No. _____

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

Jurisdictional Statement

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Questions Presented

Federal law imposes two types of limits on individual political contributions. *Base limits* restrict the amount an individual may contribute to a candidate committee ($2,500 per election), a national-party committee ($30,800 per calendar year), a state, local, and district party committee ($10,000 per calendar year (combined limit)), and a political-action committee ("PAC") ($5,000 per calendar year). 2 U.S.C. 441a(a)(1) (current limits provided). *Biennial limits* restrict the aggregate amount an individual may contribute biennially as follows: $46,200 to candidate committees; $70,800 to all other committees, of which no more than $46,200 may go to non-national-party committees (e.g., state parties and PACs). 2 U.S.C. 441a(a)(3) (current limits provided) (*see* Appendix at 20a (text of statute)). Appellants present five questions:

1. Whether the biennial limit on contributions to non-candidate committees, 2 U.S.C. 441a(a)(3)(B), is unconstitutional for lacking a constitutionally cognizable interest as applied to contributions to national-party committees.

2. Whether the biennial limits on contributions to non-candidate committees, 2 U.S.C. 441a(a)(3)(B), are unconstitutional facially for lacking a constitutionally cognizable interest.

3. Whether the biennial limits on contributions to non-candidate committees are unconstitutionally too low, as applied and facially.

4. Whether the biennial limit on contributions to candidate committees, 2 U.S.C. 441a(a)(3)(A), is unconstitutional for lacking a constitutionally cognizable interest.

5. Whether the biennial limit on contributions to candidate committees, 2 U.S.C. 441a(a)(3)(A), is unconstitutionally too low.

Corporate Disclosure

Shaun McCutcheon is an individual and the Republican National Committee ("RNC") is an unincorporated association, so no corporations are involved.

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Opinion Below

The yet-unreported Memorandum Opinion, with Order and Final Judgment, is at 2012 WL 4466482 and in the Appendix ("App.") at 1a.

Jurisdiction

On September 28, 2012, the district court granted the Federal Election Commission's ("FEC") motion to dismiss, entering final judgment for FEC. App.17a. Appellants timely noticed appeal on October 10. App. 18a. This Court has appellate jurisdiction under section 403(a)(3) of the Bipartisan Campaign Reform Act ("BCRA"), Pub.L.No. 107-155, 116 Stat. 81, 113-14 (App.21a).

Constitution, Statutes & Regulations

Appended are the First Amendment (App.20a); 2 U.S.C. 441a(a)(3) (App.20a); BCRA 403(a) (App.21a).

Statement of the Case

BCRA enacted two separate biennial limits (one with a sub-limit), in place of one aggregate limit. FEC describes the new limits (App.20a) thus:

> [A]n . . . individual . . . [is] subject to a biennial limit on contributions . . . to federal candidates, party committees and . . . PACs . . . . This . . . includes up to:
>
> - $46,200 in contributions to candidate committees; and
> - $70,800 in contributions to any other committees, of which no more than $46,200 of this amount may be given to committees that are not national-party committees.
>
> * * *
>
> [W]ithin this biennial limit . . . , an individual

may not exceed the specific [base] limits . . . in the contribution limits chart . . . .

* * *

Individual Limits for 2011-2012

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

* These . . . are indexed for inflation . . . .

FN6 Because local party committees are presumed . . . affiliated with the . . . state committee, a contribution to a local . . . committee counts against the contributor's limit for the state party.

FEC, *The Biennial Contribution Limit* (2004, updated 2011) (citations and footnotes omitted) (*see* http://www.fec.gov/pages/brochures/biennial_limit_brochure. pdf.).

As set out in the Verified Complaint, McCutcheon would contribute $25,000 each to RNC, National Republican Senatorial Committee ("NRSC"), and National Republican Congressional Committee ("NRCC") before the November 2012 election but for the biennial limit, 2 U.S.C. 441a(a)(3)(B). In this biennium, he has given $1,776 each to RNC, NRSC, and NRCC, $2,000 to a PAC, and $20,000 to a state-party-committee federal fund, all counting against the $70,800 limit.

McCutcheon challenges this biennial limit as unconstitutional, as applied to contributions to national-

party committees and facially. He wants to express his support for, and associate with, non-candidate committees as permitted by the base limits, 2 U.S.C. 441a(a)(1)(B)-(D), without biennial limits.

McCutcheon also challenges the biennial candidate-contribution limit, 2 U.S.C. 441a(a)(3)(A). He has given $33,088 in contributions to federal candidates and intends to give $21,312 more to federal candidates, for a biennial aggregate of $54,400, which he would do but for the $46,200 limit. He wants to express his support for, and associate with, candidates as permitted by the base limits without a biennial limit.

RNC, a national-party committee, challenges the $70,800 biennial limit on non-candidate contributions as unconstitutional, 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 any biennial limit.

FEC is the agency with enforcement authority over the Federal Election Campaign Act of 1971 ("FECA"), 2 U.S.C. 431 et seq., and BCRA.

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

On June 22, 2012, Plaintiffs filed their Verified Complaint, three-judge-court motion,[1] and preliminary-

[1] BCRA 403(d)(2) authorizes challengers of BCRA provisions to elect BCRA's judicial-review provisions, 116 Stat. at 114, which require a three-judge court, expedition, and direct appeal to this Court. BCRA 403(a); App.21a.

injunction motion. The three-judge court consolidated the preliminary-injunction motion with the merits and set a September 6 hearing. FEC moved for dismissal under Federal Rule of Civil Procedure 12(b)(6). On September 28, the court released an opinion (App.1a) and order (App.17a) granting FEC's motion to dismiss, dismissing the preliminary-injunction motion as moot, and entering final judgment for FEC on all counts. On October 10, Plaintiffs noticed appeal. App.18a.

The Questions Presented Are Substantial

Introduction

The substantial questions raised here involve core political expression and association and proper application of this Court's precedents to a challenge to biennial limits on contributions to candidates, parties, and PACs.

In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court rejected a *facial* challenge to a biennial-contribution limit based on an *anti-circumvention* analysis. *Id.* at 38 ("to prevent evasion of the [base] contribution limitation "). But that involved a statute since replaced by a scheme different in wording and statutory context. Post-*Buckley* base limits eliminated the anti-circumvention interest that *Buckley* said justified a "ceiling." And *Buckley*'s anti-circumvention analysis did not even suggest that contributions to *candidates* pose a cognizable circumvention concern.

Yet the court below dismissed challenges to the biennial limits (a) *as-applied* to limits on contributions to national-party committees and (b) on contributions to *candidates* for failing to state a claim. It did so though no anti-circumvention interest now justifies the limits.

And in its legal analysis it did not even mention the limit on contributions to candidates (for lacking a justifying interest), despite the unique nature of that challenge, and the important distinctions between the two claims.

The district court said that these issues are for this Court to decide. "Although we acknowledge the constitutional line between political speech and contributions grows increasingly difficult to discern, we decline Plaintiffs' invitation to anticipate the Supreme Court's agenda." App.7a. "To break the chain of legal consequences tied to th[e] fact [that the restricted contributions do not directly pay for speech] would require a judicial act we are not empowered to perform." App.9a. "Plaintiffs raise the troubling possibility that *Citizens United*[*v. FEC*, 130 S.Ct. 876 (2010),] undermined the entire contribution limits scheme, but whether that case will ultimately spur a new evaluation of *Buckley* is a question for the Supreme Court, not us." App.16a.

The challenged provisions fail under *existing* precedent, but if this Court finds that the case turns on *Buckley*'s expenditure-contribution scrutiny distinction, Appellants have preserved that issue and assert that the distinction is unconstitutional.

I.

The Biennial Limit on Contributions to Non-Candidate Committees Is Unconstitutional for Lacking a Cognizable Interest as Applied to Contributions to National-Party Committees.

Appellants challenge the $70,800 biennial limit on contributions to non-candidate committees, 2 U.S.C. 441a(a)(3)(B), as unconstitutional (under First Amendment free-speech and -association rights) as applied to contributions to national-party committees for lacking

a cognizable interest.

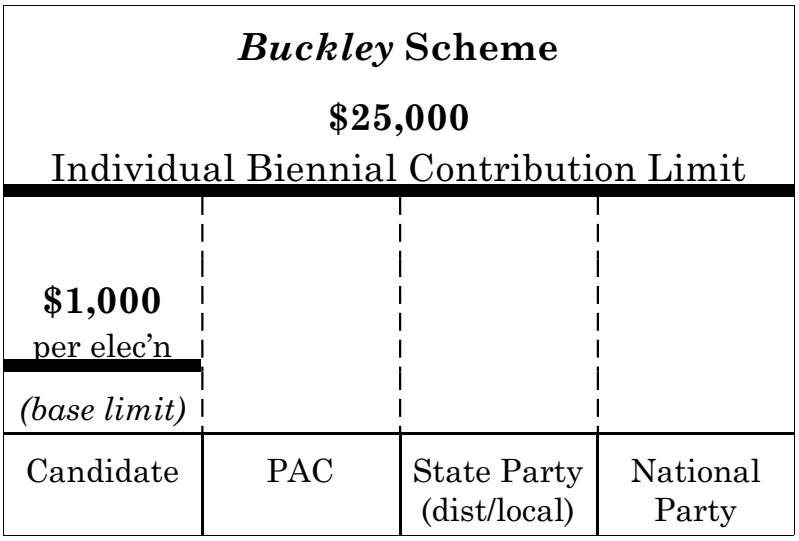
A. Strict Scrutiny Is Required Because the Biennial Limits Are in Essence Expenditure Limitations, Though Exacting Scrutiny Suffices for Appellants' Success.

Appellants argued below that strict scrutiny applies because the biennial limits are essentially expenditure limits, *see infra*, but that even under intermediate scrutiny the government failed to prove that the biennial limits are supported by the requisite anti-circumvention interest, and that, if this case hinges on scrutiny, *Buckley* must be overruled to the extent it applies lower scrutiny to contribution limits.

The district court says that Appellants "are wrong" in asserting that base limits make biennial limits essentially expenditure limits because "[t]he difference between contributions and expenditures is the difference between giving money to an entity and spending that money directly on advocacy." App.8a.

But that avoids Appellants' argument. It simply recites *Buckley*'s familiar expenditure-contribution distinction, which does not address *this* situation. The biennial limits do not limit any contribution to a *particular* entity or candidate, as do base limits. Rather, biennial limits restrict *how many* entities or candidates individuals may express their support for (expression) and associate with. That imposes a more serious burden than a base limit, so *Buckley*'s distinction does not address that burden.

And the biennial "ceiling" at issue in *Buckley did* function as a contribution limit, though BCRA's biennial limits *do not* function as contribution limits as is shown in *Buckley*-Scheme and BCRA-Scheme charts.

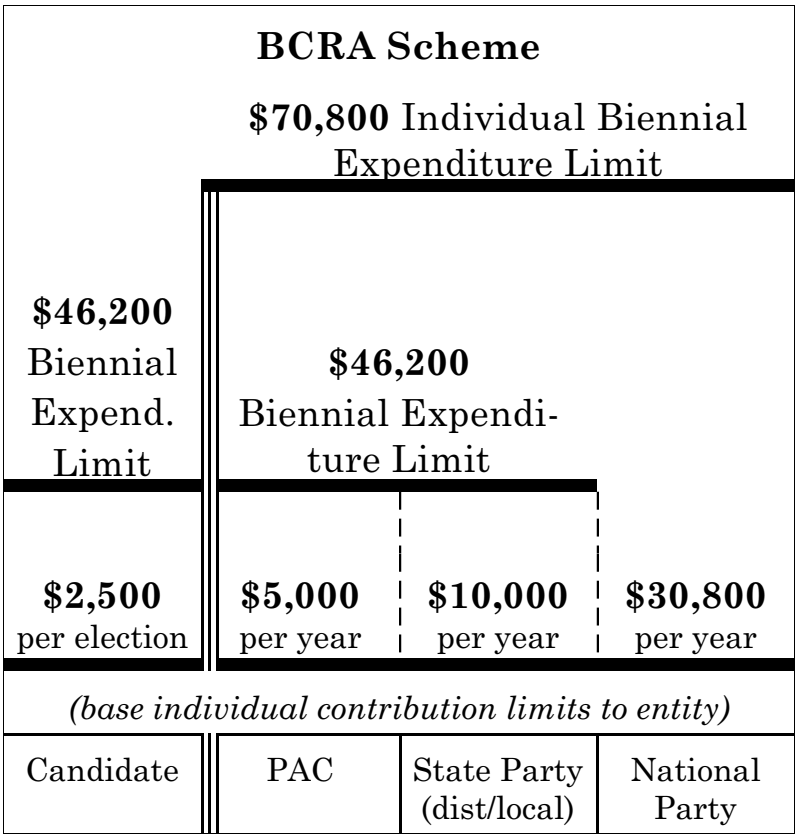


The *Buckley* Scheme had a base limit ($1,000) for contributions to candidates, but none for contributions to PACs or parties. So the biennial limit functioned as a base limit, restricting how *much* one could give to a party or PAC.[2]

But the BCRA Scheme layers biennial limits atop base limits. The base limits restrict *how much* an indi-

[2] The base limit was justified by a quid-pro-quo, *anti-corruption* interest because it involved a contribution to a particular candidate, *see Buckley*, 424 U.S. at 26 ("[t]o the extent that large contributions are given to secure a political quid pro quo from current and potential office holders"), which is the only situation in which a quid-pro-quo-corruption risk can arise. All limits on contributions to parties and PACs are based on an *anti-circumvention* interest, as are the biennial limits, *see Buckley*, 424 U.S. at 38 ("evasion of the . . . contribution limit[]"), because they do not involve contributions to candidates. The anti-circumvention interest arises where there is a cognizable risk of a conduit-contribution resulting from a contribution.

vidual may contribute to a candidate, PAC, or party. The biennial limits restrict *how many* entities an individual may express support for, or associate with, by making base-level contributions, i.e., how much one may *spend* on political expression and association as base-level contributions.



Because BCRA's biennial limits function in essence as expenditure limits, strict scrutiny applies. But even under exacting scrutiny, the heightened burden of BCRA biennial limits over the burden of base limits requires higher scrutiny than for ordinary base limits

because "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Davis v. FEC*, 554 U.S. 724, 744 (2008).

Under either scrutiny, there is a no-broader-than-necessary tailoring requirement. *See Buckley*, 424 U.S. at 25 (a restriction that is closely drawn must nonetheless "avoid unnecessary abridgement of associational freedoms"). *See also California Medical Association v. FEC*, 453 U.S. 182 (1981) (controlling opinion) ("*CMA*") (requiring "that contributions to political committees . . . be limited only if . . . limitation is no broader than necessary. . . .").

Under either scrutiny, "[w]hen Congress finds that a problem exists, we must give that finding due deference; but Congress may not choose an unconstitutional remedy," *Citizens United*, 130 S.Ct. at 911.

Under either scrutiny, *Buckley*'s *anti-circumvention* interest must be proved by the government, i.e., that a cognizable *conduit-contribution* to a candidate can result from base-limit contributions, absent the biennial limits, given the layered prophylaxes enacted to eliminate circumvention. This burden cannot be met by broad-brush speculation about *corruption* (especially forbidden theories of corruption). The district court did not require the government to meet this burden.

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

"[FECA]'s contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities." *Buckley*, 424 U.S. at 14. "[T]he First and Fourteenth Amendments guarantee freedom

to associate with others for the common advancement of political beliefs and ideas, a freedom that encompasses (t)he right to associate with the political party of one's choice." *Id.* at 15 (citations and citation marks omitted). "Making a contribution, like joining a political party, serves to affiliate a person with a candidate [or a political party]. In addition, it enables like-minded persons to pool their resources in furtherance of common political goals." *Id.* at 22.

Buckley rejected a facial constitutional challenge to an "overall $25,000 ceiling" on biennial contributions. *Id.* at 38. This holding does not control here because: that ceiling's statutory context was materially altered; the ceiling was repealed and replaced by BCRA's multiple biennial limits; and *Buckley* was a facial holding (so inapplicable to as-applied challenges). But the *concerns* on which *Buckley* relied to uphold the old ceiling control the analysis here, and those were promptly eliminated by Congress after *Buckley*. Key to the analysis is the fact that the 1974 FECA contribution-limits scheme considered in *Buckley* included only the following applicable contribution limits, *see Buckley*, 424 U.S. at 189:

- a $1,000 per election limit on contributions by a "person" to a candidate;
- a $5,000 per election limit on contributions by what would now be called a multi-candidate political committee to a candidate; and
- an individual, biennial overall $25,000 ceiling on total contributions.

That scheme lacked limits on contributions *to* political committees *other than* the "overall $25,000 ceiling" on total contributions. *Without* that ceiling, individuals could give unlimited amounts to political parties and

PACs. Also missing was a restriction on the proliferation of political committees controlled by single entities, which Congress installed shortly after *Buckley*. *Buckley* upheld the ceiling facially in that context, though the provision was "not . . . separately addressed at length by the parties," 424 U.S. at 38, with this limited analysis:

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

Id. (emphasis added). Essential to this analysis is the Court's earlier highlighting of the political-committee-proliferation potential. *Id.* at 28 & n.31.

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

on contributions, as discussed next.

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

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

- a $1,000 per election limit on contributions by persons to a candidate;
- a (*new*) $20,000 per year limit on contributions by persons *to* a national-party committee;
- a (*new*) $5,000 per year limit on contributions by persons *to* other political committees;
- limits on contributions by a "multicandidate committee"[3] as follows—

  - $5,000 per election to a candidate,

  - (*new*) $15,000 per year *to* a national-party committee, and

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

See FECA Amendments of 1976, Pub.L.No. 94-283, 90 Stat. 475. And Congress eliminated the proliferation of political committees. *See infra* at 13-14. While eliminating *Buckley*'s reasons for upholding the "overall $25,000 ceiling," Congress retained it.

The $5,000 per year limit on contributions *to* a PAC was upheld in *CMA*, based on a circumvention risk.

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[3] These limits are only for *multicandidate committees*. *See* 11 C.F.R.100.5(e)(3). Other committees would contribute as any other "person." 11 C.F.R. 100.5(e)(2).

453 U.S. at 197-99 (plurality); *id.* at 203 (Blackmun, J., concurring in part and in judgment). The plurality recited a Conference Report explaining that the 1976 amendments were to eliminate circumvention and political-committee proliferation:

> "The conferees' decision to impose more precisely defined limitations on the amount an individual may contribute to a political committee, other than a candidate's committees, and to impose new limits on the amount a person or multicandidate committee may contribute to a political committee, other than candidates' committees, is predicated on the following considerations: first, *these limits restrict the opportunity to circumvent the $1,000 and $5,000 limits on contributions to a candidate*; . . . and third, *these limitations minimize the adverse impact 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*."

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

The Conference Report described the anti-proliferation rules in anti-circumvention terms thus:

> The anti-proliferation rules . . . are intended to prevent corporations, labor organizations, or other persons or groups of persons from evading the contribution limits . . . . Such rules are described as follows:
>
> 1. All of the political committees set up by a single corporation and its subsidiaries are treated as a single political committee.
>
> 2. All of the political committees set up by a single international union and its local unions are

> treated as a single political committee.
>
> 3. All of the political committees set up by the AFL-CIO and all its State and local central bodies are treated as a single political committee.
>
> 4. All the political committees established by the Chamber of Commerce and its State and local Chambers are treated as a single political committee.
>
> 5. The anti-proliferation rules stated also apply in the case of multiple committees established by a group of persons.

H.R.Rep.No. 94-1057, at 58.

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

D. In BCRA, Congress Repealed and Replaced the "Overall $25,000 Ceiling" with Multiple Biennial limits.

The challenged biennial limits were enacted as BCRA § 307(b), 116 Stat. 102-03, repealing the old ceiling and replacing it with separate biennial contribution limits. See App.20a (text of 2 U.S.C. 441a(a)(3)). So *Buckley*'s facial upholding of the old ceiling does not control here. And the new limits are no more justified than the old ceiling after the 1976, post-*Buckley*, FECA amendments.

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

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

1. No Anti-Corruption Interest Applies.

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

The anti-corruption interest does not apply to contributions to national-party committees because "[t]his anticorruption interest 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 (anti-corruption interest triggered by "large contributions"), as to cause a candidate "to act contrary to [his or her] obligations of office," *Citizens United*, 130 S.Ct. at 497. National-party committees are not candidates.

National-party committees pose no cognizable corruption risk to their candidates. "We are not aware of any special dangers of corruption associated with political parties . . . ." *Colo. Republican Fed. Camp'n Comm.*

v. FEC, 518 U.S. 604, 616 (1996) ("Breyer, J., joined by O'Connor & Souter, JJ.) ("*Colorado-I*"). Moreover,

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

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

2. No Anti-Circumvention Interest Exists.

While "preventing corruption" is the only cognizable interest "for restricting campaign finances." *NCPAC*, 470 U.S. at 496-97, this Court has recognized a *prophylactic* interest in preventing *circumvention* of the contribution limits that eliminate the quid-pro-quo risk. This anti-circumvention interest is the interest that justifies limits on contributions to parties and PACs and on how much candidates may contribute to other candidates. Does an anti-circumvention interest justify the biennial limits as applied to contributions to national-party committees?

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

The anti-circumvention interest must be limited,

just as the anti-corruption interest is limited. Because the anti-circumvention interest is derivative and prophylactic, there must be a viable quid-pro-quo-corruption risk to begin with. Since *Buckley* held that only "*large* contributions" trigger a quid-pro-quo-corruption risk, 424 U.S. at 26 (emphasis added), there is no cognizable conduit concern justifying biennial limits unless it is possible to "contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party," *id.* at 38. If the ability to do this is eliminated by one prophylaxis, there remains no justification for an additional prophylaxis. This is clear from the prohibition on layering "prophylaxis-on-prophylaxis" articulated in *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 479 (2007) (Roberts, C.J., joined by Alito, J.) (controlling opinion) ("*WRTL-II*"). *WRTL-II* held that the "prophylaxis-on-prophylaxis approach" . . . is not consistent with strict scrutiny." *Id.* Neither is it consistent with the requirement that any "limitation [be] no broader than necessary," *CMA*, 453 U.S. at 203 (controlling opinion), and "avoid unnecessary abridgement," *Buckley*, 424 U.S. at 25.

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

Does a cognizable anti-circumvention interest justify the biennial limit as applied to national-party committees? This requires returning to *Buckley*, which said the ceiling could "prevent *evasion* [circumvention] of the $1,000 contribution limitation by a person who

might otherwise contribute *massive* amounts of money to a particular candidate through the use of unearmarked contributions *to political committees likely to contribute to that candidate*, or huge contributions *to the candidate's political party*." *Id.* (emphasis added). This was premised on possible political-committee proliferation. *Id.* at 28. So in searching for a circumvention risk, *Buckley* requires us to consider three questions of the *current* campaign-finance scheme: (a) Is *political-committee proliferation* possible?; (b) Can *massive contributions* be made *to* parties and PACs?; and (c) Are political committees *now capable of serving as conduits* for transmitting massive contributions to candidates?

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

Can an individual give massive contributions to a *proliferation* of political committees? No. Committee proliferation by the same entities has been eliminated. *See supra* at 13-14.

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

Can an individual make *massive* or *huge* contributions to a party or PAC? No. Individuals may give $30,800 per year to a national-party committee; $10,000 per year to a state-party committee (combined limit); $5,000 per year to a PAC; and $2,500 to a candidate per election. *See supra* at 2. None of these is "massive" or "huge" because *Buckley* said the "overall $25,000 ceiling" *prevented* such large contributions. 424 U.S. at 38. Adjusted for inflation, $25,000 in 1974 is worth $116,676 as of June 2012.

Congress made the judgment that each of these base limits eliminates any cognizable circumvention

risk as to the entity to which the limit applies, e.g. giving $30,800 per year eliminates any cognizable circumvention risk as to a contribution to RNC. Doing something that poses a noncognizable risk multiple times does not create a cognizable risk. Zero multiplied by anything equals zero. If there is no cognizable circumvention risk in giving $30,800 to RNC, NRSC, or NRCC, then there is no cognizable circumvention risk in giving that amount to all of them in a year or to each per year in a biennium. Thus, there is no anti-circumvention justification for a biennial limit.

Congress instituted another prophylaxis against massive funds to political parties by banning "soft money." This was upheld because, as *McConnell* said, "[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." 540 U.S. at 145. *Citizens United* rejected influence, access, and gratitude as cognizable corruption beyond the soft-money context, 130 S.Ct. at 909-10, but the ban remains another prophylaxis preventing "massive" funds going to political party committees.

Buckley's circumvention concern was based on the movement of large amounts of money from individuals to political parties and PACs without limits. 424 U.S. at 38. This is now impossible because of prophylaxes preventing it.

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

Are political committees *now capable of serving as conduits* for transmitting massive contributions to candidates? No. By the foregoing prophylaxes, and others sketched below, Congress has imposed an *anti-conduit* prophylaxis.

A base limit on contributions to candidates is *itself* a prophylactic measure because there is no inherent wrong in a large contribution to a candidate, only in quid pro quo, and a limit is designed to prevent the quid-pro-quo-corruption risk. Laws criminalizing bribery and requiring contribution disclosure are also prophylaxes, as are laws involving earmarking and false-name contributions. Earmarked contributions through an intermediary are deemed contributions from the original contributor. 2 U.S.C. 441a(a)(8).[4] False-name contributions are barred. 2 U.S.C. 441f. So any effort to pass contributions to a candidate through a party or PAC must be done in one's own name and subject to one's own limit or the effort is illegal.

But can there *be* any cognizable circumvention risk from truly *un*earmarked contributions? Obviously, an *un*earmarked contribution *to* a political party committee or a PAC is not a contribution "*to* a particular candidate," as *Buckley* suggested, 424 U.S. at 38 (emphasis added), though an earmarked contribution is a contribution to a candidate. Unearmarked contributions are "to" the recipient party or PAC. *See, e.g., id.* at 23 n.24. Nonetheless, *Buckley*'s conduit concern was that "a person . . . might otherwise [absent the "ceiling"] contribute massive amounts of money to a particular can-

[4] "Earmarking" includes understandings of all sort about the use of a contribution, not just, e.g., those reduced to formal agreement in writing. FEC counts a contribution to a party committee against a "contributor's contribution limit for a particular candidate" where the contributor "retains control" (as by earmarking) or where "contributor[s] know[] that a substantial portion of [their] contribution will be given to or spent on behalf of a particular candidate." FEC, *Political Party Committees* at 15 (July 2009).

didate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party." *Id.* at 38. Giving "massive" sums "to a candidate" by such means could only result if parties and/or PACs decided, without being required to do so (absent earmarking), to *contribute* to a specific candidate.[5] But even in *Buckley*'s time, political committees could only contribute $1,000 or $5,000 (for what would now be called multi-candidate committees) per election to a candidate. So the idea that "massive" contributions from a particular contributor could reach a particular candidate by means of unearmarked contributions to a party and/or PAC was remote. The recited possibility necessarily turned on "huge" sums to parties or PACs, presumably increasing the chance that a base-level contribution will be made to a particular candidate, and on political-committee proliferation. Otherwise, nothing approaching "massive" sums could ever get to a candidate. But "huge" contributions to parties and PACs have been eliminated since *Buckley*, along with the proliferation problem. So without earmarking, there is no cognizable conduit concern.

Without earmarking, there is no way to *assure* that *any* of the money one contributes to a political committee will ever make it to a particular candidate as a contribution. *Buckley* addressed this long-odds problem, absent any evidence, by suggesting one might contribute "to political committees *likely* to contribute to that candidate[] or . . . *the candidate's political party*." 424 U.S. at 38 (emphasis added). Especially as applied to

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[5] This conduit concern cannot be about independent *expenditures* because the independence eliminates cognizable benefit to a candidate. *Citizens United*, 130 S.Ct. at 908.

national-party committees, which support numerous candidates and have numerous monetary demands, any conduit concern with unearmarked funds is either non-existent or so minuscule as to be noncognizable. The PAC most "likely to contribute to [a] candidate," *id.*, would be a single-candidate PAC (which can receive a contribution of $5,000 per year and contribute $2,500 per candidate), not a multi-candidate committee (which can receive $5,000 per year and contribute $5,000 per candidate). So trying to contribute "to" a candidate through a party or PAC without earmarking is uncertain, inefficient, and unlikely to succeed— impossible in any cognizable amount—making it more likely that a would-be "massive" contributor would simply spend the money on independent expenditures supporting the candidate or contribute earmarked funds to an IE-PAC for independent expenditures favorable to the candidate.

Even if a contributor's unearmarked contribution to a political committee could somehow be attributed to a political-committee contribution to a candidate, it only would be *attributable on a pro-rata basis* because unearmarked contributions become a fungible part of all contributions received (which in turn are added to funds carried over from prior election cycles). Consider if a contributor gives $30,800 in 2011 and 2012 to RNC, totaling $61,600. As a share of RNC's contributions received, $61,600 is a minuscule amount. Such a pro-rata share must be applied to any national-party committee contribution to a candidate to determine the contributor's share of the contribution. And since the limits on contributions to national-party committees and by them to candidates already eliminate any circumvention risk, a contributor's minuscule share of any contribution to a candidate is noncognizable as a

governmental interest justifying biennial limits, which are thus meaningless prophylaxes on prophylaxes.[6]

Even if numerous contributors try to use a political committee as a conduit to get pro-rata contributions to a candidate, there is the barricade of the limit on contributions *to* a candidate. For example, if a $5,000 per candidate per election contribution *has already been made* by a party, then no matter how many contributors give in the hope of triggering a contribution to the candidate, no more can go to the candidate.[7] The limits on contributions *to* and *by* political committees eliminate any cognizable circumvention risk.[8]

The foregoing shows that there are no "massive" contributions to parties or PACs to begin with, and the contributor's pro-rata share of any contribution to a party or PAC and of any party's or PAC's contribution to a candidate are noncognizable as circumvention because of existing base limits absent the biennial limits. From this review of *Buckley*'s conduit concerns as applied, it is clear that Congress has created prophylaxes

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[6] This pro-rata analysis also applies to multicandidate PACs, which must have at least 51 contributors and must contribute to 5 or more candidates, for reasons that can be shown in subsequent briefing.

[7] Also if a national party has met its contribution limit under 2 U.S.C. 441a(h), no more can be given.

[8] In addition to the permitted $5,000 per-candidate per-election contribution limit, a political party's national committee has spending authority for expenditures coordinated with candidates. 2 U.S.C. 441a(d). But any anti-circumvention interest is already addressed by the limit on this coordinated spending. *See FEC v. Colo. Republican Fed. Camp'n Comm.*, 533 U.S. 431, 452 (2001) (expenditure limit "target[s]" circumvention concern) ("*Colorado–II*").

on prophylaxes that have eliminated *Buckley*'s concerns. *See* 424 U.S. at 38. Because *Buckley*'s conduit concern is already amply addressed *without* the biennial limits, there remains no justification for the $70,800 biennial limit on contributions to national-party committees. This limit is a vestigial appendage lacking constitutional justification. It is simply layering prophylaxis on prophylaxes without justification and in a manner broader than necessary to address the expressed circumvention concern.[9]

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

Because the biennial limit as applied is not justified by any anti-circumvention interest, it serves only to level the playing field, limiting persons who could give a biennial total of $184,800 to three national-party committees (under base limits) to $70,800. This Court has repeatedly rejected any equalizing interest. *See, e.g.*, *Buckley*, 424 U.S. at 48-49, 57.

4. The District Court Ignored the Required Conduit-Contribution Analysis and Considered Non-Cognizable Interests.

The district court's constitutional analysis is broad-brush, lacking the precision required where core political speech and association are substantially burdened.

It fails to make the necessary distinction between the anti-corruption and anti-circumvention interests. The former applies to limits on direct contributions to

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[9] Congress's assertion of an anti-circumvention interest is underinclusive because PACs have no biennial aggregate limit. Multi-candidate PACs, as deeply interested in legislative outcomes as individual contributors, may contribute $5,000 to as many candidates as they can afford. *Cf. Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002).

candidates, where the quid-pro-quo-corruption risk is possible. The latter applies to biennial limits, *Buckley*, 424 U.S. at 38, and asks whether a contribution poses a conduit-contribution risk, i.e., whether there is a cognizable risk that base-level contributions will result in a cognizable contribution to a candidate, absent the biennial limits.

The court's failure to employ this required analysis leads to its error of considering non-cognizable interests, including corruption and forbidden theories of corruption. As shown above, there is no cognizable risk that any contribution restricted by the biennial limits poses a cognizable conduit risk, due to layers of prophylaxes, especially the post-*Buckley* FECA amendments—and the government has proved no such risk.

The court ignored these prophylaxes 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." App.13a. But that is neither precise First Amendment analysis nor the way of *Buckley*, which considered each limit individually and asked whether it was justified under the proper scrutiny. *See, e.g.*, 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. Had the court employed the proper analysis, it would have been compelled to a different outcome because the government failed to prove a conduit-contribution risk from base-level contributions absent biennial limits.

The court's handling of cognizable governmental interests is erroneous—even beyond its looking to an

anti-corruption risk. Though *Citizens United* expressly limited corruption to quid-pro-quo corruption, the court tries to show that *Citizens United* included in corruption "a wheeling-and-dealing space" beyond true quid-pro-quo dollars for votes, citing a portion of *Citizens United* that was not trying to establish the scope of corruption (which had already been done). App.10a. While acknowledging that large contributions "do[] not ipso facto" create corruption, *id.*, the court relies heavily on the ability to "give half-a-million dollars in a single check to a joint fundraising committee," App.12a. This is a sub silentio reliance on the forbidden equalizing interest. And though the court acknowledges that "[g]ratitude . . . is not itself a cognizable form of corruption," App.12a, it relies precisely on the prospect of a candidate "lay[ing] the wreath of gratitude" before the writer of a large check at a joint fundraiser—without demonstrating that any cognizable conduit-contribution has made its way through the many prophylaxes to that candidate.

The court imagines that "the parties implicitly agree" to a conduit contribution. App.12a. But if they *agree*, the contribution is *earmarked* and governed by the same limits as any other contribution by a contributor to the candidate. Exceeding those limits is illegal. So the court's posited mechanism for circumvention relies on individuals violating the law. It is a flawed analysis that upholds one provision (the biennial limits) on the presumption that people will violate another (the earmarking rules).

The court couples a concern with an illegitimate interest (gratitude) with an illegal scheme (violating earmarking rules) to create a supposedly cognizable hybrid interest. App.12-13a. But no such interest has been recognized. One cannot create cognizable inter-

ests by mating rejected interests. Moreover, *Buckley*'s upholding of the "overall $25,000 ceiling" was premised precisely on "the use of unearmarked contributions" for circumvention. 424 U.S. at 38.

Instead of requiring the government to meet its burden of showing how a base-level contribution can result in a cognizable conduit-contribution to a particular candidate absent the biennial limits, the court relies on *speculation* (based on flawed premises, *supra*). This appears in two key passages.

First, the court says it "cannot ignore the ability of aggregate limits to prevent evasion of the base limits," App.11a, for which it cites as an example the ability of party committees to transfer funds, App.12a. But contributions to and by parties are subject to limits enacted to eliminate (or make non-cognizable) circumvention, and the ability of parties to transfer funds does not alter that. The court fails to *show* any cognizable risk that transfers can result in any cognizable conduit-contribution, saying instead that a "half-a-million dollar contribution *might* . . . find its way to a single committee's coffers," which might make a coordinated expenditure. App.12a. (emphasis added). Aside from "might" being speculation, the limit on coordinated party expenditures is already in place to address the government's anti-circumvention interest. *See Colorado-II*, 533 U.S. at 452 (expenditure limit "target[s]" circumvention concern).

Second, the court says that "it is *not hard to imagine* a situation where the parties implicitly agree to such a system," i.e., where "many separate entities would willingly serve as conduits for a single contributor's interests." App.12a. (emphasis added). The implicit-agreement-as-earmarking problem has been

addressed above, i.e., it constitutes a *contribution*. The it-is-not-hard-to-imagine analysis is speculation, not reliance on facts proven by the FEC, and has no place in First Amendment analysis. And this imagination is premised on people violating earmarking laws. Finally, the court ignores the uniqueness of the candidate-committee claim, sweeping it into the court's flawed broad-brush analysis. *See* Part IV. The district court's opinion is improper First Amendment analysis.

The first question presented is a substantial question that this Court should decide.

II.

The Biennial Limits on Contributions to Non-Candidate Committees Are Unconstitutional Facially for Lacking a Constitutionally Cognizable Interest.

Appellants challenge the biennial limits ($70,800 and $46,200) on contributions to non-candidate committees, 2 U.S.C. 441a(a)(3)(B), as facially unconstitutional under the First Amendment. As noted in Part I, the post-*Buckley* FECA amendments eliminated the two bases on which *Buckley* relied, 424 U.S. at 38, to facially uphold the old "ceiling," i.e., there can no longer be either political-committee proliferation or the risk of circumvention of contribution limits by contributing "massive" amounts of money to parties or PACs. Thus, there is no cognizable interest to justify these biennial limits as applied to *any* non-candidate committees, so they are *facially* unconstitutional.

Because of the lacking interest, these biennial limits are facially unconstitutional for being substantially overbroad under the analysis of *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). This Court is justified in "prohibiting all enforcement" of the limits be-

cause their application to protected speech and association is substantial, "not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications." *Virginia* v. *Hicks,* 539 U.S. 113, 119-20 (2003). The unconstitutional application of 2 U.S.C. 441a(a)(3)(B) to all national-party committees is substantial, not only in an absolute sense, but also in a relative sense, especially because there is no "scope of . . . plainly legitimate applications" due to the lack of legitimate application to state-party committees and PACs, as set out in the preceding paragraph.

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

The district court rejects this argument because it finds that the biennial limits are constitutional as applied to national-party committees, App.13a, but as argued above, that is erroneous.

The second question presented is a substantial question that this Court should decide.

III.

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

Appellants challenge the limits on contributions to non-candidate committees at 2 U.S.C. 441a(a)(3)(B) as unconstitutional for being too low, as applied to national-party committees and facially, under *Randall v. Sorrell*, 548 U.S. 230 (2006). *Randall*'s analysis rejects contribution limits "fail[ing] to satisfy the First

Amendment's requirement of careful tailoring" by "impos[ing] burdens upon First Amendment interests that (when viewed in light of the statute's legitimate objectives) are disproportionately severe." *Id.* at 237 (plurality).

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

In *Randall*, this Court struck as too low a $400 limit on contributions an individual may make, in a biennium, to a state-party committee. 548 U.S. at 262 (plurality opinion). The state-party committee in *Randall* needed funds to reach the voters in a population of 621,000, *see id.* at 250 (Vermont population in 2006). Applying *Randall*'s analysis to the $70,800 biennial limit as applied to national-party committees shows its unconstitutionality. RNC, NRSC, and NRCC need funds to reach the voters in a population of over 308,000,000, *see* http://2010.census.gov/2010census/data/ (2010 U.S. population 308,745,538). A ratio shows that contributions of $198,389.69 over two years to the national committees of one political party—RNC, NRSC, and NRCC—would still be too low under *Randall.* ($400/621,000 = $198,389/308,000,000). The $30,800 per national-party committee per year that individuals are permitted to give under 2 U.S.C. 441a(a)(1)(B) would result in $184,800 to the party committees per biennium. This $184,000 is much

closer to the $198,389 ratio derived from *Randall*. But the national-party committees cannot accept these otherwise legal amounts because of the $70,800 biennial limit, which is far too low to be constitutional. The biennial limit frustrates individuals' right to meaningfully associate with the national committees of their political party and to fund robust political discussion at the full base-level limits.

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

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

The district court rejected this challenge, in part because "individuals remain able to volunteer, join political associations, and engage in independent expenditures." App.15a. But the idea that alternative means of expression and association fix unconstitutional provisions is erroneous. *See, e.g.*, *WRTL-II*, 551 U.S. at 477

n.9 (controlling opinion).

The third question presented is a substantial question that this Court should decide.

IV.

The Biennial Limit on Contributions to Candidates Is Unconstitutional for Lacking a Constitutionally Cognizable Interest.

McCutcheon challenges the $46,200 biennial limit on contributions to candidates, 2 U.S.C. 441a(a)(3)(A), as unconstitutional for lacking a constitutionally cognizable interest to justify it. This limit bans him from associating with all the candidates of his choosing with full-base-level contributions.[10]

The district court does not even address this challenge. This is erroneous because this challenge and the one to the biennial limit restricting national-party committees differ in key ways, as highlighted below. The two challenges do not rise and fall together. In fact, the case against the $46,200 limit on contributions to candidates is even stronger than the powerful case against the $70,800 limit (on contributions to national-party committees) because *Buckley* did not even suggest that contributions to candidates might serve as a potential conduit for circumvention, though it did suggest that parties and PACs might have done so (under the *Buckley* Scheme). *See* 424 U.S. at 38.

Strict scrutiny should apply for reasons stated in Part I.A, but exacting scrutiny suffices for McCutcheon to prevail because the government has failed to prove a cognizable risk that a base-level contribution to a

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[10] Even candidates who do not represent McCutcheon's home district or state have a direct effect on him, so he has an interest in races elsewhere.

candidate can result in a cognizable conduit-contribution absent biennial limits.

Though an anti-corruption interest may justify *base* limits on contributions to a candidate, *see, e.g.*, *Buckley*, 424 U.S. at 26-28, it does not justify the *biennial* limit because the latter does not apply to any contribution to a *particular* candidate (essential to a cognizable quid-pro-quo-corruption risk).

The biennial limit is not supported by an anti-circumvention interest, the only cognizable interest. *Id.* at 38. *Buckley* did not even suggest that the old "ceiling" might be justified by the use of candidates as conduits, though it suggested that parties and PACs might be conduits. *Id.* No "massive" funds could be channeled through candidate committees because candidate committees were "persons" limited to contributing $1,000 per election to candidates or candidate's committees under the FECA scheme that *Buckley* considered. Consequently, contributions to candidate committees could not pose any possibility of circumvention by "massive" contributions to candidate committees that might somehow benefit other candidates. And there was no candidate-committee proliferation problem because each candidate had only one principal-campaign committee, *id.* at 187, and contributions to any authorized candidate committee were deemed made to the candidate, *id.* at 189-90. So *Buckley*'s concerns in upholding the old ceiling simply did not exist with respect to individuals' contributions to candidates.

This remains true because individuals now may contribute only $2,500 per candidate per election, *see supra* at 2, and candidate committees may contribute only $2,000 per candidate per election to other candidates. 11 C.F.R. 102.12(c)(2). Moreover, "[a]ll autho-

rized committees of the same candidate for the same election to Federal office are affiliated," 11 C.F.R. 100.5(g)(1), so there is no proliferation.

Yet in BCRA, Congress acted as if the circumvention risk somehow had *increased* by restricting what contributors could do in three ways.

First, it failed to properly adjust for inflation from the 1974 FECA scheme that *Buckley* considered. The old $1,000 limit on a person's contribution to a candidate is now worth $4,667, not the current $2,500 limit, and in 1974, if an individual wanted to give his whole "overall $25,000 ceiling" to candidates, that ceiling is now worth $116,676, not the $46,200 limit now allowed for contributions to candidates.

Second, BCRA decreased the number of candidates with which a contributor may associate at the maximum base contribution level ($25,000/$1,000 versus $46,200/$2,500).

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

candidate committees. Thus, the district court's decision to treat "the contribution limits as a coherent system," App.13a, fails particularly regarding the biennial limit on contributions to candidates, which Congress isolated and which thus must stand on its own without regard to other limits and which the court could not ignore as if it were interdependent with other biennial limits.

Congress and now FEC have failed to justify these changes by explaining how there is a greater circumvention risk now than in 1974. There was no risk then, and there is no greater risk now.

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

This is true even absent earmarking, though earmarking contributions to a candidate via another officeholder's authorized committee is already illegal, 2 U.S.C. 441a(a)(8) and 441f. Individuals even suggesting that the first officeholder forward $2,000, *see* 2 U.S.C. 432e(3)(B), of the original $2,500 contribution,

see 2 U.S.C. 441a(a)(l)(A), to another candidate violate the earmarking prohibition. Moreover, even if candidate committees could be deemed conduits absent earmarking, the $2,000 contribution limit raises no cognizable circumvention (or corruption) concerns. If used to support a Senate candidate running statewide, $2,000 is only five times greater than the $400 limit struck down in *Randall* six years ago as too low to further a statewide campaign in Vermont. *Randall*, 548 U.S. at 253, 261-62. And "Vermont is about one-ninth the size of Missouri." *Id.* at 251.

Finally, this biennial limit is directed at a noncognizable anti-distortion interest, as demonstrated by simple arithmetic. 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[1] population of the average congressional district. In 2006, the biennial limit was $40,000. If an individual wanted to make a contribution of equal value to one candidate of his choice in all 468 federal races that year (435 House races, 33 Senate races, and the presidential race), in order to comply with 2 U.S.C. 441a(a)(3)(A), he would have been limited to $85.29 per candidate for the entire 2006 election cycle, i.e., $42.64 per primary and general election. That is far below the $200 limit struck in *Randall*. In the 2012 biennium, with a $46,200 limit, McCutcheon is limited to $98.71 per candidate for the entire cycle (468 races). This is $49.35 per election (though thirty-three are statewide races for Senator, with on-average 8.7 times the number of persons needed to be reached in a congressional

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

campaign). Aside from being too low under *Randall*, *see infra* Part V, considering that $49.35 is $2,450.65 less than the per-candidate limit Congress itself deems permissible, it is clear that the aggregate limit furthers only the anti-distortion goal, an illegitimate government purpose.

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

The fourth question presented is a substantial question that this Court should decide.

V.

The Biennial Limit on Contributions to Candidates Is Unconstitutionally Too Low.

McCutcheon challenges the biennial limit on contributions to candidates at 2 U.S.C. 441a(a)(3)(A) as unconstitutionally too low. The reasons set out above at the end of Part IV demonstrate the unconstitutionality of this limit. Because the limit prevents McCutcheon from meaningfully associating with all the candidates of his choice at the base-level amount, it is too low and improperly tailored under the First Amendment. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 397 (2000) (whether contribution "limitation [is] so radical in effect as to render political association ineffective . . . or pointless").

The fifth question presented is a substantial question that this Court should decide.

Conclusion

For the foregoing reasons, this Court should note probable jurisdiction.

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