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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 THE CAMPAIGN LEGAL CENTER, AARP, ASIAN AMERICANS ADVANCING JUSTICE, ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, COMMON CAUSE, CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, THE LEAGUE OF WOMEN VOTERS OF THE UNITED STATES, PROGRESSIVES UNITED AND PUBLIC CAMPAIGN AS *AMICI CURIAE* IN SUPPORT OF APPELLEE

TREVOR POTTER
Counsel of Record
J. GERALD HEBERT
TARA MALLOY
PAUL S. RYAN
MEGAN MCALLEN
THE CAMPAIGN LEGAL CENTER
215 E Street, N.E.
Washington, D.C. 20002
(202) 736-2200
tpotter@campaignlegalcenter.org

Counsel for Amici Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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2 U.S.C. § 441a(a)(3)(A) 5

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2 U.S.C. § 441a(a)(8) 18, 25

2 U.S.C. § 441a(d) 10, 25

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FEC, *Contribution Limits for 2013-2014*, http://www.fec.gov/info/contriblimitschart1314.pdf 4

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FEC, *FEC Summarizes Campaign Activity of the 2011-2012 Election Cycle* (Apr. 19, 2013), http://www.fec.gov/press/press2013/20130419_2012-24m-Summary.shtml 6, 17

OTHER AUTHORITIES:

Paul Blumenthal, *Romney Victory Raises $140 Million, Exploits Campaign Finance Loophole*, Huffington Post, July 16, 2012, http://www.huffingtonpost.com/2012/07/16/romney-victory-fundraising_n_1675231.html 15

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Ctr. for Responsive Pol., *Joint Fundraising Committees*, http://www.opensecrets.org/pres12/jfc.php 14

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Anthony Corrado, *Party Finance in the 2000 Elections: The Federal Role of Soft Money Financing*, 34 Ariz. St. L.J. 1025 (2002) 12

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Eric S. Heberlig & Bruce A. Larson, *Congressional Parties and the Mobilization of Leadership PAC Contributions*, 16 Party Pol. 451 (2010)....................19

Keena Lipsitz & Costas Panagopoulos, *Filled Coffers: Campaign Contributions and Contributors in the 2008 Elections*, 13 J. Pol. Marketing 21 (2011)....................13

Michael Luo and Griff Palmer, *In Fine Print, a Proliferation of Large Donors*, N.Y. Times, Oct. 20, 2008, http://www.nytimes.com/2008/10/21/us/politics/21donate.html....................13

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Matthew Mosk, *McCain Able to Skirt Limits of Federal Financing*, Wash. Post, Sept. 17, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/09/16/AR2008091603321.html 13

Michael E. Toner, *The Impact of Federal Election Laws on the 2008 Presidential Election*, *in* The Year of Obama: How Barack Obama Won the White House 149 (Larry J. Sabato ed., 2009) 14

Kenneth P. Vogel & Abby Phillip, *Mitt Romney winning mega-donor war*, Politico, June 21, 2012, http://www.politico.com/news/stories/0612/77680.html 15

INTEREST OF *AMICI CURIAE*[1]

This brief is filed on behalf of nine nonprofit organizations that are concerned about the efficacy of our campaign finance laws and that work to enact, implement and defend measures to protect the integrity of government.[2]

SUMMARY OF ARGUMENT

In this case, plaintiffs-appellants McCutcheon and the Republican National Committee take aim at settled Supreme Court precedent, and request that this Court reconsider *Buckley v. Valeo*, 424 U.S. 1 (1976), in order to strike down the aggregate limits on contributions by individuals in connection to federal elections at 2 U.S.C. § 441a(a)(3).

In *Buckley*, the Supreme Court upheld the predecessor version of these aggregate limits because it prevented donors from circumventing the base limits on contributions to candidates by making "unearmarked contributions to political committees likely to contribute to [their preferred] candidate, or huge contributions to the candidate's political party." 424 U.S. at 38.

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[1] This brief is filed with the written consent of all parties. This brief was not authored in whole or in part by counsel for any party. No person or entity other than *amici* or their counsel made a monetary contribution to this brief's preparation or submission.

[2] A description of the *amici curiae* is attached as Appendix A.

Appellants attempt to escape this precedent by arguing that Congress amended the Federal Election Campaign Act (FECA), as amended, 2 U.S.C. §§ 431 *et seq*., following *Buckley*, and thereby resolved the circumvention problems identified in that decision and rendered the aggregate limits obsolete.

Appellants are wrong. They turn a blind eye to the real-world consequences of eliminating the aggregate limits, and disregard the ways the limits continue to advance the governmental interest in preventing corruption and the appearance of corruption, as well as in deterring circumvention of the base contribution limits.

First, as outlined in Section I of this brief, the practical effect of invalidating the challenged limits would be the evisceration of the base limits on contributions by individuals to candidates and political parties under federal law. Absent the aggregate limits, a single donor could contribute a total of more than *$2.4 million* to the candidates of his favored political party and over *$1.1 million* to the three federal committees and fifty state committees of that party in a two-year election cycle. Through the mechanism of joint fundraising, this donor could avoid the burden of making hundreds of separate contributions, and instead could write a single huge check to a joint fundraising committee formed by some or all of these entities. The proceeds of the joint fundraising effort could subsequently be funneled through the participating committees to the donor's preferred candidates. Finally, absent the aggregate limits, any

candidate could solicit a million-dollar contribution to such a joint fundraising committee, because the committee would technically receive only "hard money" contributions – even though the soliciting candidate's campaign might benefit from this largesse. In short, any serious inquiry into the probable practical effects of invalidating the aggregate limits demonstrates that those limits are vital to preserving the integrity of the contribution limits.

Second, a review of Supreme Court precedent confirms that the aggregate limits serve the governmental interest in impeding circumvention of the base limits and preventing quid pro quo corruption and its appearance. Section II of this brief demonstrates that the amendments to FECA following *Buckley* did not address, much less resolve, the circumvention concerns that the aggregate limit was devised to allay. Despite changes to federal law, the circumvention feared by the *Buckley* Court – i.e., circumvention by "unearmarked contributions to political committees likely to contribute to [a] candidate, or huge contributions to the candidate's political party" – remains possible today absent the aggregate limits. Furthermore, the aggregate limits directly prevent corruption and the appearance of corruption by blocking the recreation of the party "soft money" system that this court deemed corruptive in *McConnell v. FEC*, 540 U.S. 93 (2003). These limits should be upheld.

ARGUMENT

I. The Real-World Consequence of Eliminating the Aggregate Contribution Limits Would Be Massive Circumvention of the Individual Contribution Limits.

Appellants contend that the aggregate contribution limits are unnecessary because adherence to FECA's other contribution limits eliminates any risk of corruption. That assertion is demonstrably at odds with the foreseeable practical results of removing the aggregate limits.

A. Absent the Aggregate Limits, a Single Donor Could Contribute Millions of Dollars to Federal Candidates and Party Committees.

Under current law, the limit for contributions by an individual to a federal candidate is $2,600 per election (and thus, a total of $5,200 to a single candidate for a primary[3] and general election in a two-year election cycle). 2 U.S.C. § 441a(a)(1)(A).[4] The limit for contributions by an individual to a federal

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[3] Every candidate is permitted to raise contributions up to the applicable primary election contribution limit, regardless of whether a primary election is held in his or her race. 11 C.F.R. § 110.1(j).

[4] The dollar limits in the statute are indexed for inflation and are consequently now higher than the amounts that appear in the statute. FEC, *Contribution Limits for 2013-2014*, http://www.fec.gov/info/contriblimitschart1314.pdf (last visited July 16, 2013).

political party committee is $32,400 per year. *Id.* § 441a(a)(1)(B). This $32,400 annual limit applies separately to each of the three federal committees of a political party – the national party committee (e.g., the RNC or DNC), the party's Senate campaign committee, and the party's House campaign committee. 11 C.F.R. § 110.1(c)(3). The limit on contributions by an individual to a state political party committee is $10,000 per year, and this limit applies separately to each of the 50 state parties. 2 U.S.C. § 441a(a)(1)(D); 11 C.F.R. § 110.1(c)(5). Lastly, individuals may give up to $5,000 per year to a multicandidate committee or any other political committee that gives to candidates ("PAC"). 2 U.S.C. § 441a(a)(1)(C).

All of these contributions subject to the federal limits ("hard money") are also subject to the umbrella aggregate limits of 2 U.S.C. § 441a(a)(3). All contributions by an individual to federal candidates are capped at an aggregate of $48,600 on a biennial basis ("$48,600 aggregate limit"), 2 U.S.C. § 441a(a)(3)(A), and all contributions by an individual to non-candidate political committees (including party committees) are capped at $74,600 biennially ("$74,600 aggregate limit"), *id.* § 441a(a)(3)(B).

These aggregate limits are crucial to making the base contribution limits effective. Without the $48,600 aggregate limit, a single donor could contribute $5,200 to every Republican or Democratic House and Senate candidate in an election cycle. In aggregate, this individual could contribute $2,433,600 to all the federal candidates of one party (given 468 federal

elections per cycle, not including run-offs or presidential candidates).

Eliminating the $74,600 aggregate limit would also enable a single donor to give similarly massive contributions to party committees. By contributing $32,400 to each of a party's three federal party committees each year, a single donor could give $194,400 to just the national party in a two-year election cycle. The same donor could give $1 million to that party's state committees by contributing $10,000 a year (or $20,000 in a two-year cycle) to each of that party's 50 state committees. By this means, a single wealthy donor could contribute $1,194,400 to one party's committees in a single election cycle. Combined with the contributions that could be made directly to that party's candidates, a single donor could provide *$3,628,000* in "limited" hard money contributions to a party and its federal candidates in a single election cycle.

Finally, the same individual could also contribute to an indeterminate – but potentially vast – number of PACs aligned with his partisan or ideological interests. In the 2012 elections, over 2,757 "non-connected" PACs (not including independent expenditure-only PACs) were active. *See* FEC, *FEC Summarizes Campaign Activity of the 2011-2012 Election Cycle* (Apr. 19, 2013), http://www.fec.gov/press/press2013/20130419_2012-24m-Summary.shtml. If those committees are roughly split between the two major parties in terms of ideological orientation, donors theoretically could give $10,000 to over 1,350 PACs aligned with their

interests, or approximately $13.5 million, in a two-year election cycle. Even assuming conservatively that only 10% of these ideologically-aligned committees are "likely to contribute to [the donor's preferred] candidate[s]," as described in *Buckley*, that donor would have another outlet for over $1,350,000 in contributions in an election cycle.

It is only the aggregate limits that prevent the flow of such massive and plainly corrupting donations from donors seeking political influence to federal candidates and party leaders.

B. Invalidation of the Aggregate Limits Would Transform Political Party Committees Into "Soft Money" Vehicles for Donors Seeking to Circumvent the Base Limits.

1. Laws Permitting Joint Fundraising and Unlimited Internal Party Transfers Would Facilitate Circumvention.

It is not at all far-fetched to foresee that political parties would become vehicles for circumvention in the absence of aggregate limits: the law has mechanisms already in place that would facilitate a political party's efforts to raise, organize and spend such money, and those mechanisms are already used by parties and their candidates within the limits of current law.

Simply put, "joint fundraising" allows two or more political committees – including "political party

committees . . . candidate committees [and] multicandidate committees" – to form a committee exclusively for joint fundraising efforts. 11 C.F.R. § 102.17(a)(2). A donor may make a single check to the joint fundraising committee equaling the "total amount that the contributor could contribute to all of the participants under the applicable limits." *Id.* § 102.17(c)(5). This check is then "split" between the participating committees according to written agreement, but a participant's allocation cannot exceed its applicable contribution limit. *Id.* § 102.17(c)(6).

Using this mutually beneficial arrangement, parties and candidates can coordinate their fundraising efforts without running afoul of contribution limits. Most importantly, donors are relieved of the logistical challenge of making separate contributions to an array of different committees, and instead can simply write one check to a joint fundraising entity and receive immediate recognition for their largesse. Finally, in the case of a joint fundraising committee established between a candidate and party committees, a donor can not only contribute to the participating candidate, but also "signal" his interest in having the party committees use their allocated share of the proceeds to support this candidate.

In its simplest iteration, for example, a presidential candidate can form a joint fundraising committee with the candidate's national party and raise $37,600 in a single check, of which $5,200 can be dispersed to the candidate and $32,400 to the national party committee. Variants of this model were used by both

the Democratic and Republican presidential nominees in the 2008 and 2012 elections. *See* Section I.B.2 *infra*.

Eliminate the aggregate limits, however, and these joint fundraising committees would be able to receive single checks of astronomical amounts from individual donors. A candidate could join with the three federal party committees to form a joint fundraising committee that could receive checks of $102,400 (with $32,400 applied to the contribution limit of each party committee and $5,200 applied to the limit of the candidate's campaign committee). Nothing would prevent these participants from adding the 50 state parties to their effort. The massive joint fundraising committee that would result could receive a huge check totaling *$602,400* in a year from a single individual (with $97,200 allocated to the national party committees, $500,000 to the state party committees and $5,200 to the candidate campaign committee). And in a two-year election cycle, the total amount that could be raised would nearly double to approximately $1.2 million.

Second, federal law allows for unrestricted transfers between, *inter alia*, national and state party committees of the same party; and joint fundraising committee participants. *See* 2 U.S.C. § 441a(a)(4); 11 C.F.R. § 110.3(c)(1), (2). The law also permits candidates to transfer money to national, state and local committees of their political party without limit. 2 U.S.C. § 439a(a)(4).

In the case of a joint fundraising committee, the liberal transfer rules allow money jointly raised and subsequently allocated between the participating committees to be quickly routed back to a single committee. Thus, the joint fundraising committee discussed above, i.e., "Entire Party Joint Fundraising Committee," could take a donor's $602,000 check and allocate that money to the participating candidate committee and each of the party committees in order to attribute it to each participant's contribution limit. Then, however, all of the participating committees could each transfer their allocated amount back to a single federal party committee, such as the DNC or RNC. Because these allocations and transfers can be performed electronically and instantaneously, most of the donor's $602,000 check made out to "Entire Party Joint Fundraising Committee" could quickly end up being deposited into a single federal party committee's bank account.

Finally, the contributions aggregated in a federal party committee account could ultimately be used to benefit the candidate who had participated in the joint fundraising effort. The national party can contribute $5,000 directly to a candidate, 2 U.S.C. § 441a(a)(1)(C), and then donate significantly more in the form of coordinated expenditures. *Id*. § 441a(d). Coordinated party expenditures do not count against the party's contribution limit, but are subject to a different and higher set of limits: most recently, $21,684,200 for presidential nominees; a range from $91,200 to $2,593,100 for Senate nominees; and

$45,600 or $91,200 for House nominees. *See* FEC, *Coordinated Party Expenditure Limits 2012*, http://www.fec.gov/info/charts_441ad_2012.shtml (last visited July 12, 2013). Once the coordinated spending limit is reached, parties can make unlimited independent expenditures in support of a candidate, such as for express advocacy advertisements or GOTV in the relevant jurisdiction. Thus, by contributing to a joint fundraising committee formed by a favored candidate and multiple committees of that candidate's party, donors can signal to the participants, without triggering the earmarking rules, that their entire contribution should ultimately be used to support the participating candidate.

In short, without the aggregate limits, joint fundraising and unrestricted intra-party transfers would make the parties effective vehicles for circumvention because these techniques streamline the donation process for influence-seeking donors and enable such donors to communicate to party committees the identity of their preferred candidates.

2. The Practice of Joint Fundraising Is Not Hypothetical.

There can be no doubt that joint fundraising is legal. The FEC has permitted the use of "joint fundraising committees" in its regulations for at least 30 years. *See* Transfers of Funds, Collecting Agents and Joint Fundraising, Explanation and Justification, 48 Fed. Reg. 26296 (June 7, 1983) (codified as amended

at 11 C.F.R. § 102.17). Appellants acknowledge as much, stating that "joint-fundraising contributions are hard money, for which Congress has *already* satisfied its conduit-contribution concern." RNC Br. 47.

It is thus paradoxical that appellants also attempt to characterize joint fundraising, as described by the district court, as a "far-fetched" "hypothetical scenario." McCutcheon Br. 44-45. One can only assume they deny this reality in an attempt to undercut the lower court's finding that absent the aggregate limits, joint fundraising would offer a simple technique for donors seeking to direct "half-a-million dollars" to their candidates of choice without running afoul of the earmarking rules. *McCutcheon v. FEC*, 893 F. Supp. 2d 133, 140 (D.D.C. 2012). But there is nothing hypothetical about joint fundraising. It is a fundraising practice that has been in regular use for over a decade, and there is no serious doubt about its existence or efficacy.

The use of joint fundraising committees first began in earnest in 2000, and was initially prevalent in Senate races.[5] During the 2000 election, 21 Senate candidates, including 14 Democrats and seven Republicans, formed joint fundraising committees with party committees.[6]

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[5] Anthony Corrado, *Party Finance in the 2000 Elections: The Federal Role of Soft Money Financing*, 34 Ariz. St. L.J. 1025, 1040 (2002).

[6] *Id*. at 1041.

Joint fundraising committees were established by presidential candidates in the 2000 and 2004 elections, but not until 2008 did this technique became "a central component of both the candidates' and parties' fundraising strategies."[7] In 2008, then-presidential nominee Barack Obama and the DNC established a joint fundraising committee that could accept checks of over $33,000.[8] Then-presidential nominee John McCain was connected to a somewhat more complex joint fundraising effort involving the RNC, certain state Republican parties, and his campaign's compliance fund that accepted as much as $70,000 per donor.[9] In total, "the McCain campaign and Republican Party committees raised approximately $221 million through ten separate [joint fundraising committees]," while Obama and the Democratic Party

[7] Keena Lipsitz & Costas Panagopoulos, *Filled Coffers: Campaign Contributions and Contributors in the 2008 Elections*, 13 J. Pol. Marketing 21, 48 (2011).

[8] Michael Luo & Griff Palmer, *In Fine Print, a Proliferation of Large Donors*, N.Y. Times, Oct. 20, 2008, http://www.nytimes.com/2008/10/21/us/politics/21donate.html.

[9] Matthew Mosk, *McCain Able to Skirt Limits of Federal Financing*, Wash. Post, Sept. 17, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/09/16/AR2008091603321.html. For more on the presidential joint fundraising committees in 2008, *see* Ctr. for Responsive Pol., *Joint Fundraising Committees*, http://www.opensecrets.org/pres08/jfc.php?cycle=2008 (last visited July 12, 2013).

raised "approximately $228 million through three [joint fundraising committees]."[10]

The total amount raised by presidential joint fundraising committees increased substantially in the 2012 elections. Romney's joint fundraising committee, Romney Victory, raised over $492 million, and Obama's committees, Obama Victory Fund and Swing State Victory Fund, raised over $460 million.[11]

All of this information is publicly available on the FEC's website, and it is improbable that appellants are unaware of these facts.[12] They therefore have no basis for their skepticism regarding the existence of joint fundraising.

The evidence also indicates that presidential joint fundraising committees were designed to ensure that the fundraising proceeds allocated to the participating party committees were in large part used to

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[10] Michael E. Toner, *The Impact of Federal Election Laws on the 2008 Presidential Election*, *in* The Year of Obama: How Barack Obama Won the White House 149, 156 (Larry J. Sabato ed., 2009).

[11] Ctr. for Responsive Pol., *Joint Fundraising Committees*, http://www.opensecrets.org/pres12/jfc.php (last visited July 2, 2013).

[12] Fundraising totals for particular joint fundraising committees can be found using the FEC's online search engine, available at http://www.fec.gov/finance/disclosure/candcmte_info.shtml. Conducting an advanced search by committee type (i.e., "Joint Fundraising Committee") further reveals that there are over 300 joint fundraising committees active in 2013, confirming that the practice remains widespread.

benefit the "headlining" candidate. In 2012, Romney Victory accepted checks as large as $75,800,[13] and allocated $40,000 "to state GOP accounts in Idaho, Massachusetts, Oklahoma, and Vermont," none of which were swing states in the 2012 election.[14] These state parties were chosen as participants in the joint fundraising effort because they could be counted on to transfer the money to battleground states.[15] As a Republican fundraiser stated, "I guarantee the reason they're asking for those is [because] they can control them."[16] The fact that three of the four state parties receiving Romney Victory funds were headed by Romney loyalists "provide[d] the Romney camp with assurance that the money will be transferred to swing-state parties as the campaign desires and not be diverted to other efforts."[17]

In short, the use of joint fundraising as an informal means of "earmarking" contributions is far from

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[13] *See* Kenneth P. Vogel & Abby Phillip, *Mitt Romney winning mega-donor war*, Politico, June 21, 2012, http://www.politico.com/news/stories/0612/77680.html.

[14] David M. Drucker, *Mitt Romney's Fundraising Boost Stems From Unique Tactic*, Roll Call, July 30, 2012, http://www.rollcall.com/issues/58_13/Mitt-Romneys-Fundraising-Boost-Stems-From-Unique-Tactic-216525-1.html.

[15] *Id*.

[16] *Id*.

[17] Paul Blumenthal, *Romney Victory Raises $140 Million, Exploits Campaign Finance Loophole*, Huffington Post, July 16, 2012, http://www.huffingtonpost.com/2012/07/16/romney-victory-fundraising_n_1675231.html.

"hypothetical," *see* McCutcheon Br. 44; it is now standard practice.[18]

C. Invalidation of the Aggregate Limits Would Multiply Candidate-to-Candidate Contributions and Reinvigorate the Practice of "Soft Money" Solicitations by Federal Candidates and Officeholders.

1. In the Absence of the Aggregate Limits, Candidates Could Participate in Massive Circumvention Schemes.

Eliminate the aggregate limits, and candidates would control two vehicles for large-scale circumvention – namely, their campaign committees and their leadership committees. A candidate may contribute

[18] Appellants also argue that prohibiting joint fundraising would be a more narrowly tailored solution for circumvention than retaining the aggregate limits. McCutcheon Br. 60. But this assertion – even insofar as it is relevant given that the "least restrictive means" test is inapplicable here, *see, e.g.*, *California Med. Ass'n v. FEC (CalMed)*, 453 U.S. 182, 199 n.20 (1981) – rests on the faulty premise that joint fundraising is the only means of circumventing the base contribution limits. But this Court has noted multiple ways that donors circumvent the contribution limits without earmarking. *Buckley* warned of the dangers entailed in the "use of unearmarked contributions to political committees likely to contribute to [preferred] candidates" even though joint fundraising had not been developed in any significant way in 1976. And in *Colorado II*, the Court expressed concern that a party "tallying" system, i.e., a party's informal records of its candidates' fundraising, furthered circumvention without necessarily triggering the earmarking restrictions. 533 U.S. at 459.

$4,000 from his campaign committee to another candidate in a two-year election cycle. 11 C.F.R. § 102.12(c)(2). In addition, candidates may establish a "leadership PAC," which is simply a multicandidate committee that is controlled or maintained by an officeholder or candidate. *See* 2 U.S.C. § 434(i)(8)(B); 11 C.F.R. § 100.5(e)(6). A leadership PAC, like any multicandidate committee, may contribute up to $5,000 to another candidate. 2 U.S.C. § 441a(a)(1)(C).

As discussed in Section I.A. *supra*, without the aggregate limits, donors could give more than $2.4 million to the campaign committees of their preferred party's candidates. They could also give to the leadership PACs that many candidates have established. These funds would not have to remain dispersed in the committees of 400 or more candidates. Donors could indicate with a "wink and a nod" or other informal means that certain recipients should transfer their contributions to their favored candidate. According to the FEC, there were 1,949 congressional candidates in the 2012 elections, and in addition, 532 active leadership PACs.[19] Even if only a fraction of these committees were willing to serve as conduits for a big donor seeking to circumvent the base limits,

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[19] *FEC Summarizes Campaign Activity*, http://www.fec.gov/press/press2013/20130419_2012-24m-Summary.shtml. A candidate's campaign committee and his leadership PAC are not considered affiliated committees, *see* 11 C.F.R. § 100.5(g)(5). Consequently, each may separately contribute to a given candidate, and are not deemed to be a single committee for the purposes of the contribution limits.

there would still be potentially hundreds of committees available to this donor.

Further, to accomplish the circumvention scheme described above, a donor would not need to direct an elaborate conspiracy involving hundreds of candidates, but instead could simply request that the recipients of his largesse transfer the funds to a party committee. There is no prohibition on a donor "earmarking" contributions to a candidate for transfer *to a political party*. *See* 2 U.S.C. § 441a(a)(8). These contributions could then be aggregated in party coffers and ultimately spent to benefit the donor's preferred candidates.

Appellants and their *amici* suggest that these circumvention schemes are "implausible" or "hypothetical" but fail to recognize that there are significant incentives for candidates to serve as intermediaries in this scheme. *See* Br. of NRSC and NRCC as *Amici Curiae* Supp. Pls.-Appellants at 30. It is already typical for candidates to fundraise for other candidates and officeholders in their party. In 2012, leadership PACs contributed approximately $46 million to federal candidates, either by donating their own funds or serving as intermediaries for other contributors. *See* Ctr. for Responsive Pol., *Leadership PACs*, http://www.opensecrets.org/pacs/industry.php?txt=Q03&cycle=2012 (last visited July 10, 2013).[20] As *amici* NRSC

[20] Several PACs that were headed by non-federal or former federal officeholders were included in the tally, but their aggregate giving comprised less than $1.5 million. Ctr. for Responsive Pol., *Leadership PACs*, *supra*.

and NRCC admit, direct candidate-to-candidate giving is also significant: in 2012, contributions from candidate campaign committees to other candidate campaign committees totaled over $3.6 million. NRSC and NRCC Br. 29. The incentives for peer-to-peer giving are clear. Prolific contributors reap both the indirect benefit of enhanced political standing and clout among their peers, and the more tangible benefits of "prestige committee assignments, committee leadership positions, extended leadership positions and, in the majority party, . . . greater floor access for their legislation."[21] Therefore, it is customary for Members seeking key committee assignments or leadership positions to give generously to their peers: some of the biggest donors in 2012 were, unsurprisingly, Speaker of the House John Boehner's leadership PAC ($1,725,000 in contributions) and House Minority Whip Steny Hoyer's leadership PAC ($1,448,000 in contributions). Ctr. for Responsive Pol., *Leadership PACs*, *supra*.

The incidence of candidate-to-candidate contributions, as well as the entire phenomenon of leadership PACs, attests to the substantial advantages created by such giving. If aggregate limits were eliminated, big donors wishing to route money in excess of the base limits to their preferred candidates would likely

[21] Eric S. Heberlig & Bruce A. Larson, *Congressional Parties and the Mobilization of Leadership PAC Contributions*, 16 Party Pol. 451, 454 (2010) (internal citations omitted).

find a host of willing intermediaries among the candidates' peers.

2. Invalidation of the Aggregate Limits Would Allow Candidates to Solicit Multi-Million Dollar Checks, Recreating the Corruptive Practices That Necessitated the Bipartisan Campaign Reform Act.

Absent the aggregate limits, candidates would be able to solicit donors for huge sums of money that in appearance and effect would be the equivalent of "soft money donations," i.e., money not subject to the federal limits, but would be treated as the aggregation of numerous hard money contributions.

The Bipartisan Campaign Reform Act (BCRA) amended FECA to provide that federal party committees, as well as federal officeholders and candidates, "may not solicit, receive, or direct to another person a contribution, donation or transfer of funds or any other thing of value . . . that are not subject to [FECA's] limitations, prohibitions, and reporting requirements. . . ." 2 U.S.C. § 441i(a)(1), (e)(1). Otherwise put, a federal officeholder or candidate can only solicit, receive, direct or transfer hard money subject to the federal contribution limits.

These solicitation restrictions would be functionally nullified if the aggregate limits were to be invalidated. Because one donor would be able to give a joint fundraising committee a single check for over

$600,000 in funds that are subject to FECA's hard money limits, candidates would be able to solicit eye-popping sums while technically remaining in compliance with the solicitation restriction.

Further, candidates and parties would likely work together to ensure that candidates who solicit large amounts for their parties would also be the beneficiaries of the spending by their parties. In addition to joint fundraising practices, certain federal party committees have also employed a "tally system," wherein the party keeps informal records of the money that a candidate raises for her party and credits those funds to either that candidate's campaign or to any other candidates of her choice. *See, e.g.*, *FEC v. Colorado Republican Fed. Campaign Comm.* (*Colorado II*), 533 U.S. 431, 459 (2001) (noting that tally system made party committees conduits for unearmarked contributions by "connect[ing] donors to candidates through the accommodation of a party"); *id*. at 460 n.23.

Thus, in a regime without aggregate limits, one can foresee that a candidate headlining joint fundraising efforts would make solicitations for massive contributions. As discussed in Section I.B., the "Entire Party Joint Fundraising Committee" comprised of all of the federal and state committees of the candidate's party would be able to raise over $600,000 per year and $1.2 million per election cycle from a single donor. The candidate could solicit donors for this amount, because such contributions will

technically be within the federal limits and are thus permitted by the solicitation restrictions. Once allocated to the participating party committees, the contributions could be transferred to a single party committee, where they could be used for the benefit of the candidate who participated in the fundraising effort and solicited the money. Such an arrangement would plainly enable a candidate to solicit huge contributions for her own campaign – she need only direct the money through a party joint fundraising committee with the understanding that the party committees would spend it for her benefit.

These scenarios are not fanciful. The history of campaign finance shows that when it comes to maximizing the raising and spending of campaign money, what can be done will be done. Only the aggregate limits now act as the critical bulwark against such easy and open circumvention of the underlying contribution limits.

II. The Governmental Interests That Were Found in *Buckley* to Support the Constitutionality of the Original $25,000 Aggregate Limit Support the Current Aggregate Limits.

A. The Aggregate Limits Block Circumvention of the Base Contribution Limits.

In *Buckley*, the Supreme Court found that the $25,000 aggregate limit was justified principally by

the governmental interest in preventing circumvention of FECA's base contribution limits, explaining:

> But this quite modest restraint upon protected political activity serves to prevent evasion of the $1,000 contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party.

424 U.S. at 38.

The *same circumvention schemes* outlined by *Buckley* remain possible today, and continue to justify the challenged aggregate limits. Absent the aggregate limits, contemporary donors could still circumvent the base contribution limits by making "unearmarked contributions to political committees likely to contribute to [their preferred] candidate." Similarly, without the challenged limits, donors could still route "massive amounts of money" to their preferred candidates by donating a "huge contribution" in the form of aggregated hard money contributions to the candidates' political party. Appellants' attempts to prove otherwise are untenable.

1. The $74,600 Aggregate Limit on Contributions to Party Committees and PACs

Appellants do not contest that *Buckley* explicitly sustained the $25,000 limit, the predecessor of the limits challenged here, on grounds that it deterred evasion of the base contribution limits. Attempting to escape this governing precedent, however, they claim that amendments to the law after *Buckley* now prohibit the circumvention feared by the *Buckley* Court, and that consequently the $74,600 aggregate limit is no longer justified.

In so arguing, appellants rely on a faulty and incomplete history of FECA's enactment and amendment. They also rely on an incorrect understanding of *Buckley*'s holding, claiming that the Court was motivated not by a broad concern about circumvention, but rather by much narrower fears of "political committee proliferation" and the specter of "unlimited" contributions to the political parties. Because appellants' premises fail, so too does their argument that the post-*Buckley* amendments to the law "solved" the "conduit contribution concern" identified in *Buckley*.

a. Appellants Rely Upon a Flawed History of FECA's Enactment.

At the time *Buckley* was decided, the original FECA had already undergone a round of amendments. *See* FECA Amendments of 1974 ("1974 Amendments"), Pub. L. No. 93-443, 88 Stat. 1263. In addition to the

aggregate limits, the 1974 Amendments added, *inter alia*, the following provisions relevant to this case:

- *Contribution limits*, including a $1,000 limit on contributions to candidates; and a $5,000 limit on contributions from a political committee (including party committee) to a candidate. *Id.* § 101(a), 88 Stat. at 1263 (codified as amended at 2 U.S.C. §§ 441a(a)(1)-(2)).

- *Party coordinated spending limits* restricting the amount a party could spend in coordination with their presidential, senatorial and congressional nominees. *Id.* § 101(a), 88 Stat. at 1265-66 (codified as amended at 2 U.S.C. § 441a(d)).

- An *earmarking provision* providing that contributions that were earmarked or "otherwise directed through an intermediary or conduit" to a candidate would be deemed a contribution from the original donor. *Id.* § 101(a), 88 Stat. at 1264 (codified as amended at 2 U.S.C. § 441a(a)(8)).

- A provision banning contributions "in the name of another." *Id.* § 101(f), 88 Stat. at 1267-68 (codified as amended at 2 U.S.C. § 441(f)).

Following the *Buckley* decision, the FECA Amendments of 1976 ("1976 Amendments"), Pub. L. No. 94-283, 90 Stat. 475, included a few additional provisions highlighted by appellants:

- *Additional contribution limits*, including a $20,000 limit on contributions to national party committees; and a $5,000 limit on contributions to multicandidate committees. *Id.* sec. 112(2), § 320(a)(1)(B)-(C), 90 Stat. at 487 (codified as amended at 2 U.S.C. §§ 441a(a)(1)(B)-(C)).

- A *transfer provision* providing that transfers between national state and local committees of the same political party are not subject to the contribution limits. *Id.* sec. 112(2), § 320(a)(4), 90 Stat. at 487 (codified as amended at 2 U.S.C. § 441a(a)(4)).

- An *"anti-proliferation" provision* stating that contributions from committees established, financed, maintained or controlled by the same corporation, union, organization or person would be deemed to have been made by a single political committee. *Id.* sec. 112(2), § 320(a)(5), 90 Stat. at 487-88 (codified as amended at 2 U.S.C. § 441a(a)(5)).

Appellants' description of this history is misleading. They are correct in stating that the "anti-proliferation" provision was passed in 1976, but this provision is not relevant to the function of the aggregate limit, as discussed in the following section.

Their discussion of the base contribution limits is fatally incomplete. It is true that in 1974, FECA contained no limits on contributions *to* political party committees or to PACs. It was not until 1976 that

Congress added a $20,000 limit on contributions to a national party committee, and a $5,000 limit on contributions to multicandidate PACs. *See* 1976 Amendments, sec. 112(2), § 320(a)(1)(B)-(C), 90 Stat. at 487. But appellants fail to mention that at the time of *Buckley*, candidates were limited in how much they could accept *from* party committees and multicandidate committees. Party committees and PACs could contribute only $5,000 to a candidate, although the parties were permitted to make a prescribed amount of coordinated expenditures in connection to a candidate as well. *See* 1974 Amendments, § 101(a), 88 Stat. at 1263, 1265-66; *see also Buckley*, 424 U.S. at 13 n.12, 35-36. Thus, even without the $25,000 aggregate limit, at the time of *Buckley*, a donor could not route an "unlimited" contribution through parties and PACs to a particular candidate.

Finally, appellants are simply wrong in suggesting that the earmarking provision included in the 1974 Amendments, § 101(a), 88 Stat. at 1264, and the "in the name of another" prohibition, *id*. § 101(f), were first enacted *after Buckley*. *See* McCutcheon Br. 42-43, 43 n.20; RNC Br. 38-39. Both were passed as part of the 1974 Amendments and were thus in effect when *Buckley* was decided.[22]

[22] Appellants' confusion may stem from the fact that the 1976 Amendments transferred these provisions – in language identical to then-existing law – from title 18 to title 2 of the U.S. Code. *See* H. R. Rep. 94-1057, at 53 (1976) (Conf. Rep.), *reprinted in* 1976 U.S.C.C.A.N. 946, 968.

b. Appellants Mischaracterize *Buckley* in an Attempt to Characterize the Aggregate Limits as Redundant.

After constructing this flawed history of FECA's enactment and amendment, appellants argue that the 1976 amendments to the law addressed *Buckley*'s circumvention concerns. But to make this argument, appellants must not only distort the history of the Act, but also must distort the holding of *Buckley*. In effect, they are "reverse-engineering" the concerns they claim informed the *Buckley* decision to "match" the changes to the law that postdated the decision: only by thus mischaracterizing the reasoning of *Buckley* can they maintain their unsustainable claim that subsequent amendments to the law rendered the aggregate limits obsolete.

Thus, because an "anti-proliferation" law was passed after *Buckley*, appellants unsurprisingly assert that the "analytical key" to the Court's decision to uphold the $25,000 aggregate limit was concern about donors giving to a "proliferation of political committees," i.e., multiple committees controlled by a single individual or entity. RNC Br. 17-18. Appellants claim that the 1976 Amendments to FECA fully addressed this concern, and therefore rendered the aggregate limits redundant. *Id*. at 21-22.

The problem with this argument is that the *Buckley* Court did not even mention "political-committee proliferation" in its analysis of the $25,000 aggregate limit, and certainly did not suggest that

political committees under common control represented the only avenue for circumvention. *See Buckley*, 424 U.S. at 38. The Court's decision to uphold the $25,000 aggregate limit was instead animated by the far broader concern that donors seeking to give contributions in excess of the federal limits to their favored candidate would simply channel "unearmarked contributions to political committees likely to contribute to that candidate." *Id.* The inapplicability of "political-committee proliferation" to the analysis of the $25,000 aggregate limit is made apparent by appellants' failure to offer any textual support other than a passage imported from an entirely different section of *Buckley*. RNC Br. 18 (citing 424 U.S. at 28 n.31) (discussing $1,000 base contribution limitation). Further, a plain reading of the Court's discussion of the type of circumvention that the aggregate limit thwarted – i.e., the donation of "unearmarked contributions to political committees *likely* to contribute to [the donor's preferred] candidate" – also contradicts appellants' proliferation argument. 424 U.S. at 38 (emphasis added). Multiple committees under the control of single donor are not merely *likely* to contribute to a preferred candidate; instead such committees will *certainly* contribute in the manner directed by this donor – that is the entire point of common control. *Buckley*'s articulation of the threat thus does not comport with the nature of appellants' "anti-proliferation" theory.

Second, appellants contend that the *Buckley* Court sustained the aggregate limit only because it

feared that otherwise individuals could make "unlimited" contributions to political parties and PACs, which then could be funneled to their preferred candidates. McCutcheon Br. 41. This alleged fear, according to appellants, was alleviated by the enactment of additional contribution limits by the 1976 Amendments. *Id.* at 41-42. But as described in the foregoing section, both party committees and PACs in 1974 were subject to limits on how much they could contribute to, or spend in coordination with, candidates. Thus, even without the $25,000 aggregate limit, the law at the time of *Buckley* would not have permitted donors to route "unlimited" contributions through parties and PACs to a particular candidate. Because the amount of money that could pass through a party or PAC was already restricted, the limits on contributions to a party or PAC added by the 1976 Amendments had at most a limited effect on circumvention.

Indeed, absent the aggregate limits, a donor today could route virtually as much money through a party committee to a candidate as she could have at the time of *Buckley*. To be sure, at the time of *Buckley*, the donor could have made unlimited contributions to a political party absent the aggregate limits. But, similarly, a donor today could contribute a massive sum exceeding $1 million to a party absent the aggregate limits: she would simply have to route the money through its three federal committees and 50 state committees. In 1975, the party in turn could have contributed $5,000 of this donation to the

donor's preferred House candidate[23] and made $10,000 in coordinated expenditures. 1974 Amendments, § 101(a), 88 Stat. at 1265-66. In 2013, the party could have contributed $5,000 of the donation to the donor's preferred House candidate and made $46,600 in coordinated expenditures. *See* FEC, *2013 Coordinated Party Expenditure Limits*, http://www.fec.gov/info/charts_441ad_2013.shtml (last visited July 19, 2013). Thus, although new contribution limits have been enacted post-*Buckley*, they have done little to block the circumvention that *Buckley* feared.

Finally, in a statement that flatly contradicts the holding of *Buckley*, appellants assert that this Court should only be concerned about circumvention when contributions to a party or PAC are "earmarked" for a particular candidate. Without this designation, appellants contend, a contribution funneled through a "pass-through" entity to a donor's candidate of choice "is non-cognizable as a conduit-contribution concern." RNC Br. 49.

Once more, appellants insinuate that the passage of new laws ameliorated the dangers of earmarked contributions. McCutcheon Br. 42-43 (suggesting that Congress specifically addressed problem of donors "channeling contributions through a PAC or political party committee"). But as the foregoing history of FECA confirms, the earmarking provision was

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[23] These are the coordinated party spending limits for House candidates in states with more than one Representative.

enacted in 1974. Thus, the *Buckley* Court was aware that the law regulated earmarked contributions, *see* 424 U.S. at 23-24, and yet still found that the $25,000 aggregate limit was necessary to forestall circumvention schemes involving the donation of "*unearmarked* contributions to political committees likely to contribute to [a donor's preferred] candidate." 424 U.S. at 38 (emphasis added). Directly at odds with appellants' suggestion, it was precisely the flow of *unearmarked* contributions that gave rise to circumvention concerns.

Further, *Buckley* is hardly the only Supreme Court precedent to have found that unearmarked contributions can pose a danger of circumvention. For example, the plaintiffs in *Colorado II* argued that the coordinated spending limits were overbroad because any circumvention through parties could be more narrowly addressed by application or enhancement of the earmarking rules. 533 U.S. at 462. While not disputing that the earmarking rules might prevent some measure of circumvention – namely, "the most clumsy attempts to pass contributions through to candidates" – the Supreme Court rejected the argument that this regulation obviated the government's concerns. *Id*. As the Court noted, "[plaintiffs'] position . . . ignores the practical difficulty of identifying and directly combating circumvention under actual political conditions." *Id*. Thus, far from endorsing appellants' claim that unearmarked contributions are by definition benign, the *Colorado II* Court rejected the

notion that "the earmarking provision [was] the outer limit of acceptable tailoring." *Id*.

In short, appellants have no basis for their misreading of *Buckley*, or for their contention that post-*Buckley* amendments addressed the concerns that the Court articulated there. An aggregate limit remains as relevant today as it was when *Buckley* was decided.

2. The $48,600 Aggregate Limit on Contributions to Candidates

As documented in Section I.C. *supra*, candidates reap significant rewards for contributing to, and serving as intermediaries for, other candidates and officeholders. Eliminate the aggregate limits, and donors seeking to purchase influence would use candidate campaign committees as yet another conduit for channeling donations to their favored candidates.

In addition, FECA permits candidates to transfer funds without limit to their political party, so contributions to individual candidates can easily be transferred to party coffers and aggregated for the benefit of a donor's preferred candidates. An influence-seeking donor would not need to communicate the details of the circumvention scheme every candidate to whom the donor contributes, but rather could simply direct recipients to transfer the donations to their party.

Nevertheless, appellants dispute that the $48,600 aggregate limit is supported by an anti-circumvention interest, alleging that "[*Buckley*] did not suggest a mechanism for how an unearmarked conduit-contribution might pass from an individual, through a candidate committee, to another intended, particular candidate." RNC Br. 54. But appellants are incorrect. *Buckley* stated broadly that the aggregate limit was necessary to avert circumvention schemes involving "unearmarked contributions to *political committees* likely to contribute to [a] candidate. . . ." 424 U.S. at 38 (emphasis added). The Court did not suggest that candidate committees were to be exempted from the category of "political committees" that could be used to circumvent the base limit, and appellants do not even attempt to provide any rationale for such an exemption.

Appellants also fail to acknowledge that *Buckley* can *only* be understood as upholding the challenged aggregate limit as applied to contributions to candidate committees. The $25,000 aggregate limit applied to contributions to party committees, PACs, and candidate committees and was upheld on its face by *Buckley*. If applying an aggregate limit to candidate contributions was unconstitutional, then the $25,000 limit would have been fatally overbroad. *See*, *e.g.*, RNC Br. 52 (arguing that if the $74,600 limit were invalidated as applied to federal party committees, the entire limit would be facially overbroad). At the least, Congress – or a court – would have to devise a narrower measure exempting contributions to candidate

committees from the limit. The *Buckley* Court could not have logically sustained the $25,000 limit without finding that it was constitutional to impose an aggregate cap on contributions to candidates.

Likewise unavailing is the argument that conduit schemes involving candidate committees cannot be corruptive, because no "'huge' contribution could be given to a candidate committee, so no 'massive' conduit-contribution could be channeled through one." RNC Br. 55. To be sure, individuals may only contribute $5,200 in an election cycle to a particular candidate, and candidate committees can only transfer $4,000 to another candidate committee per cycle. But appellants misunderstand the nature of the circumvention scheme. The danger is not that a donor will attempt to funnel a *single* large contribution through a candidate committee to her favored candidate, but rather that she will contribute *many* limited contributions to *many* candidate committees that will pass on these funds to her favored candidates. By blocking donors from routing hundreds of contributions to their preferred candidates through candidate committees, the aggregate limits are a crucial guard against political corruption.

B. The Aggregate Limits Directly Serve the Governmental Interest in Preventing Quid Pro Quo Corruption and the Appearance of Corruption.

Although *Buckley*'s discussion of the $25,000 aggregate limit focused primarily on its anti-circumvention purpose, the current aggregate limits also directly advance the goal of preventing actual and apparent corruption. As *Buckley* acknowledged, the government may legitimately prohibit not only quid pro quo corruption, but also practices that give rise to an appearance of such corruption. A single donor giving multi-million dollar sums to the candidates and committees of one party inarguably creates at least the appearance of impropriety.

Later cases have made the anti-corruption goals of the aggregate limits even more explicit. In *CalMed*, this Court explained that *Buckley* had upheld both the base limits on contributions to candidates and the $25,000 aggregate limit because "such limitations served the important governmental interests in preventing *the corruption or appearance of corruption* of the political process that might result if such contributions were not restrained." 453 U.S. at 194-95 & n.15 (emphasis added).

Most significantly, the Court in *McConnell* subsequently explained how large "soft money" contributions to federal and state party committees – contributions that are tantamount to the million-dollar sums in hard money that appellants propose here – create a

threat of actual and apparent corruption. Eliminating the aggregate limits would quickly result in a system of massive contributions to parties that would be indistinguishable from the system of "soft money" that was shut down by BCRA's enactment in 2002. *See* 540 U.S. at 144-45.

Appellants counter that "the anti-*corruption* interest is not directly implicated with contributions to national party committees," RNC Br. 25, but this theory was rejected in *McConnell*. There, this Court recognized that contributions to a candidate's party could create a sense of obligation no less than a direct contribution to the candidate himself, 540 U.S. at 144-45, and noted that "[t]his is particularly true of contributions to national parties, with which federal candidates and officeholders enjoy a special relationship and unity of interest." *Id*. at 145. Because of this "close affiliation," the national parties are placed "in a unique position, 'whether they like it or not,' to serve 'as agents for spending on behalf of those who seek to produce obligated officeholders.'" *Id.* (quoting *Colorado II*, 533 U.S. at 452). After surveying the voluminous record compiled by Congress in support of the soft money limits, the *McConnell* Court concluded that "there is substantial evidence to support Congress' determination that large soft-money contributions to national political parties give rise to corruption and the appearance of corruption." *Id*. at 154.

McConnell also catalogued the dangers posed by the widespread practice of officeholders soliciting soft money for other candidates and their party's federal

and state committees. *See* 540 U.S. at 181-84; *see also id*. at 308 (Kennedy, J., concurring). The majority noted that "[l]arge soft-money donations at a candidate's or officeholder's behest give rise to all of the same corruption concerns posed by contributions made directly to the candidate or officeholder." *Id*. at 182. Justice Kennedy further expounded in his concurrence:

> The making of a solicited gift is a *quid* both to the recipient of the money and to the one who solicits the payment (by granting his request). Rules governing candidates' or officeholders' solicitation of contributions are, therefore, regulations governing their receipt of *quids*. *This regulation fits under Buckley's anticorruption rationale*.

Id. at 308 (Kennedy, J., concurring) (emphasis added).

If the aggregate limits were to be invalidated, the soft money abuses deemed corruptive in *McConnell* would quickly resurface. Invalidating the aggregate limits would allow a single individual to donate over $1 million to a political party's federal and state party committees in a two-year election cycle. The federal and state party committees could transfer such contributions internally without restriction, and aggregate the contributions in the account of one recipient committee. There would be no functional difference between the massive sum of hard money contributions that appellants wish to legalize here and the soft money contributions outlawed by BCRA.

Further, as discussed in Section I.C. *supra*, officeholders gain power and influence on the Hill and in their parties by soliciting contributions for other candidates and their parties. In the absence of the aggregate limits, officeholders and candidates have every incentive to make solicitations for huge aggregate amounts – regardless of whether the money was ultimately used to support their own campaign, or the campaigns of others. Just as this Court found that solicitations by candidates for huge soft money contributions pose a danger of corruption or the appearance of corruption, so too would candidates' solicitation of donors for possibly millions of dollars in hard money contributions give rise to corruption and the appearance of corruption.

Contrary to appellants' suggestion, *Citizens United v. FEC*, 558 U.S. 310 (2010), did not question *McConnell*'s conception of corruption in connection to the soft money restrictions of Title I of BCRA. RNC Br. 37. *Citizens United* dealt with the entirely distinct question of whether Congress may regulate independent expenditures by corporations. *See id.* at 359. And this Court recently reaffirmed *McConnell*'s holding on Title I, when, after *Citizens United*, it summarily affirmed a three-judge district court decision that sustained BCRA's restrictions on party soft money. *RNC v. FEC*, 698 F. Supp. 2d 150 (D.D.C.), *aff'd*, 130 S. Ct. 3544 (2010) (mem.).

Moreover, although *Buckley* did not specifically consider limits on contributions to political parties, its analysis of corruption supports their constitutionality

and is consistent with *McConnell*. The *Buckley* Court emphasized that "[o]f almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the *appearance of corruption* stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions." 424 U.S. at 27 (emphasis added). *See also Citizens United*, 558 U.S. at 357 ("The *Buckley* Court . . . sustained limits on direct contributions in order to ensure against the reality or *appearance* of corruption.") (emphasis added). *Buckley* made clear that the government had a legitimate interest not only in outlawing "the most blatant and specific attempts of those with money to influence governmental action" but also in preserving public confidence in government by prohibiting practices that created an appearance of corruption. 424 U.S. at 27-28. Appellants all but ignore this fundamental aspect of the concept of corruption articulated in *Buckley*. Elimination of the aggregate limits would permit a single donor to contribute over $1 million to her favored party and over $2 million to that party's candidates in an election cycle. Appellants cannot credibly deny that this quantum of giving would not create the appearance that the party's candidates and officeholders were indebted to such donor – and unsurprisingly, appellants do not even attempt such a denial.

Appellants also advance a more targeted attack on the $74,600 aggregate limit, challenging it as applied to only the national party committees. *See* RNC Br. 24. Even this fallback position, however, would

allow a single individual to donate, and an officeholder to solicit, a total of $194,400 to the three national committees of a major political party in a two-year election cycle. And in addition to this $194,800, appellants propose that a donor also be permitted to meet his $48,600 sub-limit for contributions to state party committees and PACs, *see* RNC Br. 52-53, bringing the grand total of potential contributions to party committees to *$243,000*.[24] Although appellant McCutcheon claims that *Buckley*'s approval of the aggregate limit was motivated only by the fear of "*unlimited* contributions" to political parties, McCutcheon Br. 41, the text of the decision provides no support for this proposition. *Compare* 424 U.S. at 38 (expressing concern about "huge contributions" funneled through political parties to candidates).

[24] Appellants' final attempt to deny the corruptive potential of a $243,000 contribution to a political party is to assert that the Court cannot take into account the ability of party committees to make unlimited internal transfers when assessing the need for aggregate limits. According to appellants, Congress passed the intra-party transfer provision because it believed that there was "no conduit-contribution risk in transfers between federal committees of the same political party." RNC Br. 20. But appellants' theory about Congress' intent cannot be correct. The $25,000 aggregate limit was enacted as part of the 1974 amendments to FECA. The intra-party transfer provision was only first enacted in 1976. *See supra* Section II.A.1.a. Congress thus passed the transfer provision *after the enactment of the aggregate limit and in reliance on its existence*. Congress could not have considered the corruptive risk that unlimited intra-party transfers might pose in the absence of an aggregate limit.

Further, Supreme Court precedent on this subject indicates that sums as small as *$20,000* can be problematic when routed to candidates in addition to the base limit amount. *See, e.g.*, *Colorado II*, 533 U.S. at 457-58 (noting that donors could circumvent the base limits by giving, in addition to the base limits, $20,000 each year to a national party committee supporting the candidate). Clearly a contribution of $243,000 to a single party in an election cycle exceeds this standard.

Eliminating the aggregate limits would thus herald the return to a pre-*McConnell* era when enormous contributions to parties and candidates were freely solicited and often given by donors explicitly seeking favors from elected officials.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the district court.

Respectfully submitted,

TREVOR POTTER
Counsel of Record
J. GERALD HEBERT
TARA MALLOY
PAUL S. RYAN
MEGAN MCALLEN
THE CAMPAIGN LEGAL CENTER
215 E Street, N.E.
Washington, D.C. 20002
(202) 736-2200
tpotter@campaignlegalcenter.org

Counsel for Amici Curiae

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APPENDIX A
Description of the *Amici Curiae*

AARP is a nonprofit, nonpartisan organization with a membership that helps people turn their goals and dreams into real possibilities, strengthens communities and fights for issues that matter most to families, such as healthcare, employment and income security, retirement planning, affordable utilities and protection from financial abuse. In particular, AARP engages in legal and legislative advocacy to secure public policies of benefit to older Americans. AARP recognizes the importance of federal regulation of campaign finances, so that all members of the electorate are able to express their preferences and have a realistic chance to be heard by candidates and public officials. AARP does not endorse candidates for public office or make contributions to political campaigns or candidates.

Asian Americans Advancing Justice (Advancing Justice) promotes a fair and equitable society for all by working for civil and human rights and empowering Asian Americans and Pacific Islanders and other underserved communities. Advancing Justice comprises four independent affiliates: Asian Americans Advancing Justice-AAJC, Asian Americans Advancing Justice-Asian Law Caucus, Asian Americans Advancing Justice-Chicago and Asian Americans Advancing Justice-Los Angeles. Advancing Justice has advocated for Asian Americans' equal access to the political process through litigation, public policy advocacy, community education and community mobilization. Advancing Justice sees campaign donations as one

of the ways in which Asian Americans can participate in the political process and have their voices heard.

Founded in 1974, the **Asian American Legal Defense and Education Fund (AALDEF)** is a national organization that protects and promotes the civil rights of Asian Americans. By combining litigation, advocacy, education, and organizing, AALDEF works with Asian American communities across the country to secure human rights for all.

The Campaign Legal Center is a nonprofit, nonpartisan organization created to represent the public perspective in administrative and legal proceedings interpreting and enforcing campaign finance and other election laws throughout the nation. It participates in rulemaking and advisory opinion proceedings at the FEC to ensure that the agency is properly enforcing federal election laws, and files complaints with the FEC requesting that enforcement actions be taken against individuals or organizations that violate the law.

Citizens for Responsibility and Ethics in Washington (CREW) is a nonprofit, nonpartisan corporation organized under section 501(c)(3) of the Internal Revenue Code. Through a combined approach of research, advocacy, public education, and litigation, CREW seeks to protect the rights of citizens to be informed about the activities of government officials and to ensure the integrity of those officials. Among its principal activities, CREW monitors the activities of members of Congress and, where appropriate, files

ethics complaints with Congress. CREW also prepared written reports, including a yearly report it disseminates publicly about the most unethical members of Congress. CREW also has filed lawsuits seeking to stem the flow of anonymous money into our electoral system.

Common Cause is a nonprofit, nonpartisan citizens' organization with approximately 400,000 members and supporters nationwide. Common Cause has long been concerned with the growing problem of money in the federal political process, and has publicly advocated for appropriate regulation in order to restore integrity to the electoral system. Common Cause was a strong advocate for congressional enactment of the Bipartisan Campaign Reform Act of 2002.

The League of Women Voters of the United States is a nonpartisan, community based organization that encourages the informed and active participation of citizens in government and influences public policy through education and advocacy. Founded in 1920 as an outgrowth of the struggle to win voting rights for women, the League is organized in approximately 800 communities and in every state, with more than 140,000 members and supporters nationwide. One of the League's primary goals is to promote an open governmental system that is representative, accountable, and responsive and that assures opportunities for citizen participation in government decision making. To further this goal, the League has been a leader in seeking campaign finance reform at

the state, local, and federal levels for more than three decades.

Progressives United is a nonprofit, nonpartisan organization created to educate policymakers, opinion leaders and the public about the corrupting influence of unlimited and corporate money in our political system. Progressives United was founded by former U.S. Senator Russ Feingold, co-author of the 2002 Bipartisan Campaign Reform Act.

Public Campaign is a nonprofit, nonpartisan organization dedicated to substantial reform of the current campaign finance system. Since 1997, Public Campaign has built a network of national and state-based efforts that aim to dramatically reduce the role of powerful special interest money in American politics and equally amplify the voices of all Americans in the electoral process. In addition to work with national reform groups, Public Campaign also works with a broad range of non-reform partners, including local community groups and national membership organizations around the country.