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 *AMICUS CURIAE* CENTER FOR COMPETITIVE POLITICS IN SUPPORT OF APPELLANTS

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INTEREST OF *AMICUS CURIAE*[1]

Founded in 2005 by former Federal Election Commission Chairman Bradley Smith, the Center for Competitive Politics ("CCP") is a 501(c)(3) organization that seeks to educate the public about the effects of money in politics, and the benefits of increased freedom and competition in the electoral process. CCP works to defend the First Amendment rights of speech, assembly, and petition through scholarly research and both state and federal litigation.

Amicus has participated in many of the notable cases concerning campaign finance laws and restrictions on political speech, including *Citizens United v. FEC,* 558 U.S. 310 (2010) and *SpeechNow.org v. FEC,* 599 F.3d 686 (D.C. Cir. 2010). *Amicus* also represents the plaintiff-appellant in *James v. FEC*, No. 12-683, a challenge to 2 U.S.C. §441a(a)'s limitation on the contribution of funds directly to candidates that may, under the statute, lawfully be contributed to parties and political committees.

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[1] No party has contributed, monetarily or otherwise, to the preparation or filing of this brief, which was authored entirely by counsel for *amicus*. Copies of the consents of all parties to the filing of this brief are filed with the Clerk of this Court.

SUMMARY OF ARGUMENT

The district court's decision to uphold the aggregate individual contribution limits of the Bipartisan Campaign Reform Act ("BCRA"), codified at 2 U.S.C. § 441a(a), did not reflect the exacting review demanded by the First Amendment interests implicated here. Even if the court were correct in declining to apply strict scrutiny, contribution limits must still be "closely drawn to match a sufficiently important interest." *McConnell v. FEC,* 540 U.S. 93, 136 (2003). While noting this standard, the district court failed to adequately apply it.

This error stems, in part, from confusion over the proper standard of review for contribution limits. In particular, the tailoring prong of such analysis has often been replaced by deference to legislators' "particular expertise" regarding "the cost and nature of running for office." *Randall v. Sorrell*, 548 U.S. 230, 248 (quoting *McConnell,* 540 U.S. at 137).

Such deference is mistaken in this case, and should be reconsidered generally. Where, as here, the Congress failed to generate any substantive record to justify its legislative approach, the rationale for judicial deference collapses. Moreover, such deference substantially increases the likelihood that legislative action will disproportionately serve the interests of incumbent politicians. Finally, the premise undergirding deference to legislative pronouncements in this area – that legislators actually possess expertise in the area of campaign finance – may be fundamentally mistaken.

Contribution limits implicate "the most fundamental" First Amendment interests. *Buckley v.*

Valeo, 424 U.S. 1, 14 (1976). This Court has consequently demanded that they be subjected to heightened judicial scrutiny. Deference to the Congress, especially in the absence of any relevant legislative record, is inconsistent with that requirement and fails to adequately safeguard the First Amendment's guarantees.

ARGUMENT

I. This Court has consistently applied a rigorous standard in reviewing contribution limits, but has not consistently defined that standard.

Appellants have brought a challenge to, *inter alia*, the aggregate individual contribution limits of the Bipartisan Campaign Reform Act ("BCRA"), codified at 2 U.S.C. § 441a(a); 11 C.F.R. 110.5 (2013). The district court's decision to uphold the aggregate individual limit did not reflect the exacting review demanded by the First Amendment interests implicated here. But that error can be explained, in part, by the lack of clear guidance from this Court, which can be corrected here.

Since *Buckley v. Valeo*, this Court has required that contribution limits must be "closely drawn to avoid unnecessary abridgement of associational freedoms." 424 U.S. 1, 25 (1976) (internal citations omitted). Consistently, this Court has determined that a "rigorous standard of review" must be applied to determine if such limits are appropriately drawn. *Buckley*, 424 U.S. at 29.

However, the Court has not consistently defined the contours of this rigorous standard. At times, it has analyzed contribution limits under "exacting judicial scrutiny." *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 298 (1981). In other decisions, such as its consideration of the contribution limits imposed by the state of Missouri, it has applied "heightened judicial scrutiny." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 (2000).

And other courts have "held that the standard to apply to contribution limits is akin to intermediate scrutiny." *Libertarian Nat'l Comm. v. FEC*, No. 1:11-cv-00562, 2013 U.S. Dist. LEXIS 36729, at *25 (D.D.C. March 18, 2013) (citing *SpeechNow.org v. FEC*, 599 F.3d 686, 692 (D.C. Cir. 2010); *Republican Nat'l Comm. v. FEC*, 698 F. Supp. 2d 150, 156 (D.D.C. 2010)).

What is clear is that there is a requirement of heightened scrutiny and, like strict scrutiny, the scrutiny applied to contribution limits proceeds in two steps. First, the government must show a sufficiently important governmental interest to justify infringements on the First Amendment. *Buckley*, 424 U.S. at 25. Second, it must choose means "closely drawn" to that interest. *Id.* But the tailoring prong of this analysis remains a source of confusion.

In *Shrink Missouri*, the Court itself recognized this lack of a uniform rule. In determining if a contribution limit is closely drawn, "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislation will vary up or down with the novelty and plausibility of the justification raised." *Shrink*, 528 U.S. at 391.

II. In applying this standard, the Court has implied that courts should defer to legislatures when reviewing contribution limits.

The Court has held that, generally, proper application of this amorphous standard requires some "defer[ence] to the legislature[]." *Randall v.*

Sorrell, 548 U.S. 230, 248. Legislators have "particular expertise" regarding "the cost and nature of running for office." *Id.* (quoting *McConnell v. FEC*, 540 U.S. 93, 137 (2003)). Given this perceived competency of legislative bodies, the Court has declined to wholly substitute its judgment for that of Congress or the state legislatures. Thus, "[t]he judiciary owes special deference to legislative determinations regarding campaign contribution restrictions." *Ognibene v. Parkes*, 671 F.3d 174, 182 (2d Cir. 2011).

In the contribution context, the lower courts have "emphasized that it is for the legislature—not the courts—to determine how to appropriately address corruption." *Wagner v. FEC*, 854 F. Supp. 2d 83, 92 (D.D.C. 2012). The Fourth Circuit Court of Appeals recently noted that deference to "important and…legitimate judgment[s]" is appropriate, "especially where corruption is the evil feared." *Preston v. Leake*, 660 F.3d 726, 736 (4th Cir. 2011) (internal citations and quotation marks omitted).

But this deference does not extinguish the tailoring required to satisfy heightened scrutiny. This Court has foresworn "accept[ing] mere conjecture as adequate to carry a First Amendment burden." *Shrink*, 528 U.S. at 392. The government may not prevail on the basis of hypothetical danger. "The Court's decisions involving associational freedoms establish that the right of association is a basic constitutional freedom…[which] lies at the foundation of a free society." *Buckley*, 424 U.S. at 25 (internal citations and quotations omitted). Indeed, even when dealing with speech lying further from the core of the First Amendment than political

speech, this Court has demanded that the government demonstrate that "the harms it recites are real and that its restriction will in fact alleviate them to some degree." *Greater New Orleans Broadcasting Ass'n. v. United States,* 527 U.S. 173, 188 (1999). Restricting First Amendment freedoms necessarily requires the government to concretely explain *why* it has the right to do so, and that its means for doing so are "closely drawn."

In *Citizens Against Rent Control*, Justice Marshall explained the requirements of heighted scrutiny. In order for the government to succeed, "the record…[must] disclose sufficient evidence to justify the conclusion that" contributions in excess of present limits would "undermine[] the confidence of the citizenry in government." *Citizens Against Rent Control*, 454 U.S. at 301 (Marshall, J., concurring). Without such evidence, the justification for deference to the legislature dissolves.

III. Where, as here, the government has neither justified its restriction nor demonstrated that it is closely drawn, deference to Congress is inconsistent with the required rigorous review of the challenged statute.

In this case, *no record exists*. Neither the lower court nor the FEC offered any evidence supporting the contention that the individual aggregate limits address either corruption or a credible threat of circumvention.

Indeed, the *McCutcheon* panel largely relied on the very sort of "mere conjecture" that the *Shrink*

Missouri Court rejected. The lower court presented a hypothetical scenario, whereby joint fundraising committees could serve as a means for corruption-by-conduit. *McCutcheon v. FEC*, No, 1:12-cv-01034, slip op. at 9 (D.D.C. Sept. 28, 2012). But the court itself noted that "it may seem unlikely that so many separate entities would willingly serve as conduits for a single contributor's interests." *McCutcheon* at 10. Despite its own skepticism, the lower court decided that because "it is not hard to imagine a situation where the parties implicitly agree to such a system," it was forced to uphold the individual aggregate limits. *Id.* This is precisely the constitutionality-by-conjecture approach that this Court's holdings have repeatedly disavowed.

Nor did the district court rely on a legislative record substantiating the alleged risks of corruption-by-conduit. Despite extensive research, *amicus* could locate no record regarding any of the Bipartisan Campaign Reform Act's aggregate limits. *Amicus* reviewed all references to "aggregate limits" and all permutations of the phrase that appear in the Congressional Record for the 107th Congress. This review included statements on the House and Senate floors, and all relevant committee material.

Based on this review of the public record, *amicus* submits that no member of Congress made any substantive representation as to the purpose of the aggregate limits. Indeed, most references to the aggregate limits in the Congressional Record consist of draft legislative text or statements which merely acknowledge the limits' existence. *See, e.g.,* 147 Cong. Rec. S. 3028; 147 Cong. Rec. S. 3090. The current individual aggregate limit emerged from a

compromise brokered by Senator Dianne Feinstein of California and then-Senator Fred Thompson of Tennessee. 148 Cong. Rec. S. 2154. Neither senator devoted any time on the record to an explanation of the anti-corruption or anti-circumvention rationale of an aggregate limit on individual contributions. *Id.* Nor did any committee take testimony or assemble evidence on this point.

It may be that Congress felt little need to substantiate the necessity of the aggregate limits in light of *Buckley*'s determination that aggregate limits are "no more than a corollary of the basic individual contribution limitation." *Buckley*, 424 U.S. at 38. But *Buckley*'s statement arose in a substantially different statutory context: in 1976, it was possible for an individual to circumvent FECA's $1,000-per-candidate contribution limit "by contributing up to $5,000 in unearmarked funds to as many [political] committees as he wished, which in turn could have re-contributed those funds to a particular candidate." McCutcheon Open. Br. at 4.

Moreover, *Buckley* upheld an overall cap on giving—not a system where the government both limits the total amount any individual may contribute *and* further directs that overall giving via caps on contributions to PACs, parties, and candidates. Under FECA, an individual could contribute $25,000 to candidates, $25,000 to committees, or a mixture of her choosing. That ability to divide aggregate contributions among entities of an individual contributor's choosing no longer exists, and Congress left no discussion on the record as to how BCRA's novel scheme fights corruption.

Ignoring these changes, and failing to cite to any legislative or judicial record, the district court asserts that "[i]t is not the judicial role to parse legislative judgment about what limits to impose." *McCutcheon* at 10 (internal citation omitted). In doing so, the lower court engages in no more than the application of a soft, rational basis review—not the rigorous, heightened scrutiny required by this Court's precedents. Leaving the lower court's ruling in place would implicitly overturn *Buckley*'s holding that contribution limits must be closely drawn. In fact, leaving *McCutcheon* undisturbed will permit the government to prevail by merely asserting constitutionality.[2]

In light of the "scant evidence" to support Congress's judgment, the lower court exercised an inappropriate level of deference. *See McConnell*, 540 U.S. at 232. Reliance upon the "mere conjecture"

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[2] In another case presently before the D.C. District Court, the FEC claims that court committed clear error by certifying a question to the *en banc* Court of Appeals under the procedure established by 2 U.S.C. § 437(h). *See Libertarian Nat'l Comm. v. FEC,* No. 1:11-cv-00562, 2013 U.S. Dist. LEXIS 36729 (D.D.C. March 18, 2013). The FEC's argument rests on the notion that as-applied challenges threaten "the interest in maintaining clear, bright-line prophylactic rules." FEC Mot. to Alt. at 12. Moreover, the Commission argued that the district court's mere *consideration* of less-restrictive means, as part of a tailoring analysis under exacting scrutiny, was too similar to strict scrutiny, and consequently also clear error. FEC Mot. to Alt. at 16. But "a prophylaxis-upon-prophylaxis approach to regulating expression is not consistent with strict scrutiny." *FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 479 (2007) (controlling opinion). Nor, we suggest, is it compatible with the exacting scrutiny demanded by this Court in the realm of contribution limitations.

that unlimited individual aggregate contributions to candidates may be harmful is not the "rigorous standard of review" demanded by *Buckley* and its progeny. This Court has regularly relied on a "record or legislative findings" to determine whether or not a contribution limit passes constitutional muster. *Citizens Against Rent Control*, 454 U.S. at 302 (Blackmun, J., concurring). While "[t]he quantum of empirical evidence needed [from such a record]…will vary," what has been presented to this Court is wholly "[in]adequate to carry a First Amendment burden." *Shrink*, 528 U.S. at 392. This Court's review of the individual aggregate contribution limit, like all contribution limits, must be rigorous and searching, and not simply an unconditional deference to a legislative decision made without evidence or deliberation.

IV. Moreover, if "rigorous standard of review" is to have meaning, even when presented with a legislative record, courts must undertake a probing analysis of that record rather than simply deferring to the legislature's proffered or conclusory findings.

Without a record, the district court nonetheless stated that it is "not the judicial role to parse legislative judgment about what [contribution] limits to impose." *McCutcheon* at 10 (*citing Randall*, 548 U.S. at 248 (internal citations and quotations omitted)). While this Court has "ordinarily…deferred to the legislature's determination of such matters," such deference to expertise must, in the context of

heightened scrutiny, have some basis. *Randall,* 548 U.S. at 248. Courts must demand evidence that the legislature's expertise was actually used, and also that it was directed toward a constitutionally-permissible end. An established record is clearly necessary to such an inquiry.

The absence of such a record poses two troubling possibilities. First, the legislature's "particular expertise" may have been used to protect incumbents, a danger that justices of this Court and members of the 107th Congress have explicitly recognized. Second, in the case of campaign finance law, compelling evidence suggests that many – perhaps most – legislators have no actual expertise.

Of course, these two options are not mutually exclusive. Some members of Congress may be conniving, and others ignorant.

A. Deference to legislative determinations, especially where no record justifies doing so, risks incumbent self-protection.

Members of Congress are returned to office on the basis of successful political campaigns, which "in the modern setting" necessarily "involve the expenditure of money." *Buckley*, 424 U.S. at 11. Thus, members of Congress have a particular self-interest in the regulation of campaign finance. This self-interest could conceivably lead legislators to design rules that protect their incumbency. As Robert Bauer, a noted campaign-finance attorney who served as General Counsel of Obama for America and as the President's White House Counsel, has written:

> The problem is not simply that, in a critique of their own involvement with political money, officeholders may be tempted to rig the game for their own purposes. There is also the fair possibility that, even if they do the best they can, their biases will taint, if not wholly disqualify, the effort.

Robert F. Bauer, *When 'The Pols Make the Calls':* McConnell's *Theory of Judicial Deference in the Twilight of* Buckley, 153 U. PENN. L. REV. 5, 18 (2004).

This bias poses a threat to First Amendment interests. As this Court recognized in *Randall,* the danger that contribution limits could prevent candidates from "amassing the resources necessary for effective advocacy," has a corollary. Because such limits are drafted by incumbents, they may "magnify the advantages of incumbency to the point where they put challengers to a significant disadvantage." *Randall*, 548 U.S. at 248 (citing *Buckley*, 424 U.S. at 21). Individual members of this Court have gone further. *McConnell*, 540 U.S. at 249 (Scalia, J., dissenting) ("as everyone knows, this is an area in which evenhandedness is not fairness…*any* restriction upon a type of campaign speech that is equally available to challengers and incumbents tends to favor incumbents.") (emphasis in original); *Id.* at 306 (Kennedy, J., dissenting) ("Title I's entirety begins to look very much like an incumbency protection plan….The very nature of the restrictions imposed by these provisions makes one

all the more skeptical of the…explanation of the interests at stake.").

Such concerns are not misplaced. While no substantial legislative record justifies BCRA's aggregate contribution provisions, BCRA as a whole was heavily debated. Many senators made statements noting that the overall effect of the law would be to protect incumbents from electoral challenges. *See, e.g.,* 148 Cong. Rec. S. 2132 (Statement of Senator Rick Santorum: "If you do not think this is an incumbent protection plan, I guarantee you have not been listening."); 148 Cong. Rec. S. 2131 (Text of letter from Laura W. Murphy of the American Civil Liberties Union introduced into the record by Senator Mitch McConnell: "[BCRA will] protect incumbents….").

Indeed, a floor statement by Senator John McCain openly adopted a "defend the incumbents" rationale to justify the so-called Millionaire's Amendment struck down by this Court in *Davis v. FEC*, 554 U.S. 724 (2008). 147 Cong. Rec. S. 2540 (The amendment "addresses, in all candor, a concern that virtually any nonmillionaire Member of this body has"—namely, being challenged by a deep-pocketed citizen.) In response, Senator Chris Dodd demurred that "this is what I would call incumbency protection." 147 Cong. Rec. S. 2542.

The danger that legislators will protect their own jobs, intentionally or otherwise, is insufficient standing alone to invalidate campaign-finance regulations. But it is enough to show that legislative pronouncements must not be taken at face value.

B. Deference to legislative judgments may also rely upon a false premise: that legislators actually possess expertise concerning the regulation of campaign finance.

Deference to legislative expertise is inappropriate where there is little expertise to defer to. Members of Congress have often shown considerable ignorance of the nation's campaign finance laws. For example, in October 2003, less than one year after the effective date of BCRA, the House Administration Committee (which has jurisdiction over campaign finance laws) formally requested that the FEC provide training sessions for representatives. Jennifer Yachinin, *House Admin Requests BCRA Symposium*, ROLL CALL, Oct. 20, 2003. The committee's ranking minority member, who supported the request, was apparently unaware that BCRA had already gone into effect, "unwittingly demonstrat[ing] the need for such a seminar." *Id.*

Such ignorance is not surprising given that "members of Congress…do not actually manage their own campaigns and usually have little experience working in the party structure or with the types of citizen groups affect by…[BCRA]." Bradley A. Smith, McConnell v. FEC*:* *Ideology Trumps Reality*, 3 ELECTION L.J. 345, 349 (2004). As a result, most members "may actually have very little understanding of how provisions of the law might work" despite enthusiastically supporting it. *Id.* After teaching a "McCain-Feingold school" for Democrats, a party which overwhelmingly supported

BCRA,[3] Robert Bauer noted that the lessons "sometimes leave…[congressional] audiences in a state of complete shock." *Woe Is Them*, THE WALL STREET JOURNAL, Feb. 20, 2003 at A12.

Courts ought not, and consistent with exacting scrutiny cannot, presume legislative expertise absent a rigorous examination of a serious record. Further, if heightened scrutiny is to be meaningful, the Court's examination must do more than rely on self-interested assertions as truth and newspaper editorials as fact. *See* Lillian BeVier, *Not Senator Buckley's First Amendment*, 3 ELECTION L.J. 127 (2004); *see also McConnell* at 271 n. 3 (Thomas, J., concurring in part and dissenting in part) ("…the principal contents of Senator McCain's declaration are his complaints that several bills he supported were defeated…[t]he possibility that his favored policy outcomes lose due to lack of public support, or because the opponents of the amendment honestly believed it would do harm to the public, does not appear to be addressed.").

On this record and on these facts, there is "no alternative to the exercise of independent judicial judgment" concerning the individual aggregate limits. *Randall*, 548 U.S. at 249. But the point is broader. Regulation of campaign contributions implicates important First Amendment interests, and is consequently subject to exacting scrutiny. Such scrutiny requires that the means chosen be

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[3] The Senate roll call for BCRA is available at: http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=107&session=2&vote=00054. The House roll call for BCRA is available at: http://clerk.house.gov/evs/2002/roll034.xml.

reasonably tailored to the ends desired. As the lower court's decision shows, over the years this Court's required level of scrutiny has become "rigorous" in theory, but wholly deferential in fact. Mere deference to legislatures, especially given the concerns outlined above, is inconsistent with the judiciary's duty to independently, and carefully, probe the record for evidence supporting legislative judgments.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the district court.

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Respectfully Submitted,

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