No. 12-536

IN THE

Supreme Court of the United States

SHAUN MCCUTCHEON AND
FEDERAL ELECTION COMMITTEE,
Plaintiffs-Appellants,

v.

FEDERAL ELECTION COMMISSION,
Defendant-Appellee.

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

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF APPELLANTS

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INTEREST OF THE *AMICUS CURIAE* [1]

The American Civil Rights Union is a non-partisan, non-profit, 501(c)(3), legal/educational policy organization dedicated to defending all of our constitutional rights, not just those that might be politically correct or fit a particular ideology. It was founded in 1998 by long time policy advisor to President Reagan, and the architect of modern welfare reform, Robert B. Carleson. Carleson served as President Reagan's chief domestic policy advisor on federalism, and originated the concept of ending the federal entitlement to welfare by giving the responsibility for those programs to the states through finite block grants. Since its founding, the ACRU has filed *amicus curiae* briefs on constitutional law issues in cases nationwide.

Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General, Edwin Meese III; former Assistant Attorney General for Civil Rights, William Bradford Reynolds; former Assistant Attorney General for the Office of Legal Counsel, Charles J. Cooper; John M. Olin Distinguished Professor of Economics at George Mason University, Walter E. Williams; former Ambassador Curtin Winsor, Jr.; former Assistant Attorney General for Justice Programs, Richard

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[1] Peter J. Ferrara authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief. All parties were timely notified and have consented to the filing of this brief.

Bender Abell and former Ohio Secretary of State J. Kenneth Blackwell.

This case is of interest to the ACRU because we are concerned to protect the constitutional rights of all Americans, regardless of political correctness, including the First Amendment Right to Freedom of Speech.

STATEMENT OF THE CASE

Campaign finance law includes "base limits" restricting direct, total contributions to individual candidates, political parties, and PACs, 2 U.S.C. 441a(a)(1), and "aggregate limits" limiting total contributions combined to each and all of these entities in each election cycle, 2 U.S.C. 441a(a)(3). *See* MB-App. 17a (FEC, *Contribution Limits for 2013-2014*).

The base limits were upheld as constitutional in *Buckley v. Valeo*, 424 U.S. 1 (1976) based on an anti-corruption interest in justification for the restriction. The aggregate limits were upheld in order to prevent evasion of the base limits, through contributions to parties and committees that the contributor knows or believes would be passed through to the contributor's favored candidate. The aggregate limits were upheld based on a different, anti-circumvention interest to justify the restriction.

Plaintiff McCutcheon filed suit challenging the aggregate limit (currently $74,600) on contributions to non-candidate committees, 2 U.S.C. 441a(a)(3)(B), as unconstitutional. McCutcheon wanted to con-

tribute $25,000 each to the Republican National Committee ("RNC"), National Republican Senatorial Committee ("NRSC"), and National Republican Congressional Committee ("NRCC") during the 2012 election cycle, but was prohibited from doing so by the aggregate limit.

McCutcheon's suit also challenged the aggregate limit (currently $48,000) on contributions to candidate committees, 2 U.S.C. 441a(a)(3)(A), as unconstitutional. At the time of suit, McCutcheon had contributed $33,088 to federal candidates and wanted to contribute another $21,312 to such candidates, but was prohibited from doing so by the aggregate limit.

Plaintiff Republican National Committee (RNC) is also a party to the suit, and challenges the aggregate limit on contributions to non-candidate committees as well. The RNC wants to receive such contributions but is prohibited from doing so by the aggregate limit.

Plaintiff-Appellants desire to engage in such actions in the future, if they are not prohibited from doing so by the aggregate limits. But if they are not relieved from the limits, their rights to freedom of speech and association will be abridged, which would subject them to irreparable harm.

Plaintiff-Appellants filed their Verified Complaint in the United States District Court for the District of Columbia on June 22, 2012. On September 28, the District Court granted the FEC's motion to dismiss. JS-App. 1a, 17a. Plaintiff-

Appellants noticed this appeal on October 10. JS-App. 18a.

SUMMARY OF ARGUMENT

The liberty interests at issue in this case include the core First Amendment activity – political speech – and the fundamental liberty interest of freedom of association. These core, fundamental, liberty interests of the First Amendment are entitled in our law to the highest possible protection – strict scrutiny.

Under strict scrutiny, restrictions on political speech and political association can only be allowed where they are justified by a compelling state interest, and only where the restrictions are narrowly tailored to serve that interest.

This Court has held that the only compelling state interest that can justify infringing such basic, core liberties is to prevent *quid-pro-quo* corruption, trading campaign contributions for political favors. That is the compelling interest that served to justify the base limits on campaign contributions.

But the aggregate limits serve no anti-corruption interest beyond what is already served by the base limits, and no other compelling state interest that can justify the infringement of these most basic, core, Constitutional liberties. That applies to the $74,600 aggregate limit on contributions to non-candidate committees. It applies to the $48,600 aggregate limit on contributions to state and local political parties and

PACs. And it applies to the $48,600 aggregate contribution to candidate committees.

We respectfully submit that this Court should consequently reverse the court below, and strike down all these aggregate limits as unconstitutional.

ARGUMENT

I. THE AGGREGATE LIMITS IN TODAY'S FEDERAL CAMPAIGN FINANCE LAW UNCONSTITUTIONALLY VIOLATE FREEDOM OF POLITICAL SPEECH AND FREEDOM OF POLITICAL ASSOCIATION.

The liberty interest at issue in this case is the core First Amendment activity – political speech. Contributors speak in the contributions they make, and those contributions are used to finance the political speech of a political campaign. As the Court said in *Buckley*, "[C]ontribution and expenditure limitations . . . [affect] the most fundamental First Amendment activities." 424 U.S. at 14.

This case also involves the fundamental liberty interest of freedom of association. Contributors associate themselves with candidates, campaigns, and political parties through political contributions such as those at issue in this case. Such freedom of political association, in particular, is another core First Amendment activity. As this Court also said in *Buckley*, "[T]he First . . . Amendment[] guarantees freedom to associate with others for the common

advancement of political beliefs and ideas, a freedom that encompasses (t)he right to associate with the political party of one's choice." *Id.* at 15 (citations and quotation marks omitted).

This Court in *Buckley* added, "Making a contribution, like joining a political party, serves to affiliate a person with a candidate [or a political party]. . . . [I]t enables like-minded persons to pool their resources in furtherance of common political goals." *Id.* at 22.

The freedom to engage in core political speech, not pornography or nude dancing, has been recognized since the Founding as a fundamental foundation of our democracy, and the freedom of political association, forming political parties and campaigns, is just as important.

These core, fundamental, liberty interests of the First Amendment are consequently entitled in our law to the highest possible protection – strict scrutiny. *E.g., Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 300(1981) ("to limit the right of association places an impermissible restraint on . . . expression."); *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011); *Davis v. FEC*, 554 U.S. 724,744 (2008); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986)("*MCFL*"); *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995); *Boos v. Barry*, 485 U.S. 312 (1988); *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652 (2007); *FEC v. National*

Conservative Political Action Committee, 470 U.S. 480 (1985)("*NCPAC*"); *Williams v. Rhodes*, 393 U.S. 23 (1968).

Can we possibly contemplate in these United States downgrading the constitutional protection for political speech below the highest level accorded to some other rights? Are we about to the point where we accord higher protection to pornography, nude dancing, and abortion than to the core political speech that has always been the foundation of our democracy?

Under strict scrutiny, restrictions on political speech and political association can only be allowed where they are justified by a compelling state interest, and only where the restrictions are narrowly tailored to serve that interest. *E.g., Buckley; MCFL; NCPAC; Bellotti; Wisconsin Right to Life.*

The base limits on contributions to political campaigns have been justified by a compelling state interest in preventing corruption. As this Court said in *NCPAC*, "[P]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances." 470 U.S. at 496-497.

A. The $74,600 Aggregate Limit on Contributions to Non-Candidate Committees Is Unconstitutional.

Base contribution limits already apply to individual contributions to national parties, state and

local parties, and PACs. They are legally justified on a *quid-pro-quo* anti-corruption interest. *Buckley; NCPAC; Citizens United v. FEC*, 130 S. Ct. 876 (2010). Such *quid-pro-quo* corruption arises when elected officials provide political favors for campaign contributions. *NCPAC; Citizens United.*

But the aggregate limits on the non-candidate committees serve no anti-corruption interest. Such a corruption interest can only arise in relation to contributions to a particular candidate, who would then be in position to provide political favors in return once elected. *NCPAC*, 470 U.S. at 497; *Buckley*, 424 U.S. at 26; *EMILY's List v. FEC*, 581 F.3d 1, 6 (D.C.Cir. 2009). *See also, FEC v. Colorado Republican Federal Campaign Committee*, 518 U.S. 604 (1996). PACs, state and local parties, and even national political parties do not hold any offices they can use to provide political favors in return.

Moreover, without the aggregate limits, the base limits would remain, preventing any conceivable, compelling, anti-corruption interest. In today's modern framework of campaign finance restrictions, there is no compelling anti-circumvention interest that can be served by the aggregate limits in addition to the base limits in regard to non-candidate committees. Consequently, the restrictions on political speech and political association involved in the aggregate limits on contributions to non-candidate committees are unjustified and unconstitutional.

B. The Additional $48,600 Aggregate Limit on Contributions to State Party Committees and PACs Is Unconstitutional.

Besides the $74,600 aggregate limit on contributions to non-candidate committees, current campaign finance law provides for an additional $48,600 aggregate limit on contributions to state party committees and PACs. But base contribution limits still apply to contributions to state party committees and PACs as well. Those base limits are legally justified again on an anti-corruption compelling state interest.

But these additional aggregate limits cannot be justified by any anti-corruption interest either. They again do not relate to contributions to a particular candidate who can provide political favors in return. State parties and PACs do not hold elected offices empowering them to provide such favors.

Without the aggregate limits, the base limits would remain to serve the compelling anti-corruption state interest. The modern framework of campaign finance restrictions leaves no compelling anti-circumvention state interest to be served by the aggregate limits. Moreover, it is also true that this additional state and local party and PAC aggregate limit is not severable from the overall aggregate limit on non-candidate committee contributions, which is unconstitutional as explained in A. above. Therefore, this additional aggregate limit on state and local party and PAC contributions is unconstitutional as well.

C. The $48,600 Aggregate Limit on Contributions to Candidates Is Unconstitutional.

Base contribution limits of course already apply to candidate committees. There is no compelling government interest to justify the additional restrictions on political speech and political association involved in the additional $48,600 aggregate limit on contributions to all candidate committees combined.

The compelling government interest justifying the base contribution limits is the same anti-corruption concern to prevent the *quid-pro-quo* exchange of campaign contributions for political favors. But that anti-corruption interest does not apply to the aggregate limit on all candidate contributions. All candidate contributions would still have to comply with the base contribution limits in any event.

The aggregate limit puts an absolute limit on the political speech and political association of any one individual or contributor, infringing on these most fundamental of constitutional rights. It prevents the contributor from contributing to any additional candidates once he or she has reached the limit. But that prohibition on contributing to any further candidates does not further any anti-corruption interest, beyond what is served by the base contribution limit that would continue to apply to any such further contributions even without the aggregate limit.

Most importantly, *there is no circumvention interest involved in the aggregate limit on candidate contributions, serving to enforce the base limit.* There is no potential that contributions to additional candidate committees once the aggregate limit has been reached can be contributed with the intent and expectation of providing further funds to candidates who have already been provided contributions by the same contributor up to the base limit.

If you have already contributed up to the base limit to the reelection campaign of California Senator Barbara Boxer, for example, contributing in addition up to the limit to the reelection campaign of Ohio Senator Sherrod Brown is not a viable way of getting additional funds to the Boxer campaign.

The real interest behind the aggregate limit on candidate committee contributions is really the equalizing interest that was rejected by this Court in *Citizens United v. FEC*, 130 S. Ct. 876 (2010). The idea is that no one person should be allowed to contribute the allowed maximum to more than a few federal campaigns. But this Court rejected precisely that notion as a compelling state interest justifying restrictions on political speech and political association in *Citizens United*. The policy of the First Amendment, the Court recognized in *Citizens United*, is to maximize speech, and the liberty to choose to engage in it, not equalizing it through government regulation limiting speech.

The aggregate limit on candidate contributions is consequently also unconstitutional.

CONCLUSION

For all of the foregoing reasons, this Court should reverse the decision of the court below, and find unconstitutional the aggregate limit on contributions to non-candidate committees, the aggregate limit on contributions to state and local parties and PACs, and the aggregate limit on contributions to candidate committees.

Respectfully submitted,

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