NO. 12-536

In the
Supreme Court of the United States

SHAUN McCUTCHEON and
REPUBLICAN NATIONAL COMMITTEE,
Appellants,
v.
FEDERAL ELECTION COMMISSION,
Appellee.

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

AMICUS CURIAE BRIEF OF THE WISCONSIN INSTITUTE FOR LAW & LIBERTY IN SUPPORT OF THE APPELLANTS

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Interest of Amicus

Amicus Wisconsin Institute for Law & Liberty[1] is a public interest law firm dedicated to advancing the public interest in limited government, free markets, individual liberty, and a robust civil society. Founded in June of 2011, it has represented individuals and organizations seeking to speak or to associate with others for the purpose of speech, including the petitioners in *Wis. Prosperity Network v. Myse*, 2012 WI 27, 339 Wis. 2d 243, 810 N.W.2d 356, a challenge to certain Wisconsin regulations restricting and burdening independent express and issue advocacy and certain parties seeking to challenge Wisconsin state aggregate contribution limits that cap aggregate limits at the same dollar amount as individual limits for state wide offices. Its President, General Counsel and Founder, Richard M. Esenberg, teaches Election Law at Marquette University Law School and is an Academic Advisor to the Center for Competitive Politics. His scholarship[2] argues for less regulation and more

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[1] As required by Supreme Court rule 37.6, Amicus states as follows. No counsel for a party authored this brief in whole or in part. No such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the Amicus, its members, or its counsel, made such a monetary contribution. Consent has been given by all parties for this brief.

[2] *See, e.g.*, Richard M. Esenberg, *If You Speak Up, Must You Stand Down: Caperton and Its Limits*, 45 WAKE FOREST L. REV. 1287 (2010); Richard M. Esenberg, *The Lonely Death of Public Campaign Financing*, 33 HARV. J.L. & PUB. POL'Y 283 (2010); Richard M. Esenberg, Citizens United *Is No* Dred Scott, 16 Nexus: Chap. J.L. & Pol'y 99 (2010-11); Richard M. Esenberg,

freedom for those who wish to speak about politics and matters of public policy, whether individually or in association with others.

Amicus frequently represents persons other than political parties, candidates or political parties who wish to exercise their freedoms of speech and association – particularly in the face of state regulation. In this capacity, it seeks guidance from this Court that will ensure robust protection of expressive and associational rights in the face of state and local regulation. These regulations are often applied to speakers who are unlikely to have the resources to seek federal review. To protect their rights, clear – and not subtle – constitutional protection is vital.

Summary of Argument

The aggregate limits at issue here do not serve any legitimate interest in combating actual or apparent quid pro quo corruption and can be upheld – if at all – only by the application of a highly deferential approach to the regulation of direct contributions to candidates. The Circuit Court's use of that approach to uphold aggregate limits that do not serve the anti-corruption objective illustrates the unworkability of this bifurcated form of review. While independent expenditures deserve every bit of protection they have been afforded, Amicus believes that the disparate treatment of contributions and expenditures distorts the political process and

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Playing Out the String: Will Public Financing of Elections Survive McComish v. Bennet*?*, 10 ELECTION L.J. 165 (2011).

causes speakers to modify their messages and preferred forms of association. It respectfully requests this Court to reconsider its current approach and extend to all forms of political expression and association the constitutional protection that they deserve.

Argument

I.

Bifurcated Scrutiny of Expenditures and Contributions Results in Inadequate Protection of Political Speech and Association, and Contributes to Distortion of the Political Process

Almost 40 years of regulation, including two major acts of Congress and subsequent amendments, federal regulation and countless state and local counterparts have not kept money out of politics. We spend more than ever[3] and more than ever is undisclosed.[4]

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[3] Total spending on all elections in the U.S. went from $540 million in 1976 to $3.9 billion in 2000, Joseph E. Cantor, Government and Finance Division, *CRS Issue Brief for Congress*, 2 (2003), available at http://fpc.state.gov/documents/organization/28105.pdf (last visited May 10, 2013), to an estimated $6 billion in 2012 which was $700 million more than in 2008, Matea Gold, *2012 Campaign Set to Cost a Record $6 Billion*, L.A. TIMES, October 31, 2012, available at http://articles.latimes.com/2012/oct/31/news/la-pn-2012-campaign-costs-6-billion-20121031 (last visited May 13, 2013).

[4] *See* Gold, *supra* n. 3 ("In all, C[enter for] R[esponsive] P[olitics] estimates that expenditures by outside groups will

But regulation has certainly changed the political landscape, albeit in unintended ways. By permitting virtually no restrictions on expenditures by a candidate and relatively robust regulation of contributions to a candidate, *see infra*, Parts I.A., I.B., I.C., the Court's interpretation of the First Amendment has created the modern phenomenon of the self-funded millionaire politician for whom public office is a prerogative of family wealth or a nice coda to a successful business career.[5] In 1972, General Motors heir Stewart Mott financed an experienced public servant, George McGovern.[6] In 1992, H. Ross Perot and Steve Forbes ran major self-funded campaigns.

Because giving money to independent groups offers a path of lesser resistance, money that might have gone to candidates now flows to independent expenditures. *See infra*, Part I.D. While independent expenditures can now finance express advocacy, bifurcated review has certainly contributed to the current phenomenon of sepia-toned advertisements urging us to call Senator Foghorn and tell him to stop starving children and destroying the Republic. Although negative campaigning is not a modern

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reach more than $970 million this election. That's more than three times the previous record of $301 million in 2008.").

[5]. *See* Charles Krauthammer, *The U.S. House of Lords?*, WASH. POST, Dec. 19, 2008, at A35.

[6]. Douglas Martin, *Stewart R. Mott, Longtime Patron of Liberal and Offbeat Causes, Dies at 70*, N.Y. TIMES, June 14, 2008, at B6. Mott later opposed efforts at campaign finance regulation. *Id.*

development or solely the product of regulation,[7] the modern independent ad—attacking in the guise of attempting to persuade—has certainly been encouraged by regulation and the desire to avoid its limitations. *See Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 406–07 (2000) (Kennedy, J., dissenting) (asserting that *Buckley v. Valeo*, 424 U.S. 1 (1976) has "given us covert speech" that "mocks the First Amendment"). The modern "shadowy" attack ad may be a product of the fact that the law encourages money to flow away from candidates who can no longer control – or be as readily held responsible for what it buys.

In part, this is because what cannot be done through contribution can be done with expenditure. Dollars that can no longer be given to a candidate are given to a political party. Money that cannot be contributed to a party is given to an independent organization. What cannot be done by a political committee is done by a 527 or 501(c)(4) organization. Dollars that can no longer be spent in one way simply flow to a new use. At least one commentator has likened campaign finance reform to a game of "Whack-A-Mole" in which there is an endless supply of moles. Robert P. Beard, *Whacking the Political Money "Mole" Without Whacking Speech: Accounting for Congressional Self-Dealing in Campaign Finance Reform After* Wisconsin Right to Life, 2008 U. Ill. L. Rev. 731.

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[7]. *See* David Mark, GOING DIRTY: THE ART OF NEGATIVE CAMPAIGNING (2006); Kerwin C. Swint, MUDSLINGERS: THE TOP 25 NEGATIVE POLITICAL CAMPAIGNS OF ALL TIME (2006).

It may be a cliché to observe that campaign finance reform has proved conclusively that the road to perdition is paved with good intentions and that unforeseen consequences plague the human condition.[8] Our continuing quest for "clean" elections and cosmic justice in the realm of campaign finance brings to mind Albert Einstein's reflections on insanity: "doing the same thing over and over again and expecting different results." Remarking on the inability of years—actually decades—of reform to wring "excess" money out of the process, Chief Justice John Roberts declared, "Enough is enough." *FEC v. Wis. Right to Life, Inc.* (*WRTL II*), 551 U.S. 449, 478 (2007).

A. Expenditures Receive Full and Appropriate Constitutional Protection

Much of this distortion is rooted in the weakened constitutional protection for campaign contributions. This Court has consistently recognized that it is essential to provide robust constitutional protection to expenditures for the purpose of political advocacy – whether it be an individual seeking to spend his own resources on behalf of his candidacy, *Buckley*, 424 U.S. at 51-54; *Davis v. FEC*, 554 U.S. 724, 738-44 (2008), a

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[8] *See* William P. Marshall, *The Last Best Chance For Campaign Finance Reform*, 94 NW. U. L. REV. 335, 342–45 (2000) (listing examples of unintended consequences of reform: a decline in grassroots campaigning, the rise of "soft money" for "party building," issue ads, independent ads, and a substantial increase in the time that must be devoted to fundraising and bundling).

candidate deciding how much lawfully raised money to spend on her own campaign, *Buckley*, 424 U.S. at 54-58; *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2818-19 (2011), or independent individual groups seeking to speak at the time of an election. *WRTL II*, 551 U.S. at 481-82; *Buckley*, 424 U.S. at 47-48. While the latter protection was limited to issue advocacy, there is now robust protection for expenditures expressly advocating for the election or defeat of candidates. *Citizens United v. FEC*, 558 U.S. 310, 318-19 (2010); *FEC v. Nat'l Conservative PAC* ("NCPAC"), 470 U.S. 480, 493 (1985) (invalidating expenditures by political action committees to further the election of publicly financed candidates for President).

It is difficult to see how it could be otherwise.

Money may not be speech, but effective speech has nearly always required the freedom to amass and spend the resources necessary to communicate one's message. A right to speak freely limited to the ability to stand on a street corner and shout at passing cars would be an empty right. *See NCPAC*, 470 U.S. at 493 (limitation of expenditures to $1,000 "much like allowing a speaker in a public hall to express his views while denying him the use of an amplifying system"). Free speech is incompatible with restrictions on the right of an individual or association to hear, to speak, and to use information, *Citizens United*, 558 U. S. at 339, and this Court has made quite clear that the First Amendment provides robust protection for expenditures to convey a political message. They are subject to strict scrutiny. *See, e.g.*, *Bennett*, 131 S. Ct. at 2817–18 (collecting

cases); *Citizens United*, 558 U.S. at 335-39; *Davis*, 554 U.S. at 740–44; *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 441–42 (2001); *Buckley*, 424 U.S. at 55–56.

For this reason, as the Seventh Circuit recently noted, expenditure limits "usually flunk." *Wis. Right to Life State PAC v. Barland*, 664 F.3d 139, 153 (7th Cir. 2011). This Court has now firmly established that only the interest in preventing actual or apparent quid pro quo corruption can justify restrictions on the ability to raise and spend money, *Citizens United*, 558 U.S. at 360-61; *see* Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1, 4 (2012) ("Citizens United sharply reversed this expansion [of the types of corruption government had a compelling interest in discouraging] and narrowed the definition of corruption by limiting it to the risk of quid pro quo transactions involving campaign contributions directly to candidates for office."). It has now made clear that expenditures that are truly independent, i.e., not coordinated with a candidate, do not implicate that interest, *Citizens United*, 558 U.S. 360-61; *WRTL II*, 551 U.S. at 478-79. Expenditure limits ought to "flunk."

B. Strong Protection for Independent Expenditures Extends to Contributions Made for that Purpose

Although not yet addressed by this Court, a necessary corollary is that contributions to entities that intend to make independent expenditures may not be restricted. Although limits on contributions to

political candidates and committees have traditionally been subject to less rigorous "exacting" scrutiny, contributions, as well as expenditures, "fall within the First Amendment's protection of speech and political association." *Colo. Republican Fed. Campaign Comm.*, 533 U.S. at 437; *Buckley*, 424 U.S. at 16-17.

Restricting the ability of persons to contribute money to associations that are independent of a candidate to make expenditures that will not be coordinated with a candidate does not serve the anti-corruption interest and, because that interest is the only one that will justify restrictions, few, if any, restrictions ought to be permitted – certainly not limits on what can be spent. As the D.C. Circuit has observed, "something … outweighs nothing every time." *SpeechNow.org v. FEC*, 599 F.3d 686, 695 (D.C. Cir. 2010) (*quoting Nat'l Ass'n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989)). Every Circuit Court to have addressed the issue in the aftermath of *Citizens United* has so concluded. *See Wisconsin Right to Life State PAC,* 664 F.3d at 154; *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684, 687 (9th Cir. 2010); *SpeechNow.org,* 599 F.3d at 694-695; *see also North Carolina Right to Life, Inc., v. Leake*, 525 F.3d 274, 293 (4th Cir. 2008) (pre-dating *Citizens United*).

Thus, in the current campaign finance landscape, a person is free to spend his or her own resources to advocate for or against the election of a candidate. This freedom extends to corporations. Both natural persons (and presumably corporations)

are free to contribute to a corporation or other form of association – in other words, they may freely associate with others – for the purpose of spending money to advocate for or against the election of a candidate. Let us hypothesize a politically active citizen - Mary Smith of Virginia – who wants to see a Democratic majority in the U.S. Senate. She may spend whatever she wants to speak in favor of her own election. She may also spend whatever she wishes to promote the re-election of Senator Mark Warner (D-Va.). She may give whatever she wants to advocacy organization to spend money advocating the re-election of Senator Warner. She may do these things, if she so desires and has the resources, for every Democratic candidate for Senator in the country.

But if Mary Smith, believing that candidates ought to control and be responsible for campaign messaging, wishes to give directly to Senator Warner's campaign or that of other Democratic candidates, she faces a very different legal environment.

C. Contributions to Candidates, Parties, and Political Committees Do Not Receive Adequate Constitutional Protection

What Ms. Smith may not do is give an amount in excess of the base contribution limit to Senator Warner or any other candidate. Restrictions on contributions to a candidate are subjected to less rigorous "exacting" scrutiny, requiring only that limitations be "closely drawn" to serve a "sufficiently

important interest." *Buckley*, 424 U.S. at 25; *see also Ariz. Free Enter.,* 131 S. Ct. at 2817; *Davis,* 554 U.S. at 737; *Randall v. Sorrell,* 548 U.S. 230 (2006); *Colo. Republican,* 533 U.S. at 446.

Applying this less-demanding standard of review, contribution limits usually do not flunk. *See, e.g.*, *FEC v. Beaumont*, 539 U.S. 146, 159–60 (2003) (upholding restrictions on campaign contributions made by an advocacy corporation); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 381–82 (2000) (upholding state campaign contribution limits); *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 209–10 (1982) (upholding restrictions on solicitations by a corporate PAC); *California Med. Assoc. v. FEC*, 453 U.S. 182, 197 (1981) (upholding limitations on contributions to multi-candidate committees); *Buckley*, 424 U.S. at 29 (upholding limitations on the amount of contributions).

Of course, there have been exceptions. In *Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley*, 454 U.S. 290 (1981), this Court invalidated limits on contributions to committees that supported or opposed ballot measures. In *Randall v. Sorrell*, 548 U.S. 230 (2006), the plurality invalidated Vermont's contributions as too low because they "would reduce the voice of political parties in Vermont to a whisper." 548 U.S. at 253 (Breyer, J., joined by Roberts, C.J., and Alito, J).[9]

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[9] Justice Kennedy concurred in the judgment alone, expressing "skepticism regarding th[e] system and its operation," 548 U.S. at 265 (Kennedy, J., concurring in the judgment), while Justices Scalia and Thomas would have struck down the limits

Of course, exacting scrutiny is not akin to rational basis review. *See Clark v. Jeter*, 486 U.S. 456, 461 (1988). It is heightened scrutiny, but it is inadequate where the First Amendment is concerned. It risks creating a form of "binary" review where too much turns on whether a regulation is characterized as a restriction on contributions or a restriction on expenditures.

Although it should not, "exacting scrutiny" can, in practice, result in review that is exacting by description, but deferential in practice. Restrictions on contributions generally do not "flunk" even when they should.

The decision below is a perfect example. There is no need for Amicus to repeat the thorough analysis of the Appellants' merits brief. *See, e.g.*, Brief for Appellant Shaun McCutcheon, 5-11, 35-54; Brief on the Merits for Appellant Republican National Committee, 26-43.

Because aggregate limits cannot result in a single contribution exceeding the limit set by Congress, they do not directly serve the anti-corruption interest. Because they restrict the number of candidates with whom a contributor may associate, they directly restrict the exercise of associational rights in a way that single contribution limits do not. Although they are claimed to serve an "anti-circumvention" interest, the circumvention scenarios that they might prevent are remote, and

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by overruling *Buckley*, *id.* at 273 (Scalia, J. concurring in the judgment).

almost certainly illegal. No proof of the likelihood of circumvention was required. The government offered no evidence that they were likely or even possible and the district court itself acknowledged that the anti-circumvention rationale was predicated on an "unlikely" scenario that it could only "imagine." Even if such scenarios were more than conjecture, they could be better prevented by regulatory responses that are more narrow and direct. No serious consideration of alternatives was undertaken.

To be sure, exacting scrutiny requires a closer look but, as explained below, lower courts – and speakers – would benefit from a direction to apply strict scrutiny across the board.

D. Binary Review Contributes to Distortion of the Political Process

As noted above, the result of this legal regime is to move money from contributions to candidates to expenditures. As Professor Michael Kang recently pointed out, almost $300 million of the 2010 total campaign spending was spent by outside groups,[10] up from less than $75 million in 2006. Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1, 37 (2012). This amounts to an increase of 168% over 2008 in House races and 44% in Senate races. *Id.* at 38. The bifurcated review of expenditures and contributions creates a "reverse

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[10] *Congressional Campaigns: Half of Outside Spending in Campaigns Came from Groups Not Revealing Donors*, BNA MONEY & POL. REP., Nov. 12, 2010.

hydraulics" in which money flows back to where it had originally been steered away from. *Id.* at 40-43.

In Amicus' home state of Wisconsin, the recent Senate race between Democrat Tammy Baldwin and Republican Tommy Thompson was dominated by independent expenditures. In a report published several days before the election, it was revealed that, while Ms. Baldwin had spent $8.5M and Mr. Thompson had spent $3.8M, independent expenditures had been almost three times higher at $ 30.8 million.[11]

While this may diminish the risk of quid pro quo corruption, it artificially distorts the political process. The consequence can be campaigns that are less about the candidates than about the messaging preferred by independent organizations. The latter – because they can't be attributed to a candidate – are not disciplined by the need for anyone to stand behind them. They are, as a result, far more likely to be negative and corrosive.

Independence comes at a cost. Independent spenders are less likely to be accountable. Candidates have a reputation to protect and can be held accountable by voters for what they say. While permanent advocacy organizations which must retain financial support and credibility may also

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[11] Bill Lueders, *Baldwin-Thompson Senate race sets new spending record, led by outside groups*, WisWatchBlog (Oct. 26, 2012) (available at http://www.wisconsinwatch.org/2012/10/26/baldwin-thompson-senate-race-sets-new-spending-record-led-by-outside-groups/) (last visited May 10, 2013).

have accountability concerns, independent organizations with generic and malleable monikers (not to mention anonymous donors) are often formed for purposes of a single election. There is evidence that independent ads are far more likely to be negative than candidate ads. See Erika Franklin Fowler & Travis N. Ridout, *Advertising Trends in 2010*, THE FORUM 11 (2010) (analyzing advertising data).

In an analysis conducted by the Wisconsin Center for Investigative Journalism, roughly 90 % of the independent spending in the Baldwin-Thompson Senate race – spending that was several times that of the candidates' – went for attack ads.[12]

The point is not that independent expenditures and communications are bad – they are, to the contrary, constitutionally protected communications and a vital part of our democracy Because expenditures are independent, they do not raise concerns about corruption or even the appearance of corruption. As the D.C. Circuit has observed, "there is no corrupting 'quid' for which a candidate might in exchange offer a corrupt 'quo.'" *SpeechNow.org v. FEC*, 599 F.3d 686, 694-95 (D.C. Cir. 2010).

It is that the interplay between regulation and constitutional doctrine compels people to communicate in ways that they might otherwise choose not to do. The balance between candidate and independent speech is unnaturally altered. It is one

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[12] *Id.*

thing for people to decide to spend money independently if that is what they wish to do. It is another for this to occur because they have no other way to lawfully spend as much as they would prefer to do. When legal rules cause people who wish to pool their resources and participate in the political resources to engage in avoidance behaviors, we ought to be concerned. Political speech is "ingrained" in our culture and Americans are hard wired to express themselves. *Citizens United v. FEC*, 558 U.S. 310, 364 (2010). They ought to be able to do so in an environment that is not artificially contrived to force supporters to speak in one way and push candidates to the side. *Id.* ("Our Nation's speech dynamic is changing, and informative voices should not have to circumvent onerous restrictions to exercise their First Amendment rights.").

II.

This Court Should Abandon Differing Review of Expenditures and Contributions

A. The Distinction Between Expenditures and Contributions Cannot Support Differing Standards of Review

The distinction between expenditures and contributions is not sufficiently robust to warrant this binary form of review. In particular, it is simply not the case that contributions *qua* contributions are sufficiently different from expenditures to warrant a differing level of review. As Justice Thomas, for example, has argued, whether one chooses to participate by expenditure or contribution, there is

"usually some go-between that facilitates the dissemination of the spender's message—for instance, an advertising agency or a television station" such that calling a contribution "'speech by proxy' . . . does little to differentiate it from an expenditure." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 413 (2000) (Thomas, J., dissenting), *quoting Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 638-39 (1996) (Thomas, J., concurring in judgment and dissenting in part)). Nor is it correct in Justice Thomas's view to state that a contribution to a candidate does not constitute communication by the donor who, in contributing, endorses and facilitates a message (that of his candidate) that he prefers. A larger contribution communicates "more" in the same way as a larger expenditure. Buckley's distinction between expenditures and contributions, in his view, "ignores the distinct role of candidate organizations as a means of individual participation in the Nation's civic dialogue." *Id.* at 417.

For example, our hypothetical Mary Smith, if she wishes to produce a communication for broadcast or on-line distribution, will probably engage someone to produce it. That she associates with another to craft a message does not make the resulting communication any less her own or diminish the constitutional protection to which she is entitled. No one is constitutionally permitted to tell her that she has spent "enough." While the expressive and associational value of a contribution may differ in some ways, they don't differ enough to warrant differing levels of scrutiny.

She has engaged in an expressive act. By choosing to contribute, she must "obviously like the message . . . and want to add [her] voice[] to that message." *FEC v. Nat'l Conservative PAC*, 470 U.S. 480, 495 (1985). Just as the third parties in *Bennett*, a restriction on "how much" expression that she is permitted or a burden imposed on her decision to support "too much" speech is an imposition that ought to surmount strict scrutiny.

In *Citizens United*, this Court recognized that preventing the speech of incorporated associations muffled voices by preventing corporations from "presenting both facts and opinions to the public." 558 U.S. at 355. In *Bennett*, it recognized that "rescue funding" offered to publicly financed candidates in response to constitutionally protected speech forced speakers to alter their message or refrain from speaking to avoid triggering these matching fund provisions. This, it concluded, was a constitutional burden calling for strict scrutiny. *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2819-20 (2011).

Contribution restrictions may also prevent or diminish speech by making it more difficult for candidates to raise the resources necessary to effectively communicate, thus "muffling" their voices. While *Randall* was certainly correct in holding that contribution limits which were so low as to silence challengers was unconstitutional, this certainly is not the only way in that restrictions on contributions may limit core political speech in a way that merits the most careful form of review.

Given the differing ways in which contribution restrictions impact expressive and associational interests and the greater possibility that the anti-corruption interest will be served, limits on the amount that one may give directly to a candidate for public office may more often survive strict scrutiny than limits on expenditures do. For example, the application of contribution limits to bequests may not implicate anti-corruption concerns in the same ways. Prohibitions on contributions by corporations or persons with certain relationships to the government as well as limitations on when contributions may be made may constitute more substantial burdens than limits on the size of contributions. As noted above, limits on the size of contributions may distort and muffle speech in ways less severe than present in *Randall* but still of critical constitutional concern. In different circumstances, the strength of the interest in preventing *quid pro quo* corruption will vary.

Even on the issue before the Court, more or less onerous burdens on speech can be presented by aggregate contribution limits. For example, in Amicus' home state of Wisconsin, the aggregate limit for contributions to candidates and committees is $ 10,000. Wis. Stat. § 11.26(4). This is equal to the maximum contribution that can be made to a single candidate for state-wide office. Thus, a person who wished to contribute the maximum amount to Governor Scott Walker can make no other contributions – not to another candidate for state

wide office nor, for that matter, to his local alderman.[13]

When contribution limits can impose those kinds of burden on expressive and associational rights, it is essential to make clear that only strict scrutiny applies – not only so that aggrieved parties will win their particular cases, but so that legislators and regulators will be apprised of the critical constitutional interests at stake.

Seen in this way, the expressive and associational interests burdened by contribution restrictions are not materially different than those impaired by expenditure limits. To borrow the phrasing of the panel in *SpeechNow.org*, both burden constitutional rights in a way that constitutes "something" and, upon closer examination, that "something" does not differ in any material way.

To be sure, contributions may – but will not always – present a risk of quid pro quo corruption that is not present with expenditures (although the aggregate limits at issue here do not do so). The "something" that is burdened by contribution limits may be less likely to encounter a posited state interest that amounts to "nothing." But those differences ought to be addressed in the application

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[13] The limits result in a biannual ritual of complaints filed by advocacy organizations against campaigns and individuals who inadvertently exceeded the limit – often by a small amount. *See, e.g.*, Wisconsin Democracy Campaign, *Walker, Donors Accused of 24 Violations of Campaign Finance Law*, July 6, 2011, www.wisdc.org/pr070611.php (last visited May 13, 2013).

of a standard requiring robust constitutional protection rather than a regime of bifurcated review in which the case turns largely on the way in which a regulatory scheme is characterized. The old law school adage that such review is "strict in theory, but fatal in fact" is true in general, but often proves to be false in the particular. *See, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (upholding government racial discrimination against strict scrutiny).

The reason is simple. Restrictions on contributions limit the ability of individuals to associate with candidates for public office and to participate in the political process. At the same time, limitations restrict the ability of candidates – particularly the unwealthy, unknown, and un-incumbent – to amass the resources necessary to communicate. Even if one believes that an anti-corruption interest might justify limits on what can be contributed to a candidate or committee, there is no doubt that what we are dealing with is core political speech where First Amendment concerns are at their height. *See Citizens United*, 558 U.S. at 335-39; *Davis v. FEC*, 554 U.S. 724, 740-44 (2008); *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. at 441–42; *Buckley v. Valeo*, 424 U.S. 1, 55-56 (1976).

Strict scrutiny ought to be the standard. Under the Court's current approach, the presumptions are in favor of regulation and against the expressive and associational interests implicated by whatever might be characterized as a "contribution." But in this core area of First Amendment rights, it is far better that the

presumption be in favor of speech. "Where the First Amendment is implicated, the tie goes to the speaker, not the censor." *WRTL II*, 551 U.S. 449, 474 (2007) (Roberts, C.J.).

B. Departure from Existing Precedent Is Warranted in Light of Doctrinal Development and Its Impact

As appellants point out, it is certainly possible to dispose of this case by correcting error. This Court could conclude that the Circuit Court improperly applied the "exacting scrutiny" standard. This is a case in which "something" – the expressive and associational rights of those who support "too many" candidates and committees at non-corrupting levels – is met by nothing.

But Amicus believes that, in the critical area of political speech – where First Amendment protections are at their height – more is required.

We are aware of the value that the Court properly places on stare decisis and we cannot say anything about the reasons to adhere to or depart from precedent that is not well known to the Justices of this Court. Stare decisis is at its weakest on constitutional questions. *WRTL II*, 551 U.S. at 500 (Scalia, J., concurring) ("This Court has not hesitated to overrule decisions offensive to the First Amendment . . . ."). As Chief Justice Roberts recognized in *Citizens United*, *stare decisis* is not an "inexorable command" or a "mechanical formula of adherence to the latest decision," but a "principle of policy" requiring a "sober appraisal of the

disadvantages of the innovation" against "those of the questioned case." 558 U.S. at 378 (Roberts, C.J., concurring).

As in *Citizens United*, no reliance interests are at stake here where adjustment of the level of scrutiny accorded contribution restrictions will, if dispositive in any particular case, merely permit people to act where they have been unable to act. *Id.* at 365. Permissible regulations have been steadily eroded to constitutional challenge. The relatively unfettered ability to spend money for issue advocacy has become – quite properly – the relatively unfettered ability to spend money for express advocacy. The relatively unfettered ability to spend one's own money for independent communications has expanded – quite properly – to the relatively unfettered ability to contribute money for independent communications. Arguments that free speech must be compromised to "level the playing field" or serve some broader notion of "corruption" have been considered and found wanting. To continue to subject contributions to those who are actually running for office to a lesser form of scrutiny can only, in light of these developments, distort the political process to no great end.

Disparate scrutiny of contributions and expenditures has been predicated on the notion that restrictions on the former are not distorting, *i.e.*, that they do not materially "undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues by individual citizens, associations, the institutional

press, candidates, and political parties." *Buckley*, 424 U.S. at 28-29.

Certainly candidates still raise money. But experience has shown that the differing scrutiny of one mode of expression and association can distort the process and result in a misallocation of resources. Privileging contributions over expenditures by *a priori* designation of a differing form of scrutiny contributes to distortion of the political process.

In *Davis*, Justice Alito considered the argument that regulation that has made it harder for those who are not wealthy to raise funds and distorted "the normal relationship between a candidate's financial resources and the level of popular support for his candidacy." 554 U.S. at 743. In that case, the Court concluded that the answer to any such distorting effect was to eliminate or raise those limits rather than further restrict speech. *Id.*

In the same vein, that distortion ought not be permitted unless it serves a compelling interest. We are talking about the First Amendment in its most critical context. We are talking about democracy and core political speech.

Enough is enough.

CONCLUSION

For the foregoing reasons, Amicus Wisconsin Institute for Law & Liberty respectfully requests that this Court hold that restrictions on

expenditures and contributions ought to be subjected to strict scrutiny and reverse the decision below.

Respectfully submitted,

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