NO. 12-536

In the
Supreme Court of the United States

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

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

REPLY BRIEF FOR APPELLANT SHAUN MCCUTCHEON

Erin E. Murphy
BANCROFT PLLC
1919 M Street, NW
Suite 470
Washington, DC 20036

Dan Backer
Paul Henry Jossey
DB CAPITOL
STRATEGIES, PLLC
717 King Street
Suite 300
Alexandria, VA 22314

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

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

Counsel for Plaintiff-Appellant Shaun McCutcheon

August 19, 2013

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes & Regulation

Other Authorities

REPLY BRIEF

The Bipartisan Campaign Reform Act's ("BCRA") aggregate contribution limits unconstitutionally burden fundamental First Amendment rights. The government's attempts to demonstrate otherwise only underscore that imposing an ultimate limit on how many otherwise permissible contributions someone may make does not further any legitimate anti-corruption or anti-circumvention interest. Nor, under this Court's precedents, may aggregate limits be justified as a means of equalizing the relative ability of individuals to participate in the political process or preventing the kind of "influence" or "gratitude" this Court has already concluded does not constitute corruption.

Rather than attempt to defend BCRA's aggregate limits on their own terms, the government devotes the bulk of its brief to insisting that this Court's one-paragraph discussion upholding the Federal Election Campaign Act's ("FECA") aggregate contribution ceiling in *Buckley v. Valeo*, 424 U.S. 1, 38 (1976)—a decision that emphasized that this issue was not "separately addressed at length by the parties"—somehow forecloses challenges to BCRA's distinct provision. In doing so, the government largely ignores fundamental differences between FECA and BCRA, as well as key changes in this Court's campaign finance jurisprudence in the four decades since *Buckley*. Critically, FECA contained no limits *at all* on contributions to a political party committee or political action committee ("PAC"). The Court's decision to uphold an aggregate ceiling in that context in no way compels the conclusion that

Congress may impose aggregate limits in a scheme that contains not only a full complement of base limits, but numerous much more direct anti-circumvention measures as well. Nor, as this Court's post-*Buckley* decisions confirm, is there any circumvention concern to address when someone who has contributed the maximum permissible amount to a candidate also contributes unearmarked funds within base limits to a political committee that, without "prearrangement" or "coordination" with the contributor, independently chooses to make a contribution within base limits to the same candidate. *FEC v. Nat'l Conservative Political Action Comm.* ("*NCPAC*"), 470 U.S. 480, 498 (1985).

Even assuming aggregate limits serve some valid anti-circumvention purpose, they are not remotely adequately tailored to do so, and instead are nothing more than impermissible prophylaxis-upon-prophylaxis. Sweeping in far more First Amendment activity than there is any reason to suspect raises circumvention concerns, they are a blunderbuss approach to concerns that readily could be addressed by much more targeted measures. If Congress is concerned about transfers between candidates and/or committees, or the mechanics of joint fundraising committees ("JFC"), then it should devise a solution to those concerns. What Congress may not do is use aggregate limits to "suppress lawful" First Amendment activity "as the means to suppress" some small sliver of "unlawful" activity. *FEC v. Wis. Right to Life, Inc.* ("*WRTL II*"), 551 U.S. 449, 475 (2007) (plurality op.).

ARGUMENT

I. BCRA'S AGGREGATE CONTRIBUTION LIMITS SUBSTANTIALLY BURDEN CORE FIRST AMENDMENT RIGHTS.

The government's brief dramatically understates the severe burdens aggregate contribution limits impose on protected First Amendment activity. Whereas base limits restrict *how much* someone may contribute to a candidate or committee, aggregate limits effectively restrict *how many* candidates or committees to whom or which someone may contribute—even within the base limits Congress has already deemed sufficient to address any cognizable corruption concerns. The government inexplicably fights this premise, insisting that "aggregate contribution limits do not preclude a contributor from contributing to as many candidates, parties, and other committees as he desires." FEC Br. 24. But this Court long has recognized that an aggregate contribution 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." *Buckley*, 424 U.S. at 38 (emphasis added). Aggregate limits therefore differ in both kind and effect from base limits and impose far greater burdens on First Amendment activity. *See* McCutcheon Opening Br. 24-31.

The government's attempts to prove otherwise cannot be reconciled with this Court's precedents or the realities of the constitutionally protected conduct Congress seeks to curtail. The government first insists any burden on fundamental rights is minimal

because a contributor may increase the number of candidates to whom he may contribute by decreasing the size of his contributions. FEC Br. 24. At the outset, that argument ignores the expressive value of the size of a contribution. A $20 contribution sends a very different message than a $2,600 contribution regarding the strength of someone's support for a candidate—especially if the same person contributes more to other candidates. *See Buckley*, 424 U.S. at 21 ("the size of [a] contribution provides a very rough index of the intensity of the contributor's support"). Depriving someone of the ability to give each candidate as much support as he chooses within the base limits Congress has already imposed to address corruption concerns plainly imposes a substantial burden on that First Amendment right.

That burden is particularly pernicious because this Court has emphatically rejected the notion that Congress may structure campaign finance laws to penalize those who "robustly exercise[] th[eir] First Amendment right[s]." *Davis v. FEC*, 554 U.S. 724, 739 (2008) (striking down law that "require[d] a candidate to choose between the First Amendment right to engage in unfettered political speech" and avoiding a "penalty"); *see also Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2818 (2011) (striking down law that imposed "'a special and potentially significant burden'" on candidate for "choosing to exercise his First Amendment right to spend funds on behalf of his candidacy"). That is exactly what aggregate limits do. They deprive those who wish to support numerous candidates or committees of the same control over the size of their contributions as those

who engage in less First Amendment activity. To put it in concrete terms, because of BCRA's aggregate limits, someone who wanted to contribute to one candidate in every federal race in 2006 "would [have] be[en] limited to contributing $85.29 per candidate for the entire election cycle." JS.App.14a. That is barely *2%* of what individuals who exercised their First Amendment rights less robustly were allowed to contribute to their candidates of choice.

Rather than deny that aggregate limits impose special burdens on those who exercise their First Amendment rights vigorously, the government simply insists that *Davis* and *Bennett* involved only independent expenditures, not contributions. FEC Br. 24. *Bennett*, however, invalidated a law that imposed special burdens on candidates based in large part on the amount of contributions they received. *Bennett*, 131 S. Ct. at 2813-14. Moreover, the government does not and cannot offer any principled basis for allowing Congress greater leeway to use aggregate limits to impose a "special and potentially significant burden," *Davis*, 554 U.S. at 739, on individuals who exercise their First Amendment rights robustly by forcing them to choose among the candidates they wish to support up to the base limit. A "drag on First Amendment rights" does not become "constitutional simply because it attaches as a consequence of a statutorily imposed choice." *Id.*

The government attempts to justify this penalty by noting that aggregate limits leave individuals free to "donat[e] … time and energy" to as many candidates or committees as they chose. FEC Br. 22. Again, this ignores the distinct First Amendment

burdens aggregate limits, as opposed to base limits, impose. When someone wants to express more support for one candidate than base limits allow, time and energy might offer a viable alternative. But aggregate limits affect individuals who wish to support *numerous*, often geographically dispersed, candidates and committees.

Notwithstanding the government's vague allusions to the telephone and Internet, FEC Br. 23, there are obvious practical limitations on the ability to associate with and express support for numerous candidates and committees throughout the country. Time and geographic constraints make it unrealistic to personally or physically participate in more than a few campaigns in any given election cycle. Moreover, a bumper, lapel, front lawn, or even Internet homepage has only so much space for stickers, buttons, lawn signs, and online banners, meaning any attempt to associate with and express support for a large number of candidates through such means tends to crowd out and dilute the impact of each individual communication. In any event, local means of expressing support such as lawn signs and bumper stickers do little for someone like McCutcheon, who wants to support 27 candidates spread across the country. Compl. ¶¶ 27-28 (Doc. 1). Thus, to the extent the government identifies alternative avenues for exercising First Amendment rights, they are much "more burdensome than the one [aggregate limits] foreclose[]." *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 255 (1986) (plurality op.).

The government's contention that individuals still may make independent expenditures fares no

better. FEC Br. 21-22. If that alone were enough to alleviate First Amendment concerns, then every contribution limit would survive constitutional scrutiny. *But see Randall v. Sorrell*, 548 U.S. 230 (2006) (invalidating Vermont's base contribution limits). Moreover, rather than offering an alternative means of associating with a candidate, independent expenditures require a substantial degree of *dissociation* between the speaker and candidate, lest the speaker's communications be perceived as "coordinated" and subject to contribution limits. 2 U.S.C. § 431(17). In any event, when someone wishes to support multiple geographically dispersed candidates, preparing and distributing flyers, drafting letters to the editor, developing television or newspaper advertisements, and other such activities are much less readily available avenues of expression and association than making a monetary contribution.

The burden imposed by aggregate limits is especially acute in primary elections. A contributor must make decisions about how many candidates to support and how much to contribute to each based in part on speculation about which and how many of those candidates will win their primaries and run in the general election, and how much support she may want to provide in that election. Aggregate limits thus pressure people to reduce the number or size of their contributions to avoid hitting their limit too early in an election cycle and retain flexibility should a special election or other unexpected development arise. *Cf. Bennett*, 131 S. Ct. at 2328 (invalidating law that required privately funded candidate "to make guesses about how much he will receive in the

form of contributions and supportive independent expenditures," noting that "[h]e might well guess wrong").

In short, aggregate contribution limits substantially burden core First Amendment activity. The government therefore bears a particularly heavy burden in establishing their constitutionality. *See Davis*, 554 U.S. at 744 ("the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights"). Indeed, for all the reasons identified by the RNC and Appellants' *amici*, such limits should be subject to strict scrutiny. *See* RNC Reply Br. 1-8; *McConnell v. FEC*, 540 U.S. 93, 141 n.43 (2003) ("the associational burdens imposed by a particular piece of campaign-finance regulation may at times be so severe as to warrant strict scrutiny"); Br. of *Amicus Curiae* Sen. Mitch McConnell 4-22. But in the end, whether the Court applies strict or exacting scrutiny is beside the point because the government cannot carry its burden of establishing that BCRA's aggregate limits are constitutional under either standard.

II. BCRA'S AGGREGATE LIMITS DO NOT FURTHER AN IMPORTANT GOVERNMENT INTEREST.

This Court has deemed only two closely related interests sufficiently important to allow the government to abridge First Amendment rights through contribution limits: avoiding corruption and avoiding the appearance of corruption. *WRTL II*, 551 U.S. at 478-79. By extension, the Court also has recognized a government interest in preventing circumvention of anti-corruption measures. As the

government's arguments ultimately reveal, BCRA's aggregate limits do not further any such interests. Instead, at most, they serve only to limit the kind of "influence" or "access" this Court already has concluded does not constitute corruption, or promote the kind of First Amendment "equalization" this Court has long rejected.

A. There Is No Cognizable Circumvention Problem for BCRA's Aggregate Limits to Address.

The government appears to accept that BCRA's aggregate limits may be upheld only as anti-circumvention measures—and for good reason, as they plainly do not combat corruption directly. Congress's anti-corruption interest is limited to preventing actual or apparent *quid pro quo* corruption through massive contributions. *Buckley*, 424 U.S. at 28. Congress has addressed that problem directly by imposing base limits on contributions to candidates, which already embody its judgment regarding the point at which the size of a contribution raises cognizable corruption concerns. There is no reason to assume that a candidate who receives a contribution within those base limits from an individual will suddenly become significantly more susceptible to *quid pro quo* corruption by that individual simply because the individual decides to make similar contributions to nine other candidates.

The government therefore bears the burden of demonstrating that aggregate limits are necessary to prevent circumvention of the base limits that already prevent the actuality or appearance of *quid pro quo* corruption. *Citizens Against Rent Control/Coalition*

for Fair Hous. v. City of Berkeley, Cal., 454 U.S. 290, 299 (1981). Its attempts to do so never get off the ground; the government identifies nothing whatsoever to substantiate its professed concern that allowing individuals to make contributions within allowable base limits to "too many" candidates or committees creates a cognizable circumvention concern.

At the outset, the government's argument is seriously undermined by the fact that BCRA already includes a plethora of much more direct anti-circumvention measures designed to prevent the very problem aggregate limits purportedly address. *See* McCutcheon Opening Br. 40-43. For instance, under earmarking provisions enacted in FECA and retained by BCRA, if someone contributes to a candidate or committee with the "direct[] or indirect[]" understanding that those funds are to be transferred to a particular candidate, the transaction is treated as a direct contribution from the original contributor to the ultimate candidate recipient. 2 U.S.C. § 441a(a)(8). BCRA also prohibits the making or receipt of a contribution "in the name of another," *id.* § 441f, meaning someone may not circumvent the statute's earmarking restrictions by funneling a contribution through another contributor.

The government nevertheless insists aggregate limits are needed to prevent *unearmarked* contributions from finding their way back to a candidate to whom a contributor already has given the maximum permissible amount. To begin with, as McCutcheon pointed out in his opening brief (at 51-52), that argument would justify virtually any

aggregate limit, as the government never explains why someone's tenth contribution is any more likely than his second or third contribution to find its way back to a particular candidate. But the government's argument also suffers from the more fundamental flaw that the "circumvention" it hypothesizes lacks the kind of coordination between candidate and contributor needed to give rise to a cognizable *quid pro quo* corruption concern under this Court's precedents.

As this Court has explained time and again, when there is no "prearrangement or coordination" between a candidate and someone who would like to spend money to support his candidacy, any such spending cannot function as "a *quid pro quo* for improper commitments from the candidate." *NCPAC*, 470 U.S. at 495, 498; *see also Colorado Republican Fed. Campaign Comm. v. FEC* ("*Colorado I*"), 518 U.S. 604, 617-18 (1996) ("the constitutionally significant fact … is the lack of coordination between the candidate and the source of the expenditure"). That is why the Court has repeatedly rejected independent expenditures limits—the "absence of prearrangement and coordination," *NCPAC*, 470 U.S. at 498, ensures a "separation between candidates and independent expenditure groups" that "negates the possibility that independent expenditures will result in the sort of *quid pro quo* corruption with which [the Court's] case law is concerned." *Bennett*, 131 S. Ct. at 2826-27.

The government faces the same problem here. Precisely because the source of an *unearmarked* contribution, by definition, may not "in any way …

direct[]" the subsequent disposition of those funds, 2 U.S.C. § 441a(a)(8), any contribution that a party committee or PAC makes to a candidate may not be attributed to its contributors. A committee's free, independent, and uncoordinated decisions about the candidates to which it will contribute prevent any risk of corruption with respect to those candidates and the committee's contributors. *NCPAC*, 470 U.S. at 495; *Colorado I*, 518 U.S. at 617-18.

In that sense, an unearmarked contribution is like a general grant of government funding. As the Court has explained in its Establishment Clause cases, when the government provides funds or other benefits to individuals who independently choose to contribute them to or use them in connection with religious institutions, those individuals' decisions are neither attributable to the government nor deemed official support of religion. *See, e.g.*, *Zelman v. Simmons-Harris*, 536 U.S. 639, 655 (2002) (rejecting argument that "a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it an *imprimatur* of government endorsement"); *Witters v. Wash. Dep't of Servs. for Blind*, 474 U.S. 481, 488 (1986) ("[a]ny aid … that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients").

Just as the link between the government and a religious institution is severed by the independent choices of intermediaries, here, "[t]he candidate-funding circuit is broken," *Bennett*, 131 S. Ct. at 2826. There is no prearrangement or coordination

between the "ultimate" recipient and the "original" contributor when the "intermediary" committee makes an independent determination as to what to do with the contribution. Indeed, the argument is even stronger here because the recipient of an unearmarked contribution is not only presumed but *legally required* to decide how to spend a contribution independent from the contributor's direction or control. 2 U.S.C. § 441a(a)(8). Because there is no constitutionally cognizable risk of *quid pro quo* corruption when the contributor has lost all control over the funds, there is no important or even legitimate interest in prohibiting the contribution.

The government seems to recognize this, as it, too, ultimately concedes that the recipient of a contribution has "considerable discretion" in deciding what to do with the funds. FEC Br. 37. It is little surprise, then, that most of the circumvention scenarios it hypothesizes involve the kind of coordination or prearrangement that is already precluded by laws restricting coordinated expenditures, earmarking, contributions in the name of another, and the like. *See* FEC Br. 37-38 (suggesting a party might use a contribution to make coordinated expenditures on a candidate's behalf); FEC Br. 41-42 (analogizing to laws that preclude attempts to bribe federal employees by instructing third parties to pass along otherwise impermissible gifts). The government's attempt to analogize political contributions to efforts to bribe federal employees—an activity that is decidedly not entitled to First Amendment protection—only underscores the extent to which it trivializes the constitutional interests at stake.

Beyond that, the government invokes scenarios where not only is coordination or prearrangement lacking, but the amount of the contribution that theoretically might be "credited" to a particular contributor is so minimal as to be non-cognizable. Taking contributions to national party committees as an example, the RNC raised more than $386 million during the 2012 election. McCutcheon Opening Br. 51. Even if someone contributed the maximum to the RNC ($32,400), and the RNC in turn contributed the maximum to a candidate ($5,000), the *pro rata* share of that contribution for which the candidate could "credit" the "original" contributor would be less than one hundredth of one percent, amounting—quite literally—to pocket change.

The government's own examples confirm that contributions to state parties are no different. The government notes that the Democratic Party of New Mexico spent $210,000—96% of its coordinated expenditures—on behalf of one candidate in 2012. FEC Br. 45. But it conveniently omits the fact that the party received approximately $2.8 million in its federal account during that election cycle, meaning the *pro rata* share of its coordinated expenditures attributable to any one contributor was miniscule. The $334,604 the Missouri Democratic State Committee spent on coordinated expenditures was an even smaller percentage of its overall federal receipts.[1] Thus, even the government's cherry-picked

[1] *See* Democratic Party of N.M., *Report of Receipts and Disbursements* 3 (Apr. 8, 2013), http://images.nictusa.com/pdf/488/13961253488/13961253488.pdf; Missouri Democratic State

examples do not advance its circumvention argument.

The same ultimate attribution problem is true as to multicandidate PACs, which receive the lion's share of contributions made by individuals to PACs. These entities must be funded by 50 or more individuals, must contribute to five or more candidates, and may not contribute more than $5,000 to any candidate. 2 U.S.C. § 441a(a)(2), (4). As the number of contributors to a multicandidate PAC or the number of candidates the PAC supports grows, the *pro rata* share of the PAC's contribution to a candidate that might be attributed to any particular contributor becomes increasingly negligible (assuming the candidate even knows who contributed to the PAC in the first place). That hardly has the makings of the kind of *quid pro quo* corruption with which this Court's cases are concerned.

In sum, the government's attempts to defend BCRA's aggregate limits on anti-circumvention grounds cannot withstand close scrutiny, as the circumvention concerns it suggests are unfounded. Unless campaign finance regulation is to devolve into the sort of prophylaxis-upon-prophylaxis—upon even more prophylaxis yet—that this Court has already declared impermissible, *cf. WRTL II*, 551 U.S. at 479, there must be some end to the government's ability to continue recycling the same generic corruption interests to justify ever more burdensome restrictions on core First Amendment activity.

Comm., *Report of Receipts and Disbursements* 3 (May 13, 2013), http://images.nictusa.com/pdf/727/13962195727/13962195727.pdf.

B. *Buckley* Does Not Relieve the Government of Its Burden of Establishing that BCRA's Aggregate Limits Are Constitutional.

Implicitly recognizing the myriad shortcomings of its efforts to establish that BCRA's aggregate limits are constitutional on their own terms, the government spends the bulk of its brief attempting to relieve itself of that burden by insisting that *Buckley* already resolved this case in its favor. *Buckley* did no such thing. *Buckley* upheld a specific aggregate contribution ceiling in a very different campaign finance scheme at a very different moment in this Court's jurisprudence. The government's attempt to convert *Buckley*'s single-paragraph discussion of that distinct provision into some sort of blanket immunity against challenges to aggregate limits both misreads *Buckley* and ignores critical changes to campaign finance law and jurisprudence in the past four decades.

After emphasizing that the issue "was not addressed at length by the parties," *Buckley* explained its rationale for upholding FECA's aggregate contribution ceiling in a single sentence:

> [T]his 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.

Buckley, 424 U.S. at 38. While the Court addressed this issue at even less length than the parties, this sentence suggests it was concerned with the possibility that someone might contribute "massive amounts" to a political party or committee that was "likely" to funnel those amounts back to a "particular candidate."

As McCutcheon explained in his opening brief (at 40-43), whatever validity these concerns might have had under FECA, they are inapplicable to BCRA. Unlike FECA, BCRA imposes base limits not only on contributions to candidate committees, but also on contributions to party committees and PACs. 2 U.S.C. § 441a(a)(1)(B)-(C). It thus is simply no longer the case, as it was under FECA, that someone may make unlimited contributions to party committees and PACs.[2] Nor may someone circumvent BCRA's base limits by contributing to multiple PACs created or controlled by a single entity, as BCRA treats all such PACs as a single committee. *Id.* § 441a(a)(5). Because Congress has foreclosed these "massive" contribution avenues directly, the government may no longer justify aggregate limits as a surrogate base limit on contributions to party committees and PACs.

The government attempts to downplay this distinction between FECA and BCRA, FEC Br. 47,

---

[2] Post-*Buckley* amendments also added base limits—which FECA originally lacked—on how much a PAC may contribute to another PAC or a local, state, or national political party. 2 U.S.C. § 441a(a)(2).

but its importance cannot be overstated. The core concern this Court has identified in upholding base contribution limits is the possibility that *"large* campaign contributions" might create "the actuality and potential for corruption." *Buckley*, 424 U.S. at 28 (emphasis added); *see also Citizens Against Rent Control*, 454 U.S. at 296-97 (noting that "*large* contributors to a *candidate*" can create actuality or appearance of corruption (first emphasis added)). It is understandable that the Court deemed an aggregate contribution ceiling permissible in a regulatory scheme that imposed no limits on contributions to political parties or committees. But neither *Buckley* nor any other decision of this Court has suggested Congress may impose aggregate limits *on top of* a full complement of base limits—let alone on top of myriad other anti-circumvention measures as well. Thus, Appellants do not seek to limit *Buckley*; rather, the government seeks to extend it.[3]

That is nowhere more apparent than in its repeated insistence that aggregate limits are needed to prevent someone from contributing *a total* of

[3] Although the government notes that FECA contained a few of BCRA's restrictions, *Buckley* did not discuss or rely on those measures when assessing the constitutionality of FECA's aggregate ceiling. The *Buckley* Court thus may well have overlooked the importance of FECA's earmarking provisions or, as more recent cases have suggested, overestimated the potential for *unearmarked* contributions to be used as mechanisms for circumvention. While there is no need to revisit the constitutionality of FECA's long-since repealed provision, this Court certainly need not extend *Buckley*'s reasoning to entirely distinct aggregate limits imposed as part of a very different campaign finance scheme.

millions of dollars to all national, state, and local parties combined, thereby "acquir[ing] actual or perceived 'improper influence,' … *regardless of how the money is spent*." FEC Br. 40 (quoting *Buckley*, 424 U.S. at 27; emphasis added). First, that is not the kind of "massive" contributing with which *Buckley* was concerned. The anti-corruption concern *Buckley* identified was the possibility that someone might use "massive" contributions to committees to *circumvent* base limits on candidate contributions, not that a collection of modest, non-corrupting contributions might, when aggregated together, create the appearance of disproportionate influence or access, wholly apart from circumvention concerns. Indeed, *Buckley* could not have more clearly rejected the notion that Congress may seek to "equaliz[e] the relative ability of individuals and groups to influence the outcome of elections," *Buckley*, 424 U.S. at 48-49—a principle this Court has since reiterated, *see, e.g.*, *Bennett*, 131 S. Ct. at 2821 ("restrict[ing] the speech of some elements of our society in order to enhance the relative voice of others … is wholly foreign to the First Amendment").

Subsequent decisions likewise have rejected the "'generic favoritism or influence theory'" of corruption the government continues to espouse, condemning it as "'unbounded and susceptible to no limiting principle.'" *Citizens United v. FEC*, 558 U.S. 310, 359 (2010) (quoting *McConnell*, 540 U.S. at 296 (opinion of Kennedy, J.)). That a single contributor may have a disproportionately large impact on numerous races, garner potential influence over multiple candidates, or perhaps even earn their generalized gratitude is simply not a permissible basis for preventing him

from robustly exercising his First Amendment rights. "Ingratiation and access … are not corruption," *id.* at 360, and the government may not invoke them to attach special burdens to the vigorous exercise of First Amendment rights.

The government's subtle resort to the same "equalization" and "undue influence" theories this Court already has rejected ultimately underscores the basic problem with its arguments. The government has no answer to the reality that subsequent developments in campaign finance law and jurisprudence preclude it from relying on the circumvention concerns articulated in *Buckley*. Just like base contribution limits, *see Randall*, 548 U.S. 230, each aggregate contribution limit must be justified on its own terms. The government cannot establish the constitutionality of BCRA's aggregate limits by mechanically pointing to *Buckley*'s analysis of a very different legal provision in a very different legal regime. Because the government has failed to demonstrate that BCRA's aggregate limits further any cognizable anti-corruption interest, the limits cannot survive heightened constitutional scrutiny.

III. EVEN IF BCRA'S AGGREGATE LIMITS SERVE AN IMPORTANT INTEREST, THEY ARE NOT REMOTELY ADEQUATELY TAILORED.

In all events, even assuming BCRA's aggregate limits further anti-circumvention interests rather than impermissible "equalization" or "undue influence" goals, they are a drastically overbroad means of doing so. At a minimum, aggregate limits must be "'closely drawn to avoid unnecessary

abridgement of associational freedoms.'" FEC Br. 18 (quoting *Buckley*, 424 U.S. at 25). BCRA's aggregate limits do not come close to satisfying that "exacting" standard, *Citizens Against Rent Control*, 454 U.S. at 298.

At the outset, even indulging the government's dubious assumption that allowing individuals to make contributions within base limits to more candidates, political parties, or PACs might raise circumvention concerns in *some* instances, the government has provided no evidence that the number of instances in which it would do so is significant. Instead, it mentions only a handful of newspaper articles and a press release about entirely inapposite corruption and circumvention incidents. FEC Br. 53-54. The government does not even try to show that aggregate limits would have done anything to prevent these already illegal activities; indeed, it appears that each of the transactions the government identifies was *within* aggregate limits (but prohibited by bribery and/or earmarking laws). Beyond that, the government offers only unsubstantiated speculation, but this Court has "never accepted mere conjecture as adequate to carry a First Amendment burden." *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 392 (2000). Thus, not only is the kind of illegal conduct the government identifies unaffected by aggregate limits, but aggregate limits prohibit far more contributions than there is any reason to suspect raise circumvention concerns under this Court's precedents.

Rather than attempt to demonstrate otherwise, the government points to *Buckley*'s rejection of an

overbreadth challenge to *base* contribution limits. FEC Br. 52. Once again, that ignores fundamental differences between limits on *how much* someone may contribute to each candidate and limits on *how many* candidates someone may support. Contributing $250,000 to one candidate is far different, and raises far different actual or apparent corruption concerns under this Court's precedents, than dividing the same amount among 100 different candidates.

In any event, a sweeping, maladroit prohibition on all contributions over a certain aggregate total—regardless of whether the recipients transfer those funds to another candidate, party, or PAC—is not an adequately tailored solution to any circumvention concern the government has identified. That Congress is regulating contributions does not change the fact that "the argument that protected speech may be banned as a means to ban unprotected speech … turns the First Amendment upside down." *WRTL II*, 551 U.S. at 475. Here, Congress clearly could achieve its asserted anti-circumvention goals through much more direct means that would abridge far less First Amendment activity.

For example, Congress could require aggregate contributions above a threshold to be deposited into a special account that may not be transferred or re-contributed to other candidates or committees. Or it could prohibit contributions above an aggregate threshold only when made to a candidate committee or political committee that has expressed its intent to contribute to a recipient as to whom the potential contributor has reached her base limit. Congress

also could impose limits on a candidate's ability to solicit contributions to other candidates, party committees, or PACs from someone who has already reached her base limit on contributions to the soliciting candidate. Congress likewise could address the government's professed anti-circumvention concerns about political parties or JFCs through less restrictive means. For example, as to political parties, Congress could treat transfers from candidates to party committees, or between party committees, as ordinary contributions subject to base limits. And as to JFCs, Congress could limit how many entities may join a JFC, require funds received through a JFC to be spent by the recipient rather than transferred to another JFC participant or other committee, or treat transfers by or among participants in JFCs as ordinary contributions subject to base limits.[4]

---

[4] The government's concerns about JFCs are largely ephemeral. A JFC is simply a convenient vehicle that allows multiple candidates or political parties to fundraise together and enables contributors to contribute to multiple entities by writing a single check. 2 U.S.C. § 432(e)(3)(A)(ii); 11 C.F.R. § 102.17. Base limits cannot be avoided by contributing through a JFC. 11 C.F.R. § 102.17(c)(1). Candidate committees or political committees that form a JFC must agree on the percentage of each contribution that each participating entity will receive, *id*. § 102.17(c)(1), and no entity may accept contributions that exceed base limits, *id*. § 102.17(c)(3)(i), (c)(6)(i). Thus, when someone contributes to a JFC, the legal effect is no different than if she had written separate checks for a *pro rata* share of that contribution to each of the entities that comprise the JFC. The notion that all the participants in a JFC might independently and without earmarking choose to contribute all their contributions to a single recipient is conceptually dubious and empirically unsupported.

McCutcheon identified many of these less restrictive alternatives in his opening brief (at 60-61), but the government tellingly offers no response. Instead, it attempts to change the subject, insisting that aggregate limits are needed to prevent individuals from contributing to every member of the same congressional committee. FEC Br. 53. Rather than bolster the government's case, this argument only underscores the basic problem with aggregate limits. There would be nothing inherently suspect should an individual wish to make contributions within base limits to every member of a particular committee—a staunch education advocate, for example, might wish to support each member of the House Education and the Workforce Committee based on their support of critical education reforms. Congress's structure and procedures ensure that an individual's freedom, pecuniary interests, and political interests are directly affected by *numerous* members of Congress. *See* William N. Eskridge, Jr., *Vetogates*, Chevron, *Preemption*, 83 Notre Dame L. Rev. 1441, 1444-48 (2008). Someone who supports the enactment or repeal of a particular law or policy thus has a distinct interest in supporting *each* member of Congress who is in a position to promote that goal.

Moreover, every voter is directly and substantially affected by which political party controls each legislative chamber, which typically turns on races occurring all over the country. *See* Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. Pa. L. Rev. 541, 570-74 (2004). The enactment, amendment, or repeal of laws that

directly affect someone's freedom and well-being in areas such as health care, taxes, immigration, the economy, and environmental regulation, often depends on the outcome of those races. Individuals therefore have a substantial interest in associating with and expressing support for candidates in races throughout the country. That BCRA's aggregate limits prevent them from doing so is not a virtue but a vice.

Finally, experience contradicts the government's contention that aggregate limits are needed to prevent circumvention of base limits. Over 70% of states that limit contributions to candidates have concluded that aggregate limits are unnecessary. *See* McCutcheon Opening Br. 53-54 & n.21. The government has not introduced a shred of evidence that the absence of such limits has led to impermissible circumvention or actual or apparent corruption in those states. The relative scarcity of aggregate limits in state campaign finance schemes, coupled with the lack of evidence that the absence of such limits has fostered corruption, undermines any claim that aggregate limits are a closely drawn means of addressing circumvention concerns. Instead, BCRA's aggregate limits are superfluous prophylaxis-upon-prophylaxis and abridge far more First Amendment activity than the Constitution permits.

CONCLUSION

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

Respectfully submitted,

Erin E. Murphy
BANCROFT PLLC
1919 M Street, NW
Suite 470
Washington, DC 20036

Dan Backer
Paul Henry Jossey
DB CAPITOL
STRATEGIES, PLLC
717 King Street
Suite 300
Alexandria, VA 22314

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

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

Counsel for Plaintiff-Appellant Shaun McCutcheon

August 19, 2013