No. 12-536

IN THE

Supreme Court of the United States

SHAUN MCCUTCHEON and REPUBLICAN NATIONAL COMMITTEE,

Plaintiffs-Appellants,

—v.—

FEDERAL ELECTION COMMISSION,

Defendant-Appellee.

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

BRIEF OF THE BRENNAN CENTER FOR JUSTICE AT N.Y.U. SCHOOL OF LAW AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE

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INTEREST OF THE *AMICUS CURIAE*[1]

The Brennan Center for Justice at N.Y.U. School of Law is a not-for-profit, non-partisan public policy and law institute that focuses on issues of democracy and justice. Through the activities of its Democracy Program, the Brennan Center seeks to bring the ideal of representative self-government closer to reality by working to eliminate barriers to full political participation, and to ensure that public policy and institutions reflect diverse voices and interests that make for a rich and energetic democracy.

SUMMARY OF ARGUMENT

On Inauguration Day when each new President of the United States takes office, those watching on television across the United States and throughout the world are reminded that on that day our country is undertaking a peaceful transition of power from one leader to the next and often one political party to another. Regardless of how vehemently the election campaign had been waged, there is no argument from the outgoing president, who until leaving office is seen as the most powerful public figure in the world. There is instead acceptance that the people have chosen a new leader by operation of a democratic process designed over two hundred years ago. While many have come to

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[1] This *amicus curiae* brief is filed with the written consent of the parties. Pursuant to Supreme Court Rule 37, *amicus curiae* states that counsel for *amicus* authored this brief in its entirety. No person or entity other than *amicus*, its supporting organizations, and its counsel made a monetary contribution to the preparation of this brief. This brief does not purport to convey the position of N.Y.U. School of Law.

take such peaceful transitions in the United States for granted, they are, in fact, remarkable in the context of history and in comparison to many other nations of the world.

Such transitions are possible because the Founders of our Republic carefully crafted a form of government designed to ensure that sovereignty would rest with the "People" as a whole, and that the People would have continuing faith in our representative form of government as a government "of the People." Fearing that government could be corrupted if influence-seeking were unchecked and narrow classes gained disproportionate influence, the Founders structured our republic to ensure that the People were the "pure, original fountain of all authority." They sought to ensure that the People were steadfastly confident in the integrity of the government.

Maintaining the People's sovereignty and their faith in the government are compelling interests of the highest order. The Founders understood that if these interests are not properly safeguarded, the government can become subject to control by factions working for their own peculiar interests rather than the interests of the broader public.

History reinforces the importance of the faith of the People in government and our collective abhorrence for any particular faction or group becoming sovereign. When in our history the People have seen such control or influence by a faction developing, strong steps have been taken to ensure that sovereignty remains with the People.

One of the most important steps to beat back government by faction has been the adoption of campaign contribution limits, of which aggregate contribution limits are an essential component. In the absence of aggregate contribution limits, donors of substantial means could give effectively unlimited sums directly to candidates and parties, marginalizing the role of the People as a whole and ensuring the dominance of powerful factions after elections conclude. That would invite the very consequence that our nation has long sought to avoid: undue influence of the few with a resulting loss by the People of their faith in our system of representative government.

We submit this brief to emphasize the singular importance of maintaining the integrity of the democratic process and the faith of the People in their government, as designed by the Founders, and the importance of weighing the constitutionality of campaign contribution limits with due emphasis on those compelling government interests.

ARGUMENT

I. From the Founding of Our Government Through to the Present Day, Efforts To Protect the Integrity of the Democratic System of Government Have Been Considered To Be Imperative.

A. The Founders were concerned with the integrity of the new form of government and the People's confidence in that government.

From the nation's inception, the Founders sought to ensure the integrity of the new system of representative government and the People's confidence in it. Doing so, they understood, required that sovereignty be genuinely held—and be understood by the citizenry to be held—by the People as a whole.

As Alexander Hamilton proclaimed in the Federalist Papers, the legitimacy of a democratic government depends on the People's confidence and consent: "The fabric of American empire ought to rest on the solid basis of THE CONSENT OF THE PEOPLE. The streams of national power ought to flow immediately from that pure, original fountain of all legitimate authority." *The Federalist No. 22*, at 151 (Alexander Hamilton) (Tudor Publishing Co. 1937); *see also* John Locke, *Two Treatises of Government* 355 (1821); Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* 9-16 (1948). James Madison reiterated this principle: "[T]he ultimate authority, wherever the derivative

may be found, resides in the people alone . . . ." *The Federalist No. 46*, at 321 (James Madison) (Tudor Publishing Co. 1937). And James Wilson warned at the Constitutional Convention that without the support of the people, a republican government will fail: "No government could long subsist without the confidence of the People. In a republican Government this confidence was particularly essential." *Notes of Debates in the Federal Convention of 1787 Reported by James Madison* 40 (Bicentennial ed. 1987) [hereinafter *Debates*]. *See also Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 390 (2000) ("Democracy works only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption." (citing *United States v. Miss. Valley Generating Co.*, 364 U.S. 520, 562 (1961)) (internal quotation marks omitted)).

The Founders conceived of public office as a trust,[2] with politicians as fiduciaries who must be loyal to the whole people, not just to a particular

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[2] The language of trusteeship permeates the founding documents, state constitutions, and writings from the time. It is found in the Federalist Papers and in debates over the sedition act. For example, The Federalist No. 46 states: "[G]overnments are in fact . . . agents and trustees of the people . . . ." *The Federalist No. 46*, *supra*, at 321. The language of trusteeship and fiduciary responsibility "seems to rank just below 'liberty' and 'republicanism' as an element of the ideology of the day." *See* Robert G. Natelson, *The Constitution and the Public Trust*, 52 Buff. L. Rev. 1077, 1086 (2004).

group. Accordingly, the Founders were especially concerned about the growth of small and powerful factions—defined, in Madison's words, as groups of citizens "united and actuated by some common impulse of passion, or of interest, adversed to the rights of other citizens, or to the permanent and aggregate interests of the community." *The Federalist No. 10*, at 63 (James Madison) (Tudor Publishing Co. 1937). They believed that such factions were not unlike the King and the aristocracy from whom they had separated, and were concerned that factions wielding undue influence would corrupt the government and undermine the People's confidence in it.

In the Federalist Papers, Madison voiced his worry about the impact that effective representation of factions rather than the whole people would have on the new Republican form of government:

> [W]e may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people . . . . It is ESSENTIAL to such a government that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it; otherwise a handful of tyrannical nobles, exercising their oppressions by a delegation of their powers, might aspire to the rank of republicans, and claim for

> their government the honorable title of republic.

The Federalist No. 39, at 257 (James Madison) (Tudor Publishing Co. 1937).

The Founders worried that if such factions became too powerful, public officials would become beholden to them and would use, or be perceived as using, their power as representatives of the people to benefit only narrow coalitions. Driven by that concern, the Founders designed a government that would not likely fall prey to such factions. *See* Lawrence Lessig, *Republic Lost* 130 (2011) (quoting *The Federalist No. 52* (James Madison) ("This is the work of sophisticated constitutional architects all aimed at a single end: to establish and protect a link between Congress and 'the People alone.'")). The Constitution that they wrote distributed power between state and federal governments, put in place checks and balances between the three federal branches, and designed elections so as to maintain a government free from control by a few.

While debating the method of electing senators at the Constitutional Convention of 1787, as reported by James Madison, Gouverneur Morris of Pennsylvania urged that even a strong, independent government was not enough. The new Republic also needed shrewd, carefully selected politicians, as well as governmental institutions designed to watch those elected closely: "A firm [government] alone can protect our liberties. [Morris] fears the influence of the rich. They will have the same effect here as

elsewhere if we do not by such a [government] keep them within their proper sphere." *Debates*, *supra*, at 235.

To this end, beyond structuring the government to divide powers among the branches, the Founders placed additional safeguards in the Constitution to prevent government from developing illegitimate dependencies. The Ineligibility Clause,[3] the Origination Clause,[4] and the Emoluments Clause[5] were all created to preserve the government's dependency upon the People. Lessig, *supra*, at 129-30. Similarly, the delegates decided that the federal government should pay for the salaries of members of Congress in order to prevent them from being dependent upon state legislatures rather than the People.[6] Edmund Randolph warned, "If the States were to pay the members of the Natl. Legislature, a dependence would be created that would vitiate the whole System." *Debates*, *supra*, at 171. Hamilton echoed this concern, saying, "Those who pay are the masters of those who are paid." *Id.* at 133.

The founding generation cited the need to avoid the corrupt capture of government by faction early and often in the convention and ratification

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[3] U.S. Const. art. I, § 6, cl. 2.

[4] *Id.* art. I, § 7, cl. 1.

[5] *Id.* art. I, § 6, cl. 2.

[6] *See id.* art. I, § 6, cl. 1.

debates. In one of the first speeches made at the Constitutional Convention, George Mason warned, "[I]f we do not provide against corruption, our government will soon be at an end . . . ." Notes of Robert Yates (June 23, 1787), *in* 1 *The Records of the Federal Convention of 1787*, at 391, 392 (Max Farrand ed. 1911). In his Notes, Madison noted that fifteen delegates used the term "corruption" no fewer than a combined fifty-four times. *See* James D. Savage, *Corruption and Virtue at the Constitutional Convention*, 56 J. Pol. 174, 177 (1994). Indeed, at the Convention, "there was near unanimous agreement that corruption was to be avoided, that its presence in the political system produced a degenerative effect." *Id*. at 181.[7] The topic was again discussed extensively in the public debates over the Constitution's ratification. *See* Bernard Bailyn, *The Ideological Origins of the American Revolution*, at xiii (enlarged ed. 1992). As Professor Zephyr Teachout succinctly notes, "The Framers were obsessed with corruption." Zephyr Teachout, *The*

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[7] Madison expressed a similar concern in The Federalist No. 57:

> The aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous whilst they continue to hold their public trust.

The Federalist No. 57, at 389 (James Madison) (Tudor Publishing Co. 1937).

Anti-Corruption Principle, 94 Cornell L. Rev. 341, 348 (2009).

The historical record leaves no doubt that the Founders understood corruption as more than just individual *quid pro quo* payments for legislation. To them corruption encompassed any use of public power for private purposes—not merely theft, but any use of government power and assets to benefit special interests rather than the broader public. *See* Robert Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 U. Kan. L. Rev. 1, 48 (2003). They believed it critical that legislators remain "impartial guardians of a common interest," *The Federalist No. 46*, at 324 (James Madison) (Tudor Publishing Co. 1937), and be "scrupulously impartial to the rights and pretensions of every class and description of citizens." *The Federalist No. 57*, at 389-90 (James Madison) (Tudor Publishing Co. 1937). They discussed the need for impartiality repeatedly when drafting the Constitution.[8] And

[8] *See* Notes of James Madison, in 1 *The Records of the Federal Convention of 1787*, at 88 (Max Farrand ed. (1911)) (reporting Pierce Butler's statement that unity in executive will promote impartiality); *id.* at 139 (recording Elbridge Gerry as making same point); *id.* at 427-28 (noting James Madison's belief that Senate would promote impartiality); *id.* at 580 (recording John Randolph's statement on importance of impartial census); Notes of James Madison, 2 *The Records of the Federal Convention of 1787*, at 42 (Max Farrand ed. (1911)) (reporting statement of Gouverneur Morris on importance of impartial impeachment trial); *id.* at 124 (noting James Madison's belief in need for impartiality in representation); *id.* at 288 (noting Oliver Elsworth's statement on desirability of

they structured the new government to ensure that it could not be bent to the will of any circumscribed class of citizens, declaring that the People would recognize the government as a failure if such a result came to pass. *See The Federalist No. 51*, at 358 (Alexander Hamilton or James Madison) (Tudor Publishing Co. 1937) (discussing need for checks and balances to create government immune to control by factions).

B. The First Amendment reflects the Founders' concern for the integrity of the new system of democratic self-government and the People's confidence in that government.

Just as checks and balances were intended to prevent the rise of a new controlling aristocracy, the First Amendment was designed to safeguard a full and robust debate among all citizens in order to preserve the People's role in the electoral and legislative processes. As this Court has repeatedly recognized, such robust "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." *Buckley v. Valeo*, 424 U.S. 1, 14 (1976).

The First Amendment seeks to preserve a genuine public debate, not a debate where only powerful factions are able to meaningfully

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impartial rewards for merit). *See generally*, Natelson, *The General Welfare Clause and the Public Trust*, *supra*, at 51-53.

communicate. The amendment is intended to ensure that no faction exerts undue influence upon the subjects and parameters of the debate by overwhelming the voices of others in the debate as to both possible issues and candidates for political office. It would be the very antithesis of what the First Amendment freedoms are intended to preserve to allow factions, using their wealth, to monopolize debate, and thereby monopolize governance.

This concern is not that the "playing field" be made "level" for all, *see Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011), or that all citizens be given an equal voice. Rather, the concern is that all citizens be afforded a chance to participate meaningfully in the public debate and that their voices not be drowned out. The aggregate contribution limits at issue in this case afford a chance for citizens who give only modest sums to have their voices heard in the public debate and thereby guide governmental policy. That is the very essence of representational government and, as the Founders recognized, it is crucial if the People are to have faith in their government.

Scholars have often recognized that one of the fundamental aims of the First Amendment is to protect and preserve the People's interest in self-government and governmental processes. *See* Meiklejohn, *supra*, at 26 ("The principle of the freedom of speech springs from the necessities of the program of self-government."); *see also* Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* 46-47 (2005) (explaining how First

Amendment protects participatory self-government); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1, 24-28 (1971); Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 Sup. Ct. Rev. 245, 255.

It has been recognized accordingly from the time of the Founders and throughout the country's history that self-government—and the public's confidence in government—are threatened by the ability of a faction of wealthy individuals to monopolize political debate by contributing immense amounts of money to political parties and candidates for political office. *See infra* Parts I.C, II.B. Wholly consistent with that, limits on contributions to candidates for political office have been adopted to thwart control by faction and the resulting erosion of the public's confidence in self-government. Such limits are thus entirely consistent with the imperative of self-government that animates the First Amendment. *See* Breyer, *supra*, at 47-48 ("To focus upon the First Amendment's relation to the Constitution's democratic objective is helpful because the campaign laws seek to further a similar objective. . . . Ultimately, they seek thereby to maintain the integrity of the political process . . . . Insofar as they achieve these objectives, those laws, despite the limits they impose, will help to further the kind of open public political discussion that the First Amendment seeks to sustain, both as an end and as a means of achieving a workable democracy.").

C. When factions have threatened the People's faith in democracy, the Congress has acted to reform campaign finance practices.

History provides numerous examples of the danger of political capture by factions threatening democratic governance and the People's faith therein. Such episodes have regularly been followed by steps to reinforce the People's faith in their representative government through legislation and reform.

i) The excesses of the Gilded Age and resulting reforms of the Progressive Era

It was widely known that the 1872 presidential campaign of Ulysses S. Grant was financed in large part by a few exceedingly wealthy individuals. In fact, financier and railroad tycoon Jay Cooke single-handedly funded twenty-five percent of the Republican campaign budget. *See* Katherine Bacher, Univ. of Pittsburgh Sch. of Law, *U.S. Campaign Finance*, Jurist, http://jurist.org/feature/2013/07/us-campaign-finance.php (last visited July 19, 2013).

Such contributions became a singular concern of the American people, who considered Grant entirely beholden to his wealthy backers. As one contemporaneous editorial explained, a common assertion was that "President Grant's friends are all in office or all in 'rings.' . . . All are gorged with

plunder or plethoric with power." *See President Grant's Friends*, Independent (New York), Aug. 22, 1872, at 4. Grant's notoriety made him the subject of a poem published in The Prairie Farmer, which called him the "Present-Taking President" and noted, "a liberal giver never lacks [a] welcome at [his] gate." *See Mescellany—Campaign Poetry: The Present-Taking President*, 43 Prairie Farmer 267 (Chicago 1872). The public believed that Grant was indebted to the wealthy and that his government was illicitly filled with his financiers rather than individuals chosen in the best interests of the People.

Concerns about election funding—and the capture of government by wealthy political benefactors—continued throughout the nineteenth century's Gilded Age. *See* Robert H. Sitkoff, *Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters*, 69 U. Chi. L. Rev. 1103, 1131 (2002). The 1896 election of William McKinley was particularly notorious as the "high-water mark" for corporate funding of political campaigns. Adam Winkler, *"Other People's Money": Corporations, Agency Costs, and Campaign Finance Law*, 92 Geo. L.J. 871, 883 (2004).

Mark Hanna, McKinley's campaign manager, famously said, "There are two things that are important in politics. The first is money, and I can't remember what the second is." Melvin I. Urofsky, *Money and Free Speech: Campaign Finance Reform and the Courts* 3 (2005). Consistent with that approach to government—which was exactly what the Founders feared—Hanna's extensive fundraising

efforts brought McKinley to the White House. Hanna solicited contributions from corporate leaders, irrespective of their party affiliation, while informing them of the contributions their peers and competitors had already made. Sitkoff, *supra*, at 1133. In doing so, he essentially "taxed" large corporations and financiers for contributions to support his candidates. *See id.* at 1132.

Tapping into such reservoirs of great wealth allowed the Republican Party to "open[] up a tremendous money advantage over the Democrats." Richard Briffault, *Life of the Parties? Money, Politics, and Campaign Finance Reform*, 8 Election L.J. 207, 211 (2009). Hanna raised "as much as $7 million," Bradley A. Smith, *The Sirens' Song: Campaign Finance Regulation and the First Amendment*, 6 J.L. & Pol'y 1, 10 (1997), an extraordinary sum equivalent, as a percentage of gross domestic product, to about $3 billion in today's dollars. *See also* Jackson Lears, *Rebirth of a Nation: The Making of Modern America*, *1877-1920*, at 188 (2009). One historian estimates that the McKinley campaign outspent William Jennings Bryan by ten-to-one. Winkler, *supra*, at 884.

So important was Hanna's fundraising to the McKinley campaign that critics saw "[t]he candidate [as] swallowed by the manager." Alfred Henry Lewis, *Mark Hanna, M'Kinley, and the Labor Unions*, News & Observer (Raleigh, N.C.), Aug. 9, 1896, at 2. McKinley's subsequent narrow victory spurred calls for campaign finance reform that were central to the platform espoused by Progressive Era

reformers. Burt Neuborne, *Felix Frankfurter's Revenge: An Accidental Democracy Built by Judges*, 35 N.Y.U. Rev. L. & Soc. Change 602, 648 (2011).

Prominently, at the beginning of the twentieth century, President Theodore Roosevelt recognized the need for campaign finance reform and called for legislation to ban corporate contributions for political purposes. He advocated the establishment of meaningful contribution limits and the public financing of campaigns, expressing embarrassment over the corporate financing of his own campaign for the Presidency. *See* Kate Pickert, *Campaign Financing: A Brief History*, Time (June 30, 2008), http://www.time.com/time/nation/article/0,8599,1819288,00.html (noting Roosevelt was accused of "promis[ing] a French ambassadorship to a senator from New York in exchange for $200,000 in big business campaign donations"). In his 1907 State of the Union address, President Roosevelt proclaimed:

> The need for collecting large campaign funds would vanish if Congress provided an appropriation for the proper and legitimate expenses of each of the great national parties, an appropriation ample enough to meet the necessity for thorough organization and machinery, which requires a large expenditure of money. Then the stipulation should be made that no party receiving campaign funds from the Treasury should accept more than a fixed amount from any individual subscriber or donor; and the

> necessary publicity for receipts and expenditures could without difficulty be provided.

Theodore Roosevelt, President of the U.S., State of the Union Address (Dec. 3, 1907).

Roosevelt's call for meaningful contribution limits followed from his belief that large contributions necessarily corrupted government and undermined public faith in the government's integrity. He called such contributions "sins which [America] treats as most abhorrent," going on to say that "we are peculiarly sensitive about big money contributions for which the donors expect any reward." *See* Theodore Roosevelt, *Theodore Roosevelt: An Autobiography* (1913).

Roosevelt's encouragement led to passage of the Tillman Act of 1907. The Senate's report on the legislation emphasized that the pitfalls of the use of money in the political process "are so generally recognized that the committee deem it unnecessary to make any argument in favor of the general purpose of this measure. It is in the interest of good government and calculated to promote purity in the selection of public officials." S. Rep. No. 59-3056, at 2 (1906). The Tillman Act's prohibition on corporate campaign contributions was an effort to not only protect the integrity of the electoral process, but also to preserve its reputation in the eyes of the people.

For the same reasons, like legislation passed in the following decades. The Federal Corrupt

Practices Act established campaign contribution limits for House general elections, Publicity of Political Contributions Act, Pub. L. No. 61-274, 36 Stat. 822 (1910); was amended in 1911 to extend to Senate and primary elections, Pub. L. No. 62-32, 37 Stat. 25 (1911); and in 1925 was extended to multi-state parties and election committees, Pub. L. No. 506, Title III, 43 Stat. 1070 (1925). It was followed by the Hatch Act of 1939, which prevented the leveraging of federal resources for partisan political gain by prohibiting civil servants from campaigning for elected office, Pub. L. No. 76-252, 53 Stat. 1147, as well as the Taft-Hartley Act in 1947, which prohibited unions and corporations from making independent campaign expenditures, Labor Relations Management Act, 1947 ("Taft-Hartley Act"), Pub. L. No. 80-101, 61 Stat. 136. Each of these statutes sought to prevent the undue influence of large donors and special interests on candidates and elected officials, lest such factions control government.

ii) Campaign finance abuses in the Watergate Era and the post-Watergate reforms

Over the course of President Nixon's first term and into his 1972 reelection campaign, extensive campaign finance abuses again rocked Americans' faith in the political system. Months of investigation in connection with the Watergate scandal revealed a series of exchanges of government favors for outsized campaign contributions: a $300,000 contribution for a nomination to the Luxembourg Ambassadorship, a $400,000 pledge to

the 1972 Republican convention by ITT in exchange for settling several antitrust matters on favorable terms, and a $2 million contribution pledge for $100 million in price supports for milk.[9] These revelations and the others that led to President Nixon's resignation "disastrously undermined public respect and confidence in government leaders, . . . and . . . demoralized and disillusioned the youth, in particular, whose commitment to 'the system' . . . [was] pushed to an all-time low." Roger G. Dunham & Armand L. Mauss, *Waves from Watergate: Evidence Concerning the Impact of the Watergate Scandal upon Political Legitimacy and Social Control*, 19 Pac. Soc. Rev. 469, 469-70 (1976).

The impact of this disillusionment was both exceptional and lasting. "In 1964, only 29 percent of the American electorate agreed that 'the government is pretty much run by a few big interests looking out for themselves.' By 1984, that figure had risen to 55 percent." Susan J. Pharr, Robert D. Putnam & Russell J. Dalton, *A Quarter-Century of Declining Confidence*, 11 J. Democracy 5, 10 (2000). The electorate's cynicism was directed not only at the President but politicians generally, as well as to their parties and the electoral process. *See* Paul M. Sniderman et al., *Stability of Support for the Political System*, 3 Am. Pol. Q. 437, 455 (1975).

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[9] Ciara Torres-Spelliscy, *How Much Is An Ambassadorship? And the Tale of How Watergate Led to a Strong Foreign Corrupt Practices Act and a Weak Federal Election Campaign Act*, 16 Chap. L. Rev. 71, 82, 87-89, 92 (2012).

The Federal Election Campaign Act of 1971 ("FECA") was designed to increase public confidence in government and prevent corruption by increasing disclosure of federal campaign contributions. Legislative reports from both houses of Congress discussed the corruptive influence of untrammeled campaign spending on the political process, acknowledging that the appearance of corruption is as harmful to democratic governance as actual corruption, because the People's trust is necessary for democracy to function. *See, e.g.*, S. Rep. No. 92-229, at 1851-52 (1971) (supplemental views of Messrs. Prouty, Cooper & Scott) ("Democracy succeeds only where citizens have faith and trust in their Government and its elected officials. . . . [This legislation] can be the most effective method for restoring to the public the confidence necessary for democracy to work."). By making the political process more transparent and campaign contributions less clandestine, Congress sought to protect that necessary confidence.

But, in the wake of the Watergate scandal, Congress determined that increased transparency was not sufficient; more fulsome disclosure requirements without effective contribution limits would not adequately check the influence of money in elections and government. Congress therefore returned to FECA, and in 1974, amended the Act to include such limits. The legislative history shows that the contribution limits were again intended to address concern for the integrity of the election process and the public's perception of the influence of

money on elections and elected officials. As emphasized in one hearing, "It is crucial that we make our regulation of contributions and expenditures effective so that our citizens do not receive, or believe they have been duped by, a billion dollar fraud." Federal Election Reform, 1973: *Hearings Before the Subcomm. on Privileges & Elections of the Committee on Rules & Admin.*, 93d Cong. 15 (1973) (statement of Sen. Mathias).

The House reported, "Under the present law the impression persists that a candidate can buy an election by simply spending large sums in a campaign." H.R. Rep. No. 93-1239, at 3 (1974). "Contribution limitations should restore public confidence by eliminating or reducing public suspicion that candidates are being 'bought' or influenced by large campaign contributions." *Id.* at 115 (minority views). The Senate agreed, stating that "[s]urely, in the interest of protecting the integrity of the elective process, there is a right to exercise reasonable control over the amount of money which may be poured into an election campaign." S. Rep. No. 93-310, at 6 (1973). The legislature put its emphasis on protecting the faith of the People in the democratic process, and believed that limiting the size of contributions to candidates and political committees was the way to achieve that goal.

The legislators also recognized that contribution limits would encourage greater political activity by individuals who would otherwise be discouraged from participating by the perception

that large donors had overwhelming influence on the elective process. As Representative Gaydos stressed, such apathy "is a problem that concerns all of us. The setting of very low limits on individual contributions should serve to convince these individuals that they should take a more active part in election campaigns." 120 Cong. Rec. 27228 (1974) (statement of Rep. Gaydos).

A generation later, Congress amended FECA once more via the Bipartisan Campaign Reform Act of 2002 ("BCRA"). Through BCRA, Congress placed limits on the contributions that could be made by interest groups to national political parties with the goal of restoring the public's confidence in America's representative democracy. As the Committee on House Administration reported:

> It is our concern that the presumption of fairness has been seriously eroded . . . by the large sums of money raised and spent in today's elections. And it is futile to try to sort out how much of this erosion is justified by reality and how much of it is simply a perception; both pose serious problems for our democracy. For as the sense of legitimacy of our elections is eroded, so too is the fundamental legitimacy of government itself. . . . People believe . . . that campaign contributions seem to determine political outcomes more than voting. No accusation cuts deeper because when money and privilege

> replace votes, the social contract underlying the political system is abrogated. Influenced by this widespread perception, people decide that voting doesn't really count anymore — so why bother?

H.R. Rep. No. 103-375, at 29 (1993) (citation omitted). In passing BCRA, Congress determined that the appearance of capture by wealthy factions was just as troublesome as actual capture, since the belief that the political process is controlled by those with outsized wealth delegitimizes democracy and discourages participation.

Representative Shays agreed with the Committee: "[T]his legislation aims to restore public faith in our democracy. . . . We have a historic opportunity here not only to end the appearance of corruption, but to reinvigorate our democracy by making individual citizens' votes count, and by encouraging the most qualified candidates to run for election." 148 Cong. Rec. 1306 (2002) (statement of Rep. Shays). Senators and Representatives alike joined in this sentiment, stating, "The appearance of corruption is rampant in our system, and it touches virtually every issue that comes before us," 147 Cong. Rec. 3865 (2001) (statement of Sen. Feingold); "Our representative democracy is harmed by eroding participation," 147 Cong. Rec. 5198 (2001) (statement of Sen. Kohl); "It is not unreasonable that the public perception of even the appearance of corruption erodes public confidence in the integrity of our electoral process and the independence of our

democracy," 148 Cong. Rec. 3559 (2002) (statement of Sen. Dodd); and "Our election laws were designed to protect the public's confidence in our democratically elected officials," 148 Cong. Rec. 3575 (2002) (statement of Rep. Levin).

The concerns that motivated Congress in establishing limits on contributions were thus exactly the same concerns that the Founders had with respect to factions. Congress acted to preserve the integrity of government and the People's faith in it—just as the Founders had.

II. Preventing Corruption and the Appearance of Corruption Are Aspects of a More Fundamental Governmental Interest in Preserving the Integrity of Self-Government.

A. This Court has long recognized these interests as being the basis on which contribution limits are upheld.

Consistent with the history described above, this Court has repeatedly identified the prevention of government corruption and the appearance of such corruption—as those terms were understood by the Founders—as compelling interests which Congress can further through campaign contribution limits. *See Citizens United v. FEC*, 558 U.S. 310, 345 (2010); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 478 (2007); *Randall v. Sorrell*, 548 U.S. 230, 248 (2006); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 388 (2000). In *Buckley v. Valeo*, 424 U.S. 1, 26 (1976),

the Court found it "unnecessary to look beyond the Act's primary purpose—to limit the actuality and appearance of corruption resulting from large individual financial contributions—in order to find a constitutionally sufficient justification for the $1,000 contribution limitation" and associated aggregate limits.

The interest of the legislature in preventing actual corruption of government is evident and has consistently been identified as compelling by this Court. In the Court's words, the "importance of the governmental interest in preventing [corruption of elected representatives through the creation of political debts] has never been doubted." *See FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 208 (1982) (quoting *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 788 n.26 (1978)).

Like the Founders, this Court has recognized that the importance of combating the appearance of corruption has traditionally not been limited merely to addressing the perception that some individual members of government may be corrupt. Rather, the appearance of corruption encompasses public perceptions of systemic compromises to the integrity of government through government by factions. Such concerns are driven by the fundamental interest in preserving necessary public confidence in the democratic concept that members of government actually represent the People as a whole.

As emphasized by this Court in *FEC v. National Right to Work Committee*, "These interests directly implicate the integrity of our electoral

process, and, not less, the responsibility of the individual citizen for the successful functioning of that process." 459 U.S. 197, 208 (1982) (internal quotation marks omitted). Public confidence in the system of government is the ultimate interest on which a government can legislate because it is firmly based in constitutional bedrock, and because public engagement in self-government is impossible without it. The legitimacy of the government legislating to protect public confidence in the system of government was recognized by this Court in *Ex parte Yarbrough*, 110 U.S. 651, 658 (1884), when it stated that "[i]f it has not this power it is left helpless before the two great natural and historical enemies of all republics, open violence and insidious corruption."[10]

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[10] As discussed more fully above, *see supra* Part I, the origin of this fundamental interest can be traced back to the Declaration of Independence and the struggle of colonial America in freeing itself from the rule of a King and the aristocratic class in England. The republican form of government as provided for by the Constitution and the rights enshrined by the First Amendment were the means by which the Founders sought to ensure government by the People, free from a governing elite. The same concern for government by the People animated campaign finance reform in the years after the Civil War era, when rapid industrial expansion led to the concentration of wealth in the hands of a few. As observed by the Supreme Court, "[n]o less lively [an issue than abusive monopolies], although slower to evoke federal action, was popular feeling that aggregated capital unduly influenced politics, an influence not stopping short of corruption." *United States v. Automobile Workers*, 352 U.S. 567, 570 (1957). "[T]he power of wealth threatened to undermine the political integrity of the Republic." *Id.* (quoting 2 Samuel Eliot Morison & Henry Steele Commager, *The Growth of the American Republic* 355 (4th ed. 1950)).

The concern now, as in all periods of our nation's history, is that citizens who do not believe that their government represents them, or that it is not responsive to their needs, have no interest in remaining bound to that polity's rules and values. As this Court also said in *Ex parte Yarbrough*:

> In a republican government, like ours, where political power is reposed in representatives of the entire body of the people, chosen at short intervals by popular elections, the temptations to control these elections by violence and by corruption is a constant source of danger.
>
> Such has been the history of all republics, and, though ours has been comparatively free from both these evils in the past, no lover of his country can shut his eyes to the fear of future danger from both sources. . . .
>
> If the government of the United States has within its constitutional domain no authority to provide against these evils, if the very sources of power may be poisoned by corruption or controlled by violence and outrage, without legal

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This concern about concentration of power goes to the heart of the American experiment—preventing rule by a King or a factional elite and ensuring the government appears legitimate.

> restraint, then, indeed, is the country in danger, and its best powers, its highest purposes, the hopes which it inspires, and the love which enshrines it, are at the mercy of the combinations of those who respect no right but brute force, on the one hand, and unprincipled corruptionists on the other.

110 U.S. at 666-67.

B. Concerns about the perception of corruption are well founded.

Recent polls show that voters again today generally assume a high degree of corruption in government and feel negatively toward money in politics.

In a 2011 CNN Opinion Research Poll, two-thirds of respondents agreed that "elections are usually for sale to the candidate who can raise the most money," and eighty-six percent thought that "elected officials in the nation's capital are mostly influenced by the pressure they receive from campaign contributors." CNN Opinion Research Corporation, *Poll: June 3-7, 2012*, CNN.com 2 (June 9, 2011), http://i2.cdn.turner.com/cnn/2011/images/06/09/rel10d-2.pdf. A 2009 Rasmussen Poll found that fifty-seven percent of American adults believed political donors "get more than their money back in terms of favors from members of Congress." *Most Say Political Donors Get More than Their Money's Worth*, Rasmussen Reports (Feb. 9, 2009), http://www.rasmussenreports.com/public_content/

politics/general_politics/february_2009/most_say_political_donors_get_more_than_their_money_s_worth.

Likewise, sixty-six percent of those polled in a 2013 Huffington Post poll believed that money spent on election advertising by independent groups, corporations and unions causes political corruption. Only fifteen percent of those polled believed that such money does not cause political corruption. *See* Huffington Post & YouGov, *Omnibus Poll*, Huffington Post (Feb. 2013), http://big.assets.huffingtonpost.com/cftoplines_split1.pdf; *see also* Emily Swanson, *Campaign Finance Poll Finds Most Support Donation Limits*, Huffington Post (Feb. 22, 2013), http://www.huffingtonpost.com/2013/02/22/campaign-finance-poll_n_2743877.html.

One cannot overstate the strength of the connection between the public perception of the corrupting influence of large campaign donations and the public's faith that our republican democracy serves the will of the People.

III. The Results of Striking Aggregate Contribution Limits Must Be Assessed Against This Background.

A. Eliminating aggregate limits would render the underlying contribution limits virtually meaningless.

As the lower court properly held, striking the aggregate contribution limits at issue on this appeal would facilitate easy circumvention of the underlying

contribution limits that have long stood as a bulwark against government corruption and perceptions of corruption, rendering the underlying limits a dead letter.

Without the aggregate limits, a wealthy donor in the 2013-14 election cycle could give $2,433,600 to all federal candidates of one party; $194,400 to the federal party; and $1,000,000 to the party's state committees. *See* Notice of Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 78 Fed. Reg. 8530, 8532 (Feb. 6, 2013). In all, a single donor could give $3,628,000 to benefit one party over the course of one election cycle—an amount more than 70 times the median annual family income of just over $51,000.

Similarly, were the aggregate limits eliminated, a donor hedging his or her bets by supporting both major parties could legally donate over $7.25 million in one federal election cycle—thus ensuring undue influence and access to elected officials regardless of which party prevailed. This is not a fanciful possibility; the Court has noted the prevalence of such bet-hedging, observing a decade ago that "more than half of the top 50 soft-money donors gave substantial sums to *both* major national parties, leaving room for no other conclusion but that these donors were seeking influence, or avoiding retaliation, rather than promoting any particular ideology." *McConnell v. FEC*, 540 U.S. 93, 148 (2003); *see also id.* at 147 ("[L]obbyists, CEOs, and wealthy individuals alike all have candidly admitted donating substantial sums of soft money to national

committees not on ideological grounds, but for the express purpose of securing influence over federal officials.").

The likelihood of donors making six- and seven-figure donations would be compounded by the ability—and practical need—of federal candidates and officeholders to legally solicit such massive contributions. While federal law prohibits officeholders and candidates from soliciting "soft money" funds not subject to the federal "hard money" limits, *see* 2 U.S.C. § 441i(e), in the absence of aggregate limits, these solicitation restrictions would effectively be eliminated through the use of joint fundraising committees and internal party transfers.

Joint fundraising committees are commonly used vehicles that allow candidates and other political committees to fundraise together; they allow donors to write the joint fundraising committee a single check equaling the "total amount that the contributor could contribute to all of the participants under the applicable limits" for all participating committees. 11 C.F.R. § 102.17(c)(5). Through the use of a joint fundraising committee, a single candidate could solicit multi-million dollar contributions, which donors could make with the stroke of a pen across a single check. As a formal legal matter, these funds would be allocated among the individual committees that effectively make up the joint fundraising committee. But because federal law permits unrestricted transfers between joint fundraising committee participants, *see* 2 U.S.C. § 441a(a)(4); 11 C.F.R. § 110.3(c), and because electronic banking allows funds to be transferred and

allocated instantaneously, a single donor's seven-figure check could be immediately disaggregated and reallocated to the national party committee to be used to promote the officeholder who solicited the check.

Without aggregate limits, this system of effectively unlimited contributions would permit a tiny class of donors to wield vastly disproportionate influence over our elected representatives, encouraging the control of government by faction that has been feared and resisted since the founding of our government.

B. Were contributions to candidates and parties effectively unlimited, they would follow the pattern of contributions to super PACs.

Without aggregate limits, contributions to federal candidates and party committees would be effectively unlimited. Under such circumstances, donations to candidates and party committees would surely follow the existing pattern of unlimited contributions to super PACs, in which a tiny group of mega-donors has dramatically dominated all contribution activity.

After the Court concluded in *Citizens United* that spending by groups formally independent of candidates would not give rise to *quid pro quo* corruption, various lower court decisions permitted the creation of so-called "independent expenditure-only groups," more commonly known as "super PACs." *See, e.g.*, *SpeechNow.org v. FEC*, 599 F.3d

686 (D.C. Cir. 2010). Super PACs are subject to no contribution limits and have collected breathtaking sums from a very small number of donors in recent years.

In 2012, just 1,578 donors who gave at least $50,000 to super PACs were responsible for more than $760 million in donations—or 89.3% of all donations to super PACs. A mere 304 donors who gave at least $500,000 were responsible for nearly $600 million in donations—or 69.5% of funds raised by super PACs. And a tiny group of only 159 contributors, each of whom gave at least $1 million, was responsible for approximately $505 million in contributions to super PACs. This tiny faction, equivalent to about 0.00005% of the U.S. population, was responsible for nearly three in every five dollars donated to super PACs, or 58.9% of all contributions to the groups. *See* Blair Bowie & Adam Lioz, *Billion-Dollar Democracy: The Unprecedented Role of Money in the 2012 Elections* 8 (2013).

Comparing this pattern of large donor domination of super PAC giving to small donor contributions to the presidential candidates is telling. Barack Obama and Mitt Romney combined to raise $313 million in small contributions of less than $200. While the precise number of these small donors cannot be ascertained because their donations are not itemized, a conservative estimate is that there were at least 3.7 million of these small donors. By contrast, it took fewer than three dozen large super PAC donors—thirty-two contributors, each giving an average amount of $9.9 million—to exceed the amount contributed by all small donors in the

presidential race. *Id.* at 9. Similarly, House candidates raised nearly half—45%—of all individual contributions in 2012 from donors who gave less than $1,000, and Senate candidates raised more than a third—36%—of all individual contributions from donors who gave less than $1,000. *See id.* at 13. By contrast, super PACs raised nearly 94% of all of their funds from fewer than 5,000 donors who gave at least $5,000. *Id.* at 8.

Without aggregate contribution limits in place, contributions to political committees and candidates would mirror the pattern of donations to super PACs. Overwhelmingly large contributions to candidates and parties from a handful of sources—solicited directly by federal candidates and officeholders—would thus become the norm.

C. Permitting a tiny class of donors making enormous contributions to dominate political giving would give rise to extraordinary corruption risks.

Huge political contributions pose grave dangers to our democratic processes. This Court explained in *Buckley* that "contribution ceilings [are] a necessary legislative concomitant [to anti-bribery laws] to deal with the reality or appearance of corruption *inherent* in a system permitting unlimited financial contributions." *Buckley v. Valeo*, 424 U.S. 1, 28 (1976) (emphasis added). Only the combined operation of the underlying contribution limits and the aggregate limits challenged here has prevented such an inherently corrupt system of unlimited contributions flowing directly to candidates and

parties. Even accepting, *arguendo*, that there are no corruption risks associated with the vastly disproportionate role that mere dozens of donors play with respect to nominally independent super PACs, it is clear that permitting the same domination of contributions made directly to candidates and parties would entail serious corruption risks.

Allowing a tiny faction to dominate candidate and party funding to the same degree it dominates super PAC funding would inevitably lead to the control and perception of control by factions the Founders sought to avoid. The Court affirmed the threat of real or apparent corruption in such a system when it recognized the "substantial evidence . . . that large soft-money contributions to national political parties give rise to corruption and the appearance of corruption." *McConnell*, 540 U.S. at 154. As former Senator Alan Simpson (R-Wyo.) said, "Who, after all, can seriously contend that a $100,000 donation does not alter the way [an elected official] thinks about—and quite possibly votes on—an issue?" *Id.* at 149.

Ushering in a system of virtually unlimited direct contributions to candidates and parties would certainly give rise to pervasive perceptions of corruption among citizens. Such enhanced, widespread concerns would engender apathy, cynicism, and hopelessness toward our democratic processes, driving ordinary citizens out of the process. In the absence of aggregate contribution limits, a tiny handful of kingmakers—the dozens or hundreds of political donors capable of making seven-figure political contributions—would

monopolize political fundraising and drown out the political voices of citizens of ordinary means, regardless of their political leanings, the strength of their beliefs, or the underlying soundness of their positions. Such a system would choke the robust public debate and principled government envisioned by the Founders.

IV. The Validity of Campaign Contribution Limits Should Be Determined by a Review Cognizant of the Fundamental Interests in Maintaining Both the Integrity of Government and Public Confidence in that Government.

In an unbroken line of precedent since *Buckley*, this Court has applied "closely drawn" scrutiny to contribution limits. The Court should reaffirm that closely drawn scrutiny is the appropriate standard for evaluating the constitutionality of contribution limits, and that contribution limits pass constitutional muster if they are "'closely drawn' to match a 'sufficiently important interest.'" *FEC v. Beaumont*, 539 U.S. 146, 161-62 (2003) (quoting *Buckley*, 424 U.S. at 25); *see also Randall v. Sorrell*, 548 U.S. 230, 247, 253 (2006) (applying "closely drawn" scrutiny).

In scrutinizing the aggregate contribution limits at issue under this standard, the Court should be mindful of the paramount importance of the interests at stake. In our system of government, no interest can be more compelling than maintaining sovereignty in the whole People and their faith in the integrity of government.

In the face of a challenge to aggregate contribution limits—long a bulwark against the power of factions and the erosive force of doubt and skepticism about our system of government—these compelling interests must be given their due weight. A failure to do so would have ruinous consequences for our system of government.

CONCLUSION

For the foregoing reasons, the decision of the United States District Court for the District of Columbia should be affirmed and the challenged biennial campaign contribution limits should be upheld as constitutional.

Respectfully submitted,

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