No._____

In The

Supreme Court of the United States

VIRGINIA JAMES,

Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

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

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Section 307 of the Bipartisan Campaign Reform Act, Pub. L. 107-155, 116 Stat. 93 (2002) ("BCRA"), codified at 2 U.S.C. § 441a(a) (2012), imposes a limit of $2,500 per election on all individual contributions to candidates. It also provides that no individual may contribute, in the aggregate, more than $117,000 in each biennial period, subdivided as follows: $46,200 to candidate committees and $70,800 to all other committees, of which $24,600 must be contributed to national party committees.

Appellant wishes to make contributions to individual candidate committees, but not political committees ("PACs") or party committees. She does not wish to contribute more than $2,500 in any election to any single candidate committee. Nor does she wish to contribute more than $117,000 to all committees, in the aggregate, in any biennium. Rather, she wishes to take funds which may legally be contributed to PACs and party committees, and instead contribute those same funds directly to additional candidate committees.

Appellant presents one question:

1. Whether the three-judge district court erred in dismissing Appellant's facial and as-applied challenge to Section 307(b) of the Bipartisan Campaign Reform Act, Pub. L. 107-155, 116 Stat. 93 (2002) ("BCRA") codified at 2 U.S.C. § 441a(a)(3)(A).

PARTIES TO THE PROCEEDING

Appellant is an individual United States citizen who wishes to contribute to the campaigns of candidates for federal office. She wishes to contribute more than the $46,200 presently permitted by 2 U.S.C. § 441a(a)(3)(A) but less than the $117,000 presently permitted as contributions to candidate committees, political committees, and party committees taken together (2 U.S.C. § 441a(a)(3) (2012) (indexed for inflation 11 C.F.R. § 110.5(b)(3)-(4) per 76 Fed. Reg. 8368 (Feb. 14, 2011))).

Appellee is the Federal Election Commission ("FEC"), the named defendant in the district court.

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The opinion of the district court, *James v. FEC,* No. 12-1451 (D.D.C. Oct. 31, 2012) is reprinted in the appendix ("App.") to this jurisdictional statement. App. 3-12.

JURISDICTION

The three-judge district court entered a memorandum opinion and order on October 31, 2012. *James v. FEC*, Order at App. 1-2, Mem. Op. at App. 3-12. That order dismissed the case and entered judgment for Appellee FEC. *James*, Order at App. 1. Appellant filed a notice of appeal on November 1, 2012. Notice of Appeal, App. 13.

This Court has jurisdiction under Section 403(a)(3) of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 113-114, codified at 2 U.S.C. § 437h note 5 (2012); and 28 U.S.C. § 1253 (2012).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Pertinent constitutional and statutory provisions are reproduced at App. 36-38 of the appendix to this jurisdictional statement.

STATEMENT OF THE CASE

Appellant Virginia James wishes to contribute to federal candidates and their committees. She does not intend to exceed the $2,500 limit on contributions to particular candidates. But she does prefer to make contributions, in the aggregate, exceeding the $46,200 ceiling the Bipartisan Campaign Reform Act of 2002 ("BCRA") and subsequent FEC regulations impose.

BCRA provides two separate "aggregate" contribution limits: $46,200 to all candidates, and $70,800 to all political committees ("PACs") and party committees. These together comprise what Appellee FEC itself calls the "$117,000 overall biennial limit" Federal Election Commission, Contribution Limits 2011-12, http://www.fec.gov/pages/brochures/contriblimits.shtml (last visited Nov. 29, 2012). These also constitute what the FEC's own regulations, which have the force of law, clearly define as an aggregate cap on contributions. 11 C.F.R. § 110.5(b)(1).

Appellant wishes to take some portion of the $70,800 she may already contribute to PACs and parties, and instead give it directly to candidates.

Doing so would not increase the total amount Ms. James would contribute, directly and indirectly, to federal candidates – she could still give no more than $117,000 in the aggregate. Nor would it pose any greater risk of circumventing the $2,500 per

candidate limit than does the present statutory scheme. Instead, on every metric, Ms. James's contributions would pose a lower risk of corruption and a lower risk of circumvention than do contributions under the present regime. Consequently, BCRA's provisions requiring her to contribute to political committees and national party committees, rather than directly to candidates, cannot survive constitutional scrutiny.

PROCEDURAL HISTORY

This action was filed on August 31, 2012. The district court had jurisdiction under 28 U.S.C. § 1331 (2012). Five days later, Appellant moved for a preliminary injunction, noting that the 2012 election was approaching, and asking the Court to expeditiously ensure that she could exercise her First Amendment rights in advance of that date.

In June 2012, *McCutcheon v. FEC,* No. 12-1034, was filed and assigned to a three-judge panel of the district court. Over Appellant's objection, the same panel was assigned this case. On September 19, the district court stayed its consideration of this matter pending the outcome of *McCutcheon.* One week later, noting the approaching election, Appellant asked the court to lift its stay.

On September 28, the district court issued its decision in *McCutcheon.* Three days later, the court ordered Appellant to show cause, within eight days, why her case should not be dismissed under

McCutcheon's reasoning. Upon receiving Appellant's response, the FEC was invited to submit a reply to that document within eleven days.

On October 31, the district court granted Appellant's motion to lift its stay, and dismissed Appellant's case *sua sponte*. In doing so, the court relied on *McCutcheon* and the FEC's response to the court's Order to Show Cause. Appellant was given no opportunity to reply to the FEC's arguments. No dispositive motion was ever filed, and the district court heard no argument.

Believing the district court's ruling to be in error, Appellant filed her Notice of Appeal on November 1, 2012.

THE QUESTION PRESENTED IS SUBSTANTIAL

Appellant's argument is straightforward. Laws regulating contribution limits are subject to "the exacting scrutiny required by the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 16 (1976). While Congress has substantial discretion to set aggregate contribution limits, it must do so in a way that is "closely drawn" to match a "sufficiently important governmental interest." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 387-388 (2000) ("*Shrink*"). Only one such interest has been identified: the risk that large contributions, in the aggregate, may be funneled through committees so

as to evade the limitations on contributions to individual candidates.

BCRA establishes a biennial aggregate contribution limit: $117,000. It then subdivides this limit: only $46,200 may be contributed directly to candidates. 2 U.S.C. § 441a(a)(3)(A) (indexed for inflation per 11 C.F.R. § 110.5(b)(3)-(4) at 76 Fed. Reg. 8368 (Feb. 14, 2011)). The remaining $70,800 *must* be contributed to PACs or parties. Of this $70,800, no more than $46,200 may be given to "to political committees which are not political parties of national political parties." To truly "max out," then, $24,600 *must* be contributed to national party committees. In short, while Congress has stated that individuals may contribute $117,000 toward federal elections, the law requires that 60% of that amount be given to political intermediaries, and that 21% be given *only* to party committees.

The risk of circumvention of the $2,500 individual candidate limit is patently greater when large sums are given to party committees rather than divided among a number of candidates. Nonetheless, once an individual has contributed $46,200 to various federal candidates, that individual may not contribute a cent more, but may contribute an additional $70,800 to committees that may, in turn, contribute to candidates – *including the candidates to whom our hypothetical individual had originally contributed*. 2 U.S.C. § 441a(a)(2)(A).

Appellant does not wish to associate with political committees or party committees. She wishes to associate directly with candidates for federal office. Engaging in such association would lessen, rather than raise, the possibility of circumvention. Yet BCRA's statutory scheme prohibits Appellant from associating as she wishes within the bounds of an overall aggregate contribution cap, and therefore unconstitutionally limits her associational rights under the First Amendment.

In dismissing this argument, the district court made two significant legal errors.

First, it ruled that there is no $117,000 aggregate limit in BCRA, only aggregate limits on particular types of contributions. This holding is contrary to the plain language of BCRA, the FEC's regulations implementing that Act, and the legislative history of BCRA itself. *See* 11 C.F.R. § 110.5. It also ignores a central premise of Appellant's complaint: that she acknowledges Congress's ability to impose the $117,000 aggregate limit, and would abide by that cap.

Second, the district court held, for the first time and without referencing any authority, that contributions directly to candidate committees pose the same risk of circumvention as do much larger contributions to PACs and, especially, party committees.

Both errors are substantial. Not only do they prevent Appellant from associating directly with candidates—a right protected by the First

Amendment—they also uphold a statute that manifestly *increases* the possibility that the limits on contributions to candidates will be circumvented. Consequently, the district court is mistaken, and the sub-aggregate limit of 2 U.S.C. § 441a(a)(3)(A) cannot survive exacting scrutiny.

These errors are compounded by the Court's failure to allow Appellant to respond to the Appellee's theory of this case. Consequently, this Court should exercise its jurisdiction to provide *de novo* review of the district court's dismissal, *sua sponte* and without argument, of Appellant's case.

I. BCRA's statutory scheme must survive "exacting scrutiny."

Contribution limits implicate fundamental First Amendment interests. *Buckley*, 424 U.S. at 24-25 (1976). As is often the case with challenges to federal campaign finance laws, *Buckley v. Valeo* provides the touchstone for constitutional analysis here. *Buckley* examined the Federal Election Campaign Act ("FECA"), BCRA's predecessor.[1] *Id.* at 6; *McConnell v. FEC*, 540 U.S. 93, 118-119 (2003). In *Buckley*, this Court identified campaign contributions as a component of the "right to associate" and therefore determined that limits on contributions must be subject "to the closest

[1] Indeed, the *McConnell* opinion occasionally refers to BCRA as "New FECA." *See, e.g.,* 540 U.S. at 133.

scrutiny." *Buckley*, 424 U.S. at 25 (citing *NAACP v. Ala. ex rel Patterson*, 357 U.S. 449, 460-61 (1958)). While the right to associate and participate in politics "is not absolute," the government must "demonstrate[] a sufficiently important interest and employ[] means closely drawn to avoid unnecessary abridgement of associational freedoms." *Id.* (internal quotations and citations omitted); *see Shrink,* 528 U.S. at 387-388 (contribution limits were constitutionally sound when "closely drawn" to match a "sufficiently important interest").

In *McConnell v. FEC*, this Court specifically examined BCRA's provisions, including its contribution limits. 540 U.S. at 141. *McConnell* reiterated *Shrink*'s formulation of "exacting scrutiny," and further noted that "contribution limits may bear more heavily on the associational right than on freedom to speak." *Id.* at 134-135 (citing, *inter alia*, *Shrink*, 528 U.S. at 388). While *McConnell* emphasized that campaign expenditure limitations are subject to a higher level of scrutiny than campaign contribution limitations, this Court still applied the "closely drawn" standard in rejecting a facial challenge to BCRA. *McConnell*, 540 U.S. at 134, 136. This analysis was repeated as recently as last year. *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett,* 131 S. Ct. 2806, 2817 (2011) (examining the level of scrutiny applicable to contribution limits).

The district court itself correctly recognized that exacting scrutiny is the proper standard of

review in this case. *James v. FEC*, No. 12-01451, App. 7-8 (D.D.C. Oct. 31, 2012). Indeed, the same three-judge panel explicitly applied exacting scrutiny in *McCutcheon* as well. *McCutcheon v. FEC*, --- F. Supp. 2d ---, No. 12-1034, App. 22 (D.D.C. Sept. 28, 2012).

Therefore, any provision of BCRA governing contribution limits may only survive constitutional scrutiny if it is "closely drawn to match a sufficiently important governmental interest."

II. The only state interest justifying aggregate contribution limits is preventing circumvention of limitations on contributions to individual candidates.

This Court has previously upheld aggregate contribution limits, with the caveat that "preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances." *Shrink*, 528 U.S. at 428 (citing *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985)).

In *Buckley v. Valeo*, the Court considered FECA's overall limit on total contributions by individuals to candidates, political committees, and parties. Specifically, FECA imposed a $1,000 limit on individual contributions to candidates, and a

$25,000 limit on all contributions to federal committees. *Buckley*, 424 U.S. at 7. FECA did not subdivide this $25,000 aggregate limit; rather, it applied to all contributions to all federal entities, including candidate committees, political committees, and parties. *Id.* at 13.

The *Buckley* Court held that contribution limits are constitutional when they serve to prevent "corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office." *Id.* at 25. It went on to note that preventing the "evasion of the…[individual] contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate through" pass-through vehicles such as PACs and parties necessitated an overall aggregate limit as "a corollary of the basic individual contribution limitation." *Id.* at 38.

Thus, while the Court acknowledged that an aggregate limit "does impose an ultimate restriction upon the number of candidates and committees with which an individual may associate himself," the overall, undivided aggregate limit was upheld. *Id.* But the Court's concern in doing so was specific: "a person [might] contribute 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.*[2]

Buckley's analysis, then, rested on three points. First, the only justification for aggregate limits is the need to prevent circumvention of the limits on contributions to individual candidates. Second, this danger of circumvention is posed by contributions to PACs and political parties. Third, this concern stems from the contribution of "massive amounts of money." *Id.* at 38.

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[2] The full quote reads:

> In addition to the $ 1,000 limitation on the nonexempt contributions that an individual may make to a particular candidate for any single election, the Act contains an overall $ 25,000 limitation on total contributions by an individual … The overall $ 25,000 ceiling does impose an ultimate restriction upon the number of candidates and committees with which an individual may associate himself by means of financial support. But this quite modest restraint upon protected political activity serves to prevent evasion of the $ 1,000 contribution limitation by a person *who might otherwise contribute 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*. The limited, additional restriction on associational freedom imposed by the overall ceiling is thus no more than a corollary of the basic individual contribution limitation that we have found to be constitutionally valid (emphasis supplied).

This framework has never been disturbed.[3] Indeed, the district court explicitly keyed its decision to the "ability of aggregate limits to prevent evasion of the base limits." *James*, at App. 7 (citing *Buckley*, 424 U.S. at 38). Consequently, the question posed by this appeal is a simple one: once Congress has set an aggregate limit, may it subdivide that limit, and require that certain funds be contributed to parties and PACs instead of directly to candidates? And the answer to this question must, under *Buckley*, turn on whether such a requirement helps or hinders the ability of contributors to circumvent or "evade the base limits" on contributions to candidates.

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[3] *McConnell v. FEC* is not to the contrary. Indeed, in that case the Court merely noted:

> [c]onsiderations of *stare decisis*, buttressed by the respect that the Legislative and Judicial Branches owe to one another, provide additional powerful reasons for adhering to the analysis of contribution limits that the Court has consistently followed since *Buckley* was decided" and "[t]he relevant inquiry is whether the mechanism adopted to implement the contribution limit, or to prevent circumvention of that limit, burdens speech in a way that a direct restriction on the contribution itself would not. 540 U.S. at 137-138, 138-139 (2003).

III. BCRA and the FEC's implementing regulations unambiguously create an overall aggregate cap on contributions.

The district court held that "[t]here is no $117,000 total aggregate limit in the statute; instead, there are merely sublimits of $46,200 and $70,800. Remove one of the sublimits, and there is no higher constraint."[4] *James*, at App. 9. This novel belief was first advanced by the Commission in its Opposition to Plaintiff's Response to Order to Show Cause ("OPRSC"). OPRSC at App. 100 ("[t]here is no $117,000 aggregate contribution limit."). Appellant was provided with no opportunity to contest this view before her case was dismissed.

The district court's ruling misinterprets the statutory scheme. Indeed, the FEC's implementing regulation, all possible windows into the collective intent of the Congress, and the text of the statute itself clearly establish that an aggregate limit of $95,000 – $117,000 after indexing for inflation – was intended merely as an increase of the old FECA aggregate limit of $25,000, which had been devalued by 28 years of inflation. The sub-aggregate limits were added late in the legislative process in order to direct to whom various slices of that $95,000 could be contributed.

The Federal Election Commission itself could not have been clearer on this point. Its implementing

[4] The district court's use of the word "sublimit" is telling. One cannot have "sublimits" unless they *sub*divide an underlying, overall limit.

regulation unambiguously refers to the overall aggregate limit: "In the two-year period beginning on January 1 of an odd-numbered year and ending on December 31 of the next even-numbered year, no individual shall make contributions aggregating more than $95,000." 11 C.F.R. 110.5(b)(1). Only then does the regulation go on to enumerate the sub-limits of $37,500 to candidate committees and $57,500 for "other contributions." These are tellingly enumerated in *subparts* (i) and (ii) of 11 C.F.R. 110.5(b).[5]

It is not clear how the Commission can claim in this litigation that the overall aggregate limit does not exist, when its regulations say otherwise. Indeed, this theory was first proposed by the Commission in response to the district court's order and, unlike BCRA's implementing regulations, have never been considered or passed upon by the commissioners themselves.

A. BCRA's legislative history convincingly demonstrates that Congress intended to establish an updated overall aggregate limit, subdivided to advantage party and political committees at the expense of candidate committees.

The BCRA biennial aggregate limit of $95,000 indexed to inflation was born out of the $25,000

[5] Per 11 C.F.R. § 110.5(b)(3), the limits are indexed to inflation, hence the current total aggregate of $117,000.

annual limit imposed by the Federal Election Campaign Act of 1974. *See Buckley*, 424 U.S. at 38. In the final day of Senate debate on BCRA, Senator Chris Dodd specifically noted that the "[t]he aggregate individual contribution limit to parties, PACs, and candidates per year is increased from $25,000 per year to $95,000 per election cycle, including not more than $37,000 [*sic*] to candidates and $20,000 to the national party committees." 148 Cong. Rec. S. 2155 (2002).

Senator Dianne Feinstein of California, together with Senator Fred Thompson of Tennessee, originally intended to increase "the individual aggregate contribution limit, the amount that can be given to PACs, parties, and candidates combined…from the…$25,000 per year to $37,500 per year…. [creating a] $75,000 per cycle limit." 148 Cong. Rec. S 2154.[6] But as Senator Feinstein noted the day of Senate passage of the House version of BCRA, "[t]he House bill creates a $95,000 per cycle aggregate limit. Of that [aggregate limit], $37,500 can be given to candidates and $57,500 can be given to parties and PACs. But to actually max out, an individual must contribute $20,000 of the aggregate to national party committees." *Id.*

Senator Dodd and Senator Feinstein's understanding is further supported by a

[6] Indeed, the Thompson-Feinstein proposal emerged out of Senator Thompson's proposed amendment to the 2001 version of BCRA, which would have simply raised the aggregate limit from $25,000 to $50,000. 147 Cong. Rec. S. 2958.

Congressional Research Service summary of the law, which notes that BCRA "[r]aise[d] the aggregate limit to $95,000 per 2-year cycle, with sub-limits." Joseph E. Cantor and L. Paige Whitaker, Cong. Research Serv., RL31402, CRS Report for Congress: Bipartisan Campaign Reform Act of 2002: Summary and Comparison with Previous Law CRS-2 (2004). This reference to a "raise" of the aggregate limit further demonstrates that BCRA was understood to increase FECA's already-extant, unitary limit.

Finally, there is the plain text of the statute itself. The relevant portion of BCRA states that: "no individual may make contributions aggregating more than" the exact sublimits. 2 U.S.C. §441a(a)(3). And these two sublimits may, as a matter of logic, be added together to determine the aggregate ceiling on the total amount of money that an individual may give toward political campaigns. That amount, created and sanctioned by Congress, is $117,000.

Congress established an overall limit on aggregate contributions to federal political committees. This is the inescapable meaning of BCRA's text, the statements of those who wrote and voted for that text, and of the Federal Election Commission's own interpretation of that text. Ms. James does not challenge the wisdom of this overall amount. She merely asks whether Congress may require some of those funds to be given to parties and PACs, instead of directly to candidates.

IV. BCRA's statutory scheme increases, rather than decreases, the risk that large contributions to PACs and parties will be used to circumvent the limits on contributions to candidates.

In dismissing Appellant's case, the district court relied upon its decision in *McCutcheon. James v. FEC*, No. 12-01451, App. 6-11. But unlike McCutcheon, James does not challenge the overall cap on contributions. Thus, while McCutcheon challenged a central holding of *Buckley* – that aggregate limits are generally constitutional – James does not. In fact, her claim is that the anti-circumvention concern of *Buckley* is, if anything, better addressed by allowing her to contribute to candidates rather than forcing her to contribute to parties.

McCutcheon emphasized the threat posed by parties potentially being used to circumvent contribution limits. *McCutcheon v. FEC*, --- F. Supp. 2d ---, No. 12-1034, App. 28-30. This is unremarkable, as this danger receives special consideration in the case law. *See, e.g., Buckley*, 424 U.S. at 38. Indeed, appellant does not dispute *McCutcheon's* analysis. Rather, this case arises precisely because BCRA aggravates the party pass-through concern. An individual *must* donate to a national party in order to contribute the maximum amount allowed by BCRA's overall aggregate limit.

Appellant wishes, instead, to contribute those funds directly to individual candidate committees. Doing so would lessen, not increase, the risk that the candidate contribution limit would be circumvented.

A. In order to contribute the overall amount found to be noncorrupting, BCRA requires an individual to contribute to parties.

By operation of federal law and regulation, an individual may not contribute more than $117,000 in a biennium. Within that $117,000 limit, there is a limit of $46,200 on contributions to candidates and a limit of $70,800 to PACs and parties. 11 C.F.R. § 110.5.[7] Within that sub-aggregate limit on PAC and party contributions, there is yet *another* limitation, which restricts the amount of money an individual can give to local parties and PACs. Of the $70,800 allowed to PACs and parties, contributions to *state and local parties and PACs* are limited to $46,200. 76 Fed. Reg. at 8370. Therefore, simple arithmetic dictates that an individual can only reach the PAC and party sub-aggregate limit of $70,800 (and therefore the aggregate biennial limit of $117,000)

[7] These amounts are indexed to inflation pursuant to 11 C.F.R. § 110.17, and published at 76 Fed. Reg. 8368, 8370 (Feb. 14, 2011). They are also available on the FEC's website *at*: http://www.fec.gov/pages/brochures/contriblimits.shtml.

by contributing $24,600 to national party committees.[8]

B. Contributions to national party committees, pose a far greater risk of circumvention than do contributions to candidate committees.

The lower court ruled against Appellant in part because it held that the "anti-circumvention rationale…applie[s] equally to candidate committees." App. 8. But, in fact, contributions to national parties pose a far greater danger of being used to circumvent the individual contribution limit.

The district court offered the following hypothetical in dismissing Appellant's case:

> [i]f the $46,200 aggregate limit on candidate contributions were erased, James or anyone else could give at least $2.34 million (435 House candidates plus 33 Senate candidates multiplied by $5,000 – that is, $2,500 for primary and $2,500 for general election) to candidate committees (or possibly to a joint fundraising committee), which could then transfer those sums to certain

[8] The $24,600 figure is obtained by subtracting $46,200, the PAC and local and state party limit, from $70,800, the overall PAC and party limit.

> preferred candidates or even to non-candidate national committees. App. 8-9.

The first problem with this analysis, of course, is that it posits contributions of $2.34 million. Appellant's Verified Complaint explicitly states that she would contribute only $117,000. V.Compl. at App. 40-41, 43. Her claims involve the distribution of funds under BCRA's aggregate cap, not the existence of the cap itself.

The question, then, is whether the same pool of money – $70,800 – is more likely to be funneled to a single candidate if it is given to a minimum of fifteen federal candidates[9] (who presumably require resources for their own elections) or to a much smaller number of large political committees (which exist principally to provide funds and expertise to external candidates).

Under current law, an individual is permitted to give up to $2,500, per election, to a candidate committee. 2 U.S.C. § 441a(a)(1)(A). Such committees may, in turn, contribute a maximum of $2,000, per election, to another candidate committee. 2 U.S.C. § 432(e)(3)(B). Of course, this is the *total* amount that may be transferred per election, and not the portion of each $2,500 contribution that may be passed to another candidate.

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[9] $70,800 divided "by $5,000 – that is, $2,500 for primary and $2,500 for general election" *James*, at App. 9.

Both the FEC and the district court note that a candidate committee may also contribute unlimited funds to a political party. *James*, at App. 7-9, OPRSC at App. 99. But this is a red herring. Whether Appellant contributed $70,800 directly to the national party committees, as is presently allowed, or those contributions were made indirectly by candidate committees, is immaterial.

Consequently, if Appellant were permitted to contribute to additional candidates under the aggregate contribution cap, her $70,800 in additional aggregated contributions could be diverted only by coordinating a large number of conspirators. If she "maxed out" to each, she could contribute to as few as fifteen candidates. If she wished to pass through the entirety of her contributions, she would need to give to eighteen candidates – each of whom has strong incentives to use her contributions for his or her own campaign.

In stark contrast, an individual may give up to $30,800, per year, to a party's national committee, Senate committee, and House committee. 2 U.S.C. §441a(a)(1)(B). A contributor may divide her $70,800 in non-candidate contributions among these entities as she sees fit. 11 C.F.R. § 110.1(c)(3).

National parties may contribute $5,000 to candidate committees per election. 2 U.S.C. §§ 441a(a)(2)(A), 441a(a)(4), 431(4), and 431(16). But they are also subject to special rules regarding, for examples, Senate campaigns: the Democratic and

Republican senate campaign committees may, in combination with the Democratic or Republican national committees, give up to $43,100 to "a candidate for nomination for election, or for election, to the United States Senate during the year in which an election is held in which he is a candidate." 2 U.S.C. § 441a(h) (2012) (indexed for inflation per 11 C.F.R. § 110.5(b)(3)-(4) at 76 Fed. Reg. 8368 (Feb. 14, 2011)).

Moreover, the national committee of a political party may make coordinated expenditures with House and Senate candidates up to the greater value of "2 cents multiplied by the voting age population of the State" or "$20,000." 2 U.S.C. §441a(d)(3)(A) (indexed for voting age population at 76 Fed. Reg. at 8369 (Feb. 14, 2011)). Coordinated expenditures are the functional equivalent of a contribution. *McConnell*, 540 U.S. at 188 ("In addition, party committees are entitled in effect to contribute to candidates by making coordinated expenditures, and those expenditures may greatly exceed the contribution limits that apply to other donors."). Truly, "BCRA actually favors political parties in many ways." *Id.*

Consequently, the same $70,800 that, if given to candidates, would need to be spread among fifteen co-conspirators, could instead be given to as few as three national party committees. Those committees in turn may make far larger contributions directly to their party's candidates.

It is abundantly clear that these large contributions to centralized committees pose the greater risk of circumventing the $2,500 limit on contributions to each candidate committee. But a simple example will help illustrate the point.

Suppose a contributor wishes to support a particular Republican Senate candidate, and is willing to violate the law in order to evade the $2,500 limit on contributions to that candidate.

It is currently legal for an individual to contribute $30,800 to both the Republican National Committee and the Republican Senatorial Campaign Committee. Those two entities may then use that money to give a single check of $43,100 to a Senate candidate. Or, they may make coordinated expenditures – the equivalent of a contribution – on behalf of that candidate, in a minimum amount of $91,000. [10] In either case, perfectly legal routes exist for the contributor's entire $61,600 to end up supporting the preferred candidate.

By contrast, if the same individual wanted to use candidate committees to funnel $61,600 to a preferred candidate, a minimum of sixteen[11] federal

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[10] The coordinated party expenditures "range from $91,200 to $2,593,100 for Senate nominees, depending on each state's voting age population." Federal Election Commission, 2012 Coordinated Party Expenditure Limits, *available at* http://www.fec.gov/info/charts_441ad_2012.shtml.

[11] Fifteen candidates making the maximum contribution of $4,000 ($2,000 for the primary and $2,000 for the general election) and a fifteenth contributing $1,600.

candidates would need to agree to send the maximum amount to a single recipient.[12]

There is no need to belabor the point. This Court has already noted the dangers posed by party committees. *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 459-460 (2001) ("*Colorado II*"). The point is a comparative one: the danger of circumvention is no higher, and in fact rather lower, if contributors may contribute funds to multiple candidate committees instead of a few party committees. Perhaps this is why Appellant could find no authority, and the district court cited none, stating that candidate committees are a likely conduit for circumventing campaign contribution limits.

C. The district court, for the first time, held that contributions to candidate committees pose the same risk of circumvention as do contributions to PACs and Parties.

The district court acknowledged that "the hypothetical [it] offered [in *McCutcheon*] involved [only non-candidate committees]." *James*, at App. 8.

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[12] In both cases, the $9,200 remaining under the contributor's aggregate cap could be given to the Republican Congressional Campaign Committee to be used for coordinated expenditures in favor of candidates for the House of Representatives. Or it could be given to political committees which may, in turn, contribute to candidates.

Nevertheless, it asserted that a hypothetical demonstrating candidate committee circumvention is "easily invented." Even if this conclusion were legally sound, it is unprecedented: neither Congress nor any court has ever before considered contributions directly to candidate committees as posing the same risk of circumvention as (much larger) contributions to PACs or party committees.

BCRA's legislative history indicates that the chief intent behind the Act's contribution limits was eliminating corruption caused by "soft money" party contributions. By contrast, Appellant ascertained no evidence in the Act's extensive legislative history that Congress even considered candidate committee circumvention a possibility. Instead, as far back as its FECA debates, Congress specifically excluded candidate contributions from those with circumvention potential, noting, "[t]he…decision to impose more precisely defined limitations on the amount an individual may contribute to a political committee*, other than a candidate's committees,* and to impose new limits on the amount a person or multicandidate committee may contribute to a political committee, *other than candidates' committees,* is predicated on the following considerations: first, *these limits restrict the opportunity to circumvent the…limits on contributions to a candidate*…" H. R. Rep. No. 94-1057, 57-58 (1976) (Conf. Rep.) (emphasis added).[13]

[13] The Report continues:

Like Congress, this Court has never recognized candidate committee circumvention. Instead, its only opinion directly addressing the aggregate limits specifically recognized the unique circumvention danger posed by contributions to parties (and implicitly, though to a lesser extent, PACs). *Buckley*, 424 U.S. at 38. Similarly, *McConnell* upheld BCRA's ban on soft money contributions to parties—at least in part—*because* of their unique potential to circumvent contribution limits. 540 U.S. at 154-55. And *McConnell*, like *Buckley*, does not recognize a threat of candidate committee circumvention.

Thus, the district court is the only entity to find that contributions to candidate committee pose the same risk of corruption as do contributions to political committees and parties.

Conclusion

The Court should note probable jurisdiction.

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second, these limits serve to assure that candidates' reports reveal the root source of the contributions the candidate has received; and third, these limitations minimize the adverse impact on the statutory scheme caused by political committees that appear to be separate entities pursuing their own ends, but are actually a means for advancing a candidate's campaign.

Respectfully submitted,

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November 30, 2012

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

VIRGINIA JAMES, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	**Civil Action No. 12-1451** **(JEB)(JRB)(RLW)** **Three-Judge Court**

ORDER

For the reasons set forth in the accompanying Memorandum Opinion, the Court ORDERS that:

1. Plaintiff's Motion for Preliminary Injunction is DENIED;
2. The Case is DISMISSED; and
3. Judgment is ENTERED in favor of Defendant Federal Election Commission.

IT IS SO ORDERED.

/s/ JANICE ROGERS BROWN
United States Circuit Judge

/s/ ROBERT L. WILKINS
United States District Judge

/s/ JAMES E. BOASBERG
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

VIRGINIA JAMES, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	**Civil Action No. 12-1451** **(JEB)(JRB)(RLW)** **Three-Judge Court**

Before: BROWN, Circuit Judge; WILKINS, District Judge; and BOASBERG, District Judge

MEMORANDUM OPINION

BOASBERG, District Judge:

Plaintiff Virginia James wishes to contribute to federal candidates and their committees. Although she has no desire to exceed the $2,500 limit on contributions to particular candidates, she seeks to make contributions in the aggregate beyond the $46,200 ceiling currently allowed by the Bipartisan Campaign Reform Act of 2002. She has, accordingly, brought this suit against the Federal Election Commission, arguing that the aggregate limit on candidate contributions is unconstitutional.

At the time she filed this action, this same three-judge Court was considering the case of McCutcheon v. FEC, No. 12-cv-1034. The plaintiffs there had challenged several of BCRA's aggregate limits, including the one James takes issue with. We consequently stayed James's suit pending the resolution of McCutcheon. Having now rejected all of the McCutcheon plaintiffs' claims, see --- F. Supp. 2d ---, 2012 WL 4466482 (D.D.C. Sept. 28, 2012), the Court may turn to James's suit. Finding no basis to distinguish it from McCutcheon, the Court will dismiss her case as well.

I. Background

According to the Complaint, which must be presumed true for purposes of this Opinion, Plaintiff is "a private individual" who "has given to political candidates in the past and plans to continue doing so." Compl., ¶ 5. During this biennium, she "has contributed at least $27,000 to candidate committees." Id., ¶ 15. She wishes, however, "to contribute more than the current sub-aggregate limit of $46,200 to various political candidates, but does not wish to exceed the $2,500 limit on contributions to each individual candidate." Id., ¶ 5 (citation omitted). In addition, she does not "wish to exceed the overall biennial limit of $117,000 on all contributions to candidates, PACs, and parties." Id. (citation omitted). "Rather, she wishes to take money that she may legally contribute to PACs and parties, and instead contribute it directly to candidates she wishes to support." Id. Indeed, the "only

contributions Ms. James wishes to make during the balance of this biennium are direct contributions of up to $2,500 to individual candidate committees." Id., ¶ 21 (emphasis original).

To ensure that her desired contributions are legal, she filed this suit on August 31, 2012, challenging BCRA's aggregate limit of $46,200 on contributions to individual candidates as facially unconstitutional (Count I) and unconstitutional as applied to her (Count II). She then moved five days later for a preliminary injunction enjoining the FEC from enforcing the aggregate limits on contributions to candidate committees. See ECF No. 5.

An action filed after December 31, 2006, that is "brought for declaratory or injunctive relief to challenge the constitutionality of any provision" of BCRA "shall be filed in the United States District Court for the District of Columbia and shall be heard by a 3-judge court convened pursuant to [28 U.S.C. § 2284]" if the plaintiff requests such a court. See Pub. L. No. 107-155, 116 Stat. 113-14. As Plaintiff here filed an unopposed request for a 3-judge court, Chief Judge David B. Sentelle assigned this matter to us. See Amended Order of September 18, 2012.

Meanwhile, back in June 2012, Shaun McCutcheon and the Republican National Committee had brought an action against the FEC challenging the limits on contributions to both candidate and non-candidate committees. This matter was assigned to the three judges of this Court, who received lengthy briefing from the

parties and *amici curiae* and held a hearing on September 6, 2012. Not wishing to duplicate efforts, we stayed James's case on September 19 pending the decision in McCutcheon. See Minute Order of Sept. 19, 2012. On September 28, the Court issued its Opinion in McCutcheon, rejecting all of the plaintiffs' challenges and dismissing the case. See 2012 WL 4466482, at *7. On October 1, we lifted the stay here and ordered Plaintiff to show cause why her case should not be dismissed for the reasons set forth in McCutcheon. See Minute Order of Oct. 1, 2012. Plaintiff then filed a Response to the Order to Show Cause, and the FEC has now, after invitation from the Court, filed an Opposition.

II. Analysis

Our holding in McCutcheon must be the point of departure here. By way of background, we first explained the structure of BCRA, noting, "During each two-year period starting in an odd-numbered year, no individual may contribute more than an aggregate of $46,200 to candidates and their authorized committees or more than $70,800 to anyone else." 2012 WL 4466482, at *2 (citing 2 U.S.C. § 441a(a)(3)). Added together, these sums equal $117,000. McCutcheon himself desired to contribute additional amounts to candidates, which would yield a total of $54,400, thus exceeding the $46,200 cap. Id. He also wished to make contributions to national party committees of $75,000, which would similarly exceed the $70,800 ceiling. Id.

McCutcheon, accordingly, challenged both aggregate limits, arguing, for instance, that the $46,200 candidate limit was "unsupported by any cognizable government interest . . . at any level of review" and was "unconstitutionally low." Id. at *3 (internal quotation marks omitted).

In rejecting his challenge, we first disagreed with his position that the limits should be subject to strict scrutiny: "Contribution limits are subject to lower scrutiny because they primarily implicate the First Amendment rights of association, not expression, and contributors remain able to vindicate their associational interests in other ways . . . ." Id. at *4 (citing Buckley v. Valeo, 424 U.S. 1, 22, 28 (1976)). The Court then explained that "[t]he government may justify the aggregate limits as a means of preventing corruption or the appearance of corruption, or as a means of preventing circumvention of contribution limits imposed to further its anticorruption interest." Id. (citing Buckley, 424 U.S. at 26-27, 38; footnote omitted). We thus held, "[W]e cannot ignore the ability of aggregate limits to prevent evasion of the base limits." Id. at *5 (citing Buckley, 424 U.S. at 38). Evasion could occur, for example, where large sums were contributed to a joint fundraising committee, which could then transfer money back "to a single committee's coffers." Id. (citations omitted). The committee, in addition, could "use the money for coordinated expenditures, which have no 'significant functional difference' from the party's direct candidate contributions." Id. (quoting FEC v. Colo.

Republican Fed. Campaign Comm., 533 U.S. 431, 460 (2001)).

We also "reject[ed] Plaintiffs' arguments that the limits are unconstitutionally low and unconstitutionally overbroad" because, for one thing, "[i]t is not the judicial role to parse legislative judgment about what limits to impose." Id. at *6 (citing, inter alia, Randall v. Sorrell, 548 U.S. 230, 248 (2006) (plurality); Buckley, 424 U.S. at 30 ("[I]f it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000.")).

James nevertheless maintains that her case does not fall within the ambit of McCutcheon's fairly broad holding for three principal reasons. First, she asserts that her challenge does not implicate the anti-circumvention rationale relied on by McCutcheon. See OSC Resp. at 1-2. More specifically, she notes that the plaintiffs in McCutcheon "sought to lift the aggregate limits on non-candidate committees, precisely the entities Buckley identifies as potential conduits for unearmarked contributions." Id. at 4. In this she is only half right. McCutcheon did not limit its anti-circumvention rationale to only non-candidate committees; instead, the reasoning applied equally to candidate committees. While the hypothetical we offered there involved the former, see 2012 WL 4466482, at *5, one is just as easily invented for the latter: If the $46,200 aggregate limit on candidate contributions were erased, James or anyone else

could give at least $2.34 million (435 House candidates plus 33 Senate candidates multiplied by $5,000 – that is, $2,500 for primary and $2,500 for general election) to candidate committees (or possibly to a joint fundraising committee), which could then transfer those sums to certain preferred candidates or even to non-candidate national committees. See FEC Opp. at 4-5 (detailing candidate-to-candidate transfers).

While James believes this could not happen because "[s]he is not challenging the biennial aggregate limit of $117,000," OSC Resp. at 10 (footnote omitted), and "she does not intend to give more than the $117,000 Congress already allows," id. at 3 (footnote omitted), such belief rests on a fundamental miscomprehension of BCRA. There is no $117,000 total aggregate limit in the statute; instead, there are merely sublimits of $46,200 and $70,800, which add up to $117,000. See 2 U.S.C. §§ 441a(a)(3)(A), (B). Remove one of the sublimits, and there is no higher constraint.

James next contends that her case is different from McCutcheon because, instead of his facial challenge, she "brings a narrow as-applied challenge, one which accepts both the base limitation and the overall limitation imposed by Congress." OSC Resp. at 2. Passing the fact that one of her two counts is a facial challenge, see Compl. at 6, she nonetheless errs in her description of the law. As we just pointed out, there is no "overall limitation" of $117,000; there are only the two sublimits. So the notion that "this

case presents specific contributions with specific limits," OSC Resp. at 8, is not accurate.

While Plaintiff is correct that a "decision on a facial challenge does not foreclose later, as-applied challenges," id. at 7 (citing Wisconsin Right to Life, Inc. v. FEC, 546 U.S. 410 (2006)), another three-judge court in this District has guidance on this type of suit:

> In general, a plaintiff cannot successfully bring an as-applied challenge to a statutory provision based on the same factual and legal arguments the Supreme Court expressly considered when rejecting a facial challenge to that provision. Doing so is not so much an as-applied challenge as it is an argument for overruling a precedent.

Republican Nat'l Comm. v. FEC, 698 F. Supp. 2d 150, 157 (D.D.C. 2010) (three-judge court), aff'd mem., 130 S. Ct. 3544 (2010). It should be recalled that McCutcheon only wanted to contribute $54,400 to candidate committees, which represents less than half the $117,000 James seeks to give. See 2012 WL 4466482, at *2. The factual arguments James raises, therefore, are even less compelling than McCutcheon's, while the legal arguments are no different in relation to candidate limits. And even if Plaintiff had been right that a $117,000 limit existed – thereby enabling her to claim that such a limit was constitutional, but $46,200 was not – McCutcheon

explained that Congress, not the courts, draws these lines. See 2012 WL 4466482, at *6.

James's final argument is that even if McCutcheon is viewed as an as-applied challenge, the facts here are so dissimilar as to render McCutcheon non-binding. See OSC Resp. at 2-3. In particular, James argues that "[s]he brings this challenge alone, without any political party, political action committee, or other entity. She is not challenging any of the other sub-aggregate contribution limits. She is not challenging the biennial aggregate limit of $117,000." Id. at 10 (footnote and internal footnote omitted). Yet none of these points, singly or in concert, is remotely persuasive: McCutcheon's holding did not rest on the presence of the RNC as a plaintiff; that James is not challenging the non-candidate limit does not strengthen her candidate-limit challenge; and, as we have reiterated, there is no $117,000 biennial limit that exists beyond the sublimits.

III. Conclusion

Because the outcome of James's suit is dictated by what we have already decided in McCutcheon, we will contemporaneously issue an Order dismissing the case.

/s/ JANICE ROGERS BROWN
United States Circuit Judge

/s/ ROBERT L. WILKINS

United States District Judge

/s/ JAMES E. BOASBERG
United States District Judge

Date: October 31, 2012

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

VIRGINIA JAMES, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	**Civil Action No. 12-1451** **(JEB)(JRB)(RLW)**

NOTICE OF APPEAL

Notice is given that Plaintiff Virginia James hereby appeals to the United States Supreme Court from this Court's Order denying Plaintiff's Motion for Preliminary Injunction, Dismissal and Judgment in favor of Defendant Federal Election Commission (filed Oct. 31, 2012; Doc. 20). This notice is timely submitted within ten days of the aforementioned order.

Direct appeal is taken pursuant to § 403(a)(3) of the Bipartisan Campaign Reform Act of 2002. 2 U.S.C. § 437h n. 5.

Respectfully submitted this 1st day of November, 2012.

/s/Allen Dickerson
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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of November, 2012, I caused the foregoing document to be sent via First Class and electronic mail to:

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Counsel for Defendant

/s/ Allen Dickerson
Allen Dickerson

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHAUN McCUTCHEON, et al., Plaintiffs,	**Civil Action No. 12-1034**
v.	**(JEB)(JRB)(RLW)**
FEDERAL ELECTION COMMISSION, Defendant.	**Three-Judge Court**

Before: BROWN, Circuit Judge; WILKINS, District Judge; and BOASBERG, District Judge.

MEMORANDUM OPINION

BROWN, Circuit Judge:

Congress enacted the Federal Elections Campaign Act of 1971 (FECA) to "promote fair practices in the conduct of electin campaigns for Federal political offices." Pub. L. No. 92-225, preamble, 86 Stat. 3, 3 (1972). Since 1972, the law has changed significantly. The current iteration of FECA imposes contribution limits stratified to track both the identity of the contributor and the identity of the receiver. Individuals, however, cannot

necessarily contribute as much as they might wish within these limits; they, and only they, must comply with a second regulatory tier: a set of aggregate contribution limits. 2 U.S.C. § 441a(a)(3). Plaintiffs Shaun McCutcheon and the Republican National Committee ("RNC") now challenge these aggregate limits as unconstitutional. We reject their challenge.

I. Background

A. Legal Background

In 1974, Congress amended FECA to prohibit persons from contributing more than $1,000 to any political candidate, individuals from contributing more than an aggregate of $25,000 in any calendar year, and political committees from contributing more than $5,000 to any political candidate. FECA Amendments of 1974 § 101, Pub. L. No. 93-443, 88 Stat. 1263, 1263. The Supreme Court ultimately upheld these contribution limits in the face of a First Amendment challenge, thought it struck down FECA's expenditure limits. *Buckley v. Valeo*, 424 U.S. 1, 58 (1976) (per curiam) (summarizing holdings). A few months after the *Buckley* Court handed down its decision, Congress amended the FECA to distinguish (1) between contributions by persons and contributions by multicandidate political committees, and (2) among contributions to candidates and their authorized committees, contributions to national political party committees, and contributions to all other political committees. FECA Amendments of 1976 §§ 111, 201, Pub. L. No.

94-283, 90 Stat. 475, 486-87. Congress left the $25,000 aggregate limit on individuals' contributions untouched, however, until the Bipartisan Campaign Reform Act of 2002 ("BCRA"), which replaced the $25,000 aggregate limit with the bifurcated limiting scheme that Plaintiffs now challenge. Section 307, Pub. L. No. 107-155, 116 Stat. 81, 102-03. There are thus two sets of contribution limits: base limits calibrated to the identity of the contributor regulating how much the contributor may give to specified categories of recipients, and a set of aggregate limits regulating the total amount an individual may contribute in any two-year election cycle. Some (but not all) of these limits are periodically indexed for inflation. *See* 2 U.S.C. § 441a(c).

The default base limits apply to contributions by "persons," that is, individuals, partnerships, committees, associations, corporations, unions, and other organizations. *See* 2 U.S.C. 431(11) (defining "person"). FECA currently prohibits persons from contributing more than $2,500 per election to any given candidate or that candidate's agent or authorized committee; more than $30,800 in any calendar year to each of a national political party's national committee, House campaign committee, and Senate campaign committee; more than $10,000 in any calendar year to a state political party committee; and more than $5,000 in any calendar year to any other political committee. 2 U.S.C. § 441a(a)(1); 11 C.F.R. § 110.1(b)-(d); 76 Fed. Reg. 8,368, 8,370 (Feb. 14, 2011) (indexing for inflation).

These base contribution limits do not limit how much a contributor can contribute as long as the contributions remain within the limits for each recipient. Under the base contribution limits, for example, an individual might contribute $3.5 million to one party and its affiliated committees in a single election cycle.[1] The aggregate limits prevent this. During each two-year period starting in an odd-numbered year, no individual may contribute more than an aggregate of $46,200 to candidates and their authorized committees or more than $70,800 to anyone else. 2 U.S.C. § 441a(a)(3); 76 Fed. Reg. at 8,370. Of that $70,800, no more than $46,200 may be contributions to political committees that are not national political party committees. 2 U.S.C. § 441a(a)(3); 76 Fed. Reg. at 8,370. These aggregate limits, which amount to a total biennial limit of $117,000, 11 C.F.R. § 110.5(b); 76 Fed. Reg. at 8,370, thus prevent individuals from contributing the statutory maximum to more than eighteen candidates.

FECA includes a number of provisions designed to prevent evasion of the various limits.

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[1] As amici Campaign Legal Center and Democracy 21 explain, because primary and general elections held during the same calendar year count as separate elections, 11 C.F.R. §§ 100.2, 110.1(j), an individual might contribute $5,000 to each of a party's House and Senate candidates, $30,800 to each of a party's three federal party committees each year, and $10,000 to each of a party's fifty state committees a year. McCutcheon does not dispute this calculation. This $3.5 million, moreover, does not include contributions to PACs, a sum that would equal $5,000 multiplied by whatever number of PACs an individual desires to give to.

First, anyone who contributes more than permitted may be subject to civil or criminal penalties. 2 U.S.C. § 437g(a), (d). Second, indirect contributions, such as earmarked contributions to an intermediary, are deemed contributions to that candidate. 2 U.S.C. § 441a(a)(8). Third, FECA prohibits contributions made in the name of someone else. 2 U.S.C. § 441f. Finally, contributions made or received by more than one "affiliated" committee are deemed to have been made or received by the same committee. 2 U.S.C. § 441a(a)(5); 11 C.F.R. §§ 100.5(g), 110.3.

B. Factual and Procedural Background

McCutcheon is an Alabama resident eligible to vote in an U.S. presidential election. Thus far, during the 2011-2012 election cycle, he has contributed a total of $33,088 to sixteen different candidates in amounts ranging from $1,776 to $2,500 per election; $1,776 to each of the RNC, the National Republican Senatorial Committee ("NRSC"), and the National Republican Congressional Committee ("NRCC"); $2,000 to a nonparty political committee (the Senate Conservative Fund); and $20,000 to the federal account of a state party committee (the Alabama Republican Party). McCutcheon, however, wants to contribute more. He wants to contribute $1,776 to twelve other candidates and enough money to the RNC, NRSC, and NRCC to bring his total contributions up to $25,000 each. Doing either of these, however, would violate the aggregate limits: the additional candidate contributions would amount to aggregate candidate contributions of $54,400, and

the additional party committee contributions would amount to aggregate contributions of $75,000 to national party committees. McCutcheon assures us he intends to repeat these donation patterns during future election cycles.

The RNC, meanwhile, wishes to receive contributions from individuals like McCutcheon that would be permissible under the base limits but violate the aggregate limit on contributions to party committees. Because of the aggregate limit, the RNC has both refused and returned contributions. The RNC believes that others would contribute o the RNC but for the limit. According to the verified complaint, the RNC does not control either the NRSC or the NRCC.

Plaintiffs challenge both the $46,200 aggregate limit on candidate contributions and the $70,800 aggregate limit on other contributions under the First Amendment. They challenge the $46,200 aggregate limit for being "unsupported by any cognizable government interest…at any level of review" and for being unconstitutionally low. They challenge the $70,800 aggregate limit facially, as applied to contributions up to $30,800 per calendar year to national party committees, and for being too low, both facially and as applied to contributions to national party committees. Plaintiffs also ask this Court for a preliminary injunction to enjoin Federal Election Commission ("FEC") enforcement of the aggregate limits. We consolidated the preliminary injunction hearing with the hearing on the merits and now resolve both issues.

II. Discussion

A. Level of Scrutiny

Both contribution limits and expenditure limits implicate "the most fundamental" First Amendment interests, but each does so in a different way. *Buckley*, 424 U.S. at 14. The Supreme Court has accordingly applied different levels of scrutiny to each: expenditure limits are subject to strict scrutiny, while contribution limits will be valid as long as they satisfy "the less demand of being closely drawn to match a sufficiently important interest." *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 136 (2003) (quoting *Fed. Election Comm'n v. Beaumont*, 539 U.S. 146, 162 (2003)), *overruled on other grounds by Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 913 (2010). The Court has never repudiated this distinction. *See Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2817 (2011) (distinguishing between scrutiny of contributions and expenditures).

Plaintiffs argue that the aggregate limits must be subject to strict scrutiny because laws burdening political speech are subject to strict scrutiny and the aggregate limits "similarly 'burden' First Amendment rights." This syllogism is rooted in *Buckley* itself. The *Buckley* Court did not unequivocally hold that political expenditures are speech. Rather, it drew on the fact that "virtually every means of communicating ideas in today's mass society requires the expenditure of money" to hold that "[a] restriction on the amount of money a person

or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." 424 U.S. at 19. Thus, the Court suggested, contribution limits might sometimes implicate rights of expression in more than a "marginal" way, like a spiking seismograph at the onset of an earthquake. More recently, *Citizens United* proclaimed that "[l]aws that burden political speech are 'subject to strict scrutiny,' 130 S. Ct. at 898, and this Court relied on that principle to preliminarily enjoin the FEC from enforcing limits on contributions to a political committee interested in making independent expenditures, *Carey v. Fed. Election Comm'n*, 791 F. Supp. 2d 121, 125, 128 (D.D.C. 2011).[2] Although we acknowledge the constitutional line between political speech and political contributions grows increasingly difficult to discern, we decline the Plaintiffs' invitation to anticipate the Supreme Court's agenda. *See Rodriguez de Quijas v. Sherson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

[2] We note contributions for independent expenditures are a different beast altogether. The *Carey* court was constrained by the D.C. Circuit's recent decision in *SpeechNow.org v. Fed. Election Comm'n*, 599 F.3d 686 (D.C. Cir. 2010), holding unconstitutional contribution limits to independent expenditure groups. *Id.* at 695.

Every contribution limit may "logically reduce[] the total amount that the recipient of the contributions otherwise could spend," but for now, "this truism does not mean limits on contributions are simultaneously considered limits on expenditures that therefore receive strict scrutiny." *Republican Nat'l Comm. v. Fed. Election Comm'n*, 698 F. Supp. 2d 150, 156 (D.D.C. 2010), *aff'd*, 130 S. Ct. 3544 (2010) (mem.); *see Citizens United*, 130 S. Ct. at 909 (declining to "reconsider whether contribution limits should be subjected to rigorous First Amendment scrutiny").

Plaintiffs try to escape the consequences of lesser scrutiny by arguing that the aggregate limits are actually expenditure limits, not contribution limits. Because § 441a(a)(1) already establishes base contribution limits, they say, "added biennial contribution limits are more appropriately deemed *expenditure* limits, subject to strict scrutiny." They are wrong. The different between contributions and expenditures is the difference between giving money to an entity and spending that money directly on advocacy. Contribution limits are subject to lower scrutiny because they primarily implicate the First Amendment rights of association, not expression, and contributors remain able to vindicate their associational interests in other ways, *Buckley*, 424 U.S. at 22, 28; the limits primarily implication associational rights rather than rights of expression because they impose only a "marginal" restriction on the contributor's "ability to engage in free communication," *id.* at 20; they impose only a marginal restriction on a contributor's expressive

ability because the expressive value of a contribution derives from the "undifferentiated, symbolic act of communicating," *id.* at 21; and the expressive value of contributions are limited because "the transformation of contributions into political debate involves speech by someone other than the contributor," *id.* The aggregate limits do not regulate money injected directly into the nation's political discourse, the regulated money goes into a pool from which another entity draws to fund its advocacy. *See Cal. Med. Ass'n v. Fed. Election Comm'n*, 453 U.S. 182, 195-96 (1981) (rejecting "speech by proxy" argument that limit on contributions to political committee is actually expenditure limit "because it restricts the ability of [the contributor] to engage in political speech through a political committee"). To break the chain of legal consequences tied to that fact would require a judicial act we are not empowered to perform.

B. The Merits

The government may justify the aggregate limits as a means of preventing corruption or the appearance of corruption, or as a means of preventing circumvention of contribution limits imposed to further its anticorruption interest.[3]

[3] Even after *Citizens United*, a number of other circuits continue to recognize anticorruption and anticircumvention as valid government interests. They likewise continue to recognize the government's interest in preventing the appearance of corruption. *See, e.g.*, *United States v. Danielczyk*, 683 F.3d 611, 618 (4th Cir. 2012); *Ognibene v. Parkes*, 671 F.3d 174, 187, 195 & n.21 (2d Cir. 2011); *Wis. Right to Life State Political Action*

Buckley, 424 U.S. at 26-27, 38. The Supreme Court has recognized no other governmental interest "sufficiently important to outweigh the First Amendment interests implicated by contributions for political speech." *SpeechNow.org*, 599 F.3d at 692. "Corruption," though, is a narrow term of art: "Election officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial *quid pro quo*: dollars for political favors." *Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985). Influence over or access to elected officials does not amount to corruption. *Citizens United* , 130 S. Ct. at 910 ("Democracy is premised on responsiveness." (quoting *McConnell*, 540 U.S. at 297 (Kennedy, J., concurring in the judgment in part and dissenting in part))).

Citizens United left unclear the constitutionally permissible scope of the government's anticorruption interest. It both restricted the concept of quid-pro-quo corruption to bribery, *see* 130 S. Ct. at 908 ("The practices *Buckley* noted would be covered by bribery laws if a *quid pro quo* arrangement were proved."), and suggested that there is a wheeling-and-dealing space between pure bribery and mere influence and access where elected officials are "corrupt" for acting contrary to their

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Comm. v. Barland, 664 F.3d 139, 153 (7th Cir. 2011); *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1118, 1124-25 (9th Cir. 2011).

representative obligations, *see id.* at 911 (stating that there would be "cause for concern" if elected officials "succumb to improper influences," "surrender their best judgment," and "put expediency before principle" because of independent expenditures. Yet if anything is clear, it is that contributing a large amount of money does not ipso facto implicate the government's anticorruption interest. The government's assertion that large contributions "could easily exert a corrupting influence on the democratic system" and would present "the appearance of corruption that is 'inherent in a regime of large individual financial contributions'" simply sweeps too broadly. McCutcheon alleges that he has "deeply held principles regarding government and public policy," believing that "the United States is slowly but surely losing its character as an exceptional nation that stands for liberty and limited government under the Constitution." He wants to contribute to a number of candidates "who are interested in advancing the cause of liberty." Supporting general principles of governance does not bespeak corruption; such is democracy. "It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies." *Citizens United*, 130 S. Ct. at 910 (quoting *McConnell*, 540 U.S. at 297 (Kennedy, J., concurring in the judgment in part and dissenting in part)).

Plaintiffs do not, however, challenge the base contribution limits,[4] so we may assume they are valid expressions of the government's anticorruption interest. And that being so, we cannot ignore the ability of aggregate limits to prevent evasion of the base limits. *See Buckley*, 424 U.S. at 38 (upholding the $25,000 aggregate limit as "no more than a corollary of the basic individual contribution limitation that we have found to be constitutionally valid"). Circumvention, after all, can be "very hard to trace." *Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 462 (2001) ("*Colorado II*"); *see McConnell*, 540 U.S. at 165, 224 (explaining that "[m]oney, like water, will always find an outlet," and Congress has learned "the hard lesson of circumvention" from "the entire history of campaign finance regulation"). Eliminating the aggregate limits means an individual might, for example, give half-a-million dollars in a single check to a joint fundraising committee composing of a party's presidential candidate, the party's national party committee, and most of the party's state committees. After the fundraiser, the committees are required to divvy the contributions to ensure that no committee receives more than its permitted share, 11 C.F.R. §§ 102.6(a)(1), 110.3(c)(2), but because

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[4] We take no position on whether plaintiffs could have done so. *See McConnell*, 540 U.S. at 229 ("This Court has no power to adjudicate a challenge to the FECA [contribution] limits because challenges to the constitutionality of FECA provisions are subject to direct review before an appropriate en banc court of appeals . . . not in the three-judge District Court convened pursuant to BCRA § 403(a).")).

party committees may transfer unlimited amounts of money to other party committees of the same party, the half-a-million-dollar contribution might nevertheless find its way to a single committee's coffers. 2 U.S.C. § 441a(a)(4); 11 C.F.R. §§ 102.6(a)(1)(ii), 110.3(c)(1). That committee, in turn, might use the money for coordinated expenditures, which have no "significant functional difference" from the party's direct candidate contributions. *Colorado II*, 533 U.S. at 460. The candidate who knows the coordinated expenditure funding derives from that single large check at the joint fundraising event will know precisely where to lay the wreath of gratitude.

Gratitude, of course, is not itself a constitutionally-cognizable form of corruption, *Republican Nat'l Comm.*, 698 F. Supp. 2d at 158, and it may seem unlikely that so many separate entities would willingly serve as conduits for a single contributor's interests. But it is not hard to imagine a situation where the parties implicitly agree to such a system, *see Colorado II*, 533 U.S. at 459 (upholding limits on coordinate spending as a means of preventing circumvention of contribution limits because of "informal bookkeeping" practices by which, among other things, "[d]onors would be told the money they contributed could be credited to any Senate candidate"), and there is no reason to think the quid pro quo of an exchange depends on the number of steps in the transaction, *see McConnell*, 540 U.S. at 155 ("[T]here is no meaningful separation between the national party committees and the public officials who control them."). The

Supreme Court has rejected the argument that Congress cannot restrict coordinated spending as an anticircumvention measure because there are "better crafted safeguards" in place like the earmarking rules. *Colorado II*, 533 U.S. at 462. We follow the Court's lead and conceive of the contribution limits as a coherent system rather than merely a collection of individual limits stacking prophylaxis upon prophylaxis.

Given our conclusion that the aggregate limits are justified, we reject Plaintiffs' arguments that the limits are unconstitutionally low and unconstitutionally overbroad. It is not the judicial role to parse legislative judgment about what limits to impose. *See Randall v. Sorrell*, 548 U.S. 230, 248 (2006) (plurality) ("We cannot determine with any degree of exactitude the precise restriction necessary to carry out the statute's legitimate objectives. In practice, the legislature is better equipped to make such empirical judgments…."); *Colorado II*, 533 U.S. at 446 ("[T]he dollar amount of the limit need not be 'fine tun[ed].'" (quoting *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 387-88 (2000))); *Buckley*, 424 at 30 ("[I]f it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000." (internal quotation marks omitted)). Only if there are "danger signs" that the limits are not closely drawn will we examine the record to review the statute's tailoring. *Randall*, 548 U.S. at 249; *see Buckley*, 424 U.S. at 30 ("Such distinctions in degree become significant only when they can be said to amount to differences in kind.").

We see no danger signs here. Plaintiffs' argument depends on using "simple arithmetic" to translate the Vermont contribution limits invalidated in *Randall* to imaginary biennial limits on contributions to party committees and candidates. They argue that the limit on contributions to state party committees invalidated by *Randall* is equivalent to a biennial contribution limit of $198,389 to national party committees, which they explain is about $14,000 *more* than the total amount an individual could biennially contribution to the three committees—an amount an individual still cannot contribute because of the aggregate limits. They likewise argue that if an individual wanted to contribute equally to "one candidate of his choice in all 468 federal races" in 2006, he would be limited to contributing $85.29 per candidate for the entire election cycle, an amount "far below the $200 limit held too low in *Randall*." Even granting that Plaintiffs' methodology and results are correct,[5] "the

[5] Their premise that the *Randall* Court struck down a "$400 limit on contributions an individual may may make, over a two-year period, to a state party committee" distorts the Court's description that the statute in question "imposes a limit of $2,000 upon the amount any individual can give to a political party during a 2-year general election cycle." 548 U.S. at 239. In any event, to compare the amount of money required to reach the national population to the amount needed to reach just the citizens of Vermont is not a matter of a mere multiplier. If direct mail were the only means, such a multiplier might work. But to take a simple example, building a website to reach a national audience is not any more expensive than building one to reach citizens of a single state. As a result, Plaintiffs are wrong to create a simple ratio of money needed to reach Vermonters over money needed to reach all Americans.

dictates of the First Amendment are not mere functions of the Consumer Price Index." *Shrink Mo. Gov't PAC*, 528 U.S. at 397. The effect of the aggregate limits on a challenger's ability to wage an effective campaign is limited because the aggregate limits do not apply to nonindividuals. *See Randall*, 548 U.S. at 236, 249 (invalidating contribution limit that imposed a burden on First Amendment rights "disproportionately severe" to the government's legitimate interests because the limits "harm[ed] the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability"). *Buckley*, 424 U.S. at 21 (suggesting the contribution limits would be problematic if they "prevented candidates and political committees from amassing the resources necessary for effective advocacy"). And in any event, individuals remain able to volunteer, join political associations, and engage in independent expenditures. *See Wagner v. Fed. Election Comm'n*, Civ. Action No. 11-1841(JEB), 2012 WL 1255145, at *9 (D.D.C. Apr. 16, 2012) ("There is even less need for the Court to interfere with legislative judgments where the persons affected by the ban have other meaningful avenues for political association and expression.").

Plaintiffs' overbreadth challenge consists of the conclusory assertions that the aggregate limits substantially inhibit protected speech and association "not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications," and that "there is no 'scope of…plainly legitimate applications'" since neither political party

proliferation nor movement of "massive" amounts of money through party committees or PACs to candidates is now possible. The *Buckley* Court rejected challenges that the contribution limits are overbroad because most contributors are not seeking a quo for their quid and the base contribution limit is "unrealistically low." 424 U.S. at 30. Aside from these two claims, which we join the *Buckley* Court in rejecting, Plaintiffs do not explain how the aggregate limits potentially regulate both protected *and* unprotected conduct. *See Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (tracing the overbreadth doctrine to "concern that the threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech"); *Hill v. Colorado*, 530 U.S. 703, 731-32 (2000) (emphasizing that the overbreadth doctrine permits litigants to challenge a statute because of a "judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression"); *Broadrick v. Oklahoma*, 413 U.S. 601, 610-12 (1973) (explaining the overbreadth doctrine as a tool for circumventing an otherwise prohibitory standing doctrine). Plaintiffs' overbreadth argument is essentially a severability claim, but because we conclude that nothing needs to be severed, this argument fails.

Plaintiffs raise the troubling possibility that *Citizens United* undermined the entire contribution limits scheme, but whether that case will ultimately spur a new evaluation of *Buckley* is a question for the Supreme Court, not us.

III. Conclusion

For the foregoing reasons, the Court will issue a contemporaneous Order denying Plaintiffs' Motion for a Preliminary Injunction and granting the FEC's motion to dismiss.

/s/ JANICE ROGERS BROWN
United States Circuit Judge

/s/ ROBERT L. WILKINS
United States District Judge

/s/ JAMES E. BOASBERG
United States District Judge

Date: September 28, 2012

ORDER AND FINAL JUDGMENT

For the reasons set forth in the Memorandum Opinion, it is this 28th day of September, 2012, hereby

ORDERED that the Defendant Federal Election Commission's motion to dismiss is Granted; it is further

ORDERED that the Plaintiff's motion for a preliminary injunction is **DISMISSED AS MOOT**; and it is further

ORDERED that final judgment be entered for the defendant.

SO ORDERED.

/s/ JANICE ROGERS BROWN
United States Circuit Judge

/s/ ROBERT L. WILKINS
United States District Judge

/s/ JAMES E. BOASBERG
United States District Judge

APPENDIX E

U.S. Const. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2 U.S.C. §441a. Limitations on contributions and expenditures

(a) Dollar limits on contributions

(1) Except as provided in subsection (i) of this section and section 441a–1 of this title, no person shall make contributions—

> (A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $2,000;
>
> (B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year which, in the aggregate, exceed $25,000;
>
> (C) to any other political committee (other than a committee described in subparagraph

(D)) in any calendar year which, in the aggregate, exceed $5,000; or

(D) to a political committee established and maintained by a State committee of a political party in any calendar year which, in the aggregate, exceed $10,000.

[…]

(3) During the period which begins on January 1 of an odd-numbered year and ends on December 31 of the next even-numbered year, no individual may make contributions aggregating more than—

(A) $37,500, in the case of contributions to candidates and the authorized committees of candidates;

(B) $57,500, in the case of any other contributions, of which not more than $37,500 may be attributable to contributions to political committees which are not political committees of national political parties.

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11 C.F.R. § 110.5(b)
Aggregate biennial contribution limitation for individuals (2 U.S.C. 441a(a)(3)).

(1) In the two-year period beginning on January 1 of an odd-numbered year and ending on December 31 of the next even-numbered year, no individual shall

make contributions aggregating more than $95,000, including no more than:

> (i) $37,500 in the case of contributions to candidates and the authorized committees of candidates; and
>
> (ii) $57,500 in the case of any other contributions, of which not more than $37,500 may be attributable to contributions to political committees that are not political committees of any national political parties.

(2) [Reserved]

(3) The contribution limitations in paragraph (b)(1) of this section shall be increased by the percent difference in the price index in accordance with 11 CFR 110.17. The increased contribution limitations shall be in effect for the two calendar years starting on January 1 of the year in which the contribution limitations are increased.

(4) In every odd-numbered year, the Commission will publish in the Federal Register the amount of the contribution limitations in effect and place such information on the Commission's Web site.

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

VIRGINIA JAMES, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	**Civil Action No. 12-1451** **Three-Judge Court Requested** **Oral Argument Requested**

VERIFIED COMPLAINT FOR DECLARATORY RELIEF

I. NATURE OF ACTION

1. Plaintiff challenges the limit on total contributions to candidate committees ("sub-aggregate limit") under the Bipartisan Campaign Reform Act. Pub. L. 107-155, 116 Stat. 93 (2002) ("BCRA"); 2 U.S.C. § 441a(a)(3)(A) (indexed for inflation per 11 C.F.R. § 110.5(b)(4) at 76 Fed. Reg. 8368 (Feb. 14, 2011)).

2. *Buckley v. Valeo*, 424 U.S. 1 (1976), upheld the aggregate contribution limits of BCRA's predecessor, the Federal Election Campaign Act ("FECA"). *Buckley*'s holding stemmed from concern that contributors could circumvent limits on

contributions to individual candidates by contributing to parties and other committees. *Buckley*, 424 U.S. at 38.

3. Plaintiff does not wish or intend to give to parties or PACs, thus negating the *Buckley* rationale. Therefore, this challenge to the sub-aggregate limit on total contributions to candidates is one of first impression.

4. Moreover, *Buckley* did not consider the sub-aggregate limits that exist under BCRA because those limits did not exist in 1976. Rather, *Buckley* considered a statute that contained only one, overall annual aggregate limit on all contributions to candidate committees, party committees and political committees.. Pub. L. 93-443, Sec. 101(3) (1974) ("Federal Election Campaign Act Amendments of 1974"); *see also* Pub. L. 92-225, Sec. 205 (definition of contributions for Federal Election Campaign Act of 1971).

5. Plaintiff Virginia James, a private individual, has given to political candidates in the past and plans to continue doing so. This biennium, she wishes to contribute more than the current sub-aggregate limit of $46,200 to various political candidates, but does not wish to exceed the $2,500 limit on contributions to each individual candidate. 2 U.S.C. § 441a(a)(1)(A) (indexed for inflation per 11 C.F.R. § 110.5(b)(3)-(4) at 76 Fed. Reg. 8368 (Feb. 14, 2011)). Nor does she wish to exceed the overall biennial limit of $117,000 on all contributions to candidates, PACs, and parties. 2 U.S.C. § 441a(a)(3)(A)-(B)

(indexed for inflation per 11 C.F.R. § 110.5(b)(3)-(4) at 76 Fed. Reg. 8368 (Feb. 14, 2011)). Rather, she wishes to take money that she may legally contribute to PACs and parties, and instead contribute it directly to candidates she wishes to support.

II. JURISDICTION AND VENUE

6. This Court has jurisdiction because this action arises under the First Amendment to the United States Constitution and a federal statute. 28 U.S.C. § 1331 (2012).

7. This Court has jurisdiction under sections 403(a)(1) and (d)(2) of the Bipartisan Campaign Reform Act of 2002 ("BCRA"). Pub. L. No. 107-155 (2002), 116 Stat. 81, 113-14. *See* 28 U.S.C. § 2284; LCvR 9.1.

8. This court has jurisdiction as to the constitutionality of FECA and its subsequent amendments under 2 U.S.C. § 437h (2012).

9. This Court has jurisdiction under the Declaratory Judgment Act. 28 U.S.C. §§ 2201and 2202 (2012).

10. Venue in this Court is proper under 28 U.S.C. §§ 1391(e) (2012).

III. PARTIES

11. Plaintiff Virginia James is an investor and resident of Lambertville, New Jersey, who has given

to political candidates and political action committees ("PACs") in the past, and plans to continue contributing to federal candidate committees.

12. Defendant Federal Election Commission ("FEC") is the federal government agency charged with enforcing BCRA.

IV. FACTS

13. Ms. James wishes to exercise her First Amendment right to associate by contributing directly to various candidates for federal office.

14. This biennium, Ms. James has contributed to individual candidate committees, political action committees ("PACs"), and independent expenditure only committees.

15. During this biennium, Ms. James has contributed at least $27,000 to candidate committees. Ms. James made these contributions in accordance with the $2,500 limit on contributions to individual candidates under 2 U.S.C. § 441a(a)(1)(A) (indexed for inflation per 11 C.F.R. § 110.5(b)(3)-(4) at 76 Fed. Reg. 8368 (Feb. 14, 2011)).

16. Ms. James's contributions to candidates during this biennium do not exceed $46,200.

17. During this biennium, Ms. James has contributed $5,000 to PACs, an amount well below the $46,200 limit on contributions to PACs under 2

U.S.C. § 441a(a)(3)(B) (indexed for inflation per 11 C.F.R. § 110.5(b)(3)-(4) at 76 Fed. Reg. 8368 (Feb. 14, 2011)).

18. Ms. James does not wish to make any further contributions to PACs this biennium, and stipulates that she will not do so.

19. Ms. James does not wish to make any contributions to political parties this biennium, and stipulates that she will not do so.

20. This biennium, Ms. James wishes to contribute up to the $117,000 aggregate biennial limit under 2 U.S.C. § 441a(a)(3) (indexed for inflation per 11 C.F.R. § 110.5(b)(3)-(4) at 76 Fed. Reg. 8368 (Feb. 14, 2011)).

21. The *only* contributions Ms. James wishes to make during the balance of this biennium are direct contributions of up to $2,500 to individual candidate committees.

22. Ms. James wishes to contribute more than the sub-aggregate biennial limit of $46,200 on total candidate contributions.

23. Ms. James does not seek to contribute in excess of the current aggregate biennial contribution limit of $117,000.

V. CAUSES OF ACTION

COUNT 1:
The Sub-Aggregate Limit on Contributions to Individual Candidates is Facially Unconstitutional.

24. Plaintiff realleges and incorporates by reference paragraphs 1 – 23.

25. Contribution limits implicate the First Amendment by limiting the freedoms of political association and speech. *Buckley*, 424 U.S. at 15; *Randall v. Sorrell*, 548 U.S. 230, 246-247 (2006).

26. Contribution limits are permissible in the interest of preventing actual or apparent corruption. *Buckley*, 424 U.S. at 28.

27. But, "[i]n drawing that line, the First Amendment requires us to err on the side of protecting political speech rather than suppressing it," *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 457 (2007) ("*WRTL II*"), because "[t]he First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office." *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010) (internal citations omitted).

28. In *Buckley*, the Supreme Court upheld FECA's contribution limits for both individual candidates and in the aggregate, based on different rationales.

29. The *Buckley* Court upheld contribution limits for individual candidates under the rationale that such limits were necessary to prevent actual or apparent corruption. *Buckley*, 424 U.S. at 26.

30. The *Buckley* Court upheld limits on aggregate contributions:

> to prevent evasion of the [individual candidate] contribution limitation by a person who might otherwise contribute 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.

Buckley, 424 U.S. at 38, *cf. McConnell v. FEC*, 540 U.S. 93, 152 n. 48 (2003).

31. BCRA also eliminated unlimited contributions to political parties for party-building activities; so-called "soft money." *See* BCRA, § 323, 2 U.S.C. § 441i; *McConnell*, 540 U.S. at 288 (Kennedy, J. concurring in part and dissenting in part); *Citizens United*, 130 S. Ct. at 910.

32. In *McConnell*, the U.S. Supreme Court did not discuss BCRA's sub-aggregate biennial limit on contributions to individual candidates—although the issue was properly pled before the Court. However, the Court did uphold FECA's annual, total aggregate contribution limit. *McConnell*, 540 U.S. at 152, 167

(2003). The Court did so on identical grounds to those in *Buckley. Id.*

33. The sub-aggregate limit on candidate contributions prevents contributors from giving to more than a limited number of races in any one electoral cycle, despite the fact that an individual may wish to associate with multiple candidates in multiple races—all at a level Congress has identified as non-corrupting in setting other contribution limits.

34. Thus, there is no anti-corruption or anti-circumvention rationale that remains for individual contributors wishing to contribute solely to candidates. The sub-aggregate limit on individual candidate contributions unnecessarily chills speech and infringes upon associational rights through a means that is not appropriately tailored. Thus, that limit is unconstitutionally overbroad.

35. Plaintiff realleges and incorporates by reference paragraphs 1 – 34.

COUNT 2:
The Sub-Aggregate Limit on Contributions to Individual Candidates is Unconstitutional as Applied to Plaintiff.

36. *McConnell* did not address the factual landscape present here. Plaintiff pledges strict adherence to the individual candidate contribution limit and the overall biennial contribution limit. However, she wishes to contribute more than $46,200 of the

biennial limit's $117,000 directly to candidate committees. In light of the foregoing, this is a case of first impression.

37. The sub-aggregate limit on candidate contributions prevents Ms. James from giving to more than a handful of races in any one electoral cycle, despite the fact that she wishes to associate with multiple candidates in multiple races—all at a level Congress has identified as non-corrupting in setting other contribution limits.

38. There is no anti-corruption or anti-circumvention rationale that remains relevant given Ms. James's wish to emphasize candidate committees in assigning her contributions. The sub-aggregate limit on individual candidate contributions unnecessarily chills Ms. James's speech and infringes upon her associational rights through a means that is not appropriately tailored. Thus, that limit is unconstitutionally overbroad.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for the following relief:

A. A declaration that the aggregate limit on contributions to individual candidates at 2 U.S.C. §441a(a)(3)(A) is unconstitutional on its face.

B. A declaration that, in light of Ms. James' right to association and the government's mooted

interest in the anti-circumvention and corruption rationales, the sub-aggregate limit on contributions to individual candidates at 2 U.S.C. §441a(a)(3)(A) is unconstitutional as applied to Ms. James.

C. An injunction barring enforcement of 2 USC §441a(a)(3)(A).

D. Costs and Attorneys' Fees.

E. Such equitable or other relief as this Court may consider just and appropriate.

Respectfully submitted this 31st day of August, 2012.

/s/Allen Dickerson
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Counsel for Plaintiff

VERIFICATION

STATE OF MAINE)
) ss.
COUNTY OF HANCOCK)

I, Virginia James, being first duly sworn, state under oath that I have read the foregoing VERIFIED COMPLAINT, and that the statements contained therein are true and correct to the best of my knowledge, information, and belief.

/s/ Virginia James

Subscribed and sworn before me this 30th day of August, 2012.

/s/ Diane M. Willey-Ward
Notary Public

My Commission Expires: [STAMP]
DIANE M. WILLY-WARD
Notary Public Maine
My Commission Expires
January 15, 2019

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of August, 2012, the foregoing document was served on the following, via first class mail:

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Secretary of the Senate
United States Senate
Washington, DC 20510-6601

/s/ Allen Dickerson
Allen Dickerson

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

VIRGINIA JAMES, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	**Civil Action No. 12-1451** **Three-Judge Court Requested** **Oral Argument Requested**

MOTION FOR PRELIMINARY INJUNCTION

Plaintiff Virginia James, by and through undersigned counsel, moves this Court for a preliminary injunction enjoining the Federal Election Commission ("the Commission"), from enforcing the aggregate limit on contributions to candidate committees ("sub-aggregate limit") under the Bipartisan Campaign Reform Act. Pub. L. 107-155, 116 Stat. 93 (2002) ("BCRA"); 2 U.S.C. § 441a(a)(3)(A) (indexed for inflation per 11 C.F.R. § 110.5(b)(4) at 76 Fed. Reg. 8368 (Feb. 14, 2011)). As set forth in the accompanying Memorandum of Law in support of this Motion, if Ms. James is required to abide by the sub-aggregate limit, she will be denied the full expression of her First Amendment rights to association and speech. Absent an injunction from

this Court, Ms. James reasonably fears that the Commission will proceed with the enforcement of the sub-aggregate limit, burdening her First Amendment rights.

The sub-aggregate limit would be constitutional only if the limit is shown to be necessary to prevent actual or apparent corruption, or to prevent contributors from utilizing PACs or political parties as a means of circumventing the limits on contributions to individual candidate committees. However, for reasons enumerated in the accompanying Memorandum of Law in support of this Motion, neither the anti-corruption nor the anti-circumvention rationales exists as regards to the sub-aggregate limit, either facially or as applied to Ms. James. Thus, the Commission, the agency charged with enforcing the Federal campaign finance laws, may not enforce the sub-aggregate limit against Ms. James.

Ms. James is likely to succeed on the merits of her constitutional claims. Plaintiff would be irreparably harmed if the Commission enforces the sub-aggregate limit against her, thereby placing an unconstitutional burden on Plaintiff's First Amendment rights. Moreover, neither the public interest nor the Commission's interest is contrary to the entering of an injunction. Consequently, Ms. James meets the standard for the issuance of a preliminary injunction, and requests that this Court enter the same.

Pursuant to LCvR 7(m) of this Court. Plaintiff has conferred with opposing counsel by telephone, and Defendant opposes this motion.

Respectfully submitted this 5th day of September, 2012.

/s/Allen Dickerson
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Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of September, 2012, I caused the foregoing document to be served on the following, via electronic and First Class mail:

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Counsel for Defendant, FEC

/s/ Allen Dickerson
Allen Dickerson

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

VIRGINIA JAMES, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	**Civil Action No. 12-1451** **Three-Judge Court Requested** **Oral Argument Requested**

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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Counsel for Plaintiff

[TABLE OF CONTENTS AND TABLE OF AUTHORITIES OMITTED HERE DUE TO INCONSISTENT PAGINATION BETWEEN ORIGINAL AND THIS APPENDIX]

Introduction

Plaintiff Virginia James challenges the individual biennial limits on contributions to candidate committees at 2 U.S.C. 441a(a)(3)(A) ("sub-aggregate limit") as violative of her First Amendment right to free association. This challenge is based on the changed state of the law since the landmark campaign finance case *Buckley v. Valeo*.[1]

Facts

Virginia James wishes to exercise her First Amendment right to associate by contributing directly to candidates for federal office. She wishes to contribute up to the aggregate limit of $117,000 over a two-year period.[2] Ms. James is not challenging this aggregate limit, and stipulates that her relevant biennial contributions will not, in the aggregate, exceed $117,000.

In the past year, Ms. James gave $5,000 to the Club for Growth, a political action committee or "PAC."[3] She also contributed at least $27,000 to

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[1] 424 U.S. 1 (1976).

[2] 2 U.S.C. § 441a(a)(3).

[3] Ms. James also gave $1,000,000 to independent-expenditure-only political action committees, or "SuperPACs," per the decision of the D.C. Circuit in *SpeechNow.org v. FEC*, 599 F.3d 686 (DC Cir. 2010). However, contributions to independent-

individual candidates she supports, most of which was for primary election contests.[4] She made all of these contributions in accordance with the $2,500 limit on contributions to individual candidates.[5] Going forward, Ms. James stipulates that she will not make any future contributions to PACs, and will not make any contributions to political parties.

The *only* future participation Ms. James wishes to have in the 2012 election cycle is via direct contributions of up to $2,500 to individual candidates, consistent with the individual candidate contribution limit.[6] She wishes to do so up to the aggregate contribution cap of $117,000.[7] But BCRA requires that she divide that $117,000 among parties, PACs, and candidates, instead of allowing her to choose which candidates to directly support. Consequently, Ms. James is subject to an aggregate limit of $46,200 on her monetary participation in this election.[8] Other individuals, who would also like to associate with PACs and parties – in many cases because those entities may in turn contribute to

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expenditure-only committees are not subject to contribution limits, and consequently not relevant to this case.

[4] *See* Federal Election Commission Data, Individual Contributions for Virginia James, Jan. 1 2011, to Aug. 30 2012 available at http://www.fec.gov/finance/disclosure/advindsea.shtml *last accessed* Aug. 30, 2012.

[5] 2 U.S.C. § 441a(a)(1)(A) (indexed for inflation per 11 C.F.R. § 110.5(b)(3)-(4) at 76 Fed. Reg. 8368 (Feb. 14, 2011)).

[6] *Id.*

[7] 2 U.S.C. § 441a(a)(3)(A)-(B) (indexed for inflation per 11 C.F.R. § 110.5(b)(3)-(4) at 76 Fed. Reg. 8368 (Feb. 14, 2011)).

[8] 2 U.S.C. § 441a(a)(3)(A) (indexed for inflation per 11 C.F.R. § 110.5(b)(3)-(4) at 76 Fed. Reg. 8368 (Feb. 14, 2011)).

candidates – may contribute $70,800 more than Ms. James.

Plaintiff wishes merely to exercise her associational right to contribute during this election cycle at the same level as those who choose to contribute to parties and PACs in addition to candidates. Ms. James asks for a ruling allowing her to make contributions to the extent allowed by Congress, but to do so by directly supporting candidates, instead of being required to associate with PACs and parties.

Argument

I. Standard for preliminary injunction

To obtain a preliminary injunction, the moving party must show: (1) substantial likelihood of success on the merits; (2) that it would suffer irreparable injury if the injunction were not granted; (3) that an injunction would not substantially injure other interested parties; and (4) that the public interest would be furthered by the injunction.[9] This Court applies this four-factor test on a sliding scale, where "a particularly strong showing in one area can compensate for weakness in another."[10] Thus, "[i]f the showing in one area is particularly strong, an

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[9] *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 11-12 (D.D.C. 2009) (citing *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006)).

[10] *England*, 454 F.3d at 297.

injunction may issue even if the showings in other areas are rather weak."[11]

II. Ms. James will likely succeed on the merits.

When determining whether a preliminary injunction is appropriate, "the most critical" factor is the plaintiff's likelihood of success on the merits.[12] Virginia James wishes to associate with the candidates she supports by making contributions to their campaigns at a level (in the aggregate) above $46,200 but below $117,000. This Court has been asked to determine whether she may constitutionally be prohibited from doing so. Because candidate contributions are protected by the First Amendment, and because statutes limiting such contributions must survive exacting scrutiny, the challenged statute is likely unconstitutional.

A. Legal landscape and historical background.

Congress has established a biennial limit on the total value of political contributions an individual may make in a two-year period.[13] The current overall biennial limit is $117,000. This limit is subject to "sub-aggregate" limits on (1) the aggregate amount an individual may contribute to

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[11] *Brady Campaign, id.* (quoting *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 747 (D.C. Cir. 1995)).
[12] *Carey v. FEC*, 791 F. Supp. 2d 121, 128 (D.D.C. 2011).
[13] 2 U.S.C. § 441a(a)(3).

individual candidates in a two-year period,[14] (2) the aggregate amount an individual may contribute to political committees that are not political committees of national political parties in a two-year period,[15] and (3) the aggregate amount of "any other contributions" an individual may make in a two-year period.[16] In addition, Congress has also established "categorical limits" on the amount an individual may contribute to each of three categories of political actors during a given election or calendar year: (1) individual candidates, (2) national party committees, and (3) other political action committees.[17] Under these statutes and their implementing regulations, Ms. James may contribute only $46,200 to all candidates every two years.[18]

Ms. James is not challenging 2 U.S.C. § 441a(a)(3)'s aggregate limit as a whole. That is, she does not ask to contribute more than $117,000 to all regulated entities *in toto.* Nor is she challenging 2 U.S.C. § 441a(a)(1)'s categorical limit on contributions to each individual candidate. That is, she will not give more than $2,500 to any single candidate committee in either the primary or general election periods.

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[14] 2 U.S.C. § 441a(a)(3)(A).
[15] 2 U.S.C. § 441a(a)(3)(B).
[16] 2 U.S.C. § 441a(a)(3)(B).
[17] 2 U.S.C. § 441a(a)(1) (with current price index adjustments reflected at 76 Fed. Reg. 8368 (Feb. 14, 2011)).
[18] 2 U.S.C. § 441a(a)(3) (with current price index adjustments reflected at 76 Fed. Reg. 8368 (Feb. 14, 2011)).

Instead, she challenges 2 U.S.C. § 441a(a)(3)(A)'s sub-aggregate candidate contribution limit as an unconstitutional burden on her associational right to contribute to the individual candidates she supports. Ms. James limits her claims to 2 U.S.C. § 441a(a)(3)(A) and does not challenge any other element of campaign finance law.

This Court is asked whether Ms. James may constitutionally be prohibited from contributing more than $46,200 to candidate committees, but less than $117,000, during this biennium. The question posed, then, is whether Congress may place an aggregate cap on contributions to candidate committees when the additional funds used for those contributions could, instead, have been contributed to political committees or political parties under existing law.

Congress may act to prevent corruption or the appearance of corruption, including by creating reasonable limits on political contributions.[19] But in doing so, its rules must actually address corruption or its appearance, and must be "closely drawn" to accomplish that end.[20] Because Congress failed to appropriately tailor its statutory means to its legitimate legislative ends, the sublimit on aggregate contributions to candidate committees is unconstitutional.

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[19] *Buckley v. Valeo*, 424 U.S. 1, 38 (1976).
[20] *See*, *e.g.*, *Randall v. Sorrell*, 548 U.S. 230, 249 (2006).

B. *Buckley v. Valeo* and *McConnell v. FEC*

Plaintiff is aware that the Supreme Court upheld FECA's aggregate contribution limit against a constitutional challenge in *Buckley*,[21] and left that holding intact in *McConnell v. FEC*.[22] But the constitutional challenge Ms. James brings is one of first impression, since neither *Buckley* nor *McConnell* addressed the constitutionality of BCRA's sub-aggregate limit on contributions to individual candidates under BCRA.

The Federal Election Campaign Act—the statute at issue in *Buckley*—provided for "an overall $25,000[23] limitation on total contributions by an individual during any calendar year,"[24] and stipulated that "no person shall make contributions to any candidate with respect to any election for Federal office which, in the aggregate, exceed $1,000."[25] In analyzing FECA, the *Buckley* Court upheld the $1,000 limit on individual candidate committee (or "hard money") contributions in the interest of preventing donors from obtaining undue influence over any particular candidate.[26] The Court

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[21] *Buckley*, 424 U.S. at 38.

[22] *McConnell v. FEC*, 540 U.S. 93 (2003).

[23] Equivalent to roughly $116,000 today. CPI Inflation Calculator, Bureau of Labor Statistics, http://www.bls.gov/data/inflation_calculator.htm.

[24] *Buckley*, 424 U.S. at 38 (citing Federal Election Campaign Act, Pub.L. No. 92-225, 86 Stat. 3 (1972) ("FECA") §608(b)(3)).

[25] *Id.* at 23 (citing FECA § 608(b)).

[26] *Id.* at 29. ("We find that, under the rigorous standard of review established by our prior decisions, the weighty interests served by restricting the size of financial contributions to

also upheld the $25,000 aggregate limit, in order to prevent donors from circumventing the limits on candidate contributions by making large contributions to political parties and other committees, which would then funnel those funds, without formal earmarking, to individual candidates, thereby circumventing the $1,000 hard money limit.[27] Thus, the candidate contribution limit was upheld under an anti-corruption rationale, and the aggregate contribution limit was upheld under an anti-circumvention rationale.

As the Court put it:

> "[t]he overall $25,000 ceiling does impose an ultimate restriction upon the number of candidates and committees with which an individual may associate himself by means of financial support. But this quite modest restraint upon protected political activity *serves to prevent evasion of the $ 1,000 contribution limitation by a person who might otherwise contribute massive amounts of money to a particular*

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political candidates are sufficient to justify the limited effect upon First Amendment freedoms caused by the $1,000 contribution ceiling.")

[27] *Id.* at 38. Note that actually earmarking contributions to a party to be used for particular candidate races would be treated by the law as a direct contribution to the candidate, thus triggering the cap on contributions to individual candidates. What concerned the Court was that donors might give with an informal understanding that their contributions to the party would be used for particular candidates. *Id.*

> *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*. The limited, additional restriction on associational freedom imposed by the overall ceiling is thus no more than a corollary of the basic individual contribution limitation that we have found to be constitutionally valid."[28]

Thus, to prevent circumvention of the $1,000 per candidate limit,[29] *Buckley* upheld FECA's aggregate limit.

When BCRA modified FECA, it established sub-aggregate limits on each of three contribution categories: (1) total contributions to candidates, (2) total contributions to parties, and (3) total contributions to PACs. These limits together comprised an aggregate cap on *total* contributions to candidates, parties, and PACs.[30] After BCRA entered into force, the Supreme Court again considered the constitutionality of aggregate contribution limits in *McConnell v. FEC*.[31]

McConnell differed from *Buckley* because BCRA had outlawed the type of 'soft money'

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[28] *Buckley*, 424 U.S. at 38 (emphasis added).
[29] This amount is akin to BCRA's current inflation-adjusted individual candidate contribution ceiling of $2,500.
[30] 2 U.S.C. § 441a(a)(3).
[31] *McConnell v. FEC*, 540 U.S. 93 (2003).

contributions with which *Buckley* was so concerned,[32] and because the sub-aggregate limits had been added to the applicable law. But in evaluating the constitutionality of BCRA, the *McConnell* Court summarily upheld BCRA's aggregate *and* sub-aggregate contribution limits – without adding to *Buckley*'s anti-circumvention analysis. The Court merely noted, "[c]onsiderations of *stare decisis*, buttressed by the respect that the Legislative and Judicial Branches owe to one another, provide additional powerful reasons for adhering to the analysis of contribution limits that the Court has consistently followed since *Buckley* was decided."[33]

Thus, the Court upheld the new sub-aggregate limit on candidate contributions without finding an anti-corruption or anti-circumvention rationale. This is logical as applied to those entities that pose a risk of circumvention: parties and PACs. But it is irrational as applied to candidate committees, and the Court did not discuss that limit at all.

Since the *McConnell* Court did not consider the sub-aggregate limit challenge here, this challenge is a case of first impression.

The Supreme Court has been clear that an aggregate contribution limit is justified to prevent circumvention of an individual candidate

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[32] *McConnell*, 540 U.S. at 133-134 (2003) (citing 2 U.S.C. § 441i(a), (b), (d)-(f)).
[33] *Id.* at 137-138.

contribution limit. But the more funds given to candidates directly—as opposed to PACs or parties—the lower the chance that those limits will be circumvented. Congress has already allowed contributions to parties and PACs at a particular level: $70,800 per biennium. Any additional funds Ms. James contributes to candidate committees must, as a result of the overall biennial limit of $117,000, *come at the expense of PACs and party committees.* Consequently, allowing Ms. James to contribute more to candidates directly, and less to PACs and parties, in fact alleviates *Buckley's* anti-circumvention concerns. *Buckley* and *McConnell*, then, do not address Ms. James's situation.

III. Standard of review for aggregate contribution limits

It has been the law for nearly four decades that, in cases involving limits on political contributions, government "action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny."[34] While *Buckley* used the phrase "the closest scrutiny," recent case law affirms that contribution limits are subject to a less-stringent "exacting scrutiny" standard. A brief review of the case law on exacting scrutiny will outline the contours of the standard of review, and demonstrate why the challenged law cannot survive exacting scrutiny.

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[34] *Buckley*, 424 U.S. at 25 (1976); *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 207 (1982) (both citing *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460-61 (1958*)*.

Buckley was the first major case to address contribution limits and their accompanying standard of review. The Court recognized that contribution limits, like expenditure limits, "implicate fundamental First Amendment interests" which are traditionally subject to strict scrutiny.[35] Nevertheless, the Court noted that "even a significant interference with protected rights of political association may be sustained if the state demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms."[36] The Court affirmed FECA's contribution limits, but only because the restriction focused "precisely" on the problem of corruption.[37]

Similarly, in *McConnell,*[38] the Court explicitly acknowledged that expenditures received closer scrutiny than contributions. But the majority opinion also noted that contribution limitations are still subject to "heightened scrutiny" as they impinge on the protected freedoms of expression and association.[39]

Nixon v. Shrink Missouri Government PAC, gave the now-standard formula for exacting scrutiny in noting that a contribution limit could survive constitutional muster if it was "closely drawn" to

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[35] *Buckley*, 424 U.S. at 23.
[36] *Id.* at 25 (internal citations omitted).
[37] *Id.* at 28.
[38] *McConnell*, 540 U.S. at 134.
[39] *Id.* at 145.

match a "sufficiently important" interest.[40] Yet, the Court declined to further clarify, stating that it did not "attempt to parse distinctions between the speech and association standards of scrutiny for contribution limits."[41] The Court simply stated that the quantum of evidence needed to satisfy judicial scrutiny would vary with the "novelty and plausibility of the justification raised."[42] Without enumerating any indicia or factors, the Court found that Missouri had met its factual burden.[43] The case thus reaffirmed that contributions are somewhat less protected than expenditures, but not by how much, nor what specific factors would allow a contribution limitation to survive where an expenditure limit would not.

Finally, *Randall v. Sorrell*,[44] a case concerning unconstitutionally-low contribution limits, articulated a two-part test for a challenged contribution restriction designed to determine if the contribution limit was "too low and too strict to survive First Amendment scrutiny."[45] The Court found that Vermont's low contribution cap was

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[40] *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 387-388 (2000) (internal citations omitted).
[41] *Id.* at 388.
[42] *Id.* at 391.
[43] *Id.* at 393.
[44] *Randall v. Sorrell*, 548 U.S. 230 (2006).
[45] *Id.* at 248 (articulating a two part test in which the court (1) determines if the statute has the "danger signs" of putting challengers and a significant disadvantage; and (2) reviews the record independently and carefully with an eye toward assessing the statute's tailoring and proportionality).

unconstitutional,[46] but failed to clarify the precise level of scrutiny being applied. The ambiguity of the majority opinion did not escape the notice of other justices on the Court.[47] Justice Thomas in particular noted that the review in *Randall* is based on immeasurable[48] and arguably inappropriate[49] factors. In effect, the standard of "exacting" scrutiny appears to apply to contribution limits,[50] but how exacting the scrutiny is remains unclear. What is known it that it is a heightened standard, but a less stringent one than that applied to expenditure limits.

Therefore, in light of recent case law, Plaintiff asks the court to review the statute under exacting scrutiny. Nevertheless, Plaintiff contends that BCRA's sub-aggregate limit on candidate contributions fails any level of scrutiny.

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[46] *Id* at 263.

[47] *Id.* at 267-68 (Thomas, J., concurring) ("[N]either step of this test can be reduced to a workable inquiry to be performed by States attempting to comply with this Court's jurisprudence.").

[48] *Id.* at 267 (Thomas, J., concurring) ("[C]ourts have no yardstick by which to judge the proper amount and effectiveness of campaign speech.") (internal citations omitted).

[49] *Id.* at 272 (Thomas, J., concurring) ("[T]ying an individuals' First Amendment rights to the presence or absence of similar laws in other States is inconsistent with the First Amendment.").

[50] *Id.* at 264 (Kennedy, J., concurring).

IV. The aggregate contribution limit of $46,200 to candidate committees is not closely drawn to a sufficiently important governmental interest.

Under exacting scrutiny, a law infringing on First Amendment rights may only be upheld if it is "closely drawn" to a "sufficiently important" interest.[51] The Supreme Court has only permitted two such interests. The government may permissibly limit contributions to prevent corruption or the appearance of corruption.[52] And the government may limit contributions so as to prevent contributors use of vehicles such as parties or PACs to circumvent individual contribution limits to particular candidate committees.[53] Neither interest is threatened in this case. Consequently, the statute is not closely drawn to those interests and fails exacting scrutiny.

The current aggregate limit for individuals is $117,000.[54] However, the law does not permit an individual to contribute $117,000 to candidates. Instead, the statute caps all contributions to candidate committees at $46,200.[55] The practical effect of this law is that individuals who wish to express their political views and exercise their associational rights by supporting candidates, and to

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[51] *Nixon*, 528 U.S. at 387-388.
[52] *Buckley*, 424 U.S. at 28.
[53] *Id.* at 45. *See also McConnell*, 540 U.S. at 145-154 (2003) (upholding restrictions on "soft money" under the anti-circumvention rationale).
[54] 2 U.S.C. § 441a(a)(3); 76 Fed. Reg. 8368 (Feb. 14, 2011).
[55] *Id.*

do so beyond $46,200, must seek other means of doing so. The means provided by BCRA is contributions to PACs or parties. Indeed, the mere existence of a biennial aggregate cap on individual contributions that is only a third of the total biennial aggregate cap itself actually directs individuals to contribute to parties or PACs—the very entities whose existence demands the need for an anti-circumvention rationale in the first place, and the entities that are, if anything, *disfavored* by *Buckley's* analysis.

Consequently, BCRA forces individuals to associate with PACs or parties if they wish to contribute up to the legally-permissible biennial limit of $117,000. But Ms. James does not wish to associate with PACs or parties. She wishes to associate with individual candidates for office. Specifically, she wishes to contribute within the $2,500 contribution limit of 2 U.S.C. § 441a(a)(1)(A) to candidates of her choice up to a total of $117,000.

Additionally, the anti-corruption interest is not threatened by Ms. James's donations. In setting a cap of $117,000, Congress has determined that total contributions in this amount from a single individual are not corrupting.[56] Moreover, in drafting the categorical limits, Congress determined that individual contributions to candidate committees consistent with the limits of 2 U.S.C. § 441a(a)(1)(A)[57] are non-corrupting. Since Ms. James

[56] *See Buckley*, 424 U.S. at 25.
[57] $2500 in 2012. *See* 76 Fed. Reg. 8368 (Feb. 14, 2011).

is willing to adhere to both the limits on individual candidate contributions and the aggregate contribution limit, there is no further anti-corruption interest served by the 'sub-aggregate' limit of 2 U.S.C. §441a(a)(3)(A).

Furthermore, the threat of corrupting "soft money" that the Supreme Court acknowledged in *McConnell* does not present any threat in the instant case: BCRA has outlawed *all* soft money contributions to parties.[58] Therefore, the 'soft money' threat of corruption has no application to biennial limits or to Ms. James.

Since neither of the sufficiently important interests are affected by Ms. James's wish to contribute only to candidate committees, the biennial aggregate limit cap is not properly tailored and does not pass exacting scrutiny as it applies to Ms. James. In fact, because each dollar Ms. James contributes to a candidate is a dollar that cannot be contributed to a PAC or party as "unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party,"[59] her desired contributions would in fact *lessen* the danger of circumvention that concerned the Supreme Court in *Buckley.*

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[58] *McConnell*, 540 U.S. at 133.
[59] *Buckley,* 424 U.S. at 38.

A. 2 U.S.C. §441a(a)(3)(A), as applied, is not rationally related to a legitimate governmental interest.

While the standard for determining the constitutionality of a statute affecting First Amendment rights is exacting scrutiny,[60] 2 U.S.C. §441a(a)(3)(A) also does not survive rational basis review. As stated *supra*, there are only two interests that the government may rely upon in limiting contributions—1) the prevention of corruption or the appearance of corruption, and 2) the anti-circumvention rationale in the case of soft money.

In essence, the limit on aggregate contribution limits to candidates limits the number of candidates with which one may associate. BCRA does not consider an individual contributing to eighteen candidates to pose a risk of corruption or its appearance.[61] But the nineteenth candidate cannot be supported at the same level as the previous eighteen. Nor may our hypothetical contributor associate with a twentieth candidate at all.

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[60] Of course, a statute that cannot survive lesser standards of review cannot, by definition, survive strict scrutiny. *See FEC v. Wis. Right To Life, Inc.*, 551 U.S. 449, 464 (2007).

[61] The $46,200 sub-aggregate limit, divided by the $2,500 limit on contributions to candidates, yields eighteen candidates to whom the full $2,500 may be given. Similar calculations are used for the remainder of the paragraph. The number is, of course, lower if a contributor supports the candidate in both the primary and general elections.

Such a line is arbitrary and lacking in foundation. Moreover, to prohibit association with a twentieth candidate, but allow significant additional contributions to entities *which may in turn make unearmarked contributions of that money to the twentieth candidate,* is a decision without any rational basis.

V. If this Court does not issue a preliminary injunction, Ms. James will suffer irreparable harm, but the FEC will not suffer irreparable harm if the injunction is granted.

The First Amendment is foundational to our political process, and so the loss of the freedom of association is particularly harmful during an election cycle. The Supreme Court held that the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."[62] Furthermore, political activity is particularly time-sensitive,[63] especially in a major election year.

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[62] *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("'Inasmuch as this case involves First Amendment rights of association which must be carefully guarded against infringement by public office holders, we judge that injunctive relief is clearly appropriate in these cases.' We agree…It is clear therefore that First Amendment interests were either threatened or in fact being impaired at the time relief was sought. The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.") (internal citation omitted).

[63] *Id.* at 374, fn. 29 (recognizing timeliness of action in context of political speech) (citing *Carroll v. Princess Anne*, 393 U.S.

Here, Ms. James wishes to associate one-on-one with candidates in this election. Elections are, by nature, time sensitive and non-repeating; 2012's contest is no exception. While there will be another federal election in two years, the candidates and issues will change—that is, no future election will be *this* election. Additionally, candidates elected in *this* election will cast votes on vital legislation in the next Congress. Ms. James wishes to associate with particular candidates this term in the context of the current political climate. Restricting her ability to do so will irreparably harm her, in violation of the First Amendment.

In contrast, the FEC will not suffer irreparable injury if this Court grants the relief Ms. James seeks. No party can be injured through lack of enforcement of a statute that violates the First Amendment.[64] Any injury the FEC could allege would stem from their interest in preventing actual

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175, 182 (1968) and *Wood v. Georgia*, 370 U.S. 375, 391-392 (1962)).

[64] *See*, *e.g.*, *Joelner v. Village of Wash. Park*, 378 F.3d 613, 620 (7th Cir. 2004) ("Concomitantly, there can be no irreparable harm to a municipality when it is prevented from enforcing an unconstitutional statute because it is always in the public interest to protect First Amendment liberties.") (internal quotation marks and citations omitted); *Florida Businessmen for Free Enterprise v. Hollywood*, 648 F.2d 956, 959 (5th Cir. 1981) ("Given appellants' substantial likelihood of success on the merits, however, the harm to the city from delaying enforcement is slight. The public interest does not support the city's expenditure of time, money, and effort in attempting to enforce an ordinance that may well be held unconstitutional") (internal citations omitted).

or apparent political corruption. Indeed, the purpose of the contribution limits in FECA[65] and BCRA[66] is to avoid this phenomenon.

But neither actual nor apparent corruption are at issue in this case. Ms. James will submit to the candidate contribution limits and the aggregate biennial limit. She will therefore not give beyond the limit for each candidate, which Congress has set at what is—in its judgment—a non-corrupting level.[67] Ms. James intends to follow the aggregate limits as well. She asks for the freedom to choose in which manner and with whom to associate. Consequently, the sub-aggregate limit on contributions to candidate committees is unconstitutional as applied to her.

Finally, as discussed *supra*, the courts have consistently noted their concern that limits on contributions to candidates could be circumvented by

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[65] *Buckley*, 424 U.S. at 26 ("It is unnecessary to look beyond the Act's primary purpose—to limit the actuality and appearance of corruption resulting from large individual financial contributions –in order to find a constitutionally sufficient justification for the $ 1,000 contribution limitation").

[66] *See*, *e.g*. *McConnell*, 540 U.S. at 136 ("Our treatment of contribution restrictions reflects more than the limited burdens they impose on First Amendment freedoms. It also reflects the importance of the interests that underlie contribution limits--interests in preventing "both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption") (applying the anticorruption rationale in examining BCRA) (internal citations omitted).

[67] *See*, *e.g.*, *id*. at 137-138 (stating that Congress relied on *Buckley* and its progeny when setting contribution limits in BCRA).

contributions to parties. Since Ms. James will not contribute to parties or PACs, the anti-circumvention rationale does not apply. Ms. James should not be forced to stay within a predetermined party or PAC framework, and instead this Court should restore her freedom to associate one-on-one with candidates of her choosing.

As discussed *supra*, the sub-aggregate limits on candidate contributions do not survive any level of scrutiny and are therefore unconstitutional as applied to Ms. James. Thus, the FEC cannot be harmed by an injunction against an unconstitutional application of this statute.

VI. If this court issues a preliminary injunction, it will further the public interest in protecting the First Amendment.

The issuance of a preliminary injunction in this case would further the public interest by protecting the freedom of association. While a preliminary injunction is an extraordinary remedy, courts may "go much farther" in granting relief when a public (as opposed to private) interest is at stake.[68]

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[68] *Nat'l Ass'n. of Farmworkers Org's v. Marshall*, 628 F.2d 604, 616 (D.C. Cir. 1980) ("As the Supreme Court has held, Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved") (citing *Virginian Ry. Co. v. System Fed'n*, 300 U.S. 515, 552, (1937), *quoted with approval*, *Yakus v. United States*, 321 U.S. 414, 441, (1944)).

Constitutional rights are a prime example of an arena that seriously implicates the public interest.[69] Since "no party has an interest in the enforcement of an unconstitutional law," the public interest is best protected by issuing a preliminary injunction.[70] Even greater care is taken to protect the First Amendment.[71]

This case is based upon the First Amendment right of association at a crucial moment: an election year. While it involves very real and important First Amendment rights, it only examines a small portion of campaign finance law: how a contributor can spend (or is prohibited from spending) their money subject to the candidate contribution and aggregate limits. So while the importance to the public is high, the relative impact on administration of campaign finance laws is low. Therefore, issuing a preliminary injunction would protect Ms. James's First

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[69] *Green v. Kennedy*, 309 F. Supp. 1127, 1139 (D.D.C. 1970) ("Equity properly grants relief when considerations of public interest are involved, as distinguished from purely private interest. This principle is properly invoked by plaintiffs claiming denial of constitutional rights") (citations omitted).

[70] *ACLU v. Reno*, 929 F. Supp. 824, 849 (E.D. Pa. 1996) (citing *Elrod*, 427 U.S. at 373-74; *Hohe v. Casey*, 868 F.2d 69, 72 (3d Cir. 1989), *cert. denied*, 493 U.S. 848 (1989); *Acierno v. New Castle Cnty.*, 40 F.3d 645, 653 (3d Cir. 1994)).

[71] *See*, *e.g.*, *ACLU v. Reno*, 929 F. Supp. at 851 ("No long string of citations is necessary to find that the public interest weighs in favor of having access to a free flow of constitutionally protected speech") (internal citations omitted); *K.H. Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006) ("The public has no interest in enforcing an unconstitutional ordinance" in the First Amendment context) (internal citations omitted).

Amendment rights while not greatly impacting the administration of the current campaign finance regime. Importantly, the aggregate amount of money available for contribution to regulated entities would not increase.

Conclusion

The "sub-aggregate" contribution limits can only be upheld if, as applied to Plaintiff, they enforce the government's anti-corruption or anti-circumvention interests. They do not. Therefore, the FEC's enforcement of the statute threatens Ms. James's First Amendment right of association in this election.

For the foregoing reasons, Ms. James respectfully asks this Court to grant her motion for preliminary injunction.

Respectfully submitted this 4th day of September, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of September, 2012, I caused the foregoing document to be served on the following, via electronic and First Class mail:

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APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

VIRGINIA JAMES, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	**Civil Action No. 12-1451** **(JEB)(JRB)(RLW)** **Three-Judge Court**

PLAINTIFF'S RESPONSE TO ORDER TO SHOW CAUSE

On September 28, 2012 this Court issued an opinion and order in *McCutcheon v. FEC,* Civil No. 12-1034, rejecting those plaintiffs' facial challenge to the aggregate limits on contributions to candidate committees. This Court subsequently ordered Plaintiff Virginia James to show cause why her suit should not be dismissed for the reasons set forth in that opinion.

There are three principal reasons why the *McCutcheon* decision does not control here.

First, and most clearly, that ruling relied entirely on the "anti-circumvention" rationale

announced in *Buckley v. Valeo,* 424 U.S. 1, 38 (1976). *McCutcheon v. FEC*, slip op. at 9 ("we cannot ignore the ability of aggregate limits to prevent evasion of the base limits."). But Ms. James's challenge does not implicate that rationale. Indeed, her preferred course of conduct would substantially *reduce* the possibility that her contributions could be used to circumvent the base limits. Ms. James will contribute only directly to candidate committees, and not to the various entities, such as parties, that both the Supreme Court and this Panel viewed as potential conduits for circumvention. *See McCutcheon* at 9-10.

Second, the *McCutcheon* plaintiffs brought a facial challenge to the aggregate limit on contributions to candidate committees. Ms. James brings a narrow as-applied challenge, one which accepts both the base limitation and the overall limitation imposed by Congress. In such circumstances, as-applied challenges are not foreclosed by a prior ruling on a facial challenge. *Wis. Right to Life, Inc. v. FEC*, 546 U.S. 410, 411-412 (2006) (*per curium*) ("*WRTL I*") ("In upholding [a section of BCRA] against a facial challenge, we did not purport to resolve future as-applied challenges.").

Third, even if this Panel did view *McCutcheon* as raising merely an as-applied challenge, the differences between that case and this are extensive. *McCutcheon* challenged the aggregate limits to party committees; Ms. James specifically does not wish to contribute to party committees. *McCutcheon*

involved a plaintiff who wished to give substantial sums to committees that could then contribute those funds to candidates, potentially circumventing the limits on contributions to individual candidate committees. Ms. James wishes to give directly to individual candidates, eliminating any possibility of circumventing the limits on such contributions.[1] *McCutcheon* asked this Court to eliminate all aggregate limits, potentially allowing individuals to contribute millions of dollars in each election cycle. *McCutcheon* at 3 n. 1 (noting that an estimate of $3.5 million for individual contributions was, in fact, conservative). Ms. James specifies that she does not intend to give more than the $117,000 Congress already allows.[2] She challenges only the distribution of those funds, and does so in a way that would *lessen* the possibility of circumvention.

I. The *McCutcheon* opinion does not address Ms. James's argument.

This Court upheld the aggregate limit on contributions to candidate committees on pages 9 and 10 of its Memorandum Opinion. It explicitly noted that it did so based on the "ability of aggregate limits to prevent evasion of the base limits." *McCutcheon* at 9. Ms. James's challenge, however, is premised on the fact that her desired activities do not implicate this anti-circumvention concern.

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[1] James V.Complaint ¶¶ 13, 21, ECF No. 1.

[2] James V.Complaint ¶¶ 20, 23.

The decision in *Buckley v. Valeo* established that aggregate limits could be enacted

> "to prevent evasion of [individual] contribution limitation[s] by a person who might otherwise contribute 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."* *Buckley*, 424 U.S. at 38 (emphasis added).

The *McCutcheon* case presented just such a situation: it sought to lift the aggregate limits on non-candidate committees, precisely the entities *Buckley* identifies as potential conduits for unearmarked contributions.

This Court's opinion in *McCutcheon* therefore appropriately keyed its analysis to *Buckley's* concerns. Specifically, it noted a telling hypothetical: what if an individual contributes $500,000 to a joint fundraising committee, which was then funneled through party committees and spent on coordinated expenditures in support of a particular candidate? *McCutcheon* at 9-10. In such a situation, the supported candidate would "know precisely where to lay the wreath of gratitude." *Id.* at 10. Moreover, despite the transaction costs inherent in such a scheme, "it is not hard to imagine a situation where the parties implicitly agree to such a system" because, in part, of the lack of "meaningful

separation between the national party committees and the public officials who control them." *Id.* Consequently, this Court found that the aggregate limits were justified.

But no part of this analysis – the joint fundraising committee, the role of political parties, the possibility of coordinated expenditures, or the size of the underlying contribution – bear any resemblance to Ms. James's claims.

Ms. James does not argue that aggregate limits are unconstitutional. She argues that a law that forbids certain direct contributions to candidates, while allowing those same funds to go to PACs and parties which may, in turn, contribute to those same candidates, cannot withstand constitutional scrutiny. The *McCutcheon* opinion explains the dangers of circumvention, and the role of party committees and PACs in increasing that danger. Such reasoning applied to *McCutcheon,* with its particular plaintiffs: a party committee and an individual wishing to entirely remove aggregate limits. But it does not apply to Ms. James.

II. *McCutcheon* challenged the candidate sub-aggregate limit facially, but Ms. James makes an as-applied challenge.

McCutcheon challenged the "biennial limit on contributions to candidate committees (currently $46,200 per biennium) at 2 U.S.C. § 441a(a)(3)(A) as unconstitutional because it lacks a constitutionally

cognizable interest to justify it."[3] McCutcheon sought "a declaratory judgment holding the biennial contribution limit at 2 U.S.C. § 441a(a)(3)(A) unconstitutional because the provision lacks a cognizable interest."[4] McCutcheon also sought a declaration that the candidate sub-aggregate limit was unconstitutional because it was too low.[5] That is, the challenge was a facial challenge to the sub-aggregate limit on total candidate contributions.

Moreover, this Court treated the *McCutcheon* claims as facial in rendering its decision. To prevail in a facial challenge, the plaintiffs must show that no set of circumstances exists under which the law would be valid. *Reno v. Flores*, 507 U.S. 292, 301 (1993) (citing *United States v. Salerno*, 481 U.S. 739, 745 (1987) and *Schall v. Martin*, 467 U.S. 253, 268 n. 18 (1984)). Facial challenges go beyond the specific facts of the claimant to examine "whether, given all of the challenged provision's potential applications, the legislation creates such a risk of curtailing protected conduct as to be constitutionally unacceptable 'on its face.'" *Sanjour v. EPA*, 56 F.3d 85, 92 nt. 10 (D.C. Cir. 1995).

Here, the Court examined the aggregate limit itself, and made use of hypothetical situations under which the aggregate limits could be upheld. For example, the Court posited that an individual could give $500,000 in a single check to a joint fundraising

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[3] McCutcheon V.Compl. ¶ 122, ECF No. 1.
[4] *Id.* Prayer for Relief, ¶ 10.
[5] *Id.* Prayer for Relief, ¶ 12.

committee, triggering *Buckley's* anti-circumvention interest. *McCutcheon*, slip op. at 9. Furthermore, the Court rejected McCutcheon's arguments that the limits were unconstitutionally low and unconstitutionally overbroad. *Id.* at 10. In so doing, the Court used analysis consistent with a facial challenge, not as an as-applied challenge. Importantly, the decision makes no mention of the specific contributions the parties wished to make.

A decision on a facial challenge does not foreclose later, as-applied challenges. In *WRTL I*, the Supreme Court specifically held that the fact that a statute was upheld facially does not protect it from an as-applied challenge. *WRTL I*, 546 U.S. 410, 411-412 (2006). Even though *McConnell v. FEC,* 540 U.S. 93 (2003), upheld the Bipartisan Campaign Reform Act ("BCRA"), Pub.L. 107-155, 116 Stat. 81 (2002), § 203, that decision did not preclude subsequent as applied challenges to portions of BCRA. *WRTL I*, 546 U.S. at 411-412; *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 456 (2007) ("*WRTL II*").

Indeed, the plaintiffs in *WRTL I* went on to succeed in their as-applied challenge in *WRTL II*. *See WRTL II*, 554 U.S. at 482. While the *McConnell* plaintiffs could not, on their record, "carr[y] their heavy burden of proving" that BCRA was facially overbroad, the Court nonetheless turned its attention to the specific facts presented by WRTL in their as-applied challenge. *WRTL II*, 551 U.S. at 456. Ultimately the Court found that, as-applied to the specific ads written by WRTL, BCRA was unconstitutional. *Id.* at 481.

This case presents a similar situation. The *McCutcheon* plaintiffs did not succeed in demonstrating that the limits on aggregate contributions to candidates were either facially unconstitutional or "too low." Nor did they plead specific facts – such as the maximum contributions the parties intended to make or receive – that would have made an as-applied analysis appropriate.

By contrast, Ms. James does plead such facts. And, while a successful facial challenge to 2 U.S.C. § 441a(a)(3)(A) would have resolved her claims, the decision in *McCutcheon* does not prevent Ms. James from presenting her specific case, on an as-applied basis, to this Court. Just as *McConnell* involved a general attack on BCRA, while *WRTL* involved specific ads with specific language, so *McCutcheon* represented a facial attack on BCRA's aggregate limits, while this case presents specific contributions with specific limits.

III. Even if *McCutcheon* is viewed as an as-applied challenge to the aggregate limit on contributions to candidate committees, the facts in that case differ significantly from the facts presented here.

Generally, as-applied challenges are fact-driven. In as applied challenges, different facts can yield different results, even where the same statue is challenged. To the extent, if any, that Mr. McCutcheon challenged the candidate sub-aggregate

limit as-applied, the facts in his case are significantly different from those presented here.

Mr. McCutcheon intended to give $54,400 to Federal candidates in the 2012 election cycle. McCutcheon V.Complaint ¶¶ 27, 28. In the next biennium, he intends to give an amount north of $60,000 to candidate committees. *Id.* ¶32. Importantly, he did not say precisely how much he intended to give in future years.

Combined with his giving to non-candidate committees (a planned $97,000 in the 2012 cycle and an unstated amount in the future), Mr. McCutcheon plainly intended to exceed the $117,000 overall cap on political contributions. McCutcheon V.Complaint ¶¶ 37, 38. Pointedly, McCutcheon intended to donate $25,000 each to the Republican National Committee, the National Republican Senatorial Committee, and the National Republican Congressional Committee. McCutcheon V.Compl. ¶¶ 34, 35.

Furthermore, the *McCutcheon* plaintiffs included both a contributor and a political party, the Republican National Committee ("RNC"). Indeed, the RNC asserted a right to receive the contributions from Mr. McCutcheon. *McCutcheon* V.Compl. ¶ 78. In connection thereto, McCutcheon challenged the limits to national parties and non-candidate committees. *Id.* ¶ 85, ¶¶ 107, ¶¶ 113. Therefore, McCutcheon challenged, by implication, the biennial

aggregate contribution limit of $117,000.[6] *McCutcheon* at 4.

Ms. James's case differs substantively. She specifically wishes *not* to associate with any political party.[7] She brings this challenge alone, without any party, political action committee, or other entity.[8] She is not challenging any of the other sub-aggregate contribution limits. She is not challenging the biennial aggregate limit of $117,000.[9] She merely wishes to associate one-on-one with candidates and not be forced to associate with groups or organizations simply to contribute up to the full biennial aggregate limits.[10]

With different facts comes a different analysis between as-applied challenges. Ms. James and Mr. McCutcheon include different types of parties and are challenging different aspects of the aggregate limits. Most importantly, Ms. James's contributions would be (1) limited, and (2) not capable of creating an anti-circumvention concern. Therefore, even if the *McCutcheon* verified complaint may be read as asserting an as-applied challenge, and even if this Panel intended to address such a claim in its opinion, Ms. James is not similarly situated to the

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[6] McCutcheon sought to contribute $54,400 to candidates and $97,000 to non-candidate committees, totaling $151,400.
[7] Doc 1 ¶ 19 ; Doc 9 p. 2.
[8] Doc. 1. ¶ 11.
[9] James V.Complaint, ¶¶ 20, 23; James Opp'n to Designation as a Related Case, pp. 2-3, ECF No. 9.
[10] James V.Complaint ¶¶ 13, 21, 23; James Opp'n to Designation as a Related Case, pp. 2-3.

McCutcheon plaintiffs. She consequently deserves full and separate consideration of her claims.

Conclusion

McCutcheon does not control the outcome of Ms. James's case. The opinion's reasoning is inapplicable, on its face, to the particular claims she brings before this Court. Moreover, under *WRTL I*, an as-applied challenge may be brought even if a facial challenge to the same statute previously failed. Finally, the facts in McCutcheon differ significantly from those posed by this case, so Ms. James is not similarly situated to the McCutcheon plaintiffs. Therefore, for the forgoing reasons, this case should not be dismissed for the reasons set forth in *McCutcheon*.

Plaintiff hastens to add that the election in which Ms. James wishes to participate in less than one month away. Consequently, she requests that this Court schedule a hearing on her claims for the earliest possible time, so that her claims may be heard while there is still time for her to exercise her rights.

Respectfully submitted this 9th day of October, 2012.

/s/ Allen Dickerson
Allen Dickerson, D.C. Bar No. 1003781
Tyler Martinez*
Anne Marie Mackin*
[SIGNATURE BLOCK OMITTED IN APPX.]

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of October, 2012, I caused the foregoing documents to be filed electronically using the CM/ECF system, causing notice to be sent to the parties listed below:

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/s/ Allen Dickerson
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APPENDIX I

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

VIRGINIA JAMES, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	Civ. No. 12-1451 (JEB)(JRB)(RLW) OPPOSITION TO RESPONSE TO ORDER TO SHOW CAUSE

DEFENDANT FEDERAL ELECTION COMMISSION'S OPPOSITION TO PLAINTIFF'S RESPONSE TO ORDER TO SHOW CAUSE

Pursuant to the Court's Minute Order of October 11, 2012, defendant Federal Election Commission respectfully submits the following opposition to plaintiff's Response to Order to Show Cause (Docket No. 17) ("Pl.'s Show Cause Br.").

This Court's opinion in *McCutcheon v. FEC*[1] disposes of plaintiff's claims. Plaintiff's plan to contribute more than $100,000 to federal candidates presents at least the same potential of circumventing the anti-corruption provisions of the Federal Election Campaign Act ("FECA") as did Mr.

[1] Civ. No. 12-1034, slip op. (D.D.C. Sept. 28, 2012).

McCutcheon's plan to contribute more than $50,000 to federal candidates. Plaintiff's attempts to distinguish this case from *McCutcheon* fail because they rely entirely on inaccurate and irrelevant assertions of law, none of which can overcome *McCutcheon*'s faithful application of *Buckley v. Valeo*, 424 U.S. 1 (1976), or provide any basis for reaching a different result here.

LEGAL AND FACTUAL BACKGROUND

FECA provides than an individual may contribute no more than $2,500 per election to any federal candidate, 2 U.S.C. § 441a(a)(1), and no more than $46,200 to all federal candidates
combined during a two-year election cycle, 2 U.S.C. § 441a(a)(3)(A). The history and purpose of these provisions are set forth in *McCutcheon*, slip op. at 1-3. *See also* Def.'s Opp. to Pl.'s Mot. for Prelim. Inj. at 1-4, *McCutcheon v. FEC*, Civ. No. 12-1034 (D.D.C. July 9, 2012 (Docket No. 16)) ("FEC Br.").

Plaintiff Virginia James is an individual United States citizen who alleges a desire to contribute more than $46,200 but no more than $117,000 to federal candidates during the current election cycle. (Compl. ¶ 5.) So far, James has contributed $27,000 to candidates and $5,000 to a federal political committee ("PAC"). (Compl. ¶¶ 15, 17.) She has also given more than $1 million to "super PACs," i.e., political committees that make no direct contributions but pay for independent

expenditures that expressly advocate the election or defeat of candidates.[2]

ARGUMENT

This Court's opinion in *McCutcheon* — particularly its interpretation and application of *Buckley*— controls this case. *McCutcheon* noted that at the time of *Buckley*, FECA imposed two relevant limits on contributions by individuals: A base limit of $1,000 on contributions to candidates, and an aggregate limit of $25,000 per two-year election cycle to all candidates, political parties, and PACs combined. *McCutcheon*, slip op. at 1-2; *see generally* FEC Br. at 1-4 (describing statutory scheme). In assessing the constitutionality of these provisions, *Buckley* acknowledged that the aggregate limit was a "restriction on associational freedom" but held that "this quite modest restraint upon protected political activity serves to prevent evasion" of the base limit on contributions to candidates. 424 U.S. at 38; *see also* FEC Br. at 3, 7-9 (discussing *Buckley*). Recognizing this, *McCutcheon* reiterated *Buckley*'s conclusion that the aggregate limit is constitutional as "'a corollary of the basic individual contribution limitation,'" *McCutcheon*, slip op. at 9 (quoting *Buckley*, 424 U.S. at 38), which the Supreme Court had found constitutional earlier in its opinion, *see Buckley*, at 26-29.

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[2] A list of plaintiff's contributions can be obtained by entering her name into the FEC's contribution-search page at http://www.fec.gov/finance/disclosure/norindsea.shtml.

Regarding limits on individual contributions to candidates, the *only* thing that has changed since *Buckley* is that the dollar amounts have been raised: The base limit is now $2,500, and the aggregate limit is now $46,200. *See* 2 U.S.C. § 441a(a)(1); *McCutcheon*, slip op. at 3. As *McCutcheon* held, the fact that these dollar amounts are now different than they were at the time of *Buckley* is not of constitutional concern. *McCutcheon*, slip op. at 10-11 (rejecting argument that Court should "parse legislative judgment about what limits to impose"). Accordingly, the only way plaintiff can prevail here is by demonstrating that *Buckley*'s upholding of the aggregate limit is no longer good law — an exceedingly difficult burden to meet, given that the Supreme Court has never overruled that holding or called it into question. *McCutcheon*, slip op. at 6 ("[W]e decline Plaintiffs' invitation to anticipate the Supreme Court's agenda.") (citing *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)).

McCutcheon emphatically confirms *Buckley*'s continued viability as to the important anti-circumvention interest served by FECA's aggregate contribution limits. *McCutcheon*, slip op. at 9. Indeed, *McCutcheon* disposes of plaintiff's claims in their entirety because candidates — like political parties and PACs — can serve as conduits for circumventing the individual contribution limits. Just as a contributor could give $5,000 to a number of PACs that in turn give to one candidate, a contributor could give $5,000 to multiple candidates who in turn give to one candidate. This is not mere

speculation. Members in "safe" legislative districts (or with ample resources) collectively contribute millions of dollars to other members of their party facing more difficult elections.[3] For example, in this election cycle alone, federal candidates have used the contributions they received to make the following contributions to other candidates:

- 57 contributions totaling $71,000 from federal candidates' committees to the campaign of Kathy Hochul
- 45 contributions totaling more than $60,000 from federal candidates' committees to the campaign of Joe Donnelly
- 44 contributions totaling more than $59,000 from federal candidates' committees to the campaign of Francisco Canseco
- 43 contributions totaling $57,500 from federal candidates' committees to the campaign of Betty Sutton
- 45 contributions totaling $57,000 from federal candidates' committees to the campaign of Lois Capps

[3] Except where noted otherwise, all contribution and transfer figures in this brief were calculated from the FEC databases at http://www.fec.gov/finance/disclosure/ftpdet.shtml and http://www.fec.gov/data/DataCatalog.do?cf=downloadable. At the time of filing, the databases for the current election cycle include transactions from January 2011 through September 2012.

- 35 contributions totaling $54,000 from federal candidates' committees to the campaign of Louise Slaughter

As these examples demonstrate, plaintiff's desired relief would allow her to give over $100,000 to candidates with ample war chests, knowing that they are in turn likely to contribute that money to the campaigns of their threatened colleagues. See Buckley, 424 U.S. at 38 (noting that aggregate limit prevents contributor from evading limit on contributions to a candidate "through the use of unearmarked contributions to political committees likely to contribute to that candidate"); 2 U.S.C. § 431(5) (defining a candidate's "principal campaign committee" as one type of political committee).[4] Plaintiff baldly asserts that her contributions are "not capable of creating an anti-circumvention concern" (*see* Pl.'s Show Cause Br. at 10), but she provides no facts or argument whatsoever to support this contention, which must in any event fail in light

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[4] The phenomenon of "leadership PACs" — i.e., a PAC established by an elected official to collect and spend funds in support of his colleagues — further demonstrates candidates' willingness to serve as conduits between individual contributors and other candidates. There are hundreds of leadership PACs, and they have raised over $100,000,000 in the current election cycle alone. *See* FEC, *2012 Leadership PACs and Sponsors*, http://www.fec.gov/data/Leadership.do?format=html&election_yr=2012 (last visited Oct. 19, 2012). Officeholders have used these funds to contribute more than $30,000,000 to other federal candidates. *See* OpenSecrets.org, *Leadership PACs*, http://www.opensecrets.org/pacs/industry.php?txt=Q03&cycle=2012 (last visited Oct. 19, 2012).

of the plain holdings of *McCutcheon* and *Buckley*, as discussed above. Channeling funds through this method could easily circumvent the $2,500 base limit on plaintiff's direct contributions to each of the targeted candidates, and the aggregate limit is a constitutional method of preventing such circumvention.[5] *See McCutcheon*, slip op. at 9-10.

Furthermore, there is no limit on the amount that a candidate can contribute to a political party. Candidates in safe seats accordingly transfer campaign funds to their parties on a massive scale, including more than $24 million to the national Democratic Party and more than $35 million to the national Republican Party in this election cycle. These transfers finance the parties' activities on behalf of candidates in contested races — activities such as "coordinated expenditures, which have no 'significant functional difference' from . . . direct candidate contributions." *McCutcheon*, slip op. at 9-10 (quoting *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 460 (2001)). Thus, in the absence of the aggregate limit, there would be a potential for circumvention identical to that which this Court recognized in *McCutcheon*: contributors giving a large number of contributions within the base limits (but aggregating well above the

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[5] As *Buckley* and *McCutcheon* each recognized, it is irrelevant for constitutional purposes whether plaintiff herself intends to engage in such circumvention. *See McCutcheon*, slip op. at 12 ("The *Buckley* Court rejected challenges that the contribution limits are overbroad because most contributors are not seeking a quo for their quid . . . . [W]e join the *Buckley* Court in rejecting [that claim] . . . .") (citing 424 U.S. at 30).

aggregate limits) with the understanding that many of these contributions will end up in the hands of the parties to be spent in support of the contributors' preferred candidates. As this Court held, "it may seem unlikely that so many separate entities would willingly serve as conduits for a single contributor's interests. But *it is not hard to imagine a situation where the parties implicitly agree to such a system*, and there is no reason to think the quid pro quo of an exchange depends on the number of steps in the transaction." *McCutcheon*, slip op. at 10 (emphasis added; internal citations omitted).

In addition to asking the Court to disregard *McCutcheon* and *Buckley*, plaintiff claims that the aggregate limit on contributions to candidates is unconstitutional because it "force[s her] to associate with groups or organizations simply to contribute up to the full biennial aggregate limits." (Pl.'s Show Cause Br. at 10.) She argues that, rather than being limited to $46,200 in candidate contributions, she must be allowed to contribute $117,000 directly to candidates because "Congress already allows" that amount through the candidate and non-candidate aggregate limits combined. (*Id.* at 3.) Plaintiff's argument seems to be premised on a complete misunderstanding of the relevant statutory provisions. There is no $117,000 aggregate contribution limit. Rather, FECA establishes *separate* aggregate limits for contributions to candidates, 2 U.S.C. § 441a(a)(3)(A), and for contributions to non-candidate entities, 2 U.S.C. § 441a(a)(3)(B). *See McCutcheon*, slip op. at 2 (noting that statute comprises "a set of aggregate limits" and

differentiating it from prior version, which contained a single aggregate limit). Plaintiff cites no authority of any kind to support her tacit assumption that the Constitution prohibits Congress from establishing these limits separately.

More specifically, there is no case law remotely suggesting that the First Amendment requires the total aggregate limit for contributions to all entities to be the same as the aggregate limit for direct contributions to candidates. To the contrary, *McCutcheon*'s holding that the aggregate limits are constitutional anti-circumvention measures, slip op. at 9-10, rejected challenges to *each* of the aggregate limits, including the *McCutcheon* plaintiffs' explicit challenge to the aggregate limit on candidate contributions (separate and apart from their challenge to the non-candidate limit). *See McCutcheon*, slip op. at 4 (noting McCutcheon's allegation that his intended contributions "would amount to aggregate candidate contributions of $54,400, *and* [non-candidate] contributions of $75,000") (emphasis added);[6] *see also McCutcheon v. FEC*, Civ. No. 12-1034, Compl. ¶¶ 121-142 (D.D.C. June 22, 2012) (devoting two counts of five-count complaint to challenging aggregate limit on contributions to candidates). Plaintiff's attempt to

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[6] As this quotation indicates, plaintiff's statement (Pl.'s Show Cause Br. at 7) that *McCutcheon* "makes no mention of the specific contributions the parties wished to make" is incorrect. *See also McCutcheon*, slip op. at 4 ("[McCutcheon] wants to contribute $1,776 to twelve other candidates and enough money to the RNC, NRSC, and NRCC to bring his total contributions up to $25,000 each.").

avoid that holding by recharacterizing it as addressing only a non-existent $117,000 limit has no basis in either the Court's opinion or the pleadings that led to it.

Moreover, the fundamental import of plaintiff's argument is that the limit of $46,200 on contributions to candidates is simply too low in comparison to (or when combined with) the $70,800 limit on other contributions. That claim cannot survive *McCutcheon*, in which this Court declined to second-guess Congress's judgment as to the exact dollar amount of each aggregate limit. *See McCutcheon*, slip op. at 11 (refusing to impute constitutional significance to plaintiffs' "argu[ment] that if an individual wanted to contribute equally to one candidate . . . in all 468 federal races . . . , he would be limited to contributing $85.29 per candidate") (internal quotation marks omitted). And like the individual plaintiff in *McCutcheon*, Ms. James remains free to "to volunteer, join political associations, and engage in independent expenditures," *id.* at 12 (citing *Wagner v. FEC*, Civ. No. 11-1841, 2012 WL 1255145, at *9 (D.D.C. Apr. 16, 2012)), to further "associate one-on-one with candidates" as she desires (Pl.'s Show Cause Br. at 10).[7] All of these holdings necessarily control

[7] The Court's observation that contribution limits leave contributors free to support candidates in other ways is particularly applicable to plaintiff, who has given over $1 million during this election cycle to finance independent advocacy for or against candidates. *See supra* p. 2; *see also Buckley*, 424 U.S. at 21-22 (noting that contribution limits leave contributors free to "discuss candidates and issues" or

plaintiff's novel attempt to conflate FECA's aggregate limits: She cannot prevail without demonstrating the unconstitutionality of either the existence or size of the aggregate limit on *contributions to candidates* specifically, and *McCutcheon* upheld that limit in both respects.

Plaintiff's final and equally meritless argument is that her complaint cannot be foreclosed by *McCutcheon* because this case has been styled an "as-applied" challenge. (*See* Pl.'s Show Cause Br. at 5-8.) As a general matter, plaintiff is correct that a decision upholding a statute on its face does not necessary foreclose subsequent as-applied challenges. See *Wis. Right to Life Inc. v. FEC*, 546 U.S. 410 (2006) (per curiam). But as another three-judge court in this District has noted in rejecting the same preclusion-avoidance argument plaintiff raises here:

> In general, a plaintiff cannot successfully bring an as-applied challenge to a statutory provision based on the same factual and legal arguments the Supreme Court expressly considered when rejecting a facial challenge to that provision. Doing so is not so much an as-applied challenge as it is an argument for overruling a precedent.

"become a member of any political association and to assist personally in the association's efforts on behalf of candidates").

Republican Nat'l Comm. v. FEC, 698 F. Supp. 2d 150, 157 (D.D.C.) (three-judge court), *aff'd mem.*, 130 S. Ct. 3544 (2010). Because Ms. James desires to contribute to candidates more than twice what Mr. McCutcheon had wished to contribute — $117,000 versus $54,400 — this Court's rejection of Mr. McCutcheon's challenge to this aggregate limit necessarily precludes her more ambitious request. The reasoning of *Republican National Committee* thus applies with full force: Plaintiff's "as-applied" challenge cannot succeed without the Supreme Court overruling *Buckley* and this Court overruling *McCutcheon*. Because the former is impossible here and plaintiff provides no basis for the latter, her claim is foreclosed.

* * *

"Having been taught the hard lesson of circumvention by the entire history of campaign finance regulation," Congress has the power to "[p]revent[ ] corrupting activity from shifting" to take advantage of gaps in the statutory regime. *McConnell v. FEC*, 540 U.S. 93, 165-66 (2003). "Circumvention, after all, can be 'very hard to trace.'" *McCutcheon*, slip op. at 9 (quoting *Colo. Republican*, 533 U.S. 431, 462 (2001)). Thus, Congress must have "sufficient room to anticipate and respond to concerns about circumvention of regulations designed to protect the integrity of the political process." *McConnell*, 540 U.S. at 137. The aggregate limit on contributions to candidates protects that integrity while leaving contributors free to "discuss candidates and issues" or "become a

member of any political association and to assist personally in the association's efforts on behalf of candidates," *Buckley*, 424 U.S. at 21-22, or "to volunteer, join political associations, and engage in independent expenditures." *McCutcheon*, slip op. at 12 (citing *Wagner v. FEC*, Civ. No. 11-1841, 2012 WL 1255145, at *9 (D.D.C. Apr. 16, 2012)). The role the aggregate limit plays within this "coherent system" of regulation, *id.* at 10, is therefore constitutional because of "the need to prevent circumvention of the entire scheme," *McConnell*, 540 U.S. at 171-72, and "evasion of the base limits." *McCutcheon*, slip op. at 9.

CONCLUSION

For the foregoing reasons, the Court should hold that this case is controlled by *Buckley* and *McCutcheon.*

Respectfully submitted,

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[SIGNATURE BLOCK OMITTED IN APPX.]

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