No. 12-536

IN THE

Supreme Court of the United States

SHAUN MCCUTCHEON, *et al.*,

Appellants,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

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

BRIEF OF AMERICANS FOR CAMPAIGN REFORM AS *AMICUS CURIAE* SUPPORTING APPELLEE

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INTEREST OF AMICUS CURIAE

Americans For Campaign Reform ("ACR") is a nonpartisan 501(c)(3) organization, chaired by John Rauh, ACR's founder.[1] ACR is co-chaired by former Senators Bill Bradley, Bob Kerrey, and Alan Simpson. The President and Chief Executive Officer of ACR is Lawrence Noble, who worked at the Federal Election Commission ("FEC") for more than twenty years, serving as General Counsel from 1987 until 2000. Americans For Campaign Reform believes that the longstanding limits on the size of contributions imposed by national, state and local legislation are important to encouraging ordinary citizens to participate in the electoral process, by affirming their belief that their participation—by their support and by their votes—makes a difference. The Court has affirmed the principle that governments may, within a broad range, impose both base and aggregate contribution limits in every decision since *Buckley v. Valeo*, finding such limitations an important bulwark against forces that would undermine the confidence, and thus discourage the participation of ordinary citizens, in the electoral process.

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus*, or its counsel, made a monetary contribution intended to fund its preparation or submission. The Solicitor General has filed a blanket waiver with the Court consenting to the submission of all *amicus* briefs. Both petitioners have also consented and their consents are attached hereto.

SUMMARY OF ARGUMENT

Starting 37 years ago with *Buckley v. Valeo,* 424 U.S. 1, 58 (1976), and without exception in every case since, this Court has insisted on the distinction between contributions and expenditures, leaving the contribution limit amount to the judgment of the legislature within a broad range. *See Ariz. Free Enter. Club's Freedom Club PAC v. Bennett,* 131 S.Ct. 2806, 2817 (2011); *Randall v. Sorrell,* 548 U.S. 230, 241 (2006) (collecting cases). The regime of contribution limits enacted by Congress in the Federal Election Campaign Act ("FECA") in 1972 and approved in *Buckley* and in every legislative iteration since have included a limit not only on direct contributions to individual candidates and committees ("base limits"), but also aggregate limits. It is the aggregate limits that Appellants attack.[2]

The Court's consistent justification for contribution limits of both kinds has been the prevention of corruption or the appearance of corruption. *See Citizens United v.*

2. The campaign finance regime currently in place with the inclusion of base and aggregate limits began 42 years ago with the passage of FECA and the inclusion of base and aggregate limits in each iteration of those laws has been upheld by this Court. In turn, states have reframed their own campaign finance laws to conform with the constitutional framework upheld since *Buckley.* Overturning that framework will have collateral impact beyond just the pronouncements of Congress. *See United States v. IBM,* 517 U.S. 843, 856 (1996) (*stare decisis* "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process"); *Harris v. United States,* 336 U.S. 545, 556-57 (2002) (recognizing the fundamental importance of *stare decisis*).

FEC, 558 U.S. 310, 360 (2010). Whatever space may be left between these forbidden rationales and outright bribery (which is, of course, subject to criminal law) is the space that base contribution limits occupy. At the time the case was initially heard, any individual could contribute $2,500 to a candidate, $30,800 to each national political party or committee, $10,000 to any state party political committee, and $5,000 to any other political committee per election cycle. *See McCutcheon v. FEC,* No. 12-1034, slip op. at 2-3 (D.D.C. Sept. 28, 2012) (citing legislative and regulatory provisions).[3] The three-judge panel of the lower court has shown that without aggregate limits, a contributor may annually contribute as much as $3,500,000, all of which might without any violation of law directly or indirectly be used to support an individual candidate. *Id.* at 3.

In this brief, *amicus* demonstrates that the sum is much greater than that, given the possibility of a potentially unlimited number of political action committees ("PACs") to which a contributor may make contributions up to the base limit set for contributions to such committees. Each such committee may then make contributions to individual candidates. In view of the iron rule that in political campaigns whatever may lawfully be done will be done, without aggregate contribution limits,

3. The limits are adjusted biannually for inflation. 2 U.S.C. § 441a(c). Although the above cites the contribution limits when the case was first litigated, the 2013-2014 contribution limits by an individual are now capped at $123,200 annually, with a base limit of $2,600 for candidates and $32,400 to national parties and committees. The base limits to any state and local party political committee and other political committees remained the same at $10,000 and $5,000 respectively. *See* http://www.fec.gov/info/contriblimitschart1314.pdf.

the amount of money that a contributor can hope to direct to a chosen candidate is virtually limitless.

Base limits are a longstanding, familiar, and approved legislative safeguard against corruption or its appearance. This Court has previously established that Congress acted with sufficient reason in concluding that the concerns that justify the base limits on direct contributions extend to justify setting aggregate limits. Congress is therefore entitled to prevent such potentially unlimited contributions from entering campaigns through what would soon become only a slightly indirect route. *See Citizens United,* 558 U.S. at 459 ("on account of the extreme difficulty of proving corruption, 'prophylactic measures, reaching some [campaign spending] not corrupt in purpose or effect, [may be] nonetheless required to guard against corruption.'" (quoting *Buckley,* 424 U.S. at 30; *see Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 392, n.5 (2000)).[4]

Finally, *amicus* demonstrates that the changes in the earlier regime wrought by the Bipartisan Campaign Reform Act (BCRA) and other adjustments in that regime—particularly provisions treating as one committee several committees set up in association with each other (anti-proliferation rules), and provisions counting against a contributor's base limit contributions explicitly earmarked to that candidate (anti-earmarking rules)—are quite inadequate to protect the integrity of the regime of base limits. The alternatives proposed by

4. Appellants also do not challenge Congress's constitutionally granted power to regulate federal elections. *See* U.S. Const. art. I, § 4.

Appellants are—to the extent that one can understand them at all—complex, unadministrable, and ineffective.

ARGUMENT

It is well established that there is a "legitimate and compelling government interest in preventing corruption or the appearance of corruption," namely the reality or appearance of *quid pro quo* arrangements between candidates and those making contributions. *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496–97 (1985); *see also Wis. Right to Life State Political Action Comm. v. Barland*, 664 F.3d 139, 153 (7th Cir. 2011) (reiterating that "preventing actual or apparent *quid pro quo* corruption is the *only* interest the Supreme Court has recognized as sufficient to justify campaign finance restrictions"). As the *Buckley* Court pointed out, unlimited contributions present a danger of *quid pro quo* corruption because it is "difficult to isolate suspect contributions." 424 U.S. at 30. As such, aggregate contribution limits, in addition to base contribution limits, were found to be a "quite modest restraint upon protected political activity [which] serves to prevent evasion" of the contribution limits. *Id.* at 38. This "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." *Id.*

"[M]ore importantly, Congress was justified in concluding that the interest in safeguarding against the *appearance* of impropriety requires that the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated." *Id.* (emphasis added). Even

while acknowledging that "few if any contributions to candidates will involve *quid pro quo* arrangements," the *Citizens United* Court most recently explained that contribution limits have been repeatedly upheld since *Buckley* for the reason that they are "preventative." 558 U.S. at 357 (citing *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S.238, 260 (1986); *Nat'l Conservative Political Action Comm.* 470 U.S. at 500; *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 210 (1982)); *Buckley,* 424 U.S. at 39 (upholding FECA's aggregate contribution limits as a "quite modest restraint" that served "to prevent evasion of the $1,000 [then base] 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"); *see also* FEC Mot. at 14 ("This Court's decision in *California Medical Association v. FEC,* 453 U.S. 182 (1981), confirms that aggregate limits and limits on contributions to political committees can permissibly coexist under the First Amendment.").

Similarly, this Court has also already concluded that anti-circumvention is a worthy goal and that there are not "better crafted safeguards" that make aggregate limits unnecessary. *FEC v. Colo. Republican Fed. Campaign Comm.* ("*Colorado II*"), 533 U.S. 431, 462 (2001); *McConnell v. FEC*, 540 U.S. 93, 144 (2003) ("because the First Amendment does not require Congress to ignore the fact that 'candidates, donors, and parties test the limits of the current law, these interests have been sufficient to justify not only contribution limits themselves, but laws preventing the circumvention of such limits") (quoting *Colorado II,* 533 U.S. at 456–57 ("all Members of the Court agree that circumvention is a valid theory of corruption")).

Appellants seek to constrain recourse to the anti-circumvention rationale, by invoking the Chief Justice's dismissal of a different rule in a different context as "prophylaxis upon prophylaxis". *See* RNC Br. 30-31, 51. But Appellants ignore that that remark was made in response to a purported justification for limiting the form and content of *expression* by an entity speaking independently of any candidate, *see FEC v. Wisconsin Right To Life*, 551 U.S. 449, 479 (2007), and unconnected to the making of contributions, which is what is at issue in this case.

Because Appellants do not challenge BCRA's base limits on contributions, McCutcheon Br. 17–20; RNC Br. 6–7, they cannot deny that base limits are compatible with First Amendment freedoms of expression and association. *See McCutcheon,* slip op. at 9 ("Plaintiffs do not, however, challenge the base contribution limits, so we may assume they are valid expressions of the government's anticorruption interest."). Rather, Appellants object to the regime of aggregate limits.

Thus, the only question before the Court is whether BCRA's aggregate limits are closely drawn to prevent the circumvention of anti-corruption measures.[5] They are.

5. The Court's previous decisions have all made clear strict scrutiny review does not apply to contributions. *See Buckley,* 424 U.S. at 25 ("In view of the fundamental nature of the right to associate, governmental 'action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.'"); *McConnell* , 540 U.S. at 136; *Mass. Citizens for Life, Inc.,* 479 U.S. at 259–260 ("We have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending."). Contrary to Appellants' suggestion, however, even if strict scrutiny review

Appellants ignore the three-judge panel's determination that the base contribution limits alone will not prevent the unlimited flow of money (and, hence, at the very least the appearance of corruption) into campaigns. Instead, Appellants invite the Court to rely upon Appellants' judgment or to substitute its own judgment for that of Congress's as to what would constitute better and less restrictive alternative measures of regulation. Appellants, however, offer scant detail regarding what these supposedly more narrowly drawn but equally effective measure would look like.

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did apply to this case, the district court's decision should still be upheld, as it reviewed the record in this case and relied in the extensive record evidence about BCRA acquired from previous cases to support its decision. *See McCutcheon,* slip op. at 9-10 (citing *McConnell*, 540 U.S. at 146 ("The evidence in the record shows that candidates and donors alike have in fact exploited the soft-money loophole, the former to increase their prospects of election and the latter to create debt on the part of officeholders, with the national parties serving as willing intermediaries. Thus, despite FECA's hard-money limits on direct contributions to candidates, federal officeholders have commonly asked donors to make soft-money donations to national and state committees 'solely in order to assist federal campaigns,' including the officeholder's own."); *Colorado II,* 533 U.S. at 458-459 & n. 22 (discussing the practice of tallying donations and citing to the declarations of various senators noting the correlation between money received by the candidate from the committee and how much the candidate encouraged donors to donate to committee)).

A. Congress Intended BCRA To Be A More Flexible And Effective Means of Accomplishing The Same Anti-Corruption Goals This Court Has Previously Endorsed.

The legislative history of the Bipartisan Campaign Reform Act of 2002, which amends FECA, demonstrates that Congress passed BCRA to accomplish the same anti-corruption goal by increasing the penalties for violating the conduit-contribution limitations and introducing measures specifically designed to regulate "soft money." *See* 2 U.S.C. § 441i.

Before BCRA, FECA limited only "federal" or "hard" money contributions. *See McConnell,* 540 U.S. at 122. Contributions known as "soft money" were not subject to caps. *Id.* at 122–23.[6] As this Court explained in *McConnell* in upholding the soft-money bans in BCRA, "national parties transferred large amounts of their soft money to the state parties, which were allowed to use a larger percentage of soft money to finance mixed-purpose activities under FEC rules." *Id.* at 124. Soft-money contributions were "dramatically larger than the contributions of hard money permitted by FECA." *Id.* Significantly, "[n]ot only were such soft-money

6. "Over time, 'contributions subject to [FECA's] source, amount, and disclosure requirements' came to be known as 'hard money,' *Shays v. FEC,* 414 F.3d 76, 80 (D.C. Cir. 2005) ("*Shays II*"), while '[p]olitical donations made in such a way as to avoid federal regulations or limits' came to be known as 'soft money,' The American Heritage Dictionary of the English Language 1652 (4th Ed.2006); *see also Shays II,* 414 F.3d at 80 (defining 'soft money' as '[f]unds outside FECA's sphere')." *Shays v. FEC*, 528 F.3d 914, 917 (D.C. Cir. 2008) ("*Shays III*").

contributions often designed to gain access to federal candidates, but they were in many cases solicited by candidates themselves. . . . The solicitation, transfer, and use of soft money thus enabled parties and candidates to circumvent FECA's limitations on the source and amount of contributions in connection with federal elections." *Id.* at 125–26. The *McConnell* Court was particularly concerned about unregulated money – local and state election money – finding its way into federal elections; so one may think of soft money as any money outside of prescribed contribution limits that is used to undermine the campaign finance regime those contribution limits seeks to put in place. *See Shays III,* 528 F.3d at 917.

A 1998 Senate Report argued that soft-money contributions caused "campaign abuses." *McConnell*, 540 U.S. at 180 (quoting 3 1998 Senate Report 4565). The Report further explained that the soft-money loophole "eviscerated the contribution limits . . . in federal election laws and caused a loss of public confidence in the integrity of our campaign finance system." *Investigation on Illegal or Improper Activities in Connection With the 1996 Federal Election Campaigns, the Minority Report: Executive Summary* (March 1998), *available at* http://www.washingtonpost.com/wp-srv/politics/special/campfin/stories/demsummary.htm. Thus, Congress engaged in an effort "to plug the soft-money loophole," which became the purpose of Title I of BCRA. *McConnell,* 540 U.S. at 180.

Numerous Senators stated that they voted for BCRA's regime of clear base and aggregate limits, with no opportunity for circumvention by various "soft money" devices in order to limit the corruption and appearance

of corruption arising from contributions far in excess of prescribed base limits. *See* 148 Cong. Rec. S2096-02 (daily ed. Mar. 20, 2002) (statement of Sen. Dodd) (arguing that soft-money contributions create "a corrupting influence, suggesting that large contributions by donors to officeholders, candidates, and political parties provide those donors with preferred access and influence over public policy," and that "the public perception of even the appearance of corruption erodes public confidence in the integrity of our electoral process"); 147 Cong. Rec. S3233-06 (daily ed. Apr. 2, 2001) (statement of Sen. Feinstein) ("These gigantic contributions are what warp our politics and cause people to lose faith in our Government and they must be halted. They give the appearance of corruption."); 147 Cong. Rec. S2943-02 (daily ed. Mar. 27, 2001) (statement of Sen. Kerry) (citing statistics showing that "overwhelming majorities think special interest contributions affect the voting behavior of Members of Congress"); 147 Cong. Rec. S3233-06 (daily ed. Apr. 2, 2001) (statement of Sen. Kohl) (arguing that Congress "must combat the perception of corruption," and that the "presence of unlimited political contributions" either is corrupting or "creates the appearance of corruption"). Even Senators who opposed the bill agreed that large individual contributions pose a risk of corruption. For example, Senator Grassley stated that "[e]ffective limitations on soft money are necessary to reduce real and perceived corruptions in the system." 148 Cong. Rec. S2096-02 (daily ed. Mar. 20, 2002) (statement of Sen. Grassley).

Because it is difficult to know what the next method of circumventing the campaign finance laws will be, Congress is entitled to some leeway in balancing the

constitutional and prudential concerns addressed by the aggregate contribution limits that BCRA established. *See Turner Broadcasting System, Inc. v. FCC,* 520 U.S. 180, 196 (1997) ("Even in the realm of First Amendment questions where Congress must base its conclusions upon substantial evidence, deference must be accorded to its findings as to the harm to be avoided and to the remedial measures adopted for that end, lest we infringe on traditional legislative authority to make predictive judgments when enacting nationwide regulatory policy"); *McConnell,* 540 U.S. at 95.

B. The *McCutcheon* Panel Recognized That Absent The Aggregate Limits, There Were Potential Channels For Large Sums Of Additional Money To Flow That Would Escape The Regulation Intended By The Base Limits.

The three-judge panel that decided Appellants' claims recognized that "[u]nder the base contribution limits, for example, an individual could contribute as much as $3.5 million to one party and its affiliated committees in a single election cycle." *McCutcheon,* slip op. at 3. The panel also recognized that "[t]his $3.5 million, moreover, does not include contributions to PACs, a sum that would equal $5,000 multiplied by whatever number of PACs an individual desires to give to." *Id.* at n.1. As such, the panel recognized that base limits alone were inadequate protection against corruption or the appearance of corruption without the addition of the aggregate contribution limits. *See id.* at 9. Without the aggregate limits, nothing would prevent an individual contributor from giving checks of hundreds of thousands dollars, if

not over a million dollars, more to a presidential joint fundraising committee that consisted of national and state party committees supporting a particular candidate. Base contribution limits also do not prevent individuals from contributing the base amount to a virtually limitless number of committees likely to support a particular candidate, thereby permitting individuals to circumvent the spirit and purpose of BCRA.

In reviewing whether BCRA's aggregate contribution limits were closely drawn to prevent circumvention of FECA base limits, the panel specifically reviewed what would happen if an individual gave a single check to a joint fundraising committee for half a million dollars. *Id.* at 9–10. While the committees are required to divide the money after a fundraiser, because party committees can transfer unlimited amounts of money to other party committees, the money may still find its way to a single committee's coffer which then might use the money for coordinated expenditures, which have "no significant functional difference from the party's direct candidate contributions." *Id.* (citing *Colorado II,* 533 U.S. at 460 ("The candidate who knows the coordinated expenditure derives from that single large check at the joint fundraising event will know precisely where to lay the wreath of gratitude.")). Although the panel noted that such coordination between a large number of entities in service of a single contributor's interests may seem unlikely, "there is no reason to think the quid pro quo of an exchange depends on the number of steps in the transaction." *Id.* at 10 (citing *McConnell,* 540 U.S. at 155). This daisy-chain scenario is exactly what several senators noted was happening prior to BCRA that led to

its passage.[7] *See* FEC, *Thirty Year Report* 5 (Sept. 2005), *available at* http://www.fec.gov/info/publications/30year.pdf (political "parties frequently asked federal candidates and officeholders to help raise large soft money donations, offering donors access to current and future federal legislators and raising concerns about potential corruption or the appearance of corruption").

Indeed, it is not a far leap to imagine that a contribution would not have to be earmarked for a particular candidate to understand, for example, that PACs such as Indianans for a Better Congress, Hoosiers for a More Liberal Congress, and Accountants for a Congress That Counts will all use their funding to support the same candidate

7. Even if the reasoning of the panel did not explicitly rely on this possibility, it noted the potentially unlimited contributions to PACs. Slip op. at n.1. This Court may still affirm the result based on that rationale. *See Reasonover v. St. Louis Cnty., Mo.,* 447 F.3d 569, 578–79 (8th Cir.2006) ("this court may affirm for any reason supported in the record, even if that reason is different from the rationale of the district court"); *Nat'l Wildlife Fed'n v. U.S. Army Corps of Engineers*, 384 F.3d 1163, 1170 (9th Cir. 2004) ("We may affirm on any ground supported by the record even if it differs from the rationale of the district court."); *United States v. Sowers*, 136 F.3d 24, 28 (1st Cir. 1998) ("Mindful that we are not chained to the lower court's rationale but may affirm on any alternative ground supported by the record, we choose to follow a different analytic path."); *Allnet Commc'n Serv., Inc. v. Nat'l Exch. Carrier Ass'n, Inc.*, 965 F.2d 1118, 1119 (D.C. Cir. 1992); *see also* Wright, Miller & Kane, 10A Federal Practice & Procedure § 2716 (3d ed.) ("The appellate court does not have to affirm a decision on a Rule 56 motion for the same reasons that persuaded the court below to grant the motion. On the contrary, it can find another ground for concluding that the movant is entitled to judgment as a matter of law and ignore any erroneous basis that the district court may have employed").

and that contributions made to each of them will either directly or indirectly find their way to the candidate. Similarly, it is equally plausible that a large donor may call up a PAC and state that he is considering giving money to the PAC and has already given to Jones, and ask whether the PAC has also considered supporting Jones. Either method would permit an individual to utilize unearmarked contributions to give additional money to Jones that would be outside of the reach of the intended base contribution limits.

Whether or not such indirect contributions to committees when taken in the aggregate might be less valuable to a candidate than an equivalent contribution made directly to the candidate, Congress was justified in fearing that such an arrangement could give rise to the same appearance or reality of *quid pro quo* corruption as contributions above the base limits. Indeed, Congress's findings concerning candidates' receipt of mediated funds prior to BCRA supports the conclusion that permitting limitless contributions through intermediaries would lead to corruption or its appearance. *McConnell*, 540 U.S. at 122–26 (discussing legislative history).

C. BCRA's Aggregate Contribution Limits Are The "Least Restrictive" And Most Readily Administrable Method of Protecting Against The Circumvention of Anti-Corruption Mechanisms.

Appellants recognizing the weakness in their argument that BCRA's aggregate limits serve no constitutionally permissible purpose and thus are an unjustified limitation on First Amendment rights, *see* RNC

Br. 20-21; McCutcheon Br. 21-30,contend instead that there must be less confining means of achieving the legitimate anti-circumvention purpose. They never clearly explain, however, what these alternatives would be and exactly how they would work. Indeed, Appellants' proffered alternative means of preventing corruption or its circumvention either do not exist or are impractical. Because the stated alternative solutions cannot be established as more workable and there is a large legislative record on the need to prevent the circumvention of contribution limits, the aggregate contribution limits, which do so, should stand.

1. Absent Aggregate Limits, Existing Legislation Is Insufficient To Fulfill The Anti-Circumvention Purpose of BCRA.

Appellants contend that provisions in existing legislation would be sufficient to prevent corruption or its appearance without recourse to aggregate limits. *See* McCutcheon Br. 40-43; RNC Br. 26-43. Each of those limitations standing alone or in conjunction fails to provide the anti-circumvention protection that aggregate limits provide.

First, as noted by the three-judge panel, BCRA's base contribution limits fail to adequately prevent corruption or its appearance without the addition of the aggregate contribution limits. *McCutcheon,* slip op. at 9 ("we cannot ignore the ability of aggregate limits to prevent evasion of the base limits."). Base contribution limits do nothing to prevent individuals from contributing the base contribution amount to an unlimited number of committees likely to support a particular candidate, thereby permitting individuals to circumvent the base limits. In affirming the

aggregate limits, the district court panel noted the use of committees as a way to circumvent base limits against which BCRA's regime of aggregate limits protects. *Id.* at 9–10. For example, in the 2000 election cycle – which took place before the BCRA's aggregate limits came into effect – 515 individuals made soft money contributions to the committees of the Democratic and Republican Party in amounts ranging from $100,000 to more than $1 million. *See McCutcheon vs. FEC*, OpenSecrets.org, http://www.opensecrets.org/overview/mccutcheon.php (citing to data released by the FEC on April 16, 2013). These are exactly the types of very large contributions that were prohibited by BCRA's soft money ban, which was affirmed as constitutional by this Court. *See McConnell,* 540 U.S. at 225; RNC Br. 36. Thirteen years later, one could only imagine what those amounts would be, had Congress not acted to eliminate the influence of soft money. To be sure, such indirect contributions through committees might be less valuable to a candidate than equivalent contributions made directly to the candidate, but it hardly follows that this device does not give rise to the appearance or reality of *quid pro quo* corruption. Indeed, Congress's findings concerning candidates' use of party committees to divert soft money to federal elections supports the conclusion that permitting limitless mediated contributions does lead to corruption or its appearance. *McConnell*, 540 U.S. at 122–26.

Second, BCRA's existing anti-proliferation rule, which treats all contributions made by affiliated committees as a contribution from a single committee, 2 U.S.C. § 441a(a)(5), is not an adequate substitute for the aggregate contribution limits. The rule is limited by its terms to contributions made by political committees "established or financed

or maintained or controlled" by a single corporation, labor organization, or other person. *Id.* Appellants do not argue, and there is nothing in the legislative record that would support an argument, that individuals could not circumvent the base contribution limits by contributing to multiple committees likely to support a single candidate, but lacking a relationship sufficient to qualify as a single committee under § 441a(a)(5).

Third, Appellants' argue that BCRA's earmark provision, in which contributions earmarked for specific candidates are deemed direct contributions to the candidate, is sufficient to prevent corruption or the appearance of corruption. *See* McCutcheon Br. 50; RNC Br. 39-42. This "ignores the practical difficulty of identifying and directly combating circumvention under actual political conditions." *Colorado II*, 533 U.S. at 462. Under "actual political conditions", earmarking provisions "reach only the most clumsy attempts to pass contributions through to candidates" and cannot be treated as "the outer limit of acceptable tailoring." *Id.* Thus, the very generous aggregate limits in conjunction with other parts of the legislation are sufficiently narrowly tailored to serve the anti-corruption and anti-circumvention goals without trampling on First Amendment association protections.

The fact that a receiving candidate, party, or committee chooses how to spend unearmarked funds, *see* McCutcheon Br. 40-42, does not eliminate the danger of corruption or its appearance. Appellants' argument that such discretion effectively "cleanses" any corruption risk ignores the contrary recognition in *Buckley*, and the specific Congressional findings underlying BCRA, that "unearmarked contributions to political committees

likely to contribute to [a given] candidate" can give rise to corruption or the appearance of corruption. 424 U.S. at 39. Committees' spending patterns are generally sufficiently predictable for a candidate to consider a contribution to be of some benefit, whether financial or political. For example, the *McConnell* Court noted that, before BCRA's passage, candidates often "directed potential donors to party committees and tax-exempt organizations that could legally accept soft money" to circumvent direct contribution limits. *Id.* at 125.

Appellants have offered no basis for calling into question Congress's findings that candidates solicited money contributions from individuals who had already met the base contribution limits in exchange for political favors. Such an arrangement clearly constitutes a corrupting *quid pro quo* arrangement. BCRA's base contribution limits, anti-proliferation rule, and earmarking provisions alone cannot prevent its occurrence without the aggregate contribution limits.

2. Appellants Proffered Closely Drawn Alternatives Fail To Prevent The Anti-Corruption And Anti-Circumvention Goals Of The Current FECA Legislation.

Equally important, Appellants proffered alternatives do not protect against the risks at issue. *See McCutcheon* Br. 60–61. For example, the segregated non-transferable accounts proposed by McCutcheon provide no solution, *id.* at 61, because at some point the candidate will be able to use those funds and will know whom to thank and patronize for them. Putting aside that Appellants fail to provide sufficient detail so that the operation of

this untested arrangement could be understood, the potential flaws in such an idea are manifest. For example, Appellants' solution would mean that if an individual decides to contribute $1 million over the limit for individual donations, while those funds could not be drawn down immediately, they could be over time, creating a sustained influence whenever the candidate went to his or her account. The public perception of a donor ATM machine (that is, a segregated fund to which a candidate could turn again and again) would wreak the havoc on the system that campaign finance legislation is intended to avoid.

Moreover, replacing the aggregate contribution limit with an aggregate contribution "threshold" for individuals, funds in excess of which would be deposited into a segregated account, *id.* at 18, ignores the fungibility of funds. For example, a committee could easily separate a contribution from a given individual that exceeds any aggregate threshold and put it towards some permissible but necessary use, thereby freeing contributions from two other individuals (neither of whom had yet reached the aggregate threshold) to fund a candidate's campaign. From the candidate's perspective, notwithstanding this maneuvering, it is still the first individual's large contribution that produced the benefit. In addition, the practical difficulties in monitoring and enforcing such a complex scheme cannot be ignored.

Similarly, solutions that focus solely on increased regulation of joint fundraising committees or transfers among political party committees, *see id.* at 60–61, fail to address the danger that other political committees could be easily and rapidly formed to accept individual contributions in order to circumvent the base contribution limits. Such a solution may also be impractical, as it would

require a significant amount of review of the accounting of these committees by the FEC to establish a violation. The damage would likely already be accomplished by the time the books were reviewed and any use of diverting accounting mechanisms understood.

The aggregate contribution limits enacted in BCRA are a constitutionally appropriate accommodation of Congress's interest in preventing individuals from directing limitless funds to candidates in a manner that gives rise to corruption or its appearance, while preserving individuals' ability to support multiple candidates.[8] BCRA itself is the more narrowly-tailored alternative by permitting biannual inflation adjusted contribution limits and tightening limitations on conduit-contributions. A leading post-BCRA example is the 2008 presidential election, in which more money was raised and spent than in any previous presidential campaign, while also increasing the overall number of contributors. *See, e.g.*, Jeanne Cummings, *2008 Campaign Costliest*

8. Indeed, Appellants recognize that BCRA does not prevent individuals from supporting *every* federal candidate for election; they simply object that, the more candidates an individual chooses to support, the lower the *amount* of the average contribution. But, as this Court has held, "[t]he quantity of communication by the contributor does not increase perceptibly with the size of his contribution." *Buckley*, 424 U.S. at 21. Specifically, Appellant McCutcheon states that he wishes to make twelve additional candidate contributions in the amount of $1,776, but may not do so because of BCRA's aggregate limits. McCutcheon Br. 12. Although McCutcheon's choice of the amount he would like to contribute has historic-patriotic associations, the significance of the amount does not convert that prohibited act to a speech act deserving full First Amendment protection, like the burning of the American Flag. Were it otherwise, a restriction on Freedom Tower's projected height of 1776 feet would raise First Amendment concerns.

in U.S. History, Politico (Nov. 5, 2008, 5:28 AM), http://www.politico.com/news/stories/1108/15283.html. Surely, associational and free speech rights cannot have been so severely weakened when greater financial participation by larger numbers of citizens was and still is possible.

Finally, Appellants also contend that because they can conceive of means by which the aggregate limitations could be circumvented, neither the aggregate contribution limits nor the goal of anti-circumvention can stand. McCutcheon Br. 44–48. This simply makes no sense. While those who seek to subvert the law may be able to find a way to do so, it is little justification for no law at all. The aggregate contribution limits seek to fill the void of both envisioned and unforeseen loopholes that would undermine the entire base contribution limit regime. Congress has done so in a manner that imposes minimal burden on citizens while preventing a host of potential ills. *See McConnell,* 540 U.S. at 165-66.[9]

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9. "Congress also made a prediction. Having been taught the hard lesson of circumvention by the entire history of campaign finance regulation, Congress knew that soft-money donors would react to § 323(a) by scrambling to find another way to purchase influence. It was "neither novel nor implausible," *Shrink Missouri,* 528 U.S. at 391, 120 S.Ct. 897, for Congress to conclude that political parties would react to § 323(a) by directing soft-money contributors to the state committees, and that federal candidates would be just as indebted to these contributors as they had been to those who had formerly contributed to the national parties. We "must accord substantial deference to the predictive judgments of Congress," *Turner Broadcasting System, Inc. v. FCC,* 512 U.S. 622, 665, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994) (plurality opinion), particularly when, as here, those predictions are so firmly rooted in relevant history and common sense. Preventing corrupting activity from shifting wholesale to state committees and thereby eviscerating FECA clearly qualifies as an important governmental interest."

3. *Citizens United* Does Not Alter The Propriety of Anti-Circumvention Measures Or Their Analysis.

Appellants and their amici suggest that the world after *Citizens United* should be one in which anything goes, because, they contend, money will now be funneled to independent expenditure-only PACs ("Super PACs"), putting candidates constrained by the aggregate contribution limit at some unspecified competitive disadvantage. *See, e.g.,* McConnell Br. 26–27; *see also* McCutcheon Br. 51.

This argument ignores the basic reasoning underpinning the *Citizens United* Court's analysis—namely, that independent expenditures do not give rise to corruption or the appearance of corruption because they are, *by definition*, not coordinated with a candidate. The "inherent opportunity" for corruption or its appearance presented by large contributions, as distinct from expenditures, is supported by *Buckley* and Congressional findings, and not questioned by *Citizens United*. And it must not be forgotten that—in spite of Appellants' penchant for deploying quotations from cases that concern expenditure not contribution limits—the limits in issue in this case apply only to contributions and have no application to expenditures. *See Citizens United*, 558 U.S. 310.

Aggregate limits prevent the filtering of this unfettered money back into the heavily regulated campaign finance system, while respecting the freedom of expression that decisions from *Buckley* through *Citizens United* and *Arizona Free Enterprise* sought to protect. In other words, BCRA's aggregate contribution limits serve

the same anti-circumvention interest that was served by aggregate contribution limit upheld in *Buckley*.

Moreover, Appellants' argument assumes that there is an interest in limiting the robust political debate carried on by independent expenditure groups, suggesting that such debate is undesirably "negative." *See* McCutcheon Br. 30. Whether the content of Super PAC speech is "desirable" or not is irrelevant. The very inquiry is at war with the premise of *Citizens United*.

Because "[m]oney, like water, will always find an outlet," *McConnell*, 540 U.S. at 224, aggregate limits became Congress's attempt to prevent the undermining of the campaign finance regime through imposition of a reasonable restriction that did not unduly impinge on First Amendment rights. Appellants cannot establish that undue impingement exists and that the tangible harms to the campaign finance law will not be felt either through eliminating the aggregate limits altogether or imposing some untried supposed more closely drawn alternative.

CONCLUSION

For the reasons set forth above, and in the briefs of Appellee Federal Election Commission, *amicus* Americans for Campaign Reform urges the Court to affirm the judgment of the three-judge panel.

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Respectfully submitted,

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