No. 12-536

In the Supreme Court of the United States

SHAUN MCCUTCHEON, ET AL., APPELLANTS

v.

FEDERAL ELECTION COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO DISMISS OR AFFIRM

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QUESTION PRESENTED

Whether the three-judge district court correctly rejected appellants' constitutional challenge to federal statutory limits on the aggregate amounts that an individual may contribute to federal candidates, political parties, and other political committees, 2 U.S.C. 441a(a)(3).

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OPINION BELOW

The opinion of the three-judge district court granting the government's motion to dismiss (J.S. App. 1a-17a) is not yet published in the *Federal Supplement* but is available at 2012 WL 4466482.

JURISDICTION

The judgment of the three-judge district court was entered on September 28, 2012. A notice of appeal was filed on October 9, 2012, and the jurisdictional statement was filed on October 26, 2012. The jurisdiction of this Court is invoked under Section 403(a)(3) of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 113-114.

STATEMENT

1. The Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. 431 *et seq.*, places two types of limits on the amounts of money that an individual can contrib-

ute in connection with a federal election. First, FECA imposes base limits on the amounts that an individual can contribute to any one candidate, political party, or non-party political committee. 2 U.S.C. 441a(a); see 2 U.S.C. 431(8)(A)(i) (definition of "contribution"). As inflation-adjusted for the 2011-2012 election cycle, FECA permitted an individual to contribute up to $2500 per election (counting primary and general elections separately) to "any candidate and his authorized political committees"; up to $30,800 per year to "the political committees established and maintained by a national political party"; up to $10,000 per year "to a political committee established and maintained by a State committee of a political party"; and up to $5000 per year "to any other political committee." 2 U.S.C. 441a(a)(1)(A)-(D); see *Price Index Adjustments for Contribution and Expenditure Limits and Lobbyist Bundling Disclosure Threshold*, 76 Fed. Reg. 8368, 8369-8370 (Feb. 14, 2011); see also 11 C.F.R. 100.2 (definition of "election").

Second, FECA imposes aggregate limits on the total amounts that an individual can contribute to all federal candidates and political committees during a two-year election cycle. 2 U.S.C. 441a(a)(3). The aggregate limits serve to "curtail the influence of excessive political contributions by any single person." 120 Cong. Rec. 27,224 (1974) (statement of Rep. Brademas). The congressional findings accompanying the 1974 enactment of the FECA contribution limits identified instances in which contributions to numerous separate entities had been used to funnel campaign funds at the request of a particular candidate. For example, the dairy industry had avoided then-existing reporting requirements by dividing a $2,000,000 contribution to President Nixon among hundreds of committees in different States, "which could

then hold the money for the President's reelection campaign." *Buckley* v. *Valeo*, 519 F.2d 821, 839 n.36 (D.C. Cir. 1975) (per curiam). On another occasion, a presidential aide had promised an ambassadorship to a particular individual in return for "a $100,000 contribution to be split between 1970 senatorial candidates designated by the White House and [President] Nixon's 1972 campaign." *Id.* at 840 n.38.

As inflation-adjusted for the 2011-2012 election cycle, FECA's aggregate limits permitted an individual to make a total of $117,000 in contributions in each two-year election cycle. 2 U.S.C. 441a(a)(3)(B); 76 Fed. Reg. at 8370. An individual could contribute $46,200 to candidates for federal office. 2 U.S.C. 441a(a)(3)(A); 76 Fed. Reg. at 8370. An individual could contribute another $70,800 to non-candidate entities—*i.e.*, national political parties, state political parties, and non-party political committees—so long as no more than $46,200 of that amount went to state political parties or non-party political committees. 2 U.S.C. 441a(a)(3)(B); 76 Fed. Reg. at 8370.

2. Appellants are Shaun McCutcheon and the Republican National Committee (RNC), a national committee of the Republican Party. J.S. App. 2a, 4a-5a. McCutcheon alleges that he would like to make, and the RNC alleges that it would like to receive, contributions that are within FECA's base limits on contributions to particular entities but that would (in combination with other contributions made by McCutcheon) exceed FECA's aggregate limits. *Id.* at 4a-5a.

In particular, McCutcheon alleges that during the 2011-2012 election cycle, he contributed a total of $33,088 to 16 different federal candidates, but wished to contribute $1776 apiece to 12 more candidates. J.S.

App. 4a. Those additional contributions would have brought his candidate-contribution total to $54,400, which would have exceeded FECA's aggregate limit by $8200. *Id.* at 4a-5a. McCutcheon also alleges that he wished to contribute $25,000 to each of three political committees established and maintained by the Republican Party (the RNC, the National Republican Senatorial Committee, and the National Republican Congressional Committee). *Id.* at 5a. Those contributions would have brought his non-candidate contributions—which included a $20,000 contribution to the Alabama Republican Party and a $2000 contribution to the Senate Conservatives Fund (a non-party political committee)—to $97,000, which would have exceeded FECA's aggregate limit on contributions to non-candidate entities by $26,200. *Ibid.* McCutcheon additionally alleges a desire to make a similar pattern of contributions in future election cycles. *Ibid.*

3. Appellants filed suit in the United States District Court for the District of Columbia, raising First Amendment challenges to both the $46,200 aggregate limit on contributions to federal candidates and the $70,800 aggregate limit on contributions to non-candidate entities. J.S. App. 1a, 4a-5a. A three-judge district court—convened pursuant to Section 403 of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 113-114—denied appellants' request for a preliminary injunction and granted the government's motion to dismiss. J.S. App. 1a-17a.

As an initial matter, the district court rejected appellants' argument that the aggregate contribution limits are subject to strict scrutiny. J.S. App. 5a-8a. The district court recognized that, although this Court has applied strict scrutiny to expenditure limits (*i.e.*, limits on

amounts spent directly on political speech), it has not done so for contribution limits (*i.e.*, limits on amounts given to support others' political activity). *Id.* at 6a (citing, *inter alia*, *Arizona Free Enter. Club's Freedom Club PAC* v. *Bennett*, 131 S. Ct. 2806, 2817 (2011)). Rather, this Court has held that contribution limits are "valid as long as they satisfy 'the lesser demand of being closely drawn to match a sufficiently important interest.'" *Ibid.* (quoting *McConnell* v. *FEC*, 540 U.S. 93, 136 (2003), overruled in part by *Citizens United* v. *FEC*, 130 S. Ct. 876 (2010)). The Court has found that less stringent standard to be appropriate because contribution limits "primarily implicate the First Amendment rights of association, not expression, and contributors remain able to vindicate their associational interests in other ways." *Id.* at 8a (citing *Buckley* v. *Valeo*, 424 U.S. 1, 22, 28 (1976) (per curiam)). The district court applied that less stringent standard here, explaining that FECA's aggregate limits "do not regulate money injected directly into the nation's political discourse; the regulated money goes into a pool from which another entity draws to fund its advocacy." *Id.* at 9a (citing *California Med. Ass'n* v. *FEC*, 453 U.S. 182, 195-196 (1981) (plurality opinion)).

Applying that standard to the aggregate limits at issue here, the district court observed that this Court has identified two important governmental interests that justify contribution limits: (1) "preventing corruption or the appearance of corruption"; and (2) "preventing circumvention of contribution limits imposed to further [the government's] anti-corruption interest." J.S. App. 9a (citing *Buckley*, 424 U.S. at 26-27, 38). The district court explained that, because appellants had not challenged the base limits on contributions to individual en-

tities (*e.g.*, the $2500 per election limit on contributions to candidates), the court could "assume [those limits] are valid expressions of the government's anticorruption interest." *Id.* at 11a. "[T]hat being so," the court continued, "we cannot ignore the ability of aggregate limits to prevent evasion of the base limits." *Ibid.*

The district court explained that, in *Buckley* v. *Valeo*, *supra*, this Court had upheld the aggregate contribution limit in the then-current version of FECA as "no more than a corollary of the basic individual contribution limitation that [it found] to be constitutionally valid." J.S. App. 11a (quoting *Buckley*, 424 U.S. at 38); see *id.* at 15a-16a (finding appellants' overbreadth claim to be foreclosed by *Buckley*). The district court drew additional support from this Court's decision in *FEC* v. *Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) (*Colorado II*), which upheld FECA's restrictions on party expenditures that are coordinated with a candidate. The district court noted, *inter alia*, that the decision in *Colorado II* had rested largely on a concern that contributions to one entity (a political party) could be used effectively to circumvent the base limits on contributions to another (an individual candidate). J.S. App. 12a (citing *Colorado II*, 533 U.S. at 459). The district court reasoned that the aggregate contribution limits here served to prevent similar circumvention, which might otherwise occur through artifices such as transfers of contributions between different party committees. *Ibid.* The district court stated that it would "follow [this] Court's lead and conceive of the contribution limits as a coherent system" that includes both base limits and aggregate limits, "rather than merely a collection of individual limits stacking prophylaxis upon prophylaxis." *Id.* at 13a.

The district court also rejected appellants' arguments that FECA's aggregate contribution limits are too low. J.S. App. 13a-15a. The district court cited several decisions of this Court for the proposition that "[i]t is not the judicial role to parse legislative judgments about what limits to impose." *Id.* at 13a (citing *Randall* v. *Sorrell*, 548 U.S. 230, 248 (2006) (plurality opinion); *Colorado II*, 533 U.S. at 466; *Nixon* v. *Shrink Mo. Gov't PAC*, 528 U.S. 377, 387-388 (2000); *Buckley*, 424 U.S. at 30). It further explained, *inter alia*, that "individuals remain able to volunteer, join political associations, and engage in independent expenditures." *Id.* at 15a.

ARGUMENT

The three-judge district court's unanimous decision reflects a straightforward application of this Court's precedents. This Court upheld FECA's aggregate contribution limit in *Buckley* v. *Valeo*, 424 U.S. 1, 38 (1976) (per curiam), and that holding applies with full force to the aggregate limits in the current version of the statute. The appeal should therefore be dismissed for lack of a substantial federal question. In the alternative, the judgment of the district court should be affirmed.

1. In *Buckley*, this Court upheld the constitutionality of various contribution limitations in the 1974 version of FECA, including a base limit of $1000 on contributions by an individual to a candidate and an aggregate limit of $25,000 on total contributions by an individual in any calendar year. 424 U.S. at 23-38. In doing so, the Court recognized that limits on contributions, unlike limits on expenditures, are not subject to strict scrutiny under the First Amendment. Compare, *e.g.*, *id.* at 24-25, with *id.* at 52-54. Instead, the Court concluded that contribution limits are constitutional so long as the government "demonstrates a sufficiently important interest and em-

ploys means closely drawn to avoid unnecessary abridgment of associational freedoms." *Id.* at 25.

The Court explained that, "[b]y contrast with a limitation upon expenditures for political expression, a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication." *Buckley*, 424 U.S. at 20-21. That is because "the transformation of contributions into political debate involves speech by someone other than the contributor." *Id.* at 21. While the contribution itself "serves as a general expression of support for the candidate and his views," it "does not communicate the underlying basis for the support," and the "quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing." *Ibid.* Furthermore, although contribution limits "impinge on protected associational freedoms" by "limit[ing] one important means of associating with a candidate or committee," they do not preclude other means of association, and they "leave the contributor free to become a member of any political association and to assist personally in the association's efforts on behalf of candidates." *Id.* at 22.

Applying the reduced degree of scrutiny appropriate to contribution limits, the Court in *Buckley* identified two "weighty interests * * * sufficient to justify" the then-current $1000 limit on individual contributions to candidates. 424 U.S. at 28-29. First, the limit reduced the opportunity for individuals to use large contributions "to secure a political *quid pro quo* from current and potential office holders." *Id.* at 26-27. Second, and "[o]f almost equal concern," the limit reduced "the ap-

pearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions." *Id.* at 27.

Turning to the $25,000 aggregate contribution limit, the Court found it to be "no more than a corollary of the basic individual contribution limitation" that the Court had already "found to be constitutionally valid." *Buckley*, 424 U.S. at 38. The Court accepted that the "overall $25,000 ceiling does impose an ultimate restriction upon the number of candidates and committees with which an individual may associate himself by means of financial support." *Ibid.* It reasoned, however, that "this quite modest restraint upon protected political activity serves to prevent evasion of the $1,000 contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party." *Ibid.*

2. In this case, appellants do not challenge the constitutionality of FECA's base limits on contributions to particular candidates or political committees. J.S. App. 11a & n.4. They argue instead that, even if the base limits are constitutional, FECA's aggregate contribution limits violate the First Amendment. That argument is foreclosed by *Buckley*'s holding that the aggregate ceiling is a permissible legislative effort "to prevent evasion" of the individual limits. 424 U.S. at 38. Contrary to appellants' contentions, nothing in this Court's post-*Buckley* case law or in the current version of FECA justifies abandoning that holding.

a. Appellants first contend (J.S. 6-9) that strict scrutiny should apply to the current aggregate limits. That contention is unfounded. Since *Buckley*, this Court has

continued to adhere to the distinction between expenditure limits (which are subject to strict scrutiny) and contribution limits (which are not). See, *e.g.*, *Arizona Free Enter. Club's Freedom Club PAC* v. *Bennett*, 131 S. Ct. 2806, 2817 (2011) ("[W]e have subjected strictures on campaign-related speech that we have found less onerous to a lower level of scrutiny and upheld those restrictions. For example, after finding that the restriction at issue was 'closely drawn' to serve a 'sufficiently important interest,' * * * we have upheld government-imposed limits on contributions to candidates.") (citing *McConnell* v. *FEC*, 540 U.S. 93, 136 (2003), overruled in part by *Citizens United* v. *FEC*, 130 S. Ct. 876 (2010); *Nixon* v. *Shrink Mo. Gov't PAC*, 528 U.S. 377, 387-388 (2000); and *Buckley*, 424 U.S. at 23-35).

Appellants assert that the biennial contribution limits in the current version of FECA "function in essence as expenditure limits" because they restrict "*how many* entities an individual may express support for, or associate with, by making base-level contributions, i.e., how much one may *spend* on political expression and association as base-level contributions." J.S. 8; see J.S. 6. The aggregate limit upheld in *Buckley*, however, imposed the very same type of restriction about which appellants now complain. The Court there took as a given that the "overall $25,000 ceiling does impose an ultimate restriction upon the number of candidates and committees with which an individual may associate himself by means of financial support," but it did not apply strict scrutiny, and it upheld the aggregate limit against constitutional challenge. 424 U.S. at 38. Appellants provide no persuasive reason for applying a different level of scrutiny now.

b. Appellants next contend (J.S. 9-14) that post-*Buckley* amendments to FECA have undermined the anti-circumvention rationale on which the *Buckley* Court relied in upholding the aggregate limit. Appellants observe (J.S. 12) that, under the version of the law in effect when *Buckley* was decided, the only base individual contribution limit in FECA was a $1000 limit on contributions to candidates. By contrast, the current version of FECA contains base limits on individual contributions to party and non-party political committees as well. See 2 U.S.C. 441(a)(1)(B)-(D). Appellants argue that these additional base limits adequately address any circumvention concerns that may exist, leaving no anti-circumvention work left for the aggregate contribution limits to do.

That argument is misconceived. Without a ceiling on aggregate contributions, contributors now could still do exactly what the *Buckley*-era aggregate limit permissibly prevented: "contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party." 424 U.S. at 38. To be sure, whereas the aggregate contribution limit was previously the only check on "huge contributions" to a single political committee or political party, FECA now contains specific limits that more directly address that concern. Contrary to appellants' contention, however, those more specific limits do not fully obviate the danger that limits on contributions to a particular candidate may be circumvented through contributions to other recipients.

A particularly effective circumvention technique, both when *Buckley* was decided and today, would be to

donate money to many different entities, each of which could then make its own contribution to the candidate. For two principal reasons, that technique is even easier now than it was when *Buckley* was decided. First, more than four times as many political committees exist today as in 1976. FEC, *PAC Count—1974 to Present*, http://www.fec.gov/press/summaries/2011/2011paccount.shtml (last visited Dec. 28, 2012) (listing 1146 political committees as of Dec. 31, 1976 and 5220 as of July 1, 2012). Second, it is much simpler today than in 1976 to determine which candidates are likely to benefit from a contribution to a particular committee, as many committees provide that information on their websites. See, *e.g.*, EMILY's List, *Our Races*, http://www.emilyslist.org/what/races (last visited Dec. 28, 2012); Press Release, *NARAL Pro-Choice America PAC Announces New Endorsements in Key House, Senate Contests To End War on Women* (Apr. 3, 2012), http://www.prochoiceamerica.org/elections/elections-press-releases/2012/pr04032012_pac-endorsements.html.

Appellants nonetheless argue (J.S. 18-19) that the aggregate limits are superfluous. In their view, Congress has "made the judgment" that, if a contribution to a single entity is below the base limit (*e.g.*, if a contribution to a political party is below $30,800), it presents no "cognizable" risk of corruption or circumvention. See *ibid.* Appellants further contend that, if no single contribution within the base limits poses a cognizable danger, Congress can have no legitimate interest in regulating the number of such contributions that an individual makes. See J.S. 19. Both steps of appellants' reasoning are flawed.

First, Congress's choice of applicable base limits on contributions to particular candidates or other entities

does not reflect any implicit determination that contributions below those limits pose no risk whatever of corruption or circumvention. Rather, the base limits strike a balance between enabling individuals to legitimately influence elections and reducing the opportunities for actual and apparent corruption. See, *e.g.*, *Buckley*, 424 U.S. at 26 (observing that "the Act's primary purpose [is] to *limit* the actuality and appearance of corruption") (emphasis added). Second, even if a single contribution below the base limit were per se risk-free, an unchecked proliferation of similar contributions would still pose meaningful dangers. As discussed above, multiple contributions create the risk that an individual contributor can circumvent the base limits by channeling his money in such a way that a particular target is likely to receive much more than the base limits would allow (*e.g.*, by contributing to political committees likely to contribute to a particular candidate). That is the precise risk that the Court in *Buckley* recognized as sufficient to uphold the aggregate contribution limit. *Id.* at 38.

Even apart from the risk that the base contribution limits may be circumvented by transfers of funds between the various recipients of contributions from a single donor, FECA's aggregate limits serve a legitimate anti-corruption purpose. If the aggregate limits did not exist, "an individual might contribute $3.5 million to one party and its affiliated committees in a single election cycle," yet remain in compliance with all of FECA's base contribution limits. J.S. App. 3a & n.1. Congress could reasonably conclude that an individual who made contributions of that magnitude to a party's overall electoral efforts might acquire actual or perceived "improper influence" (*Buckley*, 424 U.S. at 27) over the party's elect-

ed officials, even if no single contribution was likely to have that effect.

This Court's decision in *California Medical Association* v. *FEC*, 453 U.S. 182 (1981), confirms that aggregate limits and limits on contributions to political committees can permissibly coexist under the First Amendment. In that case, the Court upheld the constitutionality of a $5000 limit on contributions by an individual or an unincorporated association to a "multicandidate political committee" (*i.e.*, a political committee that receives contributions from more than 50 people and contributes to more than five candidates). *Id.* at 184-185 & n.1 (citing 2 U.S.C. 441a(a)(4)). A plurality of the Court reasoned that, if a donor could make unlimited contributions to multicandidate political committees, he could circumvent both the $1000 limit on individual contributions to candidates and the $25,000 limit on aggregate contributions to candidates, simply by giving large sums to the multicandidate committee and allowing the committee to make the contributions to the candidates. *Id.* at 198 (plurality opinion). Justice Blackmun's concurrence contained similar reasoning. *Id.* at 203 (Blackmun, J., concurring in part and concurring in the judgment) (agreeing that the limit on contributions to multicandidate committees could be upheld on anti-circumvention grounds, and analogizing the limit to "the $25,000 limitation on total contributions in a given year that *Buckley* held to be constitutional"). A majority of the Court thus recognized that aggregate limits can operate in tandem with limits on contributions to political committees. Appellants' contention that the First

Amendment forces Congress to choose one or the other cannot be squared with that analysis.[1]

c. Appellants contend (J.S. 16-28) that FECA's aggregate contribution limits are too far attenuated from actual anti-corruption and anti-circumvention concerns to survive First Amendment scrutiny. That is essentially a repackaging of their argument that base contribution limits obviate the need for aggregate contribution limits. It fails for much the same reasons, as well as several others.

First, appellants' reliance (J.S. 17) on isolated language from the controlling opinion in *FEC* v. *Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) (*WRTL*), is misplaced. In concluding that BCRA's restrictions on corporate "electioneering communications" were unconstitutional as applied to the political advertisements at issue in that case, see *id.* at 455-457, 460, 481, the controlling opinion stated that "a prophylaxis-upon-prophylaxis approach to regulating expression is not consistent with strict scrutiny," *id.* at 479. That statement has no bearing on this case. Unlike the restrictions on independent advocacy that were at issue in *WRTL*, the contribution limits at issue here do not "regulat[e] expression" and are not subject to "strict scrutiny." *Ibid.* Indeed, the controlling opinion in *WRTL* relied on the established

[1] Appellants suggest (J.S. 24 n.9) that aggregate limits on individual contributions are "underinclusive" because multicandidate political committees do not have similar aggregate limits. That reasoning is faulty. Imposing similar aggregate limits on multicandidate committees would undercut the purpose of such committees, which is to provide a mechanism for multiple individuals to pool their money to support multiple candidates. Congress would have little reason to enable the creation of an entity to take in, say, $255,000 per year ($5000 from each of 51 persons) if that entity were then limited to contributing a total of $46,200 biennially.

distinction between contributions and independent expenditures, observing that "[t]o equate WRTL's ads with contributions is to ignore their value as political speech." *Ibid.*

Second, FECA's aggregate limits are not properly characterized as a "prophylaxis-upon-prophylaxis." The premise of that argument is that contribution limits are themselves simply a prophylactic measure against bribery-like *quid pro quo* arrangements with public officials. See J.S. 20. The Court in *Buckley* observed, however, that, because bribery laws reach "only the most blatant and specific attempts" to corrupt public officials with money, those laws do not fully vindicate the government's anti-corruption interests. 424 U.S. at 28; see *McConnell*, 540 U.S. at 143 (noting that the Court in *Buckley* "expressly rejected the argument that anti-bribery laws provided a less restrictive alternative to FECA's contribution limits"). In particular, the Court recognized that contribution limits promote an interest, "[o]f almost equal concern as the danger of actual *quid pro quo* arrangements," in reducing "the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions." *Buckley*, 424 U.S. at 27; see *Shrink Mo. Gov't PAC*, 528 U.S. at 390 ("The public interest in countering [the perception of corruption] was * * * the entire answer to the overbreadth claim raised in the *Buckley* case."); see also *McConnell*, 540 U.S. at 143-144.

Because this Court's decisions "have made clear that the prevention of corruption or its appearance constitutes a sufficiently important interest to justify political contribution limits," *McConnell*, 540 U.S. at 143, such limits are not themselves prophylactic. See *id.* at 143-

144. This Court's precedents additionally recognize that the government's interests in combating corruption and its appearance "have been sufficient to justify not only contribution limits themselves, but laws preventing the circumvention of such limits." *Id.* at 144; see, *e.g.*, *Colorado II*, 533 U.S. 431, 456 (2001) ("[A]ll Members of the Court agree that circumvention is a valid theory of corruption."). As the Court in *Buckley* put it, aggregate contribution limits are simply a "corollary" of base contribution limits. 424 U.S. at 38.[2]

Third, appellants are mistaken in contending (J.S. 20-23, 27-28) that the government's anti-corruption and anti-circumvention interests are adequately protected by FECA's "earmarking" provision, 2 U.S.C. 441a(a)(8). That provision counts contributions to one entity (*e.g.*, a political committee) earmarked for transfer to a second entity (*e.g.*, a candidate) as contributions to that second entity for purposes of a person's base contribution limits (*e.g.*, the $2500 limit on candidate contributions). *Ibid.* The Court in *Buckley* recognized, however, that aggregate limits serve the permissible interest of preventing

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[2] Appellants assert (J.S. 15) that this Court's decision in *Citizens United* v. *FEC*, *supra*, called the constitutionality of contribution limits into question by restricting the scope of the government's anti-corruption interest to direct *quid pro quo* exchanges. Appellants' reliance on *Citizens United* is misplaced. That case involved limitations on independent expenditures, and the Court expressly declined to address the constitutionality of limitations on contributions. See, *e.g.*, 130 S. Ct. at 909 ("Citizens United has not made direct contributions to candidates, and it has not suggested that the Court should reconsider whether contribution limits should be subjected to rigorous First Amendment scrutiny."); *ibid.* (observing that "contribution limits * * * have been an accepted means to prevent *quid pro quo* corruption").

circumvention "through the use of *unearmarked* contributions." 424 U.S. at 38 (emphasis added). Appellants' argument is also foreclosed by this Court's decision in *Colorado II*, which rejected the contention that the earmarking provision constitutes "the outer limit of acceptable tailoring" in support of the government's anti-corruption and anti-circumvention interests. 533 U.S. at 462; see J.S. App. 13a. The Court in *Colorado II* explained that such a contention "ignores the practical difficulty of identifying and directly combating circumvention under actual political conditions," which can include various informal ways for political-party contributors to indicate how they want their money spent, and which make circumvention "very hard to trace." 533 U.S. at 462; see also *id.* at 459 (describing "tally system," through which political parties helped channel funds from contributors to candidates while avoiding formal earmarking).

Fourth, appellants are wrong in asserting (J.S. 24, 26) that aggregate contribution limits constitute an impermissible attempt to "level the playing field" by equalizing the amount of speech on different sides of a political campaign. The Court in *Buckley* recognized that contribution limits, unlike expenditure limits, are not speech-equalization measures. 424 U.S. at 25-26 & n.26. "Contribution limitations alone," the Court explained, "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 26 n.26.

d. Appellants appear to contend (J.S. 15-17, 32-37) that the structure of FECA's current aggregate limits (which are broken into separate categories for contribu-

tions to candidates and contributions to non-candidate entities) materially differs from the structure of the aggregate limit considered in *Buckley* (which was not broken out in that fashion). That difference provides no basis for avoiding the binding force of *Buckley*'s holding that an aggregate limit is constitutional. As the Court recognized in *Buckley*, the undifferentiated $25,000 limit had the purpose and effect of limiting both total contributions to parties and total contributions to candidates. 424 U.S. at 38. The minor structural change of specifying two separate aggregate limits, rather than a single aggregate limit, cannot render the current statutory scheme unconstitutional.

In any event, appellants' objections to the two distinct aggregate limits fail on their own terms. Notwithstanding appellants' reliance (J.S. 15-16) on a plurality opinion at an earlier stage of the same case, this Court's decision in *Colorado II* squarely rejected the proposition that contributions to political parties have no potential for corruption or circumvention. The Court recognized that, "whether they like it or not, [parties] act as agents for spending on behalf of those who seek to produce obligated officeholders." 533 U.S. at 452. The record in *Colorado II* showed that "substantial donations turn the parties into matchmakers whose special meetings and receptions give the donors the chance to get their points across to the candidates." *Id.* at 461. Moreover, as the Court observed in a later case, "there is no meaningful separation between the national party committees and the public officials who control them" because the "national committees of the two major parties are both run by, and largely composed of, federal officeholders and candidates." *McConnell*, 540 U.S. at 155 (internal quotation marks and brackets omitted).

As for the aggregate limits on contributions to candidates, appellants are also wrong in suggesting (J.S. 33-35) that candidates cannot serve as conduits for circumventing the individual contribution limits. Just as a contributor can give $5000 each to a number of political committees that in turn give to one candidate, the contributor can give $5000 each to a number of candidates who in turn give to one candidate (or to the party, which can make coordinated or independent expenditures in support of that candidate). Cf. *Colorado II*, 533 U.S. at 459-460 (describing political party's system of "informal bookkeeping * * * to connect donors to candidates through the accommodation of a party"). Appellants do not appear to dispute that such transfers take place, and FEC data show that candidates in "safe" districts regularly contribute campaign funds to candidates in their party who face more difficult elections. See generally FEC, *Detailed Files About Candidates, Parties, and Other Committees*, http://www.fec.gov/finance/disclosure/ftpdet.shtml (last visited Dec. 28, 2012); FEC, *Disclosure Data Catalog*, http://www.fec.gov/data/DataCatalog.do?cf=downloadable (last visited Dec. 28, 2012). And, contrary to appellants' speculation (J.S. 35) that the candidates themselves are likely to take sole credit for such contributions, evidence has shown that, even in contexts where contributions are not made directly to federal candidates, "federal officeholders [have been] well aware of the identities of the donors." *McConnell*, 540 U.S. at 147.

e. Finally, it is irrelevant that the Court in *Buckley* addressed only a facial constitutional challenge to FECA's aggregate contribution limit, while appellants describe their own suit as raising as-applied and overbreadth challenges. See, *e.g.*, J.S. 10, 27-28. A plaintiff's

characterization of his own challenge is not controlling, *Citizens United*, 130 S. Ct. at 893, and appellants do not meaningfully differentiate their claims from those rejected in *Buckley*. See, *e.g.*, J.S. 28-29 (arguing that aggregate limits on candidate contributions are substantially overbroad for the same reason that they are alleged to be facially unconstitutional). In particular, appellants identify no unusual feature of their own circumstances that would render the aggregate limits invalid as applied to them if the limits are generally constitutional.

3. As an alternative to their primary argument, which challenges the existence of any aggregate contribution limits at all, appellants contend (J.S. 29-32, 34-37) that FECA's current aggregate limits violate the First Amendment because the amount of contributions they allow is too low. That contention fails under well-settled law and presents no substantial question for this Court to review.

a. As the district court recognized (J.S. App. 13a), this Court has generally declined to second-guess legislative judgments about the exact dollar figure of contribution limits. The Court has "ordinarily * * * deferred to the legislature's determination of such matters," recognizing that a "legislature is better equipped to make such empirical judgments" based on legislators' "particular expertise in matters related to the costs and nature of running for office." *Randall* v. *Sorrell*, 548 U.S. 230, 248 (2006) (plurality opinion) (internal quotation marks and citation omitted); see *Davis* v. *FEC*, 554 U.S. 724, 737 (2008) ("When contribution limits are challenged as too restrictive, we have extended a measure of deference to the judgment of the legislative body that enacted the law."); *Buckley*, 424 U.S. at 30 ("[A] court

has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000.").

Consistent with this deferential standard of review, the level of a contribution limit violates the First Amendment only if it is "so low as to 'prevent candidates and political committees from amassing the resources necessary for effective advocacy.'" *McConnell*, 540 U.S. at 135 (quoting *Buckley*, 424 U.S. at 21) (brackets omitted); see *Buckley*, 424 U.S. at 30 ("[D]istinctions in degree become significant only when they can be said to amount to differences in kind."). The Court "ask[s], in other words, whether the contribution limitation [is] so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless." *Shrink Mo. Gov't PAC*, 528 U.S. at 397. "Such being the test, the issue * * * cannot be truncated to a narrow question about the power of the dollar, but must go to the power to mount a campaign with all the dollars likely to be forthcoming." *Ibid.*

b. Appellants offer two arguments to support their contention that FECA's current aggregate limits are unconstitutionally low. First, appellants assert (J.S. 34) that, when inflation is taken into account, the current aggregate limits are in certain respects more restrictive than the $25,000 aggregate limit upheld in *Buckley*. Appellants acknowledge, however, that $25,000 in 1974 is equivalent to $116,676 today, which is slightly less than the current $117,000 combined aggregate limit on contributions to candidates and committees. See *ibid.* In any event, this Court has previously rejected an inflation-based argument materially indistinguishable from appellants' current challenge. See *Shrink Mo. Gov't PAC*, 528 U.S. at 396-397. The Court explained in that

case that reading *Buckley* to "set a minimum constitutional threshold for contribution limits" reflects "a fundamental misunderstanding of what [*Buckley*] held." *Id.* at 396. "[T]he dictates of the First Amendment," the Court explained, "are not mere functions of the Consumer Price Index." *Id.* at 397.

Second, appellants seek to compare (J.S. 29-31, 36-37) the aggregate contribution limits at issue here to the state contribution limits that were struck down in *Randall* v. *Sorrell*, *supra*, the only case in which this Court has found a contribution limit to be unconstitutionally low. See 548 U.S. at 236-237. The state limits at issue in *Randall* restricted individual contributions to a candidate to between $200 and $400 (depending on the office) in a two-year period; they were not indexed to inflation; they applied to contributions made by political committees (including political parties) as well as those made by individuals; and they counted the value of certain self-paid expenses by campaign volunteers (such as travel expenses) as contributions. See *id.* at 237-239, 259 (plurality opinion). The plurality found the limits unconstitutional "based not merely on the low dollar amounts of the limits themselves, but also on the statute's effect on political parties and on volunteer activity in Vermont elections." *Id.* at 253. "*Taken together,*" the Court concluded, "[the state law's] substantial restrictions on the ability of candidates to raise the funds necessary to run a competitive election, on the ability of political parties to help their candidates get elected, and on the ability of individual citizens to volunteer their time to campaigns show that the Act is not closely drawn to meet its objectives." *Ibid.*

The FECA limits at issue here differ in key respects from the limits at issue in *Randall*. The FECA limits

permit substantially higher contributions, see pp. 1-3, *supra*; they generally are indexed for inflation, see 2 U.S.C. 441a(c); they allow political parties to contribute amounts significantly greater than the individual contribution limit, see *Randall*, 548 U.S. at 258 (plurality opinion); and they do not count many volunteer activities as contributions, see 2 U.S.C. 431(8)(B). Appellants do not and could not plausibly allege that FECA's aggregate limits substantially restrict the ability of any federal candidate to "run a competitive election" or the ability of a national political party "to help [its] candidates get elected." *Randall*, 548 U.S. at 253 (plurality opinion); see, *e.g.*, FEC, *2011-2012 Election Cycle: Total Disbursements by Entity Type*, http://www.fec.gov/law/2012TDbyEntity.shtml (last visited Dec. 28, 2012) (reporting that federal candidates spent more than $3 billion, and parties more than $2 billion, in the 2011-2012 election cycle). Appellants' argument instead is simply that the aggregate amount an individual contributor can give, if amortized across all federal candidates of a particular party, results in a somewhat smaller per-candidate contribution than the individual limits found unconstitutional in *Randall*. J.S. 30-31. That argument substantially oversimplifies *Randall*, and it overlooks the fact that the constitutionality of a contribution limit is analyzed from the perspective of the recipient, not the contributor. See, *e.g.*, *McConnell*, 540 U.S. at 135 ("[W]e have said that contribution limits impose serious burdens on free speech only if they are so low as to 'prevent candidates and political committees from amassing the resources necessary for effective advocacy.'") (quoting *Buckley*, 424 U.S. at 21) (brackets omitted).

Appellants are also wrong in asserting that the aggregate limits in FECA impermissibly constrict a con-

tributor's First Amendment rights. Appellant McCutcheon or any other contributor can engage in the "symbolic act of contributing," *Buckley*, 424 U.S. at 21, to every candidate in every federal election. Individuals are limited only in the *amounts* they can give to those candidates: the more candidates to whom they contribute, the smaller their average contributions must be. But that is not a substantial First Amendment burden, for "[t]he quantity of communication by the contributor does not increase perceptibly with the size of his contribution." *Ibid.*

As previously noted, the Court in *Buckley* did not dispute that the $25,000 limit at issue there "impose[d] an ultimate restriction upon the number of candidates and committees with which an individual may associate himself by means of financial support." 424 U.S. at 38. Notwithstanding that "modest restraint," it upheld the aggregate limit against substantially the same constitutional challenge that appellants assert in this case. *Ibid.* That holding remains good law, and it required the dismissal of appellants' complaint.

CONCLUSION

The appeal should be dismissed for want of a substantial federal question. In the alternative, the judgment of the district court should be affirmed.

Respectfully submitted.

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