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

Brief of the Cato Institute as *Amicus Curiae* in Support of Plaintiffs-Appellants

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QUESTIONS PRESENTED

(1) Whether the biennial limits on campaign contributions to non-candidate committees, 2 U.S.C. 441a(a)(3)(B), violate the First Amendment; and, more broadly,

(2) Whether the distinction that this Court drew in *Buckley v. Valeo*, 424 U.S. 1 (1976), between limits on campaign expenditures (unconstitutional) and contributions (constitutional under certain circumstances), respectively, is still tenable.

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences and forums, and publishes the annual *Cato Supreme Court Review*, and files *amicus* briefs. The present case concerns Cato because it involves arbitrary and unjustified restrictions on political speech, the protection of which is at the core of the First Amendment.

SUMMARY OF ARGUMENT

The First Amendment broadly protects 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). Campaign contributions and expenditures facilitate such interchanges and are thus vital to our democracy. Yet our current campaign finance restraints unconstitutionally stifle political speech and inhibit the unfettered interchange of ideas.

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[1] Pursuant to Rule 37.2(a), all parties were timely notified of and have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution to its preparation or submission.

While someone can spend an unlimited amount on his own campaigns, the amount he can donate to political parties, committees, and candidates is strictly limited by contribution limits that were upheld against constitutional challenge in *Buckley v. Valeo*, 424 U.S. 1 (1976).

Buckley correctly held that the spending money, whether in the form of contributions or expenditures, is a form of speech protected by the First Amendment. *Buckley*, 424 U.S. at 21. The Court, however, only treated caps on campaign expenditures, and not caps on contributions, as restrictions upon political speech, reasoning that "while contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor." *Id.* The Court has since abandoned the concept of "speech by proxy" generally, yet the distinction between contributions and expenditures remains. That distinction has been the target of persistent, cogent criticism and its underlying logic repudiated in subsequent decisions.

Even in *Buckley* itself, Chief Justice Burger argued that contributions and expenditures are both core political speech and "two sides of the same First Amendment coin." *Id.* at 241 (Burger, C.J., concurring in part and dissenting in part). Restrictions on both violate the Constitution. *Id.* at 241-42. Justice Thomas has also attacked the distinction as illogical and argued that both contribution and expenditure limits implicate core First Amendment values. Money contributes to the political debate whether it is spent independently or through a candidate or political party. *Colo. Fed.*

Campaign Comm. v. Fed. Election Comm'n, 518 U.S. 604, 636-67 (1996) (Thomas, J., concurring in part and dissenting in part). Justice Thomas asserted that the *Buckley* framework should be abandoned and replaced with a strict scrutiny test for both contributions and expenditure limits. *Id.* at 639.

Buckley's contribution/expenditure distinction also causes various practical issues commonly criticized in our campaign finance system. Striking down limits on spending, while upholding limits on donations, creates a system where politicians spend an inordinate amount of time fundraising as opposed to designated legislative activities. Furthermore, the flow of money has been pushed away from political parties and official associations and towards unelected advocacy groups, leaving the national parties with a distinct lack of "resources necessary for effective advocacy." *Buckley*, 424 U.S. at 21. Most importantly, the constitutional rights of U.S. citizens to engage in untempered political speech and expression is being infringed. Limitations on the amount of money an individual can contribute to the political party, committee, or candidate of his choice unconstitutionally restrains the freedom of political speech. There is "practically universal agreement" that the central purpose of the Speech and Press Clauses of the First Amendment was "to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). Since money is speech, contribution limits effectively allow speech but only up to a government-approved amount.

Nor does *stare decisis* require preserving contribution limits, including the aggregate biennial limits being challenged in this case. The *Buckley* distinction is of relatively recent constitutional

vintage and has produced an arbitrary, irrational, and increasingly unworkable campaign finance system, with no reliance interests weigh against overruling it. *Stare decisis* is an important principle vital to our legal system but it is not a binding command by which a court never overrules precedent. Instead, it is a prudential policy that—especially in the context of constitutional interpretation—doesn't prevent overruling decisions offensive to the First Amendment.

Free speech fosters political change, holds officials accountable, and sustains all other facets of a healthy democracy. Limits on individual donations impede robust political speech. *Amicus* respectfully submits that the *Buckley* distinction was made in error and that the instant challenge presents the Court an opportunity to liberate political speech. Not only would this energize our democracy, reduce corruption, and keep with *stare decisis*, it would also be consistent with the Constitution.

ARGUMENT

I. THE FIRST AMENDMENT BROADLY PROTECTS POLITICAL SPEECH

The Constitution protects individual liberty by enumerating the finite list of powers granted to the federal government and reserving all others to the states and the people. U.S. Const. amend. X. The First Amendment, in turn, broadly protects political expression in order to assure the unfettered exchange of ideas to advance the laws and policies

desired by the people. *Roth v. United States*, 354 U.S. 476, 484 (1957). Congress lacks the authority to make laws that unduly restrict an individual's ability to participate in the political process.

It is well-settled that "the central purpose of the Speech and Press Clauses was to assure a society in which 'uninhibited, robust, and wide-open' public debate concerning matters of public interest would thrive, for only in such a society can a healthy representative democracy flourish." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Free speech "is needed for republican government" and "informs voters about the conduct of elected officials, thereby helping voters to hold officials responsible at election time." John Samples, *Move to Defend: The Case against the Constitutional Amendments Seeking to Overturn* Citizens United, Cato Institute Policy Analysis No. 724 (Apr. 23, 2013), at 2. "Officials in power have every reason to fear speech. It fosters change, not least in elections. Elected officials have strong reasons to find acceptable ways to suppress free speech." *Id.* at 3.

Moreover, the First Amendment protects political speech regardless of the nature or identity of the speaker. People don't lose their rights upon coming together and forming associations, be they unions, non-profit advocacy groups, private clubs, for-profit corporations, or any other form. *See*, *e.g.*, Ilya Shapiro & Caitlyn W. McCarthy, *So What If Corporations Aren't People?*, 44 J. Marshall L. Rev. 701, 707-08 (2011). Restrictions on campaign donations—particularly "aggregate" limits on election participation—impede robust political speech and thus rob our democracy of the vibrancy and dynamism it would otherwise have.

Indeed, restricting the liberty to engage in election campaigns because such engagement somehow injures the political system is fundamentally contrary to the constitutional structure of rights and powers. As James Madison said, "it could not be less folly to abolish liberty, which is essential to political life, because it nourishes faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency." *The Federalist* No. 10, at 51-52 (James Madison) (Garry Wills ed., 2003). And as this Court recently held, "[i]f the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech." *Citizens United v. FEC*, 558 U.S. 310, 313 (2010). Since monetary contributions to parties and campaigns are a form of political speech, they too are protected by the First Amendment.

A. THE FOUNDERS ENVISIONED CAMPAIGNS WITH OPEN DEBATE AND UNINHIBITED POLITICAL EXPRESSION

The Founders believed that elections are the principal means of controlling government. *See*, *e.g.*, *The Federalist* No. 51, at 316 (James Madison) (Garry Wills ed., 2003) ("A dependence on the people is no doubt the primary control on the government."). Elections make politicians accountable to voters, which constrains the government monopoly on the legitimate use of force. If electoral competition ceases to exist, the Madisonian nightmare of government without effective restraints becomes possible.

That's why a "major purpose" of the First Amendment is "to protect the free discussion of

governmental affairs," *Mills v. Alabama*, 384 U.S. 214, 218 (1966), by limiting the government's interference with the marketplace of ideas, especially political ideas. Free and open debate is "integral to the operation of the system of government established by our Constitution." *Buckley*, 424 U.S. at 15.

While Article I, Section 4, and Article II, Section 1 authorize Congress to regulate federal elections, that regulation must be consistent with the First Amendment. As noted above, the Founders created the First Amendment to ensure free and robust political debate. They didn't want such speech to be restricted by artificial limits on the means that are necessary for such debate—financial support. *See generally* David. M. Rabban, *Free Speech in Its Forgotten Years* (1997). Accordingly, this Court has held repeatedly that campaign contributions and expenditures are protected speech.

B. THE *BUCKLEY* COURT CORRECTLY HELD THAT CAMPAIGN SPENDING IS A FORM OF SPEECH PROTECTED BY THE FIRST AMENDMENT AND FORESAW THE DANGERS OF EVEN THOSE CONTRIBUTION LIMITS IT APPROVED

It is impossible to separate speech from the money that facilitates it. *See*, *e.g.*, *Citizens United*, 130 S. Ct. at 917 (Roberts, C.J., concurring) ("The First Amendment protects more than just the individual on a soapbox and the lonely pamphleteer."). "Not a single justice of the United States Supreme Court who has voted in any of the more than a dozen cases involving the constitutionality of campaign finance regulations,

regardless of which way he or she came out in the case, has *ever* embraced the position that money is not speech." Geoffrey R. Stone, *Is Money Speech?*, Huffington Post, Feb. 5, 2012, available at http://www.huffingtonpost.com/geoffrey-r-stone/is-money-speech_b_1255787.html.

Accordingly, this Court correctly held in *Buckley* that the spending of money, whether in the form of contributions or expenditures, is a form of speech protected by the First Amendment. 424 U.S. at 21. Candidates need to amass sufficient wealth to amplify and effectively disseminate their message to the electorate. *Id.* Restricting political contributions and expenditures "necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Id.* at 19. Contributions and expenditures facilitate this interchange of ideas and cannot be regulated as "mere" conduct unrelated to the underlying communicative act of making a contribution or expenditure. *Id.* at 24.

While the *Buckley* Court allowed certain restrictions on contributions—though not expenditures—it cautioned that they "could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy." *Id.* at 21. Rapid technological progress has accentuated the money-speech dynamic, and this Court should now rethink those restrictions.

II. *BUCKLEY*'S DISTINCTION BETWEEN CONTRIBUTIONS AND EXPENDITURES IS UNWORKABLE AND DESTABILIZES OUR CAMPAIGN FINANCE SYSTEM

A. THE *BUCKLEY* DISTINCTION IS UNTENABLE AND UNWORKABLE

In *Buckley*, this Court decided to treat caps on campaign expenditures, but not campaign contributions, as restrictions upon political speech, reasoning that, "while contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor." *Id.* at 21. Expenditure limits, by contrast, "represent substantial rather than merely theoretical restraints on the quality and diversity of political speech." *Id.* at 19. Accordingly, it declined to apply strict scrutiny to contribution limits. Subsequent to *Buckley*, a Court plurality described contributions as "speech by proxy" that are "not entitled to full First Amendment protection." *Calif. Medical Assn. v. FEC*, 453 U.S. 182, 196 (1981).

Yet the impact on the amount and diversity of political speech coming from contributions and expenditures is identical. "[T]here is no real difference between the First Amendment value of a contribution and an expenditure. A contribution is a quintessential act of political association just as an expenditure is an act of expression. Nor is there much difference between the real-world potential for corruption posed by each." Burt Neuborne, *The Supreme Court and Free Speech: Love and a Question*, 42 St. Louis U. L.J. 789, 795 (1998). Even

in *Buckley* itself, several justices questioned the viability of the contribution-expenditure distinction. Chief Justice Burger, for example, stated that "contributions and expenditures are two sides of the same First Amendment coin." *Buckley*, 424 at 241 (Burger, C.J., concurring in part and dissenting in part). Restrictions on both violate the Constitution. *Id.* at 241-42. Distinguishing them is playing "word games" because both types of political disbursements have sufficient communicative content to require that laws infringing them be struck down. *Id.* at 244.

Chief Justice Burger also added that restrictions on contributions unconstitutionally hamper political candidates and activity in the same way as restrictions on independent expenditures. *Id.* at 244. He pointed out that "contribution limitations . . . limit exactly the same political activity that the expenditure ceilings limit," *id.* at 243, specifically, by limiting the amount of funds that can later be spent. The result is "an effective ceiling on the amount of political activity and debate that the Government will permit to take place." *Id.* at 242. Yet the ability to project speech is *as important* as the ability to say it. A political writer would hardly be comforted if told that the First Amendment protects her words but not her access to the internet and printing presses.

Over time, various justices have criticized *Buckley*'s expenditure/contribution distinction. Justice Thomas has in particular assailed it. *See, e.g.*, *Colo. Republican Fed. Campaign Comm.*, 518 U.S. at 635-644 (Thomas, J., concurring in judgment and dissenting in part); *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 410-429 (2000) (Thomas, J., dissenting); *McConnell v. FEC*, 540 U.S. 93, 265-286 (2003) (Thomas, J., concurring in part and dissenting

in part). Justice Thomas has written that the *Buckley* distinction lacks in "constitutional significance." *Colo. Republican Fed. Campaign Comm.*, 518 U.S. at 636. He also noted that contributions and expenditures both implicate core First Amendment values because they both facilitate political debate; whether political money is spent independently or through a candidate or political party is irrelevant. *Id.* at 636-67.

Justice Thomas suggested that *Buckley*'s framework be replaced with a strict scrutiny test to be applied to both contribution and expenditure limits. *Id.* at 639. Dissenting in part in *McConnell*, he appealed to history, observing that "repressive regimes have . . . attack[ed] all levels of the production and dissemination of ideas." 540 U.S. at 251 (2006) (Thomas, J., concurring in part and dissenting in part). He also traced some of the absurd consequences of the distinction: "What good is the right to print books without a right to buy works from authors? Or the right to publish newspapers without the right to pay deliverymen?" *Id.* at 252.

The Court has also come to repudiate the concept of "speech by proxy" generally:

> The "proxy speech" approach is not useful . . . [where] the contributors obviously like the message they are hearing from [the] organization and want to add their voices to that message; otherwise they would not part with their money. To say that their collective action in pooling their resources to amplify their voices is not entitled to full First Amendment protection would subordinate the voices of those of modest means as

> opposed to those sufficiently wealthy to be able to buy expensive media ads with their own resources.

FEC v. Nat'l Conservative Pol. Action Comm., 470 U.S. 480, 495 (1985).

Numerous academics have also criticized the *Buckley* distinction. For example, Prof. Lillian BeVier has argued that both contributions and expenditures implicate significant First Amendment values, and so they should be treated the same way. *See* Lillian R. BeVier, *Money and Politics: The First Amendment and Campaign Finance Reform*, 73 Cal. L. Rev. 1045, 1063 (1985). She argues that the distinction is merely semantic because contribution limits and expenditure limits restrict the same type of activity. *Id.* BeVier would also subject both contributions and expenditures to heightened scrutiny. *Id.* at 1090. The Cato Institute's resident political scientist, meanwhile, has noted that "[s]pending on elections by candidates and parties depends on spending by contributors. If candidates and parties do not raise money, they cannot spend it." John Samples, *The Fallacy of Campaign Finance Reform* 34 (2006).

In sum, *Buckley*'s distinction is untenable. As the court below acknowledged, "the constitutional line between political speech and political contributions grows increasingly difficult to discern." *McCutcheon v. FEC*, 893 F. Supp. 2d 133, 136 (D.D.C. 2012). Having long been the target of persistent, cogent criticism, and with its underlying logic repudiated in subsequent rulings, this Court should abandon the contribution-expenditure distinction.

B. THE *BUCKLEY* DISTINCTION HAS DESTABILIZED OUR CAMPAIGN FINANCE SYSTEM

The *Buckley* distinction and resultant limits on contributions have also caused the most commonly criticized problems of our campaign finance system.

First, political candidates must spend an inordinate amount of time raising money due to the limits on the amount of each contribution. Candidates face an unlimited demand for campaign funds but a tapered supply, leading to more time spent fundraising as opposed to legislating. And the noose of contribution limits has only tightened due to inflation. Moreover, "because some political interests have access to methods of mobilizing small contributions, while many do not, campaign-finance regulations often have the effect of exacerbating inequalities in the influence of interests." Thomas L. Gais, *Campaign Contribution Limits: Cure or Curse?*, 22 Regulation 42, 43 (1999). In other words, contribution limits increase the time candidates spend on fundraising and exacerbate resource inequalities between different political interests.

Second, the *Buckley* distinction helps the wealthy and other influential voices drown out the speech of average citizens. The contribution limit has decreased the influence of individuals and increased the importance of media, lawyers, consultants, and professional fundraisers. The *Buckley* Court failed to foresee the "pragmatic impact" of the dichotomy that it created:

> In effect, the *Buckley* Court authorized government to regulate the size and source of campaign contributions, thus permitting

> significant regulation of the supply of funds to candidates, but forbade the government to place ceilings on expenditures, thus preventing any regulation of the demand for campaign funds. Any economist will tell you that an effort to regulate supply in the teeth of unlimited demand is a prescription for a black market. And that is exactly what happened to American politics.

Neuborne, *The Supreme Court & Free Speech*, at 795.

Third, contribution limits and other campaign finance regulations have gradually pushed the flow of money away from candidates and parties, towards unelected advocacy groups. This dynamic weakens the relative ability of campaigns to compete with special-interest groups, due to the increasing flow of campaign dollars through the direct independent-spending route. *Id.* And this trend was visible long before *Citizens United* and *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010). As an unsurprising consequence of the *Buckley* distinction, donation limits to party committees have reduced the campaign influence of all political parties—whether Republican, Democrat, Libertarian, Green, or otherwise—making the field safer for rich individuals who form their own Super PACs and other campaign devices. Candidates who are neither well-known nor well-heeled are put at a significant disadvantage, reducing political competition.

The *Buckley* Court cautioned that "contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy." *Buckley*, 424 U.S.

at 21. Parties don't enjoy any special constitutional status, to be sure, but they also shouldn't bear any legal disadvantage.

Yet one of the unintended consequences of the *Buckley* distinction has been "the dispersion of money and activities among candidates and 'shadow' party groups," reinforcing a "trend toward fragmented political campaigns." Raymond La Raja, *Small Change: Money, Political Parties and Campaign Finance Reform* 44 (2008). For Prof. La Raja, these "shadow" groups include 527s, Super PACs, and labor organizations. Like other critics, La Raja suggests that campaign finance regulation has largely left national parties as peripheral players with limited direct influence over campaigns and too little ability to coordinate activities with candidates. *Id.* at 156-57. Finding contribution limits to be unconstitutional would restore some of the balance by removing restrictions on the political parties and candidates, providing for a more equal footing.

The policy choice we face in campaign finance regulation is whether we prefer money to go directly to candidates and parties or whether we prefer that it be spent independently. Quite apart from the constitutional concerns raised by the appellants here, the current regulatory regime undermines the main goals of most campaign finance reformers: political accountability and open government. Contribution limits also undermine disclosure laws by inducing donors to seek third parties to spend on their behalf, bypassing the caps. This situation in turn blurs the connection between donors and the candidate or party they wish to support. The *Buckley* distinction and its concomitant contribution limits have thus caused a multitude of practical problems.

C. ELIMINATING THE *BUCKLEY* DISTINCTION WOULD BOTH ENERGIZE OUR DEMOCRACY AND REDUCE CORRUPTION

Our democracy would be energized if freed from contribution limits. More political speech leads to better informed voters, and the kind of speech fostered by campaign contributions—political ads—tends to educate voters who are less inclined to search out information on their own. *See* John J. Coleman, *The Benefits of Campaign Spending*, Cato Institute Briefing Paper No. 84 (September 4, 2003). *See also* John Coleman and Paul F. Manna, *Congressional Campaign Spending and the Quality of Democracy*, 62 J. Pol. 757 (2002) (showing that campaign spending increases public knowledge of the candidates, including the ability to place them on ideological and issues scales); John Coleman, *The Distribution of Campaign Spending Benefits across Groups*, 63 J. Pol. 916 (2001) (arguing that campaign spending improves public trust and engagement and improves the accuracy of perceptions about candidates, particularly among socially disadvantaged groups). In other words, the speech facilitated by campaign contributions has a greater effect on those who, but for that campaign spending, would be ignorant of electoral issues.

Further, informing voters fosters electoral competition by facilitating more criticism of incumbents and creating more name recognition for challengers. Coleman, *The Benefits of Campaign Spending*, at 4-5. As mentioned above, "absent contribution limits, challengers could raise money quickly and easily from a small number of donors, if they wished." Dhammika Dharmapala and Filip

Palda, *Are Campaigns Contributions a Form of Speech? Evidence from Recent U.S. House Elections*, 112 Pub. Choice 81, 87 (July 2002). Treating contributions the same as expenditures would not only be consistent with the Constitution, but would solve the problems *Buckley* brought into being and also lessen corruption and the appearance thereof.

Contrary to what critics charge, "studies indicate that campaign spending does not diminish trust, efficacy, and involvement." Coleman, *The Benefits of Campaign Spending*, at 8. That's because "spending increases public knowledge of the candidates, across essentially all groups in the population. Less spending on campaigns is not likely to increase public trust, involvement, or attention. . . . Getting more money into campaign should, on the whole, be beneficial to American democracy." *Id.* Moreover, "a deregulated system of campaign finance should be expected to increase electoral competition." Samples, *The Fallacy of Campaign Finance Reform* 186. This competition would also reduce the power of incumbency and the corruption that can flow from it.

III. *STARE DECISIS* SHOULD NOT SAVE THE *BUCKLEY* DISTINCTION

A. *STARE DECISIS* MEANS FOLLOWING THE LAW, NOT MECHANICALLY PRESERVING EVERY PRECEDENT OR MAINTAINING ERRONEOUS DECISIONS

Stare decisis reflects the common law's declaratory view of precedent. Precedents are not law themselves, but instead are evidence of the law. *See, e.g.*, Matthew Hale, *The History of the Common Law of England* 45 (Charles M. Gray ed., 1971) (1820)

("the Decisions of Courts of Justice . . . do not make a Law . . . yet they have a great Weight and Authority in Expounding, Publishing, and Declaring what the Law of this Kingdom is."). As William Blackstone explained, *stare decisis* does not require courts to extend or preserve an earlier decision that misstated or misapplied the law:

> [A judge is] not delegated to pronounce a new law, but to maintain and expound the old one. Yet this rule admits of exception, where the former determination is most evidently contrary to reason; much more if it be contrary to the divine law. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was bad law, but that it was not law; that is, that it is not the established custom of the realm as has been erroneously determined.

1 *Commentaries* 69-70 (Univ. of Chicago Press 1979) (1765).

Blackstone concluded that "*the law*, and the *opinion of the judge* are not always convertible terms, or one and the same thing; since it sometimes may happen that the judge may *mistake* the law." *Id.* at 71. Precedent is binding "unless it can be shown that the law was misunderstood or misapplied in that particular case." James Kent, 1 *Commentaries on American Law* 475, 477 (12th ed. 1989) (O.W. Holmes, Jr. ed. 1873).

Stare decisis also derives from practical

considerations of doctrinal stability in order to "keep the scale of justice even and steady." Blackstone, 1 *Commentaries* 69. It is appropriate in many cases because "[i]t is by the notoriety and stability of such rules that professional men can give safe advice . . . and people in general can venture with confidence to buy and trust, and to deal with one another." Kent, 1 *Commentaries* 476. From its origins, *stare decisis* was intended to balance reliance interests in doctrinal stability with the countervailing interest in clarification when in an earlier case "the judge may *mistake* the law." Blackstone, 1 *Commentaries* 71. The doctrine of *stare decisis* is basic and vital to our legal system, as inherited from the common law, yet we maintain important differences in our application of this traditional principle.

In the United States, *stare decisis* does not mechanically preserve every precedent. While the doctrine plays an important part in the Court's decision-making, it is not "an inexorable command." *Payne v. Tennessee*, 501 U.S. 808, 827-28 (1991) ("*Stare decisis* is not an inexorable command; rather, it is a principle of policy and not a mechanical formula of adherence to the latest decision."). *Stare decisis*, "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Id.* at 827. A core principle underlying *stare decisis* is that courts do not make the law, but rather declare what the law is. *See, e.g.*, *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (although "judges in a real sense 'make' law . . . they make it *as judges make it*, which is to say *as though* they were 'finding' it—discerning what the

law *is*, rather than decreeing what it is today *changed to*, or what it will tomorrow be.") (Scalia, J., concurring in the judgment). Consequently, "precedents are not sacrosanct." *Patterson v. McClean Credit Union*, 491 U.S. 164, 172 (1989).

In other words, *stare decisis* is not "a binding principle by which a court—the U.S. Supreme Court or otherwise—never overrules its own precedent. Indeed, if precedent could never be reversed then *Plessy v. Ferguson* and *Bowers v. Hardwick* could never have yielded to *Brown v. Board of Education* and *Lawrence v. Texas*, respectively." Ilya Shapiro & Nicholas Mosvick, Stare Decisis *after* Citizens United*: When Should Courts Overturn Precedent*, 16 Nexus: Chap. J. Pub. Pol'y 121, 123-124. One lower court put it this way:

> *Stare decisis* is the policy of the court to stand by precedent; the term is but an abbreviation of *stare decisis et quieta non movere*—"to stand by and adhere to decisions and not disturb which is settled." Consider the word "*decisis*." The word means, literally and legally, the decision. Nor is the doctrine *stare dictis*; it is not "to stand by or keep to what was said." Nor is the doctrine *stare rationibus decidendi*—"to keep to the *rationes decidendi* of past cases." Rather, under the doctrine of *stare decisis* a case is important only for what it decides—for the "what," not for the "why," and not for the "how." Insofar as precedent is concerned, *stare decisis* is important only for the decision, for the detailed legal consequence following a detailed set of facts.

In re Osborne, 76 F.3d 306, 309 (9th Cir. 1996).

This Court recognizes the importance of having settled rules of law. *See Agostini v. Felton*, 521 U.S. 203, 235 (1997). But *stare decisis* is a prudential policy rooted in the declaratory view of precedent and its underlying interests are not equally compelling for all areas of law. *See Payne*, 501 U.S. at 828 ("Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved"); *Patterson*, 491 U.S. at 172-73 ("Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done.").

Not surprisingly, *stare decisis* is most flexible in constitutional cases, where Congress cannot "fix" an undesired legal interpretation:

> *Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. . . . But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions.

Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406-07, 410 (1932) (Brandeis, J., dissenting).

Indeed, this "policy is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions." *Agostini*, 521 U.S. at 235. Moreover, "overruling a constitutional case

decided just a few years earlier is far from unprecedented." *FEC v. Wisc. Right to Life, Inc.* ("*WRTL II*"), 551 U.S. 449, 501 (2007) (Scalia, J., concurring in part and concurring in the judgment) (collecting cases). For example, in the 50 years from 1942 to 1992, this Court reversed itself 141 times. Cong. Research Serv., *Supreme Court Decisions Overruled by Subsequent Decision* (1992).

The Court has further explained the policy of *stare decisis* as follows:

> [W]hen convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment, and not upon legislative action, this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions.

Smith v. Allwright, 321 U.S. 649, 665 (1944).

The present case turns on the proper interpretation of the First Amendment, of course, not on statutory construction or on property or contract rights. "This Court has not hesitated to overrule decisions offensive to the First Amendment (a 'fixed star in our constitutional constellation,' if there is one)—and to do so promptly where fundamental error was apparent." *WRTL II*, 551 U.S. at 500 (Scalia, J., concurring in part and concurring in the judgment) (internal citation omitted). Courts should not, and cannot, give as much judicial deference to constitutional decisions, as they would to common law cases or statutes. The doctrine of *stare decisis* is thus at its apogee here.

B. ABANDONING THE *BUCKLEY* DISTINCTION WOULD BE CONSISTENT WITH *STARE DECISIS*

The *Buckley* distinction does not survive scrutiny under the factors that courts consider in applying *stare decisis*: how well-reasoned and old the original opinion is; how much people have relied on it; and how well the resulting legal rule works.

The contribution-expenditure distinction, controversial and confusing in its own day, has not engendered the kind of reliance interests that *stare decisis* contemplates protecting. There are no contract or property rights at issue and no one has "ordered their thinking and living" *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992), in reliance on the continued viability of the *Buckley* distinction. *See* Kent, 1 *Commentaries* 443 (*stare decisis* helps ensure "people in general can venture with confidence to buy and trust, and to deal with one another."). On the contrary, restrictions on contributions have had a chilling effect on the exercise of the constitutional right to freedom of speech. No one is relying on having less freedom of speech, so no reliance interests weigh in favor of extending or preserving the distinction.

In fact, the only entities "relying" on the *Buckley* distinction are the oft-criticized "independent spending groups," such as Super PACs, which dominated the airwaves during the 2012 election cycle. Those groups partially depend on the contribution limits to funnel money in their direction. Yet it turns common sense and the First Amendment on their heads to say that one group is "relying" on the First Amendment rights of another

group being squelched. That absurdity only underscores the dangers of this Court drawing distinctions that micromanage political speech as if elections were no different than other businesses the federal government regulates. Many businesses, of course, "rely" on federal policies that disproportionately hamstring their competitors, but this Court should not maintain a distinction that that prefers one type of speaker over another.

Another "relevant factor" under *stare decisis* is "the antiquity of the precedent." *Montejo v. Louisiana*, 556 U.S. 778, 792 (2009). *See also WRTL II*, 551 U.S. at 501 ("Overruling a constitutional case decided just a few years earlier is far from unprecedented."). But *Buckley* is relatively recent. Further, by deviating from First Amendment principles, the *Buckley* distinction created an unworkable regulatory regime riddled with increasingly arbitrary exemptions, which are irreconcilable with the "corruption" interest conceived in the case. All Americans should be free to engage unfettered in constitutionally protected speech.

As Chief Justice Roberts wrote in *Citizens United*, "when fidelity to any particular precedent does more to damage this constitutional ideal [the rule of law] than to advance it, we must be more wiling to depart from that precedent." 558 U.S. 310, 378 (2010) (Roberts, J., concurring). *Stare decisis* does not require preserving or extending precedents that misstate the law. As such, it does not shield the distinction created in *Buckley* from being reexamined and overturned.

CONCLUSION

The aggregate contribution limits that stem from the *Buckley v. Valeo* contribution/expenditure distinction are an unjustified infringement of the First Amendment. This Court should reverse the decision below and remand for entry of a permanent injunction.

Respectfully submitted,

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