No. 12-536

In The
Supreme Court of the United States

Shaun McCutcheon and Republican National Committee, *Plaintiffs-Appellants*

v.

Federal Election Commission

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

Brief Opposing Motion to Dismiss or Affirm

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The Questions Presented Are Substantial[1]

I.

The Biennial Limit on Contributions to Non-Candidate Committees Is Unconstitutional for Lacking a Cognizable Interest as Applied to Contributions to National-Party Committees.

What was FEC[2] required to show to meet its burden of proving a cognizable interest supporting the biennial limit as applied to national-party committees? It needed to show a *specific* risk of *circumvention*. *See Buckley v. Valeo*, 424 U.S. 1, 38 (1976) (stating interest as "evasion of the [base] contribution limitation" and positing a specific mechanism under now-altered law). J.S.7 n.2, 9, 17.

FEC could not prove a *specific* circumvention risk with *generalized*, speculative allegations of possible circumvention, nor could it prove an anti-*circumvention* interest by relying on an inapplicable anti-*corruption* (or anti-corruption-*appearance*) interest, J.S.15-16, or with non-cognizable gratitude, access, influence, or equalizing "interests," as the lower court attempted, J.S.16-17, 24-28.

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[1] The Jurisdictional Statement established that all questions presented are substantial. Given word limits, Appellants here focus on their challenges to the biennial limits on contributions to national-party committees and candidates.

[2] Appellants employ abbreviations established in their Jurisdictional Statement ("J.S.") and FEC's Motion to Dismiss or Affirm ("Mot.").

Rather, FEC needed to show a cognizable risk that a cognizable *conduit-contribution* to a candidate could *actually result* from an individual's unearmarked, base-limit contribution to a national-party committee, given proper pro-rata attribution, J.S.22-23, and the anti-circumvention prophylaxes, including

- affiliation rules preventing political-committee proliferation, J.S.13-14, 18,
- base limits on contributions to and by candidates, political-party committees, and PACs, J.S.12-13, 18-20, and
- earmarking rules, J.S.20, 26-28.

Were the FEC able to prove that *some* attributable conduit-contribution could make it from an individual to a candidate through a base-level contribution to a national-party committee, FEC would need to show that the conduit-contribution would be *cognizable*, i.e., that it would be "'large'" enough (based on a pro-rata share of permissible contributions to and by an alleged conduit entity) to trigger the anti-quid-pro-quo-corruption interest, J.S.17 (quoting *Buckley*, 424 U.S. at 26),[3] and sufficient to justify the burden on First Amendment rights. Under *Buckley*'s analysis, individuals must be able to get "massive" contributions to specific candidates by "huge" contributions to political parties, 424 U.S. at 38, which FEC has not shown is possible after the post-*Buckley* FECA amendments, J.S.17-19.[4]

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[3] *See also Citizens United v. FEC*, 130 S.Ct. 876, 908 (2010) ("large contributions" trigger quid-pro-quo-corruption risk).

[4] Given FEC's failure to prove a *specific* conduit-contribution risk, the facts that there are more PACs today and

(continued...)

The post-*Buckley* base limits on contributions to national-party committees already address the anti-*circumvention* interest because, since the contributions are not to a *candidate*, they don't pose a quid-pro-quo-corruption risk, J.S.7 n.2, and so are necessarily based on the anti-circumvention interest. J.S.15-16. The Conference Report on the post-*Buckley* FECA amendments expressly says that the new base limits on contributions to non-candidate committees "'restrict the opportunity to circumvent the $1,000 and $5,000 limits on contributions to candidates.'" J.S.13 (citation omitted). Consequently, in enacting the base limits, Congress made the determination that contributions to parties at these levels satisfied its interest in preventing circumvention, J.S.18-19,[5] i.e., "massive" conduit-contributions could no longer travel to a candidate by reason of "huge" contributions to party committees.

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[4] (...continued)
that some identify favored candidates online, Mot.12, prove nothing. Anyway, as applied here, there are not many more *national-party* committees, and parties have always openly favored their own candidates, despite which *Buckley* required that contributions to parties be "huge" to pose a possible circumvention risk, 424 U.S. at 38.

[5] FEC argues that Congress's establishment of a base limit reflects no "implicit determination that contributions below those limits pose no [circumvention] risk"; rather, those "limits strike a balance." Mot.12-13. But the Conference Report expressly said that the base limits were to "restrict . . . circumvention." By setting a base limit, Congress asserted its anti-circumvention interest only to that point, making the interest non-cognizable beyond that point. A non-cognizable interest is correctly considered as no interest, so doing an action posing no cognizable risk many times creates no risk. *Compare* Mot.12 *with* J.S.19.

So how does FEC attempt to meet this burden of proving a specific circumvention risk? How does it try to prove a cognizable risk that a cognizable conduit-contribution can actually make it from a contributor through a national-party committee to an intended candidate, given base limits, pro-rata attribution, and other prophylaxes, and absent earmarking?

FEC attempts to meet this burden by positing "[a] particularly effective circumvention technique." Mot. 11. But as shall be shown, FEC's posited mechanism is at odds with this Court's posited mechanism in *Buckley* and so fails.

FEC first acknowledges that though the "[biennial] limit was previously the only check on '*huge* contributions' to a single political committee or political party, FECA now contains specific limits that *more directly address that concern*." Mot.11 (emphasis added). Despite these FEC concessions that (a) the posited circumvention mechanism that this Court identified in *Buckley*, 424 U.S. 1, required "huge" contributions to a political party, *id.* at 38, (b) base limits eliminate such "huge" contributions, and (c) base limits are better tailored for this purpose than biennial limits, FEC posits that a "[a] particularly effective circumvention technique" identified in *Buckley* remains—"donat[ing] money to many different entities, each of which could then make its own contribution to the candidate." Mot.11-12.

But FEC's description of *Buckley*'s suggested "circumvention technique" is wrong for ignoring what was *central* to *Buckley*'s suggested circumvention technique—the ability to "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 (emphasis added). FEC's acknowledgment that "huge contributions" to a party are no longer possible because of post-*Buckley* "specific limits" (Mot.11) is incompatible with its claim that *Buckley*'s suggested "circumvention technique" survives as applied to national-party committees.

FEC fails to discuss the actual *operation* of those "specific limits," enacted to restrict circumvention, which fixed the problems that *Buckley* identified and thereby eliminated any possible effectiveness of that circumvention technique, J.S.12-14. Consequently, FEC makes no effort to show what it must prove to support the biennial limit as applied to national-party committees—a *specific* circumvention risk.[6] FEC does argue that "multiple contributions create the risk that an individual . . . can circumvent the base limits by channeling his money in such a way that a particular target is likely to receive much more than the base limits." Mot.13. In support, FEC points to *Buckley*'s posited mechanism of "contributing to political committees likely to contribute to a particular candidate." Mot.13. But this ignores *Buckley*'s emphasis on "massive" conduit-contributions and is a mere generalized assertion of a circumvention risk. FEC again fails to show *how* an unearmarked, base-level contribution to a

[6] Given FEC's failure to show a cognizable risk that a cognizable *conduit-contribution* to a candidate could actually result from an individual's unearmarked, base-limit contribution to a national-party committee, there is nothing to trigger any *anti-corruption* interest because that interest involves only the quid-pro-quo-corruption risk, which is solely about contributions *to candidates*. J.S.15-16.

national-party committee can make it to a particular candidate as a conduit-contribution, given pro-rata attribution, earmarking rules, and the other prophylaxes all in place absent the biennial limits. FEC's mere recitation of "channeling" and "transfers" without more, Mot.13, fails its burden in light of the post-*Buckley* FECA amendments.

Failing to show what it must—a cognizable conduit-contribution risk—FEC makes tangential arguments.[7]

FEC argues that the biennial limits, as applied, are justified by the "anti-corruption purpose" of preventing "'improper influence' . . . over the party's elected officials" by "'an individual [who] might contribute $3.5 million to one party, and its affiliated committees in a single election cycle.'" Mot.13 (citations omitted). This is wrong on multiple levels. FEC must show an anti-*circumvention* interest, not an anti-*corruption* interest, *Buckley*, 424 U.S. at 38 ("evasion"); FEC's switch to a corruption theory virtually concedes that it has failed to prove a conduit-contribution risk. *Buckley*'s concern was about "massive" *conduit-contributions* getting through parties (from "huge" contributions to a party) to candidates, not some vague "influence." *Id.* And "influence" is a forbidden theory of "corruption" (or its appearance). "When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption." *Citizens United*, 130 S.Ct. at 909. "Reliance on a 'generic favoritism or influence theory . . . is at odds with standard First Amendment analyses because it is unbounded and sus-

[7] FEC's failure to show a "circumvention mechanism," Mot.11-12, makes FEC's tangential arguments insufficient, though some are addressed.

ceptible to no limiting principle.'" *Id.* at 910 (citation omitted). FEC's implicit refusal here to be governed by *Citizens United* is made express when FEC asserts that "Appellants' reliance on *Citizens United* [for the legal proposition that cognizable corruption is limited to quid pro quo] is misplaced." Mot.17 n.2. FEC's argument demonstrates—without more required—that this question is substantial and should be fully briefed and decided, in part to clarify FEC's position and for this Court to reaffirm its *Citizens United* holding in this context.

FEC argues that a plurality and concurrence in *California Medical Association v. FEC*, 453 U.S. 182 (1981) ("*CMA*"), recognized that unlimited donations to a PAC could allow circumvention of the base and biennial limits. Mot.14. But FEC misses the very point of the case, i.e., that the base limit was enacted and upheld precisely to *foreclose* that circumvention. J.S.12-14. The base limit remaining in place, the circumvention risk of which *CMA* spoke remains foreclosed by that base limit.[8] The same is true of FEC's argument that *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) ("*Colorado-II*"), recognized a circumvention risk, Mot.18, while ignoring the fact that the case upheld a limit on party expenditures to *foreclose* that circumvention. J.S.23 n.8.

FEC disputes Appellant's use of "prophylaxis-on-prophylaxis" (from *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 479 (2007)) to describe FECA's anti-circum-

[8] The biennial limit was not at issue in *CMA*, so FEC's argument that "a majority" "recognized" that base and biennial limits can coexist is at best dicta. But FEC must prove each limit is supported by a cognizable interest. FEC's burden is not foreclosed by non-court-opinion dictum.

vention scheme. Mot.15. Appellants have already addressed the fact that such a redundant approach is foreclosed by the tailoring requirement under *either* strict or intermediate scrutiny, J.S.17, which FEC fails to note. Under either scrutiny, if one prophylaxis addresses an asserted interest, that interest may not be recycled to justify another prophylaxis. J.S.17.

FEC argues that the biennial limits aren't really "prophylaxis-on-prophylaxis" because the base limits aren't prophylactic. Mot.16. *Citizens United* said otherwise: "[R]estrictions on direct contributions are preventative, because few if any contributions to candidates will involve *quid pro quo* arrangements." *Citizens United*,130 S.Ct. at 908.

And FEC's resort to a broadly conceived "appearance of corruption" interest, Mot.16 (in a curious argument that FECA does not contain layers of prophylaxes to prevent circumvention), is another rejection of *Citizen United*'s restriction of cognizable "corruption" to quid pro quo—which necessarily requires that any cognizable corruption-appearance interest must entail the appearance of quid-pro-quo corruption (which is not really at issue here anyway because an anti-circumvention interest is required to support biennial limits).

Buckley's statement that the biennial limit was a "corollary" of the sole base contribution limit then in effect, 424 U.S. at 38, doesn't help FEC, Mot.17, because the statement applied to a now-altered FECA scheme, J.S.12-14. Since the "ceiling" in *Buckley* actually was a *base* limit for contributions to non-candidate committees, J.S.7, it was a corollary of a base limit in that respect. But post-*Buckley* FECA amendments changed that. J.S.12-14.

Nonetheless, *Buckley* yet required a mechanism for "massive" conduit-contributions. That mechanism was eliminated by the post-*Buckley* FECA amendments, 424 U.S. at 38, so FEC must yet prove such a mechanism.

FEC argues that *Buckley* recognized a circumvention risk from "unearmarked contributions." Mot.17-18. But that was based on a posited circumvention mechanism allowing "massive" conduit-contributions to make it to candidates under now-altered FECA provisions. J.S.9-11. And the recognition in *Colorado-II*, 533 U.S. 431, that earmarking was not the limit of the government's permissible anti-circumvention measures, Mot.18, does not eliminate the fact that FECA *has* many anti-circumvention measures (including the party-expenditure limit upheld in *Colorado-II*, J.S.23 n.8), and FEC has not proved that the biennial limits are supported by an anti-circumvention interest after the operation of those other prophylaxes.

Appellants argued that the biennial limit really relies on a forbidden equalizing interest. J.S.24. FEC claims "*Buckley* recognized that contribution limits . . . are not speech-equalizing measures." Mot.18 (citing 424 U.S. at 25-26 & n.26). *Buckley* recorded the government's asserted equalizing interest in support of the $1,000 base limit on contributions to candidates. This Court later rejected that interest, 424 U.S. at 48-49, but found it "unnecessary" to consider the asserted equalizing interest because the anti-corruption interest was sufficient to support the base limit, *id.* at 26. *Buckley* did note that "[c]ontribution limitations *alone* would not reduce the greater potential voice of affluent persons . . . who would remain free to spend unlimited sums directly to promote candidates," *id.* at 26 n.26

(emphasis added), but that does not say that contribution limits cannot be employed to pursue the illegitimate equalizing interest, as the government asserted it was doing. Rather, *Buckley* merely said that the base limit "alone" would not fully achieve the leveling objective. But where, as here, a limit is not justified by any anti-corruption or anti-circumvention interest, that forbidden equalizing interest stands exposed and must be rejected.

FEC argues that strict scrutiny is inapplicable because *Buckley* recognized that the old biennial ceiling "'does impose an ultimate restriction upon the number of candidates and committees with which an individual may associate himself by means of financial support,' but did not apply strict scrutiny." Mot.10 (quoting 424 U.S. at 38). *Buckley* did not state what scrutiny it applied, and FEC's assumption that it applied scrutiny applicable to contributions *assumes* the answer to whether biennial limits should be treated more like expenditures than contributions for scrutiny purposes. *Buckley*'s observation of the association-limiting effect of the ceiling does not address what scrutiny ought to apply, but its observation that the ceiling *does* limit association counters any notion that it does *not*, because the true focus is on how many recipients one may associate with at the *full* base-contribution level, not at de minimis amounts. Anyway, the level of scrutiny ought to be higher than that for base-level contributions because the biennial limit is different in kind and more serious. J.S.8-9. But ultimately it doesn't matter which scrutiny applies because FEC fails to show the necessary anti-circumvention interest, required under any scrutiny. J.S.5-9.

Notably, FEC *abandons* arguments central to the lower-court opinion, including the court's

- posited interest based on a contributor's ability to "give half-a-million dollars in a single check to a joint fundraising committee," amounting to an equalizing interest, J.S.26 (citation omitted),
- wreath-of-gratitude interest, J.S.26 (citation omitted), and
- speculative "mechanism for circumvention rel[ying] on individuals violating the [earmarking] law," J.S.26-27.

Being abandoned, these should not be considered. *Cf. Citizens United*, 130 S.Ct. at 908, 912 (FEC abandoned anti-distortion-interest argument).

In sum, FEC fails to show that *Buckley* forecloses this as-applied challenge or that—given *Buckley*'s analysis and FEC's failure to show a cognizable circumvention risk from allowing base-level contributions to national-party committees without biennial limits—this question is insubstantial.

II.

The Biennial Limit on Contributions to Candidates Is Unconstitutional for Lacking a Constitutionally Cognizable Interest.

FEC had to show a *specific* risk of *circumvention* to support the biennial limit on contributions to candidates. *See* Part I. The court below ignored this challenge, despite its unique nature, the important distinctions between the two claims here, the fact that the two biennial limits don't rise or fall together, and the fact that *Buckley* didn't even posit a mechanism by which contributions to candidates could pose a circumvention risk by allowing "massive" conduit-contribu-

tions to reach candidates as a result of base-level contributions to candidates. J.S.5, 32-37.

FEC claims there is a conduit-risk, but fails to prove a specific mechanism, given the existing prophylaxes absent the biennial limits. The core of FEC's argument is that "a contributor can give [$2,500 per election] each to a number of candidates who . . . can give to one candidate (or . . . party)." Mot.20. That is true but fails FEC's burden to show a specific, cognizable conduit-contribution risk. Applying *Buckley*'s analysis, $2,500 is not a "huge" contribution to put in the purported conduit, candidates are not proven to be "likely" to give to certain other candidates, there is no proliferation of candidate committees, and earmarking is illegal, so there is no cognizable risk that such modest base-level contributions permit individuals to "contribute massive amounts of money to a particular candidate through the use of unearmarked contributions" to other candidates. 424 U.S. at 38. *See* J.S.33-34. This is especially true given the necessary *pro-rata attribution* of contributions to and by candidates, which FEC studiously avoids in its brief. Congress already asserted its anti-circumvention interest to the extent of a $2,000 (per election) limit on contributions from one candidate committee to another. J.S.33. FEC's reference to a "tally" system once used by a state party not involved here, Mot.20, proves nothing. There is no evidence here that any candidate to which Mr. McCutcheon contributes makes contributions to any other candidate or to any political party, let alone one that keeps such a "tally." And to the extent such a system relies on forbidden "influence" and "gratitude" theories of corruption, it would be non-cognizable.

In sum, no proven anti-circumvention interest justifies a biennial restriction. FEC fails to show that *Buckley* forecloses this challenge or that the issue is insubstantial.

Conclusion

This Court should note probable jurisdiction.

Respectfully submitted,

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