IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Virginia James,	)	
	)	
Plaintiff,	)	**Civil No.: 1:12-cv-01451**
	)	
v.	)	**Three-Judge Court Requested**
	)	
Federal Election Commission,	)	**Oral Argument Requested**
	)	
Defendant.	)	
	)	
	)	

MOTION FOR PRELIMINARY INJUNCTION

Plaintiff Virginia James, by and through undersigned counsel, moves this Court for a preliminary injunction enjoining the Federal Election Commission ("the Commission"), from enforcing the aggregate limit on contributions to candidate committees ("sub-aggregate limit") under the Bipartisan Campaign Reform Act. Pub. L. 107-155, 116 Stat. 93 (2002) ("BCRA"); 2 U.S.C. § 441a(a)(3)(A) (indexed for inflation per 11 C.F.R. § 110.5(b)(4) at 76 Fed. Reg. 8368 (Feb. 14, 2011)). As set forth in the accompanying Memorandum of Law in support of this Motion, if Ms. James is required to abide by the sub-aggregate limit, she will be denied the full expression of her First Amendment rights to association and speech. Absent an injunction from this Court, Ms. James

reasonably fears that the Commission will proceed with the enforcement of the sub-aggregate limit, burdening her First Amendment rights.

The sub-aggregate limit would be constitutional only if the limit is shown to be necessary to prevent actual or apparent corruption, or to prevent contributors from utilizing PACs or political parties as a means of circumventing the limits on contributions to individual candidate committees. However, for reasons enumerated in the accompanying Memorandum of Law in support of this Motion, neither the anti-corruption nor the anti-circumvention rationales exists as regards to the sub-aggregate limit, either facially or as applied to Ms. James. Thus, the Commission, the agency charged with enforcing the Federal campaign finance laws, may not enforce the sub-aggregate limit against Ms. James.

Ms. James is likely to succeed on the merits of her constitutional claims. Plaintiff would be irreparably harmed if the Commission enforces the sub-aggregate limit against her, thereby placing an unconstitutional burden on Plaintiff's First Amendment rights. Moreover, neither the public interest nor the Commission's interest is contrary to the entering of an injunction. Consequently, Ms. James meets the standard for the issuance of a preliminary injunction, and requests that this Court enter the same.

Pursuant to LCvR 7(m) of this Court. Plaintiff has conferred with opposing counsel by telephone, and Defendant opposes this motion.

Respectfully submitted this 5th day of September, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of September, 2012, I caused the foregoing document to be served on the following, via electronic and first class mail:

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MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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Introduction

Plaintiff Virginia James challenges the individual biennial limits on contributions to candidate committees at 2 U.S.C. 441a(a)(3)(A) ("sub-aggregate limit") as violative of her First Amendment right to free association. This challenge is based on the changed state of the law since the landmark campaign finance case *Buckley v. Valeo*.[1]

Facts

Virginia James wishes to exercise her First Amendment right to associate by contributing directly to candidates for federal office. She wishes to contribute up to the aggregate limit of $117,000 over a two-year period.[2] Ms. James is not challenging this aggregate limit, and stipulates that her relevant biennial contributions will not, in the aggregate, exceed $117,000.

In the past year, Ms. James gave $5,000 to the Club for Growth, a political action committee or "PAC."[3] She also contributed at least $27,000 to individual candidates she supports, most of which was for primary election contests.[4] She made all of these contributions in accordance with the $2,500 limit on

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[1] 424 U.S. 1 (1976).
[2] 2 U.S.C. § 441a(a)(3).
[3] Ms. James also gave $1,000,000 to independent-expenditure-only political action committees, or "SuperPACs," per the decision of the D.C. Circuit in *SpeechNow.org v. FEC*, 599 F.3d 686 (DC Cir. 2010). However, contributions to independent-expenditure-only committees are not subject to contribution limits, and consequently not relevant to this case.
[4] *See* Federal Election Commission Data, Individual Contributions for Virginia James, Jan. 1 2011, to Aug. 30, 2012, *available at* http://www.fec.gov/finance/disclosure/advindsea.shtml *last accessed* Aug. 30, 2012.

contributions to individual candidates.[5] Going forward, Ms. James stipulates that she will not make any future contributions to PACs, and will not make any contributions to political parties.

The *only* future participation Ms. James wishes to have in the 2012 election cycle is via direct contributions of up to $2,500 to individual candidates, consistent with the individual candidate contribution limit.[6] She wishes to do so up to the aggregate contribution cap of $117,000.[7] But BCRA requires that she divide that $117,000 among parties, PACs, and candidates, instead of allowing her to choose which candidates to directly support. Consequently, Ms. James is subject to an aggregate limit of $46,200 on her monetary participation in this election.[8] Other individuals, who would also like to associate with PACs and parties – in many cases because those entities may in turn contribute to candidates – may contribute $70,800 more than Ms. James.

Plaintiff wishes merely to exercise her associational right to contribute during this election cycle at the same level as those who choose to contribute to parties and PACs in addition to candidates. Ms. James asks for a ruling allowing her to make contributions to the extent allowed by Congress, but to do so by

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[5] 2 U.S.C. § 441a(a)(1)(A) (indexed for inflation per 11 C.F.R. § 110.5(b)(3)-(4) at 76 Fed. Reg. 8368 (Feb. 14, 2011)).
[6] *Id.*
[7] 2 U.S.C. § 441a(a)(3)(A)-(B) (indexed for inflation per 11 C.F.R. § 110.5(b)(3)-(4) at 76 Fed. Reg. 8368 (Feb. 14, 2011)).
[8] 2 U.S.C. § 441a(a)(3)(A) (indexed for inflation per 11 C.F.R. § 110.5(b)(3)-(4) at 76 Fed. Reg. 8368 (Feb. 14, 2011)).

directly supporting candidates, instead of being required to associate with PACs and parties.

Argument

I. Standard for preliminary injunction

To obtain a preliminary injunction, the moving party must show: (1) substantial likelihood of success on the merits; (2) that it would suffer irreparable injury if the injunction were not granted; (3) that an injunction would not substantially injure other interested parties; and (4) that the public interest would be furthered by the injunction.[9] This Court applies this four-factor test on a sliding scale, where "a particularly strong showing in one area can compensate for weakness in another."[10] Thus, "[i]f the showing in one area is particularly strong, an injunction may issue even if the showings in other areas are rather weak."[11]

II. Ms. James will likely succeed on the merits.

When determining whether a preliminary injunction is appropriate, "the most critical" factor is the plaintiff's likelihood of success on the merits.[12] Virginia

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[9] *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 11-12 (D.D.C. 2009) (citing *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006)).
[10] *England*, 454 F.3d at 297.
[11] *Brady Campaign, id.* (quoting *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 747 (D.C. Cir. 1995)).
[12] *Carey v. FEC*, 791 F. Supp. 2d 121, 128 (D.D.C. 2011).

James wishes to associate with the candidates she supports by making contributions to their campaigns at a level (in the aggregate) above $46,200 but below $117,000. This Court has been asked to determine whether she may constitutionally be prohibited from doing so. Because candidate contributions are protected by the First Amendment, and because statutes limiting such contributions must survive exacting scrutiny, the challenged statute is likely unconstitutional.

A. Legal landscape and historical background.

Congress has established a biennial limit on the total value of political contributions an individual may make in a two-year period.[13] The current overall biennial limit is $117,000. This limit is subject to "sub-aggregate" limits on (1) the aggregate amount an individual may contribute to individual candidates in a two-year period,[14] (2) the aggregate amount an individual may contribute to political committees that are not political committees of national political parties in a two-year period,[15] and (3) the aggregate amount of "any other contributions" an individual may make in a two-year period.[16] In addition, Congress has also established "categorical limits" on the amount an individual may contribute to each of three categories of political actors during a given election or calendar year: (1)

[13] 2 U.S.C. § 441a(a)(3).
[14] 2 U.S.C. § 441a(a)(3)(A).
[15] 2 U.S.C. § 441a(a)(3)(B).
[16] 2 U.S.C. § 441a(a)(3)(B).

individual candidates, (2) national party committees, and (3) other political action committees.[17] Under these statutes and their implementing regulations, Ms. James may contribute only $46,200 to all candidates every two years.[18]

Ms. James is not challenging 2 U.S.C. § 441a(a)(3)'s aggregate limit as a whole. That is, she does not ask to contribute more than $117,000 to all regulated entities *in toto*. Nor is she challenging 2 U.S.C. § 441a(a)(1)'s categorical limit on contributions to each individual candidate. That is, she will not give more than $2,500 to any single candidate committee in either the primary or general election periods.

Instead, she challenges 2 U.S.C. § 441a(a)(3)(A)'s sub-aggregate candidate contribution limit as an unconstitutional burden on her associational right to contribute to the individual candidates she supports. Ms. James limits her claims to 2 U.S.C. § 441a(a)(3)(A) and does not challenge any other element of campaign finance law.

This Court is asked whether Ms. James may constitutionally be prohibited from contributing more than $46,200 to candidate committees, but less than $117,000, during this biennium. The question posed, then, is whether Congress may place an aggregate cap on contributions to candidate committees when the

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[17] 2 U.S.C. § 441a(a)(1) (with current price index adjustments reflected at 76 Fed. Reg. 8368 (Feb. 14, 2011)).
[18] 2 U.S.C. § 441a(a)(3) (with current price index adjustments reflected at 76 Fed. Reg. 8368 (Feb. 14, 2011)).

additional funds used for those contributions could, instead, have been contributed to political committees or political parties under existing law.

Congress may act to prevent corruption or the appearance of corruption, including by creating reasonable limits on political contributions.[19] But in doing so, its rules must actually address corruption or its appearance, and must be "closely drawn" to accomplish that end.[20] Because Congress failed to appropriately tailor its statutory means to its legitimate legislative ends, the sublimit on aggregate contributions to candidate committees is unconstitutional.

B. *Buckley v. Valeo* and *McConnell v. FEC*

Plaintiff is aware that the Supreme Court upheld FECA's aggregate contribution limit against a constitutional challenge in *Buckley*,[21] and left that holding intact in *McConnell v. FEC*.[22] But the constitutional challenge Ms. James brings is one of first impression, since neither *Buckley* nor *McConnell* addressed the constitutionality of BCRA's sub-aggregate limit on contributions to individual candidates under BCRA.

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[19] *Buckley v. Valeo*, 424 U.S. 1, 38 (1976).
[20] *See, e.g.*, *Randall v. Sorrell*, 548 U.S. 230, 249 (2006).
[21] *Buckley*, 424 U.S. at 38.
[22] *McConnell v. FEC*, 540 U.S. 93 (2003).

The Federal Election Campaign Act—the statute at issue in *Buckley*—provided for "an overall $25,000[23] limitation on total contributions by an individual during any calendar year,"[24] and stipulated that "no person shall make contributions to any candidate with respect to any election for Federal office which, in the aggregate, exceed $1,000."[25] In analyzing FECA, the *Buckley* Court upheld the $1,000 limit on individual candidate committee (or "hard money") contributions in the interest of preventing donors from obtaining undue influence over any particular candidate.[26] The Court also upheld the $25,000 aggregate limit, in order to prevent donors from circumventing the limits on candidate contributions by making large contributions to political parties and other committees, which would then funnel those funds, without formal earmarking, to individual candidates, thereby circumventing the $1,000 hard money limit.[27] Thus, the candidate contribution limit was upheld under an anti-corruption rationale, and the aggregate contribution limit was upheld under an anti-circumvention rationale.

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[23] Equivalent to roughly $116,000 today. CPI Inflation Calculator, Bureau of Labor Statistics, http://www.bls.gov/data/inflation_calculator.htm.

[24] *Buckley*, 424 U.S. at 38 (citing Federal Election Campaign Act, Pub.L. No. 92-225, 86 Stat. 3 (1972) ("FECA") §608(b)(3)).

[25] *Id.* at 23 (citing FECA § 608(b)).

[26] *Id.* at 29. ("We find that, under the rigorous standard of review established by our prior decisions, the weighty interests served by restricting the size of financial contributions to political candidates are sufficient to justify the limited effect upon First Amendment freedoms caused by the $1,000 contribution ceiling").

[27] *Id.* at 38. Note that actually earmarking contributions to a party to be used for particular candidate races would be treated by the law as a direct contribution to the candidate, thus triggering the cap on contributions to individual candidates. What concerned the Court was that donors might give with an informal understanding that their contributions to the party would be used for particular candidates. *Id.*

As the Court put it:

> "[t]he overall $25,000 ceiling does impose an ultimate restriction upon the number of candidates and committees with which an individual may associate himself by means of financial support. But this quite modest restraint upon protected political activity *serves to prevent evasion of the $ 1,000 contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party*. The limited, additional restriction on associational freedom imposed by the overall ceiling is thus no more than a corollary of the basic individual contribution limitation that we have found to be constitutionally valid."[28]

Thus, to prevent circumvention of the $1,000 per candidate limit,[29] *Buckley* upheld FECA's aggregate limit.

When BCRA modified FECA, it established sub-aggregate limits on each of three contribution categories: (1) total contributions to candidates, (2) total contributions to parties, and (3) total contributions to PACs. These limits together comprised an aggregate cap on *total* contributions to candidates, parties, and PACs.[30] After BCRA entered into force, the Supreme Court again considered the constitutionality of aggregate contribution limits in *McConnell v. FEC*.[31]

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[28] *Buckley*, 424 U.S. at 38 (emphasis added).
[29] This amount is akin to BCRA's current inflation-adjusted individual candidate contribution ceiling of $2,500.
[30] 2 U.S.C. § 441a(a)(3).
[31] *McConnell v. FEC*, 540 U.S. 93 (2003).

McConnell differed from *Buckley* because BCRA had outlawed the type of 'soft money' contributions with which *Buckley* was so concerned,[32] and because the sub-aggregate limits had been added to the applicable law. But in evaluating the constitutionality of BCRA, the *McConnell* Court summarily upheld BCRA's aggregate *and* sub-aggregate contribution limits – without adding to *Buckley*'s anti-circumvention analysis. The Court merely noted, "[c]onsiderations of *stare decisis*, buttressed by the respect that the Legislative and Judicial Branches owe to one another, provide additional powerful reasons for adhering to the analysis of contribution limits that the Court has consistently followed since *Buckley* was decided."[33]

Thus, the Court upheld the new sub-aggregate limit on candidate contributions without finding an anti-corruption or anti-circumvention rationale. This is logical as applied to those entities that pose a risk of circumvention: parties and PACs. But it is irrational as applied to candidate committees, and the Court did not discuss that limit at all.

Since the *McConnell* Court did not consider the sub-aggregate limit challenge here, this challenge is a case of first impression.

The Supreme Court has been clear that an aggregate contribution limit is justified to prevent circumvention of an individual candidate contribution limit.

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[32] *McConnell*, 540 U.S. at 133-134 (2003) (citing 2 U.S.C. § 441i(a), (b), (d)-(f)).
[33] *Id.* at 137-138.

But the more funds given to candidates directly—as opposed to PACs or parties—the lower the chance that those limits will be circumvented. Congress has already allowed contributions to parties and PACs at a particular level: $70,800 per biennium. Any additional funds Ms. James contributes to candidate committees must, as a result of the overall biennial limit of $117,000, *come at the expense of PACs and party committees.* Consequently, allowing Ms. James to contribute more to candidates directly, and less to PACs and parties, in fact alleviates *Buckley's* anti-circumvention concerns. *Buckley* and *McConnell*, then, do not address Ms. James's situation.

III. Standard of review for aggregate contribution limits

It has been the law for nearly four decades that, in cases involving limits on political contributions, government "action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny."[34] While *Buckley* used the phrase "the closest scrutiny," recent case law affirms that contribution limits are subject to a less-stringent "exacting scrutiny" standard. A brief review of the case law on exacting scrutiny will outline the contours of the standard of review, and demonstrate why the challenged law cannot survive exacting scrutiny.

[34] *Buckley*, 424 U.S. at 25 (1976); *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 207 (1982) (both citing *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460-61 (1958).

Buckley was the first major case to address contribution limits and their accompanying standard of review. The Court recognized that contribution limits, like expenditure limits, "implicate fundamental First Amendment interests" which are traditionally subject to strict scrutiny.[35] Nevertheless, the Court noted that "even a significant interference with protected rights of political association may be sustained if the state demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms."[36] The Court affirmed FECA's contribution limits, but only because the restriction focused "precisely" on the problem of corruption.[37]

Similarly, in *McConnell,*[38] the Court explicitly acknowledged that expenditures received closer scrutiny than contributions. But the majority opinion also noted that contribution limitations are still subject to "heightened scrutiny" as they impinge on the protected freedoms of expression and association.[39]

Nixon v. Shrink Missouri Government PAC, gave the now-standard formula for exacting scrutiny in noting that a contribution limit could survive constitutional muster if it was "closely drawn" to match a "sufficiently important" interest.[40] Yet, the Court declined to further clarify, stating that it did not "attempt to parse

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[35] *Buckley*, 424 U.S. at 23.
[36] *Id.* at 25 (internal citations omitted).
[37] *Id.* at 28.
[38] *McConnell*, 540 U.S. at 134.
[39] *Id.* at 145.
[40] *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 387-388 (2000) (internal citations omitted).

distinctions between the speech and association standards of scrutiny for contribution limits."[41] The Court simply stated that the quantum of evidence needed to satisfy judicial scrutiny would vary with the "novelty and plausibility of the justification raised."[42] Without enumerating any indicia or factors, the Court found that Missouri had met its factual burden.[43] The case thus reaffirmed that contributions are somewhat less protected than expenditures, but not by how much, nor what specific factors would allow a contribution limitation to survive where an expenditure limit would not.

Finally, *Randall v. Sorrell*,[44] a case concerning unconstitutionally-low contribution limits, articulated a two-part test for a challenged contribution restriction designed to determine if the contribution limit was "too low and too strict to survive First Amendment scrutiny."[45] The Court found that Vermont's low contribution cap was unconstitutional,[46] but failed to clarify the precise level of scrutiny being applied. The ambiguity of the majority opinion did not escape

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[41] *Id.* at 388.
[42] *Id.* at 391.
[43] *Id.* at 393.
[44] *Randall v. Sorrell*, 548 U.S. 230 (2006).
[45] *Id.* at 248 (articulating a two part test in which the court (1) determines if the statute has the "danger signs" of putting challengers and a significant disadvantage; and (2) reviews the record independently and carefully with an eye toward assessing the statute's tailoring and proportionality).
[46] *Id* at 263.

the notice of other justices on the Court.[47] Justice Thomas in particular noted that the review in *Randall* is based on immeasurable[48] and arguably inappropriate[49] factors. In effect, the standard of "exacting" scrutiny appears to apply to contribution limits,[50] but how exacting the scrutiny is remains unclear. What is known it that it is a heightened standard, but a less stringent one than that applied to expenditure limits.

Therefore, in light of recent case law, Plaintiff asks the court to review the statute under exacting scrutiny. Nevertheless, Plaintiff contends that BCRA's sub-aggregate limit on candidate contributions fails any level of scrutiny.

IV. The aggregate contribution limit of $46,200 to candidate committees is not closely drawn to a sufficiently important governmental interest.

Under exacting scrutiny, a law infringing on First Amendment rights may only be upheld if it is "closely drawn" to a "sufficiently important" interest.[51] The Supreme Court has only permitted two such interests. The government may permissibly limit contributions to prevent corruption or the appearance of

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[47] *Id.* at 267-68 (Thomas, J., concurring) ("[N]either step of this test can be reduced to a workable inquiry to be performed by States attempting to comply with this Court's jurisprudence.").
[48] *Id.* at 267 (Thomas, J., concurring) ("[C]ourts have no yardstick by which to judge the proper amount and effectiveness of campaign speech.") (internal citations omitted).
[49] *Id.* at 272 (Thomas, J., concurring) ("[T]ying an individuals' First Amendment rights to the presence or absence of similar laws in other States is inconsistent with the First Amendment.").
[50] *Id.* at 264 (Kennedy, J., concurring).
[51] *Nixon*, 528 U.S. at 387-388.

corruption.[52] And the government may limit contributions so as to prevent contributors use of vehicles such as parties or PACs to circumvent individual contribution limits to particular candidate committees.[53] Neither interest is threatened in this case. Consequently, the statute is not closely drawn to those interests and fails exacting scrutiny.

The current aggregate limit for individuals is $117,000.[54] However, the law does not permit an individual to contribute $117,000 to candidates. Instead, the statute caps all contributions to candidate committees at $46,200.[55] The practical effect of this law is that individuals who wish to express their political views and exercise their associational rights by supporting candidates, and to do so beyond $46,200, must seek other means of doing so. The means provided by BCRA is contributions to PACs or parties. Indeed, the mere existence of a biennial aggregate cap on individual contributions that is only a third of the total biennial aggregate cap itself actually directs individuals to contribute to parties or PACs—the very entities whose existence demands the need for an anti-circumvention rationale in the first place, and the entities that are, if anything, *disfavored* by *Buckley's* analysis.

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[52] *Buckley*, 424 U.S. at 28.
[53] *Id.* at 45. *See also McConnell*, 540 U.S. at 145-154 (2003) (upholding restrictions on "soft money" under the anti-circumvention rationale).
[54] 2 U.S.C. § 441a(a)(3); 76 Fed. Reg. 8368 (Feb. 14, 2011).
[55] *Id.*

Consequently, BCRA forces individuals to associate with PACs or parties if they wish to contribute up to the legally-permissible biennial limit of $117,000. But Ms. James does not wish to associate with PACs or parties. She wishes to associate with individual candidates for office. Specifically, she wishes to contribute within the $2,500 contribution limit of 2 U.S.C. § 441a(a)(1)(A) to candidates of her choice up to a total of $117,000.

Additionally, the anti-corruption interest is not threatened by Ms. James's donations. In setting a cap of $117,000, Congress has determined that total contributions in this amount from a single individual are not corrupting.[56] Moreover, in drafting the categorical limits, Congress determined that individual contributions to candidate committees consistent with the limits of 2 U.S.C. § 441a(a)(1)(A)[57] are non-corrupting. Since Ms. James is willing to adhere to both the limits on individual candidate contributions and the aggregate contribution limit, there is no further anti-corruption interest served by the 'sub-aggregate' limit of 2 U.S.C. §441a(a)(3)(A).

Furthermore, the threat of corrupting "soft money" that the Supreme Court acknowledged in *McConnell* does not present any threat in the instant case: BCRA

[56] *See Buckley*, 424 U.S. at 25.
[57] $2500 in 2012. *See* 76 Fed. Reg. 8368 (Feb. 14, 2011).

has outlawed *all* soft money contributions to parties.[58] Therefore, the 'soft money' threat of corruption has no application to biennial limits or to Ms. James.

Since neither of the sufficiently important interests are affected by Ms. James's wish to contribute only to candidate committees, the biennial aggregate limit cap is not properly tailored and does not pass exacting scrutiny as it applies to Ms. James. In fact, because each dollar Ms. James contributes to a candidate is a dollar that cannot be contributed to a PAC or party as "unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party,"[59] her desired contributions would in fact *lessen* the danger of circumvention that concerned the Supreme Court in *Buckley*.

A. 2 U.S.C. §441a(a)(3)(A), as applied, is not rationally related to a legitimate governmental interest.

While the standard for determining the constitutionality of a statute affecting First Amendment rights is exacting scrutiny,[60] 2 U.S.C. §441a(a)(3)(A) also does not survive rational basis review. As stated *supra*, there are only two interests that the government may rely upon in limiting contributions—1) the prevention of

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[58] *McConnell*, 540 U.S. at 133.
[59] *Buckley,* 424 U.S. at 38.
[60] Of course, a statute that cannot survive lesser standards of review cannot, by definition, survive strict scrutiny. *See FEC v. Wis. Right To Life, Inc.*, 551 U.S. 449, 464 (2007).

corruption or the appearance of corruption, and 2) the anti-circumvention rationale in the case of soft money.

In essence, the limit on aggregate contribution limits to candidates limits the number of candidates with which one may associate. BCRA does not consider an individual contributing to eighteen candidates to pose a risk of corruption or its appearance.[61] But the nineteenth candidate cannot be supported at the same level as the previous eighteen. Nor may our hypothetical contributor associate with a twentieth candidate at all.

Such a line is arbitrary and lacking in foundation. Moreover, to prohibit association with a twentieth candidate, but allow significant additional contributions to entities *which may in turn make unearmarked contributions of that money to the twentieth candidate,* is a decision without any rational basis.

V. If this Court does not issue a preliminary injunction, Ms. James will suffer irreparable harm, but the FEC will not suffer irreparable harm if the injunction is granted.

The First Amendment is foundational to our political process, and so the loss of the freedom of association is particularly harmful during an election cycle. The Supreme Court held that the "loss of First Amendment freedoms, for even minimal

[61] The $46,200 sub-aggregate limit, divided by the $2,500 limit on contributions to candidates, yields eighteen candidates to whom the full $2,500 may be given. Similar calculations are used for the remainder of the paragraph. The number is, of course, lower if a contributor supports the candidate in both the primary and general elections.

periods of time, unquestionably constitutes irreparable injury."[62] Furthermore, political activity is particularly time-sensitive,[63] especially in a major election year.

Here, Ms. James wishes to associate one-on-one with candidates in this election. Elections are, by nature, time sensitive and non-repeating; 2012's contest is no exception. While there will be another federal election in two years, the candidates and issues will change—that is, no future election will be *this* election. Additionally, candidates elected in *this* election will cast votes on vital legislation in the next Congress. Ms. James wishes to associate with particular candidates this term in the context of the current political climate. Restricting her ability to do so will irreparably harm her, in violation of the First Amendment.

In contrast, the FEC will not suffer irreparable injury if this Court grants the relief Ms. James seeks. No party can be injured through lack of enforcement of a statute that violates the First Amendment.[64] Any injury the FEC could allege would

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[62] *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("'Inasmuch as this case involves First Amendment rights of association which must be carefully guarded against infringement by public office holders, we judge that injunctive relief is clearly appropriate in these cases.' We agree…It is clear therefore that First Amendment interests were either threatened or in fact being impaired at the time relief was sought. The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.") (internal citation omitted).

[63] *Id.* at 374, fn. 29 (recognizing timeliness of action in context of political speech) (citing *Carroll v. Princess Anne*, 393 U.S. 175, 182 (1968) and *Wood v. Georgia*, 370 U.S. 375, 391-392 (1962)).

[64] *See, e.g.*, *Joelner v. Village of Wash. Park*, 378 F.3d 613, 620 (7th Cir. 2004) ("Concomitantly, there can be no irreparable harm to a municipality when it is prevented from enforcing an unconstitutional statute because it is always in the public interest to protect First Amendment liberties.") (internal quotation marks and citations omitted); *Florida Businessmen for Free Enterprise v. Hollywood*, 648 F.2d 956, 959 (5th Cir. 1981) ("Given appellants' substantial likelihood of success on the merits, however, the harm to the city from delaying

stem from their interest in preventing actual or apparent political corruption. Indeed, the purpose of the contribution limits in FECA[65] and BCRA[66] is to avoid this phenomenon.

But neither actual nor apparent corruption are at issue in this case. Ms. James will submit to the candidate contribution limits and the aggregate biennial limit. She will therefore not give beyond the limit for each candidate, which Congress has set at what is—in its judgment—a non-corrupting level.[67] Ms. James intends to follow the aggregate limits as well. She asks for the freedom to choose in which manner and with whom to associate. Consequently, the sub-aggregate limit on contributions to candidate committees is unconstitutional as applied to her.

Finally, as discussed *supra*, the courts have consistently noted their concern that limits on contributions to candidates could be circumvented by contributions to parties. Since Ms. James will not contribute to parties or PACs, the anti-

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enforcement is slight. The public interest does not support the city's expenditure of time, money, and effort in attempting to enforce an ordinance that may well be held unconstitutional") (internal citations omitted).

[65] *Buckley*, 424 U.S. at 26 ("It is unnecessary to look beyond the Act's primary purpose—to limit the actuality and appearance of corruption resulting from large individual financial contributions –in order to find a constitutionally sufficient justification for the $ 1,000 contribution limitation").

[66] *See*, *e.g. McConnell*, 540 U.S. at 136 ("Our treatment of contribution restrictions reflects more than the limited burdens they impose on First Amendment freedoms. It also reflects the importance of the interests that underlie contribution limits--interests in preventing "both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption") (applying the anticorruption rationale in examining BCRA) (internal citations omitted).

[67] *See*, *e.g.*, *id.* at 137-138 (stating that Congress relied on *Buckley* and its progeny when setting contribution limits in BCRA).

circumvention rationale does not apply. Ms. James should not be forced to stay within a predetermined party or PAC framework, and instead this Court should restore her freedom to associate one-on-one with candidates of her choosing.

As discussed *supra*, the sub-aggregate limits on candidate contributions do not survive any level of scrutiny and are therefore unconstitutional as applied to Ms. James. Thus, the FEC cannot be harmed by an injunction against an unconstitutional application of this statute.

VI. If this court issues a preliminary injunction, it will further the public interest in protecting the First Amendment.

The issuance of a preliminary injunction in this case would further the public interest by protecting the freedom of association. While a preliminary injunction is an extraordinary remedy, courts may "go much farther" in granting relief when a public (as opposed to private) interest is at stake.[68] Constitutional rights are a prime example of an arena that seriously implicates the public interest.[69] Since "no party has an interest in the enforcement of an unconstitutional law," the public interest is

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[68] *Nat'l Ass'n. of Farmworkers Org's v. Marshall*, 628 F.2d 604, 616 (D.C. Cir. 1980) ("As the Supreme Court has held, Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved") (citing *Virginian Ry. Co. v. System Fed'n*, 300 U.S. 515, 552, (1937), *quoted with approval*, *Yakus v. United States*, 321 U.S. 414, 441, (1944)).

[69] *Green v. Kennedy*, 309 F. Supp. 1127, 1139 (D.D.C. 1970) ("Equity properly grants relief when considerations of public interest are involved, as distinguished from purely private interest. This principle is properly invoked by plaintiffs claiming denial of constitutional rights") (citations omitted).

best protected by issuing a preliminary injunction.[70] Even greater care is taken to protect the First Amendment.[71]

This case is based upon the First Amendment right of association at a crucial moment: an election year. While it involves very real and important First Amendment rights, it only examines a small portion of campaign finance law: how a contributor can spend (or is prohibited from spending) their money subject to the candidate contribution and aggregate limits. So while the importance to the public is high, the relative impact on administration of campaign finance laws is low. Therefore, issuing a preliminary injunction would protect Ms. James's First Amendment rights while not greatly impacting the administration of the current campaign finance regime. Importantly, the aggregate amount of money available for contribution to regulated entities would not increase.

Conclusion

The "sub-aggregate" contribution limits can only be upheld if, as applied to Plaintiff, they enforce the government's anti-corruption or anti-circumvention

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[70] *ACLU v. Reno*, 929 F. Supp. 824, 849 (E.D. Pa. 1996) (citing *Elrod*, 427 U.S. at 373-74; *Hohe v. Casey*, 868 F.2d 69, 72 (3d Cir. 1989), *cert. denied*, 493 U.S. 848 (1989); *Acierno v. New Castle Cnty.*, 40 F.3d 645, 653 (3d Cir. 1994)).

[71] *See, e.g.*, *ACLU v. Reno*, 929 F. Supp. at 851 ("No long string of citations is necessary to find that the public interest weighs in favor of having access to a free flow of constitutionally protected speech") (internal citations omitted); *K.H. Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006) ("The public has no interest in enforcing an unconstitutional ordinance" in the First Amendment context) (internal citations omitted).

interests. They do not. Therefore, the FEC's enforcement of the statute threatens Ms. James's First Amendment right of association in this election.

For the foregoing reasons, Ms. James respectfully asks this Court to grant her motion for preliminary injunction.

Respectfully submitted this 5th day of September, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of September, 2012, I caused the foregoing document to be served on the following, via electronic and first class mail:

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s/ Allen Dickerson
Allen Dickerson

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Virginia James,	)	
	)	
Plaintiff,	)	**Civil No.: 1:12-cv-01451**
	)	
v.	)	
	)	
Federal Election Commission,	)	
	)	
Defendant.	)	
	)	
	)	

Order

Upon consideration of the Plaintiffs' Motion for Preliminary Injunction and Memorandum in support thereof,

IT IS HEREBY ORDERED that the Motion is granted; and it is

FURTHER ORDERED that the Federal Election Commission is preliminarily enjoined from enforcing the limit on contributions to candidate committees at 2 U.S.C. § 441a(a)(3)(A).

SO ORDERED this ___ day of _____ 2012.

_____
United States District Judge

_____
United States District Judge

_____
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Virginia James,	)	
	)	
Plaintiff,	)	
	)	**Case No.: 1:12-cv-01451**
v.	)	
	)	**Three-Judge Court Requested**
Federal Election Commission,	)	
	)	**Oral Argument Requested**
Defendant.	)	

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of September, 2012, I caused the Motion for Preliminary Injunction, Memorandum of Law in Support of Motion for Preliminary Injunction, and the proposed Order granting the preliminary injunction to be served on the following, via electronic and first class mail:

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