No. 12-536

In the Supreme Court of the United States

SHAUN McCUTCHEON AND
REPUBLICAN NATIONAL COMMITTEE,
Plaintiffs-Appellants,
v.

FEDERAL ELECTION COMMISSION,
Defendant-Appellee.

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

BRIEF OF TEA PARTY LEADERSHIP FUND, NATIONAL DEFENSE PAC, COMBAT VETERANS FOR CONGRESS PAC, CONSERVATIVE MELTING POT PAC, AND FREEDOM'S DEFENSE FUND PAC AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

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INTEREST OF *AMICI CURIAE*[1]

The Tea Party Leadership Fund ("TPLF") is a non-connected hybrid[2] political action committee ("PAC") dedicated to promoting individual freedom, limited federal government, and returning political power to the states and the people.

TPLF registered with the Federal Election Commission ("FEC") on May 9, 2012. Since then, TPLF has received contributions in mostly small-dollar amounts from over 25,000 individuals and has contributed to more than five candidates, and thus is considered a multicandidate committee permitted by law to make contributions of up to $5,000 to each

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[1] Pursuant to Sup. Ct. Rule 37.6, co-counsel for Appellant McCutcheon has made a monetary contribution to partially fund the preparation of this brief. No other person, other than *amici curiae,* their members, or their counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

[2] A hybrid PAC is a political action committee that maintains a separate, non-contribution ("Carey") account from which it may receive unlimited contributions to make independent expenditures but which may receive only limited contributions from individuals with which to make PAC contributions to candidates. *Carey v. FEC*, 791 F.Supp.2d 121 (D.D.C. 2011). Throughout this brief, "PAC" refers to traditional PACs, *i.e.*, candidate-connected and non-connected political action committees, and hybrid PACs. Traditional PACs are subject to limits on contributions they may receive and contributions they may make to candidates and other committees; however, unlike individuals, PACs face no aggregate limit of contributions they may make to candidates or committees. *See* FED. ELECTION COMM'N, THE FEC CAMPAIGN GUIDE FOR NON-CONNECTED COMMITTEES at 1-2 (May 2008).

candidate per election. By pooling these contributions, TPLF is able to express its unique political perspective, engage in independent advocacy and contribute to political candidates. But under the aggregate contribution limits at issue in this case, individuals wishing to contribute to TPLF are prohibited from doing so if they have already reached their arbitrary and unconstitutional aggregate limits of contributions made to other committees or candidates, thereby preventing TPLF pooling such funds to make contributions to candidates that TPLF supports.

The National Defense Political Action Committee is dedicated to electing military veterans to the U. S. Congress who share the traditional American values of a limited fiscally responsible government, ensuring a strong national defense, protecting the rights/interests of service members, and our historic commitment to our veterans. The National Defense Political Action Committee, a hybrid non-connected PAC, was formed in 2000 and is chaired by Rear Admiral [Ret.] James J Carey. See *Carey v. FEC,* 791 F.Supp.2d 121 (D.D.C. 2011).

The Combat Veterans For Congress Political Action Committee (CVFC) is dedicated to supporting the election of fiscally conservative combat veterans to Congress. CVFC supports veteran-candidates who believe in limited government, will rein in the out-of-control spending of Congress, are committed to preserving and defending the U.S. Constitution, and will support the independence and freedom of the individual as outlined in the Bill of Rights. CVFC supports candidates who are also dedicated to promoting the free enterprise system creating the

greatest economic engine in the history of mankind, who support a strong national defense, and will endorse the teaching of U.S. history and the Founding Fathers' core values in educational institutions. CVFC, a "traditional" non-connected PAC, was formed in 2009 and is chaired by Captain [Ret.] Joseph John.

Conservative Melting Pot Political Action Committee was created to bring the GOP back to its roots as the party promoting equality and economic opportunity for all, by supporting federal and state candidates, particularly minorities and women, who are committed to taking the conservative message to every demographic. Conservative Melting Pot Political Action Committee, a "traditional" non-connected PAC, was formed in 2013 and is chaired by Crystal Wright.

Freedom's Defense Fund PAC is dedicated to the principles of limited government, as the Founders understood them. Freedom's Defense Fund believes that when government oversteps the bounds of its authority, it does so at the expense of liberty, and that in order for America to prosper it must be free from the shackles of the nanny state. Freedom's Defense Fund Political Action Committee, a "traditional" non-connected PAC, was formed in 2012 and is chaired by Michael Centanni.

This case is particularly important to all *amici* because the aggregate contribution limits prohibit like-minded individuals from contributing to and associating with *amici* and other PACs once those individuals have reached their aggregate contribution limits. The aggregate contribution limits also effectively bar *amici* and all other PACs from

associating with such individuals and from speaking "too much" in the political marketplace, thereby diminishing PAC speech relative to that of candidates and national party committees. In short, *amici*'s First Amendment rights of association and speech are unconstitutionally abridged by the aggregate individual contribution limits.

SUMMARY OF THE ARGUMENT

The aggregate contribution limits imposed on individuals not only critically infringe upon their core First Amendment rights, but also inflict a special constitutional injury on the exercise of political speech by all PACs, including *amici*. PACs play an integral part in the American political process, and their robust participation in state and federal elections is fundamental to our very system of self-governance. With distinct viewpoints focusing on issues spanning the political spectrum, PACs provide the means for all individuals to join with like-minded citizens and make their voices heard. Indeed, establishing a PAC is *mandatory* for individuals who wish to engage in collective political advocacy independent from campaigns and national party committees. *See* 2 U.S.C. § 431(4); 11 C.F.R. § 100.5(a); § 102.1(d). Any two people who wish to pool their resources and exercise their First Amendment rights by participating in the political campaign process must register as a PAC within ten days of their contributions or expenditures exceeding $1,000, and are subject to the myriad of statutory provisions and FEC regulations. *Id.* PACs are immediately subject to both base limits on contributions from individuals and aggregate contribution limits that limit PACs' ability to exercise

their core First Amendment rights. 2 U.S.C. § 441a(a)(3)(B).

The base contribution limits bar PACs from soliciting or accepting contributions from individuals of more than $5,000 per election. Moreover, once an individual has met his or her aggregate biennial contribution limit of $74,600 to non-candidate PACs and state and local party committees, that individual is barred from contributing any funds at all to additional PACs, ranging from even one dollar to the small, non-corrupting amount of $5,000. *See* 2 U.S.C. § 441a(a)(1)(C); § 441a(a)(3)(B). Individuals are further barred from contributing more than $48,600 to all candidate committees. Thus, the total aggregate limit of all political contributions from individuals cannot exceed $123,200. Further, the current legal regime arbitrarily does not index individual contribution limits to PACs to account for inflation, as is the case for an individual's contributions to all other candidate and party committees. Thus, PAC speech unfairly declines biennially in proportion to that of other political participants. *See* U.S.C. § 441a(c)(1).

The government can only justify such First Amendment injury by demonstrating a compelling governmental interest, which the regulation is narrowly tailored to advance or protect. *See Citizens United v. FEC*, 558 U.S 310, 340 (2010). But in order for a contribution or expenditure limit, both of which "operate in an area of the most fundamental First Amendment activities," *Buckley*. *Valeo*, 424 U.S. 1, 14 (1976), to survive *any* level of constitutional scrutiny, the government bears the burden of establishing a valid interest in preventing corruption or its

appearance. *See FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985) ("*NCPAC*"). As this Court made clear in *Citizens United,* the only kind of "corruption" that may be regulated is the actual or appearance of a "*quid pro quo.*" *See Citizens United v. FEC*, 130 S. Ct. 876, 909 (2010). Preventing "*quid pro quo*" corruption is the only compelling governmental interest, and it is narrowly defined as an elected leader making legislative decisions (in Congress) or executive decisions (in the case of the President and his Cabinet) in return for financial support. Further, the regulation must be "closely drawn" and "avoid unnecessary abridgment of associational freedoms." *Wagner v. FEC*, No. 11-1841, 2012 WL 1255145, at *6 (D.D.C. 2012) (quoting *Buckley*, 424 U.S. at 25). Granting access and influence or showing gratitude do not amount to corruption; indeed, *amici* submit that regulating this behavior would unlawfully infringe on yet another important First Amendment right: the right to petition the government for a redress of grievances. *See Citizens United*, 130 S. Ct. at 909 (2010).

Here, the government has proffered no presently valid anti-corruption interest necessitating such serious infringement. In *Buckley v. Valeo*, this Court held that the single contribution ceiling for all contributions was constitutionally justifiable because it prevented individuals from circumventing contribution limits. 424 U.S. at 38. Thereafter, Congress enacted the 1976 Amendments to the Federal Election Campaign Act, which removed any possibility of lawful circumvention by adding new base limits on contributions to and by entities. Therefore, no cognizable government interest currently exists

sufficient to validate stifling highly protected political speech and association. Thus, the current aggregate limits at issue in this case established under the Bipartisan Campaign Reform Act of 2002 (BCRA) now serve as an impermissible "prophylaxis upon prophylaxis" as an anticorruption measure. See *FEC v. Wisc. Rt. to Life, Inc.*, 551 U.S. 449, 478-79 (2007) ("*WRTL*").

More significantly, the only compelling governmental interest in preventing *quid pro quo* corruption is totally absent with respect to contributions to PACs for a simple reason: unlike Members of Congress or the Executive, PACs do not introduce or vote on legislation, execute the laws, or otherwise bestow political favors. This absence of any possible corruption of PACs by individuals (or somehow twice-removed through PACs to the candidates the PACs support) is further underscored by the fact that the law does not impose *any* aggregate limits on contributions from PACs to candidates. Thus, there is no rational basis, let alone a compelling reason, for a law that limits the aggregate amount an individual may give to PACs, which have no legislative power, yet imposes *no* aggregate limit on the amount that PACs may contribute to incumbents who do, or to candidates who potentially will, wield such power. Moreover, if the aggregate limits are unconstitutional as applied to national party committees, as ably argued by Appellant RNC, then they are *a fortiori* unconstitutional as applied to non-connected PACs. After all, PACs have less influence on Members of Congress than their national party, and individual contributors to PACs even less so.

Amici urge this Court to adhere to well-developed First Amendment jurisprudence in this area and protect both an individual's and a PAC's First Amendment rights against unjustified government suppression. *See, e.g., Buckley v. Valeo*, 424 U.S. 1 (1976); *Citizens United v. FEC*, 558 U.S. 310 (2010). As this Court has explained, the Constitution "demands at least" that it "give the benefit of the doubt to speech, not censorship." *WRTL*, 551 U.S. at 482.

ARGUMENT

I. POLITICAL ACTION COMMITTEES HAVE FIRST AMENDMENT RIGHTS ENTITLED TO THE HIGHEST CONSTITUTIONAL PROTECTION

A. PACs Play An Important Role In The American Political System

PACs emerged as a natural outgrowth of our time-honored, constitutionally protected national tradition of collective advocacy. In 1944, the Congress of Industrial Organizations established what is recognized as the first PAC, as individual contributors banded together with a single common goal: raising money for President Franklin D. Roosevelt's reelection. *See* WHAT IS A PAC?, THE CENTER FOR RESPONSIVE POLITICS, http://www.opensecrets.org/pacs/pacfaq.php. In 1974, the first year for which FEC data regarding PACs is available, 608 PACs were registered. *See* FED. ELECTION COMM'N, PAC COUNT: 1974- PRESENT (Jan. 2013). Within ten years, the number of PACs had multiplied significantly, and over 4,000 PACs existed, spurring citizens' involvement in the campaign process

and driving robust political debate. *See id.* Today, thirty years later, just slightly over 5,000 PACs exist. *See id.* Creating a PAC is an effective vehicle by which individuals can engage in collective federal electoral advocacy independently from campaigns and national party committees. For two or more individuals, forming a PAC is not just desirable but also mandatory: even the smallest organization must register as a PAC with the FEC within ten days of its contributions or expenditures exceeding $1,000, and is subject to the myriad of statutory provisions and FEC regulations governing its operation. *See* 2 U.S.C. § 431; 11 C.F.R. § 100.5(a); § 102.1(d). Because "virtually every means of communicating ideas in today's mass society requires the expenditure of money," *Buckley*, 424 U.S. at 19, spending this nominal amount is necessary for any sort of successful political communication. Thus, though the First Amendment extends strong protection to "the freedom to join together in furtherance of common political beliefs," *Tashjian v. Republican Party*, 479 U.S. 208, 214-215 (1986), PACs provide the only means for likeminded individuals to do so collectively outside of the parties and campaigns themselves, and allow individuals to contribute to candidates whom the PACs believe best deserves their support. Because many individuals do not have the time or resources to research the record and suitability of candidates deserving support as do like-minded PACs, such as those that support the environment or those like *amici* that support limited government, PACs serve a vital screening function in the electoral process.

As such, PACs have developed immeasurable importance in American politics. With specific,

individualized viewpoints focusing on distinct but diverse issues spanning the political spectrum, PACs provide the means for all voters, regardless of party identity (or lack thereof), to find common ground with like-minded citizens and make their voices heard. Permitting individuals to pool resources in this manner has "undeniably enhanced" their ability to engage in efficient, valuable advocacy. *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958). But aggregate limits operate to substantially burden desired PAC speech, stifling these unique voices so integral to modern debate.

Unlike the cursory analysis the lower court gave the constitutional issues presented in this case, this Court must carefully and skeptically examine even the slightest restriction on First Amendment activities. The First Amendment is "premised on mistrust of government power," and this Court has been unwilling to permit even minimal governmental infringement. *Eu v. San Francisco*, 489 U.S. 214, 223 (1989) (explaining that the First Amendment "has its fullest and most urgent application" to free discussion about candidates for political office). As an essential mechanism of our system of self-governance, "political speech must prevail against laws that would suppress it, whether by design or inadvertence." *Citizens United*, 558 U.S. at 339.

"Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." *Buckley*, 424 U.S. at 14. Indeed, our entire system of democracy "is unimaginable without the ability of citizens to band together in promoting

among the electorate candidates who espouse their political views." *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574 (2000). This is especially so when ordinary citizens come together in voluntary associations to advocate for particular issues they are passionate about, taking into account the inherent value of collective action for effective advocacy. *NAACP v. Ala.*, 357 U.S. at 460. Citizens joining in groups for purposes of political advocacy is a practice "deeply embedded in the American political process," and its inherent value is that "by collective effort individuals can make their views known, when, individually, their voices would be faint or lost." *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 294 (1981).

Like-minded Americans therefore join together not only to add to the debate, but to do so in a meaningful, effective manner. To be effective, such political speech requires financial support. The general notion that there is "too much money" in the aggregate in political campaigns is a spurious one, let alone a compelling one that can be presented as a valid means of preventing *quid pro quo* corruption. If anything, *amici* submit that funding of important political speech pales in comparison to the hundreds of billions collectively spent on advertising commercial products, such as burgers and beer. *See* http://www.businessinsider.com/the-35-companies-that-spent-1-billion-on-ads-in-2011-2012-11?op=1.

B. PACs Enjoy First Amendment Protection

The First Amendment extends strong protection not only to individual contributors but also to group associations, including PACs. *See Citizens United*, 558

U.S. at 342-43. That such associations are not "natural persons" does not in any way diminish their rights to engage in political speech and advocacy. *See First Nat'l Bank v. Bellotti*, 435 U.S. 765, 776 (1978). In truth, most PACs are small and much more closely resemble the natural persons who organize and run them than they resemble large corporations, such as the bank in *Bellotti*. But the aggregate limits infringe on three First Amendment protections: speech, assembly or association, and the right to petition for redress of grievances.

The First Amendment guarantees that individuals voluntarily associating through PACs (and being forced by the FECA to register as such) are entitled to the highest constitutional protection. But the aggregate limits prevent PACs like *amici* from freely associating with willing contributors. TPLF and other *amici* want to accept contributions up to the non-corrupting amount of $5,000, and pool these resources for political advocacy purposes, including contributing to federal candidates. *See* 2 U.S.C. § 441(a)(a)(1). Countless putative speakers, such as Appellant McCutcheon, similarly wish to associate with PACs like TPLF and other *amici*, who share their viewpoints and can uniquely express those distinct perspectives. But the aggregate limits bar these speakers from contributing more than the circumscribed amounts and concomitantly prohibit TPLF, and all other PACs, from accepting these speakers' desired contributions. 2 U.S.C. § 441a(a)(3)(B). Because money is necessary for effective political speech, *Buckley*, 424 U.S. at 19, the aggregate limits circumscribe all PACs' ability to speak effectively. In today's media markets, the cost to candidates for getting their message out is ever

increasing, and candidates must necessarily rely on contributions from both individuals and PACs to communicate effectively. Similarly, PACs that also want to have an impact must accept and spend money to speak effectively.

II. THE AGGREGATE LIMITS DO NOT SURVIVE STRICT OR EXACTING SCRUTINY.

The lower court held and the FEC argued that the strict scrutiny test does not apply to contributions, and under the lower exacting scrutiny test, the aggregate limits are constitutional. *Amici*, however, agree with the Appellants that aggregate limits are more akin to speech and therefore, the higher strict scrutiny should apply. But in any event, the limits do not survive the lower exacting scrutiny test and arguably do not pass muster even under the rational basis test.

A. Aggregate Limits Do Not Serve Any Constitutionally Valid Government Interest

The government has a valid interest in preventing *quid pro quo* corruption or its appearance. *Buckley*, 424 U.S. at 27, 45, 47. This Court has defined corruption specifically and narrowly. "The hallmark of corruption is the financial quid pro quo: dollars for political favors." *NCPAC*, 470 U.S. at 497 (emphasis added). The government has a corresponding interest in preventing circumvention of contribution limits, which Congress ostensibly imposed to further a valid anticorruption interest. See *United States v. Danielczyk,* 683 F.3d 611, 618 (4th Cir. 2012), cert. denied, 133 S. Ct. 1459 (2013); *Wis. Right to Life State Political Action Comm. v.*

Barland, 664 F.3d 139, 153 (7th Cir. 2011). Under any level of scrutiny, when a law abridges a speaker's First Amendment rights, the government bears the burden of proving that a risk of corruption or its appearance exists to render the restriction necessary. *See id.*

The government cannot meet its burden either by sweeping, unsubstantiated speculation or by suggesting some lesser form of gratitude or access qualifies. See *Republican Nat'l Comm.*, 698 F. Supp. 2d 150, 158 (D.D.C. 2010). Nor can it meet its burden of establishing a real *quid pro quo* corruption risk by either fabricating such a risk or clinging to an outdated rationale, broadly asserting that individuals can circumvent contribution limits simply because it was possible almost forty years ago.

1. The 1976 FECA Amendments Rectified Any Circumvention Risk

Buckley held that only "large contributions" in separate donations trigger a quid pro quo corruption risk. 424 U.S. at 26. Because individuals can now contribute only $5,000 to any PAC per year, there can be no anti-corruption interest justifying aggregate limits unless it is likely that these base limits can be circumvented. See *id*. Such circumvention would entail "contribut[ing] massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party." *Id*. at 38.

In 1976, *Buckley* considered and upheld the single ceiling limit in effect at the time as a justifiable means

of preventing individuals from evading base contribution limits. *Buckley*, 424 U.S. at 38. But the Buckley Court was then considering a different law—one under which circumvention was entirely possible. See *id*. In direct response to the Buckley Court's circumvention concerns, Congress amended the FECA in 1976, enacting a number of measures directly targeted towards preventing the Court's feared evasion of contribution limits. Pub. L. 94-283, Title I, 90 Stat. 486 (May 11, 1976). The 1976 Amendments were thus specifically intended to limit additional methods of circumventing contribution limits —methods that the prior version of FECA had not addressed. *See generally* McCutcheon Brief at 40-43; RNC Brief at 19-23.

Accordingly, as even the lower court was forced to acknowledge, the amended FECA "include[d] a number of provisions designed to prevent evasion of the various [base] limits." *McCutcheon v. FEC,* 893 F. Supp. 2d 133, 136 (D.D.C. 2012) (three-judge court). Specifically, to eliminate the *Buckley* Court's apprehension regarding "massive" contributions, the Amendments implemented a new $5,000 per year limit on contributions by a person to any PAC. Pub. L. 94-283, Title I, 90 Stat. 486 (May 11, 1976); 2 U.S.C. § 441a(a)(1). The legislative history shows these new contribution limits for PACs were meant to "restrict . . . circumvent[ion]" of contribution limits, including by the proliferation of PACs that "appear to be separate entities pursuing their own ends, but are actually a means for advancing a candidate's campaign." See *California Medical Association v. FEC*, 453 U.S. 182, 198 n. 18 (1981) ("*CalMed*").

As additional assurance against the potential for circumvention, the 1976 Amendments added the nonproliferation provisions—a prophylactic measure designed specifically to prevent evasion of base contribution limits. *Id.* Finally, the Amendments also provided that all PACs sponsored by the same organization or individual would henceforth be treated as "affiliated" and held to a single contribution limit. Pub. L. 94-283, Title I, 90 Stat. 486 (May 11, 1976); 2 U.S.C. § 441a(a)(5).

Thus, the 1976 Amendments easily remedied any potential for circumventing base contribution limits, short of illegal earmarking. Quite simply, individuals now cannot lawfully evade the aggregate limit for PACs, and have been similarly unable to do so since 1976. The sole rationale for initially upholding the aggregate limits in Buckley has simply disappeared. *Buckley* at 38. Even the lower court readily conceded, "it is clear that contributing a large amount of money does not ipso facto implicate the government's anticorruption interest." 893 F. Supp. 2d at 139. Thus, the lower court dismissed the FEC's argument that large contributions "could easily exert a corruption influence" or an "appearance of corruption" as "sweep[ing] too broadly." *Id*.

Nevertheless, perhaps because the government failed to meet its burden of establishing a circumvention risk on its own, the lower court was forced to *sua sponte* offer several farfetched contingent scenarios where circumvention of base limits could somehow potentially occur by an individual contributing a large single check to joint fundraising party committees, which in turn could give collectively

their base limits to a single candidate. *Id*. at 140. But even in this unrealistic scenario, the only harm the lower court identified was the expression of "gratitude" to the contributor. *Id*. However, as will be discussed *infra*, this Court stated that eliminating such "gratitude" is not a compelling governmental interest: the only compelling government interest is eliminating *quid pro quo* corruption which can occur only with introducing or voting on legislation. *Citizens United*, 558 U.S. at 359-60. Regardless of the lower court's imaginative but dubious contingent scenarios, none of them actually involved PACs—nor could they, given the anti-conduit measures Congress enacted in its post-Buckley 1976 Amendments. PACs cannot transfer unlimited funds to other PACs.

Moreover, the government's suggestion that imposing aggregate limits on an individual's contributions to PACs is a justifiable means of preventing the corruption of candidates is bereft of logic, because there are no corresponding aggregate limits on contributions from PACs to candidates. If Congress did not see any potential for corruption with unlimited aggregate base contributions by a single PAC to federal candidates who exercise legislative powers, there cannot be potential for corruption with unlimited aggregate base contributions from individuals to PACs that do not exercise legislative powers. Indeed, one is hard-pressed to find a rational basis for this distinction, let alone one that survives exacting or strict scrutiny.

The law also allows PACs and individuals to engage in "bundling," whereby smaller base limit contributions to a candidate are solicited and amassed and then

turned over to the candidate in one lump sum under the fiction that the huge contribution is not coming from the bundler, but instead collectively from all the small donors. Entertainers who have political agendas are also free to engage in a form of bundling for their favorite candidate. They perform at concerts where individual attendees contribute a relatively small amount but the total amount raised exceeds tens of thousands of dollars, if not millions. For example, in 2008, Hillary Clinton raised $2.5 million at a single concert by Elton John.[3] Surely, there is significant "gratitude" bestowed on such bundlers and performers. This reality further undermines the government's alleged compelling governmental interest in imposing aggregate limits on individual contributions to PACs.

2. Any Other Government Interest Is Constitutionally Impermissible

With the risk of corruption rectified and lawful circumvention rendered impossible, the government no longer has a valid interest sufficient to restrict speakers' First Amendment rights. *See, e.g., Davis v. FEC*, 554 U.S. 724, 740-42 (2008); *Citizens United*, 130 S. Ct. at 904-11. Accordingly, the government's interest is most accurately framed as something less than *quid pro quo* corruption, or an attempt to equalize speech. But "contributors cannot be protected from the possibility that others will make larger contributions." *Citizens Against Rent Control* at 295.

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[3] Chris Cillizza, Elton John Raises $2.5 Million for HRC, Wash. Post, April 10, 2008, http://voices.washingtonpost.com/thefix/fixcam/fixcam-an-elton-john-tribute.html.

Because "[d]emocracy is premised on responsiveness," *McConnell v. FEC,* 540 U.S. 93, 297 (2003), corruption necessitates an actual exchange of a "quid" for a "quo," and requires far more than mere receptiveness or even actual action. Thus, influence over or access to elected officials does not amount to corruption. *Citizens United*, 558 U.S. at 359. Similarly, "[i]ngratiation and access. . . . are not corruption." *Id*. at 360. Nor is "gratitude" a "constitutionally cognizable form of corruption." *Republican Nat'l Comm*., 698 F. Supp. 2d at 158; see also *McCutcheon v. FEC,* 893 F. Supp. 2d at 139. Although the lower court acknowledged "gratitude" is not enough to constrain constitutionally protected speech, it offered no other justifiable explanation—particularly relating to PACs—as to why this Court should uphold the aggregate limits.

Elected officials would not likely reserve even especial gratitude to an individual who contributed $5,000 to various disparate PACs, assuming some of these PACs, in turn, supported that official during his or her campaign. Thus, even if an elected official resolved to hunt down a prolific PAC contributor with the aid of a forensic accountant—an exceedingly difficult task compared to the easy identification of an individual who spent millions of dollars in independent expenditures and who surely deserves more gratitude—and even if that official were determined to "lay the wreath of gratitude" at the feet of such a contributor—such gratitude still would not constitute corruption. See *id*.

The lower court improperly rejected Appellants' argument that the aggregate limits effectively limited

an individual's contributions to only $85.29 per federal candidate in 2006, a limit much lower than the $400 limit rejected by this Court in *Randall v. Sorrell*, 548 U.S. 230, 253 (2006). *McCutcheon,* 893 F. Supp. 2d 133, 141 n.5. The lower court admitted that such a scenario may indeed be applicable if costly "direct mail were the only means" to reach citizens. *Id.* The lower court countered this argument by naively describing what it called a "simple example" that building a website "to reach a national audience is not any more expensive than building one to reach citizens of a single state." *Id.* But simply building a website does not "reach" anybody, let alone a national audience. Rather, consumers, voters, and contributors are the ones that must "reach out" to access the website for it to be effective. And the public only becomes aware of such a website is through an advertising campaign costing money—with more money resulting in a more effective campaign—that first "reaches out" to a target audience to familiarize them with the website. Thus, even the lower court's own example intended to refute Appellants' constitutional argument is itself akin to a costly direct mail campaign and falls flat.

B. Since No Valid Anti-Corruption Interest Exists, the Aggregate Limits Are Not Closely Drawn And Serve As An Unnecessary Prophylaxis

Ensuring political speech is most effectively shielded from government intrusion often necessitates applying "strict scrutiny" to the government restriction imposed. *Citizens United*, 558 U.S. at 340. Even the weaker "exacting scrutiny" traditionally reserved for base contribution limits to candidates, however, is

nonetheless a "rigorous standard of review." Buckley, 424 U.S. at 29. Thus, the Court may validate contribution limits only if the limits are "closely drawn to match a sufficiently important interest." *McConnell,* 540 U.S. at 136 (quoting *Fed. Election Comm'n v. Beaumont,* 539 U.S. 146, 162 (2003), overruled on other grounds by *Citizens United*, 130 S. Ct. at 913). Only one sufficiently important government interest remains: preventing quid pro quo corruption or its appearance. *Buckley*, 424 U.S. at 27. Similarly, this Court may allow "'significant interference' with protected rights of political association" but only if the government demonstrates an anti-corruption interest and employs means closely drawn to achieve that interest. *NAACP v. Button*, 371 U.S. 415, 438 (1963). "Unnecessary abridgment" of speech and associational freedoms must be avoided. *Buckley*, 424 U.S. at 25.

Here, the government has entirely failed to meet its burden of establishing any risk of corruption or its appearance necessary to justify the two aggregate limits in question. By imposing a series of prophylactic measures specifically aimed at preventing individuals from evading contribution limits, the 1976 Amendments to the Federal Election Campaign Act conclusively foreclosed any possibility of such circumvention—the sole justification the *Buckley* Court initially gave for upholding the overarching aggregate limit. See *Buckley,* 424 U.S. 1 at 38. With the prior circumvention risk rectified, the government's anti-corruption interest evaporates with respect to the aggregate limits. Because a regulation cannot be closely drawn to achieve such an invalid interest, the dual aggregate limits cannot be upheld even under lesser scrutiny. The aggregate limits thus serve no

valid purpose, and function only as an unnecessary, constitutionally infirm "prophylaxis upon prophylaxis." *WRTL*, 551 U.S. at 478-79. Not only do the aggregate limits fail the strict scrutiny test which should govern this case, but also they fail the intermediate exacting scrutiny test employed by the lower court, and arguably fail the rational basis test.

III. RESTRICTIVE AGGREGATE LIMITS DISPROPORTIONATELY IMPACT PACS AND COMPOUND THE HARMS OF A SKEWED CAMPAIGN FINANCE SYSTEM

A. The Aggregate Limits Hamper PAC Speech And Decrease Competition Of Ideas

The Founders built into our political system the presumption that more speech is better and that anyone or any group wishing to disseminate and advocate ideas should be welcomed into the "marketplace." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969). First Amendment standards require protecting rather than stifling debate over political ideas. *Citizens United*, 558 U.S. at 327. Indeed, our political system would lose its vibrancy if political debate was not "uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

However, the government has stifled political debate by restricting the ability of PAC speech relative to other political speakers. The current speech paradigm diminishes PACs' unique views to a greater degree than those of any other speakers. These

viewpoints are often unfiltered through the Washington, D.C. political class, which tightly controls the speech of parties and many candidates. The aggregate limits place a particularly heavy burden on PAC speech and political participation, because Congress did not adjust PAC contribution limits for inflation, as is the case for contributions to party and candidate committees. As a result, the aggregate limits stifle PAC speech in a particularly discriminatory and unconstitutional manner.

B. The Base Contribution Limits, Unadjusted For Inflation, Only Exacerbate The Harm

Overregulating contributions only perpetuates a "new evil," and as a result "a substantial amount of political speech [is driven] underground." *See Nixon v. Shrink Missouri*, 528 U.S. 377, 408 (2000). The current campaign finance regime additionally burdens PACs with two separate unconstitutional aggregate limits from individuals: the aggregate limit of $74,600 to all non-candidate committees, of which there is sub-aggregate limit of $48,600 to PACs and state and local party committees, the difference being $26,000 which is allowed to be contributed to national party committees. These dual limits hamper PACs by restricting its base contribution limits that are not indexed to account for inflation, exacerbating the harm to PAC speech and association rights. In conjunction, these factors serve to diminish the impact of PAC voices.

The dual aggregate limits restrict a PAC's ability to accept even the already relatively low contributions.

Under the base contribution limits, an individual may contribute up to $5,000 per year to any PAC, and $10,000 per year to a state party committee. 2 U.S.C. § 441a(a)(1)(C)-(D). As noted, the biennial aggregate limit on contributions to these non-candidate, non-national-party committees is $48,600, 2 U.S.C. § 441a(a)(3)(B), and these contributions count against the $74,600 biennial limit on contributions to non-candidate committees. 2 U.S.C. § 441a(a)(3)(B). Thus, while the base contribution limits alone would permit an individual to contribute $5,000 per year to all PACs with whom that individual desires to associate, the two aggregate limits operate to preemptively prohibit this: under no circumstance can the would-be contributor fully associate with more than nine PACs.[4]

As a result of this restriction, the current system effectively bars TPLF and other PACs from receiving desired funds from, and associating with, willing contributors. See also 2 U.S.C. § 441a(f) (prohibiting PACs from knowingly receiving contributions in excess of the aggregate limits). It necessarily follows that, although PACs *may* make unlimited aggregate contributions to candidates, *see* 2 U.S.C. § 441a(a)(1)-(8), these PACs can contribute only those funds they receive. But "virtually every means of communicating ideas in today's mass society requires the expenditure

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[4] Assuming an individual refrained from contributing to state party committees, the $48,600 limit still prohibits that individual from contributing the full lawful amount of $5,000 to more than nine PACs. *See* 2 U.S.C. § 441a(a)(3)(B). If an individual contributed the maximum amount of $10,000 to a state party committee, that individual would be limited to making full contributions to only seven PACs. *See id.*

of money." *Buckley*, 424 U.S. at 19. Thus, the aggregate limits do not merely circumscribe individuals' speech and association rights, but also operate to limit PAC spending, foreclosing PACs' ability to contribute unique, specific views to the public political discourse.

And this harm is compounded because the current system does not index contribution limits to PACs to account for inflation. As a result, PAC speech declines biennially in proportion to that of candidates and national parties. An individual may contribute a maximum amount of $5,000 to any PAC in a calendar year. 2 U.S.C. § 441a(a)(1)(C). Because this base limit is not indexed for inflation, it has remained the same since Congress first instituted the limit in 1976. *See* 2 U.S.C. § 441a(c)(1); Pub. L. 94-283, Title I, 90 Stat. 486 (May 11, 1976). In contrast, an individual may give $2,600 to a candidate per election, and up to $32,400 to a national party committee per calendar year. 2 U.S.C. § 441a(a)(1)(A)-(B). Since 2002, when Congress enacted BCRA, these limits have been increased biennially to account for inflation. 2 U.S.C. § 441a(c)(1). Thus, while the current campaign finance system permits candidates and national party committees to receive more money to fund their desired speech, PACs receive comparatively much less. There is no rational, let alone compelling, government interest in this asymmetric restriction. Congress may not value the speech of some favored group over others but must instead treat all speakers equally and allow the marketplace of ideas (and ultimately the people) to decide the speech's value. "The identity of the speaker is not decisive in determining whether speech is protected." *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1, 8 (1986) (plurality opinion).

"By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice." *Citizens United*, 558 U.S. at 340-41. Here, the government is following this unconstitutional path by weakening PACs' right to speak to the benefit of other political speakers. As described *supra*, PACs represent entirely unique interests, and thus provide all individuals across the political spectrum a means of banding together to advocate distinct viewpoints. But the vibrancy of PAC speech in the national political debate is handicapped under this outdated standard.

CONCLUSION

The Court should regard the aggregate limits with respect to PACs as a constitutionally unjustifiable blunderbuss broadly aimed at the vague, looming specter of corruption from "too much" money in the aggregate in the political system rather than as a law narrowly tailored to address the impact of single contributions from individuals to single candidates. "The First Amendment does not permit the State to sacrifice speech for efficiency." *Riley v Nat'l Fed. Of the Blind*, 487 U.S. 781, 795 (1988). Here, the aggregate limits do not simply sacrifice speech for efficiency; rather, the limits sacrifice valuable political speech and association for no reason at all.

For all the foregoing reasons and those provided by the Appellants, *amici* submit that this Court should reverse the judgment of the three-judge district court.

Respectfully submitted,

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