UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHAUN McCUTCHEON, and REPUBLICAN NATIONAL COMMITTEE, Plaintiffs, v. FEDERAL ELECTION COMMISSION, Defendant.	Civ. No. 12-1034 (JRB, RLW, JEB) OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

DEFENDANT FEDERAL ELECTION COMMISSION'S OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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The Federal Election Campaign Act, 2 U.S.C. §§ 431-457 ("FECA"), provides that an individual can contribute as much as $117,000 in a two-year election cycle to all federal candidates, political parties, and political committees combined. More than 35 years ago, the Supreme Court held that this statute — which at the time imposed an aggregate limit of $25,000 in contributions per election cycle — was consistent with the First Amendment. Plaintiffs Republican National Committee and Shaun McCutcheon, an individual donor, now ask this Court to revisit the Supreme Court's decision and to enjoin the Federal Election Commission from enforcing FECA's aggregate limits, an important tool designed by Congress to limit corruption and the appearance of corruption in federal elections. Plaintiffs' attempts to introduce doubt about whether the Supreme Court's holding remains good law in light of subsequent developments must fail. Only the Supreme Court can overrule its own decisions. And, in any event, none of the developments on which plaintiffs rely casts any doubt on the continued constitutionality of the aggregate contribution limit.

LEGAL AND FACTUAL BACKGROUND

I. THE AGGREGATE CONTRIBUTION LIMIT

FECA imposes two types of limits on the amount of money an individual can contribute in connection with federal elections. First, FECA limits the amount that a person can contribute to any one candidate, political party, or political committee (commonly known as a "PAC"). Under these limits, an individual can contribute up to:

- $2,500 per election to any candidate's campaign committee;[1]
- $30,800 per year to any national political party;

[1] In this context, primaries and general elections are separate "elections." *See* 11 C.F.R. § 100.2. Thus, an individual can contribute $2,500 to a candidate for a primary election (even if the candidate is unopposed for nomination), and another $2,500 to the candidate for the general election, for a total contribution of $5,000 per election cycle.

- $10,000 per year to any state political party; and
- $5,000 per year to any PAC.[2]

See 2 U.S.C. § 441a(a)(1); FEC, *Price Index Adjustments for Contribution and Expenditure Limits and Lobbyist Bundling Disclosure Threshold*, 76 Fed. Reg. 8368, 8370 (Feb. 14, 2011) ("*Inflation Index*").

Second, FECA caps the aggregate amount an individual can contribute to all of these entities combined during a two-year election cycle.[3] The purpose of this aggregate limit, which was enacted in 1974, was to curtail some of the most egregious Watergate-era abuses that Congress had traced to individual political contributors wielding undue influence over elected officials by virtue of outsized contributions. *See, e.g.*, 120 Cong. Rec. H7814 (Aug. 7, 1974) (statement of Rep. Gaydos) (describing bill's contribution limits, including aggregate limit, as "very low" to "eliminate the potential for abuse" and to "eliminate the undue influence of the very large contributor to past elections"); *id*. at H7810 (Aug. 7, 1974) (statement of Rep. Brademas) (explaining purpose of provision as "[t]o curtail the influence of excessive political contributions by any single person"); *id*. at H10331 (Oct. 10, 1974) (Statement of Rep. Frenzel) ("The $25,000 provision will be the death knell of the 'fat cat.' It will take not 1 year, but 160 years for the Stewart Motts and Clement Stones and other big spenders to give $2 million to all Federal candidates . . . ."); *see also Buckley v. Valeo*, 424 U.S. 1, 27 & n.28 (1976) (noting

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[2] There is no limit on contributions to so-called "super PACs," *i.e.*, political committees that engage only in independent electoral advocacy and do not make contributions to candidates. Nor do the aggregate contribution limits apply to contributions to super PACs. *See Carey v. FEC*, 791 F. Supp. 2d 121, 136 (D.D.C. 2011).

[3] The aggregate limit does not coincide exactly with election cycles; it governs the two-year period from January 1 of an odd-numbered year through December 31 of the following even-numbered year. 2 U.S.C. § 441a(a)(3).

"deeply disturbing examples surfacing after the 1972 election" of "large contributions . . . given to secure a political quid pro quo from current and potential office holders").[4]

In *Buckley*, the Supreme Court affirmed the constitutionality of FECA's aggregate contribution limit. The Court acknowledged that the limit was a "restriction on associational freedom" but held that

> this quite modest restraint upon protected political activity serves to prevent evasion of the [then-$1,000 limit on contributions to candidates] 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.

Id. at 38. *Buckley* accordingly upheld the aggregate limit as "a corollary of the basic individual contribution [limits]," which the Court had found constitutional earlier in its opinion. *Id*.

Originally, FECA's aggregate contribution limit was $25,000 per two-year election cycle. FECA Amendments of 1974, Pub. L. No. 93-443, § 101(a), 88 Stat. 1263, 1273 (1974) (first codified at 18 U.S.C. § 608(b)(3)).[5] The Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 ("BCRA"), subsequently amended FECA to raise the aggregate limit, restructure it, and index it for inflation. *See* BCRA § 307(b), 116 Stat. 102-103 (codified at 2 U.S.C. § 441a(a)(3)); BCRA § 307(d), 116 Stat. 103 (codified at 2 U.S.C. § 441a(c)(1)). As so amended and indexed, the current aggregate limits on any one person's contributions during a two-year election cycle are:

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[4] The bill's opponents, who questioned the constitutionality and enforceability of its contribution limits, agreed: "This provision may be the most significant reform in the [Act]. Contribution limitations should restore public confidence by eliminating or reducing public suspicion that candidates are being 'bought' or influenced by large campaign contributions." H.R. Rep. No. 93-1239, at 115 (1974) (minority view).

[5] In 1976, Congress transferred the aggregate limit to its current location at 2 U.S.C. § 441a(a)(3). FECA Amendments of 1976, Pub. L. No. 94-283, § 112, 90 Stat. 475, 486 (1976).

- $46,200 to all candidates; and
- $70,800 to all non-candidate entities, *i.e.*, PACs, national political parties, and state political parties; but no more than $46,200 of these non-candidate contributions can be to PACs and state political parties.

See 2 U.S.C. § 441a(a)(3); *Inflation Index*, 76 Fed. Reg. at 8370. Thus, FECA's aggregate limits permit an individual to contribute up to $117,000 to federal candidates, national political parties, state political parties, and PACs combined.[6]

II. FACTUAL BACKGROUND

The FEC is the agency of the United States government vested with statutory authority over the administration, interpretation, and civil enforcement of the FECA and other federal campaign finance statutes. The Commission is empowered to "formulate policy" with respect to FECA, 2 U.S.C. § 437c(b)(1); "to make, amend, and repeal such rules . . . as are necessary to carry out the provisions of [FECA]," 2 U.S.C. §§ 437d(a)(8), 438(a)(8); to issue advisory opinions concerning the application of FECA or the Commission's regulations to proposed transactions or activities, 2 U.S.C. §§ 437d(a)(7), 437f; and to civilly enforce FECA, 2 U.S.C. § 437g.

Plaintiff Shaun McCutcheon is an individual United States citizen who alleges a desire to contribute a total of $151,000 during the current election cycle. Specifically, McCutcheon alleges that he would like to contribute $5,000 to one candidate, $2,500 to each of two other candidates, and $1,776 to each of 25 additional candidates, for a total of $54,400 in candidate

[6] Plaintiffs quibble (Pls.' Mem. in Support of Mot. for Prelim. Inj. ("Pls.' Mem.") at 1 n.2, 2 n.4) with the Commission's reference to a $117,000 "limit," noting that there are two separate statutory limits subsumed within that figure. Plaintiffs' characterization of the statute as not having a single provision aggregating the limits may be correct, but they identify no error in the Commission's simple arithmetic: A limit of $46,200 in contributions to candidates, plus a limit of $70,800 in contributions to all other entities, means that an individual cannot make more than $117,000 in total contributions.

contributions. (Compl. ¶ 25.) He also allegedly wishes to contribute $25,000 to the Republican National Committee ("RNC") and each of the other two Republican national party committees (*id*. ¶ 34), in addition to the $20,000 he has already contributed to the Alabama Republican Party and the $2,000 he has contributed to a non-party PAC during this election cycle (*id*. ¶ 36), for a total of $97,000 in non-candidate contributions.

Plaintiff RNC is a national party committee of the Republican party. (Compl. ¶ 12.) As a national party committee, the RNC can accept up to $30,800 per year in contributions from any given individual contributor. *See* 2 U.S.C. § 441a(a)(1)(B); *Inflation Index*, 76 Fed. Reg. at 8370. The RNC alleges that it would like to receive a $25,000 contribution from Mr. McCutcheon during this election cycle. (*See* Compl. ¶¶ 34, 39.)

The Republican Party operates two national party committees in addition to the RNC: The National Republican Senatorial Committee ("NRSC"), and the National Republican Congressional Committee ("NRCC"), each of which may also accept contributions from any one individual of up to $30,800 per year. (*See id*. ¶¶ 42, 45-46.) The NRSC and NRCC are not parties to this lawsuit, and the RNC alleges that it does not control them. (*See* Compl. ¶ 43.)

ARGUMENT

This suit challenges the constitutionality of FECA provisions that *Buckley* held to be constitutional — FECA's aggregate limits on contributions. Plaintiffs openly state their intention to ask the Supreme Court to revisit *Buckley*'s holding, but unless and until that takes place, plaintiffs cannot prevail. And even if this Court could reexamine the issues that the Supreme Court previously decided, there have been no intervening factual or legal developments that cast any doubt on *Buckley*'s rationale. Because plaintiffs accordingly have *no* likelihood of succeeding on the merits of their claims — and because they also fail to demonstrate that they

will suffer any cognizable harm while this case is pending — their motion for a preliminary injunction should be denied.

I. STANDARD OF REVIEW

A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief. . . . [It is] never awarded as of right." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22, 24 (2008); *see Cobell v. Norton*, 391 F.3d 251, 258 (D.C. Cir. 2004). To prevail on a motion for a preliminary injunction, a plaintiff "must establish": "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20; *Mills v. District of Columbia*, 571 F.3d 1304, 1308 (D.C. Cir. 2009).

Plaintiffs here shoulder a particularly heavy burden because their requested relief "would alter, not preserve, the *status quo*." *Veitch v. Danzig*, 135 F. Supp. 2d 32, 35 (D.D.C. 2001). The purpose of a preliminary injunction "is merely to preserve the relative positions of the parties until a trial on the merits can be held," *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981); *Sherley v. Sebelius*, 644 F.3d 388, 398 (D.C. Cir. 2011), but plaintiffs here seek to upend the status quo by preventing the Commission from enforcing a statutory provision that has been in place for almost 40 years. *Cf. Turner Broad. Sys., Inc. v. FCC*, 507 U.S. 1301 (1993) (Rehnquist, C.J., in chambers) (refusing to enjoin enforcement of federal statute in First Amendment challenge and noting that "[b]y seeking an injunction, applicants request that I issue an order *altering* the legal status quo") (emphasis in original). This is particularly inappropriate in the pre-election context, where "considerations specific to election cases" weigh even further against the issuance of injunctions. *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam)

(vacating lower court's injunction against enforcement of election statute and noting potential for pre-election injunctions to cause confusion among voting public).

Thus, plaintiffs can prevail on their motion only by meeting their heavy burden to make a clear showing in their favor on all four of the preliminary injunction factors, *see Sherley*, 644 F.3d at 392-93 — a showing sufficient to justify bringing to a halt the enforcement of a longstanding federal election statute just as the election season approaches its peak.

II. THE COMMISSION IS LIKELY TO PREVAIL ON THE MERITS OF THIS CASE BECAUSE THE SUPREME COURT HAS ALREADY DETERMINED THAT THE AGGREGATE CONTRIBUTION LIMIT IS CONSTITUTIONAL, AND NOTHING HAS UNDERMINED THAT HOLDING

A. *Buckley* Controls the Standard of Scrutiny and the Outcome of this Case

The Supreme Court's affirmation of the constitutionality of FECA's aggregate contribution limit in *Buckley* controls this case in its entirety. Several contribution limits were at issue in *Buckley*, including a $1,000 limit on individual contributions to candidates and the $25,000 aggregate limit. *See* 424 U.S. at 23-38. The Court upheld all of the challenged contribution limits.

Analyzing the First Amendment implications of contribution limits in general, the Court noted that they restrict "one aspect of the contributor's freedom of political association," *id.* at 24, but they do not prevent a contributor from speaking. "While contributions may result in political expression if spent by a candidate . . . , the transformation of contributions into political debate involves speech by someone other than the contributor." *Id*. at 21. Accordingly, a contribution is not the contributor's direct speech, but rather a "symbolic act" that provides "a general expression of support for the candidate and his views." *Id*. And because a contribution does not "communicate the underlying basis for the support . . . [t]he quantity of communication by the contributor does not increase perceptibly with the size of his contribution." *Id*. Thus,

contribution limits leave contributors free to engage in the "symbolic act of contributing," while in no way inhibiting their ability to conduct other political activity, such as "discuss[ing] candidates and issues" or "becom[ing] a member of any political association and [assisting] personally in the association's efforts on behalf of candidates." *Id*. at 21-22.

Recognizing the lack of any direct infringement on speech, the Court declined to apply strict scrutiny to FECA's contribution limits. Instead, the Court held that such limits are constitutional if the government meets the less demanding test of "demonstrat[ing] a sufficiently important interest and employ[ing] means closely drawn to avoid unnecessary abridgment of associational freedoms." *Id*. at 25. This "sufficiently important interest" test is equivalent to what has subsequently come to be known as intermediate scrutiny. *See, e.g.*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 220 (1995) (noting that intermediate scrutiny standard requires statute to be "substantially related to the achievement of an important governmental objective" (internal quotation marks omitted)); *see also infra* Part II.B.1 (discussing cases assessing contribution limits under intermediate scrutiny).

Applying this standard to FECA's contribution limits, the Court began by upholding the then-$1,000 limit on individual contributions to candidates. The Court found that this limit furthers two important governmental interests. First, it reduces the opportunity for contributors "to secure a political *quid pro quo* from current and potential office holders" in exchange for large contributions. *Buckley*, 424 U.S. at 26-27. Second, the limit reduces "the *appearance* of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions." *Id*. at 27 (emphasis added). "[A]voidance of the appearance of improper influence," the Court held, is "critical if confidence in the system of representative Government is not to be eroded to a disastrous extent." *Id*. (internal quotation

marks and alterations omitted). These "weighty interests . . . are sufficient to justify the limited effect upon First Amendment freedoms caused by the $1,000 contribution ceiling." *Id*. at 29.

The Court then turned to the $25,000 aggregate contribution limit. The basic function of this provision, the Court noted, is to prevent evasion of the limit on individual contributions to candidates. *Buckley*, 424 U.S. at 38. The aggregate limit thwarts such evasion in two ways. First, it prevents individual contributors from giving to multiple independent PACs that the contributor knows are "likely," in turn, to contribute to a given candidate. *See id*. Second, the aggregate limit prevents contributors from giving "huge" amounts of money to a political party, knowing that the party would then contribute its funds to its candidates. *See id*. By closing these two significant loopholes in the limit on individual contributions to candidates, the Court held, the aggregate limit functions as merely "a corollary of the basic individual contribution [limit]." *Id*. Because the Court had already found that limit to be constitutional, the correlative aggregate limit was equally constitutional. *See id*.

In sum, *Buckley* established four principles that control this case: (1) contribution limits are subject to intermediate scrutiny; (2) the government's interest in preventing corruption and the appearance of corruption is sufficient to justify contribution limits; (3) the government's interest in preventing circumvention of contribution limits is an equally important corollary of its anti-corruption interest; and (4) the aggregate contribution limit furthers the government's anti-corruption interest by inhibiting circumvention of the limit on individual contributions to candidates.

B. The Aggregate Contribution Limit Remains Closely Related to the Government's Important Interests in Preventing Corruption and the Appearance of Corruption

The Supreme Court has repeatedly reaffirmed *Buckley*'s key holding that Congress's important interest in preventing governmental corruption and its appearance justifies limiting

contributions that could be used to circumvent the limits on direct contributions to candidates. Thus, as discussed below, even if this Court were to accept plaintiffs' request to disregard *Buckley*'s plain holding, the aggregate limit would still easily survive intermediate scrutiny, because it is closely drawn to further the government's interest in preventing corruption and the appearance of corruption.

1. The Aggregate Contribution Limit Is a Contribution Limit, Not an Expenditure Limit as Plaintiffs Contend

Initiating their assault on *Buckley*, plaintiffs first argue that the aggregate contribution limit is an expenditure limit in disguise and therefore should be subject to strict, not intermediate, scrutiny. The assault fails.

Plaintiffs acknowledge, as they must, that *Buckley* imposed a "lower" level of scrutiny on contribution limits and that this Court cannot disregard *Buckley*'s holding. (*See* Pls.' Mem. at 5-6 & n.5.) Indeed, numerous decisions since *Buckley* have confirmed and applied that standard. *See*, *e.g.*, *McConnell v. FEC*, 540 U.S. 93, 136 (2003) (holding that contribution limit is constitutional if "closely drawn to match a sufficiently important interest") (internal quotation marks omitted); *FEC v. Beaumont*, 539 U.S. 146, 162 (2003) (same); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 387-88 (2000) (applying same standard and referring to it as "lesser demand"); *Republican Nat'l Comm. v. FEC*, 698 F. Supp. 2d 150, 156 (D.D.C. 2010) (three-judge court) (citing *McConnell*, *Beaumont*, and *Buckley*), *aff'd*, 130 S. Ct. 3544 (2010). Yet plaintiffs nonetheless assert that the aggregate contribution limit should be subject to strict scrutiny because they claim that it reduces the amount of money contributors can give political

candidates and entities to finance their activities, and so it "is effectively a limit on expenditures."[7] (*See* Pls.' Mem. at 34.)

This is the third time the RNC has made this argument in litigation against the Commission, even though the Supreme Court and this Court have already found it devoid of merit. The RNC first raised this claim in *McConnell*, asserting that because BCRA banned the national party committees from raising or spending "soft-money" donations in excess of the contribution limits in 2 U.S.C. § 441a, BCRA's soft-money ban essentially functioned as an expenditure restriction for constitutional purposes. *See McConnell*, 540 U.S. at 138 (construing 2 U.S.C. § 441i(a)). The Supreme Court squarely rejected the RNC's argument, noting that contribution limits do not "in any way limit[ ] the total amount of money parties can spend. Rather, they simply limit the source and individual amount of donations." *Id.* at 138-39 (internal citation omitted).

The RNC then attempted to relitigate *McConnell*'s holding before a three-judge court in this District, which rejected that attempt:

> To be sure, every limit on contributions logically reduces the total amount that the recipient of the contributions otherwise could spend. *But the [Supreme] Court has stated that this truism does not mean limits on contributions are simultaneously considered limits on expenditures that therefore receive strict scrutiny*. . . . Plaintiffs contend that [soft-money] contribution limits will function as expenditure limits when applied to their proposed conduct. But that argument flies in the face of *McConnell*, which squarely held that the level of scrutiny for regulations of contributions to candidates and parties does not turn on how the candidate or party chooses to spend the money or to structure its finances.

RNC, 698 F. Supp. 2d at 156 (internal citations omitted) (emphasis added).

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[7] Plaintiffs' alternative argument that *Citizens United v. FEC*, 130 S. Ct. 876 (2010), and other cases addressing independent expenditures changed the standard of scrutiny for contribution limits is addressed *infra* pp. 17-18.

This Court should again apply the intermediate "important government interests" test to FECA's aggregate contribution limit and summarily reject the RNC's attempt to take a third bite at this apple.[8]

2. Preventing Circumvention of Contribution Limits Is Critical to Furthering the Government's Important Anti-Corruption Interest

Applying intermediate scrutiny, the Supreme Court has repeatedly upheld contribution limits as a constitutional means of furthering the government's anti-corruption interest by preventing circumvention of limits on direct contributions to candidates. Three Supreme Court decisions demonstrate precisely why plaintiffs' challenge to the aggregate contribution limit cannot be sustained.

First, in *California Medical Association v. FEC*, the Court addressed FECA's limit on contributions to PACs. 453 U.S. 182 (1981). Congress had enacted this PAC limit shortly after *Buckley* to "restrict the opportunity to circumvent the . . . limits on contributions to a candidate," and to limit the "adverse impact" of PACs that profess to be independent "but are actually a means for advancing a candidate's campaign." *Id*. at 198 n.18 (quoting H. R. Conf. Rep. No. 94-1057, at 57-58 (1976)). The Court reiterated *Buckley*'s holding that contribution limits do not "directly infringe on the ability of contributors to express their own political views." *Id*. at 194-95; *see also id*. at 196 (referring to contributions as "speech by proxy"). The Court then reaffirmed that contribution limits "serve[ ] the important governmental interests in preventing the corruption or appearance of corruption of the political process that might result if such

[8] This Court also rebuffed the RNC's argument — which it repeats here (*see* Pls.' Mem. at 8) — that the Supreme Court's facial holdings are "inapplicable" in a subsequent as-applied constitutional challenge. *RNC*, 698 F. Supp. 2d at 157 ("In general, a plaintiff cannot successfully bring an as-applied challenge to a statutory provision based on the same factual and legal arguments the Supreme Court expressly considered when rejecting a facial challenge to that provision. Doing so is not so much an as-applied challenge as it is an argument for overruling a precedent.").

contributions were not restrained." *Id*. at 194-95. In reaching this conclusion, the Court recognized that contributors could "easily" evade the then-$1,000 limit on individual contributions to candidates — as well as the then-$25,000 aggregate limit — by giving much larger amounts to multiple PACs, each of which could then make contributions of up to $5,000 to the donor's preferred candidates. *Id*. at 198. The limit on contributions to PACs was therefore constitutional because it "further[ed] the governmental interest in preventing the actual or apparent corruption of the political process" by "prevent[ing] circumvention of the very limitations on contributions that this Court upheld in Buckley." *Id*. at 197-98.

The Court next assessed — and again upheld — the constitutionality of an anti-circumvention provision in *FEC v. Colorado Republican Federal Campaign Comm.*, 533 U.S. 431 (2001) ("*Colorado II*"), where "[a]ll Members of the Court agree[d] that circumvention is a valid theory of corruption." *Id*. at 456.

The particular provision at issue in *Colorado II* limited the amount of money that a political party could spend in coordination with its own candidates; such coordinated expenditures have long been deemed equivalent to contributions. *Id*. at 438 (citing 2 U.S.C. § 441a(a)(7)(B)(i)), 464 ("There is no significant functional difference between a party's coordinated expenditure and a direct party contribution to the candidate . . . ."). The Court examined in detail the relationship between political parties and candidates, and upheld the limits on a party's coordinated expenditures by relying on an anti-circumvention rationale.

Drawing upon an extensive factual record, the Court concluded 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; *see also infra* Part II.B.4 (discussing use of contributions to political parties to circumvent other limits). Because some individuals contribute to parties to try

to gain undue influence over elected officials — and because parties can raise funds in larger increments than candidates — "[c]oordinated expenditures of money donated to a party are tailor-made to undermine contribution limits." 533 U.S. at 464 (noting that, without limits on coordinated expenditures, candidates would have incentive to encourage donors to give large amounts to parties to be spent on candidates' behalf, rather than to solicit smaller contributions to candidates' own campaigns). The Court therefore held that it was "beyond serious doubt [that] contribution limits would be eroded if inducement to circumvent them were enhanced by declaring parties' coordinated spending wide open." *Id*. at 457. The limit on coordinated expenditures was therefore constitutional to further the government's anti-corruption interest by "minimiz[ing] circumvention of contribution limits." *Id*. at 465.[9]

Third, in *McConnell* the Court assessed multiple BCRA provisions that Congress enacted to close major loopholes in FECA's prior statutory regime. Most of these were associated with the phenomenon of "soft money," which consisted of unlimited donations to state and national political parties that were supposedly designated for non-federal purposes but were actually used to influence federal elections. *See* 540 U.S. at 126 ("The solicitation, transfer, and use of soft money . . . enabled parties and candidates to circumvent FECA's limitations on the source and amount of contributions in connection with federal elections."). The Court recognized that "[t]he less rigorous standard of review we have applied to contribution limits . . . provides Congress with sufficient room to *anticipate and respond to concerns about circumvention* of regulations

[9] Plaintiffs' reliance (Pls.' Mem. at 13-14) on *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996) ("*Colorado I*") is entirely misplaced: That case involved a limit on independent expenditures, which have been constitutionally distinct from contributions ever since *Buckley*. *See Colorado II*, 533 U.S. at 438-39, 443-45 (explaining difference between independent expenditures at issue in *Colorado I* and coordinated expenditures at issue in *Colorado II*).

designed to protect the integrity of the political process." *Id*. at 137 (emphasis added); *see also id*. at 144 (quoting *Colorado II*).

Applying this "less rigorous" standard, the Court upheld multiple statutory provisions aimed at eliminating or reducing the opportunity for circumvention of FECA's contribution limits via soft money donations. *See*, *e.g.*, *McConnell*, 540 U.S. at 134, 184-85 (upholding limit on soft-money contributions to state and local entities as preventing circumvention of ban on soft-money contributions to national political parties), 165-66 (same), 171-72 ("Given the delicate and interconnected regulatory scheme at issue here, any associational burdens imposed by the [contribution] restrictions are far outweighed by the need to prevent circumvention of the entire scheme.").[10]

Each of FECA's provisions upheld by the Supreme Court in these decisions hindered contributors' ability to give money to their chosen entities in the amounts of their liking; each of the provisions was nonetheless constitutional because it furthered the government's important anti-corruption interest by preventing circumvention of the limit on how much any one person can give to any one candidate. "Having been taught the hard lesson of circumvention by the entire history of campaign finance regulation," Congress has the power to "[p]revent[ ] corrupting activity from shifting" to take advantage of gaps in the statutory regime. *See McConnell*, 540 U.S. at 165-66. Stopping financial contributors from "eviscerating FECA clearly qualifies as an important governmental interest." *Id*.

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[10] *McConnell* struck down one anti-circumvention statute: a provision that prohibited minors from making any contributions, which the government had asserted was necessary to prevent parents from making contributions in the names of their children. 540 U.S. at 231-32. The flaw that the Court found in this provision was *not* a limit on Congress's power to prevent circumvention; rather, there simply was no evidence before the Court that the purportedly problematic activity had ever occurred, and the government had not explained why a complete contribution *ban* was necessary to address such hypothetical circumvention. *See id*. at 232 & n.3.

Despite the inescapable import of these Supreme Court decisions, plaintiffs argue that this Court should disregard these dispositive holdings. First, plaintiffs argue that FECA's aggregate contribution limit is a prohibited "prophylaxis on prophylaxis," citing the Supreme Court's admonition — in a different context — that a "prophylaxis-on-prophylaxis approach . . . is not consistent with *strict scrutiny*." (Pls.' Mem. at 15 (quoting *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 479 (2007)) (emphasis added).) Indeed, plaintiffs rest much of their case on this one phrase — which they incant more than 40 times in their argument — even though their quotation is both misleading and irrelevant here. Plaintiffs' ellipsis omits the operative words "to regulating expression" and ignores the fact that *Wisconsin Right to Life* addressed a direct ban on certain independent campaign speech, not a limit on contributions. 551 U.S. at 479 (finding that communications at issue could not be "equate[d] . . . with contributions"). For that reason, the Court applied strict scrutiny, something it has *never* done when considering a contribution limit.

Setting aside the incorrect standard of scrutiny that plaintiffs urge, plaintiffs' characterization of the aggregate contribution limit as a second-level prophylactic measure is spurious. They assert that the limit on contributions to candidates is itself a prophylactic measure to prevent circumvention of bribery laws (Pls.' Mem. at 22-23), and so the aggregate contribution limit, which prevents circumvention on the candidate-contribution limit, is a constitutionally impermissible and unnecessary "prophylaxis-on-prophylaxis" against bribery. (*See* Pls.' Mem. at 22-29.) This argument is completely at odds with *Buckley*, which noted that bribery laws reach "only the most blatant and specific attempts" to corrupt public officials with money, 424 U.S. at 27-28, and that "disturbing examples" of "pernicious practices" in the 1972 election demonstrated more subtle corruption arising from "large contributions," *see id*. at 26-27.

Bribery, in other words, is only one subset of the larger category of troubling attempts to corrupt officeholders with money that contribution limits seek to redress. *See McConnell*, 540 U.S. at 143 ("Our cases have made clear that the prevention of corruption or its appearance constitutes a sufficiently important interest to justify political contribution limits. We have not limited that interest to the elimination of cash-for-votes exchanges.").

The Court in *Buckley* also held that the government has a *separate* interest in preventing the *appearance* of corruption — *i.e.*, the "disastrous" erosion of confidence "stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions,"[11] *Buckley*, 424 U.S. at 27. Thus, the limit on contributions to candidates is not merely a prophylactic rule preventing evasion of bribery statutes; it is a substantive anti-corruption measure unto itself. Because the Supreme Court has expressly held that the aggregate limit is constitutional as a "corollary" of this individual limit, *Buckley*, 424 U.S. at 38; *see also Colorado II*, 533 U.S. at 456, there is no merit to plaintiffs' repeated assertion that the aggregate limit is a "prophylaxis-on-prophylaxis." *Cf. FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 210 (1982) (noting, in case involving contribution limits, that Court will not "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared").

Plaintiffs next attempt to avoid dispositive Supreme Court precedent by asserting that the Court's decision in *Citizens United v. FEC*, 130 S. Ct. 876 (2010), limited the scope of the government's anti-corruption interest to contributions that directly extract *quid pro quo* exchanges from candidates. (*See* Pls.' Mem. at 6, 13-15, 22.) But *Citizens United* repeatedly

[11] Plaintiffs imply that *Buckley* was wrongly decided on this point (*see* Pls.' Mem. at 23 (referring to holding as "problematic")), but they appear to acknowledge, as they must, that preventing the appearance of corruption is a "justifying" interest (*id*.).

and explicitly distinguished the government's interests in limiting contributions, which were not at issue in that case, from independent political expenditures, which were. *See, e.g.*, *id*. at 909 ("[C]ontribution limits . . . unlike limits on independent expenditures, have been an accepted means to prevent *quid pro quo* corruption"), 910-11 ("The BCRA record establishes that certain donations to political parties, called 'soft money,' were made to gain access to elected officials. This case, however, is about independent expenditures, not soft money.").

This Court has accordingly declined to apply the holding of *Citizens United* to limits on contributions to political parties. *See RNC*, 698 F. Supp. 2d at 153 ("*Citizens United* did not disturb *McConnell*'s holding with respect to the constitutionality of BCRA's limits on contributions to political parties.").[12] And the Fourth Circuit recently held — agreeing with two other Circuits — that *Citizens United* "preserved" the government's anti-corruption and anti-circumvention interests in regulation of contributions. *United States v. Danielczyk*, No. 11-4667, --- F.3d ---, 2012 WL 2445040, at *5 (4th Cir. June 28, 2012) (citing *Ognibene v. Parkes*, 671 F.3d 174, 195 n.21 (2d Cir. 2011), and *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1125 (9th Cir. 2011)). Thus, neither *Citizens United* nor the subsequent cases applying it provide any support for plaintiffs' attempt to narrow the scope of the government's anti-corruption interest in the contribution context.[13]

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[12] Plaintiffs rely (Pls.' Mem. at 6) on this Court's decision in *Carey*, but like *Citizens United*, *Carey* involved the financing of independent expenditures. *See Carey*, 791 F. Supp. 2d at 129 (quoting portion of *EMILY's List v. FEC*, 581 F.3d 1, 5-8 (D.C. Cir. 2009), that distinguished independent expenditures from contributions).

[13] Plaintiffs' assertion (Pls.' Mem. at 30) that the aggregate contribution limit constitutes an impermissible attempt to equalize political speech — or "level the playing field" — is flawed. *Buckley* struck down *expenditure* limits as unconstitutional speech-equalization measures. *See* 424 U.S. at 48-49. But *Buckley* explicitly noted that contribution limits are not speech-equalizing provisions because they do 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." 424 U.S. at 26 n.26.

3. Striking Down the Aggregate Limit Would Allow Massive Contributions and Undermine FECA's Contribution Limits

Plaintiffs next challenge the continued vitality of *Buckley* and its progeny by arguing that the rationale underlying the Court's holding no longer exists. Plaintiffs argue that *Buckley* upheld FECA's aggregate contribution limit only for the purpose of preventing the opportunity for "massive" or "huge" contributions, and that such large contributions would be impossible under the current statutory regime, even without the aggregate limit, due to the limits on individual contributions to each kind of political entity. (Pls.' Mem. at 10, 19-22, 28-29.)[14] Plaintiffs correctly note that the individual limits are currently $30,800 per year to each national political party committee, and lesser amounts to other entities. (*Id*. at 20; *see also supra* pp. 1-2.) But plaintiffs then assert, without any evidence or explanation, that "[n]one of these is 'massive,' in a year or a biennium." (Pls.' Mem. at 20.)

This assertion is both wrong and misleading. It is wrong because $30,800 represents approximately 60% of the median *annual* household income in the United States, *see* United States Census Bureau, *State & Country Quick Facts*, http://quickfacts.census.gov/qfd/states/00000.html (last visited July 8, 2012), and almost 50% of the average household's net worth, *see* Federal Reserve, *Balance Sheet of Households and Nonprofit Organizations*, http://www.federalreserve.gov/releases/z1/current/z1r-5.pdf (June 7, 2012). A contribution that exceeds what the median American household earns (gross) in six months is indeed "massive" — both actually and in appearance. Because political parties and candidates have a tiny pool of people from whom to seek such contributions, those few potential contributors hold substantial leverage. And from that leverage arises the precise potential for

[14] Plaintiffs' related arguments that the aggregate limits are simply not high enough, even when indexed for inflation, are addressed *infra* Part II.C.

corruption that led *Buckley* to uphold FECA's contribution limits. *See* 424 U.S. at 26-27 (noting that large contributions have potential to "secure a political *quid pro quo*" because "[u]nder a system of private financing of elections, a candidate lacking immense personal or family wealth must depend on financial contributions from others to provide the resources necessary to conduct a successful campaign"); *see also McConnell*, 540 U.S. at 119 n.5 ("'The record before Congress was replete with specific examples of improper attempts to obtain governmental favor in return for large campaign contributions.'") (quoting *Buckley v. Valeo*, 519 F.2d 821, 839 n.37 (D.C. Cir. 1975) (en banc)).

Furthermore, plaintiffs' assertion that massive contributions would not be permitted even if plaintiffs were to prevail here is incorrect. In the absence of the aggregate limit, a single donor who wanted to support just one political party and its candidates could contribute the following during a single two-year election cycle under the current limits:

- $30,800 per year to each of the three national party committees = $184,800
- $10,000 per year to each of the 50 states' political parties = $1,000,000
- $2,500 per election (primary and general elections) to each of the party's 33 Senate candidates = $165,000
- $2,500 per election (primary and general elections) to each of the party's 435 candidates for the House of Representatives = $2,175,000
- **Total contributions in one election cycle = $3,524,800**

Plaintiffs do not and cannot seriously contend that $3.5 million — or *70 times* the annual income of the median American household — in contributions to a single political party and its

candidates is anything but "massive."[15] And this figure does not even include contributions to a potentially unlimited number of PACs, at $5,000 per PAC per year.

Thus, in the absence of the aggregate limit, individuals with the means to make such outsized contributions could offer — and be solicited — to finance millions of dollars' worth of campaign activities per election cycle. That amount of money could easily exert a corrupting influence on the democratic system, *see McConnell*, 540 U.S. at 129-31 (discussing findings of S. Rep. No. 105-167 (1998)), and it would certainly present the appearance of corruption that is "inherent in a regime of large individual financial contributions," *see Buckley*, 424 U.S. at 27. The prevention of such "huge" contributions thus falls squarely within the government's anti-corruption and anti-circumvention interests. *See Buckley*, 424 U.S. at 38.

Finally, plaintiffs argue that even if an individual donor could give large contributions to a variety of political parties and PACs, those recipients could not be counted on to help circumvent the individual contribution limit by giving the contributor's money to candidates the contributor would want to support. (Pls.' Mem. at 23-26.) Plaintiffs are wrong as a matter of fact. It is often quite simple for a contributor to know which candidates will receive contributions from political parties and PACs; indeed, many PACs simply list the candidates on their websites. *E.g.*, Club for Growth, *Club for Growth PAC Endorsed Candidates*, http://www.clubforgrowth.org/endorsedcandidates/ (last visited July 8, 2012); NARAL Pro-Choice America, Press Release, http://www.prochoiceamerica.org/elections/elections-press-releases/2012/pr04032012_pac-endorsements.html (April 3, 2012) (identifying 44 federal candidates receiving contributions from PAC). And the Supreme Court has rejected the notion

[15] Plaintiffs' suggestion that the maximum aggregate contribution would be approximately $230,000 per election cycle (*see* Pls.' Mem. at 29) fails to account for contributions that could be made to candidates and state parties if the aggregate limit were not in place.

that anti-earmarking rules alone can effectively prevent contributors from using political parties to circumvent contribution limits. *Colorado II*, 533 U.S. at 459 (describing "tally system," though which parties helped channel funds from contributors to candidates while avoiding formal earmarking).

As the Supreme Court held in *Colorado II*, "[t]o treat the earmarking provision as the outer limit of acceptable tailoring would disarm any serious effort to limit the corrosive effects of . . . 'understandings' regarding what donors give what amounts to the party, which candidates are to receive what funds from the party, and what interests particular donors are seeking to promote." *Id*. at 462 (internal citation and quotation marks omitted).[16] Moreover, plaintiffs' argument is foreclosed by *Buckley*, which noted the likelihood of circumvention "through the use of *unearmarked* contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party." 424 U.S. at 38 (emphasis added). Plaintiffs' only response is to assert that *Buckley* was wrongly decided on this point. (*See* Pls.' Mem. at 25 (arguing that *Buckley*'s holding was not supported by evidence).)[17] And that argument is not sustainable here.

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[16] Plaintiffs' related argument (Pls.' Mem. at 26-27) that contributions to an entity must be analyzed in *pro rata* proportion to the entity's total income is similarly irreconcilable with *Colorado II*. *See* 533 U.S. at 461 (rejecting political party plaintiff's argument that the contributions it received were not large enough to carry "corrupting momentum . . . through the party conduit").

[17] Plaintiffs assert that, after *Citizens United*, contributors can circumvent contribution limits by financing independent expenditures through "super PACs," and so the Court should reexamine whether the contribution limits are now so ineffective as to call their constitutionality into question. (Pls.' Mem. at 16 & n.10.) But the aggregate limit has *never* applied to independent expenditures. *See Buckley*, 424 U.S. at 39-51 (striking down limit on independent expenditures). In any event, contribution limits are not rendered unconstitutional merely because there are other ways for donors to spend large amounts of money on political purposes. *See Mariani v. United States*, 212 F.3d 761, 773-76 (3d Cir. 2000) (en banc) (rejecting pre-BCRA argument that limit on contributions was unconstitutional because it could be circumvented by soft-money donations); *RNC*, 698 F. Supp. 2d at 160 n.5 ("[O]utside groups —unlike candidates

4. Contributors Use Contributions to National Political Parties to Exert Actual or Apparently Corrupt Influence over Federal Officeholders

In addition to the foregoing challenges to the aggregate limit as a whole, plaintiffs also argue that the governmental interests underlying the aggregate limit are insufficient to justify its independent application to each type of political entity — that is, national political parties, PACs, and candidates. Plaintiffs' argument is off the mark. The aggregate limit, as applied to each entity, furthers the government's anti-corruption interests.

As to national political parties, plaintiffs' argument is completely untenable in light of *Colorado II* and *McConnell*, both of which recognized the role such parties can play in circumventing individual contribution limits. *Colorado II* upheld a limit on parties' coordinated expenditures on the grounds 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; *see also supra* pp. 13-14. Large contributors seeking to create such obligations "test[ed] the limits" by "giv[ing] to the party with the tacit understanding that the favored candidate will benefit." *Id*. at 457-58. Large donors did not need to earmark their donations; the party simply engaged in "informal bookkeeping" to track which contributors funds were intended to assist which candidates. *Id*. at 459. In light of these practices that effectively channeled more money from contributors to candidates than the individual contribution limits permitted, the Court held that the limit on parties' coordinated expenditures furthered the government's important anti-corruption interest by "minimiz[ing] circumvention of contribution limits." *Id*. at 465.

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and political parties — may receive unlimited donations both to advocate in favor of federal candidates and to sponsor issue ads. We recognize the RNC's concern about this disparity . . . . But that is an argument for the Supreme Court or Congress. As a lower court, it is not our place to reassess the constitutionality of limits on contributions to political parties that the Supreme Court has upheld.").

McConnell upheld BCRA's ban on soft-money contributions to national political parties on substantially similar grounds: "[C]ontributions to a federal candidate's party in aid of that candidate's campaign threaten to create — no less than would a direct contribution to the candidate — a sense of obligation." 540 U.S. at 144-45 (citing *Buckley*'s upholding of FECA's aggregate contribution limit). That corruptive potential "is particularly true of contributions to national parties, with which federal candidates and officeholders enjoy a special relationship and unity of interest." *Id*. Indeed, this "unity of interest" is so strong that candidates would ask donors who reached the limit on direct candidate contributions to give more money to the party, or even to outside groups that were known to support the party. *See id*. at 125. Such donations and solicitations "enabled parties and candidates to circumvent FECA's limitations," *id*. at 126: "[C]andidates and donors alike . . . exploited the . . . loophole, the former to increase their prospects of election and the latter to create debt on the part of officeholders, with the national parties serving as willing intermediaries." *Id*. at 146. This interaction resulted in two forms of corruption: "undue influence on an officeholder's judgment, and the appearance of such influence." *Id*. at 150 (quoting *Colorado II*, 553 U.S. at 441).[18] *McConnell* therefore held that the government's important interests in preventing actual and apparent corruption were sufficient to justify the soft-money contribution ban. *Id*. at 156.[19]

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[18] Although the Court need not address this question to deny plaintiffs' preliminary injunction motion, plaintiffs are incorrect to assert that a political party is incapable of leveraging its financial resources to exert corrupt influence over its own candidates. (*See* Pls.' Mem. at 13-14.) Plaintiffs cite dicta from two plurality opinions in *Colorado I* to support this assertion, but *Colorado II* explicitly noted that the Court had not reached the issue. 533 U.S. at 456 n.18.

[19] Plaintiffs' assertion that "Congress saw political parties as posing little circumvention risk" (Pls.' Mem. 17 n.11) is false. *See* S. Rep. No. 105-167 (1998) (10,000 page Senate report including investigation of political party fundraising abuses); *see also McConnell*, 540 U.S. at 129-32 (discussing Senate report and noting that it served as basis for many of BCRA's reforms). Congress granted political parties higher limits on incoming contributions because parties' diverse activities on behalf of candidates nationwide "play an important role in federal

The limit on aggregate contributions to national political parties serves the same anti-corruption and anti-circumvention functions as the limits upheld in *Buckley*, *Colorado II*, and *McConnell*. And these cases conclusively shut the door on plaintiffs' claim that the government's "anticorruption interest does not apply to contributions to national party committees," but only to contributions to candidates. (Pls.' Mem. at 13.) Indeed, *McConnell* explicitly rejected just that argument. 540 U.S. at 152 n.48.[20]

Plaintiffs unconvincingly attempt to distinguish *Colorado II* and *McConnell* on a number of grounds. Most specious is the claim that *Citizens United* redefined "corruption" in the context of political parties, *i.e.*, by "reject[ing] the notion that influence on, access to, or gratitude from candidates was cognizable as corruption or circumvention." (Pls.' Mem. at 22, 35.) Plaintiffs present this assertion as if it were a matter of first impression, but it is not: Just two years ago, the RNC raised this exact argument to a three-judge court in this District and it was rejected. *RNC*, 698 F. Supp. 2d at 158 ("The RNC contends that *Citizens United* undermines any theory of limiting contributions to political parties that might have rested on the idea that large contributions to parties create gratitude from, facilitate access to, or generate influence over federal officeholders and candidates."). The Court concluded that RNC's argument was precluded by *McConnell*'s findings that parties and candidates are so inextricably intertwined that candidates "may value contributions to their national parties — regardless of how those contributions ultimately may be used — in much the same way they value contributions to their

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elections," *cf. FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 41 (1981) (noting role of parties in FECA's "general scheme"), not because they pose less risk of corruption than PACs.

[20] Plaintiffs again rely on *Carey*, but that case involved a non-connected PAC that sought to receive unlimited contributions to make independent expenditures, and the court distinguished that plaintiff from a political party. *See* 791 F. Supp. 2d at 131 ("[N]on-connected [entities] are not the same as political parties and do not cause the same concerns of *quid pro quo* money-for-access.").

own campaigns." *Id*. at 159. Thus, because "large . . . contributions to national parties are likely to create actual or apparent indebtedness on the part of federal officeholders," *id*. at 159 (citing *McConnell*, 540 U.S. at 155) — and because *Citizens United* "did not disturb *McConnell*'s holding" on this issue, *id*. at 153 (citing *Citizens United*, 130 S. Ct. at 910-11) — this Court found that it could not rule in the RNC's favor without impermissibly "get[ting] ahead of the Supreme Court." *Id*. at 160.

The RNC appealed this decision directly to the Supreme Court, which, less than six months after *Citizens United*, summarily affirmed this Court's judgment. 130 S. Ct. 3544 (2010). Lower courts are bound by such summary affirmances. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam). Yet plaintiffs' brief makes no mention whatsoever of this Court's prior opinion, much less the Supreme Court's summary affirmance. The RNC's arguments in this action — just as in the prior case that they fail to cite — are merely "another way of asking [this Court] to overrule *McConnell*'s holding . . . . As a lower court, we of course have no authority to do so." *RNC*, 698 F. Supp. 2d at 157.

Colorado II and *McConnell* also belie plaintiffs' argument that *Buckley* upheld FECA's aggregate contribution limit only because there was no other limit on contributions to political parties at the time. Plaintiffs contend that once Congress enacted such a limit on political parties in 1976, after the *Buckley* decision, the rationale for applying the aggregate limit to contributions to political parties was vitiated. (*See* Pls.' Mem. at 8-11.) But *Buckley* upheld the aggregate limit in part to prevent contributors from using parties to circumvent the limit on direct contributions *to candidates*. 424 U.S. at 38. In 1974, the limit on contributions to candidates was $1,000, and there was no separate limit on contributions to parties; today, those limits are $2,500 per election for candidates and $30,800 per year for political parties. Because the limit

on contributions to parties is (and has always been) much higher than the limit on direct contributions to candidates, political parties remain attractive investment opportunities for contributors who "seek to produce obligated officeholders" by circumventing the direct limit. *See Colorado II*, 533 U.S. at 452. Indeed, as discussed above, that is precisely why the Court upheld anti-circumvention measures directed at parties in *Colorado II* and *McConnell* — both of which post-date Congress's enactment of the limit on individual contributions to parties.

In sum, without the aggregate limit, an individual contributor would be able to give $184,800 to the national political party committees for a single party in one election cycle, plus another $1 million to that party's state or local political party committees. The latter amount would be legally transferrable in its entirety to the national party, 2 U.S.C. § 441a(a)(4), and history shows that national and state parties exchange funds in whatever way is most advantageous to the party's candidates at the time. *See McConnell*, 540 U.S. at 124 (noting transfers from national to state parties); *id.* at 161 ("BCRA's restrictions on national committee activity would rapidly become ineffective if state and local committees remained available as a conduit . . . ."); *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 30 (1981) (describing system of state parties giving national parties control over state party's spending). These figures so dwarf the $5,000 that a contributor can give to a candidate that the "quite modest restraint" of the aggregate limit remains necessary "to prevent evasion of the $[5],000 contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate through . . . huge contributions to the candidate's political party." *Buckley*, 424 U.S. at 38.

5. Non-Party Political Committees Continue to Proliferate and Provide Means of Circumventing the Contribution Limits

Turning to the second type of political entities — non-party political committees — it is not clear whether plaintiffs specifically seek to enjoin the Commission from enforcing the aggregate limit on contributions to PACs, as McCutcheon has not alleged any desire to make contributions in excess of that limit during the pendency of this action, and plaintiffs present almost no independent legal argument regarding that portion of FECA's aggregate contribution limits (*see* Pls.' Mem. at 31).[21] Nonetheless, to the extent plaintiffs do seek such an injunction, it is also foreclosed by *Buckley*.

Buckley upheld the constitutionality of the aggregate contribution limit "to prevent evasion of the . . . limitation [on contributions to candidates] 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." 424 U.S. at 38 (emphasis added); *see also Cal. Med.*, 453 U.S. at 198 (discussing potential for PAC contributors to circumvent limit on direct candidate contributions). In light of that plain and unambiguous holding, plaintiffs simply cannot demonstrate a likelihood of success on the merits of any challenge to the aggregate limit on contributions to PACs.

Plaintiffs' argument (Pls.' Mem. at 8-12, 17-19), which is essentially identical to their argument concerning national political parties discussed above, is that *Buckley*'s rationale ceased to apply in 1976. At that time, Congress enacted limits on contributions to PACs, as well as other provisions designed to inhibit the "adverse impact" of PACs that "appear to be separate

[21] Plaintiffs' cursory assertion (Pls.' Mem. at 31-32) that the aggregate limit on contributions to state parties should be struck down appears to rest on a non-severability argument. *But see* BCRA § 401, 116 Stat. 112 ("If any provision of this Act . . . is held to be unconstitutional, the remainder of this Act and . . . the application of the [Act] to any person or circumstance[ ] shall not be affected by the holding."). Because plaintiffs are unlikely to succeed on the merits of their other claims, their derivative non-severability argument also lacks merit.

entities pursuing their own ends, but are actually a means for advancing a candidate's campaign." *Cal. Med.*, 453 U.S. at 198 n.18 (quoting H. R. Rep. No. 94-1057, at 57-58 (1976) (Conf. Rep.)); *see also* Pls.' Mem. at 17-18 (noting FEC regulations limiting ability of single individual or entity to take advantage of multiple contribution limits by controlling multiple PACs). Plaintiffs are undoubtedly correct that there are more legal barriers to the proliferation of affiliated PACs today than there were at the time of *Buckley*. But that in no way undercuts *Buckley*'s reasoning, which was based on a contributor's ability to circumvent the limit on his direct contributions to a candidate by contributing to multiple PACs "likely to contribute to that candidate." 424 U.S. at 38. As noted *supra* p. 21, the internet makes identifying such PACs a substantially easier endeavor today than it was in 1974. And combined with the explosion in the sheer number of PACs — from 600 in 1974 to more than 4,600 today[22] — there can be no serious doubt that a contributor determined to circumvent the direct contribution limit could successfully find a sufficient number of PACs likely to contribute to his preferred candidate.

For example, if a contributor were to give the maximum contribution of $5,000 to each of 100 PACs, and just one-quarter of those PACs then contributed $5,000 to the contributor's desired candidate, that would represent $125,000 in contributions to the candidate — a massive circumvention of FECA's current $2,500 per-election limit.[23] The aggregate limit on

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[22] FEC, *PAC Count — 1974 to Present*, http://www.fec.gov/press/summaries/2011/2011paccount.shtml (last updated Jan. 2012).

[23] Plaintiffs argue that the aggregate limit "is underinclusive because PACs have no biennial aggregate limit." (Pls.' Mem. at 30 n.20.) But the reason "multicandidate political committees" (*i.e.*, PACs) exist is to provide a mechanism for multiple individuals to pool their money to support multiple candidates. *See* 2 U.S.C. § 441a(a)(4) (providing that PAC is considered "multicandidate" only after it "has received contributions from more than 50 persons, and . . . has made contributions to 5 or more candidates for Federal office"). There would be little sense in Congress creating an entity to take in, *e.g.*, $255,000 per year ($5,000 from each of 51 persons) if that entity were then limited to contributing a total of $46,200 biennially.

contributions to PACs ameliorates this problem by limiting the number of PACs the contributor can attempt to use as conduits.

6. One Individual Contributing Millions of Dollars Directly to Political Candidates Would Create, at a Minimum, the Appearance of Corruption

Finally, plaintiffs' challenge to the aggregate contribution limits as applied to the third category at issue — individual candidates — must fail. Although Congress has raised both the individual and aggregate limits and indexed them for inflation since *Buckley* originally upheld them, the basic structure of those contribution limits has remained unchanged since 1974. Plaintiffs cannot, therefore, demonstrate a likelihood of success on the merits of their claim that the aggregate limit on candidate contributions is unconstitutional.

In the absence of that limit, a single donor wishing to support one political party's federal candidates could directly contribute millions of dollars to those candidates in each election cycle — approximately $2.3 million in 2011-2012. *See supra* p. 20. Viewed piecemeal, each individual contribution would be capped at $2,500 per election ($5,000 per election cycle). But if a contributor such as McCutcheon were to give millions of dollars to finance a parties' candidates, this aggregate contribution would be functionally indistinguishable from the million-dollar soft-money donations that, before the passage of BCRA, donors gave to parties to help their candidates — donations that led to well-documented instances of actual and apparent corruption. *See McConnell*, 540 U.S. at 129-31, 145-152.

Whatever undue influence soft-money donors acquired by giving hundreds of thousands of dollars to parties, contributors who give the same amount of money directly to the parties' candidates would be able to acquire the same influence. And because so few contributors would be able to provide this new level of maximum funding, those contributors would be able to extract concessions in exchange for agreeing to spread their largesse among the party's

candidates. Preventing these schemes — all of which occurred before the soft-money ban and would likely happen again if plaintiffs were to prevail — is at the heart of the government's anti-corruption interest. *Cf. McConnell*, 540 U.S. at 165 ("Having been taught the hard lesson of circumvention by the entire history of campaign finance regulation, Congress knew that soft-money donors would react to [a contribution ban] by scrambling to find another way to purchase influence."). And even apart from actual corruption, millions of dollars in contributions from a single individual present the appearance of corruption that must be avoided "if confidence in the system of representative Government is not to be eroded to a disastrous extent." *See Buckley*, 424 U.S. at 27 (internal quotation marks omitted) (upholding $1,000 contribution limit).[24]

Apart from meritless objections to the precise dollar-amount of the limit, which are addressed *infra* Part II.C, plaintiffs' other main challenge to the aggregate limit on contributions to candidates is that it "is the functional equivalent of a *ban* on an individual associating with the candidates of his choosing because it has the effect of prohibiting contributions to 'too many' candidates." (Pls.' Mem. at 34 (emphasis added).) Even if that assertion were true, it would have been just as true of the limit upheld in *Buckley*, and so it cannot overcome that precedent. But plaintiffs' claim is not even remotely true: FECA's aggregate limit of $46,200 in contributions to candidates does not place any restriction on the number of candidates to whom

[24] A contributor would not need to contribute to hundreds of candidates to raise the specter of corruption. For example, there are 29 majority members of the House Committee on Appropriations. *See* Committee on Appropriations, *Full Committee Members*, http://appropriations.house.gov/about/members/ (last visited July 8, 2012). Without the aggregate limit, an individual contributor seeking a favorable appropriation could give a total of $145,000 to these Representatives. If the contributor then received his desired appropriation, the public could reasonably believe that the committee had made its decision "not on the merits or the desires of [the Representatives'] constituencies, but according to the wishes of those who have made large financial contributions." *McConnell*, 540 U.S. at 153. "Who, after all, can seriously contend that a $100,000 donation does not alter the way one thinks about — and quite possibly votes on — an issue?" *Id*. at 149 (quoting testimony of former Sen. Alan Simpson).

McCutcheon (or anyone else) can contribute. He can quite literally contribute to every single candidate in every single federal election in the United States. McCutcheon is limited only in the *amount* he can give to each of those candidates. That is an exceedingly weak constitutional burden, for contributions implicate the First Amendment not as acts of direct speech but as symbolic acts associating the contributor with candidates; the *amount* of the contribution is largely irrelevant to the *act* of association. *See Buckley*, 424 U.S. at 21 ("[T]he quantity of communication by the contributor does not increase perceptibly with the size of his contribution . . . ."); *McConnell*, 540 U.S. at 135 (quoting *Buckley*).

Nothing could illustrate this established First Amendment principle better than plaintiffs' own Complaint. McCutcheon allegedly intends to give the symbolic figure of $1,776 to each of 25 candidates (plus a total $7,500 to three others), which would exceed the aggregate limit. But McCutcheon could lawfully contribute the equally symbolic figure of $17.76 to all 468 Republican congressional candidates in the nation. Alternatively, he could spend $1,776 (or, for that matter, $1,776,000) on independent expenditures for every candidate. Or he could choose another way to participate in the campaigns of his choosing, such as "becom[ing] a member of any political association and [assisting] personally in the association's efforts on behalf of candidates." *Buckley*, 424 U.S. at 21-22. The aggregate limit minimizes the actual and apparent corruption arising from large contributions while still permitting contributors to associate themselves with all the candidates of their choosing and to engage in any of these other First Amendment activities. *See id.*

Finally, plaintiffs' blanket assertion (*see* Pls.' Mem. at 35-36) that candidates cannot serve as conduits for circumventing the individual contribution limits to other candidates has no basis in fact. Just as a contributor can give $5,000 to a number of PACs that in turn give to one

candidate, the contributor can give $5,000 to a number of candidates who in turn give to one candidate. Plaintiffs do not appear to dispute that these transfers take place, as, indeed, they do: Members in "safe" districts routinely contribute to the members of their party facing more difficult elections. *See, e.g.*, Raymond Hernandez, *Money From Colleagues Buoys Rangel Campaign*, N.Y. Times (May 28, 2012), http://www.nytimes.com/2012/05/29/nyregion/rangels-campaign-is-helped-by-colleagues-contributions.html (May 28, 2012).

The phenomenon of "leadership PACs" — *i.e.*, a PAC established by an elected official to collect and spend funds in support of his colleagues — exacerbates this conduit potential. There are hundreds of leadership PACs, *see* FEC, *2012 Leadership PACs and Sponsors*, http://www.fec.gov/data/Leadership.do?format=html&election_yr=2012 (last visited July 7, 2012), and they give tens of millions of dollars to federal candidates. *See* OpenSecrets.org, *Leadership PACs*, http://www.opensecrets.org/pacs/industry.php?txt=Q03&cycle=2012 (last visited July 8, 2012). Leadership PACs are ready-made conduits, allowing a contributor to ingratiate himself simultaneously with the officeholder who sponsors the PAC and the candidates who receive contributions from it.[25] *Cf. McConnell*, 540 U.S. at 174-178 (upholding ban on officeholder solicitations for tax-exempt entities in light of evidence that officeholders established such entities to engage in political spending to benefit themselves and their colleagues).

[25] Plaintiffs speculate that the candidates serving as conduits and sponsors of leadership PACs take credit for these contributions themselves, rather than crediting the underlying donor. (Pls.' Mem. at 40.) The discovery process in this case may help determine the accuracy of that speculation, but it is ultimately beside the point, as multi-million-dollar contributors (who would proliferate in the absence of the aggregate limit) are not hesitant to publicize their generosity. *See McConnell*, 540 U.S. at 146-47 ("[F]or a Member [of Congress] not to know the identities of [large] donors, he or she must actively avoid such knowledge as it is provided by . . . the donors themselves.") (internal quotation marks omitted).

Because of the aggregate limit, such conduit activity is limited to $46,200 per contributor per election cycle — the amount that Congress has determined to present a sufficiently low risk of corruption.[26] Without the aggregate limit, officeholders using their leadership PACs or their own campaign committees could funnel millions of dollars from a contributor to candidates in need. For all the reasons discussed above, the government has an important interest in limiting the actual and apparent corruption inherent in such a system.

C. The Aggregate Contribution Limit Does Not Deprive National Political Parties of the Ability to Raise Enough Money to Engage in Effective Advocacy

Plaintiffs' final challenge is that FECA's aggregate limit — in general and in its specific application to each type of political entity — is so low as to violate the First Amendment. Plaintiffs cannot possibly prevail on the merits on their argument, which ignores outright the legal standard for assessing such claims, and which is unsustainable as a matter of indisputable fact.

The general rule, established in *Buckley*, is that courts do not second-guess Congress's decision regarding the exact dollar figure at which to set a contribution limit:

> [Plaintiffs argue] that the $1,000 restriction is unrealistically low because much more than that amount would still not be enough to enable an unscrupulous contributor to exercise improper influence over a candidate or officeholder, especially in campaigns for statewide or national office. . . . *Congress' failure to engage in such fine tuning does not invalidate the legislation. . . . [I]f it is satisfied that some limit on contributions is*

[26] Plaintiffs incorrectly assume that the individual contribution limits "eliminate[ ] *any* cognizable circumvention risk" (Pls.' Mem. at 21 (emphasis added)), such that no matter how many contributions an individual makes within those limits, there is no risk of corruption (*id.* ("Zero multiplied by anything equals zero.").) But neither Congress nor the courts have ever found that the individual limits *eliminate* corruption — or even that they are intended to do so. Rather, the 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 ("[T]he Act's primary purpose [is] to *limit* the actuality and appearance of corruption . . . .") (emphasis added); *cf. id.* at 30 (noting that courts do not "probe" whether Congress has set limits at exact dollar amount that would entirely prevent corruption).

> *necessary, a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000.* Such distinctions in degree become significant only when they can be said to amount to differences in kind.

Buckley, 424 U.S. at 30 (internal quotation marks omitted) (emphasis added). The Supreme Court has repeatedly reaffirmed this holding. *See Randall v. Sorrell*, 548 U.S. 230, 248 (2006) (Breyer, J., plurality op.) ("In practice, the legislature is better equipped to make such empirical judgments, as legislators have particular expertise in matters related to the costs and nature of running for office. Thus ordinarily we have deferred to the legislature's determination of such matters.") (internal quotation marks and citation omitted); *Colorado II*, 533 U.S. at 446 ("[T]he dollar amount of the limit need not be 'fine tun[ed]'") (quoting *Shrink Missouri*, alterations in original); *cf. 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.") (citing *Randall*, *Shrink Missouri*, and *Buckley*).[27]

As the Supreme Court has held, a contribution limit contravenes the First Amendment only if the limit "is so low as to 'preven[t] candidates and political committees from amassing the resources necessary for effective advocacy.'" *McConnell*, 540 U.S. at 145 (quoting *Buckley*, 424 U.S. at 21); *see Shrink Mo.*, 528 U.S. at 397 (referring to "effective advocacy" test as setting "outer limits of contribution regulation"). As *Shrink Missouri* explained:

> We ask[ ], 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. Such being the test, the issue . . . cannot be truncated to a narrow question about the power of a dollar, but must go to the power to mount a campaign with all the dollars likely to be forthcoming.

[27] Plaintiffs do not actively dispute this standard; they simply ask the Court to disregard it. (*See* Pls.' Mem. at 37 ("While prior holdings of the Supreme Court have extended deference to Congressional judgment on contribution limits, those holdings should be revisited . . . .").)

528 U.S. at 397. The Court then examined the factual record in that case and found no evidence (except the plaintiff candidate's own allegations) that contribution limits ranging from $275 to $1,075 had inhibited candidates from "amass[ing] impressive war chests" or otherwise raising sufficient funds to run effective campaigns. *Id*. at 395-97 (internal quotation marks omitted).

Plaintiffs here complain that the aggregate contribution limit is too low in two respects.[28] First, plaintiffs assert that, when inflation is taken into account, the current aggregate limit is in several respects more restrictive than the $25,000 aggregate limit upheld in *Buckley*. (*See* Pls.' Mem. at 38-39.) Yet, as plaintiffs acknowledge (*id*. at 20), $25,000 in 1974 is equivalent to $116,500 today — almost exactly the current $117,000 aggregate limit.[29] More importantly, *Shrink Missouri* — which plaintiffs' brief never mentions even though it is binding precedent here — categorically forecloses this argument. "Respondents seem to assume that *Buckley* set a minimum constitutional threshold for contribution limits, which in dollars adjusted for loss of purchasing power are now well above the [limits at issue]. But this assumption is a fundamental misunderstanding of what we held." 528 U.S. at 396 (reiterating that ability to engage in "effective advocacy," not dollar amount, is test for such challenges).

Second, plaintiffs claim that the aggregate contribution limits are equivalent to (or lower than) those struck down in *Randall*, the only case in which the Supreme Court has found a

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[28] To the extent plaintiffs purport to challenge the aggregate limit on contributions to candidates or PACs as too low (*see, e.g.*, Pls.' Mem. at 41), neither McCutcheon nor the RNC has standing to do so. As the cases discussed in the text above uniformly establish, the question of whether a contribution limit is too low is assessed from the perspective of *recipients — i.e.*, whether those recipients can amass the resources necessary to engage in effective advocacy — not from the perspective of contributors. No PAC or candidate is a plaintiff before this Court.

[29] Bureau of Labor Statistics, *Inflation Calculator*, http://www.bls.gov/data/inflation_calculator.htm/ (last visited July 8, 2012). Plaintiffs appear to argue at several points (Pls.' Mem. at 20-21, 38) that the (non-aggregate) limit on individual contributions to candidates is lower than it was in 1974; this is entirely irrelevant since plaintiffs challenge only the aggregate limits here. (*See id.* at 37 (disavowing challenge to "the base per-candidate limit").)

contribution limit to fall below the constitutional minimum. (*See* Pls.' Mem. at 32-41.) The Vermont limits struck down in *Randall* ranged from $200 to $400 per contributor, were not indexed for inflation, and were so low that some candidates — particularly challengers, whose success often depends on outspending their incumbent opponents — probably would not have been able to raise enough money to "run competitive campaigns." *See* 548 U.S. at 253-62 (quotation at 253).[30] But the Court explicitly distinguished these limits from FECA's limits, which were "far less problematic, for they were significantly higher than [Vermont's]." *Id*. at 258 (citing *Colorado II*); *see also* 2 U.S.C. § 441a(c)(1) (indexing aggregate limit for inflation).

The RNC's fundraising figures confirm the distinction the Court drew between the contribution limits at issue in *Randall* and those in FECA. The RNC received contributions totaling $83 million in 2007, $202 million in 2008, $80 million in 2009, $86 million in 2010, and $82 million in 2011 (Compl. ¶¶ 47-51), and it has taken in $81 million through the first five months of 2012.[31] Of the thousands of candidates, political parties, and PACs in the nation, only two — President Obama's campaign committee and the Democratic National Committee — have taken in more contributions during this election cycle than the RNC.

It cannot be credibly maintained that this high level of income has somehow made the RNC "ineffective" or driven its "voice below the level of notice." *Shrink Missouri*, 528 U.S. at 397. The RNC spent $210 million in the 2009-2010 election cycle (Compl. ¶ 53), and, through

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[30] Plaintiffs imply that FECA's aggregate contribution limit may serve a similarly impermissible incumbent-protection purpose (*see* Pls.' Mem. at 37), but *Buckley* explicitly rejected that argument. *See* 424 U.S. at 30-33.

[31] The RNC's most recent monthly FEC report (filed in June 2012) is available at http://images.nictusa.com/pdf/737/12971367737/12971367737.pdf. A summary of its activity to date in this election cycle is available at http://query.nictusa.com/cgi-bin/cancomsrs/?_12+C00003418 (last visited July 8, 2012). A sortable summary of all party and PAC contributions and expenditures is available at http://www.fec.gov/data/CommitteeSummary.do?format=html&election_yr=2012 (last visited July 8, 2012).

May 2012, it had spent $109 million in the 2011-2012 election cycle. That is, again, the third highest of any candidate, political party, or PAC in the United States. Indeed, the RNC — by itself — has spent almost as much as the cost of every independent expenditure in the country *combined*. (*See* Compl. ¶ 61 (citing evidence that $119 million has been spent on independent expenditures this election cycle through June 12, 2012).).[32] On their face, these facts refute any argument that FECA's aggregate limit has rendered the RNC "useless." *Cf. Colorado II*, 533 U.S. at 455 (rejecting argument that political parties needed to be able to make larger contributions to candidates to be effective). Without evidence that the RNC's massive income is insufficient to finance effective advocacy, plaintiffs cannot demonstrate that they are likely to succeed on the merits of their challenge to the dollar amounts of the aggregate limit.

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In short, plaintiffs' constitutional arguments cannot be sustained — they are foreclosed by binding Supreme Court case law. Accordingly, plaintiffs cannot shoulder their heavy burden of demonstrating that they are likely to succeed on the merits of their claims.

III. PLAINTIFFS FACE NO COGNIZABLE HARM DURING THE PENDENCY OF THIS CASE

In addition to showing probable success on the merits of their case, plaintiffs must also demonstrate a likelihood — not merely a possibility — that they will suffer irreparable harm without injunctive relief. *Winter*, 555 U.S. at 22. "[T]he injury must be . . . actual and not theoretical . . . [and] of such imminence that there is a clear and present need for equitable relief . . . ." *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). To meet this requirement,

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[32] To the extent the RNC's complaint is that it wishes to take in even more money to compete with independent groups (*see* Pls.' Mem. at 16), "that is an argument for the Supreme Court or Congress." *RNC*, 698 F. Supp. 2d at 160 n.5; *cf. Davis*, 554 U.S. at 738 (holding that government cannot use contribution limits to equalize financial resources among political competitors).

"[a] litigant must do more than merely *allege* the violation of First Amendment rights." *Wagner v. Taylor*, 836 F.2d 566, 576 n.76 (D.C. Cir. 1987) (emphasis in original) (discussing *Elrod v. Burns*, 427 U.S. 347 (1976)); *NTEU v. United States*, 927 F.2d 1253, 1254-55 (D.C. Cir. 1991) ("A preliminary injunction is not appropriate . . . 'unless the party seeking it can demonstrate that First Amendment interests are either threatened or in fact being impaired at the time relief is sought.'") (quoting *Wagner*, alterations omitted). If plaintiffs make "no showing of irreparable injury, 'that alone is sufficient' for a district court to refuse to grant preliminary injunctive relief." *Hicks v. Bush*, 397 F. Supp. 2d 36, 40 (D.D.C. 2005) (quoting *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 747 (D.C. Cir. 1995)).

The RNC alleges that it would like to receive a $25,000 contribution from McCutcheon (*see* Compl. ¶¶ 35, 39), yet McCutcheon can give the RNC that money today; FECA's aggregate limit does not prohibit him from doing so. Apparently, McCutcheon's position is that he will not give this $25,000 contribution to the RNC unless he can also give the exact same amount to the NRSC and the NRCC at the same time. (Compl. ¶ 35.)[33] In other words, the RNC alleges that it faces imminent harm because McCutcheon has decided not to make a legal contribution to his co-plaintiff RNC unless he can make large contributions to other parties as well. But the RNC's inability to receive this $25,000 is the result of McCutcheon's choice, not of FECA's command.

Furthermore, the RNC's purported need for urgent relief is belied by its own allegations. The RNC claims that *Buckley*'s rationale for upholding FECA's aggregate limit on contributions to political parties was vitiated when Congress enacted a separate limit on individual contributions to parties in 1976. *See supra* pp. 26-27 (discussing Pls.' Mem. at 8-11). Thus,

[33] The RNC has no legal authority to assert harms on behalf of the NRSC or NRCC in this litigation. (*See* Compl. ¶ 43 ("RNC, NRSC, and NRCC are in fact distinct, with separate controlling officials and governing bodies.")).

according to the RNC, the aggregate limit has been unconstitutionally infringing on the RNC's rights for the past 36 years. Yet the RNC chose to wait until June 2012 to file this lawsuit and seek an injunction. That delay alone warrants denying the RNC's request. *See Tenacre Foundation v. INS*, 78 F.3d 693, 695 n.2 (D.C. Cir. 1996) (finding that seven-month delay before filing suit "undermines any assertions that [plaintiff] will suffer irreparable harm if the Court does not grant preliminary injunctive relief"); *cf. Charlesbank Equity Fund II v. Blinds To Go, Inc.*, 370 F.3d 151, 163 (1st Cir. 2004) ("[Plaintiff's] cries of urgency are sharply undercut by its own rather leisurely approach to the question of preliminary injunctive relief.").

As to McCutcheon's alleged harm, plaintiffs assert that "[a]ny contribution that [he] cannot make now dilutes the amount of speech he can make in [this election cycle]." (Pls.' Mem. at 43.) But, as discussed *supra* pp. 7-8, 12-13, the primary First Amendment interest in making political contributions is in the symbolic act of contributing, not in the amount of the contribution. In any event, McCutcheon can contribute to all of the candidates and political parties he desires while this suit is pending.[34] *Id*. Indeed, he could even give substantial amounts: More than $1,000 to each of the 12 candidates he wishes to support, and more than $16,000 to each of the three political party committees. (*See* Compl. ¶¶ 26-28, 35-37.) His decision to "dilute[ ] the amount of his speech" by not making these contributions is his own; it is not irreparable harm entitling him to emergency relief from enforcement of an Act of Congress.

[34] *Buckley*'s observation that contribution limits also leave contributors free to support candidates in other ways, 424 U.S. at 21-22, is particularly applicable to McCutcheon, who is the chairman and almost sole financier of a "super PAC" to which he has personally contributed more than $80,000. *See* Conservative Action Fund, http://conservativeactionfund.com/ (last visited July 8, 2012). Contributors to the PAC can be seen at http://query.nictusa.com/cgi-bin/com_ind/2011_C00496505. McCutcheon's contribution records can be retrieved by searching for his name at http://www.fec.gov/finance/disclosure/norindsea.shtml.

Finally, although this suit also purports to challenge the aggregate limits on contributions to PACs, there is not even an allegation that McCutcheon wishes to exceed the aggregate limit on PAC contributions during this election. Nor has any PAC come before the Court to ask for relief. There is therefore no harm from the aggregate PAC contribution limit that could possibly warrant enjoining that provision at this preliminary stage.

IV. THE BALANCE OF EQUITIES AND THE PUBLIC INTEREST WEIGH AGAINST ENJOINING ENFORCEMENT OF THE AGGREGATE LIMIT

The balance of equities and the public interest weigh heavily in favor of preserving the status quo and denying plaintiffs' request for extraordinary injunctive relief.

In evaluating any request to enjoin the enforcement of a federal statute, "[t]he presumption of constitutionality which attaches to every Act of Congress is not merely a factor to be considered in evaluating success on the merits, but an equity to be considered in favor of [the government] in balancing hardships." *Bowen v. Kendrick*, 483 U.S. 1304 (1987) (Rehnquist, C.J., in chambers) (internal quotation marks omitted); *cf. United States v. Oakland Cannabis Buyer's Co-op.*, 532 U.S. 483, 497 (2001) (holding that "[c]ourts of equity cannot, in their discretion, reject the balance that Congress has struck in a statute" by enjoining its enforcement). That presumption is at its apex here, because the Supreme Court has already determined that the statute in question is constitutional. *See Christian Civic League of Me., Inc. v. FEC*, 433 F. Supp. 2d 81, 90 (D.D.C. 2006) ("To the extent that the injunction of the proposed application of those provisions interferes with the execution of the statute upheld by the Supreme Court . . . , the public interest is already established by the Court's holding and by Congress's enactment, and the interference therewith is inherent in the injunction.") (internal quotation marks omitted). And given the RNC's 36-year delay in bringing this case, the balance of equities weighs even further against an injunction. *See Quince Orchard Valley Citizens Ass'n,*

Inc. v. Hodel, 872 F.2d 75, 80 (4th Cir. 1989) ("[Plaintiffs'] delay is . . . quite relevant to balancing the parties' potential harms. Since an application for preliminary injunction is based upon an urgent need for the protection of a Plaintiff's rights, a long delay in seeking relief indicates that speedy action is not required.") (internal quotation marks and brackets omitted).

As discussed above, the aggregate limit is a critical piece of FECA's anti-corruption regime; enjoining its enforcement would therefore substantially injure the public interest. *See Christian Civic League*, 433 F. Supp. 2d at 90; *see also Real Truth About Obama v. FEC*, 575 F.3d 342, 352 (4th Cir. 2009) (upholding denial of pre-election preliminary injunction), *vacated on other grounds*, 130 S. Ct. 2371 (2010). An injunction would open the door to multi-million-dollar direct contributors in the 2012 elections — individuals giving contributions of a size that has been proven to cause corruption and an appearance of corruption. The price of such corruption is ultimately paid by the public, and that price far outweighs the cost of McCutcheon's voluntary decision to withhold funds from the RNC and various candidates while this case is pending. The critical months leading up to a nationwide election are more important — by orders of magnitude — than anything arising from plaintiffs' strategic and self-imposed restrictions.

CONCLUSION

Preserving the democratic process is undeniably one of the government's most important interests. Congress has determined that an individual's aggregate financial influence over that process can become so great as to pose an unacceptable risk and appearance of corruption. Congress imposed FECA's aggregate contribution limit to reduce the likelihood of such corruption, and the Supreme Court found Congress's action to be consistent with the First Amendment. Thus, and for all the foregoing reasons, plaintiffs' motion for a preliminary injunction should be denied.

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