No. 12-536

In the
Supreme Court of the United States

SHAUN MCCUTCHEON, *ET AL.*
APPELLANTS

v.

FEDERAL ELECTION COMMISSION
APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Brief of
Cause of Action Institute
As *Amicus Curiae* Supporting Appellants

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QUESTIONS PRESENTED

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.

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STATEMENT OF INTEREST

Amicus curiae Cause of Action Institute, Inc. ("CoA") is a non-partisan, non-profit organization that investigates, exposes, and fights federal government waste, fraud, and cronyism.[1] www.causeofaction.org. Cause of Action uses investigative, legal, and communications tools to educate the public about how transparency and accountability protects taxpayer interests and economic opportunity. On March 13, 2013, for example, CoA released a report on government agencies' compliance with the federal Freedom of Information Act, 5 U.S.C. §§ 552, *et seq.*, finding that federal agencies "continue to fall short of a culture of transparency in the Federal Government."[2] Thus, CoA has a unique perspective on the nature of "transparency" and "corruption" related to political speech, and hence on the arguments presented in this case.

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[1] Pursuant to Rule 37.2(b), *amicus* certifies that counsel for Appellees have provided the Clerk with blanket consent to file amicus briefs, and counsel for Appellants have consented to the filing of this brief. Copies of the consents have been filed with the Clerk.

Pursuant to Rule 37.6, *amicus* certifies that no counsel for a party authored this brief in whole or in part, and no such counsel, party or person other than the *amicus* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] www.gradingthegovernment.com. *See also Cause of Action* v. *Nat'l Archives & Records Admin.*, No. 12-1342, 2013 U.S. Dist. LEXIS 28725 (D.D.C. Mar. 1, 2013) (challenging Archivist's denial of access to Financial Crisis Inquiry Commission records).

CoA agrees with the Appellants' arguments and supports their request for reversal of the decision below. CoA writes separately to discuss the changing character of political interaction since *Buckley* v. *Valeo*, 424 U.S. 1 (1976), and the effect of that change on the anti-circumvention rationale for the aggregate contribution limits. In *Citizens United* v. *Federal Election Commission,* the Court predicted: "Soon, however, it may be that Internet sources, such as blogs and social networking Web sites, will provide citizens with significant information about political candidates and issues." 558 U.S. 310, 364 (2010). That day has arrived, and CoA will address how the historic anti-circumvention doctrine is inappropriate in today's technology-driven brutal and highly-efficient political environment.

STATEMENT OF CONTEXT

Norman Rockwell's painting "Freedom of Speech," features a man speaking in a town hall meeting – a lone individual speaking out in dissent and being accorded a respectful hearing.[3] But we no longer live in a Norman Rockwell world. A speaker today likely will be filmed by others, edited, analyzed and dissected by advocates or opponents, and pilloried or hailed within moments. "If you're at a town hall meeting, take out your iPhone and record it, we'd love to highlight your footage on our site." www.americanbridgepac.org/about.[4]

If Norman Rockwell were to paint "Freedom of Speech" today, the "town hall" would be much bigger. The speaker would be sitting in front of a computer or smartphone updating his blog or her Twitter feed, a voice heard by the Nation (or the world). The audience will have voluminous information, including detailed analyses of contributions (both objective and slanted), just a click away. This is political engagement and free speech in the twenty-first century. It is unlike anything that the judges and legislators of the last century imagined.[5]

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[3] http://en.wikipedia.org/wiki/Freedom_of_Speech_(painting).

[4] http://www.americanbridgepac.org/about/ (last visited May 8, 2013).

[5] Perhaps not all. "As far back as the 1970s Congressman Gore … was the first elected official to grasp the potential of computer communications to have a broader impact than just improving the conduct of science and scholarship." Robert Kahn and Vinton Cerf, "Al Gore and the Internet,"

With the advent of smartphone technology, this Court is examining the 1974 doctrine of anti-circumvention in an era of real-time campaign finance disclosure. In less than twenty minutes, a citizen-activist can identify every candidate who has taken a donation from the Appellants, then tweet, blog, email or text that information to a wider audience.

In *Citizens United,* the Court predicted: "Soon, however, it may be that Internet sources, such as blogs and social networking Web sites, will provide citizens with significant information about political candidates and issues." 558 U.S. at 364. "Soon" has become "now."[6]

The result is an environment where historic assumptions about disclosure and corruption may be obsolete. "Rapid changes in technology—and the creative dynamic inherent in the concept of free expression—counsel against upholding a law that restricts political speech in certain media or by certain speakers." *Citizens United*, 558 U.S. at 364.

Modern politics may be appropriately considered a contact sport. *See Doe v. Reed*, 561 U.S.

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http://web.eecs.umich.edu/~fessler/misc/funny/gore,net.txt, last visited May 8, 2013.

[6] "Americans increasingly place their trust in social media sources—almost as much as or more than they trust traditional news outlets, according to some recent surveys." Pam Greenberg, *Social Media: Becoming a Trusted Source for Political Information," The Thicket at State Legislatures,* Nat'l Conf. of State Legislatures, Feb. 6, 2013, http://ncsl.typepad.com/the_thicket/2013/02/social-media-becoming-the-go-to-source-for-political-information-.html.

__, __; 130 S.Ct. 2811, 2837 (2010) (Scalia, J., concurring) ("Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed.").[7] A speaker today, however, requires more than "civic courage" to speak or associate, at least in the context of political campaign contributions.[8]

A contributor, especially one who wants to dissent from traditional party positions or promote a broad base of candidates, faces numerous governmental restrictions, perhaps requiring the speaker to establish a political committee, register with a government agency, and limit contributions or expenditures at particular times or in particular amounts. "As a practical matter, however, given the complexity of the regulations and the deference courts show to administrative determinations, a

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[7] *See also* "But anyone pretending shock that opposition research includes discussions about a person's emotional or mental health has been dwelling in some alternate universe." Kathleen Parker, "Beauty & the beast," *The Washington Post*, April 12, 2013, http://www.washingtonpost.com/opinions/kathleen-parker-ashley-judd-and-rough-politics/2013/04/12/2dd331f6-a3a9-11e2-9c03-6952ff305f35_story.html.

[8] In other areas as well: *See, e.g.*, Chris Young, Reity O'Brien & Andrea Fuller, "Corporations, pro-business nonprofits foot bill for judicial seminars," *Center for Public Integrity: Consider the Source*, March 28, 2013, http://www.publicintegrity.org/2013/03/28/12368/corporations-pro-business-nonprofits-foot-bill-judicial-seminars. The "Find a Judge" tool, available at the Center for Public Integrity's *Consider the Source* website, allows anyone to choose a federal judge's name and link that judge to a corporation paying for a seminar the judge attended.

speaker who wants to avoid threats of criminal liability and the heavy costs of defending against FEC enforcement must ask a governmental agency for prior permission to speak." *Citizens United*, 558 U.S. at 335. As the incomprehensible contribution limit charts in Appellant RNC's opening brief indicate, these are complex and interlocking restrictions. Br. on the Merits for Appellant Republican Nat'l Comm., 17a–18a.

Thus, in today's Norman Rockwell "Freedom of Speech" painting, the lone Tweeter would have her lawyer on speed-dial on her smartphone. "Our Nation's speech dynamic is changing, and informative voices should not have to circumvent onerous restrictions to exercise their First Amendment rights." *Citizens United*, 558 U.S. at 364. Aggregate limits were crafted in a time when the town hall was still the small room in a Rockwell painting. Now our town hall is so big that the entire nation participates in the conversation (though respectful listeners are rarer than many would prefer).

Yet the aggregate limit continues to stifle the "informative voices" of at least a few individuals with "civic courage." If the changing circumstances mean that the interests underlying the aggregate limit no longer justify the intrusions upon First Amendment rights, the balance must be re-examined.

In an era in which parties and campaigns compete not only with other like entities, but also with independent voices armed with the latest technology and an almost limitless ability to

uncover, analyze and publish contributor information,[9] does the rationale for the current aggregate limits survive?

SUMMARY OF ARGUMENT

Congress may have been correct, *in 1974*, to assume that even "full disclosure"[10] of campaign contributions was insufficient to prevent circumvention of the individual aggregate contribution limits. In 1974, "full disclosure" meant filing paper copies in isolated government offices, adding to a mountain of similar forms.

Today, however, "full disclosure" means something else. A vast industry of public and private researchers and analysts is primed to receive any contribution filings, cross-check the filings against other records and against patterns and profiles, and instantly report any seeming discrepancies, especially any seemingly large contributions. In light of this new public capacity for instantaneous analysis, the aggregate limits are not needed to protect the individual contribution limits.

In addition, after *Citizens United*, the new freedom to speak directly means that there is no reason for a speaker to attempt to evade the individual contribution limits. These alternative

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[9] Sasha Eisenberg, *How President Obama's campaign used big data to rally individual voters*, MIT TECH. REV. (Dec. 16, 2012), http://www.technologyreview.com/featuredstory/508836/how-obama-used-big-data-to-rally-voters-part-1/.

[10] *See Buckley* v. *Valeo*, 424 U.S. 1, 78 (1976).

speech and association mechanisms are perfectly legal, and they make the aggregate limits irrelevant. As the Department of Justice recently testified, "We anticipate seeing fewer cases of conduit contributions directly to campaign committees or parties, because individuals or corporations who wish to influence elections or officials will no longer need to attempt to do so through conduit contribution schemes that can be criminally prosecuted. Instead, they are likely to simply make unlimited contributions to Super PACs or 501(c)s."[11]

The remaining effect of the aggregate limits is to punish those few donors who want to support more candidates directly than the aggregate limits permit. Thus the aggregate limits are simply another attempt to prevent persons of wealth (or those who seek to promote challengers or innovative candidates) from associating in the manner they choose. This "leveling the playing field" cannot be justified by the limited governmental interest in the aggregate limits.

The aggregate limits are no longer needed and are counterproductive to their expressed goal. The aggregate limits violate the First Amendment, and should be struck down.

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[11] *Current Issues in Campaign Finance Law: Hearing Before Subcomm. On Crime & Terrorism of the S. Comm. On the Judiciary*, 113 Cong. 1 (2013) (statement of Mythili Raman, Acting Assistant Att'y Gen., Criminal Div.), *available at* http://www.judiciary.senate.gov/pdf/4-09-13RamanTestimony.pdf ("Raman Statement"), at 3.

ARGUMENT

It is important to recognize at the outset that the Appellants in this case are not seeking to exceed the individual contribution limits. They do not want to engage in "conduit" transactions in which they would give money to others to report in the others' names.[12]

Those conduit transactions remain illegal, and the Department of Justice is enforcing those rules. "Since 2010, the Department has successfully prosecuted more than a dozen cases involving campaign finance violations."[13] Assistant Attorney General Raman noted that seven of those prosecutions involved "conduit" violations.[14]

Discussion of public issues and debate on the qualifications of candidates are "integral to the operation of the system of government established by our Constitution." *Buckley* v. *Valeo*, 424 U.S. 1, 14 (1976). The First Amendment affords the broadest protection to such political expression in order "to assure [the] 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).

The aggregate limits at issue in this case curtail the number of candidates, PACs, and political

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[12] *United States* v. *Whittemore*, No. 12–CR–0058, 2013 U.S. Dist. LEXIS 57198, at *16 (D. Nev. Apr. 18, 2013) (denying motion to suppress evidence of alleged conduit contributions).

[13] Raman Statement, *supra* note 11.

[14] *Id.* at 1-2.

party committees to whom a person can meaningfully contribute. In *Buckley*, however, the Court noted: "Even a 'significant interference' with protected rights of political association may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." 424 U.S. at 25 (internal citations omitted); *see also Nixon* v. *Shrink Mo. Gov't PAC*, 528 U.S. 377, 388-89 (2000).[15] "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." *Buckley*, 424 U.S. at 38 (emphasis added).

Advances in technology, however, have shown that the aggregate limits are no longer necessary as a "corollary" to the individual limits; circumvention attempts can be discovered by both public and private reviews. New freedoms to speak after *Citizens United* undercut the incentive to circumvent the individual limits, and the Department of Justice anticipates fewer conduit contributions prosecutions. And the remaining lingering effect of the aggregate limits is to "level the playing field," which this Court does not permit.

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[15] "We consequently proceeded on the understanding that a contribution limitation surviving a claim of associational abridgment would survive a speech challenge as well, and we held the standard satisfied by the contribution limits under review." *Shrink Mo. Gov't PAC*, 528 U.S. at 388.

The aggregate limits are obsolete and should be struck down. "The limits directly suppress the political speech of both contributors and candidates, and only clumsily further the governmental interests that they allegedly serve." *Shrink Mo. Gov't PAC,* 528 U.S. at 428 (Thomas, J., dissenting).

I. THE AGGREGATE LIMITS ARE NOT NARROWLY TAILORED TO THE GOVERNMENT'S INTEREST IN AVOIDING CIRCUMVENTION OF THE INDIVIDUAL CONTRIBUTION LIMITS.

A. The Aggregate Limits Are No Longer Needed Because "Fully Disclosed" Means Something Different Now Than in 1974.

In 1974, Congress felt that disclosure, using the means available at the time, was insufficient to prevent circumvention of the individual contribution limit. *Buckley*, 424 U.S. at 28 ("Congress was surely entitled to conclude that disclosure was only a partial measure, and that contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption inherent in a system permitting unlimited financial contributions, even when the identities of the contributors and the amounts of their contributions are fully disclosed.").

In the technology of 1974, that may have been true, when "fully disclosed" meant something different to Congress – reports were filed on paper

and available only in a few offices.[16] "Fully disclosed," in 1974, meant buried in a mountain of paper filings. Absent any easy alternative to examining contribution reports, individually or in combination, Congress might have felt that the burden of an aggregate limit was justified by a need to protect the contribution limit.

Today, there are effective and efficient public and private alternatives, all designed to disclose and publicize any evasions of the contribution limit. The Justice Department, the media, and private organizations all use these technologies to monitor, in real-time, campaigns and donors, and release the results on the Internet free of charge, in formats expressly designed to be used by relatively unsophisticated analysts and observers. "Fully disclosed," *Buckley*, 424 U.S. at 28, is different today. The difference demonstrates that aggregate limits are no longer tailored to the problem Congress was addressing.

1. In 1974, Information About Candidates and Donors Was Not Easily Accessible.

Forty years ago, there was no Internet, political parties and their candidates were the only way most Americans experienced political campaigns, and Walter Cronkite and his media colleagues spoke as one of the few authoritative sources of news and commentary. Citizens could not

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[16] Fed. Election Comm'n, *First Ten Years Report* (1985) ("First Ten Years"), at 9, *available at* http://fec.gov/pdf/firsttenyearsreport.pdf.

independently evaluate corruption in politics, especially that not covered in the news media. Perhaps as a result, "no candidate was ever prosecuted for violating federal campaign-finance law" from 1925 until the passage of the Federal Election Campaign Act ("FECA")[17] in 1971.[18]

The 1971 FECA was the first federal campaign finance scheme to impose a relatively centralized administrative framework and to require full reporting of political spending.[19] FECA required disclosure of all contributions and expenditures exceeding one hundred dollars.[20] Monitoring was entrusted to the Clerk of the House, the Secretary of the Senate, and the General Accounting Office.[21]

The 1972 election generated "shock waves of momentous revelations" concerning abuses by the Nixon Presidential campaign.[22] Investigations uncovered "illegal and improper" campaign practices and financing.[23]

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[17] Federal Election Campaign Act of 1971, 92 Pub. L. No. 225, 86 STAT. 3 (1972).

[18] James L. Regens & Ronald Keith Gaddie, THE ECONOMIC REALITIES OF POLITICAL REFORM: ELECTIONS & THE U.S. SENATE 15 (1995).

[19] First Ten Years, *supra* note 16, at 1.

[20] *Id.* at 1-2.

[21] *Id.* at 2.

[22] *Buckley* v. *Valeo*, 519 F.2d 821, 835 (D.C. Cir. 1975) (en banc), *aff'd in part, rev'd in part*, 424 U.S. 1 (1976).

[23] S. SELECT COMM. ON PRESIDENTIAL CAMPAIGN ACTIVITIES, FINAL REPORT, S. REP. NO. 93-981, at xxiii (1974).

Congress reacted. "The overriding concern behind the enactment of statutes such as the Federal Corrupt Practices Act[24] was the problem of corruption of elected representatives through the creation of political debts. The importance of the governmental interest in preventing this occurrence has never been doubted." *Federal Election Commission* v. *National Right to Work Committee*, 459 U.S. 197, 208 (1982) (quoting *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 788, n.26 (1978)).

Congress established the Federal Election Commission and restricted the amount an individual could directly give a candidate—capping it at $1,000 per candidate, in the 1974 amendments to FECA.[25] To provide the new agency with the ability to enforce the individual contribution limit, the 1974 FECA Amendments imposed a maximum limit of $25,000 on all contributions by an individual to candidates, PACs, and national, state and local political parties throughout each annual election cycle.[26] This is the genesis of the "aggregate limits" at issue in this case.[27] *Buckley*, 424 U.S. at 38 ("The over-all $25,000

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[24] *See* Federal Corrupt Practices Act of 1925, ch. 368, 43 Stat. 1070 (1925).

[25] Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974).

[26] *Buckley*, 424 U.S. at 38 ("[T]his quite modest restraint . . . serves to prevent evasion of the $1,000 contribution limitation . . . .").

[27] The Bipartisan Campaign Finance Reform Act (BCRA) of 2002 replaced the aggregate limit at issue in

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. . . . 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.").

One of the challenges hampering FECA's usefulness as a corruption deterrent was that, as a practical matter, the information about campaign contributions was inaccessible to the public. Reports were filed on paper; there was no alternative. "By the end of 1984, the [FEC Public Records] office had made public 5.59 million pages of documents."[28]

Disclosure in 1974 meant a civil servant retrieved an index card or paper filing from a filing cabinet.[29] The FEC admitted that analysis of those filings was even worse: "The first indexes compiled manually by the FEC staff in 1975 are primitive when compared to the variety of FEC computer indexes now available [in 1985]."[30]

Those computer indexes were available only in press releases and a few state offices;[31] to get the actual filings and any non-indexed records, the

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Buckley with a new, split set of aggregate limits. 2 U.S.C. § 441a(a)(3) (2012).

[28] First Ten Years, *supra* note 166, at 9.

[29] *Id.*, at 9; Kathleen Sullivan, Comment, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 174 (2010).

[30] First Ten Years, *supra* note 16, at 9.

[31] *Id.*

public had to request assistance from the FEC's Public Records Office.[32] The "5.59 million pages of documents" the FEC reported it made available by 1985 were, essentially, unavailable to the average person seeking information.[33] Public disclosure was consequentially quite limited.[34]

In theory, at least, a wrongdoer could gamble that the information would not be accessible on a timely basis. This Court took note:

> And while disclosure requirements serve the many salutary purposes discussed elsewhere in this opinion, Congress was surely entitled to conclude that disclosure was only a partial measure, and that contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption inherent in a system permitting unlimited financial contributions, even when the

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[32] *Id.* ("In 1984, the [FEC] Public Records Office served 17,240 people and received 13,183 telephone inquiries.").

[33] *Id.*

[34] Following the money in Alabama politics might soon get a whole lot easier. Officials of the Alabama Secretary of State's office say they'll launch a searchable online database of campaign donations by the end of May — replacing the office's old system of paper filings and scanned-in documents. State officials say the changes should make it easier for average voters to figure out who's accepting money from whom." Tim Lockette, *Alabama Campaign Finance Reports Soon to Go Online*, Anniston Star (May 4, 2013), http://www.annistonstar.com/view/full_story/22472052/article-Alabama-campaign-finance-reports-soon-to-go-online?instance=home_news.

> identities of the contributors and the amounts of their contributions are **fully disclosed.**

Buckley v. *Valeo*, 424 U.S. 1, at 28 (1976) (emphasis added) (footnote omitted).

This is the context for the enactment of the aggregate limit as an anti-circumvention device: for both government and private observers in 1974, even full disclosure was not robust enough to monitor evasions of the individual contribution limit. *Id.*

2. Today, Information About Candidates and Donors Is Readily Available.

Today, information about candidates, parties, and campaign contributors is widely available through the Internet.[35] Disclosure reports filed by political committees are now available on the FEC's website within 48 hours; reports filed electronically are available "almost instantaneously."[36] Bloggers and social media serve as the principal means of communicating information to a significant segment

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[35] *See, inter alia*, FED. ELECTION COMM'N, *Detailed Files About Candidates, Parties and Other Committees: Files By Election Cycle*, http://www.FEC.gov/disclosure.shtml (last visited May 8, 2013); CENTER FOR RESPONSIVE POLITICS, OPENSECRETS.ORG, http://www.OpenSecrets.org (last visited May 8, 2013); Tampa Bay Times, POLITIFACT, http://www.PolitiFact.com (last visited May 8, 2013).

[36] FED. ELECTION COMM'N, *Quick Answers to Disclosure Questions*, http://www.fec.gov/ans/answers_disclosure.shtml (last visited Apr. 8, 2013).

of the American electorate (as they do around the world).[37]

In addition, the development of free, on-line disclosure reports and cumulative databases puts previously-inaccessible information at the fingertips of even the least sophisticated analysts.[38] For example, the FEC maintains a free on-line database of election contributions, often reported within hours of the contribution.[39] The FEC makes available free data downloads for further data mining.[40] The Department of Justice uses the FEC database as its primary research tool to uncover instances of campaign contribution abuse.[41]

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[37] Katie Denshaw, "Social media becoming crucial political tool," *The Philadelphia Inquirer,* April 26, 2013, http://articles.philly.com/2013-04-06/news/38329744_1_social-media-president-obama-mitt-romney; Maureen ODanu, *Social Media Becoming Major News Source for Journalists*, Technorati (May 18, 2011), http://www.technorati.com/social-media/article/social-media-becoming-major-news-source.

[38] *See, e.g.*, FED. ELECTION COMM'N, PERFORMANCE AND ACCOUNTABILITY REPORT FOR FY 2012 14-15 (Nov. 15, 2012), http://www.fec.gov/pages/budget/fy2012/FEC_PAR_FY_2012-Final.pdf (noting that the "Campaign Finance Disclosure Portal" is designed to "simplify access to the wide range of data available on the agency's web site" by incorporating "a variety of search tools that will help users make the best use of the Commission's data sources," and the "Candidate and Committee Viewer" that allows "users to analyze specific transactions in a customizable way").

[39] *See* FED. ELECTION COMM'N, *Campaign Finance Disclosure Portal*, http://www.fec.gov/pindex.shtml.

[40] *See, supra* note 33.

[41] Raman Statement, *supra* note 16, at 2.

Perhaps more important, however, is the development of private entities' searchable systems of contribution disclosure and analysis. The Center for Responsive Politics, for example, maintains the web site OpenSecrets.org, which provides a "Politicians and Elections" portal, http://www.opensecrets.org/elections/, with searchable databases of Presidential, Congressional and party contributions, and cross-links that data on such topics as "earmarks,"[42] personal finances,[43] and past elections:[44]

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[42] Center for Responsive Politics, OpenSecrets.org, http://www.opensecrets.org/earmarks/index.php (last visited May 8, 2013) ("This database in large part seeks to detail how the recipients of federal earmarks interact with the federal government through lobbying efforts and campaign contributions. Readers may now, for example, determine the degree to which people and political action committees associated with a specific company or organization have donated money to a congressman responsible for giving that company or organization an earmark.").

[43] Center for Responsive Politics, *Politicians & Elections*, OpenSecrets.org, http://www.opensecrets.org/elections (last visited May 8, 2013) (description of "Personal Finances" database: "You can also see how much money elected and appointed officials have invested in industries they regulate and how they might stand to benefit personally from decisions your government makes. This is the Web's only searchable database of officials' personal financial reports, which are filed annually and are notoriously difficult to analyze.").

[44] *Id.* (description of "Historical Elections" database: "This section gives historical context to OpenSecrets.org's unparalleled campaign finance data, illuminating trends over time in fundraising and spending—the most influential

> There are a million stories to be found on the OpenSecrets website about the interaction between money and politics. But what's the bottom line and what are the most important – and interesting – trends from the last election? That's what you'll find here in the Big Picture.
>
> Have a look at the menus on the left side of the page and start clicking away. You'll find answers to basic questions about the role that money plays in our elections. You may also find answers to questions you never thought to ask. And if the Big Picture isn't enough, there are tens of thousands of other pages here on OpenSecrets that will take you as deep as you want to go.[45]

Part of this expansion of public access is the corollary expanding concept of "opposition research," which covers candidates and campaigns closely, awaiting any missteps that can yield political value. A number of organizations now conduct opposition research and post the results on the Internet, in some cases, requesting aid from the general public using modern technology.[46] Some of these private

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industries, the biggest donors, the cost of winning a seat in Congress and so much more.").

[45] Center for Responsive Politics, *The Money Behind the Elections*, OpenSecrets.org, http://www.opensecrets.org/bigpicture/index.php (last visited May 8, 2013).

[46] *See, e.g.*, American Bridge 21st Century. "American Bridge 21st Century is a progressive research and communications organization committed to holding Republicans accountable for their words and actions and

recordings can change a campaign. "One of the most influential figures in the 2012 election, the bartender who secretly filmed [former Presidential candidate Mitt] Romney at a private fundraiser in Boca Raton, Fla., last May had been anonymous until now."[47]

The result of this massive public access system is a brutally-efficient political environment. Private organizations, not registered with or regulated by the FEC, serve as opposition researchers. "Fact-checkers" at major and minor publications stand ready to attack, and "reform" organizations promote limits on speech that would have shocked Norman Rockwell.

Campaign finance disclosure in a world of modern information technology empowers voters to follow contributions and judge for themselves whether the recipients have their best interests at heart.[48] Modern technology has reduced the amount of time between the filing of a disclosure statement and its delivery in a central depository easily

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helping you ascertain when Republican candidates are pretending to be something they're not." *Who We Are*, American Bridge 21st Century, http://www.americanbridgepac.org/about (last visited May 8, 2013).

[47] Rachel Weiner, *Scott Prouty Reveals Himself As Man Who Shot '47 Percent' Video*, Wash. Post (Mar. 13, 2013, 8:19 PM), http://www.washingtonpost.com/blogs/post-politics/wp/2013/03/13/scott-prouty-reveals-himself-as-man-who-shot-47-percent-video/.

[48] Kathleen M. Sullivan, *Against Campaign Finance Reform*, 1998 UTAH L. REV. 311, 326 (1998) ("The rise of instantaneous mass communication over the Internet has transformed the world that FECA faced in 1974.").

accessible to the public.[49] "The advances brought by the new technology provide agencies with an efficient and effective means of sorting, auditing and retrieving campaign finance information, offer the public virtually immediate access to the data, in both raw and summary formats, and enable campaigns to ensure error-free reporting along with performing other campaign management functions."[50]

Large donations will stand out in contribution disclosure filings.[51] Journalists, bloggers, and other interested parties make the public aware of the candidates' source of funds.[52] The recent news coverage of the passing of major political donor Bob Perry, for example, cited FEC, media and private

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[49] *See, e.g.*, Samuel Issacharoff & Pamela Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1737 (1999) (Wisconsin put all campaign finance information online within twenty-four hours).

[50] Craig B. Holman & Robert Stern, *Campaign Money on the Information Superhighway: Electronic Filing and Disclosure of Campaign Finance Reports*, CENTER FOR GOVERNMENTAL STUDIES (1999), *available at* http://www.policyarchive.org/handle/10207/bitstreams/225.pdf.

[51] Tom Donnelly, *Candidate Venture Capital*, 80 U. CIN. L. REV. 753, 780 (2012) ("[O]ne might expect disclosure to work better here, where the few deep pocket supporters of an otherwise-destitute candidate are likely to stand out on a disclosure report. Therefore, if such a candidate manages to build a viable campaign, her deep pocket supporters are then likely to become a campaign issue - whether through related media reports or negative attack ads.").

[52] *See, e.g.*, Billy Hallowell, *Meet the 5 Biggest Donors to the Obama & Romney Campaigns*, THE BLAZE (Oct. 19, 2012), http://www.theblaze.com/stories/2012/10/19/meet-the-5-biggest-donors-to-the-obama-romney-campaigns.

sources: "Since 2004, Mr. Perry had given a total of at least $45 million in federal contribution – excluding direct donations to candidates, according to Federal Election Commission records, a 2012 [Associated Press] analysis, and figures from the Center for Responsive Politics."[53]

In the past, this Court has ignored the impact of high-speed Internet communication on FECA's disclosure regime when examining the government's interest in combating corruption.[54] Yet, only three years ago, the Court predicted that these new media outlets would have an effect on public discourse. *Citizens United*, 558 U.S. at 364. Given the prophylactic reforms enacted by Congress,[55] the presence of the FEC's on-line resources, and the legions of available private researchers, analysts and advocates, the environment facing a would-be miscreant seeking to evade the contribution limits is significantly different than in 1974.

The Court in *Buckley* upheld the aggregate limits because "disclosure was only a partial measure, … even when the identities of the contributors and the amounts of their contributions

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[53] Paul J. Weber, *Perry remembered as titan of spending,* Wash. Times, Apr. 16, 2013, at A6.

[54] *See Nixon* v. *Shrink Mo. Gov't PAC*, 528 U.S. 377, 408 (2000) ("Among the facts the Court declines to take into account is the emergence of cyberspace communication by which political contributions can be reported almost simultaneously with payment.") (Kennedy, J., dissenting).

[55] *See, e.g.*, Brief on the Merits for Appellant Republican National Committee, at 26-43 (describing various Congressional actions since 1974).

are fully disclosed." 424 U.S. at 28. Given the different environment today, "fully disclosed" means something different. "Our Nation's speech dynamic is changing, and informative voices should not have to circumvent onerous restrictions to exercise their First Amendment rights." *Citizens United*, 558 U.S. at 364.

Even if the aggregate limits were justified in 1974, the environment has changed. Although the government interests the aggregate limits were intended to protect may not have changed, those limits themselves are no longer narrowly tailored to the interests. They should be struck down.

B. The New Freedom to Make "Independent Expenditures" Has Removed the Major Incentive to Circumvent the Individual Limits.

The other major change from 1974 is the development of alternative methods for individuals to speak during political campaigns. Prior to *Citizens United*, it was difficult for individuals to speak before an election:

> The First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day. Prolix laws chill speech for the same reason that vague laws chill speech: People "of common intelligence must necessarily guess at [the law's] meaning and differ as to its application."

Citizens United, 558 U.S. at 324 (quoting *Connally* v. *Gen. Constr. Co.*, 269 U. S. 385, 391 (1926)).

Now, after *Citizens United,* speakers can make unlimited independent expenditures supporting, opposing or discussing the relative merits of candidates. "In other words, as long as a corporation or other entity spends money for political speech that is truly independent of the candidate or campaign that it supports, it may spend as much money as it wishes."[56]

The Court has spoken often on the need to avoid chilling speech and to protect speakers' choice of mechanisms. "The First Amendment protects appellees' right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Meyer* v. *Grant*, 486 U.S. 414, 424 (1988); *see also Citizens United*, 558 U.S. at 326. "[I]ndividuals contribute to a political organization in part because they regard such a contribution as a more effective means of advocacy than spending the money under their own personal direction." *FEC* v. *Mass. Citizens for Life, Inc.*, 479 U.S. 238, 261 (1986).

Those alternative means are readily available to cautious donors now. These lawful, compliant expenditures can be made by one speaker or in conjunction with others. *SpeechNow.org* v. *FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc) (applying exacting scrutiny to federal laws imposing disclosure and organizational requirements).

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[56] Raman Statement, *supra* note 11, at 3.

"Dark money"[57] is a new, and in light of the First Amendment issues involved, misleading shorthand phrase for funds lawfully contributed to advocacy where the identity of the donor is not required to be disclosed – but the phrase demonstrates exactly the opposite of the intention of the FEC campaign finance disclosure regime. The proliferation of "dark money" in the current political environment is in large part due to nonprofit organizations that are not required to disclose their donors—particularly Internal Revenue Code Section 501(c)(4)-qualified "social welfare" organizations. In the 2012 election, these groups lawfully spent $400 million[58] (out of total 2012 campaign spending of more than $6 billion).[59]

Since *Mass. Citizens for Life, Inc.*, 479 U.S. at 263-65, and *FEC* v. *Beaumont*, 539 U.S. 146, 163 (2003), Section 501(c)(4) organizations generally operate outside the scope of FEC restrictions, can raise unlimited amounts of contributions, and are

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[57] Bill Allison, *Daily Disclosures*, Sunlight Foundation (Oct. 18, 2013, 12:43 PM), http://sunlightfoundation.com/blog/2010/10/18/daily-disclosures-10/.

[58] Paul Blumenthal, *'Dark Money' in 2012 Election Tops $400 Million*, Huffington Post (Nov. 2, 2012), http://www.huffingtonpost.com/2012/11/02/dark-money-2012-election-400-million_n_2065689.html.

[59] Center for Responsive Politics, *2012 Spending Will Reach $6 Billion*, Open Secrets Blog (Oct. 31, 2012, 2:33 PM) http://www.opensecrets.org/news/2012/10/2012-election-spending-will-reach-6.html.

not required to disclose their donors.[60] President Obama's campaign committee was re-launched after the 2012 election as a Section 501(c)(4) organization, Organizing for America, and has been criticized for perpetuating dark money and a lack of transparency.[61]

A Section 501(c)(4) organization can engage in "independent expenditure" political activities as long as electioneering is not the organization's primary purpose.[62] This has typically been interpreted to mean that the Section 501(c)(4) organization cannot spend more than fifty percent of its resources on campaign-related activity, but this level allows the organization substantial flexibility to promote or oppose political candidates.[63]

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[60] I.R.C. § 6104(d)(3); Anthony J. Gaughan, *The Futility of Contribution Limits in the Age of Super PACs*, 60 DRAKE L. REV. 755, 782-83 (2012).

[61] Alana Goodman, *Lobbying for Action: OFA Registers as lobbyist in NY despite anti-lobbyist positions*, WASH. FREE BEACON (Apr. 12, 2013), http://freebeacon.com/lobbying-for-action/; Fred Wertheimer, *A Challenge to President Obama's New 501(c)(4) Group*, Huffington Post (Jan. 29, 2013), http://www.huffingtonpost.com/fred-wertheimer/a-challenge-to-president-_b_2569105.html.

[62] John Francis Reilly & Barbara A. Braig Allen, *Political Campaign and Lobbying Activities of IRC 501(c)(4), (c)(5), and (c)(6) Organizations*, Internal Revenue Service, at L-3 (2003), *available at* http://www.irs.gov/pub/irs-tege/eotopicl03.pdf.

[63] *See, e.g.*, Joseph M. Birkenstock, *Three Can Keep a Secret, If Two of Them Are Dead: A Thought Experiment Around Compelled Public Disclosure of "Anonymous" Political Expenditures*, 27 J.L. & POLITICS 609, 612 n.8 (2012).

In addition, a prospective donor could make unlimited contributions to FEC-regulated "independent expenditure-only" political committees (known informally as SuperPACs).[64] Like Section 501(c)(4) organizations, SuperPACs may receive contributions without limits (and without counting against a donor's aggregate limit), and can make unlimited independent expenditures. *SpeechNow.org* v. *FEC*, 599 F.3d 686, 695-96 (D.C. Cir. 2010) (en banc). Unlike a Section 501(c)(4) organization, all contributions to a SuperPAC are disclosed. *Id.* at 697-98.

The Department of Justice acknowledges that "[t]hese developments are having a profound effect on our ability effectively to enforce the campaign finance laws." Raman Statement, *supra* note 11, at 2.

> The increasing use of Super PACs and the types of [Internal Revenue Code Section] 501(c) organizations described above impacts transparency and changes the kinds of criminal cases the Department can bring under our campaign finance laws. We anticipate seeing fewer cases of conduit contributions directly to campaign committees or parties, because individuals or corporations who wish to influence elections or officials will no longer need to attempt to do so through conduit contribution schemes that can be

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[64] *See, e.g.,* FEC Advisory Opinion 2010-11 (Commonsense Ten), at pp. 2-3, July 22, 2010, http://saos.nictusa.com/aodocs/AO%202010-11.pdf.

> criminally prosecuted. Instead, they are likely to simply make unlimited contributions to Super PACs or 501(c)s.

Id. at 3.

The effect of that freedom to speak and associate during election campaigns is still unclear, with some claiming impending doom,[65] and others pointing to the 2012 elections as evidence that the use of more speech did not affect one of the most contentious elections in recent history.[66]

The ability to donate large sums to a Section 501(c)(4) organization or a SuperPAC means that

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[65] E.J. Dionne, Jr., Opinion, *Fighting big money with big money*, Wash. Post (Mar. 27, 2013) ("But imagine that you also believe the Supreme Court's *Citizens United* decision was a disaster for representative government because a narrow majority broke with long precedent and tore down the barriers to corporate money in politics."), http://www.washingtonpost.com/opinions/ej-dionne-michael-bloomberg-and-fighting-money-with-money/2013/03/27/54fa52d4-96f5-11e2-b68f-dc5c4b47e519_story.html.

[66] Ezra Klein, *We got way too excited over money in the 2012 elections*, Wash. Post (May 6, 2013) ("But it's hard to look at the 2012 election, with its record fundraising and the flood of super PACs and all the rest of it, and come away really persuaded that money was a decisive player."), http://www.washingtonpost.com/blogs/wonkblog/wp/2013/05/06/we-got-way-too-excited-over-money-in-the-2012-elections/; Tim Dickinson, *How President Obama Won A Second Term*, Rolling Stone (Nov. 23, 2012) (quoting political analyst James Carville: "Never have so few spent so much to accomplish so little. We all freak out that the money in politics is going to change everything. As it turned out, it really didn't change much."), http://www.rollingstone.com/politics/news/how-president-obama-won-a-second-term-20121123#ixzz2QdnM5cjL.

those seeking to contribute in excess of the aggregate limits have the ability to do so, entirely in compliance with the laws. The contributions, however, cannot be to the candidates the donors want to elect or political parties they want to support; they must be made to groups independent of the candidates or parties.

In other words, where aggregate limits might have been necessary in the past to prevent conduit contributions, now there is far less incentive to use conduits. We will see "fewer cases of conduit contributions" because donors "no longer need to attempt to do so." Raman Statement, *supra* note 11, at 3. Thus, there is no substantial connection between the aggregate limits and the expressed governmental interest supporting them. In such cases, even a slight burden imposed by the aggregate limits undercuts their constitutionality in the face of the highly-protected associational rights at issue here.

C. The Major Effect of the Aggregate Limits in a Smartphone Era Is an Impermissible "Leveling" of Speech.

The aggregate limits impose a constitutionally impermissible burden on speech by restricting the speech of some to enhance the relative voice of others.[67] This Court has "repeatedly rejected the

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[67] *See Citizens United*, 558 U.S. at 340-41 ("By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and

argument that the government has a compelling state interest in 'leveling the playing field' that can justify undue burdens on political speech."[68]

That there are relatively few of those on whom the burden falls does not lessen the First Amendment impact. "References to massive corporate treasuries should not mask the real operation of this law." *Citizens United*, 558 U.S. at 355.

In today's environment, the aggregate limits sweep both too broadly and not enough; in fact, they are counter-productive. They restrict those persons who are compliant with the individual contribution limits, such as Appellant McCutcheon, and exclude those who want to give more than the aggregate limits would permit, such as the late Bob Perry, who could spend $45 million without counting political contributions.[69] And they end up incentivizing potential donors to donate in ways that are both unlimited and not disclosed, undermining the rationale for the current campaign finance laws.

In reality, the aggregate limits will fall only on a very small sub-class of persons: those who want

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respect for the speaker's voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration."), 349-50; *Ariz. Free Enter. Club's Freedom Club PAC* v. *Bennett*, 131 S. Ct. 2806, 2821 (2011).

[68] *Arizona Free Enterprise*, 131 S. Ct. at 2825-26 ("'Leveling the playing field' can sound like a good thing. But in a democracy, campaigning for office is not a game. It is a critically important form of speech.").

[69] *See* Weber, *supra* note 53.

to support candidates through disclosed contributions rather than independent expenditures. Thus, the only persons who will be affected by the aggregate limits are those who wish to contribute directly to candidates and to be disclosed as having done so. Given the ubiquitous nature of campaign finance reporting and analysis described above, this small group will likely be those who comply with the law (or perhaps are ignorant of the realities of today's political environment).

A perverse result of the current brutally-efficient disclosure regime is that today's on-line services benefit principally those who wish to use the information to attack an opponent's supporters.[70] The aggregate limits, however, expose these donors to intense public scrutiny while at the same time limiting their ability to counter the criticism that invariably arises. The Court can assume that these donors, like many before them, will either not speak or will use other means to protect themselves.

The effect of limiting the aggregate limits to this small group of lawful and careful donors is to shift contributions away from candidates and parties, and into the independent expenditure organizations. Those who suffer from this shift will likely be innovative and distinctive candidates who

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[70] "Activists hope to use this information to publicly browbeat their opponents and eliminate their participation in public policy debates." Paul Atkins, *SEC Should Reject Partisan Ploy: Opposing View*, U.S.A. Today, May 1, 2013, *available at* http://www.usatoday.com/story/opinion/2013/05/01/sec-political-donations-disclosure-rule-editorials-debates/2128009/.

don't otherwise enjoy the support of the mainstream parties. *McConnell v. FEC,* 540 U.S. 93, 249-50 (2003) (Scalia, J., concurring in part and dissenting in part) ("[*A*]*ny* restriction upon a type of campaign speech that is equally available to challengers and incumbents tends to favor incumbents.").

In House of Representatives elections from 1964 through 2012, general election success rates for incumbents were at least 85%, and usually much higher.[71] Incumbents normally begin their campaigns with a large base of support, enjoying "such advantages as name recognition, press coverage, free mailings to their constituents, and a free staff."[72]

Because only a small percentage of the electorate actually pays attention to the earliest days of a political race, challengers and third-party candidates typically have no choice but to rely on donations from a small group of wealthy, politically-motivated contributors.[73] The need for campaign cash is most apparent early in a campaign's life cycle.[74] If aggregate limits shift funding from these challengers to independent expenditures, there may

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[71] Center for Responsive Politics, *Reelection Rates Over the Years*, OpenSecrets.org, http://www.opensecrets.org/bigpicture/reelect.php (last visited May 8, 2013).

[72] *See* Yasmin Dawood, *Electoral Fairness and the Law of Democracy*, 62 U. TORONTO L.J. 499, 547-48 (2012).

[73] Tom Donnelly, *Candidate Venture Capital*, 80 U. CIN. L. REV. 753, 761-63 (2012).

[74] *Id.* at 764, 772-773 ("[M]ost challengers receive seed money from a handful of individual contributors.").

be no innovative, upstart campaigns for the independent expenditures to support.

Thus, a doctrine designed to promote a larger number of smaller contributions to candidates will end up with the opposite effect: incentivizing politically-active persons to spend their political dollars in other ways, which do not include the disclosure deemed essential to the campaign finance system. Thus, the aggregate limits exacerbate the "covert speech" problem identified in *Shrink Mo. Gov't PAC,* 528 U.S. at 406 (Kennedy, J., dissenting), and run counter to their expressed goals. They are not narrowly-tailored to their identified governmental interests.

Advances in technology have given the public access to information that can be used to reveal patterns of corruption where they exist. *Citizens United* and its progeny have given contributors multiple avenues to speak, undercutting the incentive to circumvent the individual contribution limits. And the aggregate limits function more as an impermissible "leveling" mechanism in the field of speech than as an anti-circumvention tool. In this light, the aggregate limits may no longer be a "corollary" to the individual contribution limits. The law is "extraordinarily ill-fitted to that goal," and "other means to protect those valid interests are available."[75] Therefore, whether or not they originally met the standard of review, today the aggregate limits fail to meet that standard.

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[75] *Bullock* v. *Carter*, 405 U.S. 134, 146 (1972).

CONCLUSION

For the foregoing reasons, *Amicus Curiae* Cause of Action Institute respectfully requests this Court to reverse the decision below.

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