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 DEMOCRATIC MEMBERS OF THE UNITED STATES HOUSE OF REPRESENTATIVES AS *AMICI CURIAE* IN SUPPORT OF APPELLEE

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are Democratic Members of the United States House of Representatives, many of whom were actively involved in the passage of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 ("BCRA"). A complete list of the 85 Members of the House of Representatives participating as *amici* is provided in an appendix to this brief.

Amici are concerned about the continued vitality of BCRA's provision on aggregate campaign contributions and wish to preserve their ability to impose contribution limits to avoid both the actuality and appearance of corruption in politics. *Amici* bring to this Court the unique perspective of elected Members of Congress who are intimately familiar with the role that money plays in politics and who are deeply committed to maintaining public trust in the democratic process.

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[1] Letters from the parties consenting to the filing of this brief are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* and their counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Amici curiae submit this brief in support of Appellee urging affirmance of the District Court's decision upholding the constitutionality of the aggregate limit provision—Section 307(b)—of BCRA.

As the District Court found, the aggregate contribution limits at issue here are closely drawn to further the important interest in preventing corruption, which justifies the minimal, indirect First Amendment burden imposed on those who seek to contribute in excess of the contribution limits. Continued adherence to *Buckley v. Valeo,* 424 U.S. 1 (1976)—holding that contribution limits, including aggregate limits, receive intermediate scrutiny—is likewise justified by stare decisis as well as the deference to which Congress is entitled as a matter of relative expertise and democratic accountability.

Appellants urge this Court to disregard *Buckley*, which for nearly four decades has served as the core doctrinal framework for reviewing campaign finance laws. Congress and state legislatures have regulated against this backdrop for decades, and this Court itself has held that stare decisis necessitates adherence to the *Buckley* framework.

The longstanding deference afforded to Congress' decision to enact contribution limits is well founded. Elected Members of Congress, not unelected judges, possess expertise in the machinery of elections and the behavior of political actors. And it is elected Members of Congress, not unelected judges, who are best suited to determine the adequacy of contribution

limits to combat corruption of the democratic process.

Rather than reflecting an incumbent protection scheme, as some have claimed, these contribution limits reflect the American people's demands for more accountability from their leaders. This Court should honor this promise to *amici*'s constituents and reject Appellants' request to preclude the democratically elected branches from legislating to stem the corrosive influence of money on politics.

As this Court has continually recognized, contribution limits serve the important governmental interest of preventing real or apparent corruption. The corruption attacked by these limits includes not merely quid pro quo and outright bribery, but also extends to the undue influence exerted by large contributors. These threats of corruption, which were the impetus for campaign finance reform, remain very real today.

Aggregate limits in particular play a crucial role in preventing corruption or its appearance. First, aggregate limits buttress the base contribution limits, preventing circumvention of these primary limits. Second, aggregate limits are essential to preventing "dependence corruption," whereby government institutions become answerable to the narrow interests of a select group of elite contributors rather than responsive to the American public as a whole. Elimination of these limits would strip away a crucial limit on corruption, potentially unraveling the entire campaign finance regime.

ARGUMENT

I. As a Matter of Stare Decisis, Relative Expertise, and Democratic Accountability, This Court Should Continue Its Deference to the Elected Branches on Contribution Limits.

Appellants ask this Court to cast aside its longstanding doctrinal framework in favor of across-the-board strict scrutiny of campaign finance regulations. Precedent dictates, however, that contribution limits receive an intermediate level of scrutiny, affording Congress greater deference in enacting contribution limits than expenditure limits.

This deference properly allocates regulatory authority to Congress, the institution best equipped to police the corrupting effects of money in politics. Furthermore, Congress and state legislatures have legislated against the *Buckley* doctrinal backdrop for decades. Given that neither Appellants nor their *amici* present changed circumstances or new arguments that *Buckley* failed to consider, this Court should adhere to the settled rule that contribution limits—including aggregate limits—receive deferential review.

A. Under *Buckley*, Deferential Review Applies to Contribution Limits Generally.

"When contribution limits are challenged as too restrictive, [this Court] ha[s] extended a measure of deference to the judgment of the legislative body that enacted the law." *Davis v. FEC*, 554 U.S. 724, 737 (2008). This deferential standard of review originated in *Buckley*, which held that a contribution limit "entails only a marginal restriction upon the

contributor's ability to engage in free communication," in sharp contrast with the heavy burden on First Amendment rights imposed by an expenditure limit. 424 U.S. at 20-21.

Buckley required that contribution limits be "closely drawn" to further a "sufficiently important interest." *Id.* at 25. This standard is meaningfully different from the strict scrutiny applied to expenditure limits. For example, "the dollar amount [of a contribution limit] need not be 'fine tuned.'" *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 446 (2001) ("*Colorado II*") (quoting *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 387-88 (2000)). When it comes to contribution limits, "*even significant interference* with associational rights is nevertheless valid if it satisfies the lesser demand of" intermediate scrutiny. *McConnell v. FEC*, 540 U.S. 93, 136 (2003) (emphasis added) (internal quotation marks and citations omitted), *overruled on other grounds by Citizens United v. FEC*, 558 U.S. 310 (2010). Courts thus "respect Congress' decision to proceed in incremental steps," and "give deference to [the] congressional determination of the need for [a] prophylactic rule" when examining provisions intended to prevent circumvention of other lawful limits. *Id.* at 158, 171 (internal quotation marks and citations omitted).

For 37 years this Court has adhered to the *Buckley* contribution-expenditure dichotomy. In *Randall v. Sorrell*, the Court stated that stare decisis was "*especially* [applicable] where, as here, the [standard of review] has become settled through iteration and reiteration over a long period of time."

548 U.S. 230, 244 (2006) (emphasis added). In declining to overrule *Buckley*, the Court emphasized that "*Buckley* has promoted considerable reliance. Congress and state legislatures have used *Buckley* when drafting campaign finance laws. And, as we have said, this Court has followed *Buckley,* upholding and applying its reasoning in later cases. Overruling *Buckley* now would dramatically undermine this reliance on our settled precedent." *Id.*; *see also McConnell*, 540 U.S. at 137-38 ("[I]n its lengthy deliberations leading to the enactment of BCRA, Congress properly relied on the recognition of its authority contained in *Buckley* and its progeny. Considerations of stare decisis, buttressed by the respect that the Legislative and Judicial Branches owe to one another, provide additional powerful reasons for adhering to the analysis of contribution limits that the Court has consistently followed since *Buckley* was decided.").

Nothing has changed to justify a departure from *Buckley*. Indeed, this Court has retained the *Buckley* framework over vigorous dissents raising the very same arguments that Appellants and their *amici* put forward now. *See, e.g.*, *McConnell*, 540 U.S. at 137 ("Our application of this less rigorous degree of scrutiny has given rise to significant criticism in the past from our dissenting colleagues. We have rejected such criticism in previous cases." (internal citations omitted)).

For example, Appellants' *amici* raise the argument that the asymmetry between unlimited, third-party expenditures and restricted contributions renders the *Buckley* framework unworkable to the

detriment of candidates and parties. *See, e.g.*, Br. for Wis. Inst. for Law and Liberty as *Amici Curiae* Supporting Appellants at 3-5. This Court, however, has repeatedly rejected the argument that the *Buckley* dichotomy marginalizes parties or candidates in a constitutionally significant manner. *See, e.g.*, *Colorado II*, 533 U.S. at 469-70 (Thomas, J., dissenting); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 415-18 (2000) (Thomas, J., dissenting).[2] Appellants and their *amici* also suggest that *Citizens United v. FEC*, 558 U.S. 310 (2010), called into question the continued vitality of the *Buckley* contribution-expenditure distinction. But the Court expressly declined to reach this question in *Citizens United*, and there is no reason to revisit it now. *See* 558 U.S. 310, 359 (2010) ("Citizens United . . . has not suggested that the Court should reconsider whether contribution limits should be subjected to rigorous First Amendment scrutiny.").

This Court should thus adhere to stare decisis and refuse Appellants' invitation to jettison the *Buckley* standard of review for contribution limits. *Buckley* remains the paramount statement of First Amendment principles in the campaign finance realm, and for nearly four decades legislators have relied on this doctrinal backdrop. Appellants fail to

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[2] Furthermore, should Congress determine that a problematic asymmetry exists, it remains free to increase statutory contribution limits to normalize the ratio between coordinated and uncoordinated funding. The Court need not constitutionalize a requirement that coordinated and uncoordinated spending be equalized, given the lesser First Amendment burden imposed by limits on the former.

raise any new developments that provide "the strong justification that would be necessary to warrant overruling so well established a precedent." *Randall*, 548 U.S. at 244. A departure from longstanding, settled law now would be difficult to explain, undermining the legitimacy of judicial review of campaign finance regulations and creating the perception that the Court is entering the "political thicket." *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

B. The Aggregate Contribution Limits at Issue Here are Plainly Constitutional Under *Buckley*'s Deferential Standard of Review.

Under the standard of review established in *Buckley* and continually reaffirmed by this Court, the aggregate contribution limits at issue here pose no constitutional problem. As established above, *Buckley* requires intermediate scrutiny when reviewing aggregate contribution limits. In considering the original $25,000 aggregate contribution limit, the *Buckley* Court applied only deferential intermediate scrutiny, rather than the strict scrutiny required for expenditure limits. *Buckley*, 424 U.S. at 38; *see also Davis*, 554 U.S. at 737 ("This Court has previously sustained the facial constitutionality of limits on discrete *and aggregate* individual contributions and on coordinated party expenditures." (emphasis added)). This conclusion squarely controls the instant case. Thus, despite Appellants' claims that heightened scrutiny applies, this Court has already refused to credit the argument that "aggregate limits impose greater speech burdens than base limits," Br. on the Merits

for Appellant Republican Nat'l Comm. at 12 ("RNC App. Br.").

Buckley expressly considered and rejected the claim that aggregate limits require heightened scrutiny, holding that "[t]he limited, additional restriction on associational freedom imposed by the overall ceiling . . . [is] constitutionally valid." 424 U.S. at 38. The Court found the theoretical differences between an aggregate and a base contribution limit unimportant to determining the appropriate level of First Amendment scrutiny, declaring the aggregate limit "no more than a corollary" of base limits. *Id.*[3]

Indeed, the aggregate contribution limits at issue function like a base contribution limit, not an expenditure limit. Like a base contribution limit, and in contrast to an expenditure limit, the aggregate limit merely places a ceiling on one's ability to fund the speech of another—so-called speech by proxy. The aggregate limit does not constrain one's "freedom to discuss candidates and issues" directly, *id.* at 21, and "[it] leave[s] the

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[3] *Buckley* did not condition this application of intermediate scrutiny to aggregate limits on the existence of massive, glaring loopholes allowing circumvention of the base contribution limits—loopholes Appellants and their *amici* contend are no longer as gaping as in 1976. Tailoring questions speak to whether the regulation meets the relevant scrutiny standard; they do not define the level of scrutiny applied. Thus, even if Appellants and their *amici* are correct that some of these loopholes have closed, the *Buckley* holding that aggregate contribution limits receive deferential review continues to control the instant case.

contributor free to become a member of any political association and to assist personally in the association's efforts on behalf of candidates." *Id.* at 22; *see* 2 U.S.C. § 431(8)(B) (excluding volunteer services and other means of association from "contribution" definition).

Buckley acknowledged that an aggregate limit "does impose an ultimate restriction upon the number of candidates and committees with which an individual may associate himself by means of financial support," yet it held that an aggregate contribution limit is a "quite modest restraint upon protected political activity." 424 U.S. at 38. Thus, Appellants' argument that "while *base* limits restrict how *much* one may contribute to *particular* candidates, political parties, or PACs, *aggregate* limits restrict how *many* such entities one may support" has already been considered and rejected by this Court. RNC App. Br. at 9.

Nor do aggregate limits hinder the ability to campaign effectively. They merely "require candidates and political committees to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression." *Buckley*, 424 U.S. at 21-22. Unlike an expenditure limit that prevents an individual from expressing his or her views, the aggregate limits simply require would-be

contributors to decide how to allot up to $123,200 in coordinated financial support.[4]

Furthermore, for the overwhelming majority of Americans, the First Amendment burden imposed by the aggregate ceilings is "merely theoretical," in contrast with the "direct and substantial" restraint imposed by expenditure limits. *Buckley*, 424 U.S. at 19. Only a miniscule number of contributors risk hitting the $123,200 aggregate ceiling on contributions. The median contribution for the top .01% of elite campaign contributors in 2012 was $26,584, *well below* either aggregate limit. *See* Lee Drutman, *The Political 1% of the 1% in 2012*, Sunlight Foundation Blog (June 24, 2013, 9:00 AM), http://sunlightfoundation.com/blog/2013/06/24/1pct_of_the_1pct/.

"[D]istinctions in degree become significant only when they can be said to amount to differences in kind," and an aggregate limit creates only a "limited, additional restriction on associational freedom" beyond that imposed by base contribution limits. *Buckley*, 424 U.S. at 30, 38. Thus, the modest, marginal, and indirect First Amendment burden an aggregate limit could theoretically visit on a small number of would-be contributors is immaterial to the

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[4] During the 2013-2014 election cycle, one may contribute up to $123,200 if one maxes out under both the candidate committee contribution cap of $48,600 and the $74,600 cap on contributions to other committees. The $117,000 total cap used by the District Court reflects the 2011-2012 limits. The aggregate contribution limits are indexed to inflation. *See* 11 C.F.R. § 110.5.

level of scrutiny applied. This Court should accordingly continue applying intermediate scrutiny to aggregate contribution limits and should uphold the limits at issue here.

C. As a Matter of Relative Expertise and Democratic Accountability, the Judiciary Should Defer to the Elected Branches' Determination that Contribution Limits are Needed.

This Court should defer to Congress' considered, bipartisan determination that contribution limits reduce corruption because Congress has more experience with campaign finance issues and better tools for predicting the effects of regulation. Empirical evidence demonstrates that contribution limits are actually antithetical to incumbent protection, leaving the judiciary no cause for suspicion of such enactments. Furthermore, this Court should leave room for "play in the joints" so that *amici*—the people's democratically elected representatives—may respond to future developments in campaign tactics and the persistent ingenuity of those seeking to evade contribution limits. Harold Leventhal, *Courts and Political Thickets*, 77 Colum. L. Rev. 345, 348-49 (1977) (quoting J. Holmes).

This Court has repeatedly recognized Congress' expertise in the area of campaign finance regulation. *McConnell* explained that "[t]he less rigorous standard of review we have applied to contribution limits (*Buckley*'s 'closely drawn' scrutiny) shows proper deference to Congress' ability to weigh

competing constitutional interests in an area in which it enjoys particular expertise." 540 U.S. at 137. *McConnell* further acknowledged that "Members of Congress have vastly superior knowledge" regarding "the function played by national committees and the interactions between committees and officeholders." *Id.* at 158.

Predicting the precise ramifications of any campaign finance regulation is challenging. Nevertheless, the democratically elected branches remain relatively better equipped than members of the federal judiciary—the vast majority of whom have never campaigned for office—to make judgments about the deleterious effects of money in politics and the mechanisms needed to effectively combat corruption. Such regulation requires making difficult predictions about whether a given practice will lead to corruption, the probability of detecting corruption, the capacity to exploit loopholes, and the degree to which corruption will warp democratic decision-making. Given judges' relative inexperience with campaigns, the judiciary "must accord substantial deference to the predictive judgments of Congress." *McConnell,* 540 U.S. at 165 (quoting *Turner Broadcasting Sys., Inc. v. FCC,* 512 U.S. 622, 665 (1994)).

Furthermore, unlike judges who must proceed case by case, Members of Congress are not so constrained and thus have the time and resources to make difficult decisions about the appropriate architecture of regulation. For example, in instituting the present system of regulation under BCRA, including the aggregate limits at issue here,

the Senate Committee on Governmental Affairs "issued a six-volume report summarizing the results of an extensive investigation into the campaign practices in the 1996 federal elections." *Id.* at 129. All told, "the legislative process took over six years of study and reflection by Congress." *McConnell v. FEC*, 251 F. Supp. 2d 176, 434 (D.D.C. 2003), *aff'd in part, rev'd in part*, 540 U.S. 93 (2003) ("*McConnell D.D.C.*").

Similarly, in 1976, when Congress bolstered the campaign finance regime post-*Buckley*, including deciding to leave the original aggregate limits intact, four committees considered the regime, the full House and Senate spent a total of seven days debating the legislation, and the chambers considered 40 amendments. 32 Congressional Quarterly Almanac 459, 462-471 (1976). "This thoughtful and careful effort by [the] political branches, over such a lengthy course of time, deserves respect." *McConnell D.D.C.*, 251 F. Supp. 2d at 434.

Deference is particularly appropriate when it comes to fine details like the shoring up of base limits with aggregate limits. *Randall* explained that courts "cannot determine with any degree of exactitude the precise restriction necessary to carry out the statute's legitimate objectives. In practice, the legislature is better equipped to make such empirical judgments." 548 U.S. at 248; *see also FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 501 (1985) ("We are not quibbling over fine-tuning of prophylactic limitations, but are concerned

about wholesale restriction of clearly protected conduct.").

Contrary to the suggestions of Appellants and their *amici*, there is no cause to suspect Congress enacted contribution limits as part of a bipartisan incumbent protection scheme. In *Randall*, the Court found that heightened judicial scrutiny may be justified where contribution limits are so low that they may "harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability." 548 U.S. at 248-49. This would indeed be a powerful reason not to defer to the legislative branch regarding a contribution limit, but for the fact that the incumbent protection theory is demonstrably false.

The incumbent protection theory was, at best, disputed at the time of *Randall*. *See id.* at 287 (Souter, J., dissenting) ("The petitioners offered, and the plurality invokes, no evidence that the risk of a pro-incumbent advantage has been realized; in fact, the record evidence runs the other way, as the plurality concedes."). Subsequent empirical research demonstrates that the *Randall* Court's intuitions regarding the impact of contribution limits on electoral competition have not become reality.

A 2009 study by the nonpartisan Brennan Center for Justice examined elections in 42 states over a 10 year period, concluding that "the benefits of low contribution limits largely redound to challengers. . . . [T]he lower the contribution limit, the more competitive the election." Ciara Torres-

Spelliscy et al., Brennan Ctr. for Justice, *Electoral Competition and Low Contribution Limits* 2, 6 (2009), *available at* http://www.brennancenter.org/sites/default/files/legacy/publications/Electoral.Competition.pdf. The study found that contribution limits actually hurt incumbents, curbing the substantial fundraising advantage they enjoy over challengers.[5] *See id.* Lower contribution limits reduced the average margin of victory for incumbents, increased the likelihood of an incumbent having a viable challenger, and reduced the fundraising gap between challengers and incumbents. *See id.* at 7, 9. Thus, empirical research specifically designed to test the *Randall* Court's theory has disproven the incumbent protection hypothesis. *See also* Thomas Stratmann, *Do Low Contribution Limits Insulate Incumbents from Competition?*, 9 Election L.J. 125, 139 (2010) (finding that "having a [campaign contribution limit] increases competitiveness" and that "lower limits lead to tighter elections"); David M. Primo et al., *State Campaign Finance Reform, Competitiveness, and Party Advantage in Gubernatorial Elections*, *in The Marketplace of Democracy* 268, 277-78 (Michael P. McDonald & John Samples eds., 2006), *available at* http://www.campaignfreedom.org/doclib/20090916_Milyo2004GovStateElecs.pdf ("[I]individual contribution limits have a large, statistically

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[5] The incumbent protection theory was at least somewhat more plausible in the context of the Millionaire's Amendment invalidated in *Davis*. *See* 554 U.S. at 738. That case presented the unusual scenario in which a challenger may possess a fundraising advantage over an incumbent because the challenger is self-financed.

significant, and negative effect on the size of the winning vote margin, implying an increase in competitiveness.").

Appellants present no reason to think that an aggregate contribution limit poses a distinct entrenchment harm from that alleged—but disproven—in the broader contribution limit context. And "[a]bsent record evidence of invidious discrimination against challengers as a class, a court should generally be hesitant to invalidate legislation which on its face imposes evenhanded restrictions." *Buckley*, 424 U.S. at 31; *see also Shrink Mo.*, 528 U.S. at 395 (declining to second-guess validity of state interest where studies point in both directions).

A cynic might ask, "if contribution limits benefit challengers to the detriment of incumbents, why would a sitting Member of Congress vote to enact a contribution limit?" Although *amici* reject the premise that Members of Congress do not put the greater good first, a simple answer is apparent. Major scandals and the ensuing public outcry have served as the true impetus behind reforms—that is, the American people have been the driving force behind the regulation of money in politics. In the instant case, Congress enacted the original aggregate limits in response to the scandal surrounding Watergate, which was financed with secret funds from a few, massive contributors. *See* 120 Cong. Rec. 35,135-36 (1974) (statement of Rep. Frenzel) ("The $25,000 provision will be the death knell of the 'fat cat.' It will take not 1 year, but 160 years for the Stewart Motts and Clement Stones and other big

spenders to give $2 million to all Federal candidates, and 2,000 years to give $2 million to one candidate.").

That need for responsiveness continues today. Polling data illustrates that contribution limits reflect the demands of the American people for greater accountability from their elected officials, rather than a self-interested incumbent protection scheme. Support for contribution limits enjoys wide, bipartisan support among members of the public. A 2012 poll found that 62% of Republicans, 66% of Democrats, and 65% of Independents favored "limiting the amount of money individuals can contribute to political campaigns" over "allowing individuals to contribute as much money to political campaigns as they'd like." CBS News / New York Times Poll, Jan. 18, 2012, *available at* Polling the Nations, http://poll.orspub.com/document.php?id=quest12.out_11751&type=hitlist&num=0 (last visited July 22, 2013).[6]

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[6] *See also* Democracy Corps Poll, Nov. 9, 2012, *available at* Polling the Nations, http://poll.orspub.com/document.php?id=quest12.out_1453&type=hitlist&num=0 (last visited July 22, 2013) (finding 67% of presidential election voters strongly agreed that "reasonable limits should be placed on campaign contributions and spending"); Associated Press Nat'l Constitution Poll, Sept. 17, 2012, *available at* Polling the Nations, http://poll.orspub.com/document.php?id=quest12. out_1447&type=hitlist&num=0 (last visited July 22, 2013) (finding 67% of respondents believed there should "be limits on the amount of money individuals can contribute to campaigns for President, Senate, and U.S. House"); Rasmussen Reports Poll, July 10, 2009, *available* at Polling the Nations, http://poll.orspub.com/document.php?id=quest09.out_14739&type=hitlist&num=0 (last visited July 22, 2013) (finding 56% of

When a major scandal prompts Congress to enact reforms tying itself to the mast to respond to its constituents, the judiciary should respect its efforts, not remove its regulatory authority altogether. That is, "[t]o say that Congress is without power to pass appropriate legislation to safeguard . . . an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self protection." *McConnell*, 540 U.S. at 223-24 (quoting *Burroughs v United States*, 290 U.S. 534, 545 (1934) (quotation marks omitted)).

Finally, given the difficulty of anticipating developments in campaign finance and circumvention techniques, this Court should be extremely reluctant to further constitutionalize campaign finance law, foreclosing regulation by the democratically elected branches. "In exercising its power to review the constitutionality of a legislative Act, a federal court should act cautiously. A ruling of unconstitutionality frustrates the intent of the elected representatives of the people." *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984). Deference, on the other hand, "provides Congress with sufficient room to anticipate and respond to concerns about circumvention of regulations designed to protect the integrity of the political process." *McConnell*, 540 U.S. at 137.

Congress has regulated money in politics for over 100 years, and the interplay between the legislature and the courts has yielded a delicate balance

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likely voters thought the government should "regulate how much money individuals can give to political campaigns").

between competing concerns about government intrusion on speech and the corrupting effect of money on politics. *See, e.g.*, *id.* at 115-22 (summarizing the history of campaign finance legislation and judicial review). Despite this longstanding tradition, Appellants ask this Court to cast aside firmly established precedent and effectively declare campaign finance regulation outside the province of the democratically elected branches. This Court should instead continue to follow the course it charted in 1976, deferring to Congress vis-à-vis contribution limits generally, and aggregate limits specifically.

II. Contribution Limits in General, and Aggregate Contribution Limits in Particular, Remain Critical to Fighting the Actuality or Appearance of Corruption.

In addition to affirming the level of scrutiny applicable to contribution limits, this Court has consistently declared that contribution limits serve the important governmental interest of reducing the actuality or appearance of corruption. Preventing corruption and its appearance is critical to maintaining voters' faith in those who govern. Such "faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption." *Shrink Mo.*, 528 U.S. at 390.

Several of *amici*'s former colleagues have documented exactly the types of activities that arouse suspicions of malfeasance and corruption. As former Representative Chris Shays frankly admitted,

national parties raise soft-money by "promising donors access to elected officials." *McConnell D.D.C.*, 251 F. Supp. 2d at 471. Likewise, former Senator Simpson stated that it was "not unusual for large contributors to seek legislative favors in exchange for their contributions." *Id. at* 482. Former Senator Brock even remarked that "[large donors] for their part, feel they have a 'call' on these officials." *Id.* at 490; *see also* Br. of Solicitor General at 8-9 (canvassing testimony by senators that large contributions purchased influence). These former elected officials have thus confirmed that the threat of corruption is quite real for elected officials, as *amici* themselves can attest.

Aggregate contribution limits play a crucial role in preventing the actuality or appearance of corruption by ensuring individual contributors do not: (1) circumvent base contribution limits, or (2) contribute money with such breadth that it corrupts the institution as a whole. Yet despite these important interests, and Congress' repeated inclusion of aggregate limits in a complex regulatory regime, Appellants ask this Court to strike down aggregate limits as unnecessary for fighting corruption. *See* McCutcheon Appellant Br. at 8 ("McCutcheon App. Br.") ("aggregate contribution limits are no longer needed"); RNC App. Br. at 19 n.12 ("the ceiling no longer served any permissible purpose"). Because of the essential role these limits play in the campaign finance statutory scheme, this Court should reject Appellants' invitation and uphold the aggregate contribution limits.

A. Contribution Limits are Justified by the Interest in Preventing Both the Actuality and the Appearance of Corruption.

Since *Buckley*, this Court has upheld contribution limits as a closely drawn mechanism to "limit the actuality and appearance of corruption resulting from large individual financial contributions." 424 U.S. at 26; *see also, e.g.*, *McConnell*, 540 U.S. at 143; *Colorado II*, 533 U.S. at 456; *Shrink Mo.*, 538 U.S. at 390-91; *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 609 (1996) ("*Colorado I*"); *Cal. Med. Ass'n v. FEC,* 453 U.S. 182, 195 (1981). Absent contribution limits, this Court has recognized, "the integrity of our system of representative democracy is undermined." *Buckley*, 424 U.S. at 26-27. "Of almost equal concern" is "the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse" in a world of unconstrained political contributions. *Id.* at 27. "Leave the perception of impropriety unanswered, and the cynical assumption that large contributors call the tune could jeopardize the willingness of voters to take part in democratic governance. Democracy works only if the people have faith in those who govern." *Shrink Mo.*, 528 U.S. at 390 (internal quotation marks omitted).

The potential corruption recognized by this Court is not limited to bribery or cash-for-vote schemes, but "extend[s] to the broader threat from politicians too compliant with the wishes of large contributors." *McConnell*, 540 U.S. at 143. While bribery and anti-earmarking laws deal with the more "clumsy attempts to pass contributions through to

candidates," Congress designed contribution limits to combat the subtle "undue influence" a single contributor could exert through excessive contributions. *Colorado II*, 533 U.S. at 441. Corruption has thus been "understood not only as quid pro quo agreements, but also undue influence on an officeholder's judgment, and the appearance of such influence." *Id.* at 440-41.

Contrary to Appellants' assertions, *Citizens United* did not limit the definition of corruption to quid pro quo arrangements. *Citizens United* addressed the distinct issue of independent expenditures, which, unlike contributions, "provide little assistance to the candidate's campaign and indeed may prove counterproductive." *Buckley*, 424 U.S. at 47. The lack of "prearrangement and coordination of an expenditure . . . not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo." *Id.*; *see also Colorado II*, 533 U.S. at 440-41 ("limits on contributions are more clearly justified by a link to political corruption"); *Colorado I*, 518 U.S. at 615 (finding expenditure limits "less directly related to preventing corruption" than contribution limits).

Citizens United itself recognized a broader definition of corruption for contribution limits that includes guarding against undue influence. As this Court observed in *Citizens United*, although a quid pro quo might not be directly proved, "[t]he *Buckley* Court, nevertheless, sustained limits on direct contributions in order to ensure against the reality or appearance of corruption." 558 U.S. at 357. *Citizens*

United thus reaffirmed the continued vitality of the interest in preventing the appearance of corruption with respect to contribution limits, even though it refused to credit that interest in the context of independent expenditures. *See id.* ("[*Buckley*] did not extend this rationale [of protecting "against the reality or appearance of corruption"] to independent expenditures, and the Court does not do so here."). This Court in *Citizens United* recognized that contribution limits serve a vital goal in limiting the well-founded fear of corruption and its appearance in the political process.

Indeed, the threat of actual and apparent corruption remains real today, with contribution limits standing as the crucial bulwark. In the current political environment, a small number of elite contributors remain willing to spend millions of dollars on campaigns. *See 2012 Top Overall Individual Contributors*, OpenSecrets.org, http://www.opensecrets.org/overview/topindivs_overall.php (last visited July 22, 2013) (showing 11 individuals giving over $5 million in the 2012 elections, including six giving over $13 million and one giving over $90 million). In the absence of contribution limits, a candidate raising $1 billion for a modern presidential campaign could receive roughly 10% of his or her total funds from one contributor and potentially 20% from the top 20 contributors. *See The 2012 Money Race: Compare the Candidates*, N.Y. Times, http://elections.nytimes.com/2012/campaign-finance (last visited July 22, 2013) (showing that 2012 presidential candidate campaigns raised around $1 billion). Such

influence would be even larger in Senate and House races, where a $10 million contribution would fund 17% and 60% of the most expensive races, respectively. *Spending in Key House and Senate Races*, Wash. Post, Nov. 8, 2012, *available at* http://www.washingtonpost.com/wp-srv/special/politics/key-race-spending/.

Even if one questions the actual influence exerted by such large contributors—a position that in *amici*'s view reveals a "myopia . . . [on] how the power of money actually works in the political structure," *Colorado II*, 533 U.S. at 450—the appearance of corruption caused by such large contributions is undeniable. Empirical polling data demonstrates that the American people undeniably view large contributions as engendering corruption. *See, e.g.*, Democracy Corps Poll, Nov. 9, 2012, *available at* Polling the Nations, http://poll.orspub.com/document.php?id=quest12.out_1455&type=hitlist&num=6 (last visited July 22, 2013) (finding 64% of presidential election voters agreed with the statement that "big donors and secret money . . . control which candidates we hear about" and "undermine[ ] our democracy").[7] Thus, at the very least, the

[7] *See also* Rasmussen Reports Poll, July 10, 2009, *available at* Polling the Nations, http://poll.orspub.com/document.php?id=quest09.out_14740&type=hitlist&num=1 (last visited July 22, 2013) (finding 88% of likely voters believed it likely that even "[i]f the government places limits on how much individuals can give to campaigns . . . special interest groups will still find ways to get money to politicians and influence their votes"); Zogby Int'l Poll, Apr. 12, 2001, *available at* Polling the Nations, http://poll.orspub.com/document.php?id=quest01.out_2937&type=hitlist&num=2 (last visited July 22, 2013) (finding 69% of

elimination of contribution limits would erode public trust to a "disastrous extent." *Buckley*, 424 U.S. at 27.

B. Aggregate Contribution Limits are a Necessary Part of the Closely Drawn System for Avoiding Corruption.

Aggregate limits play a critical role in fighting the actuality and appearance of corruption in the political process. In politics, "[m]oney, like water, will always find an outlet." *McConnell*, 540 U.S. at 224. This Court has long observed that contribution limits would be of little use fighting corruption without additional measures, such as aggregate limits, to ensure that base limits are not circumvented.

The Court upheld the $25,000 aggregate limit in *Buckley* not only because it was a "quite modest restraint upon protected political activity," but also because it "serve[d] to prevent evasion . . . by a person who might otherwise contribute massive amounts of money to a particular candidate." 424 U.S. at 38. With aggregate limits, Congress sought to solve the problem of an individual contributor using political parties and PACs as a mere transfer point for money going directly to a candidate. "[D]espite years of enforcement of the challenged limits, substantial evidence demonstrates how candidates, donors, and parties test the limits of the current law." *Colorado II*, 533 U.S. at 457. Indeed,

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likely voters agreed with the position of Senator John McCain that "unlimited contributions . . . have a corrupting influence on our political system and should be banned").

"whether [parties] like it or not, they act as agents for spending on behalf of those who seek to produce obligated officeholders." *Id.* at 452.

As this Court has cautioned, failure to recognize the possibility of circumvention reflects "a refusal to see how the power of money actually works in the political structure." *Id.* at 450. Nevertheless, Appellants and their *amici* contest the effectiveness of aggregate contribution limits in curbing such circumvention and preventing corruption.

First, they argue that laws permitting the transfer of money show Congress' lack of concern about the evasion of contribution limits. *See* RNC App. Br. at 20. Although political parties, PACs, and candidates can transfer money, 2 U.S.C. § 441a(a)(4-5), this does not indicate that Congress saw the transfer of an *unlimited amount* of money as unproblematic. Instead, the transfer and aggregate limit provisions work in tandem. Congress established an equilibrium between two competing concerns: giving political parties the flexibility to support the candidates of their choice, *cf. Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989) (noting that political parties have an interest in identifying and supporting candidates), while at the same time ensuring that transfers did not become a backdoor for excessive giving beyond the base limits. Aggregate limits in combination with unrestricted transfers provide the middle ground by preserving political parties' ability to support candidates while simultaneously protecting against abuses of contribution limits.

Second, Appellants argue that anti-earmarking provisions prevent concerns of undue influence, as candidates will not know the individual source of their contributions. Actual experience, however, recognized as part of the record in *McConnell*, shows that this formalism has not prevented circumvention. Testimony from contributors and elected officials revealed that incumbent senators "were very concerned about whether or not donors' checks were tallied to them." *McConnell D.D.C.*, 251 F. Supp. 2d at 477. Committees receiving donations "underst[ood] that [the money] ha[d] been raised by or for a particular federal candidate, and this affect[ed] how much the committee spen[t] on behalf of that candidate." *Id.*

In assessing the ineffectiveness of anti-earmarking provisions standing alone, consider, for example, the 2012 Senate elections. The NRSC donated to 18 candidates and the DSCC donated to 15 candidates. *See Democratic Senatorial Campaign Cmte: Contributions to Candidates*, Open Secrets.org, http://www.opensecrets.org/parties/recipients.php?cycle=2012&cmte=DSCC (last visited July 22, 2013); *National Republican Senatorial Cmte: Contributions to Candidates*, Open Secrets.org, http://www.opensecrets.org/parties/recipients.php?cmte=NRSC&cycle=2012 (last visited July 22, 2013). Given the narrow universe of competitive races, a Senate candidate would certainly know who contributed money and for what purpose, regardless of whether the money was given to the candidate directly, a PAC, or a political party. Especially if contributors can give millions of dollars,

candidates will not be shocked that money from ostensibly disparate places actually has a single source.

Joint fundraising committees, which fall outside the earmarking ban, make this process even easier for large contributors. With joint fundraising committees, a contributor can walk into an event he or she knows is for a single candidate and write one check. *See* 11 C.F.R. § 102.17. Only afterwards do the political parties, PACs, and candidate divvy up the money. The post-hoc division of money neither makes the contributor think that he or she gave to separate organizations nor confuses the candidate as to which contributor gave the most collectively to his or her campaign or party. As this Court has recognized, "[t]o treat the earmarking provision as the outer limit of acceptable tailoring would disarm any serious efforts to limit the corrosive effects of . . . [the] understandings regarding what donors give what amounts to the party, which candidates are to receive what funds from the party, and what interests particular donors are seeking to promote." *Colorado II*, 533 U.S. at 462.

Finally, Appellants contend that aggregate limits are unnecessary because if the unrestrained contribution of money did take place, it would not be the massive influx feared. RNC App. Br. at 34; McCutcheon App. Br. at 41. They argue that the base contribution limits—$5,000 to a candidate's campaign committee, $32,400 per year to a national party, $10,000 a year to a state party, and $5,000 a year to an unlimited number of PACs—provide enough protection against corruption. RNC App. Br.

at 19; McCutcheon App. Br. at 8. The math tells a different story. As the lower court calculated, a single individual could contribute $3.5 million in one election cycle if only the base limits remained. *McCutcheon v. FEC*, 893 F. Supp. 2d 133, 135 (D.D.C. 2012), *probable jurisdiction noted*, 133 S. Ct. 1241 (2013). This does not include additional giving to an unlimited number of PACs. *Id.* at 135 n.1.

Amici for Appellants also suggest that since $7 billion was raised in the 2012 election cycle, the potential millions contributed by a single individual would be an unnoticeable drop in the bucket. *See* Br. for Nat'l Republican Sen. Comm. & Nat'l Republican Cong. Comm. as *Amici Curiae* Supporting Appellants at 22 (noting how the NRSC's ability to transfer money is limited to approximately $1.5 million—only 0.02% of $7 billion). This contention by Appellants' *amici* defies common sense. According to this view, $100 million in contributions would not be a concern for corruption because it only amounts to 1.4% of the $7 billion total raised, much less $3.5 million at 0.05%. Millions of dollars funneled to a few candidates from a single contributor can and will have an undue influence amounting to corruption or the appearance of corruption.

Despite the claims of Appellants and their *amici*, aggregate limits play an integral role in the statutory scheme regulating campaign finance, providing a crucial backstop to the base contribution limits. A decision invalidating such limits would thus have substantial consequences, potentially undermining the efficacy of the entire regulatory regime governing money in politics.

C. Aggregate Limits Also Prevent Institutional Corruption.

Corruption is not limited to individual elected officeholders. In designing the 1974 aggregate limit, Congress also sought to protect against the danger of institutional corruption, where an individual contributor donates widely across candidates and parties. *See* 120 Cong. Rec. 35,135-36 (statement of Rep. Frenzel) (emphasizing that the aggregate limit prevented big contributors from donating significant amounts to *all* federal candidates). The risk is that the breadth of donations and subsequent influence across one or both political parties cross the line from access to creating the actuality or appearance of corruption.

Even assuming money is not transferred—and the anti-circumvention rationale does not apply—base limits standing alone would still allow one contributor to give large amounts to all facets of the campaign infrastructure, including candidate committees, national parties, state parties, and PACs. Scholar Lawrence Lessig warns that this circumstance can lead to "dependence corruption" in which Congress as an institution becomes increasingly obligated to the few contributors who give heavily to a wide swath of candidates rather than to the people themselves. Lawrence Lessig, *What an 'Originalist' Would Understand 'Corruption' to Mean*, Cal. L. Rev. (forthcoming 2013), *available at* http://ssrn.com/abstract=2257948 at 6, 27-28. Avoiding dependence corruption meets the

compelling interest of "protect[ing] the legitimate processes of the government." *Id.* at 17.[8]

As a concrete example, a contributor could give the maximum amount to one party's candidate in every competitive House and Senate race—around 81 in the House and 18 in the Senate in 2012—as well as the three national party organizations. *See House Race Ratings*, N.Y. Times, http://elections.nytimes.com/2012/ratings/house (last visited July 22, 2013) *and Senate Race Ratings*, N.Y. Times, http://elections.nytimes.com/2012/ratings/senate (last visited July 22, 2013). The total amount given would be $592,200, including $495,000 to the candidates and another $97,200 for the party organizations. A sophisticated contributor might also give to both political parties and to less competitive races where the incumbent sits on a committee regulating the contributor's interests. *See McConnell*, 540 U.S. at 148 (noting that more than half of the top 50 soft-money contributors gave to both parties). With this level of giving, a conservative estimate would be that the contributor has provided the maximum amount of money to around 100 Members of Congress.[9]

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[8] Lessig also argues that the Founders viewed corruption as dependence corruption. *Id.* at 6-14.

[9] The 100 member estimate is based on two conservative assumptions: (i) 50% of the candidates the contributor backed in the 99 competitive elections win, equaling 50 current members; and (ii) the contributor will have given the maximum contribution to 50 other members of Congress, either because the contributor gave in past elections or because the members sit on committees with oversight over the contributor. The

The breadth of these contributions matters. The threat of corruption would not be ameliorated simply because the money was not funneled to one candidate. The party, its leaders, and a wide cross-section of Congress will all be indebted to a single contributor. *See McConnell D.D.C.*, 251 F. Supp. 2d at 489 (quoting a longtime lobbyist for the proposition that sophisticated political contributors are "not in the business of dispensing their money on purely ideological or charitable grounds"). Moreover, when 100 Members of Congress as well as national political organizations all receive the maximum donation from one contributor, the public will be—and should be—suspicious of corruption. As the public comes to see corruption penetrating the entire institution, the very "integrity of our system of representative democracy" will be at risk. *Buckley*, 424 U.S. at 26-27. *Amici* respectfully urge this Court to keep the integrity of the system intact.

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estimate is conservative because it does not include contributors who give to both parties.

CONCLUSION

For the foregoing reasons, the decision of the District Court should be affirmed.

July 25, 2013

Respectfully submitted,

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APPENDIX

LIST OF PARTICIPATING *AMICI*

The Members of the United States House of Representatives participating as *amici* are:

Karen Bass (CA-37)
Xavier Becerra (CA-34)
Earl Blumenauer (OR-3)
Robert A. Brady (PA-1)
Bruce Braley (IA-1)
Julia Brownley (CA-26)
Cheri Bustos (IL-17)
Lois Capps (CA-24)
Mike Capuano (MA-7)
Matt Cartwright (PA-17)
Judy Chu (CA-27)
David Cicilline (RI-1)
Steve Cohen (TN-9)
Gerald Connolly (VA-11)
John Conyers, Jr. (MI-13)
Joseph Crowley (NY-14)
Elijah Cummings (MD-7)
Susan Davis (CA-53)
Peter DeFazio (OR-4)
Rosa L. DeLauro (CT-3)
Ted Deutch (FL-21)
John Dingell (MI-12)
Lloyd Doggett (TX-35)
Donna Edwards (MD-4)
Keith Ellison (MN-5)
William Enyart (IL-12)
Anna Eshoo (CA-18)

Elizabeth Esty (CT-5)
Sam Farr (CA-20)
Alan Grayson (FL-9)
Raul Grijalva (AZ-3)
Alcee L. Hastings (FL-20)
Rush Holt (NJ-12)
Mike Honda (CA-17)
Jared Huffman (CA-2)
Sheila Jackson Lee (TX-18)
Hakeem Jeffries (NY-8)
Hank Johnson (GA-4)
Marcy Kaptur (OH-9)
William Keating (MA-9)
Daniel Kildee (MI-5)
Derek Kilmer (WA-6)
Ron Kind (WI-3)
Ann McLane Kuster (NH-2)
James Langevin (RI-2)
John Larson (CT-1)
Barbara Lee (CA-13)
John Lewis (GA-5)
David Loebsack (IA-2)
Zoe Lofgren (CA-19)
Alan Lowenthal (CA-47)
Michelle Lujan Grisham (NM-1)
Jim McDermott (WA-7)
Jim McGovern (MA-2)
George Miller (CA-11)
Gwen Moore (WI-4)
Jim Moran (VA-8)
Patrick Murphy (FL-18)
Eleanor Holmes Norton (DC)
Beto O'Rourke (TX-16)

Bill Pascrell (NJ-9)
Donald Payne Jr. (NJ-10)
Gary Peters (MI-14)
Chellie Pingree (ME-1)
Mark Pocan (WI-2)
Charles B. Rangel (NY-13)
C.A. Dutch Ruppersberger (MD-2)
Bobby Rush (IL-1)
Tim Ryan (OH-13)
Loretta Sanchez (CA-46)
John Sarbanes (MD-3)
Jan Schakowsky (IL-9)
Kurt Schrader (OR-15)
Bobby Scott (VA-3)
Jose Serrano (NY-15)
Brad Sherman (CA-30)
Louise Slaughter (NY-25)
Eric Swalwell (CA-15)
Mark Takano (CA-41)
Mike Thompson (CA-5)
Dina Titus (NV-1)
Paul Tonko (NY-20)
Niki Tsongas (MA-3)
Frederica Wilson (FL-24)
John Yarmuth (KY-3)