No. 12-536

IN THE

Supreme Court of the United States

SHAUN MCCUTCHEON, *et al.*,
Appellants,
v.

FEDERAL ELECTION COMMISSION,
Appellee.

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

BRIEF OF AMICI CURIAE REPRESENTATIVES CHRIS VAN HOLLEN AND DAVID PRICE IN SUPPORT OF APPELLEE

SCOTT L. NELSON
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, NW
Washington, DC 20009

FRED WERTHEIMER
DEMOCRACY 21
2000 Massachusetts Ave., NW
Washington, DC 20036

DONALD J. SIMON
SONOSKY, CHAMBERS, SACHSE, ENDRESON & PERRY, LLP
1425 K Street, NW
Suite 600
Washington, DC 20005

SETH P. WAXMAN
Counsel of Record
RANDOLPH D. MOSS
WEILI J. SHAW
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6800
seth.waxman@wilmerhale.com

ROGER M. WITTEN
WILMER CUTLER PICKERING HALE AND DORR LLP
7 World Trade Center
New York, NY 10007

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INTEREST OF AMICI CURIAE[1]

Chris Van Hollen is the United States Representative for the Eighth Congressional District of the State of Maryland and the ranking Democrat on the House Budget Committee. From 2007 to 2011, Representative Van Hollen also served as Chairman of the Democratic Congressional Campaign Committee.

David Price is the United States Representative for the Fourth Congressional District of the State of North Carolina. He serves on the House Appropriations Committee and is the ranking Democrat on the Homeland Security Appropriations Subcommittee.

As federal officeholders, candidates, and leaders of their political party, amici are directly affected by the aggregate contribution limits at issue in this case. Amici believe strongly in the necessity of recognizing the crucial role that political parties play in our system of democratic representative government. At the same time, they recognize the critical importance of limits on contributions to political parties and candidates in preserving our system against the reality and appearance of corruption. Aggregate limits on contributions are essential to achieving the latter goal while fully accommodating the former. Amici submit this brief because they believe that their perspective may be of assistance to the Court as it considers the issues in this case.

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[1] Written consents to the filing of this amicus brief have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person other than amici or their counsel made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case starkly poses the question whether the competition for the massive individual contributions that would be permitted without aggregate contribution limits would threaten to create the reality or appearance of corruption. This Court's decisions leave no doubt that the answer is yes. Striking down these limits would create obvious possibilities for even the most blatant forms of corruption: solicitations for hundreds of thousands or millions of dollars, creating the opportunity for transactions exchanging contributions for anticipated political favors from officeholders. While there may be disagreement about the precise boundaries of corruption and its appearance, it has long been settled that such arrangements, at least, fall within its core.

Unlike expenditure limits, contribution limits impose "only a marginal restriction upon the contributor's ability to" communicate, and are thus subject to a less demanding standard of review. *Buckley* v. *Valeo*, 424 U.S. 1, 20 (1976) (per curiam). Here, the aggregate contribution limits that Congress enacted serve the important interest in curtailing actual and apparent corruption. Absent those limits, extremely large contributions to party committees and affiliated candidates would directly threaten to foster the reality or appearance of corrupt arrangements resulting in officeholders beholden to their large financial backers.

In particular, elimination of aggregate limits would allow candidates and officeholders to use joint fundraising committees to solicit six- and seven-figure donations from single donors. Regardless of the use to which the contributions were ultimately put, such transactions would create the opportunity for, and the

appearance of, the most blatant forms of quid quo pro corruption.

Large donations to parties and affiliated candidates, moreover, benefit candidates in ways likely to foster corruption directly as well as through the circumvention of the base candidate contribution limits that are the most fundamental check on corruption. Parties and their candidates are part of a common political enterprise with shared interests. Party committees can freely transfer money among themselves and spend it in a variety of ways that directly benefit candidates. Because experience demonstrates that parties and donors find ways to target funds for particular candidates that prohibitions on "earmarking" can neither detect nor prevent, eliminating aggregate limits would enable donors to give massive donations with the expectation that they would be spent to support particular candidates. And, even when those very large donations were used to support the party more broadly, they would still have been provided in response to solicitations from the candidates and officeholders who make up the party and its leadership. Either way, such inflated donations would result in officeholders and party leaders beholden to their extraordinary financial patrons.

The important—indeed, compelling—governmental interest in preventing actual or apparent corruption provided ample basis to uphold individual and aggregate contribution limits in *Buckley*, 424 U.S. at 23-29, 38, the ban on corporate contributions in *FEC* v. *Beaumont*, 539 U.S. 146 (2003), and the soft money ban in *McConnell* v. *FEC*, 540 U.S. 93, 132-189 (2003), and it provides more than sufficient basis to uphold the aggregate contribution limits at issue here.

ARGUMENT

I. THE AGGREGATE CONTRIBUTION LIMITS AT ISSUE IN THIS CASE ARE JUST THAT—*CONTRIBUTION* LIMITS—AND MUST BE JUDGED ACCORDINGLY

A foundational principle of this Court's modern campaign finance precedent is the distinction between limits on expenditures and limits on contributions. *See, e.g.*, *Buckley* v. *Valeo*, 424 U.S. 1, 19-22 (1976) (per curiam); *McConnell* v. *FEC*, 540 U.S. 93, 120, 137 (2003), *overruled in other part by Citizens United* v. *FEC*, 558 U.S. 310 (2010). Under the approach consistently applied by this Court, contribution limits are not subject to the same strict scrutiny as expenditure limits. Instead, contribution limits are constitutional so long as they are "'closely drawn' to serve a 'sufficiently important interest.'" *Arizona Free Enter. Club's Freedom Club PAC* v. *Bennett*, 131 S. Ct. 2806, 2817 (2011). As the Court explained in *Buckley*, unlike "a limitation upon expenditures for political expression, a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communications." 424 U.S. at 20-21. Accordingly, the courts have long applied a "less rigorous standard of review" to contribution limits. *McConnell*, 540 U.S. at 137.

The significance of this distinction is borne out by this Court's holdings. Although the Court has at times struck down expenditure limits, *see, e.g.*, *Citizens United*, 558 U.S. at 365-366; *Buckley*, 424 U.S. at 58-59, it has uniformly upheld federal statutory limits on contributions to candidates, political parties, and political committees, *see McConnell*, 540 U.S. at 142-185; *FEC* v. *Beaumont*, 539 U.S. 146, 149 (2003); *FEC* v. *Colora-*

do Republican Fed. Campaign Comm., 533 U.S. 431, 465 (2001) (*Colorado II*); *California Med. Ass'n* v. *FEC*, 453 U.S. 182, 201 (1981); *Buckley*, 424 U.S. at 24-36.[2] As this Court explained in *Citizens United*, "contribution limits, … unlike limits on independent expenditures, have been an accepted means to prevent … corruption." 558 U.S. at 359 (citation omitted).

This distinction stems from fundamental differences between the two types of restrictions. The Court has subjected expenditure limits to strict scrutiny because they are direct restrictions on speech. *See Citizens United*, 558 U.S. at 339; *see also FEC* v. *Wisconsin Right To Life, Inc.*, 551 U.S. 449, 464 (2007) (opinion of Roberts, C.J.). Thus, the Court has described limits on campaign expenditures as "direct and substantial restraints on the quantity of political speech" that "limit political expression 'at the core of our electoral process and of … First Amendment freedoms,'" *Buckley*, 424 U.S. at 39, and it has applied a correspondingly stringent standard of review.

By contrast, the Court has long emphasized that because "the transformation of contributions into political debate involves speech by someone other than the contributor," contribution limits "entail[] only a marginal restriction" on speech:

> A limitation on the amount of money a person may give to a candidate or campaign organiza-

[2] The *only* case in which this Court has struck down a contribution limit is *Randall* v. *Sorrell*, 548 U.S. 230 (2006), which struck down *state* contribution limits of as little as $200 per two-year cycle on the grounds that they effectively "prevent[ed] challengers from mounting effective campaigns against incumbent officeholders." *Id.* at 249 (opinion of Breyer, J.). Appellants have raised no such concern here.

> tion thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues. While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor.

Buckley, 424 U.S. at 20, 21. Moreover, "[t]he quantity of communication by the *contributor* does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing." *Id.* at 21 (emphasis added). Accordingly, "contribution limits impose serious burdens on free speech *only* if they are so low as to 'preven[t] *candidates* and political committees from amassing the resources necessary for effective advocacy.'" *McConnell*, 540 U.S. at 135 (emphases added).

Contributions can also be a means of exercising associational rights because they can "serve[] to affiliate a person with a candidate." *Buckley*, 424 U.S. at 22. However, a contributor's ability to associate with a candidate or organization is not fundamentally altered based on the size of the contribution. And although contributions "enable[] like-minded persons to pool their resources in furtherance of common political goals," the burden of contribution limits is limited because they still "allow associations 'to aggregate large sums of money to promote effective advocacy.'" *McConnell*, 540 U.S. at 136. A contribution limit will thus be sustained if it is "'closely drawn' to match a 'suf-

ficiently important interest.'" *Beaumont*, 539 U.S. at 162 (quoting *Nixon* v. *Shrink Mo. Gov't PAC*, 528 U.S. 377, 387-388 (2000)).

The Court's opinions have consistently adhered to this understanding of contributions. Thus, in *Beaumont*, the Court reiterated that "[g]oing back to *Buckley* v. *Valeo*, restrictions on political contributions have been treated as merely 'marginal' speech restrictions subject to relatively complaisant review under the First Amendment, because contributions lie closer to the edges than to the core of political expression." 539 U.S. at 161 (citation omitted). The Court made exactly the same point in *McConnell*, again emphasizing "the limited burdens [contribution restrictions] impose on First Amendment freedoms" and "adhering to the analysis of contribution limits that the Court has consistently followed since *Buckley* was decided." 540 U.S. at 136, 137-138. In *Citizens United*, the Court again preserved what the Chief Justice referred to as "the careful line that *Buckley* drew to distinguish limits on contributions to candidates from limits on independent expenditures on speech." 558 U.S. at 379 (Roberts, C.J., concurring); *see also Randall* v. *Sorrell*, 548 U.S. 230, 246-248 (2006) (opinion of Breyer, J.) (same); *id.* at 281-282, 284-285 (Souter, J., dissenting) (same). And in *Republican National Committee* v. *FEC*, 130 S. Ct. 3544 (2010), the Court summarily affirmed the holding of a three-judge district court that limits on contributions to national, state, and local political party committees remain subject to less rigorous scrutiny than expenditure limits, and are constitutional when subjected to that scrutiny. *See Republican Nat'l Comm.* v. *FEC*, 698 F. Supp. 2d 150, 156 (D.D.C. 2010).

As this Court recognized in *Buckley*, *aggregate* contribution limits are subject to the same level of scrutiny as base contribution limits. 424 U.S. at 38. Aggregate contribution limits implicate the same interests as do other contribution limits the Court has sustained, and there is accordingly no reason to apply a different standard of review. Indeed, because aggregate limits, if anything, operate *less* directly to affect a contributor's ability to associate with any particular candidate or committee, they also implicate First Amendment concerns less directly.

Appellants rightly do not contend that the aggregate contribution limits at issue here prevent them from directly expending money on speech, as did the expenditure limits struck down in *Buckley* and *Citizens United*. *See California Med. Ass'n*, 453 U.S. at 196 (holding that contributing funds to a political committee does not turn the committee's speech into the contributor's for First Amendment purposes). Of course, a contribution involves speech to the extent it serves as a "symbolic expression of support." *Buckley*, 424 U.S. at 21. But the aggregate limits at issue here do not prevent contributors from making that symbolic expression with respect to as many candidates as they wish. Instead, the aggregate limits affect only the *size* of such contributions, which has little significance to the speech right: As this Court has explained, the quantity of expression "does not increase perceptibly" with the amount of the contribution. *Id.* The aggregate limits at issue here therefore burden speech no differently than those upheld in this Court's previous cases.

Nor do the aggregate limits burden *association* in a different manner than other contribution limits sustained by this Court. McCutcheon concedes (at 25) that

aggregate limits do not directly restrict how many candidates contributors may associate with through contributions, but he protests that the aggregate limits may prevent giving the legal maximum to each candidate. But meaningful association does not require maximal support. And even if an aggregate limit imposes some theoretical outside limit on the number of candidates, parties, and political committees with whom a contributor can associate, the same was true of the $25,000 aggregate limit at issue in *Buckley*. 424 U.S. at 38. The Court nonetheless applied the same level of scrutiny to "this quite modest restraint upon protected political activity" as to the other contribution limits it sustained. *Id.* To the extent the aggregate limits here differ from the lower limit sustained in *Buckley* in terms of the number of candidates and organizations that can be supported, and the level of support allowed, those are merely differences in degree. "Such distinctions in degree become significant only when they can be said to amount to differences in kind." *Id.* at 30.

Ultimately, the *nature* of the act of contributing—and hence the interests it implicates—does not vary depending on whether it is restricted on an aggregate or per-recipient basis, and it is the nature of the activity restricted that determines the level of scrutiny. *Beaumont*, 539 U.S. at 162. In *Beaumont*, the Court upheld the longstanding statutory prohibition on corporate contributions—a prohibition far stricter than the aggregate limits at issue here. *See id.* at 149.[3] *Beau-*

[3] *Accord, e.g.*, *United States* v. *Danielczyk*, 683 F.3d 611, 617 (4th Cir. 2012) (upholding ban on corporate contributions under the *Buckley* standard as applied in *Beaumont*), *cert. denied*, 133 S. Ct. 1459 (2013); *Ognibene* v. *Parkes*, 671 F.3d 174, 194-197 (2d Cir.

mont held that the nature of the activity affected by the prohibition at issue in that case—contributing money to candidates, parties, and political committees—was the same as the activity affected by a contribution limit and hence bore the same relationship to First Amendment interests. *Id.* at 161-162. And because, in turn, "the level of scrutiny is based on the importance of the 'political activity at issue' to effective speech or political association," *id.* at 161, the same standard of review applied to the contribution prohibition in *Beaumont* as to the contribution limits in *Buckley*.

The limits at issue here apply to activity of exactly the same nature: Aggregate contribution limits limit contributions. The First Amendment interests they affect are the same interests affected by any other limit on contributions. The constitutional standard against which they must be judged is accordingly the one applicable to contributions. *See McConnell*, 540 U.S. at 139 (declining to apply strict scrutiny because the provisions at issue did not "burden[] speech" differently from any other contribution limit).

2011) (applying *Buckley* standard to uphold ban on contributions by non-corporate entities), *cert. denied*, 133 S. Ct. 28 (2012); *Preston* v. *Leake*, 660 F.3d 726, 732-735 (4th Cir. 2011) (applying *Buckley* standard to uphold ban on contributions by lobbyists); *Green Party of Conn.* v. *Garfield*, 616 F.3d 189, 198-199 (2d Cir. 2010) (applying *Buckley* standard to bans on contributions by government contractors and lobbyists), *cert. denied*, 131 S. Ct. 3090 (2011).

II. THE AGGREGATE CONTRIBUTION LIMITS ARE CLOSELY DRAWN TO COUNTER REAL THREATS OF CORRUPTION

A. This Court Has Consistently Recognized That Contribution Limits Serve The Important Interests Of Preventing Corruption, The Appearance Of Corruption, And Circumvention

In every case in which this Court has considered federal contribution limits, it has upheld those limits because they serve an interest the Court has always deemed sufficiently important to justify campaign finance regulation: preventing corruption and the appearance of corruption. Very large political contributions create both the risk that officeholders and potential officeholders will be tempted to forsake their public duties and the opportunity for corrupt bargains. They thus threaten to foster both actual corruption and, what may be just as damaging, its appearance. *Buckley*, 424 U.S. at 26-27; *accord Citizens United*, 558 U.S. at 345, 356-357.

These justifications suffice even though corrupt bargains would otherwise be illegal, both because the difficulty of unearthing and proving their existence means that "the scope of such pernicious practices can never be reliably ascertained," *Citizens United*, 558 U.S. at 356 (quoting *Buckley*, 424 U.S. at 27), and because "public awareness of the opportunities for abuse *inherent* in a regime of large individual financial contributions" may otherwise erode "'confidence in the system of representative Government … to a disastrous extent,'" *Buckley*, 424 U.S. at 27 (emphasis added).

The government's anti-corruption interest is "sufficient to justify not only contribution limits themselves, but laws preventing the circumvention of such limits." *McConnell*, 540 U.S. at 144; *see also Colorado II*, 533

U.S. at 456 ("[A]ll members of the Court agree that circumvention is a valid theory of corruption."). Thus, *Buckley* upheld an aggregate contribution limit because it prevented donors from circumventing the base limits and "contribut[ing] massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party." 424 U.S. at 38. "The limited, additional restriction on associational freedom imposed by the overall ceiling [was] thus no more than a corollary of the basic individual contribution limitation that we have found to be constitutionally valid." *Id.*

B. Aggregate Contribution Limits Prevent Fundraising Practices That Carry Inherent Risks Of Corruption And Circumvention

The aggregate contribution limits at issue here are likewise constitutional because they prevent a variety of fundraising practices that raise the precise concerns this Court has previously held to justify contribution limits.

1. Absent aggregate contribution limits, candidates and officeholders would be permitted to solicit massive donations to their parties and fellow candidates, explicitly and directly from their donors. Candidates and officeholders are allowed to solicit any contributions that "are subject to the limitations, prohibitions, and reporting requirements of" the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. §§ 431 *et seq.* 2 U.S.C. § 441i(e)(1)(A). And candidates and parties often create joint fundraising committees to receive combined contributions from a single donor to be allocated, up to the applicable per-contribution limits for the relevant election cycles, to as many national,

state, and local party committees and candidates as possible. Without aggregate limits, such practices would easily allow candidates and officeholders to solicit and receive contributions that substantially exceed $1 million.

- Congressional leaders could form a joint fundraising committee soliciting the maximum contributions per cycle for their two national party campaign committees[4] ($64,800 each, for a total of $129,600), as well as the maximum per-cycle contributions for 435 House and 33 Senate candidates ($5,200 each, for a total of $2,433,600). The committee could solicit and receive amounts totaling $2,563,200 from a single donor.[5]
- A party's national leaders could join forces to solicit the maximum contributions per cycle for all three national party committees ($64,800 each, for a total of $194,400), all state party committees ($20,000 each, for a total of $1,000,000), and the party's presidential candidate and each of its House and Senate candidates ($5,200 each, for a total of $2,438,800). The grand total: $3,633,200.
- Presidential candidates (or candidates for other federal offices) and their parties could solicit the maximum contributions per cycle for their

[4] Those committees are the National Republican Senatorial Committee and the National Republican Congressional Committee, and the Democratic Senatorial Campaign Committee and the Democratic Congressional Campaign Committee.

[5] Current contribution limits are collected in the government's brief (at 9-10).

> own campaign committees ($5,200), plus the maximum for the national party committees ($64,800 each, for a total of $194,400), plus the maximum for state party committees ($20,000 each, for a total of $1,000,000). The total amount such a candidate or committee could solicit from a single donor would be $1,199,600.

As this Court recognized in *McConnell*, the prospect of candidates soliciting and receiving multi-million dollar checks from donors creates both the risk of corruption and the appearance of corruption. To be sure, these funds might not all be expended directly on the candidate's own campaign. But this Court has not required a direct financial benefit to the candidate's own campaign committee to recognize the potential for corruption or its appearance when a contributor makes a large donation at a candidate's request. It is enough that the contribution benefits the party and its candidates, directly satisfying the request. Thus, in *McConnell*, seven Justices held that solicitation of very large contributions for national parties presented corruption concerns regardless of how those contributions were ultimately used. As the majority observed:

> Large … donations [to parties or other organizations] at a candidate's or officeholder's behest give rise to all of the same corruption concerns posed by contributions made directly to the candidate or officeholder. Though the candidate may not ultimately control how the funds are spent, the value of the donation to the candidate or officeholder is evident from the fact of the solicitation itself.

McConnell, 540 U.S. at 182. Justice Kennedy, joined by Chief Justice Rehnquist, agreed, explaining that

"regulation of a candidate's solicitation of funds" "furthers a constitutionally sufficient" anti-corruption interest, even "if the funds are given to another," because "[t]he making of a solicited gift is a *quid* both to the recipient of the money and to the one who solicits the payment (by granting his request)." *Id.* at 308 (Kennedy, J., concurring in judgment in part and dissenting in part). Thus, limiting the amounts candidates may raise for their parties, as well as other party candidates and organizations, "satisfies *Buckley*'s anticorruption rationale and the First Amendment's guarantee." *Id.*

McConnell also recognized more generally that "large … contributions to national parties are likely to create actual or apparent indebtedness on the part of federal officeholders, regardless of how those funds are ultimately used." 540 U.S. at 155. That candidates and officeholders may be obligated by contributions to their party, or to other candidates, is not surprising. "The national committees of the two major parties are both run by, and largely composed of, federal officeholders and candidates." *Id.* Those officeholders are tasked in significant part with raising money for the party and its candidates, and their future prospects for leadership posts and even electoral success are influenced by how well they perform that role. *Cf. id.* at 156 (citing evidence that "'political parties[] control the resources crucial to subsequent electoral success and legislative power'" and that "officeholders' reelection prospects are significantly influenced by attitudes of party leadership"). The electoral successes of the candidate's party, moreover, dictate whether the candidate, if elected, will serve in the majority or the minority in Congress. Such officeholders therefore stand to benefit from contributions to the party both directly, through party

spending, and indirectly, through their success at fundraising for and electing other candidates.

Eliminating FECA's aggregate limits on party and candidate contributions would effectively negate the interests served by the soft-money solicitation ban upheld in *McConnell* by once again allowing candidates and officeholders to seek extremely large contributions to benefit themselves, their parties, and their political allies. Past experience provides every reason to believe that parties and candidates would take advantage of this opportunity. During the soft-money period, when limits on contributions to political parties were bypassed through contributions not covered by FECA (because they were supposedly not for federal election purposes), the parties and their officeholders established joint fundraising committees to solicit FECA-limited contributions to the candidates together with limited hard-money or unlimited soft-money contributions to party committees. In the 2000 elections, the last in which soft-money contributions to the national parties were permitted, individual contributors made more than 500 soft-money contributions to Democratic or Republican party committees of at least $100,000.[6] Several made contributions of at least $1 million. The number of possible large donors today, and the amounts they would be willing to contribute, would undoubtedly be even higher, and if the parties and their candidates were once more permitted to tap them for amounts ex-

[6] The figures cited in the paragraph accompanying this footnote and the two that follow were compiled by the Center for Responsive Politics from FEC disclosure data. *See* Center for Responsive Politics, *McCutcheon vs FEC*, http://www.opensecrets.org/overview/mccutcheon.php (last visited July 24, 2013).

ceeding the current aggregate limits, they would certainly do so.

This conclusion is confirmed by the fact that parties and candidates have continued to operate joint fundraising committees up to the limits permitted by the soft-money ban and FECA's aggregate limits. Thus, in the 2012 presidential elections, both major-party presidential candidates operated joint fundraising committees called, respectively, the Obama Victory Fund and Romney Victory, which sought both contributions to the candidates' campaign committees and the maximum contributions to party committees permissible under the applicable aggregate limits ($70,800 for the 2012 election cycle). Hundreds of donors responded: 721 donors made maximum party contributions through Romney Victory, while 536 hit the party aggregate caps through the Obama Victory Fund. If the presidential candidates had been able to ask for contributions exceeding half a million dollars per year for all party committees in conjunction with their own campaign committees—as they would have absent aggregate limits—they would undoubtedly have done so. And donors would almost certainly have responded with six-figure contributions.[7]

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[7] Such joint fundraising committees are not limited to presidential candidates. For example, House Speaker John Boehner operates "a joint fundraising committee composed of Friends of John Boehner …, the National Republican Congressional Committee …, THE FREEDOM PROJECT … and the Ohio Republican Party State Central & Executive Committee," which accepts donations from individuals of more than *ten times* the maximum contribution an individual could make to the candidate directly. Team Boehner, *Contribute*, https://www.geticontribute.com/teamboehner (last visited July 24, 2013).

All told, more than 1,700 donors gave the maximum permitted amount to committees of the major parties in the 2012 election cycle, accounting for well over $100 million in contributions.[8] Almost 600 reached the aggregate limit on contributions to federal candidates. These figures indicate the extent to which the existing limits provide scope for substantial contributions by those who are in a position to, and choose to, make them. But they also starkly reveal the potential for candidates and officeholders to solicit far larger contributions if allowed to do so.

2. For the reasons described above, the government has a strong anti-corruption interest in preventing the massive combined contributions that would occur absent aggregate limits, even where those funds were not ultimately spent directly to support a targeted candidate. But, in practice, it is likely that parties and candidates *would* find ways to ensure that large contributions were spent on behalf of those candidates the contributors sought to obligate, exacerbating the problem. Candidates, political parties, and their associated committees have substantial freedom to transfer funds to each other, and to spend them to support can-

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Similarly, in 2010, California Senator Barbara Boxer operated a variety of joint fundraising committees, joining forces with the Democratic National Committee, the Democratic Senatorial Campaign Committee, the California Democratic Party, and other federal candidates to solicit amounts supporting her reelection that significantly exceeded the limit on direct contributions to her campaign committee. *See* Knott, *Politicians Create Record Number of Joint Fundraising Committees*, Roll Call (Sept. 17, 2010), http://www.rollcall.com/news/-49934-1.html?pg=1.

[8] This number includes donors who gave through the presidential candidates' joint fundraising committees as well as others who did not.

didates of their choosing, making it possible to target contributions and to circumvent the base limits on contributions to candidates.

This potential for corruption and its appearance exists because federal campaign finance law quite appropriately recognizes the important role of political parties in our system and fosters their relationship with their candidates. Ironically, when the current aggregate limits that appellants target were established in the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81, they reflected substantial *increases* designed to ensure that although parties would henceforth be limited to "hard-money" contributions (i.e., those subject to FECA's limits), the parties' fundraising and their relationship to their candidates would not be handicapped. Prior to BCRA's enactment, contributions to national party committees were limited to $20,000 per year, subject to the $25,000 aggregate limit that had remained unchanged since the time of *Buckley*. BCRA significantly increased the limits on contributions to each national party committee and provided for the first time that they would be indexed for inflation. BCRA also substantially increased the overall aggregate limit, indexed it to inflation, and created sub-aggregate limits within it so that contributions to candidates and parties no longer applied toward the same limit.

In addition to benefiting from these very high contribution limits, the political parties have the freedom to transfer *unlimited* amounts of the funds they raise among their national, state, and local party committees. 2 U.S.C. § 441a(a)(4). Thus, the parties may divide and direct their financial resources as they see fit. Party committees may make substantial expenditures of the-

se funds in coordination with their candidates—from just below $100,000 to over $2.5 million for Senate candidates (depending on the population of the state), nearly $50,000 for most candidates for the House of Representatives,[9] and well over $20 million for candidates for the Presidency.[10] In addition, the parties may make *unlimited* non-coordinated expenditures in support of their candidates. *See McConnell*, 540 U.S. at 213-219 (invalidating BCRA provision that required parties to choose between engaging in limited coordinated spending and unlimited coordinated spending); *see also Colorado Republican Fed. Campaign Comm.* v. *FEC*, 518 U.S. 604 (1996) (*Colorado I*) (holding that First Amendment prohibits restriction on parties' non-coordinated spending). Candidates may also contribute funds from their own campaign committees to other candidates (subject to FECA contribution limits, *see* 2 U.S.C. § 432(e)(3)(B)), and they may make *unlimited* transfers of their campaign committee funds to national and state party committees, which can then use them to

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[9] A higher limit, equal to that of the limit applicable to Senate candidates in the least populous states, applies for House candidates who campaign statewide in those same states because they have only one United States Representative.

[10] *See* FEC, *2013 Coordinated Party Expenditure Limits*, http://www.fec.gov/info/charts_441ad_2013.shtml (last visited July 24, 2013); FEC, *2012 Coordinated Party Expenditure Limits*, http://www.fec.gov/info/charts_441ad_2012.shtml (last visited July 24, 2013). The limits on coordinated spending for House and Senate races apply separately to the national party committees and state party committees in the relevant state. A state party committee can assign its spending right to the national party committee, or vice versa, thereby doubling the coordinated spending by the party committee. *See* 11 C.F.R. § 109.33.

support other party candidates through coordinated or non-coordinated expenditures.

These features of our campaign finance laws, as enacted by Congress and interpreted and limited by this Court, reflect the central importance of political parties to our country's electoral process. As this Court has stated:

> The formation of national political parties was almost concurrent with the formation of the Republic itself. Consistent with this tradition, the Court has recognized that the First Amendment protects "the freedom to join together in furtherance of common political beliefs[.]"

California Democratic Party v. *Jones*, 530 U.S. 567, 574 (2000) (citation omitted) (quoting *Tashjian* v. *Republican Party of Conn.*, 479 U.S. 208, 214 (1986)). By permitting the parties, their leaders, and their candidates to work together to wage effective political campaigns, the campaign finance laws foster these important interests. And by allowing candidates and officeholders to participate in the work of their parties by soliciting lawful contributions for other candidates and party organizations subject to applicable limits, the laws avoid unduly circumscribing First Amendment rights. *See McConnell*, 540 U.S. at 314 (Kennedy, J., concurring in judgment in part and dissenting in part) ("These provisions help ensure that the law is narrowly tailored to satisfy First Amendment requirements.").

At the same time, the close relationships among the parties and their candidates and officeholders, together with the features of the campaign finance laws described above, create obvious potential means for fostering corruption and its appearance. As this Court has

recognized, political parties, in addition to their many positive functions in fostering an effective and competitive representative democracy, may also serve as "agents for spending on behalf of those who seek to produce obligated officeholders" and "conduits for contributions meant to place candidates under obligation." *Colorado II*, 533 U.S. at 452.

McConnell, upholding the ban on party soft-money contributions that was recently summarily reaffirmed by this Court in *Republican National Committee*, 130 S. Ct. 3544, explained:

> The idea that large contributions to a national party can corrupt or, at the very least, create the appearance of corruption of federal candidates and officeholders is neither novel nor implausible. For nearly 30 years, FECA has placed strict dollar limits and source restrictions on contributions that individuals and other entities can give to national, state, and local party committees for the purpose of influencing a federal election. The premise behind these restrictions has been, and continues to be, that contributions 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. This is particularly true of contributions to national parties, with which federal candidates and officeholders enjoy a special relationship and unity of interest.

540 U.S. at 144-145 (citation omitted).

These concerns led the *Buckley* Court to conclude that, absent aggregate contribution limits, large contributions to parties would threaten corruption of candi-

dates. *Buckley*'s concerns are no less real today. Then, as now, a contribution to a party earmarked to benefit a particular candidate was treated as a contribution to that candidate, and was subject to the limit on individual contributions to that candidate. *See Buckley*, 424 U.S. at 24; 2 U.S.C. § 441a(a)(8). Nonetheless, the difficulty of policing against tacit understandings that a large party contribution would be spent to support a particular candidate led the Court to conclude that large, "*unearmarked*" contributions created a sufficient threat of corruption to justify the "modest" restriction imposed by aggregate limits. *Buckley*, 424 U.S. at 38 (emphasis added).

The Court in *Colorado II* similarly explained that the earmarking rule "would reach only the most clumsy attempts to pass contributions through to candidates." 533 U.S. at 462. The prospect that large donations to parties may be targeted to benefit particular candidates is fostered not only by the parties' ability to transfer funds between committees at will and spend it to support their candidates, but also by the reality of "actual political conditions":

> Donations are made to a party by contributors who favor the party's candidates in races that affect them; donors are (of course) permitted to express their views and preferences to party officials; and the party is permitted (as we have held it must be) to spend money in its own right. When this is the environment for contributions going into a general party treasury, and candidate-fundraisers are rewarded with something less obvious than dollar-for-dollar pass-throughs (distributed through contributions and party spending), circumvention [of

> contribution limits] is obviously very hard to trace.

Id.

Past experience provides ample evidence that candidates and party committees at both the national and state levels will work together to ensure that funds are spent for the donor's targeted purposes. In *Colorado II*, this Court cited evidence that "[d]onors give to the party with the tacit understanding that the favored candidate will benefit," and indeed that "the frequency of the practice and the volume of money involved" necessitated an "informal bookkeeping" system for tracking desired beneficiaries, known as "tallying." 533 U.S. at 458, 459. The *McConnell* Court likewise concluded that donors often made large donations to parties accompanied by requests that they be "credited to particular candidates, and the parties obliged, irrespective of whether the funds were hard or soft." 540 U.S. at 146.

Moreover, as discussed above, "[n]ational party committees often teamed with individual candidates' campaign committees to create joint fundraising committees, which enabled the candidates to take advantage of the party's higher contribution limits while still allowing donors to give to their preferred candidate." *McConnell*, 540 U.S. at 93. And "national parties often made substantial transfers of soft money to 'state and local political parties … that in fact ultimately benefit[ed] federal candidates because the funds for all practical purposes remain[ed] under the control of the national committees.'" *Id.* at 131. In short, there is every reason to think that if contributors are permitted to give a large *aggregate* amount to multiple party committees and candidates, they will be able to direct

those funds to the benefit of specific candidates and officeholders they wish to obligate, circumventing base limits and creating the potential for both corruption and its appearance.

3. Appellants contend that the aggregate limits no longer serve an anti-corruption purpose because the limits on contributions to individual party committees—which appellants do not challenge here—now preclude "huge" contributions. *See* McCutcheon Br. 40-43; RNC Br. 19-24. But absent the aggregate limits challenged here, a contributor seeking to assist a single candidate could give a total of $194,400 per election cycle to the three national party committees. The contributor could also directly contribute an additional $5,200 per election cycle to that candidate (assuming both a primary and general election campaign), for a combined total of nearly $200,000.

Appellant RNC asserts (at 42) that such a contribution is not "huge," although it is almost four times the median annual income of U.S. households and exceeds the annual salaries of all members of the Senate and House of Representatives except the Speaker of the House.[11] Congress, having made the judgment that contributions of greater than $5,200 posed a risk of corruption, could permissibly determine that contributions nearly 40 times larger to national party committees could similarly pose a risk of corruption. As this Court has recognized, it has "'no scalpel to probe' each possi-

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[11] *See* U.S. Census Bureau, *State & County QuickFacts*, http://quickfacts.census.gov/qfd/states/00000.html (last visited July 25, 2013); Brudnick, Congressional Research Service, *Congressional Salaries and Allowances* 10 (2013), *available at* http://www.senate.gov/CRSReports/crs-publish.cfm?pid='0E%2C*PL%5B%3D%23P%20%20%0A.

ble contribution level" and "cannot determine with any degree of exactitude the precise restriction necessary to carry out the statute's legitimate objectives." *Randall*, 548 U.S. at 248 (opinion of Breyer, J.). Congress's judgment that the size of the national party contributions that would be allowed if the aggregate limits were lifted would pose a threat of corruption should not be overturned on the basis of a subjective judgment that $200,000 is not "huge" enough.

Moreover, appellants do not dispute Congress's judgment that donations to national party committees above the base limit present a significant threat of corruption. But if a contribution to one national party committee exceeding $64,800 per election cycle poses enough of a threat of corruption to justify setting the limit for contributions to the committee at that level, a significant *additional* contribution to another related national party committee that could immediately turn the money over to the first committee poses just as much of a threat. Because the national party committees are all instruments of a single political enterprise—the party—it makes perfect sense for the aggregate limit for all party committees to be very close to the level of the limit for a single party committee. A contribution to one committee is, functionally, little different from a contribution to all of them (or, put another way, to the "national party" as a unified entity).

In any event, focusing solely on the national party committees misses more than half the point of the aggregate limits on party and political committee contributions. Given appellants' position that the aggregate limits for both national and state party committees must stand or fall together, their insistence (RNC Br. 42 n.33) that this Court should disregard the effect of

abrogating aggregate limits on state as well as national party committees is nonsensical. Absent the aggregate limit, a contributor would be able to give the party of his or her favored candidate not only the $194,400 per election cycle that would be allowed for the national party committees, but also another $1,000,000 per election cycle for federal campaign purposes to all of the party's *state* committees. All of that money could then be rerouted by the party to a committee that would spend it to advance the prospects of a particular candidate. *Cf. McConnell*, 540 U.S. at 156 (explaining that national party effectively retained control over funds held by state party). Such a contribution would be "huge" by any realistic measure, and certainly large enough to pose what Congress could legitimately judge to be a threat of corruption.

4. Permitting the parties and their candidates to solicit and receive contributions of millions of dollars from individual donors would again foster the appearance that our officeholders and our government are for sale. That is the judgment Congress expressed in enacting aggregate limits, and the Court "must give weight to attempts by Congress to seek to dispel either the appearance or the reality of [improper] influences" as long as the remedies chosen by Congress "comply with the First Amendment." *Citizens United*, 558 U.S. at 361. Here, Congress has enacted remedies long recognized by this Court as complying with the First Amendment: limits on campaign contributions. Setting aside those carefully constructed limits, which respect the important interests of candidates and political parties as well as the critical need to prevent the corrupting influence of extremely large contributions, would indeed threaten to "cause the electorate to lose faith in our democracy." *Id.* at 360.

This Court must not countenance, let alone bring about, that result.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

SCOTT L. NELSON
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street, NW
Washington, DC 20009

FRED WERTHEIMER
DEMOCRACY 21
2000 Massachusetts Ave., NW
Washington, DC 20036

DONALD J. SIMON
SONOSKY, CHAMBERS,
SACHSE, ENDRESON
& PERRY, LLP
1425 K Street, NW
Suite 600
Washington, DC 20005

SETH P. WAXMAN
Counsel of Record
RANDOLPH D. MOSS
WEILI J. SHAW
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6800
seth.waxman@wilmerhale.com

ROGER M. WITTEN
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
New York, NY 10007

JULY 2013