United States District Court
District of Columbia

Shaun McCutcheon et al., *Plaintiffs*	
v.	**Civ. No. 1:12-cv-01034-JEB-JRB-RLW**
Federal Election Commission, *Defendant*	THREE-JUDGE COURT

Reply Memorandum in Support of Motion for Preliminary Injunction

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- "Elected officials are influenced to act contrary to their obligations of office by the prospect of *financial gain to themselves or infusions of money into their campaigns*. The hallmark of corruption is the financial *quid pro quo*: dollars for political favors." – *FEC v. National Conservative PAC*, 470 U.S. 480, 497 (1985) (emphasis added) ("*NCPAC*").

- "When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption. The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt . . . . Reliance on a 'generic favoritism or influence theory . . . is at odds with standard First Amendment analyses because it is unbounded and susceptible to no limiting principle.'" – *Citizens United v. FEC*, 130 S. Ct. 876, 909-10 (2010) (citations omitted).

- "The overall $25,000 ceiling . . . . serves to prevent *evasion* of the $1,000 contribution limitation . . . ." – *Buckley v. Valeo*, 424 U.S. 1, 38 (1976) (emphasis added).

The foregoing holdings—that the only cognizable anti-*corruption* interest is in preventing quid-pro-quo financial gain to particular elected officials or their campaigns and that biennial limits are analyzed under an anti-*circumvention* interest—control this case and prove the biennial limits unconstitutional.[1]

In their opening preliminary-injunction memorandum ("Mem."), Plaintiffs established that the biennial limits at 2 U.S.C. 441a(3) are unconstitutional because they lack a constitutionally cognizable interest—under any standard of review (Mem. 5-6)—and are too low.[2]

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[1] The *Citizens United* holdings are binding, even if one disagrees with them, *see American Tradition P'ship, Inc. v. Bullock*, 132 S. Ct. 1307, 1308 (2012) (Ginsburg, J., concurring), as FEC and its amici plainly do. *Cf. Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2825 (2011) (following the *Citizens United* formulation of the anti-corruption interest and rejecting any level-the-playing-field, or equalizing, interest).

[2] Because Plaintiffs established likely success on the merits in this First Amendment case, they consequently established the other preliminary-injunction factors. Mem. 5, 41-44. Since this Court consolidated the preliminary-injunction and merits hearings (July 12, 2012 Minute Order) and instructed counsel to address the merits at the hearing, Plaintiffs focus on the merits here.

In its opposition memorandum ("Opp'n"), FEC had the burden to show (inter alia) that a cognizable anti-*circumvention* interest justifies the biennial limits. It could not meet this burden by relying on an anti-*corruption* interest instead of the anti-*circumvention* interest identified as the applicable interest in this context by *Buckley*, 424 U.S. at 38. And it could not rely on forbidden theories of corruption (influence, gratitude, access, or equalization) or arguments from a soft-money analysis that has been limited to its context. Mem. 13-16. FEC fails to carry its burden.

I. The Biennial Limit on Contributions to Non-Candidate Committees Lacks a Constitutionally Cognizable Interest as Applied to Contributions to National Party Committees (Count 1).

A. "The Closest Scrutiny" of the Biennial Limits Is Required, Any Restriction Must Be No Broader than Necessary, and Deference Is Subordinate to the Constitution.[3]

Plaintiffs made and preserved the argument that contribution limits should not be subject to lower scrutiny than other burdens on core political speech and association protected by the First Amendment, and they argued that the biennial limits at issue are more properly analyzed as expenditures (*see infra*). Mem. 5-6 & n.5. But, Plaintiffs said, "even under intermediate scrutiny" they should succeed and it is unnecessary for the Court to decide which scrutiny applies because both require a cognizable interest, which the biennial limits lack. Mem. 6. Plaintiffs established that "[w]hatever scrutiny applies, there is a no-broader-than-necessary tailoring requirement" and that deference to Congress is subordinate to the First Amendment. Mem. 7, 37.

Regarding deference, FEC argues for deferring to Congress regarding whether the biennial limits are too low, Opp'n 35, but fails to mention or counter Plaintiffs' controlling authority that deference is subordinate to constitutional demand, Opp'n 35 n.7, which FEC cannot dispute.

Regarding the no-broader-than-necessary tailoring requirement, FEC makes no response. That tailoring requirement has particular force given the forbidden prophylaxis-on-prophylaxis

[3] This analysis also applies to review of the other counts.

approach that the biennial limits embody. Mem. 1, 17-30. FEC attempts to evade the constitutional requirement that prophylaxis not be layered on prophylaxis without a constitutionally cognizable interest and proper tailoring to justify each layer. Opp'n 16. It argues that *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 479 (2007) (controlling opin.) (forbidden "prophylaxis-on-prophylaxis approach") ("*WRTL-II*"), was about expression and independent expenditures. Opp'n 16. But FEC's attempt fails because (a) Plaintiffs already noted *WRTL-II*'s context, Mem. 15; (b) contributions are both association and expression; (c) the prophylaxis-on-prophylaxis ban simply restates the constitutional requirement that each First Amendment burden be justified by a cognizable interest and proper tailoring, Mem. 15-16; *cf. WRTL-II*, 551 U.S. at 478 ("A court applying strict scrutiny must ensure that a compelling interest supports *each application* of a statute restricting speech." (emphasis in original)); and (d) the layered prophylaxis approach is inconsistent with the no-broader-than-necessary requirement, which FEC does not contest.

Regarding strict versus intermediate scrutiny, FEC argues that *Buckley*'s distinction, 424 U.S. 1, between contributions and expenditures controls, Opp'n 7-9, and that the biennial limit is not an expenditure limit, basing its argument on two soft-money cases, Opp'n 10-12 (citing *McConnell v. FEC*, 540 U.S. 93 (2003), and *Republican Nat'l Comm v. FEC*, 698 F. Supp. 2d 150 (D.D.C. 2010) (three-judge court) ("*RNC*"), *aff'd*, 130 S. Ct. 3544 (2010)).

But as discussed further below, biennial limits are materially unlike the contribution limits that *Buckley* addressed in distinguishing between review of contribution and expenditure limits, which difference in kind *Buckley* recognized by applying an anti-*corruption* analysis to the $1,000 limit on contributions to candidates, 424 U.S. at 23-29, and an anti-*circumvention* analysis to the "overall $25,000 ceiling, *id.* at 38. And the two cited soft-money cases did not deal with anything like the biennial limits, the uniqueness of which is addressed further below. For present,

it is enough to note that the soft-money cases dealt with a complete ban on soft money in politics, not the sort of statutory scheme at issue here (with base contribution limits and aggregate biennial limits). Congress could have established a scheme for soft money with base contribution limits and biennial limits, but it chose a ban instead. So on a factual level, the statutory schemes are so materially distinct that the soft-money cases cannot control the constitutionality of the unique scheme of base contribution limits with overarching biennial limits at issue here.

Also, these soft-money cases do not control here because this case does not involve soft-money contributions and those cases were based on *McConnell*'s deference to Congress and broad theories of corruption that were expressly rejected and limited to their context in *Citizens United*, 130 S. Ct. at 909-11. Mem. 7, 13, 22. FEC attempts unsuccessfully to avoid this fact by arguing that *Citizens United* was about independent expenditures and "'preserved' the government's anti-corruption and anti-circumvention interests in regulation of contributions." Opp'n 18 (citations omitted). The fact that *Citizens United* involved a ban on corporate electioneering communications and independent expenditures does not alter the fact that it stated broadly the applicability of strict scrutiny and, most importantly, held that the scope of cognizable corruption is limited to a quid-pro-quo financial benefit to a particular candidate or the candidate's campaign. FEC and its amici argue as if *Citizens United* never held this.

As to FEC's argument that the anti-corruption and anti-circumvention interests survive *Citizens United*, there is no question that these interests may be asserted *as appropriate*. But FEC's argument gains it nothing because the issue is not about whether these two interests *exist* but about their *scope* and about *which* interest applies to analyzing the constitutionality of the biennial limits. So while FEC may indeed assert an anti-*corruption* interest to defend limits on *contributions to particular candidates* and an anti-*circumvention* interest to support limits on *contri-*

butions to other entities or for biennial limits, asserting the undisputed fact that these interests *exist* does not meet FEC's burden of justifying the biennial limits. Nor does reliance on soft-money cases. FEC needed to provide a finely targeted analysis, as required in First Amendment cases, proving that there is a cognizable anti-circumvention risk in this unique context.

To that unique context we now turn. The biennial limits do *not* limit the amount of any contribution to a *particular* candidate. Where there *is* a contribution to a particular candidate, the government may assert an anti-corruption interest, which *Citizens United* reaffirmed is limited to quid-pro-quo corruption. 130 S. Ct. at 909-10. That anti-corruption interest applies only to contributions to *particular* candidates because there must be a risk that "[e]lected officials are influenced to act contrary to their obligations of office by the prospect of *financial gain to themselves or infusions of money into their campaigns*. The hallmark of corruption is the financial *quid pro quo*: dollars for political favors." *NCPAC*, 470 U.S. at 497 (emphasis added). Forbidden theories of corruption (influence, gratitude, access, or equalization) do not involve such financial gain for a particular officeholder or his or her campaign and so are not cognizable. The base contribution limit on an individual's contribution to a candidate at 2 U.S.C. 441a(a)(1)(A) (currently $2,500 per election) asserts both the government's anti-corruption interest and its level.

Beyond limits on contributions to particular candidates, the cognizable interest for contribution limits is an anti-*circumvention* interest. For example, a contribution to a political party committee is not, by definition, a financial contribution to a particular candidate or candidate's campaign, so inherently it poses no cognizable *corruption* risk. The question then becomes whether a contribution can be made to a candidate by being routed *through* the political party committee.[4] *Buckley* expressly identified this anti-circumvention interest as being about "*contribut*[*ing*] mas-

[4] The question is not whether the political party might make an *independent expenditure* favoring the candidate, Mem. 24, but whether a conduit-contribution can pass through it.

sive amounts of money *to a particular candidate* through the use of unearmarked[5] 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). That is the circumvention concern. The base contribution limits at 2 U.S.C. 441a(a)(1)(B)-(D)—on national party committees, PACs, and state party committees—are all based on an anti-*circumvention* interest.[6] This is necessarily so because contributions to these entities involve no potential for quid-pro-quo corruption as to particular candidates, so no anti-corruption interest engages. Political parties or PACs are not office-holders who can give a political quid for a financial benefit to themselves or their campaigns, so the only interest that can justify limiting a contribution to them is an anti-circumvention interest. Of course, this anti-circumvention interest is exactly the basis on which the Supreme Court upheld a limit on contributions to PACs in *California Medical Association v. FEC*, 453 U.S. 182, 197-99 (1981) (plurality opin.) ("*CMA*"); *id.* at 203 (Blackmun, J., concurring in part and in judgment), and on the ability of political parties to coordinate unlimited expenditures with their candidates in *Colorado-II*, 533 U.S. 431. FEC agrees that "Congress . . . enacted th[e] PAC limit . . . to 'restrict the opportunity to circumvent the . . . limits on contributions to a candidate.'" Opp'n 12 (quoting *CMA*, 453 U.S. at 198 n.18). *See also id.* at 13 ("evade," "circumvention," "anti-circumvention interest"), 28 (citing *CMA* as "discussing potential for PAC contributors to circumvent limit on direct candidate contributions").[7]

[5] Contributions *earmarked* for a contribution to a candidate are counted as contributions to the candidate by the original contributor.

[6] The party-coordinated-expenditure limit, 2 U.S.C. 441a(d), upheld in *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) (*Colorado-II*), is also a base contribution limit because it limits the expenditures that party committees may make in coordination with candidates and "coordinated expenditures are treated as contributions under the Act." *Buckley*, 424 U.S. at 46.

[7] FEC also notes that *CMA* "reaffirmed that contribution limits 'serve[ ] the important governmental interests in preventing the corruption or appearance of corruption of the political pro-

This distinction between the permissible assertion of an anti-*corruption* interest and an anti-*circumvention* interest is not mere semantics. It is central to the careful analysis required where burdens are imposed on core political speech and association. The issue where a contribution is made to an entity other than a particular candidate is whether there is a cognizable risk that some of that contribution *can become a contribution to an intended candidate*, i.e., is there a substantial risk that a substantial amount of this unearmarked contribution can get through this recipient entity—functioning as a conduit—to an intended candidate? FEC cannot change the subject to evade that narrow question, e.g., by arguing that there is an anti-*corruption* interest that engages when contributions are made *to particular candidates* (which is undisputed but immaterial). Nor can FEC change the subject to consider *impermissible* interests, e.g., whether a contribution might result in candidate influence, gratitude, or access, or whether absent the biennial limits people might give to *many* candidates, which is an impermissible equalizing argument.

Moreover, the *risk* and *amount* of any possible circumvention must be sufficiently substantial to justify burdening core First Amendment rights. And the base limits that Congress imposed on individual contributions *to* national political party committees ($30,800 per year), PACs ($5,000 per year), and state party committees ($10,000 per year), and on contributions *by* entities, including on candidate-to-candidate contributions ($2,000 per election), Mem. 19, which are justified *solely* by the anti-circumvention interest, (a) represent the level at which Congress has *as-*

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cess that might result if such contributions were not restrained.'" Opp'n 12-13. This anti-corruption interest, of course, applies to contributions to candidates, while the interest in limiting contributions to other entities is, as FEC acknowledges, an anti-circumvention interest. FEC also finishes its interpretation of *Buckley*'s four controlling principles with the principle that the "ceiling" serves an "anti-corruption interest by inhibiting circumvention." Opp'n 9. This, of course, seems true in a broad sense, but it may not be used to overlook the fact that the constitutional analysis of the biennial limits must focus precisely on whether cognizable *circumvention* is possible. FEC may not simply argue that biennial limits are permissible because of the fact that government has an anti-corruption interest that applies to contributions to particular candidates.

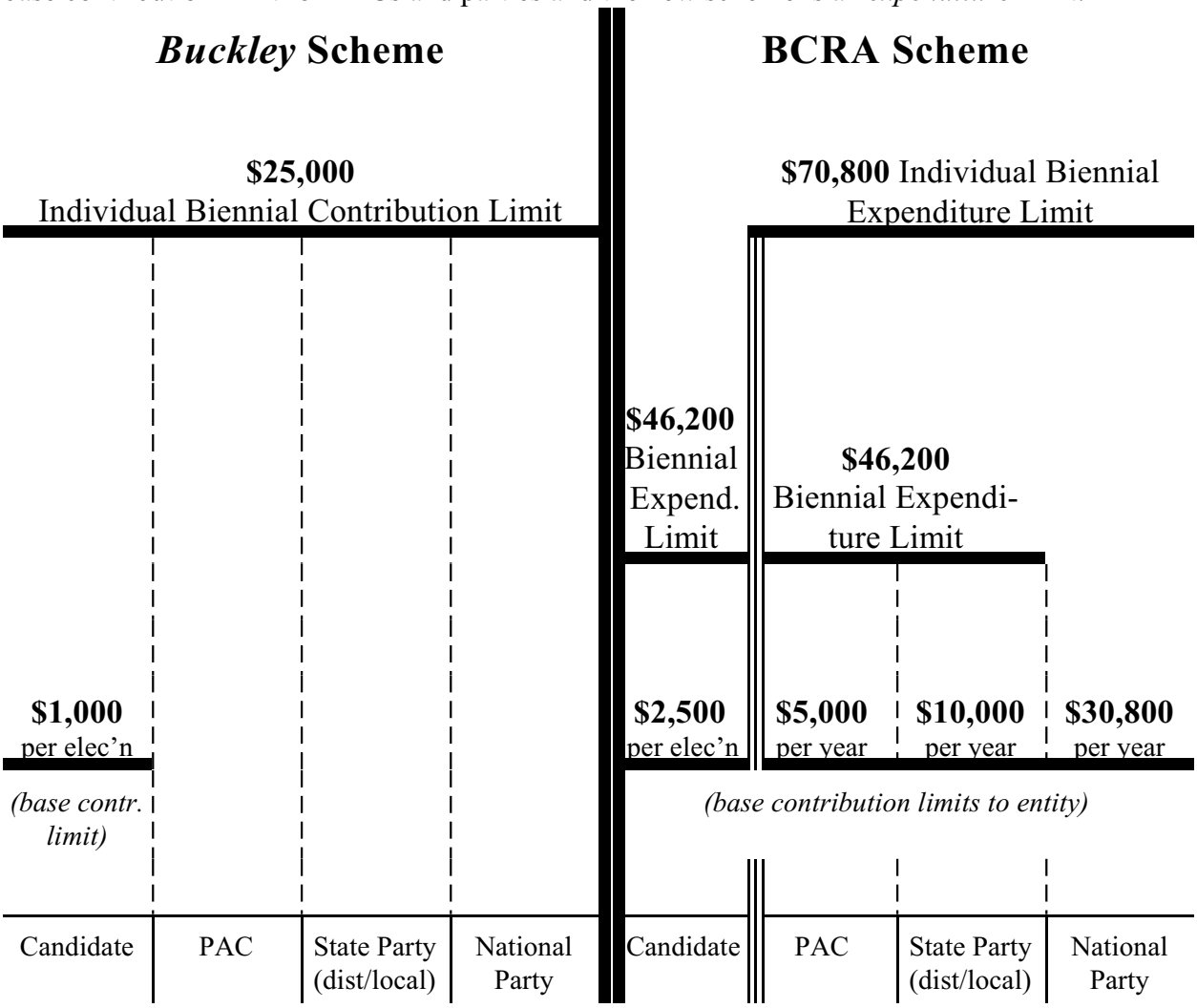
serted its anti-circumvention interest as to each of these entities, (b) establish the level at which Congress found that an anti-circumvention interest *exists* as to each entity, and (c) were designed to *reduce to a non-cognizable level* the circumvention risk.[8]

The interest that the government may assert with regard to the *biennial limits* is an anti-circumvention interest, *see Buckley*, 424 U.S. at 38 ("overall $25,000 ceiling" was to "prevent *evasion* of the $1,000 contribution limitation" (emphasis added)), not an anti-corruption interest. While an anti-circumvention interest seeks to avoid evasion of the contribution limits that in turn seek to advance an anti-corruption interest, it is an erroneous and over-generalized constitutional analysis to conflate the two and simply say that biennial limits are to prevent corruption. The biennial limits don't limit how much one may give to any *particular* candidate, so they do not in themselves limit quid-pro-quo corruption.

Now, the "overall $25,000 ceiling" considered by *Buckley*, 424 U.S. at 38, *did* act as a contribution limit, in part, because it was the *only* limit on how much one could give to a political party committee or a PAC. *See infra* (chart comparing *Buckley* and BCRA schemes and showing "overall $25,000 ceiling" as only limit on contributions to political parties and PACs under pre-1976 FECA scheme). There was a base limit on how much one could give to a candidate ($1,000 per election), so with respect to candidates, whom *Buckley*'s biennial-limit analysis did not mention, the "overall $25,000 ceiling" limited only the *number* of candidates one could publicly ex-

[8] FEC argues that "Plaintiffs incorrectly assume that the individual [base] contribution limits 'eliminate[ ] *any* cognizable circumvention risk." Opp'n 34 n.26 (quoting Mem. 21, emphasis by FEC). FEC ignores the word "cognizable," which Plaintiffs use repeatedly. For example, if Congress decides that a limit on annual contributions to political parties of $30,800 is sufficient to meet its anti-circumvention interest, then, whatever the Congressional balancing involved in reaching that number, Congress has asserted its anti-circumvention no further than that amount, making any further risk of circumvention noncognizable. And if a risk of circumvention is so low as not to justify the burdens on core First Amendment rights required to totally eliminate that risk, then the risk is noncognizable. So where base contribution limits eliminate any cognizable circumvention risk, it is fair to say that the risk has been "eliminated" for analytical purposes.

press one's support for, and associate with, to the full extent permitted by the base limits that were designed to reduce to a noncognizable level any corruption risk. But when the 1976 FECA amendments established base limits on contributions to *all* entities, the "overall $25,000 ceiling" ceased to act as a contribution limit (as remains true with the BCRA amendments). Note that, though the old "ceiling" acted in some measure as a contribution limit, *Buckley* nonetheless applied an anti-*circumvention* analysis specifically to political party committees and PACs, which analysis remains controlling. The following chart shows the relevant features of the *Buckley* and BCRA biennial-limit schemes, including how the "overall $25,000 ceiling" acted as a type of base contribution limit for PACs and parties and the new scheme is an *expenditure* limit.



In sum, because the BCRA biennial limits do not restrict any particular contribution to a particular candidate, they are not properly *contribution* limits, i.e., limits supportable by an anti-corruption interest. Rather, they restrict how much an individual may *spend* in aggregate on contributions expressing his or her political views by supporting, and associating with, political parties, PACs, and candidate committees to the full extent permitted by the base contribution limits[9] (which reduce any anti-corruption and/or anti-circumvention risk to a non-cognizable limit). Thus, these biennial limits are "biennial *expenditure* limits,"[10] and *strict scrutiny* applies, though Plaintiffs also prevail under intermediate scrutiny.

B. *Buckley*'s Facial Upholding of the Now-Repealed "Overall $25,000 Ceiling" Does not Control this Case, but *Buckley*'s Concerns Guide the Analysis.

As Plaintiffs said in a heading in their opening memorandum, Mem. 8, and repeat in the heading to this discussion, "*Buckley*'s facial upholding . . . *does not control this case* . . . ." Plaintiffs explained these statements. Mem. 8-12. Regarding whether *Buckley* is binding precedent, Plaintiffs said that *Buckley*'s facial upholding "does not control here because: (a) that ceiling's statutory context was materially altered, *see infra*; (b) the ceiling was repealed and replaced by BCRA's multiple biennial limits, *see* 2 U.S.C. 441a(a)(3); and (c) *Buckley* was a facial holding (so inapplicable to as-applied challenges here)." Mem. 8.

Despite the obvious clarity of Plaintiffs' position, FEC says Plaintiffs *do* ask this Court to *overrule Buckley* as to its facial upholding of the old "ceiling." First, FEC says that *Buckley* "held

[9] Plaintiff McCutcheon wants to speak and associate to the *full extent* permitted by the base contribution limits. Mem. 3. Telling him that he may speak and associate as much as desired by giving less to each, Opp'n 32, is a constitutionally impermissible response. *See WRTL-II*, 551 U.S. at 477 n.9 ("Such notions run afoul of 'the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.'" (citation omitted)).

[10] Even if this Court chooses to label the aggregate limits "contribution limits" and not "expenditure limits," the fact remains that they are limits that further no cognizable interest.

that this statute . . . was consistent with the First Amendment" but "Plaintiffs . . . now ask this Court to revisit the Supreme Court's decision." Opp'n 1. Second, FEC says "Plaintiffs openly state their intention to ask the Supreme Court to revisit *Buckley*'s holding [that the 'ceiling' was constitutional], but unless and until that takes place, plaintiffs cannot prevail." Opp'n 5. That is *not* what Plaintiffs said. Plaintiffs said that they "challenge any lowered scrutiny of limits on campaign contributions as unconstitutional and, to the extent that *Buckley* is interpreted as imposing lowered scrutiny on contribution limits than on expenditure limits, expressly call for the reconsideration of *Buckley* on *that issue*." Mem. 5-6 (emphasis added). But Plaintiffs said that *Buckley* is *not* binding precedent on the core issue. This twisting of what Plaintiffs said (not the only occurrence) cautions readers to carefully examine FEC assertions.

This Court need not overturn *Buckley* to rule for Plaintiffs. FEC's substantive argument is that *RNC*, 698 F. Supp. 2d at 157, ruled against plaintiffs making as-applied challenges to the soft-money ban upheld in *McConnell*, stating that the plaintiffs were essentially asking the court to overrule *McConnell*. Opp'n 11-12 & n.8, 26. As noted above, the soft-money cases in general have no relevance here. Specifically, as FEC notes, Opp'n 12 n.8, *RNC* decided that the claim there was "based on the same factual and legal arguments" as in *McConnell*. *RNC*, 698 F. Supp. 2d at 157.

Here that is not the case. *Buckley* expressly stated that, "[a]lthough the constitutionality of [the old ceiling] was drawn into question by appellants, it [was] not . . . separately addressed at length by the parties." 424 U.S. at 38. So there were few or no "factual and legal arguments" addressed to the unique nature of a biennial limit that might be repeated. The "ceiling" was not challenged as applied or as too low. *Buckley*'s analysis focused on the potential for "evasion" of limits on contributions to candidates by "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.

But that has all changed. First, the circumvention possibility identified in *Buckley* was materially altered by the 1976 FECA changes responding to *Buckley*. These amendments placed limits on PAC proliferation and contributions to PACs and parties, which could only be justified by an anti-circumvention interest (on which *Buckley* relied in upholding the old "ceiling") and were designed to eliminate any cognizable circumvention risk. So, for example, "huge contributions to [a] candidate's political party," *id.*, are no longer possible because of post-*Buckley* contribution limits. Second, BCRA created a new biennial-limit scheme that is sufficiently different from the old "ceiling" that FEC did not even oppose a three-judge court (*see* Dkt. 3), for which the provision at issue had to be a BCRA, not FECA, provision. *See* BCRA § 403(a)(1), Pub. L. No. 107-155 (2002), 116 Stat. 81, 113-14. The fact that the statutory citation remains the same means nothing about the statute's contents. The chart above, *supra* at 9, shows the *Buckley* and BCRA schemes side-by-side, highlighting the several material differences between them. For example, the old scheme included contributions to candidates under the same ceiling as for contributions to PACs and all parties, while BCRA's scheme separates candidate contributions from those to non-candidate committees. That is especially material to the challenge to the biennial limit on contributions to candidate committees. The *Buckley* scheme acted as a type of contribution limit (in addition to being a biennial expenditure limit) for entities without a base contribution limit, but none of the BCRA biennial limits so operate. The *Buckley* scheme permitted a person to spend *all* of his or her "ceiling" limit on contributions to candidates (in $1,000 per election increments), national party committees, state party committees, or PACs, at the person's choice, while BCRA's scheme separately limits contributions to candidates and to state parties and PACs.

Moreover, even if *Buckley* were precedential—despite the changed FECA context and BCRA's repeal and replacement of the "ceiling" with a materially different biennial-limits scheme—it only would control as to a *similar facial* challenge. *Buckley* was a facial challenge but the present case includes a challenge as applied to national party committees and a challenge to the limit on contributions to candidates that would be an as-applied challenge if the biennial limits were one unified "ceiling." Also, the facial challenge to the BCRA limit on contributions to non-candidate committees is based primarily on the fact that the provision is unconstitutionally overbroad in light of its unconstitutional application as applied to national party committees, so though it is a facial challenge it flows from the as-applied challenge. *WRTL-II* is a prime example of how a provision facially upheld (the corporate electioneering-communication ban) may be unconstitutional as applied. 551 U.S. at 482 (controlling opin.). That is the pattern that should be followed here, if *Buckley* controls at all (which it does not).

However, *Buckley*'s concerns must clearly guide the present analysis. Note that *Buckley* did not just focus on some potential for "corruption" in the abstract, but rather on a potential for "evasion" of the limit on contributions to candidates by a specifically articulated *mechanism*—i.e., whether there was a cognizable circumvention risk resulting from the ability to "contribute *massive* amounts of money *to a particular candidate* through the use of unearmarked contributions to political committees likely to contribute to that candidate, or *huge* contributions to the candidate's political party." 424 U.S. at 38 (emphasis added).[11] *Buckley* expressed this concern in the

[11] FEC's amici argue that *Buckley* expressed no concern in this statement about "massive" or "huge" contributions *to* PACs and parties that were eliminated by limits on contributions to PACs and parties, but that the real concern was with contributions to multiple PACs. Amici Curiae Br. ("AC") 20-24. But the plain reading of "*huge contributions to the candidate's political party*," 424 U.S. at 38, belies this argument. And absent "massive" contributions to PACs, there could be no cognizable risk of circumvention as to them. Moreover, *Buckley* here plainly speaks of contributions to "political committees" (plural), not a single PAC, so *Buckley*'s concern is just as Plaintiffs stated it. Mem. 8-12. But amici's argument that *Buckley*'s concern was with gifts to

context of its earlier concern about PAC proliferation. 424 U.S. at 28 n.31. And *Buckley*'s statement that the "ceiling" was a "corollary" of the base limit on contributions to candidates, 424 U.S. at 38, was based on this situation, including the fact that the "ceiling" was the sole limit on contributions to parties and PACs. But all of that changed in 1976.

C. Congress Fixed the Problems that *Buckley* Identified.

As Plaintiffs have shown, the post-*Buckley* 1976 FECA amendments restricted PAC proliferation by the same persons and placed limits on contributions to political parties and PACs, thereby reducing the problems that *Buckley* identified to a noncognizable level. Mem. 10-12. So FEC must show that, given the post-*Buckley* and other anti-circumvention measures, there remains a cognizable risk that contributions to political parties or PACs (or candidate committees) will allow a cognizable conduit-contribution *to* a candidate to result. FEC fails this task.

D. The $70,800 Biennial Limit Lacks a Cognizable Interest as Applied to Contributions to National Party Committees.

As discussed above, FEC needed to do what *Buckley* did, i.e., to identify a specific mechanism posing a cognizable circumvention risk that survives after post-*Buckley* changes in the law. It needed to show that cognizable conduit-contributions to candidates, by means of contributions to PACs, political parties, and other candidates, were still possible after the base limits on contributions to PACs and parties were enacted (each based solely on the anti-circumvention interest and expressing the extent of Congress's assertion of an anti-circumvention interest for that entity) and in light of the multiple prophylaxes already in place. Mem. 17-30. So what does FEC argue?

In an argument captioned "Striking Down the Aggregate Limit Would Allow Massive Con-

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multiple PACs, AC 23, which clearly *was* a *Buckley* concern, is inconsistent with amici's argument that *Buckley* was unconcerned with PAC proliferation, AC 20, which problem *Buckley* clearly addressed prior to stating its circumvention concerns, as already explained at length. Mem. 8-12. Amici can't have it both ways.

tributions and Undermine FECA's Contribution Limits," FEC first notes the current base contribution limits and argues that "plaintiffs . . . assert, without any evidence or explanation" that these limits are not "massive." Opp'n 19. But Plaintiffs supplied both evidence and explanation, starting on the same page that FEC cites, by asking whether *Buckley* gave any guidance on what is "massive" and noting that *Buckley* did not consider "$25,000 massive because it said the ceiling *prevented* massive contributions." Mem. 20.[12] Plaintiffs then showed that the old "ceiling" in *Buckley* is presently worth $116,676, which means that the permissible base-level contributions for two years to three national party committees—totaling $184,800—are not "massive" under the *Buckley* standard. Mem. 20-21. Ignoring this, FEC argues that the $30,800 that an individual can contribute to one national party in one year is itself "massive" based on median household income. Opp'n.19. Presumably the $25,000 that *Buckley* did not deem massive in 1974 was also substantial compared to 1974 median incomes, but that did not make *Buckley* deem it "massive."

What FEC does next is the core problem with its analysis. It changes the subject. It tries by sleight-of-hand to distract attention from whether there is a mechanism for *circumvention*, on which *Buckley* focused, to a *now-rejected* theory of *corruption*, which is not even the proper focus of the analysis.[13] FEC says that those who can give such large sums as $30,800 to a national political party "hold substantial leverage." Opp'n 19. "And from that leverage arises the precise

[12] As discussed above and below, the real issue is whether there is a cognizable risk that a cognizable contribution can get through existing anti-circumvention prophylaxes to a candidate. Whether "massive" contributions to PACs or parties are now permitted, as they were in *Buckley*'s day, is only a part of the analysis, but it is the part on which *Buckley* focused and serves as a quick analytical tool for assessing whether circumvention is possible, i.e., absent massive contributions to PACs or parties, it is highly unlikely that any conduit-contribution can get through to a candidate. Given the bottleneck of limits on PAC and party contributions to candidates, even massive contributions to PACs and parties will not result in circumvention. Mem. 27.

[13] The "'anticorruption interest is implicated by contributions to *candidates*.'" *Carey v. FEC*, 791 F. Supp. 2d 121, 129 (D.D.C. 2006) (citation omitted). The fact that *Carey* addressed limits on independent expenditures, Opp'n 18 n.12, does not alter this constitutional analysis.

potential for corruption that led *Buckley* to uphold FECA's contribution limits." Opp'n 19-20.

As support, FEC cites two cases. First, it cites *Buckley* for the proposition that large contributions pose a quid-pro-quo-corruption risk. Opp'n 20 (citing 424 U.S. at 26-27). But *Buckley* was talking about large contributions *to candidates*, which contributions pose a risk of a political quid for the quo of a financial benefit to a candidate or the candidate's campaign. That has nothing to do with whether contributions to *political parties* pose a quid-pro-quo-corruption risk—they do not, and the base contribution limit of $30,800 per year is the extent to which Congress asserted an anti-*circumvention* risk as to any national political party committee.

Second, FEC cites *McConnell* for the proposition that large contributions to political parties pose a corruption risk. Opp'n 20 (citing 540 U.S. at 119 n.5). FEC ignores *Citizens United*, which limited the cognizable corruption to a financial quid-pro-quo-corruption risk and rejected any notion that influence, gratitude, access, or inequality are corruption, 130 S. Ct. at 909-11, and it limited any broader corruption concept to the soft-money cases, *id.* at 910. This case is not about soft money, and "substantial leverage" is FEC's new name for influence, gratitude, and access.[14]

Then FEC employs another twist of Plaintiffs' position, saying that "plaintiffs' assertion that massive contributions would not be permitted even if plaintiffs were to prevail here is incorrect." Opp'n 20. Plaintiffs' true position is that massive contributions to *particular* PACs or parties are no longer possible and that removing that possibility (on which *Buckley* focused) is an important part of the current scheme that assures that no cognizable conduit-contribution can make it through to any particular candidate. Nonetheless, FEC recites that by giving the maximum base

[14] FEC also suggests the "appearance of corruption" interest, Opp'n 8, should determine the outcome of this case. But the appearance of corruption standard must also mean the appearance of quid-pro-quo corruption, not the *appearance* of influence, gratitude, access, or inequality.

contribution (the extent of Congress's assertion of an anti-circumvention interest) to national parties, state parties, and candidates, one could contribute over three million dollars, not including a lot of money to multiple PACs at the base limit. Opp'n 20-21. FEC's point is that this is "massive" (though it is not so to any particular entity), and so "could easily exert a corrupting influence on the democratic system." Opp'n 21.[15] But again FEC relies on *McConnell*, which was about soft money and relied on theories of corruption banned beyond that context, and on *Buckley*'s recognition of a true corruption potential arising from "large" contributions *to candidates*. Opp'n 21 (citations omitted). These citations prove nothing that aids FEC. By an act of attempted prestidigitation, FEC tries to sweep *Buckley*'s specific-mechanism, anti-circumvention concerns into this flawed analysis by boldly declaring: "The prevention of such 'huge' contributions thus falls squarely within the government's anti-corruption and anti-circumvention interests." Opp'n 21 (citing *Buckley*, 424 U.S. at 38). But legerdemain is no substitute for the required precise analysis, and the discrete interests that *Buckley* identified and dealt with separately cannot be so conflated. FEC fails to sustain its burden.

FEC finally turns to the issue at hand, i.e., addressing whether unearmarked base-level contributions to PACs, parties, and other candidates *can* result in any cognizable circumvention risk given the layers of prophylaxes without the biennial limits. Opp'n 21. FEC argues that, as to PACs, a contributor can know to whom a PAC is likely to contribute because many publish lists of endorsed candidates. *Id.* This argument lacks salience as applied to national party committees

[15] The fact that parties have joint fundraisers and transfer money between entities of the same party, *see, e.g.*, AC 6-8, is beyond an individual's control (this challenge is about *individual* contribution limits) and neither FEC nor its amici have shown a mechanism of how these practices create a cognizable risk that a conduit-contribution to a candidate will result from an unearmarked contribution to a party at the base contribution limit (expressing the extent of Congress's assertion of an anti-circumvention interest). The argument that joint fundraisers allow contributors to conveniently write large checks asserts a forbidden equalizing interest. *See infra*.

(who "have many demands on their funds," Mem. 25), which are the present concern (and the argument for facial invalidation of the biennial limits on non-candidate committees is based on First Amendment substantial overbreadth and statutory entanglement, *see* Mem. 31-32). But even as to PACs, FEC ignores the fact that the base limit on contributions to PACs ($5,000 per year for multicandidate PACs) was based solely on an anti-circumvention interest (the same that *Buckley* applied to the "ceiling") and is the extent of Congress's assertion of an anti-circumvention interest as to any particular PAC. And FEC still fails to show a specific mechanism for circumvention as to any entity, given the many layers of prophylaxis. *See* Mem. 17-30. For example, Plaintiffs showed that only a pro-rata share of any PAC, party, or candidate-committee contribution to a candidate may be attributed to an original contributor, and that, if the maximum contribution to a candidate has already been made, then none can even be attributed to the original contributor pro-rata because no more can go through the purported conduit. Mem. 25-27.

Instead of showing how there is a cognizable risk that an unearmarked, base-level contribution can make it through the many current prophylaxes to a candidate, which is its burden, FEC tries to attack parts of Plaintiffs' argument. It twists Plaintiffs' observation that *Buckley* said there was no specific briefing on the "ceiling" before it and recited no evidence that political parties or PACs served as "a viable way to get contributions to a candidate absent earmarking," Mem. 25, into an erroneous statement that "Plaintiffs' only response is to assert that *Buckley* was wrongly decided on this point" and an assertion that *Buckley* "foreclosed" Plaintiffs' argument. Opp'n 22. Plaintiffs spent many pages showing that, absent earmarking and given the many prophylaxes, a base-level contribution to another entity is not a viable means to get a contribution to a candidate. Mem. 17-30.[16] Regarding the fact that any entity's contribution to a candidate must only be at

[16] FEC also argues that "the earmarking provision . . . [is not] the outer limit of acceptable tailoring,'" Opp'n 22 (quoting *Colorado-II*, 533 U.S. at 462), which is irrelevant here, and in any

tributed on a pro-rata basis to contributors to the entity, Mem. 26-27, FEC tries to evade this logical necessity with a citation to the fact that *Colorado-II* declined to find no anti-circumvention interest where contributions were small. Opp'n 22 n.16. But this response does not disprove Plaintiffs' analysis concerning *how* the FEC would have to prove that there is a cognizable risk of an unearmarked but intended conduit-contribution making it through the existing prophylaxes (absent the biennial limit) to a candidate. FEC's attempted evasions only highlight its failure to carry its burden of proving a cognizable anti-circumvention interest justifying the biennial limits.[17]

Finally, the arguments of both FEC and its amici highlight Plaintiffs' argument that what really underlies the biennial limit is a forbidden equalizing interest. Mem. 30. For example, FEC says that by contributing the base-contribution amount to all possible parties and candidates of one political party an individual could contribute over three million dollars. Opp'n 20. FEC shows no mechanism for how those base-level contributions pose a cognizable *circumvention* risk, so FEC's problem with the cumulative effect of base-level contributions must be based on an inapplicable anti-*corruption* interest. But even if an anti-corruption interest were applicable, none of these base-level contributions poses a *quid-pro-quo-corruption* risk because the anti-cor-

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event, the fact that *Colorado-II* upheld the limits on how much political parties can spend on coordinated expenditures makes any anti-circumvention interest as to the Party Expenditure Provision Limits non-cognizable because the limit already makes the interest noncognizable for reuse. Mem. 27-28.

[17] FEC's amici argues that Plaintiffs' picture of the scheme considered in *Buckley* is incomplete because it fails to mention the $5,000 limit on contributions from political parties and multi-candidate committees to candidates. AC 23. But Plaintiffs set out this limit plainly, Mem. 8-9, and as amici acknowledge, *Buckley* also recited this limit, AC 23. So the Court in *Buckley* was aware of this limit when it spoke about the circumvention concern being with "massive" contributions "to a particular candidate through the use of unearmarked contributions likely to contribute to that candidate, or huge contributions to the candidate's political party." 424 U.S. at 38. The fact that would-be conduit-contributors might attempt to use multiple PACs, as amici urge, does not prove that there is a cognizable circumvention risk in light of the numerous prophylaxes in place, including the 1976 limits on contributions to parties and PACs.

ruption interest is reduced to a noncognizable level by the base limits on contributions to and by each entity. So the cumulative effect that FEC decries could only be cognizable as an anti-corruption interest under *forbidden* corruption theories, especially the forbidden *equalizing* interest.[18] Amici are even more blatant, arguing that with joint fundraisers individuals can write "single checks of astronomical amounts," which is irrelevant unless a cognizable circumvention risk is shown (amici prove none), making this and other similar arguments by these "reform" groups really about an equalizing interest, i.e., some people can't write big checks, so no one should.

II. The Biennial Limits on Contributions to Non-Candidate Committees Are Facially Unconstitutional for Lacking a Cognizable Interest (Count 2).

Because the biennial limit on contributions to national party committees lacks any cognizable interest, the limit on contributions to non-candidate committees is facially overbroad because it is substantially overbroad under the analysis of *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). Mem. 31. Thus, any suggestion that Plaintiffs lack standing to challenge the limit as applied to state parties and PACs, Opp'n 28, is irrelevant. Moreover, because the national party committee limit is intertwined with limits on state parties and PACs, Congress intended the limit to be considered as a package, Mem. 31-32, making the existence of a severability clause irrelevant. Opp'n 28 n.21.

III. The Biennial Limits on Contributions to Non-Candidate Committees Are Unconstitutionally Too Low, as Applied and Facially (Count 3).

Plaintiffs showed that the biennial limits on contributions to non-candidate committees are unconstitutionally too low, using the straightforward application of a formula based on the limit held to be too low in *Randall v. Sorrell*, 548 U.S. 230 (2006). Mem. 32-33.

[18] In fact FEC's recitation of non-controlling statements of legislators in the debate on the 1974 FECA, to the effect that the old ceiling would "be the death knell of the 'fat cat,'" Opp'n 2, evinces just such a forbidden equalizing interest, which *Buckley* would reject.

FEC argues deference to Congress, Opp'n 35, but of course deference must yield to constitutional demand, as recognized in *Citizens United*, 130 S. Ct. at 911, and *Randall* itself, which found a limit to be too low.

FEC then relies on the argument that the limit cannot be too low unless it prevents recipients from having sufficient funds to effectively advocate. Opp'n 35.[19] But that argument applies to ordinary contribution limits, not the biennial limits, which differ in kind. As noted above, the biennial limits operate as a limit on how much an *individual* may *spend* on full-base-limit contributions to the entities of his or her choice. A base limit on contributions to candidates, *see* 2 U.S.C. 441a(a)(1)(A), is designed to reduce the quid-pro-quo-corruption risk to a noncognizable level and is the limit to which Congress asserts that interest, while a base limit on contributions to other entities, *see* 2 U.S.C. 441a(a)(1)(B)-(D), is designed to do the same regarding any circumvention risk. But as FEC acknowledges, the exact limit is a congressional effort to "strike a balance." Opp'n 34 n.26. Part of that balance, is whether the limit allows recipients to effectively communicate, as FEC argues. In other words, a limit of $1 on contributions to all entities might eliminate corruption and circumvention concerns, but it would silence all but self-funded entities, so it is too low. But the biennial limits don't limit the amount of any particular contribution to any particular candidate or other entity. They limit how many candidates, political parties, or PACs that individuals may identify and associate with to the full extent permitted by the base contribution limits. So this limit is different in kind. Thus, the analysis of whether any particular entity can receive enough contributions to effectively advocate does not apply. Rather, the limit

[19] FEC fails to address the aggregate limit's burden on political association. When determining the constitutionality of a limit, the Court asks . . . whether the "limitation [is] so radical in effect as to render political association ineffective . . . and render contributions [to candidates that would further that association] pointless." *Nixon v. Shrink Mo. Gov. PAC*, 528 U.S. 377, 397 (2000) (emphasis added) (*"Shrink*").

must be justified, if at all, based on the sole interest that purportedly supports it—an anti-circumvention interest. So FEC was required to show that the amount of the biennial limits is necessary to prevent a cognizable circumvention risk, as opposed to a limit simply arrived at by totaling the base contribution limits (e.g., $30,800 per national party committee per year). FEC fails.

IV. The Biennial Limit on Contributions to Candidate Committees Lacks a Constitutionally Cognizable Interest (Count 4).

Plaintiffs established that there is no cognizable anti-circumvention interest (the only relevant interest) to support the biennial limit on contributions to candidate committees at 2 U.S.C. 441a(a)(3)(A), so it is unconstitutional under any standard. Mem. 33-41.

FEC argues that *Buckley* upheld the old "ceiling," which swept contributions to candidates within its limit and that "the basic structure of those contribution limits has remained unchanged since 1974." Opp'n 30. But *Buckley* did not even *mention* contributions to candidates in its description of a mechanism that could pose a circumvention risk. Mem. 35-36. And BCRA substantially altered the biennial limits regarding candidates by isolating them from the other biennial limits and reducing the potential number of candidates concerning which one could express one's views and with whom one could associate to the full extent permitted by the base contribution limits at 2 U.S.C. 441a(a)(1)(A). Thus, a challenge to the biennial limits on contributions to candidates, which would have been an as-applied challenge under the old "ceiling," poses an open question.

More importantly, FEC fails its duty to show a cognizable circumvention risk arising from base-limit contributions to candidates, i.e., contributions to candidates at the level at which Congress asserted its anti-corruption and anti-circumvention interests, given the other prophylaxes in place, such as the limit on contributions from candidate committees to other candidates.

Instead it turns to forbidden considerations. FEC cites the soft-money *McConnell* case for the notion that, if McCutcheon gave millions at the base contribution limits, "this aggregate contribution would be functionally indistinguishable from the million-dollar soft-money donations . . . that led to . . . actual and apparent corruption." Opp'n 30. This reliance on soft-money cases and their broad theories of corruption outside the soft-money context has been absolutely foreclosed by *Citizens United*, 130 S. Ct. at 909-11, as already noted above. That FEC should assert them here shows, at a minimum, the paucity of its available defenses for the biennial limits. And FEC's next assertion that such major donors "would be able to extract concessions" (from whom is not stated, but this is not quid-pro-quo corruption from candidates), Opp'n 30, relies on forbidden corruption theories—influence, gratitude, access, and equalizing.

FEC next takes issue, Opp'n 31, with Plaintiffs' assertion that the biennial limit on contributions to candidates "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." Mem. 34. FEC argues that this would also have been true under *Buckley*, Opp'n 31, but that does not foreclose this challenge for reasons explained above. FEC argues that there really is no "restriction on the number of candidates to whom McCutcheon . . . can contribute" because it can give smaller amounts to more candidates. Opp'n 31-32. But McCutcheon verified clearly that "[h]e wants to express his support for, and to associate with, any and all candidates of his choosing *to the full extent permitted by the base contribution limits* at 2 U.S.C. 441a(a)(1)(A). Mem. 3 (citing VC ¶ 33) (emphasis added). Telling Mr. McCutcheon that he may speak and associate as much as desired by giving less to each candidate, Opp'n 32, is a constitutionally impermissible response. *See WRTL-II*, 551 U.S. at 477 n.9 ("Such notions run afoul of 'the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of

his own message.'" (citation omitted)); *see also Shrink*, 528 U.S. at 397 (limits cannot be "so radical in effect as to render political association ineffective.")

Finally turning to an effort to meet its burden here, FEC argues that a contributor can give to candidates at the base-limit level, who can then give the permissible amount ($2,000) to other candidates. Opp'n 33. But that is the sum of the argument! FEC fails to show that there is a cognizable risk of circumvention given the limit on the contribution to a candidate and the limit on that candidate's contribution to another candidate. Instead, FEC turns to discussing leadership PACs, but those are by definition PACs, so do not help FEC meet its burden of proving a circumvention risk as to contributions to candidate committees. But even as to leadership PACs, FEC merely asserts a "ready-made conduit[]" problem, Opp'n 33, without showing any mechanism for getting a cognizable conduit-contribution through the existing prophylaxes. Instead, it relies on the fact that a contributor may "ingratiate" himself with candidates, Opp'n 33, which is yet another recycling of forbidden corruption notions—access, gratitude, influence—rejected since *Citizens United*. So when FEC sums up its argument by saying that the $46,200 biennial limits restrict "such conduit activity," Opp'n 34, it has failed its duty to demonstrate any.

V. The Biennial Limit on Contributions to Candidate Committees Is Unconstitutionally Too Low (Count 5).

Plaintiffs established that the $46,200 limit contributions to candidates is too low to be constitutional. Mem. 41. For the reasons stated there, and based on the analysis in Part III above, FEC has not met its burden of proving that this limit is constitutionally permissible.

Conclusion

For the foregoing reasons, this Court should declare the biennial limits unconstitutional and enjoin their enforcement as sought in Plaintiffs' Prayer for Relief in the Complaint (Dkt. 1).

Respectfully submitted,

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