posed no conduit-contribution risk when this Court decided *Buckley* and

they pose none now. Even under an anti-corruption-interest analysis, there is no quid-pro-quo risk from candidate *Z* knowing that an individual contributed the base-level amount to candidates *A*-*Y*. The aggregate limit is overbroad as to any anti-corruption interest or the conduit-contribution concern, so it is not properly tailored (closely or strictly) to the anti-corruption interest.

Argument

I.
Aggregate Limits Fail Exacting Scrutiny, Though Strict Scrutiny Should Apply.

Aggregate limits fail the exacting scrutiny that the lower court chose, but strict scrutiny should apply.

Buckley decided that contribution and expenditure limits "implicate fundamental First Amendment interests," but the latter "impose significantly more severe restrictions on . . . political expression and association." 424 U.S. at 23. Based on this dichotomy, *Buckley* is now commonly understood as applying exacting scrutiny to contribution limits, *id.* at 25, and strict scrutiny to expenditure limits, *id.* at 39-49. *See, e.g.*, *FEC v. Beaumont*, 539 U.S. 146, 162 (2003).

The lower court cited *Buckley*'s contribution/expenditure scrutiny dichotomy and *labeled* aggregate limits as mere "contribution limits." JS-App. 6a-9a.[3] It applied exacting scrutiny, requiring only that the aggre-

[3] Government "cannot foreclose . . . constitutional rights by mere labels." *NAACP v. Button*, 371 U.S. 415, 429 (1963), *followed in FEC v. Colorado Republican Fed. Campaign Comm.*, 518 U.S. 604, 622 (1996) ("*Colorado-I*").

gate limits be "'closely drawn to match a sufficiently important interest.'" JS-App. 6a-9a (citation omitted).[4]

However, aggregate limits fail under the exacting scrutiny employed by the lower court. Exacting scrutiny is in fact an "exacting" test, and the government should not be allowed to essentially argue a rational-basis test. The lower court did not require the government to prove that the aggregate limits are supported by a "sufficiently important interest," let alone that they are "closely drawn" to a cognizable interest, or that the government has "avoid[ed] unnecessary abridgement" of First Amendment rights. *Buckley*, 424 U.S. at 25.

But aggregate limits materially differ from, and impose greater burdens than, ordinary contribution limits. So higher scrutiny should apply.

A. Aggregate Limits Should Not Be Treated as Mere Base Contribution Limits.

Since aggregate limits impose greater burdens than base limits, there is no principled way to apply the same scrutiny. They differ in two key respects.

First, they have different justifications. The justification for a *base* limit is the *quid-pro-quo* risk, *Buckley*, 424 U.S. at 26, based on the fact that a particular candidate *receives* the contribution. But an *aggregate* limit restricts an individual's total contributions, not any contribution received by a particular candidate, so *Buckley* required a *conduit-contribution* risk to justify it. *Id.* at 38. Thus, the limits differ in kind. *Cf. id.* at 30 (even "distinctions in degree become significant . . . when they . . . amount to differences in kind").

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[4] The court ignored the requirement to "avoid unnecessary abridgement." *Buckley*, 424 U.S. at 25.

Second, while *base* limits restrict how *much* one may contribute to *particular* candidates, political parties, or PACs, *aggregate* limits restrict how *many* such entities one may support at the *full*-base-limit amount (what Congress contemplates an individual being *able* to give). *Buckley* agreed that the "ceiling" limited the "number of candidates and committees with which individuals may associate," though it held this restriction justified by a conduit-contribution risk. *Id.* at 38.[5] *Buckley*'s statements, however, do not justify *current* aggregate limits. *See* Part II. But *Buckley* does acknowledge that the burdens *differ*. Thus, applying the same scrutiny based on mere *labeling* is erroneous.

The *Buckley*- and BCRA-Scheme Charts, MB-App. 18a, show how the scheme has changed. With base limits for all entities, BCRA layers aggregate limits *atop* them, restricting how much an individual may *spend* on political expression and association at the full-base-limit level. Thus, though the aggregate limits are not expenditure limits in the sense of directly limiting an individual's expenditures for, e.g., ads, they are more in the nature of an expenditure limit than a contribution limit, and expenditure limits are *per se* unconstitutional. *Randall v. Sorrell*, 548 U.S. 230, 242-46 (2006) (plurality).

The fact that aggregate limits are not actually contribution limits is well stated by Bob Bauer:

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[5] This refutes any notion that aggregate limits impose no association burden because one may associate with many candidates or committees at lower levels. Burdens should be analyzed on the basis of full-base-level contributions, above which Congress asserted no cognizable interest.

> [T]he [aggregate limit] is not [the] same as a contribution limit in the traditional sense. Most contributions are made specifically to someone or some entity, and the limit on contributions decreases the risk of corrupting that *particular* someone or entity. The overall limit might seem more like a ceiling on spending. The individual subject to this limit is unable to spend more than an amount fixed by statute for all her contributions in the aggregate. The result is an aggregate limit which smacks of a spending limit . . . ."

Robert Bauer, *The McCutcheon Case and the Contribution/Expenditure Limit Problem*, More Soft Money Hard Law, Apr. 26, 2013, http://www.moresoftmoneyhardlaw.com/2013/04/contributions-and-expenditures-in-campaign-finance-jurisprudence/ (emphasis in original).

Bauer then notes that aggregate limits are sometimes deemed contribution limits because they are part of a *package* aiding enforcement. But he explains why that logic fails, based on the history of the *spending* limit in *Buckley*:

> [A]n aggregate limit . . . is assumed to be a contribution limit because it aids enforcement of such limits (the base limits). But this logic does not hold up well. In the Buckley case, the limit on aggregate spending was argued as necessary to enforce the contribution limits. The Court of Appeals had held that "We . . . uphold the expenditure ceilings imposed by [citation omitted] as an essential ingredient in the regulatory scheme propounded by this comprehensive legislation, one which reduces the incentive to cir-

> cumvent direct contribution limits and bans." (*Buckley v. Valeo*, 519 F.2d 821, [858-59 (D.C. Cir. 1975)]). The Supreme Court rejected this rationale in the case of this [expenditure] limit. But this history illustrates the larger point that a limit's function in enforcing contribution limits does not mean that it is, by definition, a *contribution limit*.

Id. (emphasis in original).[6]

In *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) ("*Colorado-II*"), Justice Thomas, joined by Justice Scalia, called for the overruling of *Buckley*'s contribution/expenditure scrutiny dichotomy because strict scrutiny should extend to all core political activity, i.e., "the core speech and associational rights that our Founders sought to defend," *id.* at 465-66 (dissenting) (collecting cases).[7] This Court should overrule *Buckley*'s scrutiny dichotomy in this case. Alternatively, precedent requires strict scrutiny under two other approaches. *Infra* Parts I(B)-(C).

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[6] Furthermore, this *Buckley* history demonstrates that limits must be scrutinized separately, not as part of "a coherent system" as the lower court did here. JS-App. 13a.

[7] *See also Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 192 n.12 (1999); *id.* at 206, 214 (Thomas, J., concurring in the judgment). *See also Randall*, 548 U.S. at 242-44 (2006) (plurality); *id.* at 263 (Alito, J., concurring in part and concurring in judgment); *id.* at 264 (Kennedy, J., concurring in judgment); *id.* at 266 (Thomas, J., joined by Scalia, J., concurring in judgment).

B. Under *Buckley*'s Scrutiny Dichotomy, Strict Scrutiny Applies Because the Speech Burden Is Cognizable.

If this Court retains its contribution/expenditure scrutiny dichotomy, it should apply strict scrutiny because aggregate limits impose greater speech burdens than base limits. Precedent requires strict scrutiny where such a cognizable speech burden exists.

Buckley recognized that base limits burden *both* expression and association rights, 424 U.S. at 23, but decided that a "limitation upon the amount that any . . . person . . . may contribute *to* a candidate or political committee entails only a marginal restriction upon the contributor's . . . free communication," *id.* at 20 (emphasis added). This addresses contributions "*to*" political entities, not *total contributions*. It applies to *base*, not *aggregate*, limits.

Furthermore, it is no longer true "that the contribution limitations . . . have [no] dramatic adverse effect on the funding of campaigns and political associations." *Buckley*, 424 U.S. at 21. While candidates and political parties raise substantial funds, they are increasingly being disadvantaged and marginalized vis-a-vis super-PACs,[8] which are not subject to aggregate limits.[9] The

[8] Restore Our Future, the leading super-PAC in 2012 (in fundraising and expenditures), had numerous individual donors giving it over $1 million, with some, like casino-magnate Sheldon Adelson and his wife, giving as much as $5 million each. CRP, *Restore Our Future Contributors*, http://www.opensecrets.org/pacs/pacgave2.php?sort=A&cmte=C00490045&cycle=2012&Page=1.

[9] Super-PACs are PACs that only make independent expenditures (not contributions) and which may receive (continued...)

situation has changed since *Buckley*. And once a contributor has made a base-level contribution to nine candidates for *both* primary and general elections (dividing $48,600 by $5,200, *see supra* at i), or eighteen different candidates for single elections, the contributor cannot contribute to another, reducing that candidate's political speech, which cannot be made up by "merely . . . rais(ing) funds from a greater number of people." *Buckley*, 424 U.S. at 22.

Nor can individuals make up for their inability to make full-base-level contributions to as many candidates and political parties as they choose by volunteering to work for candidates and political parties. That might work where a single candidate or national party committee is involved, as with a base limit. But where an individual seeks to make full-base-level contributions to more than nine (or eighteen) candidates and to all three Republican national party committees, the option fails—time and energy preclude it.

Buckley indicated that where a cognizable speech burden is involved, higher scrutiny applies, *id.* at 23, 39-49, and as a result, this Court has applied strict scrutiny even to contribution limits. *See Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 300 (1981) ("to limit the right of association places an impermissible restraint on . . . expression."); *Randall*, 548 U.S. at 261 (limit "so restrictive as to bring about . . . serious associational and expressive problems").

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[9] (...continued)
unlimited contributions, including contributions earmarked for specific independent expenditures. *See* FEC, Advisory Opinion 2010-09 (Club for Growth) at 5, *available through* http://saos.nictusa.com/saos/searchao.

C. Alternatively, Strict Scrutiny Should Apply Under Substantial-Burden Analysis.

If this Court decides that *Buckley*'s contribution/expenditure scrutiny dichotomy is no longer useful but does not decide to strictly scrutinize *all* campaign-finance laws, it should apply strict scrutiny here because the aggregate limits impose a *substantial* burden. This occurred in recent decisions, including one involving contribution limits. *See Davis v. FEC*, 554 U.S. 724, 744 (2008) ("strength of . . . interest must reflect . . . seriousness of . . . actual burden on First Amendment rights"); *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2813 (2011) ("Arizona's . . . scheme substantially burdens protected political speech without serving a compelling state interest").

In sum, if the aggregate limits are labeled mere contribution limits and subjected to exacting scrutiny, they fail that *exacting* scrutiny. But this Court should apply strict scrutiny, and it should overrule *Buckley*'s contribution/expenditure scrutiny dichotomy. And this Court should require the government to actually *meet* its scrutiny burden, which the lower court did not do.

II.

The $74,600 Aggregate Limit on Contributions to Non-Candidate Committees Is Unconstitutional as Applied to National Party Committees.

The $74,600 aggregate limit on contributions to non-candidate committees, 2 U.S.C. 441a(a)(3)(B), violates First Amendment free speech and association

rights as applied to contributions to national party committees.[10]

The aggregate limit serves no permissible purpose. In *Buckley*, this Court upheld a "ceiling" on individuals' aggregate contributions, 424 U.S. at 38, but that holding does not control here. However, this Court should follow its analysis in *Buckley*, *id.*, under which the aggregate limit is unconstitutional.

A. *Buckley*'s Facial Upholding of the "Ceiling" Does Not Control this Case, but this Court Should Apply *Buckley*'s Analysis.

Buckley recognized the core First Amendment rights at issue here. "[C]ontribution and expenditure limitations . . . [affect] the most fundamental First Amendment activities." *Id.* at 14. "[T]he First . . . Amendment[] guarantees freedom to associate with others for the common advancement of political beliefs and ideas, a freedom that encompasses (t)he right to associate with the political party of one's choice." *Id.* at 15 (citations and quotation marks omitted). "Making a contribution, like joining a political party, serves to affiliate a person with a candidate [or a political party]. . . . [I]t enables like-minded persons to pool their resources in furtherance of common political goals." *Id.* at 22.

Buckley rejected a constitutional challenge to a "ceiling" on an individual's contributions. *Id.* at 38. That

[10] Appellant addresses 441a(a)(3)(B) *before* 441a(a)(3)(A) because the analysis begins with *Buckley*'s conduit-contribution analysis and posited mechanism, 424 U.S. at 38, which identified concerns with political party committees (and PACs), *not* candidate committees. So the analysis first shows the elimination of *Buckley*'s conduit-contribution concern and mechanism.

holding does not control here because *Buckley* involved a *facial* challenge and Congress materially *altered* the statutory context by enacting new base limits and by replacing the "ceiling" with multiple aggregate limits.

But this Court's *analysis* in *Buckley* should be followed here. That analysis involves three key factors.

First, that analysis requires the government to prove a *conduit-contribution* risk (not the quid-pro-quo risk this Court applied to base limits, *id.* at 26). While the conduit-contribution risk derives from the quid-pro-quo risk, the quid-pro-quo risk does not arise unless a " *large* contribution [is] *given* to secure a political quid pro quo from current and potential office holders," i.e., a "large" contribution is actually "given" to a candidate. *Id.* (emphasis added). However, base limits *prevent* "large" contributions and an aggregate limit restricts what a contributor can spend on political contributions—not what is *given* to a candidate. So the government must specifically prove a "large"-*conduit-contribution* risk and may not meet its burden with broad-brush theories of *corruption* instead.

Second, *Buckley*'s analysis requires the government to prove this conduit-contribution risk by a *mechanism* showing *how* a "large" conduit-contribution might actually get to a particular, intended candidate with everyone abiding by existing laws. *Id.* at 38. This mechanism fails *per se* if it tries to show something *other* than a conduit-contribution risk, e.g., that some candidate might be grateful.

Third, *Buckley*'s analysis requires that the mechanism be based on the *function* of the aggregate limit *itself*. *Id.* That was the case with *Buckley*'s mechanism because the "ceiling" filled base-limit gaps. *See* MB-App. 18a. The "ceiling" actually provided the base lim-

its for political parties (and PACs), preventing "huge" contributions to them. 424 U.S. at 38. This Court based its mechanism in *Buckley* on this function of the "ceiling" itself.

Key to *Buckley*'s mechanism was the fact that FECA had only these applicable limits, *see id.* at 189:

- $1,000/election person-to-candidate base limit;
- $5,000/election limit on a contribution by a multicandidate political committees to a candidate;
- $25,000/biennium "ceiling" on all an individual's contributions.

See MB-App. 18a.

There were no limits on contributions *to* political party committees and PACs *other than* the "ceiling." Absent that "ceiling," individuals could give *unlimited* amounts to political parties (and PACs). Also missing was a restriction on political-committee proliferation by the same entities. *See infra* at 17-18. *Buckley* upheld the "ceiling" *facially*, in *that* context (though it was "not . . . separately addressed at length by the parties"). *Id.* at 38. The key was *Buckley*'s posited conduit-contribution mechanism:

> The . . . ceiling . . . . prevent[s] 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. (emphasis added).

Essential to this analysis is the Court's earlier highlighting of the political-committee proliferation prob-

lem, which, the Court noted (regarding the base limit's tailoring), left "persons free . . . to assist to a . . . substantial extent in supporting candidates and committees with financial resources [FN31]." *Id.* at 28. The Court explained political-committee proliferation:

> [FN 31] While providing significant limitations on the ability . . . to contribute large amounts of money to candidates, the Act's contribution ceilings do not foreclose . . . making . . . substantial contributions to candidates by some major special-interest groups through the combined effect of individual contributions from adherents or the *proliferation* of political funds each authorized under the Act to contribute to candidates. . . . [FECA] permits corporations and labor unions to establish segregated funds . . . for political purposes. . . . Each separate fund may contribute up to $5,000 per candidate per election . . . .
>
> *The Act places no limit on the number of funds that may be formed through the use of subsidiaries or divisions of corporations, or of local and regional units of a national labor union. The potential for proliferation of these sources of contributions is not insignificant.* . . .

Id. at 28 n.31 (emphasis added; citations omitted).

In sum, the analytical key to *Buckley*'s facial upholding is its posited conduit-contribution mechanism based on (a) political-committee proliferation by the same entities, (b) a "huge" contribution to a political party (or PAC), and (c) a resulting capability for "massive" conduit-contributions from an individual to a particular, intended candidate.

B. Congress Fixed *Buckley*'s Posited Conduit-Contribution Mechanism.

Congress promptly eliminated *Buckley*'s conduit-contribution concern and mechanism. It eliminated "huge" contributions to political parties (or PACs) by adding new limits on contributions to and by entities:

- $1,000/election person-to-candidate base limit;
- (*new*) $20,000/year base limit by "persons" *to* national party committees;
- (*new*) $5,000/year base limit by "persons" *to* other political committees;
- by "multicandidate committees"[11] as follows—
  - $5,000/election to candidates,
  - (*new*) $15,000/year *to* national party committees,
  - (*new*) $5,000/year *to* other political committees;
- $25,000/biennium "ceiling" on all an individual's contributions.[12]

See FECA Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (1976). *See also* 2 U.S.C. 441a(a)(1).

These new limits, without more, eliminate *Buckley*'s conduit-contribution concern and mechanism. These limits represent the level at which Congress recognized and asserted relevant interests. Only a "large" contribution *to a candidate* triggers the quid-pro-quo risk. 424 U.S. at 23-27. The concern supporting limits on contributions *to political parties and PACs* is *Buckley*'s conduit-contribution risk, *id.* at 38, but only "huge"

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[11] *See* 11 C.F.R. 100.5(e)(3) (definition).

[12] Because the new base limits eliminated the conduit-contribution concern and mechanism on which this Court justified the "ceiling," the "ceiling" no longer served any permissible purpose. Yet it remained.

contributions to political parties (or PACs) trigger that "massive"-conduit-contribution risk. *Id.* at 38. Thus, Congress's limits on contributions to and by these entities were the level at which Congress *asserted* its anti-corruption interest and conduit-contribution concern. In other words, these limits fix the "huge" and "massive" contribution problems that *Buckley* identified. This leaves no justification for aggregate limits to purportedly fix these same problems.

Furthermore, FEC cannot meets its burden to prove a conduit-contribution mechanism by relying on transfers.[13] When Congress fixed the conduit-contribution problem, it expressly exempted "transfers" from its new contribution limits: "The limitations on contributions . . . do not apply to transfers between and among political parties which are national, State, district, or local committees . . . of the political party." 2 U.S.C. 441a(a)(4). *See* MB-App. 4a. Thus, Congress perceives *no* conduit-contribution risk in transfers between federal committees of the same political party—or of any affiliated committees. 11 C.F.R. 110.3(c)(1). So Congress asserted no conduit-contribution (or other) concern regarding these transfers. This is logical because hard money does not raise the concerns Congress identified with soft money: "[P]rohibiting parties from donating funds already raised in compliance with FECA does little to further Congress' goal of preventing corruption or the appearance of corruption of federal can-

[13] Unlimited funds may be transferred between political parties, from candidates to political parties, and between affiliated committees ("transfers" are not included within the "contribution" definition). *See* 11 C.F.R. 110.3(c). The lower court relied on transfers for its hypothetical mechanism. JS-App.12a.

didates and officeholders." *McConnell v. FEC*, 540 U.S. 93, 179 (2003). "We have found no evidence that Congress was concerned about . . . money . . . regulated by FECA." *Id.* at 180. Congress having asserted no interest regarding transfers, FEC may not now claim that transfers raise corruption or conduit-contribution concerns.

Thus, two of the factors key to *Buckley*'s conduit-contribution mechanism were eliminated by these new limits—(1) the ability to give a "huge contribution to a political party committee (or PAC) and thereby (2) the ability to trigger a "massive" conduit-contribution to a particular, intended candidate.

Congress also eliminated the third factor in *Buckley*'s mechanism—*political-committee proliferation*. The 1976 Conference Report described the new anti-circumvention, anti-proliferation rules as follows:

> The anti-proliferation rules . . . are intended to prevent . . . persons or groups . . . from *evading the contribution limits* . . . . Such rules are described as follows:
>
> 1. All . . . political committees set up by a single corporation and its subsidiaries are treated as a single political committee.
>
> 2. All . . . political committees set up by a single international union and its local unions are treated as a single political committee.
>
> 3. All . . . political committees set up by the AFL-CIO and all its State and local central bodies are treated as a single political committee.
>
> 4. All . . . political committees established by the Chamber of Commerce and its State and

> local Chambers are treated as a single political committee.
>
> 5. The anti-proliferation rules stated also apply in the case of multiple committees established by a group of persons.

H.R. Rep. No. 94-1057, at 58 (1976) (emphasis added).[14]

In 1980, Congress did two further things related to *Buckley*'s analysis. It barred "personal use" of candidate campaign funds *and* expressly authorized candidate "transfers without limitation to any . . . political party." Pub. L. 96-187, § 113, 93 Stat. 1339. When this Court decided *Buckley*, candidates could use contributions "for any . . . lawful purpose," 424 U.S. at 179, including *personal* use. That is now impossible, reducing any quid-pro-quo risk. 11 C.F.R. 113.1(g), 113.2 (defining and barring "personal use").[15] Permitting unlimited candidate transfers to political parties means that Congress perceives, and asserts, *no* conduit-contribution or other risk in such transfers.

Because this Court upheld one of Congress's post-*Buckley* cures for the conduit-contribution risk and mechanism, those cures remain in place and effective. The $5,000/year limit on contributions *to* a PAC was upheld in *California Medical Association v. FEC*, 453 U.S. 182 (1981) ("*Cal. Med.*"), based on a conduit-con-

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[14] Affiliated committees share a contribution limit, and FEC may consider *numerous* factors to identify affiliation. 11 C.F.R. 100.5(g), 110.3(a). *See* MB-App. 8a-9a.

[15] *Cf. FEC v. Craig*, No. 12-0958, 2013 WL 1248271, (D.D.C. Mar. 28, 2013) (re impermissible use of campaign funds by former Sen. Craig for legal defense unrelated to official duties).

tribution risk. *Id.* at 197-99 (plurality); *id.* at 203 (Blackmun, J., concurring in part and in judgment).[16] The plurality recited legislative history declaring that the 1976 amendments were to eliminate circumvention and political-committee proliferation:

> The Conference Report . . . specifically notes:
>
> > "The conferees' decision to impose more precisely defined limitations on the amount an individual may contribute to a political committee . . . and to impose new limits on the amount a person or multicandidate committee may contribute to a political committee . . . is predicated on the following considerations: first, these limits *restrict the opportunity to circumvent* the $1,000 and $5,000 limits on contributions to a candidate; second, these limits serve to assure that candidates' reports *reveal the root source* of the contributions the candidate has received; and third, these limitations *minimize* the adverse im-

[16] CMA argued that contributors should be able to make unlimited contributions to multicandidate PACs, to which the plurality replied that eliminating the base limit would reinstate *Buckley*'s conduit-contribution risk, including evasion of the $25,000-ceiling, "since such committees are not limited in the aggregate amount they may contribute in any year. These concerns prompted Congress to enact § 441a(a)(1)(C) . . . to protect the integrity of the contribution restrictions upheld . . . in *Buckley*." *Cal. Med.*, 453 U.S. at 197-99 (plurality). The plurality's comment in *Cal. Med.* about the "ceiling" does not control here because it is not a court opinion, it does not deal with the new aggregate limits, and the ceiling's constitutionality was not at issue. Vitally, because the Court *upheld the PAC base limit*, *Buckley*'s conduit-contribution mechanism remains eliminated.

> pact on the statutory scheme caused by *political committees that appear to be separate entities pursuing their own ends, but are actually a means for advancing a candidate's campaign*."

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

In sum, Congress eliminated the conduit-contribution mechanism that *Buckley* posited to uphold the "ceiling."Congress having fixed *Buckley*'s conduit-contribution concern and mechanism—which this Court deemed the justification for the old "ceiling"—that "ceiling" is no longer justified, nor is any other aggregate limit on an individual's total contributions.

C. In BCRA, Congress Repealed and Replaced the "Ceiling" with Multiple Aggregate limits.

In BCRA § 307(b), 116 Stat. 102-03, Congress repealed and replaced the "ceiling" with multiple aggregate limits. *See* MB-App. 18a. But the new aggregate limits are no more justified now than the "ceiling."

D. The $74,600 Aggregate Limit Lacks a Cognizable Interest as Applied to National Party Committees.

The aggregate limit on contributions to non-candidate committees, 2 U.S.C. 441a(a)(3)(B), is unconstitutional as applied to national party committees. The aggregate limit serves no permissible purpose. Lacking such a purpose, it is not properly tailored (neither closely nor narrowly) to a cognizable interest (neither sufficiently important nor compelling).

1. The Anti-Corruption Interest Is Not Directly Implicated.

"[P]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances." *FEC v. National Conservative PAC*, 470 U.S. 480, 496-97 (1985) ("*NCPAC*"). "Corruption" is limited: "Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial *quid pro quo*: dollars for political favors." *Id.* at 497. *Citizens United* again limited "corruption" to quid-pro-quo corruption, rejecting influence, access, gratitude, and leveling-the-playing-field as cognizable corruption. 130 S. Ct. at 909-12.

However, the anti-*corruption* interest is not directly implicated with contributions to national party committees because it "is implicated by contributions to *candidates*."*EMILY's List v. FEC*, 581 F.3d 1, 6 (D.C. Cir. 2009)) (emphasis in original). Cognizable quid-pro-quo corruption is based on a *financial* benefit to a *particular* candidate in such a "large" amount, *Buckley*, 424 U.S. at 26, as to cause a candidate "to act contrary to [the candidate's] obligations of office," *NCPAC,* 470 U.S. at 497. Only if a large contribution is actually *received* by a particular candidate is the quid-pro-quo risk directly implicated.

Because the anti-corruption interest is not directly implicated with aggregate limits, *Buckley* required that the government show a mechanism explaining how a conduit-contribution could actually *get* to a particular, intended candidate. This Court required that conduit-contribution mechanism to justify the aggre-

gate "ceiling," 424 U.S. at 38, not the anti-corruption interest applicable to base limits, *id.* at 26.

Furthermore, national party committees pose no inherent quid-pro-quo risk to their candidates. *See Colorado-I*, 518 U.S. at 616 ("Breyer, J., joined by O'Connor & Souter, JJ.) ("We are not aware of any special dangers of corruption associated with political parties . . . ."); *id.* at 646 (Thomas, J., joined by Rehnquist, C.J., and Scalia, J., concurring in judgment and dissenting in part).[17] Thus, just as in *Colorado-I*, where an anti-corruption interest could not be used as a basis to prohibit political party committee independent expenditures, here it cannot be used to limit contributions to national party committees because there is no quid-pro-quo risk. *See also Colorado-II*, 533 U.S. at 456 (relying on anti-*circumvention* concern in upholding limit on party expenditures coordinated with candidates).

2. No Conduit-Contribution Concern Exists.

Under this Court's analysis in *Buckley*, FEC must prove a specific *mechanism* by which the *conduit-con-*

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[17]

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

Id. at 646 (Thomas, J., joined by Rehnquist, C.J., and Scalia, J., concurring in judgment and dissenting in part) (citations omitted).

tribution risk might arise. FEC has proven none. There is none.

This Court recognized that Congress may take *prophylactic* measures to prevent *circumvention* of the contribution limits that eliminate the quid-pro-quo risk.[18] But the anti-circumvention interest does not justify the $74,600 aggregate limit as applied to contributions to national party committees.

(a) The Government's Ability to Assert a Conduit-Contribution Concern Is Limited in Scope.

Just as cognizable *corruption* is strictly limited, *see Citizens United*, 130 S. Ct. at 909-10, cognizable *circumvention*, i.e., a conduit-contribution risk, is also limited—in four ways.

First, because the government's ability to prevent a conduit-contribution risk is derivative and prophylactic, there must first be a cognizable, *underlying quid-pro-quo risk*. Since *Buckley* held that only "large contributions" trigger a quid-pro-quo risk, 424 U.S. at 26, any conduit-contribution mechanism must allow an individual to get a "*large*" conduit contribution to a particular, intended candidate (without any sort of earmarking) in order to trigger a risk. This Court recognized this requirement by requiring that a conduit-contribution mechanism allow an individual to "contribute *massive* amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or

[18] The base limits are themselves "preventative," *Citizens United*, 130 S. Ct. at 908, as are limits on contributions *by* political party committees, PACs, and candidate committees, making aggregate limits a prophylaxis-on-prophylaxis.

huge contributions to the candidate's political party," *id.* at 38 (emphasis added).

Given the requirement of massive contributions for a cognizable conduit-contribution concern, the tiny percent of a contribution by a national party committee to a candidate that might be deemed attributable on a prorated basis to the contributor of an unearmarked, base-level amount to the national party committee would not be cognizable as a conduit-contribution. If an individual gave $1,000 to a national party committee that received $1,000,000, her share of the million would be 0.1%. If that committee contributes $5,000 to a candidate, then a prorated portion of that contribution might be deemed attributable to that individual. Multiplying $5,000 by 0.1%, reveals that $5 might be deemed attributable to that individual. But that prorated amount is not cognizable for a conduit-contribution analysis for two reasons: (a) it is neither "large" nor "massive" and so cannot trigger the quid-pro-quo risk and (b) it is at a level approved by Congress when Congress set limits on contributions *to* national party committees and on contributions *by* national party committees. So such a prorated share of a contribution to a candidate resulting from activity within the limits set by Congress raises neither a quid-pro-quo interest nor a conduit-contribution concern.

Moreover, no underlying interest in preventing quid-pro-quo corruption would be triggered if an unearmarked conduit-contribution could not be clearly *attributed* to a particular individual intending to benefit a particular candidate, because otherwise there would be no underlying quid-pro-quo risk. Such "attribution" occurs when there is earmarking (which is broadly defined, *see infra* at 38-40), but it does not occur where

there is a mere assignment of credit, e.g., a "tallying" system.[19] This is clear from FEC's recent decision in Matter Under Review ("MUR") 3620 (Democratic Senatorial Campaign Committee ("DSCC")),[20] wherein FEC made clear that absent earmarking (a) a national party committee may do what it wants with contributions to it that are tallied to the credit of a particular candidate, (b) that such tallied contributions are not implicitly earmarked, and (c) that tallied contributions do not trigger a quid-pro-quo or conduit-contribution risk. *See infra* at 41-42 (discussing MUR 3620).

Second, the government must prove that "harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broadcasting Sys. v. FCC,* 512 U.S. 622, 664 (1994) (citation omitted). So any suggested conduit-contribution mechanism and underlying quid-pro-quo risk must be *proven*, not based on speculation.

Third, just as "[r]eliance on a 'generic favoritism or influence theory . . . is at odds with . . . First Amendment analyses because it is unbounded and susceptible to no limiting principle,'" *Citizens United*, 130 S. Ct. at 910 (citation omitted), so there can be no generic "circumvention" theory lacking a "limiting principle."

Fourth, while true circumvention cannot be based on citizens changing from now-barred political activity to yet-legal activity, such avoidance (not evasion) can be a reason to *overturn* restrictions, not multiply them:

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[19] The lower court cited a tallying scheme for its assertion that "it is not hard to imagine a situation where parties implicitly agree [to serve as conduits]." JS-App. 12a.

[20] *Available through* http://fec.gov/em/mur.shtml.

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

Citizens United, 130 S. Ct. at 912 (emphasis added). So if would-be contributors to national party committees are restricted by aggregate limits and instead give to super-PACs,[21] that kind of "circumvention" requires careful examination of whether the aggregate limits are constitutionally justified.[22]

Even where there *is* a conduit-contribution risk, "Congress may not choose an unconstitutional remedy." *Citizens United*, 130 S. Ct. at 911. If the ability to move "massive" unearmarked conduit-contributions to a particular candidate is already eliminated by post-*Buckley* amendments, there remains no justification for additional prophylaxes. This is clear from the prohibition on layering "prophylaxis-upon-prophylaxis" ar-

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[21] *See, e.g.*, Anupama Narayanswamy, *Presidential campaign donors moving to super PACs*, Sunlight Reporting Group, Apr. 26, 2012, http://reporting.sunlightfoundation.com/2012/maxed-out-donors/.

[22] *Buckley* applied this "circumvention" principle in rejecting an independent-expenditure limit. 424 U.S. at 45-47. "Rather than preventing circumvention of the contribution limitations, [the limit] severely restricts all independent advocacy despite its substantially diminished potential for abuse." *Id.* at 47.

ticulated in *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 479 (2007) ("*WRTL-II*") (Roberts, C.J., joined by Alito, J.) (controlling opinion). *WRTL-II* rejected the argument "that an expansive definition of 'functional equivalent' [wa]s needed to ensure that issue advocacy does not circumvent the rule against express advocacy, which in turn helps protect against circumvention of the rule against contributions." *Id.* at 479. *WRTL-II* held that the "prophylaxis-upon-prophylaxis approach" . . . is not consistent with strict scrutiny." *Id.*

Nor is layering prophylaxes consistent with the exacting scrutiny *tailoring* requirement that any contribution "limitation [be] no broader than necessary to achieve th[e governmental] interest," *Cal. Med.*, 453 U.S. at 203 (Blackmun, J., concurring in part and in judgment) (controlling opinion), or that the government "avoid unnecessary abridgement of associational freedoms," *Buckley*, 424 U.S. at 25. An aggregate limit is inadequately tailored and too broad if a base limit eliminates conduit-contribution risks.

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

Applying these principles limiting a cognizable conduit-contribution risk and remedy, we return to whether a conduit-contribution concern justifies the $74,600 aggregate limit as applied to national party committees.[23]

[23] Congress saw political parties as posing little conduit-contribution risk because it created a higher limit on contributions to them and gave them extra spending authority. *See* MB-App. 17a.

This requires returning to *Buckley*'s analysis in facially upholding the old "ceiling." *See supra* at 15-18. This Court's analysis pointed to a conduit-contribution mechanism. Employing that analysis in searching for a conduit-contribution mechanism here, *as applied to national party committees*, *Buckley*'s analysis requires consideration of three questions:

- Is *political-committee proliferation* by national party committees possible?
- Can a "*huge* contribution" be made to a national party committee?
- Can a national party committee be a vehicle for a "*massive*" conduit-contribution to a particular candidate?[24]

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

Beginning with *Buckley*'s concern about political-committee proliferation, is it possible to make a "massive" conduit-contribution to a candidate through a *proliferation* of political committees by the same persons? No. *Buckley*'s specific concern was with a proliferation of *PACs*, *see* 424 U.S. at 28 n.31, but the 1976 FECA amendments eliminated all political-committee proliferation by the same entities. FEC has detailed "affiliation" rules preventing this proliferation. 11 C.F.R. 100.5(g).[25]

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[24] Only arguments applicable to national party committees are relevant to this *as-applied* challenge (though Congress fixed *Buckley*'s concerns broadly). So, e.g., an argument that there are now more PACs is irrelevant here.

[25] The "affiliated committee" definition establishes which committees "shar[e] a single contribution limitation." (continued...)

As relevant here, national party committees of the same political party are not affiliated, 11 C.F.R. 100.5(g)(3)(iv), but only three Congress-approved national party committees are permitted per national political party—a national committee, a Senate campaign committee, and a House campaign committee, 11 C.F.R. 110.3(b)(1)-(2). Congress gave them separate limits on contributions received and made.[26] And Congress expressly declined to limit transfers between them—indicating Congress's judgment that national party committees pose no cognizable corruption or conduit-contribution risk based on these hard-money limits. RNC, NRSC, and NRCC are, *in fact*, separate legal entities with separate histories, governing bodies, and focuses. Verified Complaint ("VC–") ¶¶ 43-58. They have their own agendas, e.g., RNC focuses primarily on presidential elections and party matters, NRSC focuses on electing Republican senators, and NRCC focuses on electing Republican representatives. VC–¶¶ 43-46. So there is no reason to treat them as one for the $74,600 aggregate limit.

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[25] (...continued)
11 C.F.R. 100.5(g)(3). All committees run by the same entities are "affiliated." *Id.* FEC broadly defines factors it considers in determining "affiliation," including formal and informal control, control over employees, overlapping membership, overlapping officers or employees, funding relationships, founding relationships, and patterns of contributions and contributors. 11 C.F.R. 100.5(g)(4). *See* MB-App. 7a-9a. *See also* 11 C.F.R. 110.3(a) (same factors).

[26] National party committees have Congress-approved separate limits on contributions, e.g., each may receive $32,400/year from an individual and each may contribute $5,000/election to a candidate. MB-App. 17a.

In sum, it is now impossible to move massive conduit-contributions to candidates through a *proliferation* of political committees created by the same persons, and there are only three, unique national party committees per political party—all expressly approved by Congress.

(d) Congress Imposed a *Huge-Contribution* Prophylaxis.

Turning to *Buckley*'s conduit-contribution concern about "huge" contributions to national party committees, is it possible now for an individual to make a "*huge* contribution[]" to a national party committee? *Buckley*, 424 U.S. at 38 (emphasis added). No. Nor is it possible to make a "huge" contribution to any political party committee or PAC (that makes contributions). While the system that *Buckley* considered had no base limits on contributions *to* political parties and PACs (other than the "ceiling"), those now exist. *See* MB-App. 18a. Thus, *Buckley*'s conduit-contribution mechanism no longer functions.

Individuals may currently give $32,400/year to a national party committee, $10,000/year to a state party committee (combined), $5,000/year to a PAC, and $2,600/election to a candidate. *Id.* None of these is "huge," per year or biennium.[27]

Moreover, failure of Congress to properly adjust limits for inflation means that any quid-pro-quo or con-

[27] *Buckley* did not consider the $25,000 "ceiling" huge, because the Court said it *prevented* "huge" contributions. That $25,000 (in 1974) is worth $118,039 now. *See* www.bls.gov/data/inflation_calculator.htm. But the present aggregate limit on contributions to all non-candidate committees is only $74,600.

duit-contribution risk has *decreased* since the 1974 FECA scheme. Failure to inflation-adjust limits is a "danger sign" requiring careful scrutiny as to tailoring. *Randall*, 548 U.S. at 252-53 (plurality). The inflation calculator provides current equivalents for the permissible 1974 contribution-limits. The $1,000 limit on a person's contributions to candidates upheld in *Buckley*, 424 U.S. at 23-35, is now worth $4,722, not the current $2,600. The $5,000 limit on a political committee's contributions to candidates upheld in *Buckley*, *id.* at 35-37, is now worth $23,608, not the current $5,000. Using 1974 dollar values in a typical election cycle with primary and general elections, an individual should be able to contribute $9,444 to a candidate, not $5,200, and a political party committee or multicandidate PAC should be able to contribute $47,216 to a candidate, not $10,000. Though Congress found no corruption or conduit-contribution risk below these inflation-adjusted amounts, it failed to properly adjust the limits for inflation, thereby layering on yet another prophylaxis affecting the conduit-contribution analysis. For example, even if a contributor could somehow use a national party committee as a conduit for a $5,000 contribution to a candidate, the actual level at which Congress asserted a conduit-corruption risk is now worth $23,608.

And turning specifically to national party committees, we again see that the failure to inflation-adjust limits has decreased any conduit-contribution risk since 1976. The 1976 FECA amendments established a $20,000 base limit for an individual's contribution to a national party committee. *See supra* at 19. In 2002, BCRA increased this to $25,000. 2 U.S.C. 441a(a)(1)(B). But inflation-adjusted from 1976 to 2002, that should have been $63,234. *See* http://www. bls.gov/data/inflation_calculator.htm. Inflation adjustments *since*

2002 do not fix this problem; properly adjusted *since 1976*, this base limit should now be $81,818, not $32,400. *Id.* Since base limits on contributions to non-candidate committees are based on a conduit-contribution concern, the base limits are far below those at which Congress asserted its concern in 1976. Any conduit-contribution risk from base-level contributions has proportionately diminished.

Congress made the judgment that each base limit strikes the right balance in eliminating any *cognizable* conduit-contribution and corruption risk as to the entity to which the limit applies. *See supra* at 21, 23 (Conference Committee Report). So a $32,400/year limit on contributions to RNC, coupled with limits on contributions and coordinated expenditures by RNC, eliminates any cognizable conduit-contribution risk as to a contribution to RNC. Doing something posing zero *cognizable* risk multiple times does not increase the risk. Zero multiplied by anything equals zero. Thus, there is no conduit-contribution justification for an aggregate limit. If there is no conduit-contribution risk in giving $32,400/year to RNC, NRSC, or NRCC, there is no such risk in giving that to all of them in a year, or to each per year per biennium.

In BCRA, Congress instituted yet another prophylaxis against giving "huge" amounts *to* political committees in the form of "soft money." This prophylaxis was a total ban, upheld in *McConnell*:

> The question for present purposes is whether large *soft-money* contributions to national party committees have a corrupting influence or give rise to the appearance of corruption. Both common sense and the ample record in these cases confirm Congress' belief that they do. . . . FEC's

> allocation regime has invited widespread circumvention of FECA's limits on contributions to parties for the purpose of influencing federal elections.

540 U.S. at 145.[28] This was so, the Court said, because "[i]t is not only plausible, but likely, that candidates would feel grateful for such donations and that donors would seek to exploit that gratitude." *Id.* The "circumvention" mentioned here had nothing to do with the conduit-contribution mechanism of *Buckley*. 424 U.S. at 38. Rather, the described "circumvention" mechanism was through broadly defined "corruption" (and its appearance), not conduit-contributions reaching candidates. *Citizens United* rejected this equation of corruption with influence, access, or gratitude. 130 S. Ct. at 909-10. Nonetheless, Congress's ban on soft-money contributions remains in effect, providing another prophylaxis preventing the movement of "huge" amounts to political party committees.

In sum, *Buckley*'s conduit-contribution concern was based on the movement of "massive" conduit-contributions to a particular candidate by means of a "huge" unearmarked contribution to a political party (or PAC). 424 U.S. at 38. That is now impossible.

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

Buckley's conduit-contribution mechanism dealt with whether political party committees could *be con-*

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[28] Some of the perceived problem with soft money was Congress's failure to adjust hard money contribution limits for inflation. A $20,000 hard money contribution plus a $40,000 soft money contribution to RNC in 2001, totaling $60,000, would have been well within a properly inflation-adjusted *hard* money limit. *See supra* at 35.

duits for "massive" contributions to a particular, intended candidate. That is now impossible, which is clear from the elimination of "huge" contributions to political party committees and of political-committee proliferation. *See supra* Part II(B). It is further clear that Congress imposed a general conduit-contribution prophylaxis from the following layers of prophylaxes. As a result, conduit-contributions are impossible now.

One prophylaxis is a base limit on a contribution to a candidate. That base limit—aimed at the underlying quid-pro-quo risk— is "preventative." *Citizens United*, 130 S. Ct. at 908. There is no inherent wrong in a large contribution to a candidate. Rather, the giving of financial quids for political quos is wrong: "The hallmark of corruption is the financial quid pro quo: dollars for political favors." *NCPAC*, 470 U.S. at 497.

That base-limit prophylaxis is layered atop two other prophylaxes, discussed in *Buckley*, designed to eliminate quid-pro-quo corruption, i.e., laws criminalizing *bribery* and requiring contribution *disclosure*. *See* 424 U.S. at 27-28. *Buckley* decided that the challenged base limit was justified as an additional prophylaxis because "laws making [bribes] criminal . . . deal with only the most blatant and specific attempts of those with money to influence governmental action." *Id.*

And there are other prophylaxes. One prohibits *false-name contributions*—making or accepting contributions other than in the name of the true contributor. 2 U.S.C. 441f. *See* MB-App. 6a. This includes "assist-[ing]" another in making such a contribution and simply not "disclosing the source of the money." 11 C.F.R. 110.4(b). *See* MB-App. 10a. Contributions to a candidate through another entity must be done in one's own

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

Another prophylaxis involves *earmarking* laws. Earmarked contributions through an intermediary are deemed contributions from the original contributor, subject to that contributor's limit and to disclosure. 2 U.S.C. 441a(a)(8). *See* MB-App. 6a.

> All contributions by a person made on behalf of or to a candidate, including contributions which are in any way earmarked or otherwise directed to the candidate through an intermediary or conduit, are contributions from the person to the candidate.

11 C.F.R. 110.6(a). *See* MB-App. 12a. And "earmarked" sweeps broadly:

> *[E]armarked* means a designation, instruction, or encumbrance, whether direct or indirect, express or implied, oral or written, which results in all or any part of a contribution or expenditure being made to, or expended on behalf of, a clearly identified candidate or a candidate's authorized committee.

11 C.F.R. 110.6(b)(1). *See* MB-App. 12a.[29]

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[29] FEC further expands the reach of the earmarking rule as follows:

> A contribution received by a party committee may count against the contributor's contribution limit for a particular candidate if:
>
> - The contributor knows that a substantial portion of his or her contribution will be given to or spent on behalf of a particular candidate; or
> - The contributor retains control over the funds

(continued...)

Thus, any conduit-contribution mechanism advanced to justify aggregate limits may not assume some "agreement" or "understanding" as the mechanism to get a conduit-contribution through a political committee to a candidate *unless* all parties involved scrupulously complied with the "conduit or intermediary" requirements of contribution limits and reporting at 11 C.F.R. 110.6. Otherwise the attempted conduit contribution is illegal. *Buckley*'s mechanism was based on "unearmarked" contributions, so any attempt to show a mechanism now must assume non-earmarking (but full compliance with the law).

From the foregoing, it is clear that *unearmarked* contributions do not include wink-and-nod arrangements, and that the "huge" contributions essential to *Buckley*'s mechanism are prohibited. But there is also an analytical problem for any suggested conduit-contribution mechanism based on *truly* unearmarked contributions: can an unearmarked contribution actually pose a conduit-contribution risk?

Without earmarking, a national party committee *might* decide to contribute the now-permissible $5,000 to a candidate, but it might not. Without earmarking,

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[29] (...continued)

> after making the contribution (for example, the contributor earmarks the contribution for a particular candidate). [11 C.F.R.]110.1(h), 110.2(h) and 110.6.

FEC, *Political Party Committees* at 15 (2009). "On behalf of" here means something like paying a candidate's bills, not making independent expenditures supporting a candidate, because unlimited contributions to super-PACs *may* be earmarked for particular independent expenditures. *See* FEC, Advisory Opinion 2010-09 (Club for Growth) at 5.

there is no way to *assure* that any of an individual's contribution to a national party committee will ever make it to a particular candidate as a contribution. A political party committee is free to do with the money as it wishes. National party committees have many demands on their funds. The odds that any funds from an unearmarked contribution might flow to a particular candidate are so low as to be noncognizable—even setting aside the fact that unearmarked funds, pooled with millions of dollars from myriad contributors, become fungible.

FEC has recently confirmed that *unearmarked* contributions do not bind a national party committee in any way and that the presence of a tally system neither alters the committee's spending liberty nor creates any conduit-contribution concern.[30] In 2012, FEC lifted the requirements of a settlement agreement on DSCC arising from a complaint that it was accepting contributions that were really earmarked, though it was not treating them as such.[31] Included in the complaint was the fact that DSCC had a tally system whereby contributions to DSCC were being tallied for certain candidates, who would then be favored if DSCC decided that the candidate's campaign would receive financial support. FEC permitted such a tally system so long as DSCC included the following notice on its solicitations:

> The DSCC does not accept contributions earmarked for a particular candidate. Contributions tallied for a particular candidate will be

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[30] The lower court cited a tally system as support for its hypothetical circumvention mechanism. JS-App. 12a.

[31] *See* FEC, MUR 3620 (DSCC), *available through* http://fec.gov/em/mur.shtml, and accompanying documents.

> spent for DSCC activities and programs as the Committee determines within its sole discretion.

DSCC recently asked to have the notice requirement lifted, and FEC agreed. For present purposes, this FEC concession establishes that contributions to a national party committee are not cognizable as conduit-contributions *absent formal earmarking*, even where a tally system lets the candidate know that the individual made a contribution that the individual wanted credited to that candidate.

If this as-applied challenge succeeds, what could an individual contribute per biennium under 2 U.S.C. 441a(a)(3)(B)?[32] An individual could give $194,400 to national party committees, plus $48,600 to state party committees and PACs.[33] These are not "huge" contributions, and an individual's prorated shares of contributions to and by these entities are not cognizable circumvention because Congress approved these limits. Thus, *Buckley*'s "massive"-contribution-conduit concern is eliminated by, inter alia, the $32,400/year base limit on contributions to national party committees, the $5,000/election limit on contributions by a national party committee to a candidate, and the coordinated-

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[32] An individual also has a $48,600 aggregate limit for contributions to candidates. *See* MB-App. 18a. Congress bifurcated the limits, so it is not relevant here.

[33] The lower court claims that—absent *all* aggregate limits—"an individual might contribute $3.5 million to one party and its affiliated committees in a single election cycle." JS-App. 3a n.1. But under this *as-applied challenge*, and if this Court decides that the $48,600 limit on contributions to non-national party committees is severable, *see* Part V, an individual could contribute the stated $194,400 + $48,600.

expenditure Party Expenditure Provision limits. *See* MB-App. 17a.[34]

From this review of *Buckley*'s conduit-contribution concerns as applied, it is clear that Congress has created prophylaxes on prophylaxes eliminating *Buckley*'s concerns. The 1976 Conference Report specifically said that Congress was amending FECA to eliminate these concerns. *See supra* at 21, 23. Because *Buckley*'s conduit-contribution concern is already amply addressed *without* the aggregate limits, there remains no justification for the $74,600 aggregate limit on contributions as applied to national party committees. Congress is layering prophylaxes in a manner broader than necessary.

In sum, the $74,600 aggregate limit is supported by neither a justifying interest nor proper tailoring, under strict or exacting scrutiny, as applied to national party-committees.[35]

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[34] The Party Expenditure Provision limits were *upheld* in *Colorado-II*, because political parties "act as agents for spending on behalf of those who seek to produce obligated officeholders." 533 U.S. at 452. This reiterated *Buckley*'s concern about political parties serving as conduits for circumventing contribution limits. (The dissent disputed that the evidence showed any corruption or circumvention concern. *Id.* at 475-80.) But, the Court added, "[i]t is this party role . . . that the Party Expenditure Provision *targets*." *Id.* at 452 (emphasis added). This *targeting* by Congress was its circumvention cure. It was the level at which Congress perceived a potential problem and asserted an interest.

[35] Congress's assertion of an anti-circumvention interest is also underinclusive because PACs' contributions candidates are not subject to an aggregate limit. Multicandidate

(continued...)

3. The Aggregate Limit Relies on an Unconstitutional Equalizing Interest.

Because the aggregate limit is not justified by a conduit-contribution concern, it serves only to limit persons who could contribute $194,400 to three national party committees to giving just $74,600. FEC asserts an equalizing interest by declaring that "the aggregate limits serve to 'curtail the influence of excessive political contributions by any single person.'" Mot. Dismiss or Affirm at 2 (quoting 120 Cong. Rec. 27,224 (1974) (Statement of Rep. Brademas)). This is unsurprising because in *Buckley* the government also asserted an interest in "mut[ing] the voices of affluent persons . . . and thereby . . . equaliz[ing] the . . . ability . . . to affect . . . elections." 424 U.S. at 25-26. But *Buckley* rejected an equalizing interest, *id.* at 48-49, 54, 57, as did *Citizens United*, 130 S. Ct. at 904, 910. FEC cannot meet its burden with forbidden interests.

4. The Lower Court's Posited Conduit-Contribution Mechanism Fails Scrutiny.

Given the foregoing, the lower court's proposed conduit-contribution mechanism, JS-App. 12a, fails scrutiny.

Buckley requires a specific, cognizable *mechanism* by which an individual's unearmarked contribution results in a cognizable conduit-contribution to a particular, intended (but unspecified) candidate, through a

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[35] (...continued)
PACs, as deeply interested in legislative outcomes as individuals, may contribute $5,000 to as many candidates as they can afford. *Cf. Republican Party of Minnesota v. White*, 536 U.S. 765, 780 (2002) ("As a means of pursuing the [articulated] objective . . . , the [provision] is so . . . underinclusive" it is not credible.).

national party committee (absent the aggregate limit). 424 U.S. at 38 (positing conduit-contribution mechanism). And the mechanism must be based on the function of the aggregate limit *itself*, just as in *Buckley* the mechanism was based on base-limit gaps that the "ceiling" closed.

Moreover, the lower court's hypothetical mechanism must comport with the governing principles:

- the government's duty to prove interests with evidence, not speculation, *see supra* at 29;
- the assumption that individuals, political party committees, and candidates *obey* the law;
- the ban on giving, receiving, or assisting contributions in the name of another, *see supra* at 38;
- the broad definition of "earmarking" (catching implicit understandings) and the ban on earmarking absent compliance with contribution limits and reporting requirements, *see supra* at 38-39;
- elimination of political-committee proliferation by the same persons and Congress's authorization of three national party committees per political party, *see supra* at 32-34
- the base limit eliminating the possibility of a "huge" contribution by an individual to a national party committee—set at the level at which Congress perceived, and asserted, a conduit-contribution concern, *see supra* at 21, 23 (Conference Committee Report);
- congressionally established limits on national party committee contributions to, and coordinated expenditures with, candidates—which "target" circumvention at the level at which Congress perceived, and asserted, a conduit-contribution concern, *see*

See Colorado-II, 533 U.S. at 452 (Party Expenditure Provision limit "targets" circumvention interest);

- Congress's express exemption of political party transfers and candidate-to-political party transfers from the contribution limits, thereby asserting no conduit-contribution concern, *see supra* at 20; and
- the fact that, absent earmarking, there is no reliable way for a contributor to assure that a national party committee will contribute to, or coordinate expenditures with, any particular candidate or at any particular level, *see supra* at 40-42.

The hypothetical mechanism underlying the lower court's decision has four elements:

(1) "an individual . . . give[s] half-a-million dollars in a single check to a joint fundraising committee comprising a party's presidential candidate, . . . national party committee, and most of the party's state party committees";

(2) these committees *might* "transfer" funds, so "the . . . contribution *might* . . . find its way to a single committee[]," which "*might* use the money for coordinated expenditures";

(3) the benefitted "candidate . . . knows the coordinated expenditure derives from that . . . check . . . [and] will know precisely where to lay the wreath of gratitude," though "[g]ratitude . . . is not . . . a constitutionally-cognizable form of corruption"; and

(4) though "it may seem *unlikely* that so many entities would willingly serve as conduits for a single contributor's interests[,] . . . it is not hard to *imagine* a situation where the parties implicitly agree to such a system." JS-App. 12a (emphasis added).

Considering these four elements in light of the foregoing principles, reveals that the lower court's mechanism fails.

(1) In the first element, the half-million-dollar figure is erroneous for this *as-applied* challenge. If the $74,600 aggregate limit is struck as applied to national party committees, an individual could contribute $194,400/biennium (for three national party committees) plus $48,600 (for state party committees). *See supra* at 42. An individual may give a candidate only $2,600/election, potentially $5,200/biennium (with primary and general elections).[36] *Only* if the challenges in Parts III (facial) and IV (severability) succeed, could more be contributed to state party committees biennially. Furthermore, there is no evidence that state party committees have been willing to join a presidential committee in a joint fundraising effort and then transfer all theirs receipts to a national party committee.

Moreover, joint-fundraising contributions are hard money, for which Congress has *already* satisfied its conduit-contribution concern. FEC's joint-fundraising regulation requires compliance with all applicable source-and-amount restrictions (and imposes considerable administrative burdens). *See* 11 C.F.R. 102.17. So a *single* check is immaterial, as is an allegedly *large* check—these arguments are based on a forbidden equalizing interest. And if Congress perceives problems with joint fundraisers, that is a separate issue that Congress can fix—without burdening individuals' First Amendment rights with aggregate limits.

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[36] Contributions to candidates are presumed for the *next* election, unless otherwise designated in writing; contributions designated for past-elections can only retire debts. 11 C.F.R. 110.1(b).

(2) In the second element, the lower court's repetition of "*might*" is impermissible speculation. Where First Amendment rights are involved, the government "must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural . . . ." *Turner Broadcasting Sys.*, 512 U.S. at 664 (internal citation omitted). This speculation is not even credible because it purportedly occurs despite: no earmarking (broadly defined); the ban on name-of-another contributions; and the fact that candidate committees and party committees have their own diverse and pressing needs for which they fundraise.

Congress perceived no problem with, and asserted no interest in restricting, *transfers*, so transfers may not now be asserted as justifying aggregate limits. When Congress asserted its conduit-contribution concern post-*Buckley* with new limits on contributions to and by committees—and on political committee proliferation—it *expressly excluded* hard-money "transfers." *See supra* at 20. And if transfers *were* a cognizable problem, that is a separate issue that Congress could address, not a reason to uphold aggregate limits. The limit on national party committee's coordinated expenditures *already* "targets" the conduit-contribution concern. *Colorado-II*, 533 U.S. at 452. That limit—with the limit on contributions to and by party committees—are Congress's cure for conduit-contributions. In analyzing a circumvention risk in *Colorado-II*, this Court made no mention of transfers, indicating that with the aforementioned limits in place, national party

committees were free to transfer funds without concern.[37, 38]

(3) In the third element, the lower court asserts that the benefitted "candidate . . . knows the coordinated expenditure derives from that . . . check . . . [and] will know precisely where to lay the wreath of gratitude," though "[g]ratitude . . . is not . . . a constitutionally-cognizable form of corruption."

As discussed regarding the DSCC tally system, *supra* at 41-42, mere knowledge of an individual contributor's preference is non-cognizable as a conduit-contribution concern absent earmarking. And the lower court may not assume sub-silentio earmarking unless it is willing to assume that an individual, state party com-

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[37] Even the Democratic Party's tallying system, *Colorado-II*, 533 U.S. at 459-60, which was "legal," *id.* at 459 n.22, could function without posing a circumvention risk with the party coordinated expenditure limit in place. So the lower court's citation of the tally system, JS-App. 12a, was erroneous, especially since there is no evidence of such a system here.

Moreover, a tally-system argument is no longer viable after FEC's 2012 decision that the DSCC fulfilled conciliation-agreement obligations regarding its ongoing tallying system. *See supra* at 41-42. Tallying creates no cognizable conduit-contribution risk.

[38] At a minimum, FEC must prove that the *increment* between the $74,600 aggregate limit and the $194,400 that the base limit allows (to three national party committees per biennium), creates a conduit-contribution mechanism. FEC must do so based *either* on the premise that single-checks, transfers, and gratitude are not part of any cognizable mechanism, *see supra*, *or* on the proof that these somehow apply to the *increment* even though they do not apply to contributions under the $74,600 aggregate limit.

mittees, a national party committee, and a candidate are willing to violate a law with serious legal and reputation penalties—an erroneous assumption, both factually and legally. *See infra* at 50. Notably, the court does not assert that a *conduit-contribution* occurs in its mechanism—a fatal problem—citing, rather, forbidden *gratitude* "corruption." And, while acknowledging that it may *not* rely on gratitude, it *does*. *See* JS-App. 12a ("wreath of gratitude").

(4) With the fourth element, the court acknowledges the "unlikel[ihood] that so many entities would willingly serve as conduits for a single contributor's interests." But if they are "conduits" then the court is now implying an actual conduit-contribution, despite its prior reliance on "gratitude." If a conduit-contribution is alleged, then the question is whether political parties, a candidate, and an individual are "likely" to engage in illegal activity with serious reputation and legal penalties, i.e., whether they are willing to violate the bans on *making*, *assisting*, and *receiving* name-of-another contributions and on making earmarked contributions without proper reporting and compliance with contribution limits.

The court's solution to this *unlikely* scenario is that "it is not hard to *imagine* a situation where the parties *implicitly* agree to such a system." Such *speculation* has no place in First Amendment jurisprudence.

It *is* hard to imagine so many so willing to violate the law and risk serious consequences—which could doom their ability to pursue their political goals at all.[39] *Implicit* agreement *is* agreement. *Implicit* ear-

[39] Violators risk civil (greater of $10,000 or 200% of un-
(continued...)

marking *is* earmarking. *Implicit* contributions *are* contributions. *Implicitly* violating contribution limits and conduit-reporting laws *is* violating the law.

The court's mechanism assumes that multiple entities will violate existing laws designed to prevent the conduit-contribution it posits. Justifying one conduit-contribution law on the basis that persons will violate other conduit-contribution laws is erroneous. Otherwise, Congress could create *endless* prophylaxes on prophylaxes, with each new one purportedly justified by the *same* interest and *assuming violation* of all preceding laws. Proper analysis is premised on obedience, not disobedience. If people violate existing laws, the solution is *enforcement*, not creating new laws for presumed violators to also violate.

The court ignored the many prophylaxes in place—and their individual and cumulative effects—by "conceiv[ing] of the contribution limits as a coherent system rather than merely a collection of individual limits stacking prophylaxis upon prophylaxis." JS-App. 13a. That is neither precise First Amendment analysis nor the way of *Buckley*, which considered each limit individually. 424 U.S. at 23-51. Nor was it the way of *Citizens United*, which systematically and carefully considered each proffered interest before striking down the corporate independent-expenditure ban. 130 S. Ct. at 909-11.[40]

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[39] (...continued)
lawful contribution) and criminal penalties (up to $500,000 and 5 years in prison). 2 U.S.C. 437g.

[40] The amici curiae brief by NRSC and NRCC further demonstrates that joint fundraising committees are not a means of circumventing contribution limits.

In sum, the lower court's hypothetical mechanism fails.

III.
The $74,600 Aggregate Limit on Contributions to Non-Candidate Committees Is Facially Unconstitutional.

The $74,600 aggregate limit, 2 U.S.C. 441a(a)(3)(B), restricts contributions to all non-candidate committees. If the $74,600 limit is held unconstitutional as applied to the substantial contributions received by national party committees, *see* http://www.opensecrets.org/parties/, it is substantially overbroad and facially unconstitutional. *See Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). So if the $48,600 sub-limit is struck, *see* Part IV, state, district, and localparty committees, as well as PACs, would not be bound by the $74,600 limit.

IV.
The $48,600 Aggregate Limit on Contributions to State Party Committees and PACs Is Non-Severable and So Should Be Struck.

Congress drafted 2 U.S.C. 441a(a)(3)(B) in an unusual way. It logically and grammatically intertwined the $74,600 aggregate limit with the $48,600 sub-limit on non-national party committees. *See* MB-App. 4a. By contrast, in 441a(a)(1), Congress listed base limits in easily severable sub-sections. *See* MB-App. 3a. But in 441a(a)(3)(B), Congress intertwined the $74,600 limit with the $48,600 sub-limit, so striking the former leaves meaningless language:

> [N]o individual may make contributions aggregating more than—
>
> . . .
>
> (B) ~~[$74,600], in the case of any other contributions,~~ of which not more than [$48,600] may be attributable to contributions to political committees which are not political committees of national political parties.

Fixing this would require the Court to rewrite the provision. "[I]t is for Congress, not this Court, to rewrite the statute." *Blount v. Rizzi*, 400 U.S. 410, 419 (1971). Congress "would have intended [this Court] to set aside the . . . limits, leaving [it] free to rewrite." *Randall*, 548 U.S. at 262 (plurality).

Because the $48,600 sub-limit on contributions to non-national party committees is an integral part of 441a(a)(3)(B), Congress thereby indicated its intention that the provision operate as a unit. So the sub-limit is non-severable and must fall with the whole provision.

V.

The $48,600 Aggregate Limit on Contributions to Candidates Is Unconstitutional.

The $48,600 aggregate limit on contributions to candidate committees, 2 U.S.C. 441a(a)(3)(A) (MB-App. 4a), also violates First Amendment rights. It bars contributors from expressing support for, and associating with, all the candidates they choose with full-base-level contributions.[41] The lower court erroneously did not separately address this limit, though this limit is even less defensible than the $74,600 aggregate limit.

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[41] Even candidates who do not represent a contributor's home-district or state have a direct effect on the contributor, so contributors have an interest in races elsewhere.

A. The Applicable Concern Is Preventing Conduit-Contributions.

The *Buckley* Court did not suggest a mechanism for how an unearmarked conduit-contribution might pass from an individual, through a candidate committee, to another intended, particular candidate. *See* 424 U.S. at 38. Because *Buckley*'s analysis should guide this analysis, there must be a cognizable conduit-contribution mechanism. *Id. See supra* at 15-18.

As noted above, *base* limits on contributions to candidates must be justified by an anti-*corruption* interest, *Buckley*, 424 U.S. at 26-28, while *aggregate* limits may be justified by the derivative *conduit-contribution* concern, *id.* at 38. *See* Part II(D)(1)-(2). To the limited extent that candidate committees may contribute to other candidates, the *base* limit on contributions to candidates might *also* be justified by a conduit-contribution concern. Congress only perceived, and asserted, its anti-corruption interest and conduit-contribution concern as far as its limits on contributions to and by candidate committees.[42]

To uphold the aggregate limits on contributions to candidates, a cognizable conduit-contribution mechanism must be proven, i.e., a means by which an individual's unearmarked contribution to a candidate committee yields a "massive" contribution to another, intended "particular candidate." *See Buckley*, 424 U.S. at 38.

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[42] The ability of candidate committees to transfer funds to party committees does not implicate the conduit-contribution concern because Congress expressly permits such transfers (without limitation), thereby asserting no interest in regulating them. 2 U.S.C. 439a(a)(4); 11 C.F.R. 113.2(c). This makes transfers inapplicable to a proposed conduit-contribution mechanism.

The mechanism must be based on the function of the aggregate limit *itself*, as was *Buckley*'s mechanism. *Id.*

B. The Government Cannot Justify the Aggregate Limit Under Either Exacting or Strict Scrutiny.

Strict scrutiny should apply, *see* Part I, though exacting scrutiny suffices for McCutcheon to prevail because the aggregate limit is not supported by either the anti-corruption interest or a derivative conduit-contribution concern, required by *Buckley*. *See* 424 U.S. at 38.

Buckley did not even *suggest* that the "ceiling" on all of an individual's political contributions might be justified by circumvention of the $1,000/election base limit on contributions to candidates through the use of *candidate committees* for conduit-contributions. *Id.* at 23, 38. Under the *Buckley*-era FECA scheme, no "huge" contribution could be given to a candidate committee, so no "massive" conduit-contribution could be channeled through one. *Id.* And there was no candidate-committee proliferation because each candidate had one principal-campaign committee, *id.* at 187, and contributions to any authorized candidate committee were deemed made to the candidate, *id.* at 189-90. So *Buckley*'s conduit-contribution mechanism did not, and does not, apply to candidate committees.

These limits remain low: a $2,600/election base limit and a $2,000/election candidate-to-candidate-limit. *See* MB-App. 17a.[43] Congress had no need to fix

[43] The $2,000 candidate-to-candidate contribution-limit raises no cognizable conduit-contribution concern. If used to support a Senate (statewide) candidate, $2,000 is only five

(continued...)

conduit-contribution problems regarding candidate-committees in the 1976, post-*Buckley* FECA amendments because there were none.

The lower court proposed no conduit-contribution mechanism *specific* to candidate committees, though the joint-fundraising mechanism it offered would fail as applied solely to candidate committees, based on the principles and reasons stated in Part II. Generally, no "huge" contributions can be made *to* a candidate committee, no "massive" contribution can be made *by* a candidate committee. Name-of-another and earmarking laws prohibit any implicit earmarking, and earmarked contributions are subject to both contribution limits and reporting requirements—and assuming that individuals and candidate committees will violate the law in order to layer on another prophylaxis is a flawed analysis because otherwise endless prophylaxes could be created based on the same interest but assuming all prior laws would be violated. *See supra* at 38-39, 50-51. Neither transfers nor any tally system (none is in evidence here) may be considered as part of conduit-contribution mechanism because Congress asserted no interest in restricting transfers, *see supra* at 20, 54 n.42, and FEC expressly recognizes that a tally system is permissible so long as all contribution limits, ear-

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[43] (...continued)
times greater than the $400 limit struck down in *Randall* as too low to further a statewide campaign in tiny Vermont. *Randall*, 548 U.S. at 253, 261-62. Moreover, this non-inflation-adjusted, $2,000 limit is lower than the $2,600 base limit on an individual's contribution to a candidate—the level at which Congress perceived, and asserted, its anti-corruption interest regarding a contribution to a candidate.

marking requirements, and reporting laws are followed, *see supra* at 41-42, 48 n.38. So there is no means by which conduit-contributions can be made, and thus no justification based on a conduit-contribution concern for an aggregate limit on individuals' contributions to candidate committees.

Though *Buckley*'s analysis requires the government to prove a "massive"-conduit-contribution mechanism, 424 U.S. at 38, examining this aggregate limit under a simple quid-pro-quo corruption analysis is also instructive.

A quid-pro-quo corruption interest may justify the base limit on a contribution to a candidate. *Id.* at 26. But it does not justify the aggregate limit because a contribution at the full-base-level limit (currently $2,600/election) to all of candidates *A*-*Y* cannot corrupt candidate *Z*. There is no monetary quid for an official quo (absent all manner of illegal activity). *Buckley*'s description of quid-pro-quo corruption involved a large sum to a *particular* candidate who then gives a quid for that quo, *id.* at 26, which is absent with respect to *Z*. At best *Z* could be grateful for contributions to other candidates, but gratitude is a forbidden theory of corruption. *Citizens United*, 130 S. Ct. at 909-10. Thus, the aggregate limit is overbroad as to the anti-corruption interest. It is merely a prophylaxis-on-prophylaxis layer atop the limits on contributions to and by candidate committees that already eliminate a quid-pro-quo risk. It is irrelevant to the conduit-contribution concern, which is derivative of the anti-corruption interest. Thus, it is not properly tailored (closely or narrowly) to the anti-corruption interest.

As a result it becomes clear that this aggregate limit serves only the forbidden equalizing interest.

Consider that, in 2006, this Court held that a $200 per election limit on contributions to Vermont statewide candidates was unconstitutionally low. *Randall*, 548 U.S. at 249, 262-63. Vermont's 2004 population was 621,000, *id.* at 250, well below the 646,947 population of the average congressional district.[44] In 2006, the aggregate-limit was $40,000. If an individual wanted to make an equal contribution to a candidate in all federal races (435 House, 33 Senate), she would have been limited by the aggregate limit to $43/election per candidate (assuming primary and general elections). That is far below the $1,000/election per candidate base-limit at which Congress perceived, and asserted, any anti-corruption interest or conduit-contribution concern.

Finally, if candidate committees posed no cognizable conduit-contribution risk in *Buckley*, they pose even *less* risk now because, in BCRA, Congress restricted what contributors could do in three ways:

- It failed to properly inflation-adjust the 1974 FECA-scheme that *Buckley* considered. The old $1,000 base limit on a person's contribution to a candidate is now worth $4,722, not the current $2,600; the $1,000 that one candidate could give another is also now worth $4,722, not the current $2,000; and if an individual wanted to give his whole "$25,000 ceiling" to candidates, that ceiling is now worth $118,039, not the current $48,600. *See* http://www.bls.gov/data/inflation_calculator. htm.
- BCRA decreased the number of candidates an individual may express support for, and associate with, at the full-base-level limit in single elections, from

[44] Dividing the 2000 U.S. population, 281,421,90, by 435.

twenty-five to eighteen ($25,000/$1,000 versus $48,600/$2,600), or only nine if the same candidates are supported in both primary and general elections.

- Congress gave contributions to candidates their own aggregate limit, 2 U.S.C. 441a(a)(3)(A), rather than including them with other contributions as under the old "ceiling." Congress thus asserted that giving *solely* to candidates poses a conduit-contribution risk. So the constitutionality of this aggregate limit must be justified alone, making the lower court's analysis of the aggregate "limits as a coherent system," JS-App. 13a, erroneous.

In sum, because 2 U.S.C. 441a(a)(3)(A) is unsupported by a conduit-contribution concern and is overbroad with regard to the anti-corruption interest, this aggregate limit is unconstitutional.

Conclusion

The limit at 2 U.S.C. 441a(a)(3)(B) should be held unconstitutional, as applied to national party committees and facially, and its sub-limit should be struck as non-severable. The limit at 2 U.S.C. 441a(a)(3)(A) should be held unconstitutional.

Respectfully submitted,

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