No. 12-536

IN THE
Supreme Court of the United States

SHAUN MCCUTCHEON AND
REPUBLICAN NATIONAL COMMITTEE,
Appellants,

v.

FEDERAL ELECTION COMMISSION,
Appellee.

On Appeal from the United States District Court for the District of Columbia

BRIEF *AMICUS CURIAE* OF THE COMMITTEE FOR JUSTICE IN SUPPORT OF APPELLANTS

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INTEREST OF THE AMICUS[1]

The Committee for Justice is a nonprofit, nonpartisan organization dedicated to advancing the rule of law by promoting constitutionalist nominees to the federal judiciary and educating government officials, the media and the American people about the dangers of judicial activism and the proper role of the courts in interpreting the Constitution. Central to the rule of law is the robust enforcement of the Bill of Rights — including the First Amendment — especially when the political winds are blowing in the opposite direction, as is the case for the campaign finance regulations at issue here.

Moreover, as a 501(c)(4) organization, the Committee for Justice is keenly aware that no matter how much money flows to (c)(4)'s and Super PACs, these groups cannot serve the unique and vital roles that political parties play in the political process.

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[1] No party's counsel 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 *amicus* or its counsel made a monetary contribution to fund the preparation or submission of this brief. Both Appellants have provided written consent to the filing of this brief and Appellee has provided written blanket consent to the filing of all *amicus* briefs. All consent documents are on file with the Clerk.

SUMMARY OF THE ARGUMENT

Aggregate contribution limits have a significant and divisive effect on the political process. One of the groups that is most seriously affected by aggregate limits is political parties. Aggregate contribution limits channel money away from political parties while doing little to restrict the overall flow of money into politics. That redirection of funds caused by aggregate limits has the effect of marginalizing political parties and preventing them from fulfilling their key roles: (1) aggregating political views, (2) moderating policies, and (3) energizing and mobilizing citizens. Moreover, aggregate contribution limits have the unique effect of increasing conflict between members of the same party, hampering the party's ability to unify candidates and officials.

Aggregate contribution limits also fail to further a key purported government interest put forth by the Appellee to support the limits: decreasing the perception of corruption. In the wake of several decisions by this Court limiting the legitimate government interests available to support campaign finance restrictions, the government's interest in the perception of corruption is forced to carry much of the burden of defending these aggregate contribution limits. The scope of this interest has been narrowly defined by the Supreme Court and must be limited to the appearance of *quid pro quo* corruption.

Empirical data suggests that the aggregate limits have not been successful at decreasing the public's perception of corruption or encouraging public trust in government. Campaign finance laws — including the aggregate limits — have historically had

minimal effect on levels of trust. Recent studies show that levels of trust in the government are dependent on social and political factors independent of campaign finance restrictions.

ARGUMENT

I. Aggregate Limits Improperly Diminish the Unique and Vital Roles of Political Parties in the Electoral Process.

One of the groups most affected by aggregate limits is political parties. Aggregate limits cause political parties to lose the benefit of donors who can contribute to both their coffers and those of their candidates, diminishing political parties' traditional roles in the political process. Aggregate limits do not apply to and therefore preference independent expenditure-only committees — more commonly known as Super PACs — and 501(c)(4) organizations over political parties.[2] *See* Part I.A. The relative marginalization of political parties caused by aggregate limits flies in the face of this Court's consistent and unambiguous support for the autonomy and freedom of association of political

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[2] Traditional political actions committees, in contrast to Super PACs and 501(c)(4) organizations, are subject to the aggregate contribution limits. 2 U.S.C. § 441a(a) (2006). Another important type of committee is the "joint financing committee," which raises money for a candidate or cause and then distributes money among candidate PACs, the national party, and state and local parties. *See generally* Alex Knott, *Politicians Create Record Number of Joint Fundraising Committees*, Rollcall (Sept. 17, 2010), http://www.rollcall.com/news/-49934-1.html.

parties. *See infra* Part I.B. Aggregate limits have a unique and lasting impact on political parties by spurring conflict between party officials, making it harder for the party to serve its key roles. *See* Part I.C. This Court's precedents support the view that parties have significant rights under both the freedom of speech and the freedom of association, and that even fairly weighty state interests cannot overcome those rights. *See* Part I.D.

A. *Aggregate contribution limits direct the flow of money to organizations making independent expenditures, which have less interest in moderation and compromise.*

Aggregate contribution limits allow Super PACs and 501(c)(4) organizations to exert exaggerated control over the political process because their independent expenditures are not subject to campaign finance regulations. The market for political monies is a market like any other, in that money flows to the "lowest," that is, the least regulated point.[3] The aggregate contribution limits force money out of the hands of the parties and their candidates, the central political actors, and into the hands of Super PACs and 501(c)(4) organizations, which face far fewer regulations. As discussed

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[3] In academia, this is known as the "hydraulics" of campaign finance reform. *See* Samuel Issacharoff & Pamela Karlan, The Hydraulics of Campaign Finance Reform, 77 Tex. L. Rev. 1705 (1999). In the post-*Citizens United* era, one scholar has referred to the flow of money into the recently deregulated area of independent expenditures as "reverse hydraulics." *See* Michael S. Kang, The End of Campaign Finance Law, 98 Va. L. Rev. 1 (2012).

further in Part II, aggregate contribution limits have no material effect on the presence or appearance of *quid pro quo* corruption. Instead, they leave politically active donors with no option but to give money to organizations making independent expenditures.

Aggregate contribution limits have the perverse effect of deregulating portions of the very democratic process they seek to protect. Aggregate limits weaken the influence of established political parties and their candidates, and strengthen the largely unregulated group of political actors operating as Super PACs and 501(c)(4) organizations. Their effects on parties and candidates are particularly pronounced following the deregulation of independent expenditures in the wake of *Citizens United v. FEC*, 558 U.S. 310 (2010). In this post-*Citizens United* era, aggregate contribution limits are particularly pernicious.

Aggregate contribution limits suppress the ability of parties and candidates to advance their goals and key positions in our democracy by directing the flow of campaign funds away from contributions to political parties and candidates, and toward the independent expenditures of Super PACs and 501(c)(4) organizations.

1. Aggregate contribution limits allow Super PACs and 501(c)(4) organizations to exert greater control over the electoral process, incentivizing the flow of money into independent expenditures, leading to the hyper-politicization of campaigns.

Campaign spending has increasingly flowed into the war chests of Super PACs and 501(c)(4) organizations and thus into independent expenditures. For example, during the 2006 election cycle, approximately $75 million was spent on independent expenditures. During the 2010 election cycle, spending on independent expenditures exploded to roughly $300 million. *Id.* at 42. While it may have once been true that campaign finance regulations controlled all the major channels through which political money moves, the stark reality of post-*Citizens United* campaign finance is that they now control only a small fraction of the money.

Independent expenditures, in the wake of *Citizens United* and *SpeechNow.org v. FEC*, are virtually unregulated. 599 F.3d 686 (D.C. Cir. 2010). In the era of deregulated independent expenditures, aggregate contribution limits do not further candidate or officeholder autonomy as intended, but rather limit candidate competition with Super PACs and 501(c)(4) organizations. While it is true that independent expenditures must be made in the absence of coordination with a campaign, the deregulation of independent expenditures has allowed such speech to dominate the market at the

expense of that endorsed by the actual campaigns. With their budgets and ability to promote their agendas marginalized, Super PACs and 501(c)(4) organizations are in a better position to disseminate political messages than the parties. When the parties and candidates need to rely on Super PACs and 501(c)(4) organizations to disseminate political messaging, that message is controlled not by parties or candidates, but by Super PACs and 501(c)(4) organizations.

The burden of aggregate contribution limits on parties is exacerbated by the fact that their competitors, at least when speaking through independent expenditures, are subject to no such limitations. An individual may contribute no more than $74,600 and $48,600 to all PACs and parties and all candidates per election cycle, respectively. *See* Federal Election Commission, *Contributions*, http://www.fec.gov/pages/-brochures/contrib.shtml. As such, parties and candidates are limited to spending on ads and other forms of messaging within the confines imposed by these contribution limits. Super PACs and 501(c)(4) organizations, however, are not so limited. They can use the funds of one wealthy donor to spread their message to the voting populace. In this sense, aggregate contribution limits make it difficult for parties and candidates to effectively compete with Super PACs and 501(c)(4) organizations for control of the political message.

Aggregate contribution limits allow Super PACs and 501(c)(4) organizations to exert greater influence over the electoral process by incentivizing political money to independent expenditures, which, in turn, forces parties and candidates — and indeed the

entire public debate — to align themselves with those entities' narrow, less moderate agendas and more inflammatory rhetoric. Take, for example, the "attack ad" released by Priorities USA Action, a Super PAC, against Mitt Romney during the 2012 election cycle titled "Understand." Priorities USAaction, *Understand*, Youtube (Aug. 7, 2012), http://youtube.com/watch?v=Nj70XqOxptU. The ad claims that while Romney was CEO of Bain Capital, he and others made millions shutting down a paper plant, leaving the workers and their families to suffer a loss of healthcare benefits.[4] As a result of public outcry in response, Romney was forced to address these comments despite their apparent inaccuracy. There was little disincentive to run such an inflammatory and inaccurate ad because the Barack Obama campaign and the Democratic National Committee could disavow responsibility for this independent expenditure.

2. Aggregate contribution limits are anticompetitive because they suppress parties' and candidates' ability to fundraise relative to Super PACs and 501(c)(4) organizations.

Aggregate contribution limits suppress the ability of parties and candidates to fundraise relative to Super PACs and 501(c)(4) organizations by forcing

[4] Such ads were released by proponents of both presidential candidates in the 2012 election. For an example of an Super PAC's attack on Barack Obama, see Restore Our Future's ad titled "New Normal." Restore Our Future, *New Normal*, YouTube (May 11, 2013) http://restoreourfuture.com/new-normal.

them to expand the sheer volume of donors. While parties and candidates can theoretically turn to growing their donor bases, the reality is that the volume of donors cannot be substantially increased. For parties and candidates, expanding donor numbers is no small feat. During the 1999-2000 election cycle only about 3.5 million Americans, or approximately 1.7% of the voting population, contributed to any party or candidate. Brief for Rodney A. Smith as Amicus Curiae Supporting Petitioner at 4, *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2002) (No. 02-1674). During the 2010 election cycle, 0.53% of the U.S. population accounted for two-thirds of all the money donated to parties and candidates. Ctr. for Responsive Politics, *Donor Demographics*, OpenSecrets.org (last accessed May 11, 2013) http://opensecrets.org/overview/donor demographics.php.

Additionally, aggregate contribution limits are anticompetitive in that they reduce the ability of parties to help challengers defeat incumbents. Research indicates that limits on contributions, particularly to political parties, not only have a substantial negative effect on a challenger's chances of success against an incumbent, but also reduce the overall number of challengers who run for election. *See* John R. Lott, Jr., *Campaign Finance Reform and Electoral Competition*, 129 Pub. Choice 263, 292 (2006). Such effects are due to the fact that aggregate contribution limits, and other campaign finance restrictions, benefit incumbents by making it difficult for challengers to raise enough money. *Id.* Incumbents already possess a great deal of political capital, and, as a result, parties are less likely to invest their funds, limited substantially by aggregate

contribution limits, in the uphill battles of challengers. *Id.* Aggregate limits do not decrease the presence of corruption, but they do artificially curtail the pool of viable candidates available to parties.

B. *Political parties play unique and vital roles in the political process and must be given the freedom and opportunity to acquire resources to fulfill their important roles.*

The freedom to associate in pursuit of common political ideals is "an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 214 (1996) (citing NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460 (1958)). As a primary conduit of that important liberty interest, political parties play a vital role in our "constitutional tradition." *Colorado Republican Fed. Campaign Comm. v. Fed. Election Comm'n*, 518 U.S. 604, 630 (1996) (Kennedy, J., dissenting); *see also id.* at 616 (majority opinion) (noting that "independent expression of a political party's views is 'core' First Amendment activity").[5] Parties are able to aggregate

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[5] *See, e.g.*, *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357–58 (1997) ("The First Amendment protects the right of citizens to associate and to form political parties for the advancement of common political goals and ideas."); *Norman v. Reed*, 502 U.S. 279, 288 (1992) (noting the "constitutional right of citizens to create and develop new political parties"); *see also Davis v. Bandemer*, 478 U.S. 109, 144–45 (1986) (O'Connor, J., concurring) ("There can be little doubt that the emergence of a strong and stable two-party system in this country has contributed enormously to sound and effective government. The preservation and health of our political institutions, state and

the views of many into discrete and clear viewpoints, create compromise-based solutions when confronted with many different positions, and then work towards translating those views into policy. However, aggregate limits prevent parties from serving these key functions because, as demonstrated in Part I.A, aggregate limits divert important resources from political parties.

Political parties have been an essential part of American politics from the very first votes of Congress. *See generally* John H. Aldred, Why Parties? 67–101 (2d ed. 2011). Parties now perform the "real work of American politics." Harvey Mansfield, Political Parties and American Constitutionalism, in American Political Parties and Constitutional Politics 3 (Peter W. Schramm & Bradford P. Wilson eds., 1993). There are few American institutions with a more important role in electoral politics and actual representation of voters: "Political parties have repeatedly been acknowledged as the critical link to democratic governance." *Handbook of Party Politics* 1 (Richard S. Katz & William Crotty eds., 2006). The volumes of legal and political science literature are peppered with expositions on the legal, theoretical, and practical importance of political parties. *See id.* (identifying several landmark studies on the role of political parties).

Political parties are unique in their breadth and importance. Because of their unique characteristics,

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federal, depends to no small extent on the continued vitality of our two-party system, which permits both stability and measured change.")

they serve at least three key functions: aggregating views, moderating mainstream political views, and mobilizing citizens to become active in politics.

1. Political parties are well-equipped to aggregate policy views and produce a common platform.

First, one of the most important roles of a political party is the aggregation function. Aggregating views is the process by which political parties take disparate and often competing interests and distill them into a common set of views. When parties act in this way, they are sometimes known as "encompassing organizations" because they encompass a great number of different viewpoints. *E.g.,* Richard Jankowski, *Preference Aggregation in Political Parties and Interest Groups: A Synthesis of Corporatist and Encompassing Organization Theory*, 32 Am. J. Pol. Sci. 105 (1988).

Many ideas that are mainstream today once began as fringe ideas, supported by only small players in the political arena. But many of those ideas were eventually funneled into political parties and given the platform they needed because of the breadth and reach of political parties. *See* Clinton Rositer, Parties and Politics in America 42–44 (1960). Political parties are "perhaps best fitted of all agencies to convert formless hopes or frustrations into proposals that can be understood, debated, and, if found appealing, approved by the people." *Id*. at 42.

A simple example of the aggregation function occurs when parties are faced with related policies that can have important overlapping but non-obvious effects:

> For example, the steel industry might be pursuing protectionism to save itself from foreign competition. If protectionist legislation is passed, other countries might reciprocate with import restrictions, for example, against U.S. electronics. However, if both steel and electronics were represented by the same association, that association would have to take into consideration the externality (countervailing trade restrictions) in proposing trade legislation. Since such an encompassing organization, by definition, represents both the steel and trade industry, the externality . . . is not external . . . Therefore, the probability that such an encompassing organization would pursue protectionist trade policies is substantially reduced.

Id. This example demonstrates how parties that represent factions with similar but occasionally differing views can aggregate views into a common position beneficial to all. Modern major political parties are quite simply too large to be controlled by any single faction. *See Branti v. Finkel*, 445 U.S. 507, 582 (1980) (Powell, J., dissenting) ("[Broad-based parties] serve as coalitions of different interest that combine to seek national goals. The decline of party strength inevitably will enhance the influence of special interest groups whose only concern all too often is how a political candidate votes on a single issue.").

While parties are well-equipped to consider the full spate of externalities that arise from a given position, single-issue organizations are less likely to consider the full range of costs and benefits. Single-

issue organizations are more likely to be the lone recipients of the benefits from their desired position and are less likely to be harmed by the true costs. *See* Mancur Olson, The Rise and Decline of Nations 46–47 (1982). The size and breadth of political parties, however, in contrast to comparable Super PACs and single-interest organizations, makes parties more likely to consider a wide variety of viewpoints.

2. Political parties tend to moderate political views.

Second, parties can be an important mechanism for moderating political views. Political parties tend to be moderating forces in American politics because of their fierce quests for votes and their need to appeal to as many voters as possible. In order to appeal to as many voters as possible, parties frequently moderate their positions and rhetoric. William J. Keefe, Parties, Politics, and Public Policy in America 69–71 (8th ed. 1998). Even when some party leaders may *want* to take extreme positions, the size and breadth of political parties mean that nearly all major decisions are the result of moderating compromise. *Id.* at 70. Moreover, they serve an important role in creating compromise within narrowly focused factions; they create one clearinghouse for ideas to be developed and then put into action. *See generally* Kay Lawson & Thomas

Poquntke, How Political Parties Respond: Interest Aggregation Revisited (2004); Jankowski, *supra*.[6]

The need for political parties to play their moderating role is more salient today than ever before. By at least one measure, the recently elected 112th Congress was the most polarized ever, featuring an uptick in ideological polarization from both parties. Dylan Matthews, *It's Official: The 112th Congress was the Most Polarized Ever*, Wash. Post: Wonkblog (Jan. 17, 2003), http://www.washingtonpost.com/blogs/wonkblog/2013/01/17/its-official-the-112th-congress-was-the-most-polarized-ever/. The only good news is that "it is mathematically impossible for [C]ongress to get much more polarized." Jonathan Haidt & Marc J. Hetherington, *Look How Far We've Come* (Sept. 17, 2012), http://campaignstops.blogs.nytimes.com/2012/09/17/look-how-far-weve-come-apart/.

National politics have always seen an ebb and flow between polarized and centrist politics, but aggregate contribution limits threaten to impose a structural change that clogs the natural pendulum of national politics. The need for parties to serve as a clearinghouse of ideas has never been greater.

The widely disseminated attack ads from the 2012 campaign are illustrative of the effect that polarization can have on civic discourse. *See* Part I.A.2. When unaccountable Super PACs and 501(c)(4) organizations run negative attack ads, they

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[6] For further discussion on the role of Super PACs and 501(c)(4) organizations in politicizing the electoral process, see Part I.B.

quickly dominate the news cycle, thereby hijacking the national debate over important issues. Increasingly powerful, polarized organizations not only control how candidates and parties behave, but how ordinary citizens view national politics. Comparatively moderate political parties are less likely to produce and air the same number and type of attack ads precisely because they are more accountable for their behavior.

3. Political parties are uniquely capable of mobilizing and energizing citizens.

Finally, political parties play an important role in mobilizing citizens to vote. Political parties are able to perform this function because their strengths align well with the factors that most heavily influence voter engagement and turnout. Generally, voter turnout is a function of (1) underlying individual interest in an election, (2) enthusiasm for a race based on the attention it receives, and (3) labor-intensive efforts to mobilize voters on a nearly person-to-person basis. *See* Russell J. Dalton et al., Political Parties and Democratic Linkage: How Parties Organize Democracy 57 (2011); James W. Endersby et al., *Electoral Mobilization in the United States*, *in* Handbook of Party Politics 330 (Richard S. Katz & William Crotty eds., 2006). One study from the 1990s revealed that persons who were affiliated with one of the two major American political parties were "more likely to have voted, to be interested in, pay attention to, or care about the results of the presidential elections, than persons unaffiliated with a political party, by significant margins." Brief Amicus Curiae Northern California Committee for

Party Renewal et al. at 15 n.15, *California Democratic Party v. Jones*, 530 U.S. 567 (2000) (No. 99-401), 2000 WL 245536.

Political parties are particularly well suited to address the last two factors, enthusiasm and voter turnout. Their human resources and organization provide a platform through which they can call attention to elections and reach out to individual potential voters. Individualized contact has been identified as a vital element in voter participation studies and social science research supports the view that voters turn out with increased frequency if they are personally asked to do so. *See* Donald P. Green & Alan S. Gerber, Get Out the Vote: How to Increase Voter Turnout (2d ed. 2008). The most effective techniques for getting citizens engaged in elections are also the most organizationally challenging; reaching out to voters year after year requires a stunning amount of resources. Because of their access to volunteers and party faithful, political parties are especially gifted at bringing voters to the voting booth. *See* Dalton et al., *supra*, at 57–74; *see also* Robert Stein et al., *Early Voting in Texas: Electoral Reform, Party Mobilization and Voter Turnout, prepared for delivery at the annual meeting of the American Political Science Association*, Sept. 1-4, 2005, Washington, D.C., *available at* http://www.nonprofitvote.org/download-document/electoral-reform-party-mobilization-and-voter-turnout.html ("[W]ithout the efforts of political parties and their candidates, electoral reforms are likely to continue to have a marginal effect on voter turnout.").

For political parties, their "livelihoods and very survival depend[] on who turns out to vote." Dalton

et al., *supra* at 57.[7] Out of necessity then, parties have "developed extensive mechanisms to identify potential voters and to mobilize them on election day." *Id.*

Policy-oriented groups and get-out-the-vote organizations continue to influence voter mobilization, "but their resources and efforts pale in comparison with the activities of political parties." *Id.* at 58. In the last decade, political parties have taken note of social science research demonstrating the importance of personal contact and have "invested substantial resources in [get out the vote efforts], canvassing, and grassroots programs." Endersby et al., *supra*, at 334.

C. *Aggregate contribution limits have the unique effect of increasing detrimental competition between party members.*

Among campaign finance restrictions, aggregate contribution limits impose unique harms on candidate and parties. Among the most notable unique harms is that they create competition within parties for coveted donor support. Forced *intra*-party competition has the effect of negatively decreasing cooperation and compromise, and instead forces

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[7] In this way, political parties differ dramatically from policy-oriented Super PACs and 501(c)(4) organizations. Groups advocating a particular position are concerned with garnering enough votes in the legislature for their policy preferences, regardless of how those votes come to be. Political parties, by comparison, have a much more direct and single-minded interest in who turns out to vote: the scope of their governing power largely begins and ends in the election process.

factions to break away from the party apparatus to jockey for funds. *See* Brief for Appellant Shaun McCutcheon at 28–31.

Intra-party cooperation and cohesion is threatened by the aggregate contribution limit because the limit forces candidates and elected officials to fight for the limited funds available for their general cause. For example, a wealthy donor with fervently Democratic ideals might choose to give the maximum base contribution to a dozen different Democratic party committees at the national, state, and local levels, as well as to individual candidates. But because of the aggregate limit, she can give that maximum contribution to only a handful of those committees and fewer candidates. The aggregate limit incentivizes committees and individual candidates to move toward the areas where they can jostle for contributions from key donors. Without the aggregate limit—in other words, with only the base limit—party officials at every level could work together to build a comprehensive platform without fear of losing donations to *other parts of their own organization*.

D. *This Court has heard and rejected state interests similar to the ones posited by the Appellee for upholding aggregate limits in this case.*

This Court has frequently recognized that political parties have a right to a certain degree of autonomy and self-governance that largely stems from the First Amendment guarantee of the right to association. *See, e.g.*, *California Democratic Party v.*

Jones, 530 U.S. 567, 572 (2000) ("Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views. The formation of national political parties was almost concurrent with the formation of the Republic itself.") (citation omitted). While those cases differ from the one at bar in some ways, they all signal this Court's recognition of the important and unique value of political parties. This Court's precedents also caution against the overregulation and marginalization of parties. Against this precedent, aggregate limits impermissibly hamper the right of political parties to set their own agenda and interact with their own membership.

In the early 1970s, the Court acknowledged that government intervention affecting parties implicated "[v]ital rights of association" even in the face of well-established state interests. *See* Lowenstein, *supra*, at 457. In later cases, this Court has always been careful to protect the right of association that belongs to both the party and its members. *See, e.g.*, *Cousins v. Wigoda*, 419 U.S. 477 (1975) (overturning a state court intervention into a political party's internal affairs).

Through the 1980s to the current day, the Court continued to expand the right of association for political parties. The Court has been protective of the right of political parties to "broaden the base of public participation in and support for [their] activities," even going so far as to recognize that broadening a base of support "is conduct undeniably central to the exercise of the right of association."

Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 215 (1986); *see also supra* Part I.B (noting the important role parties play energizing citizens and mobilizing them to vote). This skepticism of government intervention into the affairs of political parties has continued in more recent cases. *See, e.g.*, *California Democratic Party v. Jones*, 530 U.S. 567 (2000); *Eu v. San Francisco Democratic Central Comm.*, 489 U.S. 214 (1989).

These cases and others demonstrate this Court's consistent and strong recognition of party rights, even in the face of significant state interests. In each of the cases where the Court upheld party autonomy over state regulation, state governments asserted substantive and meaningful interests. However, those interests were rarely strong enough to overcome the freedom of association recognized for political parties.

For example, in *Tashjian v. Republican Party of Connecticut*, Connecticut defended a closed primary on the grounds that it "ensur[ed] the administrability of the primary system, prevent[ed] raiding, avoid[ed] voter confusion, and protect[ed] the responsibility of party government." 479 U.S. 208, 217 (1986). In *San Francisco Democratic Central Committee*, California defended a prohibition on endorsements by official governing bodies with twin state interests in "stable government and protecting voters from confusion and undue influence." 489 U.S. 214, 226 (1989). In *California Democratic Party v. Jones*, California offered a whopping seven state interests in support of its blanket primary, including: "producing elected officials who better represent the electorate," "expanding candidate

debate beyond the scope of partisan concerns," and "ensur[ing] that disenfranchised persons enjoy the right to an effective vote." 530 U.S. 567, 582–86 (2000).

This Court was able to quickly evaluate and discard each of these purported state interests. Some of the discarded interests were labeled as worthwhile and "highly significant values." *See, e.g.*, *id.* at 584. But this Court declined to evaluate those values "in the abstract," *id.*, instead choosing to first decide whether the state's *particular* restriction furthered a *particular* interest. Concluding that the state's attractive values were hardly furthered by their restrictions on the vital rights of parties, this Court discarded even the most weighty state interests.

II. Data Shows that Aggregate Limits Do Not Affect the Perception of Corruption.

The aggregate limits cannot be justified by the government interest in preventing the appearance or occurrence of corruption. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 344 (2010) (citing *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (per curiam)).

The government interest that justifies campaign finance restrictions is quite narrow: It is strictly limited to preventing the appearance or occurrence of *quid pro quo* corruption. The aggregate limits, imposed in addition to the base contribution limits, must be justified by a cognizable risk that the base limits will be circumvented, *Buckley*, 424 U.S. at 38, allowing an individual to avoid the government restrictions and engage in activity that is covered under the narrow definition of quid pro quo corruption.

Data suggests that campaign finance restrictions (including the aggregate limits) have been largely ineffective at improving the public's trust in government. Instead, public mistrust in the government is largely influenced by other factors, and in some cases, stricter campaign restrictions have even increased perceptions of corruption.

A. *The government interest must be constrained to quid pro quo corruption or the appearance thereof, narrowly defined by the Supreme Court.*

The government interest in preventing the appearance of corruption is strictly limited to *quid pro quo* corruption: "dollars for political favors." *Citizens United*, 558 U.S. at 360 (citing *Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985)).

Without a strict *quid pro quo* definition, the term "corruption" is so vague it becomes meaningless. Without such a definition, the government interest in "corruption" is "unbounded and susceptible to no limiting principle." *Id*. (citing *McConnell*, 540 U.S. at 296 (Kennedy, J., concurring in the judgment in part and dissenting in part)). Absent this "limiting principle," the term "corruption" can improperly be applied to any number of nebulous concepts that the government has no proper interest in managing, such as: 1) gratitude, 2) citizens' access to elected officials, and even 3) inequality in amounts of political speech.

Gratitude does not constitute corruption. The Court has made clear that the mere fact that an elected official feels grateful does not give rise to the

sort of corruption that the government has an interest in preventing. *Id.*; *McConnell* 540 U.S. at 297 (Kennedy, J., concurring in the judgment in part and dissenting in part). This limitation makes sense: an elected official may feel grateful for a local newspaper endorsement or the votes of constituents. This gratitude, however, is not *quid pro quo* corruption.

Likewise, access to, or influence over, an elected official is not corruption. *Citizens United*, 558 U.S. at 360 ("the appearance of influence or access will not cause the electorate to lose faith in this democracy"); *McConnell*, 540 U.S. at 297 (Kennedy, J., concurring in the judgment in part and dissenting in part). As the Court has noted, our entire system of representative democracy is "premised on the responsiveness" of elected leaders to their constituents. *McConnell*, 540 U.S. at 297 (Kennedy, J., concurring in the judgment in part and dissenting in part). The court has been clear that "the appearance of influence or access will not cause the electorate to lose faith in this democracy." *Citizens United*, 558 U.S. at 360.

Finally, impermissible "inequality" arguments about the "inequality" of political speech are often implicit in overbroad definitions of corruption. *See* David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 Colum. L. Rev. 1369, 1371–75 (1994) (arguing that much of the "corruption problem" could be eliminated if the "inequality problem" was solved). However, a government interest in "equalizing" political speech has long been rejected by the Court. *Citizens United*, 558 U.S. 349-52; 424 U.S. at 47–49 ("[T]he concept

that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment"). Just as the discredited "anti-distortion" argument was rejected as implicitly seeking to "equalize" political speech, *Citizens United,* 130 S. Ct. at 904, managing the public's perception of corruption caused by unequal amounts of political speech does not constitute a proper government interest. *Id.* at 910.

In sum, the Court has been clear that the government interest in managing public perception is strictly limited to perceived *quid pro quo* corruption and does not extend to cover gratitude, access, or inequality.

B. *Data demonstrates that the aggregate limits do not affect the public's perception of quid pro quo corruption.*

Campaign finance limits have no effect on the public perception of corruption, as demonstrated by empirical surveys of public opinion over the last several decades. This suggests that the marginal effect of the additional aggregate limits likewise does not improve the public's trust in the government.

1. The aggregate limits have no effect on the public perception of corruption, as demonstrated by empirical surveys of public opinion over the last several decades.

The aggregate limits, then, cannot be justified as fulfilling a legitimate government interest in

decreasing the perception of corruption because the evidence suggests that campaign finance restrictions – including the aggregate limits – have had no appreciable impact on that perception. This evidence calls into question the *Buckley* assumption that uncontrolled campaign finance will result in an increased public appearance of government corruption. *Buckley*, 242 U.S. at 27. It should also cast doubt on the argument that the limits are "closely drawn," *McConnell* 540 U.S. at 136, or even substantially related to the asserted government interest. Aggregate limits have no impact on the perception of corruption.

Data demonstrates that the aggregate limits enacted in 1974 (Federal Election Campaign Act ["FECA"]) and 2002 (Bipartisan Campaign Reform Act ["BCRA"]) have not been successful at reducing the appearance of corruption among the public or increasing the public's trust in the government. [8] Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. Pa. L. Rev. 119, 147 fig.1 (2004) (demonstrating that public trust levels dropped significantly in the early 1970s and 80s, suggesting that the 1974 passage of FECA, including the original aggregate limits had

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[8] As noted above, this is one of the two traditional government interests that justify campaign finance restrictions. The other interest, preventing the *occurrence* of corruption, is beyond the scope of this brief and will not be discussed. It is worth noting, however, that both government interests are strictly limited to *quid pro quo* corruption. *Citizens United*, 558 U.S. at 360.

little to no effect on the public perception of corruption).

The public perception that the government was "crooked" or controlled by "special interests" lessened for a short time following FECA. However, public distrust of government soon began to rise again and by the early 1990s, public trust in the government was even lower than pre-FECA levels, notwithstanding the FECA restrictions, including aggregate limits. *Id*. Although public trust in the government improved in the mid- to late-90s, this increase in trust occurred despite the enormous growth of "soft money" expenditures during this time. *Id*. at 148.

In 2002, BCRA was enacted, imposing new campaign restrictions, including aggregate limits. 2 U.S.C. § 441a(a)(3) (2006). Like FECA, the new law had little appreciable impact on the public levels of trust in the government. Persily & Lammie, *supra*, at 149. Although there was a brief increase of public trust following BCRA, *id*., within a mere two years, trust returned to the same low levels that persisted prior to BCRA. *Id*. The brief increase came despite the fact that the law increased the dollar amount of donations allowable under the aggregate limit, 2 U.S.C. § 441a(a)(3) (2006).

The fact that the FECA and BCRA restrictions, including aggregate limits, have had such a limited effect on the public's trust in government calls into question the utility of the aggregate limits.

Additionally, surveys of state laws with strict aggregate limits show little impact on voter "engagement" (as measured by participation levels).

Michael A. Nemeroff, *The Limited Role of Campaign Finance Laws in Reducing Corruption by Elected Public Officials*, 49 How. L.J. 687, 704–14 (2006). This implicitly suggests that even in states without an aggregate limit on campaign finance, there is not such a widespread perception of corruption that it impacts the willingness of voters to participate in the election.

In the past, the government has sought to justify campaign finance restrictions by claiming the restrictions result in a positive effect on the perception of corruption, but data used in these arguments have been based on polls relying on misleading or vague questions. In *McConnell*, surveys purporting to demonstrate an improvement in public perception of corruption were not properly focused on the limits at issue. Rebuttal Declaration of Q. Whitfield Ayres, *McConnell v. Fed. Election Comm'n*, 251 F. Supp. 2d 176 (2003) (No. 02-874). When the surveys were repeated using the proper contribution limits, the limits were shown to have no appreciable impact on public's perception of corruption. *Id.*

Additionally, measures of public opinion used to justify the aggregate limits are irrelevant unless they're limited to the perception of *quid pro quo* corruption, given the narrow government interest recognized by this court. *Citizens United*, 558 U.S. at 360. Much of the data presented by the government in *McConnell* relied on surveys that measured the perception of "unfairness" or "influence of special interests" in the current government. *See generally* Persily & Lammie, *supra*, at 139–44 (criticizing many of the public opinion polls used in *McConnell*

for not being properly focused on *quid pro quo* corruption, but rather measuring public perception about "influence" or "access"). Such overbroad surveys of public opinion cannot be used to justify the aggregate limits. The relevant government interest is strictly "limited to quid pro quo corruption." *Citizens United*, 130 S. Ct at 909–10.

In sum, the aggregate limits, as with most campaign finance restrictions, have not been successful at impacting — let alone substantially reducing — the public perception of *quid pro quo* corruption. Surveys that purport to demonstrate otherwise are often inapplicable because they rely on general notions of unfairness rather than the appearance of *quid pro quo* corruption, narrowly defined by the Supreme Court.

2. The public's distrust in the government is caused by factors other than campaign spending, so the aggregate limits will never succeed in reducing the appearance of corruption.

As demonstrated above, the aggregate limits do not impact the public's perception of corruption, and in fact, the public perception of corruption is controlled by a variety of other factors that are independent of campaign finance.

Historically, mistrust in the government has been driven by factors unrelated to the financing of political campaigns. Factors including the Vietnam War and a general increase in public cynicism have spurred a decline of trust in the government that has continued from the 1950s to today. David M. Primo & Jeffrey Milyo, *Campaign Finance Laws and*

Political Efficacy: Evidence from the States, 5 Election L. J. 23, 26–27 (2006). In the 1980s, the level of distrust grew higher with stagflation and the Iran hostage crisis. *Id*.

More recent studies have likewise shown that perceptions of corruption are controlled by a variety of factors unrelated to the aggregate limits – for example, the popularity of the president, government fiscal policy, whether the country is in economic growth or recession, and individual factors, such as personal views about society. *Id*. at 121, 173. Taken together, these studies cast grave doubt on the claim that the government interest in reducing perceptions of corruption can be addressed through aggregate limits.

The grave doubt is only magnified by the long-standing public belief that campaign finance laws in *any* form will not be successful – for example, at decreasing the influence of "special interests." Measures of how people perceive the power of such special interest groups are often used to evaluate the public's perception of the government's trustworthiness. *See, e.g.,* Persily & Lammie, *supra*, at 142–43 (discussing the results of Gallup poll that focus on the public's perception of "special interest" groups' influence over the government). For at least four years prior to the passage of the BCRA, over sixty percent of Americans consistently believed that campaign finance regulation would not diminish the power of special interests. Rebuttal Declaration of Q. Whitfield Ayres, *McConnell v. Fed. Election Comm'n*, 251 F. Supp. 2d 176 (2003) (No. 02-874). After the passage of the BCRA, this number is essentially unchanged. Today, two-thirds of Americans

consistently believe that "special interests" will maintain power regardless of campaign finance reforms. *Id.*; Persily & Lammie, *supra*, at 147. The fact that neither BCRA nor FECA has had an impact on the perceived power of special interests – a measure of the public's trust in the government – suggests that campaign finance restrictions, including aggregate limits, cannot decrease distrust of the government generally, no less that component of distrust flowing from the perception of corruption.

Moreover, upticks in the public perceptions of corruption may actually be due to the prominence of stricter campaign finance regulations in the public debate. *See* Beth Ann Rosenson, *The Effect of Political Reform Measures on Perception of Corruption*, 8 Election L.J. 31 (2009). Stricter campaign finance laws typically result in an increase in alleged campaign finance violations or investigations thereof, both of which tend to increase the public's perception of corruption. *Id.* at 40. Data actually points to an increase in perceptions of corruption where campaign finance laws are more restrictive. Even the most informed and knowledgeable citizens perceive greater corruption where campaign finance laws are more restrictive. *Id.* at 42–43. In a study based on the perceptions of corruption in state governments, campaign finance regulation resulted in a higher public perception of corruption. *Id.* at 40.

The possibility that campaign finance restrictions, including the aggregate limits, may actually be increasing the perception of corruption is sobering. These restrictions may be the ultimate "vicious cycle": public trust in government drops due to

political events; the government imposes new base and aggregate limits to address the drop; however, the new focus on campaign finance and increased reports of violations causes an increase in the public perception of corruption; the public perception of corruption justifies the imposition of stricter contribution limits; *ad infinitum*.

In conclusion, the aggregate limits cannot be justified by the government's interest in preventing the perception of corruption. Empirical data demonstrates that the aggregate limits have been ineffective at improving public trust of the government, largely because trust in the government is controlled by other factors. This evidence casts grave doubts on the government's theory that it can prevent the perception of corruption by restricting individuals' aggregate donations. *Cf. Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 394–95 (2000) (noting that if "doubt [was cast] on the apparent implications of *Buckley's* evidence, then that may require the government to provide more extensive evidentiary documentation").

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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