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

Reply Brief for Appellant Republican National Committee

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Corporate Disclosure

The Republican National Committee ("RNC") is an unincorporated association, so no corporations are involved.

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Argument

I.
Aggregate Limits Fail Exacting Scrutiny, Though Strict Scrutiny Should Apply.[1]

A holding for Appellants does not depend on the scrutiny level because the challenged limits fail exacting *or* strict scrutiny. But strict scrutiny should apply.

The same scrutiny should not apply to base and aggregate limits because they differ in kind and the latter impose a greater burden. RNC-Br.8-11. Unlike base limits, aggregate limits "restrict[] . . . the number of candidates and committees with which individuals may associate," *Buckley v. Valeo*, 424 U.S. 1, 38 (1976), and how much one may spend on contributions. *Buckley* further distinguished the two by requiring a quid-pro-quo risk (or its appearance[2]) to justify the limit on a direct contribution to a candidate, *id.* at 26, while requiring a conduit-contribution mechanism for an aggregate limit (showing how an intended candidate might actually *receive* a conduit-contribution so as to trigger a quid-pro-quo risk), *id.* at 38.

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[1] Appellants' amici further address scrutiny. *See* Downsize DC Foundation et al. Br.; Sen. McConnell Br.4-22; Wisconsin Institute for Law & Liberty Br.; Cato Institute Br.

[2] The "appearance" must be of *quid-pro-quo corruption*, not general public perceptions of government, *see Buckley*, 424 U.S. at 26-27, yet "appearance" remains problematic. *See* Institute for Justice Br. *Cf.* Adriana Cordis & Jeff Milyo, *Do State Campaign Reforms Reduce Public Corruption?*, April 2013, http://mercatus.org/sites/default/files/Milyo_CampaignFinanceReforms_v2.pdf (campaign-finance regulations do not ameliorate public perceptions of corruption).

FEC says *Buckley* discussed the ceiling under a "Contribution Limitations" heading, called it "a restriction on 'contributions,'" and referenced "'associational freedom.'" FEC-Br.19. By pointing to the section of *Buckley* where this Court discussed the "ceiling" (a logical place for that discussion) and this Court's accurate description of what the ceiling restricted—while ignoring the essential distinctions this Court noted between base and aggregate limits—FEC erroneously argues by label. *See NAACP v. Button*, 371 U.S. 415, 429 (1963) ("mere labels" cannot foreclose rights). Examining the *essence* of aggregate limits reveals that "an aggregate limit . . . smacks of a spending limit." Robert Bauer, *The McCutcheon Case and the Contribution/Expenditure Limit Problem*, More Soft Money Hard Law, Apr. 26, 2013, http://www.moresoftmoneyhardlaw.com/2013/04/contributions-and-expenditures-in-campaign-finance-jurisprudence/.[3]

FEC says *Buckley* reviewed the "ceiling" "under . . . scrutiny applicable to contribution limits." FEC-Br.18-19 (citing 424 U.S. at *38*). *Buckley*'s page 38 is silent on scrutiny. *Buckley*'s earlier assertion that a limit on a contribution "to a candidate or political committee entails only a marginal restriction upon the contributor's . . . free communication," *id.* at 20, addresses contributions "*to*" a political entity, so it applies to *base* limits

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[3] *See also* Robert Bauer, *Not so "Easy": The Futilities of the Contribution and Expenditure Distinction*, More Soft Money Hard Law, July 31, 2013, http://www.moresoftmoneyhardlaw.com/2013/07/contribution-expenditure-distinction (candidate's personal spending limit in *Buckley* analyzed as *contribution* limit by lower court, but as *expenditure* limit by this Court; *Davis v. FEC*, 554 U.S. 724 (2008), is both a contribution case and an expenditure case).

(which restrict a particular contribution *to* an entity), not *aggregate* limits (which restrict no *particular* contribution).

FEC says *Buckley* called the ceiling a "corollary" of the base limits and aggregate limits "further the same ultimate anti-corruption objective." FEC-Br.19. But the ceiling was also a *base* limit for contributions to PACs and political parties—in which sense *Buckley* mentioned "corollary." RNC-Br.3.[4] Aggregate limits only serve an anti-corruption interest if a conduit-contribution could *be received* by an intended candidate, RNC-Br.25-26, which FEC fails to prove and may not assume. That need to prove *receipt* of an attributable contribution is why *Buckley* required a conduit-contribution mechanism. 424 U.S. at 38. FEC's attempt to collapse *Buckley*'s conduit-contribution-mechanism requirement into an anti-corruption analysis typifies FEC's failure to provide the precision of analysis required for First Amendment rights.

FEC declares RNC's assertion that aggregate limits restrict the *number* of entities individuals may support at the full-base-level amount "misplaced." FEC-Br.20. FEC says what counts is *symbolic support*, which individuals may do for "as many entities as [they] wish[]" at minimal levels. *Id.* But *Buckley* said the "ceiling" limited the "number of candidates and committees with which individuals may associate." 424 U.S. at 38. Anyway, aggregate limits also restrict *how much* one may spend on contributions, even at less than base limits.

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[4] The "ceiling" was deemed a "corollary" and "modest burden" in a specific statutory context where *Buckley* could posit a conduit-contribution mechanism, but Congress eliminated the context and mechanism, making those descriptions inapt. RNC-Br.15-24.

FEC's arguments at pages 20-23 do not alter these facts. For example, FEC argues that McCutcheon's desire to contribute $1,776 checks beyond the aggregate limits is mere "symbolism" and "of marginal First Amendment significance." FEC-Br.21. But that does not prove that aggregate limits do not limit the number of candidates one may support at the full base level, and it does not prove that he is unrestricted in the number of such checks.[5]

Similarly, FEC's argument that McCutcheon may make independent expenditures and volunteer remotely, FEC-Br.21-23, neither proves he is unlimited in the number of candidates he can support at desired levels nor solves his problem with making intended *contributions*. Telling McCutcheon to buy ads and volunteer—instead of making constitutionally protected contributions—is like telling Cohen to get a shirt with a different anti-draft message. *See FEC v. Wisconsin Right to Life*, 551 U.S. 449, 477 n.9 (2007) ("*WRTL-II*") (controlling opinion) (citing *Cohen v. California*, 403 U.S. 15 (1971)) (rejecting notion that options vitiate constitutional protection for preferred activity). It is like telling Citizens United that, instead of doing electioneering communications, it can avoid the electioneering-communications definition (by not broadcasting its message or broadcasting outside blackout periods) or let a PAC speak instead. *See, e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 337 (2010) ("PAC . . . does not allow corporation[] to speak"). *See also* Sen. McConnell Br.13 ("Speech *by the candidate*, paid for with contributions

[5] FEC says "McCutcheon does not suggest" his intended contributions "would have meaningfully enhanced the candidate's electoral prospects or ability to communicate his message." FEC-Br.20. Appellants have no burden to prove that.

from supporters, is far more effective than the independent speech of a supporter." (citation omitted)).

FEC says to disregard the fact that candidates and political parties are increasingly being disadvantaged vis-a-vis super-PACs (not subject to aggregate limits). FEC-Br.22 n.3 (citing Cato Inst. Br.14-15).[6] This growing disadvantage goes to *Buckley*'s scrutiny dichotomy because it shows that it is no longer true "that the contribution limitations . . . have [no] dramatic adverse effect on the funding of campaigns and political associations," *Buckley*, 424 U.S. at 21. RNC-Br.12-13. Cato's brief highlights the public-policy choice at issue here: encouraging money to flow to traditionally favored political parties, which are accountable and transparent and which resist polarization, or to super-PACs and other groups, which are less accountable and transparent and which are more polarizing. *See* Cato Inst. Br. 13-15. This growing disadvantage is a growing burden on First Amendment rights, which requires stricter scrutiny, while reducing the incentive to circumvent contribution limits. *See* Cause of Action Br.24-30.[7]

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[6] *See* Matea Gold, *Super PACs, other independent political groups already setting pace for 2016 presidential race*, Wash. Post, July 22, 2013, http://www.washingtonpost.com/politics/super-pacs-other-independent-political-groups-already-setting-pace-for-2016-presidential-race/2013/07/22/784cac46-efba-11e2-9008-61e94a7ea20d_story.html?wpisrc=nl_politics.

[7] It is not inconsistent to argue that (a) pooling money with a candidate to fund the candidate's own speech is more effective than independent speech and (b) the ability to pool money in a super-PAC advocating for that candidate alleviates pressure to circumvent limits with illegal conduit-contributions. People readily do something less effective, but

FEC's three attempts to argue against the implications of the growing disadvantage of political parties and candidates vis-a-vis super-PACs and other groups miss the mark. First, FEC says "advocacy groups can as easily support a candidate as oppose a candidate." FEC-Br.22 n.3. That is not the candidate's *own* message, and *Buckley* held that "independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive." 424 U.S. at 47. *See also Citizens United*, 558 U.S. at 357 (same).

Second, FEC says "contributions to candidates present corruption concerns that contributions to advocacy groups do not." FEC-Br.22 n.3. It is true that contributions *to candidates* involve a *quid-pro-quo-corruption risk*, *Buckley*, 424 U.S. at 26, that other contributions, e.g., *to political parties*, must be justified by a *conduit-contribution risk, id.* at 38, and that super-PACs pose neither corruption nor conduit-contribution risks and so are not subject to base and aggregate limits, *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010), *cert. denied*, 131 S.Ct. 553 (2010). But these differing interests do not justify political parties and candidates being disadvantaged by aggregate limits for which the government proves no conduit-contribution mechanism.

Third, FEC says "Congress is not required to level the playing field to assure that candidates (or parties) can raise the same amount of money as advocacy groups." FEC-Br.22 n.3. RNC argues no such requirement. But this Court recognizes the need for candidates and parties to "amass[] the resources necessary for effective advocacy." *Buckley*, 424 U.S. at 21. Effec-

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legal, instead of something more effective, but illegal, wanting to be legal though preferring to be more effective.

tiveness of advocacy is relative to the volume of competing voices. Effectiveness requires sufficient resources for candidates and political parties to get their *own* message out competitively. That relative ability is currently disadvantaged. Thus, this Court's scrutiny—which historically looks to the degree of burden—should be informed by the problems now wrought by aggregate limits.[8, 9]

Finally, this is a proper case to reverse *Buckley*'s expenditure/contribution scrutiny dichotomy, RNC-Br.11; McCutcheon-Br.32 n.17, and extend full protection to "doing politics," *see* Robert Bauer, *The Right to "Do Politics" and Not Just to Speak: Thinking about the Constitutional Protections for Political Action*, More Soft Money Hard Law, Apr. 26, 2013, www.moresoftmoneyhardlaw.com/2013/04/duke-law-speech. Appellants'

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[8] Regarding "an answer to super PACs," "[w]hat may be needed is a more measured, creative course that . . . facilitates more speech and participation where the resources are harder to come by," e.g., "by freeing up resources, such as for grassroots mobilization and political parties." Robert Bauer, *The Super PACs in the Campaign Finance Reform Debate*, More Soft Money Hard Law, July 24, 2013, www.moresoftmoneyhardlaw.com/2013/07/super-pacs-reform-debate. *See also* Joel M. Gora, *Free Speech, Fair Elections, and Campaign Finance Laws: Can They Co-Exist?*, 56 How. L.J. 763, 780 (2013) (super-PACs are good but raise the "valid concern . . . that two of the most important actors in the political process—the candidates and the parties—are much more limited in their funding rights").

[9] Strict scrutiny also applies because the speech burden is cognizable and substantial-burden analysis requires it. *See* RNC-Br.12-14. FEC does not address these arguments.

amici explain why.[10]

However, even if this Court does not apply strict scrutiny or overrule *Buckley*'s dichotomy, the aggregate limits are unconstitutional under exacting scrutiny.

II.

The $74,600 Aggregate Limit on Contributions to Non-Candidate Committees Is Unconstitutional as Applied to National Party Committees.

Appellants challenge the $74,600 aggregate limit *as applied* to *national party committees*. RNC-Br.14-52. And the challenge to the aggregate limits on contributions to *candidates* is in the nature of an *as-applied* challenge, in relation to *Buckley*'s facial upholding of the blanket "ceiling." *See infra* II.A, V.

Yet FEC argues as if this were primarily a *facial*-challenge case and says "*Buckley* forecloses Appellants' challenge to the aggregate limits." FEC-Br.43. This is a version of FEC's attempt to evade an as-applied challenge in *Wisconsin Right to Life v. FEC*, 546 U.S. 410 (2006) ("*WRTL-I*"). This Court unanimously held: "In upholding [the ban] against a facial challenge, we did not purport to resolve future as-applied challenges." *Id.* at 411-12. *Buckley*'s facial upholding of the "ceiling" does not foreclose the present as-applied challenges.

As in *WRTL-I*, the lower court here granted FEC's motion "to dismiss this case for failure to state a claim on which relief can be granted." Mot. Dismiss 1. FEC put in no evidence, arguing for dismissal as a matter of law based on *Buckley*'s purported foreclosure of these as-applied challenges. So RNC objects to FEC's effort

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[10] *See* Cato Inst. Br.9-24; Downsize DC Foundation et al. Br.4-12 Sen. McConnell Br.4-22; Wisconsin Institute for Law & Liberty Br.

now to submit "evidence." *See, e.g.*, FEC-Br.53-54. Anyway, FEC's news articles reporting *violations* of campaign-finance laws do not prove any cognizable risk of a true "conduit-contribution," which must result from *legal* activity. *See* RNC-Br.2 n.1 (definition), 49-51. Tales of *illegal* activity involving *quid-pro-quo corruption* do not satisfy FEC's burden, though they provide evidence of the prophylaxes working.

A. *Buckley*'s Facial Upholding of the "Ceiling" Does Not Control this Case, but this Court Should Apply *Buckley*'s Analysis.

Buckley's *facial* holding does not control here because (a) this is an as-applied challenge, (b) Congress materially altered the statutory context necessary to *Buckley*'s holding, and (c) Congress repealed the old ceiling and replaced it with multiple aggregate limits. RNC-Br.15-16.

Regarding the *as-applied* nature of the challenges here, RNC's Question 1, says the challenge to the $74,600 limit is "as applied to contributions to national party committees." RNC-Br.i. Question 4 challenges the limit on contributions to candidates as simply "unconstitutional" because that limit applies *only* to contributions to candidates. Under *Buckley*'s facial upholding of the unified "ceiling," this challenge would have been as applied to contributions to candidates, so in relation to *Buckley* it is in the nature of an as-applied challenge.

Thus, regarding Questions 1 and 4, a precise analysis required FEC to make only arguments involving contributions to national party committees and candidates respectively, not any effect of contributions without aggregate limits to PACs or state/local parties. RNC made this clear, RNC-Br.32 & n.24, 42 & n.33,

though FEC disregards it by making broad-brush facial arguments. FEC concedes its facial focus by saying, "[i]n addition to asserting facial challenges to BCRA's aggregate limits, the RNC argues . . . that the aggregate limit . . . is unconstitutional as applied to contributions received by national party committees." FEC-Br.54-55.[11]

Buckley's *facial* upholding of the old "ceiling," does not resolve the as-applied challenges here (nor the overbreadth or severability issues). And FEC's analysis of as-applied challenges as a facial challenge lacks the precise analysis required for analyzing laws burdening protected political activity. *See Buckley*, 424 U.S. at 16 ("the exacting scrutiny required by the First Amendment").

However, though *Buckley*'s facial upholding of the old ceiling does not control here, this Court's *analysis* regarding the old "ceiling" should guide the present analysis, with careful attention to what *Buckley* required. RNC-Br.15-18, 25-26, 31-32. *Buckley* did not recite a generalized concern with corruption as justifying the ceiling. It precisely focused on something more specific. As applied to national party committees, that focus was on whether a conduit-contribution mechanism exists that permits "evasion of the [base] contribution limitation by a person . . . contribut[ing] massive amounts of money to a particular candidate through the use of unearmarked[,] . . . huge contributions to the candidate's [national] political party [committee(s)]." 424 U.S. at 38. That requires consideration of three

[11] FEC's argument regarding the as-applied challenge, FEC-Br.55, fails to prove that contributing the base limit to national-party committees poses a cognizable conduit-contribution risk.

questions from *Buckley*'s analysis:

- Is political-committee proliferation by national party committees possible?
- Can a "huge contribution" be made to a national party committee?
- Can a national party committee be a vehicle for a "massive" conduit-contribution to an intended, particular candidate?

RNC-Br.32.

Given *Buckley*'s precise focus, FEC is wrong in saying that absent an aggregate limit contributors could still "'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.'" FEC-Br.35 (citation omitted).

FEC is wrong because (inter alia) in the present challenge *as applied* to *national party committees*, no cognizance may be taken of "contributions to political committees likely to contribute to that candidate," *Buckley*, 424 U.S. at 38, beyond the allowable $48,600 limit for contributions to PACs and state/local parties (at which level Congress is satisfied as to any interests).[12] And the analysis must focus precisely on "contributions to the candidate's political party," *id.* at 38, which, as applied, must focus only on contributions to *national* party committees.

FEC must demonstrate that if an individual gives between $74,600 per biennium (current aggregate li-

[12] FEC is also wrong because it fails to show how a cognizable contribution actually reaches a candidate through the many prophylaxes existing without aggregate limits. *See* RNC-Br.26-52. *See infra* II.C.

mit) and $194,400 per biennium ($32,400/year to three national party committees), these unearmarked contributions are "huge" and pose a cognizable risk of a resulting "massive" conduit-contribution to an intended candidate despite existing laws designed to eliminate that risk.

B. Congress Fixed *Buckley*'s Posited Conduit-Contribution Mechanism.

The post-*Buckley* FECA amendments put a base limit on contributions to national party committees. RNC-Br.19-24. So a "huge" contribution to a national party committee is no longer possible and thus no "massive" conduit-contribution to an intended candidate through a national party committee is possible. And proliferation of committees by the same persons is not an issue with national party committees as there are only three per political party.[13]

FEC concedes that "those additional base limits may reduce circumvention of the base limits on contributions to candidates in certain ways, see *California*

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[13] FEC says *Buckley* did not mention such proliferation *at page 38* of the opinion and that "FECA does not limit the number of *political committees* that may exist." FEC-Br.46 (emphasis added). But (a) *Buckley* mentioned the concern *earlier* in that opinion, (b) this Court focused on the problem caused by PAC-proliferation by the *same* entities, and (c) the 1976 Conference Report specifically identified this proliferation problem and said Congress fixed it. RNC-Br.32-34. *Buckley*'s concern with PAC proliferation may have caused the Court to envision a person giving the permitted $1,000 to a candidate, then creating, e.g., fifty single-candidate PACs for the purpose of giving the permissible $1,000 to each and using each PAC to contribute the permissible $1,000 contribution to the candidate.

Med. Ass'n v. FEC, 453 U.S. 182, 198 n.18 (1981)," but then asserts that "they do not make the scheme described in *Buckley* materially harder to execute." FEC-Br.48. FEC's efforts to avoid its concession are unavailing for two main reasons.

First, FEC's passing reference to *Cal. Med.*'s "n.18" does injustice to that footnote, which quotes the 1976 Conference Report that said post-*Buckley* base "limits restrict the opportunity to circumvent the $1,000 and $5,000 limits on contributions to a candidate." Though *Cal. Med.* relied on this Report, the Report is vital legislative history, and RNC discussed it prominently, RNC-Br.21-24, FEC mentions it only as "n.18." Yet, the Report states Congress's view that the FECA amendments fixed *Buckley*'s posited conduit-contribution mechanism.

Second, FEC says that *Buckley*'s mechanism didn't really rely on the things *Buckley* said it relied on, such as "huge" contributions to a political party, but "on the ability of contributors to find various conduits through which unearmarked funds can reach a candidate." FEC-Br.48. But *Buckley* justified the "ceiling" as applied to political parties precisely on the potential for "massive" contributions to an intended, "particular candidate" by means of "huge contributions to the candidate's political party." *Id.* at 38. *Buckley* isolated that mechanism from one involving PACs with a disjunctive "or." *Id.* If FEC really wants to argue that *Buckley* was wrong in justifying the "ceiling" (as it would apply here)—which FEC seems to do—it may do so (with attendant ramifications for its other arguments). But simply applying *Buckley*'s analysis, as RNC does, readily shows that *Buckley*'s posited mechanism is no longer possible. So FEC may not simply dismiss the now-

absent "huge contributions" element of this Court's mechanism in this as-applied challenge. Also, the search for "conduits" is limited in this as-applied challenge, excluding contributions to PACs and state/local parties. And since the Conference Report says Congress fixed *Buckley*'s conduit-contribution mechanism, FEC will have difficulty showing one.

C. The $74,600 Aggregate Limit Lacks a Cognizable Interest as Applied to National Party Committees.

FEC asserts a "circumvention technique." FEC-Br. 35. Thus, it concedes it must prove a mechanism. Its "technique" is contributing "to many different entities, each of which could then make its own contributions to the candidate." *Id.* The "*could*" is a fatal flaw, but first note the suggested entities.

FEC suggests using numerous *PACs* and *candidates* as conduits. FEC-Br.35-36. The only entities properly part of the present analysis are national party committees, and FEC makes no attempt to prove a "technique" only as to them.

FEC says entities it mentions might write a "single check" to a "joint fundraising committee." FEC-Br.37. These proposed elements of a purported conduit have already been refuted. *See* RNC-Br.47. *See also* NRSC & NRCC Br. (aggregate limits do not govern party-candidate relations and joint fundraising committees are not a means of circumventing contribution limits).

FEC's repeated use of "could" in its "circumvention technique" is a fatal flaw, as is its assertion that "[t]hese entities would then have considerable *discretion* to funnel . . . money to . . . candidates." FEC-Br.37 (emphasis added). This is the same speculation that RNC already highlighted and exposed as erroneous

analysis. RNC-Br.40-42, 48-51. And it is foreclosed by FEC's acknowledgment in MUR 3620 (DSCC) that unearmarked contributions do not bind a national party committee—even where a tally system exists—and so are non-cognizable as conduit-contributions. RNC-Br.41-42, 49 n.37. FEC's attempted evasion of MUR 3620, FEC-Br.45 n.6, ignores the MUR's underlying analysis.

Even under FEC's theory—that an individual giving to many entities "could" result in a contribution to a candidate somehow attributable to that individual—FEC fails to prove its case. FEC suggests conduit by candidate or leadership PAC, even providing some contribution totals. FEC-Br.38-39.[14] If FEC's "technique" works, there should be many examples of it, but FEC fails to show even one individual giving to many candidates and leadership PACs with resulting conduit-contributions to a particular candidate.[15] That is what FEC needed to show under its theory. It did not.

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[14] Candidates are applicable only to Part V arguments, but as shown there they provide no cognizable conduit-contribution mechanism.

[15] FEC also fails to prove any joint fundraising committees comprising all (or even most) political party committees or candidates, as it suggests could be possible mechanisms. FEC-Br.37. *See also* Campaign Legal Center et al. Br.13-15 (providing examples of joint fundraising committees, none of which comprised all (or even most) political party committees or candidates). This failure to provide evidence of purported mechanism reveals them to be mere speculation. Such all-or most-entities events are unlikely given the separate interests of the entities involved. This failure of evidence also discredits the supposed "iron rule" that "whatever may lawfully be done will be done." Americans for Campaign Finance Reform Br.3.

FEC says it was "not . . . significantly easier to [make conduit-contributions] when *Buckley* was decided than . . . now" because there were limits on what political committees (e.g., party committees) could contribute, i.e., $5,000/election for multicandidate committees, $1,000/election for others. FEC-Br.47. FEC thus concedes the bottleneck problem that, with other prophylaxes, makes a cognizable conduit-contribution impossible.[16] RNC identified this problem in the Jurisdictional Statement (p.23), explaining that even if numerous contributors try to use a political committee as a conduit to get pro-rata contributions to a candidate, there is the barricade of the limit on contributions *to* a candidate. For example, if a $5,000 per candidate per election contribution *has already been made* by a party, then no matter how many contributors give in the hope of triggering a contribution to the candidate, no more can go to the candidate. The limits on contributions *to* and *by* political committees eliminate any cognizable circumvention risk.

Buckley said that, despite this known bottleneck, a "huge" contribution to a political party created a cognizable risk of a "massive contribution[]" traveling from an individual, through the party, to an intended, "particular candidate." 424 U.S. at 38. FEC now says *Buckley*'s analysis upholding the "ceiling" was wrong because of the bottleneck problem. But without needing to decide that question, simply applying *Buckley*'s

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[16] FEC's amici also concede the bottleneck problem. Campaign Legal Center et al. Br.27. These amici also allege that Appellants recited a flawed FECA history by saying that name-of-another and earmarking provisions were enacted *after Buckley*. *Id.* The parts of Appellants' briefs amici cite show this is not so.

analysis, coupled with the 1976 FECA amendments, reveals that individuals may no longer make a "huge" contribution to a national party committee—so *Buckley*'s "ceiling" justification is gone.

Regarding that $5,000 bottleneck and FEC's theory, FEC needed to prove that there is a significant number of entities (though only national party committees are properly at issue here) likely to contribute to a candidate, where the entity

(a) does not already *have* $5,000 to make a contribution to a candidate that it wants to give to and

(b) has not already *made* the permitted $5,000 contribution to that candidate.

That situation would be necessary for FEC's argument that giving to a political party or PAC might *trigger* a $5,000 contribution to a candidate. Though the bottleneck has existed for decades, FEC does not show even *one* instance of this situation occurring. Under FEC's theory, there must be *many*.

Moreover, state parties (though not involved in this as-applied challenge), like national political parties, typically have considerable funds (far beyond $5,000), so they would likely already have contributed to a favored candidate.

Even if an individual's contribution to a state party could trigger a $5,000 contribution to a candidate, only one lucky person could do that because of the bottleneck problem. And an individual would experience considerable difficulty in locating "likely" entities that lacked money to contribute to a favored candidate and had not already contributed.

FEC also needed to prove that individuals *are giving to many such entities* in hopes of triggering a con-

tribution to an intended candidate. If FEC's "technique" actually works, there should be many examples of this. FEC proved none.

In the foregoing analysis, RNC has talked of what would be necessary under FEC's analysis to "trigger" a contribution. But even if a contribution were "triggered" when an individual contributed to an entity (wanting to contribute to a candidate) that had not already made a contribution to the candidate and lacked the money to do so, that "triggered" contribution would not be a conduit-contribution because there would be no cognizable *attribution* to the individual.

Given MUR 3620 (DSCC), if a contribution to a national party committee is not earmarked, any triggered contribution is not attributable to that individual as a conduit-contribution because the entity could have done something else with the contribution received. *See supra* at 15. And even *if* a contribution to a candidate could somehow be deemed attributable to an individual who made an unearmarked contribution to a national party committee, any contribution to and by the national party committee would have to be attributed on a pro-rated basis. RNC-Br.28. Under proration, the amount of a national party committee's contribution to a candidate attributable to an unearmarked contribution from an individual would be a small fraction of the national party committee's receipts and of the contribution to the candidate. *Id.* Proration yields tiny, non-cognizable amounts concerning contributions to and by national party committees, which have large amounts of receipts and disbursements. FEC fails to even mention proration, which applies to all purported conduits.

FEC suggests a problem with "direct solicitations from the President and Members of Congress," FEC-

Br.40, though it fails to explain how who solicits establishes a cognizable *conduit-contribution mechanism* or how a solicitor-corruption theory would not necessarily rely on a forbidden gratitude, access, or influence theory of "corruption." But if Congress deems "solicitation" a conduit-contribution issue, it must narrowly regulate solicitation, as it did regarding soft money, *see, e.g.*, 2 U.S.C. 441i(d), instead of imposing onerous burdens on core First Amendment rights.

RNC argued that Congress asserted its anti-conduit-contribution and anti-corruption interests only as far as the limits on contributions to and by national party committees, RNC-Br.36,[17] and that it asserted no interest regarding transfers. RNC-Br.48. FEC says this could have been argued against *Buckley*'s ceiling. FEC-Br.50. But *Buckley* posited a conduit-contribution mechanism based on Congress's *non*-assertion of interests as to base limits that were *added* after *Buckley* and it made no mention of transfers. *Buckley*'s posited mechanism is gone. FEC may not conjure another with transfers, especially since Congress expressly *excluded* transfers from the "contribution" definition *after Buckley*.[18]

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[17] That Congress "balanc[ed] . . . objectives" in setting base levels, FEC-Br.51, does not alter this. If on balance, Congress decided to assert its anti-conduit interest at $32,400/year for a contribution to a national party committee, then contributing to three national party committees yearly at that safe level creates no governmental interest.

[18] Making unearmarked contributions to entities who might transfer funds to others who might contribute to a candidate is not *inherently* corrupting because it is possible *now*, under current limits, and Congress asserts no anti-corruption or anti-circumvention interest by regulating it.

Thus, the only remaining "justification" for the challenged aggregate limits is the forbidden equalizing interest. RNC-Br.44. FEC argues an out-of-context "equalizing" quote from *Buckley,* FEC-Br.56, that Appellants already refuted, Br. Opposing Mot. Dismiss or Affirm 9-10. *Buckley* noted that the government asserted an equalizing interest for the base limit on contributions to candidates, which *Buckley* did not reach because the anti-corruption interest sufficed. 424 U.S. at 26. *Buckley* added that base limits "alone would not reduce the greater potential voice of affluent persons and well-financed groups, who would remain free to spend unlimited sums directly to promote candidates and policies they favor in an effort to persuade voters." *Id.* at n.26. *Buckley* did not say that aggregate limits cannot be employed to pursue an equalizing interest.[19]

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

Given the unconstitutionality of the $74,600 limit as applied to national party committees, it is also facially unconstitutional based on its substantial overbreadth. RNC-Br.52. FEC's arguments regarding PACs

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[19] Professor Lessig's brief argues "dependence corruption," an equalizing theory. Professor Richard Hasen provides links to his ongoing arguments with Lessig to this effect at http://electionlawblog.org/?p=49937. *See also* Robert Bauer, *"Dependence Corruption" Before the Supreme Court*, More Soft Money Hard Law, July 29, 2013, http://www.moresoftmoneyhardlaw.com/2013/07/dependence-corruption/ (critiquing Lessig brief). However the Founders perceived "corruption," they forbade abridging speech, U.S. Const. amend. I, and pooling money to amplify speech.

and state and local parties are irrelevant to the as-applied challenge, and they are improper as to the First Amendment overbreadth challenge.[20]

FEC says an overbreadth argument should fail—not based on the breadth of contributions to national party committees—but because *Buckley* rejected an overbreadth challenge. FEC-Br.52. That challenge was to the base limit because "most large contributors do not seek improper influence . . . ." *Buckley*, 424 U.S. at 29. *Buckley*'s holding says nothing as to whether contributions to national party committees are a *substantial* part of overall contributions for overbreadth analysis, which they are. RNC-Br.52.

IV.

The $48,600 Aggregate Limit on Contributions to State Party Committees and PACs Is Non-Severable and Should Be Struck.

RNC demonstrated with strikeout text that, if the $74,600 limit is held unconstitutional, the remainder of 2 U.S.C. 441a(a)(3)(B) is meaningless, so Congress could not have intended the limit and sub-limit to be severable. RNC-Br.52-53.

FEC asserts "BCRA's severability clause" without addressing this meaningless-remainder problem. FEC-Br.55 n.9. A severability clause is not dispositive in

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[20] However, even if including PACs and state/local parties were a proper analysis, the aggregate limits remain unjustified because of the post-*Buckley* FECA amendments establishing new base limits and restricting political-committee proliferation by the same entities and because FEC fails to prove a cognizable conduit-contribution risk in light of existing prophylaxes absent the aggregate limit. *See, e.g.*, McConnell Br.36-37.

such a situation. *See United States v. Jackson*, 390 U.S. 570, 585 n.27 (1968) (severability rarely turns on severability clause), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794 (1989); *National Advertising Company v. Niagara*, 942 F.2d 145, 148 (2d Cir. 1991) (clause not dispositive).

V.

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

The aggregate limit on contributions to candidates is unsupported by the requisite conduit-contribution mechanism. RNC-Br.53-59. This limit must be considered on its own merits—without reference to contributions to PACs and political parties—because (a) Congress isolated this limit in BCRA, (b) *Buckley* did not even suggest that candidates might pose a cognizable conduit-contribution risk, and (c) in relation to *Buckley*'s facial "ceiling" holding, this is in the nature of an as-applied challenge, *see supra* at 8-11.

FEC says, absent the aggregate limit, an individual could give the base limit to all House and Senate candidates, maybe even in a "single check" to a "joint fundraising committee." FEC-Br.37. And FEC says candidates can contribute limited amounts to other candidates, and some do, and they can make transfers to political parties. FEC-Br.38-39. But FEC fails to provide evidence of any joint fundraising committees comprising all (or even most) candidates, or of an individual contributing to many candidates with a resulting conduit-contribution to an intended candidate attributable to that individual. If FEC's technique works, there should be many. FEC proves none. FEC fails to prove a cognizable conduit-contribution risk from this lawful activity, given the prophylaxes in place absent aggre-

gate limits. RNC-Br.34-52, 53-59. RNC adopts the further arguments for this challenge in the McCutcheon Reply Brief.

Conclusion

This Court should hold for Appellants. RNC-Br.60.

Respectfully submitted,

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