No. 12-536

In the Supreme Court of the United States

SHAUN MCCUTCHEON AND REPUBLICAN NATIONAL COMMITTEE,
Plaintiffs-Appellants,

v.

FEDERAL ELECTION COMMISSION,
Defendant-Appellees,

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

AMICI CURIAE BRIEF OF THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION AND THE MEDIA INSTITUTE

IN SUPPORT OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Pages

Other Authorities

STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The Thomas Jefferson Center for the Protection of Free Expression is a nonprofit, nonpartisan organization located in Charlottesville, Virginia. Founded in 1990, the Center has as its sole mission the protection of free speech and press. The Center has pursued that mission in various forms, including the filing of *amicus curiae* briefs in this and other federal courts, and in state courts around the country.

The Media Institute is an independent, nonprofit research organization located in Arlington, Virginia. Through conferences, publications and filings with courts and regulatory bodies, the Institute advocates a strong First Amendment, a competitive communications industry and journalistic excellence. The Institute has participated as *amicus curiae* in numerous court proceedings, including cases before the United States Supreme Court and federal courts of appeal.

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[1] This *amici curiae* brief is filed with the written consent of the parties. A copy of the consent of the Federal Election Commission has been filed with the Clerk of Court for the Supreme Court of the United States. The written consents of Shaun McCutcheon and the Republican National Committee are enclosed.

SUMMARY OF ARGUMENT

Laws that prevent individuals from advocating for and through their preferred candidates for public office should be subject to this Court's strictest scrutiny. Political speech is at the core of the First Amendment's sphere of protected speech. The center of that core is political speech in the context of elections. Elections are *the* essential political activity in a representative democracy. This Court has traditionally subjected laws that significantly burden political speech in the election context to strict scrutiny review. In *Buckley v. Valeo*, however, a lesser degree of scrutiny was applied to campaign contribution limits. 424 U.S. 1 (1976). This Court should repudiate that aberration, at least with respect to laws imposing an aggregate limit on campaign contributions.

Individuals have political interests that are not only local or regional but also national in scope. An aggregate contribution limit is a significant burden on core political speech in that it prohibits individuals from expressing support for, and associating with, all of their preferred candidates through contributions at the per-candidate contribution limit. The Federal Elections Campaign Act (FECA) prohibits individuals from contributing to more than 18 candidates at the per-candidate contribution limit in any two-year period. 2 U.S.C § 441a(3)(A). This aggregate limit on contributions to candidates is not narrowly tailored to further the government's anti-corruption interest. With or without the aggregate limit, individuals' every

contribution will still be within the range that Congress has found does not create a serious risk of eliciting an illicit political favor from the recipient. Furthermore, the risk that a contributor can corrupt a particular candidate by contributing to more than 17 *other* candidates at the per-candidate limit is remote. Because contributions at the per-candidate contribution limit do not create a serious risk of *quid pro quo* corruption, FECA's limit on the number of candidates to whom an individual may make such a contribution cannot survive strict scrutiny review.

DISCUSSION

I. The Aggregate Limit on Contributions to Candidates Should Be Subject to Strict Scrutiny

FECA's aggregate contribution limit should be subject to strict scrutiny review because (a) the aggregate limit constitutes a restriction on speech in the electoral context—a category traditionally afforded heightened protection, (b) the aggregate limit significantly restricts political speech by limiting an individual's ability to engage in the symbolic act of contributing to preferred candidates, and (c) the aggregate limit hinders an individual's First Amendment right to associate with the candidates of his or her choosing.

A. Speech in the Electoral Context Is Traditionally Accorded the Highest Protection.

The First Amendment's protection of speech is at its zenith in the context of political activity. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971) ("The constitutional guarantee [of free speech] has its fullest and most urgent application precisely to the conduct of campaigns for political office."). This Court has interpreted that protection broadly, reflecting a "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

Accordingly, "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people," *Roth v. United States*, 354 U.S. 476, 484 (1957), this Court has traditionally subjected the restriction of such speech to strict scrutiny. These constitutionally suspect laws include regulations concerning electioneering and other activity around polling places,[2] regulations of speech by political candidates,[3] restrictions on

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[2] *See Burson v. Freeman*, 504 U.S. 191 (1992) (applying strict scrutiny to statute prohibiting solicitation of votes within 100 feet of polling place); *see also Schirmer v. Edwards*, 2 F.3d 117 (5th Cir. 1993) (applying strict scrutiny to Louisiana statute proscribing campaign activity within 600 feet of polling places); *Am. Broad. Co., Inc. v. Blackwell*, 479 F. Supp. 2d 719 (S.D. Ohio 2006) (applying strict scrutiny to Ohio restrictions against conducting exit polling within 100 feet of a polling place).

[3] *See Republican Party of Minn. v. White*, 536 U.S. 765 (2002) (applying strict scrutiny to regulation preventing judicial

leafleting activities,[4] and regulations concerning candidate self-funding and issue funding.[5]

The application of strict scrutiny in these circumstances reflects the First Amendment norm that political speech is essential to a free and robust political process, and that laws restricting such speech must be narrowly tailored to a compelling interest lest "[t]he free exchange of ideas [which] provides special vitality to the process traditionally at the heart of American constitutional democracy," be inhibited. *Brown*, 456 U.S. at 53.

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candidates from announcing their views on disputed legal or political issues); *Brown v. Hartlage*, 456 U.S. 45 (1982) (applying strict scrutiny to regulation prohibiting candidates from offering material benefits to voters in consideration for their votes); *see also Rickert v. Pub. Disclosure Comm'n*, 168 P.3d 826 (Wash. 2007) (en banc) (applying strict scrutiny to statute prohibiting candidates from sponsoring political advertisements containing falsities).

[4] *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) (stating that "handing out leaflets in the advocacy of a politically controversial viewpoint . . . is the essence of First Amendment expression").

[5] *See Davis v. Fed. Election Comm'n*, 554 U.S. 724 (2008) (applying strict scrutiny to regulation treating self-financed candidates differently from those financed by other means); *Fed. Election Comm'n v. Mass.Citizens for Life, Inc.*, 479 U.S. 238 (1986) (applying strict scrutiny to regulation prohibiting corporations from endorsing candidates with advertisements); *see also Lincoln Club of Orange Cnty. v. City of Irvine*, 292 F.3d 934 (9th Cir. 2002) (applying strict scrutiny to city ordinance limiting the amount of contributions that a committee could receive from a single source during an election campaign).

FECA's aggregate limit on contributions to candidates should receive scrutiny that is no less stringent than these other suspect laws burdening core speech and associational rights. As Justice Kennedy observed in *Nixon v. Shrink Missouri Government PAC*, "[a]midst an atmosphere of skepticism" about the role of campaign contributions in politics, "it hardly inspires confidence for the Court to abandon the rigors of our traditional First Amendment structure." 528 U.S. 377, 406 (2000) (Kennedy, J., dissenting).

B. The Aggregate Limit on Contributions to Candidates Imposes a Significant Burden on Core Political Speech by Prohibiting Individuals from Engaging in The Symbolic Act of Contributing to Their Preferred Candidates.

Although this Court applies strict scrutiny to its review of expenditure limits, *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 136 (2003), in *Buckley* it reasoned that contribution limits are meaningfully distinguishable from expenditure limits because they impose only a marginal restriction on the donor's freedom of speech, stating as follows:

> The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. . . . A

> limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues.

424 U.S. at 21. This purported distinction between contribution and expenditure limits, however, does not hold up as applied to aggregate contribution limits, as distinct from limitations on per-candidate contribution limits. Aggregate contribution limits function as a cap on the number of candidates for whom an individual may make "the symbolic expression of support" that the *Buckley* Court acknowledged as essential political speech and, thus, diminish an individual's "quantity of communication" in the election context. *Id.* The result is the absolute suppression of one's political speech, not merely a restraint on the intensity of one's speech.

Nor can contribution limits (either aggregate or per-candidate limits) be meaningfully distinguished from expenditure limits on the basis that financial contribution is a form of indirect speech. There is no meaningful difference between commissioning and contracting for the dissemination of an advertisement in support of a candidate, and supporting the candidate by providing funds to do the same. The *Buckley* Court's reliance on a

distinction between "contributions from expenditures based on the presence of an intermediary between a contributor and the speech eventually produced . . . is misguided, given that '[e]ven in the case of direct expenditure, there is usually some go-between that facilitates the dissemination of the spender's message.'" *Randall v. Sorrell*, 548 U.S. 230, 266 (2006) (Alito, J., dissenting) (quoting *Colo. Republican Fed. Campaign Comm'n v. Fed. Election Comm'n*, 518 U.S. 604, 638-39 (1996) (opinion of Thomas, J.)).

Furthermore, the contribution limits prevent individuals from choosing how best to disseminate their message and "an individual's choice of that mode of expression" is itself entitled to protection. *Nixon*, 528 U.S. at 417 n.5 (2000) (Thomas, J., dissenting).

C. The Aggregate Contribution Limit Hinders the First Amendment Right to Associate.

FECA's aggregate contribution limit also significantly burdens core associational rights. The right to associate is a "basic constitutional freedom," *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973); that is "closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society." *Shelton v. Tucker*, 364 U.S. 479, 486 (1960). FECA's burden on that right is self-evident—once an individual has exhausted his or her biennial aggregate limit, FECA outright prohibits any association with additional candidates through

financial contributions to their campaigns during that two-year period.[6]

The mere fact that the aggregate contribution limit does not foreclose every avenue of political association (*e.g.*, handing out leaflets on the street) should not cause this Court to apply lesser scrutiny. As Justice Thomas noted in his *Nixon* dissent, this Court has "rejected the notion that a law will pass First Amendment muster simply because it leaves open other opportunities." 528 U.S. at 418 n.6 (Thomas, J., dissenting) (collecting cases).

II. The Aggregate Contribution Limit is not Narrowly Tailored to Combat Electoral Corruption

In enacting FECA, Congress determined that contributions at the per-candidate limit do not present a serious risk of corrupting the recipient. The risk that a contributor will successfully elicit an illicit political favor from a particular candidate by contributing at the per-candidate limit to *other* candidates is, therefore, remote. Thus, the burden on core political speech imposed by the aggregate limit is disproportionate to the government's interest

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[6] FECA's aggregate limit on contributions to candidates also infringes the associational rights of the candidates themselves, who wish to receive contributions. A cap on the number of candidates an individual may support is perhaps most threatening to third-party candidates, who, as the *Buckley* Court observed, "are more vulnerable to falloffs in contributions." 424 U.S. at 71.

in avoiding *quid pro quo* corruption, which is the only governmental interest "sufficiently important to outweigh the First Amendment interests implicated by contributions for political speech." *SpeechNow.org v. Fed. Election Comm'n*, 599 F.3d 686, 692 (2010) (internal quotation marks omitted); *see also Citizens United v. Fed'l Election Comm'n*, 558 U.S. 310 (2010) (rejecting nebulous notions of some "appearance of corruption," and looking instead to its historical understanding of the "hallmark of corruption . . . financial *quid pro quo*: dollars for political favors").

In the absence of a manifest risk of *quid pro quo* corruption, FECA's limit on the number of candidates to whom an individual may contribute at the per-candidate limit cannot survive strict scrutiny review. "'Where First Amendment rights are involved, a blunderbuss approach which prohibits mostly innocent speech cannot be held a means narrowly and precisely directed to the governmental interest in the small minority of contributions that are not innocent.'" *Colo. Republican Fed. Campaign Comm'n*, 518 U.S. at 642 (Thomas, J., concurring in judgment and dissenting in part) (quoting Brief for Appellants in *Buckley*, pp. 117-18).

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court hold that the Federal Elections Campaign Act's aggregate limit on contributions to candidates is unconstitutional.

Respectfully submitted,

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