

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 SHAUN MCCUTCHEON, ET AL., :

4 Appellants : No. 12-536

5 v. :

6 FEDERAL ELECTION COMMISSION :

7 - - - - - x

8 Washington, D.C.

9 Tuesday, October 8, 2013

10

11 The above-entitled matter came on for oral  
12 argument before the Supreme Court of the United States  
13 at 10:03 a.m.

14 APPEARANCES:

15 ERIN E. MURPHY, ESQ., Washington, D.C.; on behalf of  
16 Appellants.

17 BOBBY R. BURCHFIELD, ESQ., Washington, D.C., for Senator  
18 Mitch McConnell, as amicus curiae, supporting  
19 Appellants.

20 DONALD B. VERRILLI, JR., ESQ., Solicitor General,  
21 Department of Justice, Washington, D.C.; on behalf of  
22 Appellee.

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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 12-536, McCutcheon v. The Federal Election Commission.

Ms. Murphy.

ORAL ARGUMENT OF ERIN E. MURPHY

ON BEHALF OF THE APPELLANTS

MS. MURPHY: Mr. Chief Justice, and may it please the Court:

Bicker's aggregate contribution limits are an impermissible attempt to equalize the relative ability of individuals to participate in the political process. By prohibiting contributions that are within the modest base limits Congress has already imposed to combat the reality or appearance of corruption, these limits simply seek to prevent individuals from engaging in too much First Amendment activity.

These limits cannot be justified on circumvention grounds because the concerns the Government hypothesizes are already addressed by Bicker's multitude of more direct anti-circumvention measures.

JUSTICE BREYER: How is that?

MS. MURPHY: Because Bicker imposes numerous

1 direct circumvention measures. For instance, we have  
2 earmarking provisions on earmarking contributions for  
3 candidate. We have coordination restrictions on  
4 coordinated expenditures with a candidate. There are  
5 proliferation restrictions on creating multiple PACs  
6 that are all designed.

7 JUSTICE BREYER: Now, all these were there  
8 at -- but for one -- were there at the time of  
9 Buckley vs. Valeo, and I guess the Court thought  
10 something could happen like the following: Candidate  
11 Smith, we can only give him \$2600, but he has a lot of  
12 supporters. And each of them, 40 of them gets a  
13 brainstorm. And each of the 40 puts on the internet a  
14 little sign that says, Sam Smith PAC. This money goes  
15 to people like Sam Smith. Great people.

16 Now, we can give each of those 40 \$5,000.  
17 They aren't coordinated, they're not established by a  
18 single person. Each is independently run. And we know  
19 pretty well that that total of \$5,000 times 40 will go  
20 to Sam Smith. Okay? What does that violate?

21 MS. MURPHY: Well, there's a couple problems  
22 with that hypothetical, Your Honor. First of all, there  
23 are base limits both on what can be given to a PAC --

24 JUSTICE BREYER: \$5,000.

25 MS. MURPHY: -- and on what a PAC can give

1 to a candidate.

2 JUSTICE BREYER: \$5,000. So we all have is  
3 my \$5,000 going to the PAC and there happened to be 400  
4 PACs. So 5,000 times -- 4,000. Five times 40, five  
5 times 400, how much is that? I'm not too good at math.

6 (Laughter.)

7 MS. MURPHY: Without doing the math, I will  
8 tell you that earmarking and proliferation  
9 restrictions --

10 JUSTICE BREYER: No, no. There is no  
11 earmarking --

12 MS. MURPHY: But -- but there's --

13 JUSTICE BREYER: -- because earmarking  
14 requires that you write on a check or in an accompanying  
15 letter that you want the money to go to something.

16 MS. MURPHY: But actually it does not.

17 JUSTICE BREYER: It does not?

18 MS. MURPHY: Earmarking -- the FEC's  
19 earmarking regulations are broader than that. If you  
20 have a PAC that is going to contribute only to one  
21 candidate, you're not --

22 JUSTICE BREYER: No, no. They'll contribute  
23 to several because they'll get more than one  
24 contribution.

25 MS. MURPHY: And at that point, then you

1 don't have the kind of traceability you're talking about  
2 because there is more money coming into the PAC than can  
3 find its way to any one particular candidate.

4 JUSTICE SCALIA: I would think if you named  
5 the PAC after a particular candidate as the hypothetical  
6 assumes, I would be surprised if the Federal Election  
7 Commission wouldn't come after you for earmarking.

8 MS. MURPHY: That's -- that's exactly my  
9 point.

10 JUSTICE KAGAN: Well, let's say this one,  
11 Ms. Murphy. Let's say this one: You have 100 PACs and  
12 each of them say that they're going to support the five  
13 contest -- the five candidates in the most contested  
14 Senate races. There are really only five very contested  
15 Senate races, and 100 PACs say that they're going to  
16 support those five candidates.

17 So a donor gives \$5,000 to each of those 100  
18 PACs which support those candidates, the PAC divides up  
19 the money, \$1,000 goes to each candidate. The total,  
20 all those PACs, \$100,000 goes to each of the -- of the  
21 Senate candidates in the five most contested races, 20  
22 times what the individual contribution limits allow.

23 MS. MURPHY: A couple of responses to that,  
24 Your Honor. I mean, first of all, we're talking about  
25 scenarios where there isn't coordination at all between

1 the first person who makes a contribution and the  
2 candidate later on that's receiving it.

3 JUSTICE KAGAN: This candidate knows all of  
4 his \$100,000 donors. There are not all that many of  
5 them. He can keep them all in his head in a mental  
6 Rolodex.

7 MS. MURPHY: But they're not actually donors  
8 to him at that point. They're contributing to a PAC  
9 that, in your hypothetical, is contributing to multiple  
10 different candidates and --

11 JUSTICE KAGAN: Five of the most contested  
12 Senate races. So a person gives \$100,000 to each of  
13 five candidates who if they win become the five senators  
14 that are most attuned to donors. And he knows who's  
15 giving him \$100,000, each of those five senators who  
16 gets in on the strength of these contributions that are  
17 20 times what the individual limits allow.

18 MS. MURPHY: I don't think it works to think  
19 of these as direct contributions in excess of the base  
20 limits because the PAC is limited itself in how much it  
21 can contribute, so you would have to have --

22 JUSTICE BREYER: All we're trying to do,  
23 because it's hard to do in oral argument. But what  
24 we're trying to do in both, I think, our cases is that  
25 we looked up all the rules and the regs -- or my law

1 clerk did -- and -- and what she discovered, and it may  
2 be wrong because I'll look at it again, is there has  
3 been no significant change in the earmarking rules, in  
4 any of the rules that you're talking about, but for one,  
5 change since Buckley.

6           The one change, the one change is the change  
7 that all contributions made by political committees  
8 established by or financed or maintained or controlled  
9 by a single person will count as one. So what you're  
10 seeing in these hypotheticals is simply the construction  
11 of precisely the same situation that existed in Buckley  
12 while being careful to have not one person control the  
13 4,000 PACs, which is pretty easy to do. And if you want  
14 to say, is this a reality? Turn on your television set  
15 or internet. Because we found instances, without naming  
16 names, where it certainly is a reality.

17           MS. MURPHY: Two responses. There are  
18 changes in earmarking, more than what you've suggested  
19 because the restrictions that the FEC has put out in  
20 regulations are -- are -- they cover more than the  
21 statute itself. And specifically, they cover these  
22 instances of a PAC that is only going to be contributing  
23 to one candidate, which is where a lot of the concern  
24 comes from.

25           JUSTICE KENNEDY: I just want to be clear



1 what your answer to Justice Kagan was, her hypothetical.  
2 Is -- is part of your answer that this might -- the  
3 hypothetical that she gives -- contravene earmarking?  
4 Or --

5 MS. MURPHY: That's part -- it can pose both  
6 earmarking concerns and proliferation concerns if we're  
7 talking about something. And if we're talking about a  
8 PAC that's --

9 JUSTICE KENNEDY: So is part of your answer  
10 to her there that the hypothetical isn't real or isn't  
11 going to happen or --

12 MS. MURPHY: Yes, I think --

13 JUSTICE KENNEDY: -- or can't happen under  
14 the existing law? Is that your answer?

15 MS. MURPHY: That's part of the answer. I  
16 don't think it's a particularly realistic scenario under  
17 existing regulations.

18 JUSTICE KENNEDY: Would the other side  
19 concede that this is true?

20 MS. MURPHY: I -- I doubt they would concede  
21 that it's true. But, you know, I think that if you look  
22 at it, if you have a bunch of PACs that are getting  
23 contributions from this same group of individuals, you  
24 are going to run into earmarking and proliferation  
25 restrictions.

1 But the other thing I would say --

2 JUSTICE SCALIA: I can't imagine that if you  
3 have a PAC which says we're going to give money to  
4 Smith, that's bad, but if you have a PAC that says we're  
5 going to give all the money that you contribute to us to  
6 Smith and Jones, that's okay. Or Smith, Jones and three  
7 others. It seems to me that that's earmarking.

8 MS. MURPHY: Exactly. It's an earmarking  
9 restrictions if you know that your contributions --

10 JUSTICE KAGAN: Ms. Murphy, if you think  
11 it's earmarking that have a PAC that gives money to the  
12 five most -- the candidates in the five most contested  
13 Senate races, I just don't think any FEC would say that  
14 that's earmarking.

15 JUSTICE ALITO: Well, I may have an overly  
16 suspicious mind, but I don't know. If I saw 100 PACs  
17 rise up and all of them said exactly the same thing,  
18 we're going to make contributions to the five most  
19 contested Senate -- the candidates in the five most  
20 contested Senate races, I would be suspicious. And  
21 maybe the FEC would also be suspicious that they didn't  
22 just all spring up independently.

23 MS. MURPHY: I think that's absolutely  
24 right. I think the FEC would be suspicious, but --

25 JUSTICE KENNEDY: Well, suppose -- suppose a

1 number of PACs -- I forget the number in Justice Kagan's  
2 example -- said we're going to give to congressional and  
3 senatorial candidates who want to cut down on  
4 governmental spending. And we know there's only about  
5 four people that are like that.

6 MS. MURPHY: Well --

7 (Laughter.)

8 MS. MURPHY: I mean, at that point, I think,  
9 you know, that -- that when you have a PAC that's not  
10 saying to any certainty what they're going to do, then  
11 you don't -- it's not clear you have something to target  
12 there, because the PAC might be spending money in  
13 different ways that are not operating as a conduit to --  
14 for circumvention. So, you know, I think that gets  
15 again to why this doesn't have the kind of coordination  
16 you need.

17 JUSTICE KAGAN: Ms. Murphy, can I give  
18 another one? There are 150 House candidates with  
19 completely safe seats, all right? And there are maybe,  
20 you know, 30 or 40 or something like that in their party  
21 who don't have safe seats. So the 150 gets together and  
22 they say we're going to run a joint fundraiser. And  
23 anybody can contribute \$2600 to each of these  
24 candidates, 150 of them, right? So that makes about  
25 \$400,000.

1                   And then these 150 candidates with  
2 completely safe seats just transfer all this money to  
3 the one person who doesn't have a safe seat. So that's  
4 about \$400,000. Double it for a primary and a general  
5 election, that's about \$800,000 that all goes to one  
6 candidate from one donor because of the ability for  
7 candidates to transfer money to each other.

8                   MS. MURPHY: That is not legal, Justice  
9 Kagan. The candidates do not have the ability to  
10 transfer money to each other. They only have --

11                   JUSTICE KAGAN: A candidate can transfer a  
12 maximum of \$2600 to another candidate per election.

13                   MS. MURPHY: A candidate can transfer \$2,000  
14 to a candidate per election. And that's a  
15 contribution --

16                   JUSTICE KAGAN: I stand corrected on the  
17 basis of \$600.

18                   MS. MURPHY: That's a hard contribution  
19 limit on how much they can contribute. But -- but I  
20 think all of this also gets to another problem, which is  
21 there's an overbreadth problem here. Because if -- if  
22 you're talking about this scenario, in your scenario,  
23 there's only one person who can even make a contribution  
24 at that point after the first \$2600 is received.

25                   JUSTICE KAGAN: You're exactly right.

1 You're exactly right, Ms. Murphy. One person could make  
2 an \$800,000 contribution to a House race, where \$800,000  
3 goes a long way. And then what these 150 candidates can  
4 do is they can do it for every single other candidate in  
5 a contested seat. So take your 30 or 40 House contested  
6 seats and it becomes a conduit for a single person to  
7 make an \$800,000 contribution to a candidate in a  
8 contested district.

9 MS. MURPHY: I think even if you accept this  
10 scenario where all of these candidates are independently  
11 deciding to give all their money to one candidate, you  
12 can't have a law that is designed to prevent this one  
13 person from circumvention by prohibiting everybody else  
14 from engaging in contributions that don't --

15 JUSTICE GINSBURG: Ms. Murphy, on the  
16 "everyone else," can you give us an idea of whose  
17 expression is at stake? I mean, most people couldn't  
18 come even near the limit. So what percentage -- is  
19 there any information on what percentage of all  
20 contributors are able to contribute over the aggregate?

21 MS. MURPHY: I don't have a percentage on  
22 how many are able. I mean, we aren't talking about a  
23 large number of individuals. We certainly are talking  
24 about more individuals than whose First Amendment rights  
25 were implicated by the provision at issue in Davis, for

1 example.

2 JUSTICE SCALIA: I assume that a law that  
3 only -- only prohibits the speech of 2 percent of the  
4 country is okay.

5 MS. MURPHY: Absolutely not.

6 JUSTICE SCALIA: Oh, it isn't?

7 CHIEF JUSTICE ROBERTS: Ms. Murphy, we  
8 haven't talked yet about the effect of the aggregate  
9 limits on the ability of donors to give the minimum  
10 amount to as many candidates as they want. The effect  
11 of the aggregate limits is to limit someone's  
12 contribution of the maximum amount to about 9  
13 candidates, right?

14 MS. MURPHY: That's right. If you're  
15 talking about a general --

16 CHIEF JUSTICE ROBERTS: Is there a way to  
17 eliminate that aspect while retaining some of the  
18 aggregate limits? In other words, is that a necessary  
19 consequence of any way you have aggregate limits? Or  
20 are there alternative ways of enforcing the aggregate  
21 limitation that don't have that consequence?

22 MS. MURPHY: Well, it's certainly a  
23 necessary consequence of BCRA's scheme in which there's  
24 a distinct aggregate limit on contributions to  
25 candidates alone. I think, though, aggregate limits in

1 general are always going to have this effect of  
2 prohibiting people from giving contributions that don't  
3 themselves give rise to quid pro quo corruption  
4 concerns. And that's why if the government is really  
5 concerned about the things it's talking about, there are  
6 narrower avenues to get at them. If the concern is  
7 joint fundraising committees, you could have --

8 JUSTICE SOTOMAYOR: I'm a little confused,  
9 okay? I'm confused because we're talking in the  
10 abstract. This decision was based on a motion to  
11 dismiss. And there is a huge colloquy about what  
12 happens and doesn't happen. We don't have a record  
13 below.

14 MS. MURPHY: Well --

15 JUSTICE SOTOMAYOR: I mean, I can go into  
16 the news, as Justice Breyer suggested. It's very hard  
17 to think that any candidate doesn't know the contributor  
18 who has enough money to give not only to himself or  
19 herself, but to any of his or her affiliates who are  
20 supporting him or her.

21 I mean, it's nearly common sense, hard to  
22 dispute. So you're saying it can't happen, but I don't  
23 see charges of coordination going on that much.

24 MS. MURPHY: I guess I'm not sure what  
25 you're talking about happening. I mean, if you're just

1 talking about knowing that some individuals are making  
2 contributions to other candidates or State parties who  
3 are not going to share those contributions with a  
4 particular candidate, then I don't see how that -- or  
5 gives rise to any corruption or circumvention concern.

6 JUSTICE BREYER: Here is the actual ad, the  
7 actual ad. I won't name the candidate. You see a  
8 picture of the candidate. There is a sign that says  
9 "Smith PAC." That's what it says. And then it says,  
10 "Make a donation to help Smith PAC support Republican,"  
11 if you like, or "Democratic candidates." Period. And  
12 then they have an address. All right.

13 Now, it doesn't take a genius to figure out  
14 what they're going to do with the money and that maybe  
15 Smith will get a pretty good share of it. Now, if Smith  
16 has 400 people who figure this out, he will have 400  
17 times 5,000 times one person.

18 Now, you say that really couldn't happen  
19 because of the designation. We haven't found a  
20 designation rule that would stop it. But then Justice  
21 Sotomayor is saying: I don't know. And I don't either,  
22 because there's been no hearing, there's been no  
23 evidence presented. There is nothing but dismissal.

24 MS. MURPHY: Two points, Your Honor. First  
25 of all, the case was brief on cross-motion for



1 injunctive relief. So the government had an opportunity  
2 to make a record and it chose to treat this as a legal  
3 case, not as one in which --

4 JUSTICE SCALIA: Ms. Murphy, do -- do we  
5 need a record to figure out issues of law?

6 MS. MURPHY: And that's my second point.  
7 Really, this is --

8 JUSTICE SCALIA: No, no. I agree.

9 (Laughter.)

10 JUSTICE SCALIA: I agree -- I agree that --  
11 that this campaign finance law is so intricate that I  
12 can't figure it out. It might have been nice to have  
13 the, you know, the lower court tell me what the law is.  
14 But we don't normally require a record to decide  
15 questions of law.

16 MS. MURPHY: And you shouldn't need one here  
17 either because these limits are facially over- and  
18 under-inclusive. They're not closely tailored and  
19 evidence can't --

20 JUSTICE SOTOMAYOR: You're taking a  
21 position -- you're taking a position that the law stops  
22 corruption. And you're suggesting that the government  
23 is incapable of showing facts that the law doesn't work?

24 MS. MURPHY: I'm suggesting that --

25 JUSTICE SOTOMAYOR: As it is? Don't you

1 need facts to prove that or disprove that proposition?

2 MS. MURPHY: Even if the government could  
3 prove that proposition, there would still be an over-  
4 and under-breadth problem.

5 If I may, I'd like to reserve the remainder  
6 of my time.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
8 Mr. Burchfield.

9 ORAL ARGUMENT OF BOBBY R. BURCHFIELD,  
10 FOR SENATOR MITCH McCONNELL,  
11 AS AMICUS CURIAE, SUPPORTING APPELLANTS

12 MR. BURCHFIELD: Mr. Chief Justice, may it  
13 please the Court:

14 Senator McConnell agrees that this aggregate  
15 limit does not pass exacting scrutiny. Senator  
16 McConnell believes that all restrictions of this nature  
17 should be reviewed under strict scrutiny. To begin  
18 with, this is a severe restriction on political speech.

19 JUSTICE GINSBURG: Mr. Burchfield, I'd like  
20 you to address this question about the restriction on  
21 speech. It has been argued that these limits promote  
22 expression, promote democratic participation, because  
23 what they require the candidate to do is, instead of  
24 concentrating fundraising on the super-affluent, the  
25 candidate would then have to try to raise money more

1 broadly in the electorate. So that by having these  
2 limits you are promoting democratic participation, then  
3 the little people will count some, and you won't have  
4 the super-affluent as the speakers that will control the  
5 elections.

6 MR. BURCHFIELD: Your Honor, I disagree with  
7 that, for this reason. First of all, this limit, the  
8 aggregate limit on political parties, places like-minded  
9 political parties in the position of competing against  
10 each other rather than collaborating against each other.  
11 All the national political parties on the Republican  
12 side and the State political parties compete against  
13 each other for an artificially limited pool of money  
14 from each contributor.

15 The same is true on the candidate side.  
16 They compete against each other for the same  
17 artificially limited pool of money, even though each  
18 individual contribution to the candidate or to the party  
19 is limited by the base limits. The Federal Election  
20 Commission regulations -- and Justice Breyer, I would --  
21 I would propose that you look at Section 110.1(h), which  
22 specifically -- which specifically prohibits a PAC of  
23 the nature you describe.

24 If a person contributes to a PAC with  
25 knowledge his contribution is going to a particular

1 candidate, that is an earmark under the -- under the  
2 precedents of the Federal Election Commission.

3 JUSTICE SCALIA: Counsel, is it -- is it  
4 correct that the consequence of this provision has been  
5 very severe with respect to national political parties?

6 MR. BURCHFIELD: It is, Your Honor,  
7 particularly in the current environment where the  
8 national political parties are -- are being marginalized  
9 by outside forces.

10 JUSTICE SCALIA: And -- and much of the  
11 money that used to go to them now goes to PACs; isn't  
12 that what has happened?

13 MR. BURCHFIELD: Exactly right, Your Honor.

14 JUSTICE SCALIA: So that this is really, you  
15 know, turning the dials on -- on regulating elections.  
16 Now, I ask myself, why would -- why would members of  
17 Congress want to hurt their political parties? And I  
18 answer -- I answer to myself --

19 (Laughter.)

20 JUSTICE SCALIA: -- well, ordinarily, the  
21 national political parties will devote their money to  
22 elections in those States where the incumbent has a good  
23 chance of losing. So, in fact, if you're an incumbent  
24 who cares about political parties, I don't want money to  
25 go to my opponents.

1           And if you -- if you turn down the amount of  
2 money that the national political parties have, that's  
3 that much less money that can be devoted against you if  
4 you're challenged in a close race. Isn't that the  
5 consequence of this?

6           MR. BURCHFIELD: Let me see you and raise  
7 you one. There are separate limits here, Your Honor,  
8 for candidates and for political parties. The effect of  
9 this is to insulate the incumbents from competing with  
10 the political parties for the dollars. And by imposing  
11 a cap on the candidate -- on the amount candidates can  
12 raise, the incumbents realized that they're the favored  
13 class among -- among candidates who are going to be  
14 getting the contributions.

15           JUSTICE SCALIA: What a surprise.

16           JUSTICE GINSBURG: Has it worked out that  
17 way in practice? Has it worked out? Because there was  
18 one brief at least saying no, that -- that that's wrong.  
19 In fact, it's the challengers who are aided.

20           MR. BURCHFIELD: Well, Your Honor, I think  
21 it is -- it is -- there's a hard cap on the number any  
22 contributor can give to all candidates, and a separate  
23 cap on the amount that contributor can give to all party  
24 committees.

25           JUSTICE BREYER: So -- So I read in one

1 summer before BCRA, I spent several weeks reading the  
2 record before the district court in that very lengthy  
3 case on this. And it was filled with testimony by  
4 senators and congressmen that a handful of people can  
5 give hundreds of thousands of dollars, they know who  
6 those people are, and that those people do have undue  
7 influence, which means in First Amendment terms that the  
8 individual who, in fact, has wonderful ideas and  
9 convinces others, even by paying three cents to buy the  
10 internet or something, hasn't a shot because it will  
11 influence people, not ideas, but the money. Now, there  
12 was a record on that.

13 Here there is no record showing whether this  
14 aspect does or does not have the same tendency. That is  
15 why I ask: How can I decide this on the basis of theory  
16 when the record previously showed the contrary of what's  
17 been argued, and in fact at least might show that even  
18 in respect to these limits?

19 MR. BURCHFIELD: Well, Your -- Your Honor,  
20 this case comes to the Court as an as-applied challenge.  
21 Mr. McCutcheon does not want to go through -- does not  
22 want to go through the committees you're talking about.  
23 He wants to write checks directly to the candidates and  
24 directly to the committees. He is constrained by the  
25 aggregate limit.

1 JUSTICE GINSBURG: But he can -- he can  
2 write checks to everyone that he wants to write checks  
3 to. It's just he can't give his special number of 1776.

4 MR. BURCHFIELD: If -- if he wanted to give  
5 a contribution to every candidate running for a Federal  
6 congressional seat, congressional and Senate, he would  
7 be limited to \$86 or some number like that.

8 JUSTICE GINSBURG: In his own case, it would  
9 be something over \$1,000, right? Because he identified  
10 12 more candidates that he'd like to give 1776 to. But  
11 he could give each of them over \$1,000.

12 MR. BURCHFIELD: Your Honor, he could. But  
13 again, you're -- you're diminishing his right to  
14 associate and the intensity of his association by  
15 applying this aggregate limit.

16 JUSTICE KAGAN: Mr. Burchfield, if you take  
17 off the aggregate limits, people will be allowed, if you  
18 put together the national committees and all the State  
19 committees and all the candidates in the House and the  
20 Senate, it comes to over \$3.5 million. So I can write  
21 checks totalling \$3.5 million to the Republican Party  
22 committees and all its candidates or to the Democratic  
23 Party committees and all its committees even before I  
24 start writing checks to independent PACs.

25 Now, having written a check for 3.5 or so

1 million dollars to a single party's candidates, are you  
2 suggesting that that party and the members of that party  
3 are not going to owe me anything, that I won't get any  
4 special treatment? Because I thought that that was  
5 exactly what we said in McConnell, that when we talked  
6 about soft money restrictions, we understood that you  
7 give \$3.5 million, you get a very, very special place at  
8 the table. So this is effectively to -- to reintroduce  
9 the soft money scheme of McConnell, isn't it?

10 MR. BURCHFIELD: No. No, Your Honor, it is  
11 absolutely not, because McConnell dealt with the  
12 situations where there were -- you were not considering  
13 the base limits. The soft money by definition was not  
14 subject to the base limits.

15 To take your example of the joint  
16 fundraising committee, the joint fundraising regulation,  
17 which consumes more than three pages in the -- in the  
18 Federal Code of Federal Regulations -- it's at 102.17(c)  
19 -- it specifically reaffirms the base limits. It  
20 specifically reaffirms the anti-earmarking restriction,  
21 and it says that the joint fundraising committee must  
22 inform all contributors of those restrictions.

23 So, again, it's the situation where the  
24 money leaves the contributor's hands, he loses control  
25 over it, and the person who receives it makes the



1 direction.

2 JUSTICE KAGAN: But the money -- the money  
3 goes to a single party. And indeed, I could make this  
4 even worse. I could say, let's say the Speaker of the  
5 House or the Majority Leader of the House solicits this  
6 money from particular people. So solicits somebody to  
7 ante up his \$3.6 million. And then, you know,  
8 Justice Kennedy said in McConnell the making of a  
9 solicited gift is a quid both to the recipient of the  
10 money and to the one who solicits the payment.

11 So the Speaker, the Majority Leader, can  
12 solicit \$3.6 million to all the party members and you're  
13 telling me there's just no special influence that goes  
14 along with that?

15 MR. BURCHFIELD: Well, we know from the  
16 Citizens United decision, Your Honor, that gratitude and  
17 influence are not considered to be quid pro quo  
18 corruption. So I think that's what you're talking  
19 about. That is not the sort of corruption that would  
20 sustain this limit, especially in light of the severe  
21 restrictions on speech and association that it imposes  
22 as the political parties compete against each other and  
23 as they -- and as -- as the candidates have to compete  
24 against each other.

25 Justice Alito.

1 JUSTICE ALITO: In Buckley, the Court  
2 sustained -- sustained aggregate limits. What has  
3 changed since Buckley?

4 MR. BURCHFIELD: Your Honor, the -- the  
5 statute has changed significantly to impose base limits  
6 on the parties, to impose -- on both the State and --  
7 and Federal parties. It has changed to prohibit  
8 proliferation of political committees.

9 One of the concerns in Buckley was the dairy  
10 industry, which contributed to hundreds of PACs  
11 supporting President Nixon's re-election. That is no  
12 longer possible.

13 JUSTICE ALITO: Those were all created by  
14 the dairy industry or by the Nixon campaign, is that  
15 correct?

16 MR. BURCHFIELD: That's not -- as I  
17 understand -- as I read the lower court decision in  
18 Buckley, that is correct.

19 In addition, you also have -- you also have  
20 a thick volume --

21 JUSTICE SOTOMAYOR: Then how is it that --

22 MR. BURCHFIELD: In addition, you also have  
23 -- you also have a thick volume -- you have a thick  
24 volume of the Code of Federal Regulations of the Federal  
25 Election Commission, which did not exist at the time of

1 Buckley.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 MR. BURCHFIELD: Thank you, Your Honor.

4 CHIEF JUSTICE ROBERTS: General Verrilli.

5 ORAL ARGUMENT OF DONALD B. VERRILLI, JR.,

6 ON BEHALF OF THE APPELLEE

7 GENERAL VERRILLI: Mr. Chief Justice, and  
8 may it please the Court:

9 Aggregate limits combat corruption. Let me  
10 start by explaining exactly how. Aggregate limits  
11 combat corruption both by blocking circumvention of  
12 individual contribution limits and, equally  
13 fundamentally, by serving as a bulwark against a  
14 campaign finance system dominated by massive individual  
15 contributions in which the dangers of quid pro quo  
16 corruption would be obvious and inherent and the  
17 corrosive appearance of corruption would be  
18 overwhelming.

19 Now, the Appellants in this case have tried  
20 to present the case as though the issue were whether  
21 there were some corrupting potential in giving  
22 contribution to the nineteenth candidate after someone  
23 has already contributed to -- the maximum to the  
24 eighteenth. But that is not what this case is about.

25 The Appellants are not arguing that the

1 aggregate limit is drawn in the wrong place. They are  
2 arguing that there can be no aggregate limit because the  
3 base contribution limits do all the work. And so what  
4 that means is that you -- you're taking the lid off the  
5 aggregate contribution limit and, as Justice Kagan and  
6 her question earlier indicated, that means that an  
7 individual can contribute every two years up to  
8 \$3.6 million to candidates for a party, party national  
9 committees and state committees --

10 CHIEF JUSTICE ROBERTS: That's because they  
11 can transfer the funds among themselves and to a  
12 particular candidate. Is the possibility of prohibiting  
13 those transfers perhaps a way of protecting against that  
14 corruption appearance while at the same time allowing an  
15 individual to contribute to however many House  
16 candidates he wants to contribute to?

17 I mean, the concern is you have somebody who  
18 is very interested, say, in environmental regulation,  
19 and very interested in gun control. The current system,  
20 the way the anti-aggregation system works, is he's got  
21 to choose. Is he going to express his belief in  
22 environmental regulation by donating to more than nine  
23 people there? Or is he going to choose the gun control  
24 issue?

25 GENERAL VERRILLI: So, Mr. Chief Justice, I

1 want to make two different points in response to that  
2 question. The first is that restricting transfers would  
3 have a bearing on the circumvention problems. It  
4 wouldn't eliminate all circumvention risk, but would  
5 have a bearing on that problem.

6 But there is a more fundamental problem  
7 here. It's a problem analogous to the one that was at  
8 issue with soft money in McConnell, which is the very  
9 fact of delivering the \$3.6 million check to the whoever  
10 it is, the Speaker of the House, the Senate Majority  
11 Leader, whoever it is who solicits that check, the very  
12 fact of delivering that check creates the inherent  
13 opportunity for quid pro quo corruption, exactly the  
14 kind of risk that the Court identified in Buckley,  
15 wholly apart from where that money goes after it's  
16 delivered. But the delivery of it --

17 CHIEF JUSTICE ROBERTS: What is the  
18 framework -- what is the framework for analyzing -- I  
19 agree with you on the aggregation, but it has this  
20 consequence with respect to limiting how many candidates  
21 an individual can support within the limits that  
22 Congress has said don't present any danger of  
23 corruption? So what is the framework for analyzing  
24 that? Give you your argument with respect to the  
25 transfers and the appearance there, but it does have

1 that other consequence on something we've recognized as  
2 a significant right. So --

3 GENERAL VERRILLI: Let me make a specific  
4 point about that and then work into the framework. The  
5 specific point is this: The aggregate limit would have  
6 the effect of restricting the ability of a contributor  
7 to make the maximum contribution to more than a certain  
8 number of candidates. That's true. We can't help but  
9 acknowledge that. It's math.

10 But that doesn't mean that that individual  
11 cannot spend as much as the individual wants on  
12 independent expenditures to try to advance the interest  
13 of those candidates or the interests or the causes that  
14 those candidates stand for. Mr. McCutcheon, for  
15 example, can spend as much of his considerable fortune  
16 as he wants on independent expenditure advocating the  
17 election of these candidates.

18 JUSTICE SCALIA: And that does not -- that  
19 does not evoke any gratitude on the part of the people?  
20 I mean, if gratitude is corruption, you know, don't  
21 those independent expenditures evoke gratitude? And  
22 is -- is not the evil of big money -- 3.2 million, an  
23 individual can give that to an independent PAC and spend  
24 it, right?

25 GENERAL VERRILLI: The foundation --

1 JUSTICE SCALIA: It's not that we're  
2 stopping people from spending big money on politics.

3 MR. BURCHFIELD: The foundation of this  
4 Court's jurisprudence in this area is the careful line  
5 between independent expenditures, which this Court has  
6 held repeatedly do not create a sufficient risk of quid  
7 pro quo corruption to justify their regulation, and  
8 contributions which do.

9 JUSTICE SCALIA: Wait. That -- that --

10 MR. BURCHFIELD: So we're not talk --

11 JUSTICE SCALIA: That line eliminates some  
12 of the arguments that have been made here, which are  
13 arguments against big money in politics. There -- big  
14 money can be in politics. The thing is you can't give  
15 it to the Republican Party or the Democratic Party, but  
16 you can start your own PAC. That's perfectly good. I'm  
17 not sure that that's a benefit to our political system.

18 GENERAL VERRILLI: Well, I do think we have  
19 limits on contributions to political parties in addition  
20 to limits on contributions to candidates. And I think  
21 that does help establish the point here, which is that  
22 candidates are not hermetically sealed off from each  
23 other, and parties are not hermetically sealed off from  
24 candidates. They -- you know, they're all on the same  
25 team. And we limit the amount that an -- an individual

1 can contribute to a political party as well as the  
2 amount that an individual can contribute to candidates.

3 JUSTICE BREYER: That actually does very  
4 much -- while I don't -- I'm looking for an answer here.  
5 It's not that I have one at all. It is rather basic,  
6 the point I think that's being made now. I mean, as I  
7 understand it, the whole reason -- it is no doubt that  
8 campaign limits take an ordinary person and they say:  
9 You cannot give more than such-and-such an amount.

10 There are apparently, from the Internet, 200  
11 people in the United States who would like to give  
12 \$117,000 or more. We're telling them: You can't; you  
13 can't support your beliefs. That is a First Amendment  
14 negative.

15 But that tends to be justified on the other  
16 side by the First Amendment positive, because if the  
17 average person thinks that what he says exercising his  
18 First Amendment rights just can't have an impact through  
19 public opinion upon his representative, he says: What  
20 is the point of the First Amendment? And that's a First  
21 Amendment point. All right. So that's basic, I think.

22 Now, once that's so, Congress has leeway.  
23 And you are saying, and I have seen all over the place,  
24 that that's why we don't want those 200 people to spend  
25 more than 117- or 120,000 because the average person



1 thinks the election is -- after the election all the  
2 actions are affected by the pocketbook and not by the  
3 merits of the First Amendment arguments.

4           Okay. And now you say the person can do the  
5 same thing anyway; just call it independent. And what  
6 independent does, he can spend 40 million. He can spend  
7 50 million. And all that does is sort of mix up the  
8 messages because the parties can't control it.

9           Now, that's, I think, the question that's  
10 being asked. And I think that that is a very serious  
11 question, and I'd like to know what flows from it. Is  
12 it true? So what? What are we supposed to do? What is  
13 your opinion about that question?

14           JUSTICE KENNEDY: And I have the same  
15 question. You have two -- two persons. One person  
16 gives an amount to a candidate that's limited. The  
17 other takes out ads, uncoordinated, just all on his own,  
18 costing \$500,000. Don't you think that second person  
19 has more access to the candidate who's -- when the  
20 candidate is successful, than the first? I think that  
21 was at the root of Justice Scalia's question and  
22 Justice Breyer's.

23           GENERAL VERRILLI: Let me try to answer this  
24 with an analogy, if I could, Justice Kennedy.

25           I think the right way to think about it is

1 this: If somebody thinks the Secretary of Defense is  
2 doing a great job, they can take out an ad in the  
3 Washington Post, spend \$500,000 on that ad saying: The  
4 Secretary of Defense has done a great job. And -- and  
5 they would have an undoubted First Amendment right to do  
6 that. No one could think that there's a content -- it's  
7 hard to imagine a content-neutral justification for  
8 prohibiting that speech.

9 But if instead the person wanted to express  
10 their symbolic --

11 JUSTICE SCALIA: What if Boeing does it? I  
12 mean, you know --

13 GENERAL VERRILLI: I still think --

14 JUSTICE SCALIA: You think no problem?

15 GENERAL VERRILLI: -- that would be an  
16 independent expression.

17 but if, instead, somebody wanted to express  
18 symbolically their view that the Secretary of Defense  
19 has done a great job by giving the Secretary of Defense  
20 a Maserati, nobody would think that there was a First  
21 Amendment ground that could be -- that could be invoked.

22 JUSTICE ALITO: But we are talking here  
23 about -- we're talking here about campaign  
24 contributions. Isn't it illegal for a candidate to take  
25 campaign contributions and use it to buy a Maserati?

1                   GENERAL VERRILLI: We -- yes, it is, but the  
2 point --

3                   JUSTICE ALITO: Well, I don't see how that  
4 really gets to the point.

5                   GENERAL VERRILLI: But -- it get -- I think  
6 it does, if I may, Justice Alito, because I think that  
7 the point is that the -- that the rule against gifts,  
8 the conflict of interest rules, they exist to advance a  
9 content-neutral government interest of the highest  
10 importance.

11                   JUSTICE ALITO: What troubles me about your  
12 -- what troubles me about your argument, General  
13 Verrilli, and about the district court's opinion is that  
14 what I see are wild hypotheticals that are not obviously  
15 plausible or -- and lack, certainly lack any empirical  
16 support.

17                   Now, you've -- you've chosen to use the same  
18 hypothetical the district court used about the  
19 \$3.5 million contribution that would be -- that could be  
20 given by a coordinate -- which involves all of the House  
21 candidates and all of the Senate candidates in a  
22 particular year getting together with all of the -- all  
23 of the parties' national party committees, plus all of  
24 the State party committees, and then -- and that's how  
25 you get up to the \$3.5 million figure; isn't that right?

1                   GENERAL VERRILLI:  Yes.

2                   JUSTICE ALITO:  Now, how -- how realistic is  
3 that?  How realistic is it that all of the State party  
4 committees, for example, are going to get money and  
5 they're all going to transfer it to one candidate?  For  
6 49 of them, it's going to be a candidate who is not in  
7 their own State.  And there are virtually no instances  
8 of State party committees contributing to candidates  
9 from another State.

10                   And the other part of it that seems dubious  
11 on its face is that all of the party -- all of the  
12 candidates for the House and the Senate of a particular  
13 party are going to get together and they are going to  
14 transfer money to one candidate.  There really -- you  
15 cited in your brief the example -- best examples, I take  
16 it, of -- of contributions from some candidates to other  
17 candidates.  They are very small.  Isn't that true?

18                   GENERAL VERRILLI:  Yes.  But I think there  
19 are two -- Justice Alito, I think that, with all due  
20 respect, I think the point Your Honor is making confuses  
21 two different ways in which these laws combat the risk  
22 of corruption.

23                   The first one is that the -- the handing  
24 over of the large check, and whether it's a \$3.6 million  
25 check for everyone or a \$2.2 million check for the House

1 candidates or a \$1 million check for all the State  
2 committees, the very -- just as the Court found in  
3 McConnell with respect to massive soft money  
4 contributions and the inherent risks of -- of corruption  
5 there, there's an inherent risk of corruption. And  
6 that's why indeed, as I said, we have limits on how much  
7 we can contribute to a political party for that  
8 reason --

9 JUSTICE ALITO: Well, I don't understand  
10 that --

11 GENERAL VERRILLI: -- and that's apart from  
12 how it gets transferred.

13 JUSTICE ALITO: Unless the money is  
14 transferred to -- you have to get it from the person who  
15 wants to corrupt to the person who is going to be  
16 corrupted. And unless the money can make it from A to  
17 B, I don't see where the quid pro quo argument is.

18 GENERAL VERRILLI: Well, I think that the --  
19 I think that the way these joint fundraising committees  
20 work is you hand over a single check to a candidate who  
21 solicits it. Now, it could be any candidate who sets up  
22 a joint fundraising committee, says give to me and give  
23 to the rest of my team. And that's -- so the handing  
24 over the check to that candidate is a -- seems to me  
25 creates a significant risk of indebtedness on the part

1 of that candidate, even though a lot of the money is  
2 flowing through to others.

3 In addition, the party leaders are often  
4 going to be the ones who solicit those contributions,  
5 and they're going to have a particular indebtedness to  
6 candidates because, of course, their power, their  
7 authority depends on the party retaining or -- or  
8 gaining a majority in the legislature, and so they're  
9 going to feel a particular sense of indebtedness, that  
10 this person is helping not only them, but everybody --

11 JUSTICE ALITO: I understand --

12 GENERAL VERRILLI: -- in these massive  
13 amounts and then -- I'm sorry, if I may just make my  
14 third point, Mr. Chief Justice.

15 CHIEF JUSTICE ROBERTS: Sure.

16 GENERAL VERRILLI: And then the third point  
17 I think is that every, every candidate in the party is  
18 going to be affected by this, because every candidate is  
19 going to get a slice of the money and every candidate is  
20 going to know that this person who wrote the  
21 multimillion dollar check has helped not only the  
22 candidate, but the whole team, and that creates a  
23 particular sense of indebtedness. And, of course, every  
24 member of the party is likely to -- every -- every  
25 officeholder in the party is likely to be leaned on by

1 the party leadership to deliver legislation to the  
2 people who are buttering their bread.

3 JUSTICE ALITO: These -- these aggregate  
4 limits might not all stand or fall together. Let --  
5 just take this example, if you can just take a minute  
6 and walk me through this step by step.

7 You have somebody who wants to corrupt a  
8 member of the House, and this person's strategy is to  
9 make contributions to multiple House candidates with the  
10 hope, the expectation, the plan that those candidates  
11 are going to transfer -- transfer the money to the --  
12 the member that this person wants to corrupt.

13 Now, how is that person going to accomplish  
14 that given the earmarking regulations, and -- and the  
15 limits on how much one member can contribute to another?

16 GENERAL VERRILLI: So, you know, I think  
17 that that -- I think it's possible, but I think if  
18 somebody had that goal, that circumvention goal, but by  
19 far better ways of achieving it would be giving  
20 significant -- and you've taken the aggregate caps  
21 off -- would be making significant contributions to  
22 State parties and national parties who are free to  
23 transfer money among themselves without restriction, and  
24 by -- and by making contributions to PACs. And so --

25 JUSTICE ALITO: Well, if you're -- I mean,

1 if you're not going to defend the application of the  
2 aggregate limits in that situation, doesn't it follow  
3 that, as applied to that situation, these are -- these  
4 are unconstitutional?

5 GENERAL VERRILLI: No. No, I don't think  
6 so. I think it -- I think it -- I think it -- first of  
7 all, I think it could happen in that situation, but I  
8 think it's more likely to happen in those --

9 JUSTICE ALITO: Well, then just explain to  
10 me how it's going to be done. The person gives to  
11 member A with the hope that member A is going to give it  
12 to member B. If the person even implies, when making  
13 the contribution to A, that person wants it to go to B,  
14 that's earmarked. So how is this going to be done?

15 GENERAL VERRILLI: I think -- well, I -- in  
16 McConnell and in Colorado Republican to this Court said  
17 that earmarking is not the outer limit of the  
18 government's authority to regulate here. And the reason  
19 the Court said that is because a lot of this can be done  
20 with winks and nods and subtly. And so I -- and so I  
21 don't think it's the case that earmarking would work to  
22 prohibit that.

23 But I also think that the -- when we're  
24 talking about aggregate limits, they're part of an  
25 overall system of regulation. And I think that they



1 work to keep the -- to keep the circumvention risk in  
2 check, and they work to make sure that you don't have  
3 the kind of problem that you identified in McConnell.

4 JUSTICE BREYER: So what would you think? I  
5 was just listening to your dialogue, and you heard --  
6 this is pretty tough, we try to construct some  
7 hypotheticals, and -- and the counsel says, oh, I've got  
8 this part wrong or that part wrong or the other one, and  
9 they may be right. And we can't do this, figuring out  
10 all these factual things in an hour, frankly.

11 And they may be right; I'm not sure. There  
12 hasn't been a full hearing. It seemed to me there are  
13 things to explore in respect to the circumvention. Who  
14 is right? Should you change the hypothetical slightly,  
15 or what? There are things to explore in respect to the  
16 question of whether being able to write a \$3.6 million  
17 check to a lot of people does leave the average person  
18 to think, my First Amendment speech in terms of  
19 influencing my representative means nothing.

20 There are things to explore in terms of the  
21 relationship between what is permissible; namely, spend  
22 \$40 million independently. And what isn't permissible;  
23 namely, spending more than 117,000.

24 None of these have been considered. They  
25 would seem relevant. So what do you think about going

1 into these matters in a district court where the  
2 evidentiary aspects of them can be explored at some  
3 length?

4           GENERAL VERRILLI: Well, I think,  
5 Justice Breyer, that the statute can be upheld under the  
6 current state of the record. I understand and take Your  
7 Honor's point. But I do think that you had a  
8 substantial record in Buckley, you had a substantial  
9 record in McConnell, but that substantial record bears  
10 directly on the question of whether massive aggregate  
11 contributions pose the inherent danger of corruption and  
12 the corrosive appearance of corruption and that the case  
13 can be decided on that basis.

14           JUSTICE GINSBURG: General Verrilli, the  
15 Government in the proceeding below didn't suggest in  
16 response to the -- to the proceedings before the  
17 three-judge court that an evidentiary hearing was --  
18 both sides seem to treat this as a matter that could be  
19 disposed of without an evidentiary hearing; is that  
20 right?

21           GENERAL VERRILLI: That's correct, Your  
22 Honor.

23           JUSTICE GINSBURG: There's the point that  
24 the Chief made about what this does is limit  
25 particularly on the national strategy. It drives

1 contributions towards the PACs and away from the  
2 parties, that money -- without these limits, the money  
3 would flow to the candidate, to the party organization,  
4 but now, instead, it's going to the PACs. What is your  
5 response to that?

6           GENERAL VERRILLI: Well, the -- we take the  
7 constitutional First Amendment framework of this Court's  
8 decisions as a given. The Court has -- the Court has  
9 determined that independent expenditures do not present  
10 a risk of quid pro quo corruption that allows their  
11 regulation; that contributions -- direct contributions  
12 to candidates and to parties can pose that risk --

13           JUSTICE SCALIA: That's fine. They're  
14 regulated. That's the law, but the question says --  
15 what the question is directed at, given that that's the  
16 law, isn't the consequence of -- of this particular  
17 provision to sap the vitality of political parties and  
18 to encourage -- what should I say -- you know, drive-by  
19 PACs for each election? Isn't that the consequence?

20           GENERAL VERRILLI: So I think the answer is  
21 we don't know one way or another whether that's the  
22 consequence, but we --

23           JUSTICE SCALIA: I think we do.

24           GENERAL VERRILLI: Well, I don't -- with all  
25 due respect, Justice Scalia, I don't think we do. The

1 parties still raise and spend very substantial amounts  
2 of money, and so I don't think that -- that we know.  
3 But beyond that, what -- the Congress has made a  
4 determination that there is a real risk of quid pro quo  
5 corruption and the appearance of quid pro quo corruption  
6 here, and has regulated with respect to that risk, and  
7 Congress is of course free to take this into  
8 consideration.

9 JUSTICE SCALIA: You say -- you say it's  
10 \$3.5 million. If you assume somebody that gives the  
11 maximum to every possible candidate and party he can  
12 contribute to throughout the United States, 3.5 million.  
13 Just to put that in perspective, how much money is spent  
14 by political parties and PACs in all elections  
15 throughout the country --

16 GENERAL VERRILLI: Well, I think that's --

17 JUSTICE SCALIA: -- in one election cycle?

18 GENERAL VERRILLI: I think that's a good  
19 point, Justice Scalia. I think it helps illustrate --

20 JUSTICE SCALIA: Do you have any idea much?

21 GENERAL VERRILLI: I do, I do. Take the  
22 2010 election. It's a non-presidential year. Each  
23 party spent -- parties and candidates together on each  
24 side spent approximately \$1.5 billion.

25 JUSTICE SCALIA: 1.5 billion.

1                   GENERAL VERRILLI: Right.

2                   JUSTICE SCALIA: And what about PACs?

3                   GENERAL VERRILLI: That -- that I don't have  
4 specifics for, but if that were --

5                   JUSTICE SCALIA: Oh, but that was a lot in  
6 the last few elections, wasn't it?

7                   GENERAL VERRILLI: But -- but the parties --  
8 but here's the problem --

9                   JUSTICE SCALIA: And -- and what about  
10 newspapers that -- that spend a lot of money in  
11 endorsing candidates and promoting their candidacy. I  
12 suppose, you know, you -- you have to put in that money,  
13 too. That is money that is directed to political  
14 speech.

15                   When you add all that -- add -- when you add  
16 all that up, I don't think 3.5 million is a heck of a  
17 lot of money --

18                   GENERAL VERRILLI: I don't think --

19                   JUSTICE SCALIA: -- spread throughout the  
20 country.

21                   GENERAL VERRILLI: I don't think that's the  
22 right way to look at it, Your Honor. If you think that  
23 a party's got to get \$1.5 billion together to run a  
24 congressional campaign, parties and candidates together,  
25 and you've got a maximum of \$3.6 million, that is about

1 450 people you need to round up. Less than 500 people  
2 can fund the whole shooting match. And that I think is  
3 part of the problem here, is that you are going to  
4 create a situation, if you take off of the aggregate  
5 limits, in which there is a very real risk that -- that  
6 both -- that the government will be run of, by, and for  
7 those 500 people and that the public will perceive that  
8 the government is being run of, by, and for those 500  
9 people. And that is why we have these aggregate limits  
10 and why they need to remain in place.

11 CHIEF JUSTICE ROBERTS: But the -- the  
12 consequence is -- just to get back to my prior question,  
13 the consequence is you are telling somebody who doesn't  
14 want to give 3.4 million but wants to contribute to more  
15 than nine House candidates, just up to the maximum,  
16 which would be the \$5,000 per the double cycle, you are  
17 telling him that he can't make that contribution,  
18 however modest, certainly within the limits Congress has  
19 said does not present the problem of corruption, to a  
20 tenth candidate.

21 I appreciate the argument you are making  
22 about the 3-point-whatever million-dollar check and the  
23 need for the aggregate limits to address that. I  
24 understand that point. But what do you do with the flip  
25 side? I mean, you can't pretend that that is pursued

1 with no First Amendment cost quite apart from the one  
2 that's there. It seems to me a very direct restriction  
3 on much smaller contributions that Congress said do not  
4 present a problem with corruption.

5           GENERAL VERRILLI: I take that point,  
6 Mr. Chief Justice. But I think the right -- you asked  
7 earlier about the right analytical framework. I think  
8 the right analytical framework under the First Amendment  
9 is to think about this in terms of content neutrality.  
10 The government's interest in preventing corruption and  
11 the appearance of corruption, which is why I brought up  
12 the example of the Maserati to the Secretary of Defense,  
13 is an entirely content-neutral justification --

14           CHIEF JUSTICE ROBERTS: No, but that  
15 wouldn't -- doesn't normally get you very far on the  
16 First Amendment. You could not have a rule that says  
17 the -- the Post or the New York Times can only endorse  
18 nine candidates --

19           GENERAL VERRILLI: No --

20           CHIEF JUSTICE ROBERTS: -- because -- I  
21 mean, it's completely content neutral; you don't care  
22 who the tenth is. But that -- that limit would not  
23 be --

24           GENERAL VERRILLI: I would think that would  
25 be a content-based justification because the -- you are

1 not -- you are not trying to prevent corruption or the  
2 appearance of corruption by doing that, and there is no  
3 other neutral justification that I can think of for why  
4 you would impose such a rule.

5 But the point is, with respect to elected  
6 officials and the giving of money to the elected  
7 officials, there is this content-neutral justification  
8 that just doesn't exist with respect to any other entity  
9 out there in the world. And, yes, it is not free of  
10 First Amendment costs and we acknowledge that, but --  
11 but that cost is mitigated in that this is not a  
12 prohibition, that you can -- you can't make it at the  
13 maximum, but you can make less. And then you have all  
14 the --

15 CHIEF JUSTICE ROBERTS: Is there -- is there  
16 any way to prevent the concern you have about the  
17 3-point-whatever-it-is million-dollar check without  
18 imposing the limit on the person who wants to support  
19 ten candidates rather than one?

20 GENERAL VERRILLI: Well, I suppose you could  
21 try to calculate an aggregate contribution limit that is  
22 different and higher than the one that is here now, but  
23 the problem with that is that the Appellants are not  
24 making that argument. They're making the argument that  
25 you cannot have -- the only argument they've made in



1 this case is that you cannot have aggregate limits  
2 because base contribution limits do all the work.

3 JUSTICE ALITO: Well, they are making --  
4 they are making the argument that there are -- that the  
5 regulations that already exist about transfers from one  
6 entity to another prevent a lot of what you're  
7 complaining -- what you're -- what you are worried  
8 about. But if they are not sufficient, they could be  
9 bolstered. The aggregate limits are a very blunt way of  
10 trying to get out -- get at the problem that you are --  
11 that you are worried about. That's their argument.

12 What -- are -- is that wrong? There is  
13 nothing more that could be done to prevent transfers  
14 from joint fundraising committees or from one member to  
15 another or from State parties to candidates?

16 GENERAL VERRILLI: So, again, I apologize  
17 for repeating myself, Justice Alito, but circumvention  
18 is not the only problem. The delivery of the -- the  
19 solicitation and receipt of these very large checks is a  
20 problem, a direct corruption problem, and none of the  
21 alternatives that the Appellant's have identified  
22 address that problem.

23 JUSTICE ALITO: I just don't understand  
24 that. You mean at the time when the person sends the  
25 money to this hypothetical joint fundraising committee

1 there is a corruption problem immediately, even though  
2 -- what if they just took the money and they burned it?  
3 That would be a corruption problem there?

4 GENERAL VERRILLI: Well, they're not -- they  
5 are not going to burn it.

6 CHIEF JUSTICE ROBERTS: Well, all right.  
7 But -- so then --

8 GENERAL VERRILLI: And -- but -- and that's  
9 the point. They're not going to burn it. They need it.

10 JUSTICE ALITO: When does the corruption --  
11 yes. When does the corruption occur? It occurs when  
12 it's transferred to -- to the person who has power and  
13 want -- and they want to corrupt.

14 GENERAL VERRILLI: I -- I beg to differ,  
15 Your Honor. I think what it does is create the sense of  
16 indebtedness on the part of the recipient and on a part  
17 of the party leadership when it's delivered, and -- and  
18 that's the inherent risks of corruption in that  
19 situation.

20 It's -- it's quite parallel to McConnell.  
21 It's why we have aggregate limits on what you can give  
22 to a party because these people are not hermetically  
23 sealed off from each other. They are all on the same  
24 team. They all have an interest in each other's  
25 success. And so party leaders in particular are going

1 to feel a sense of indebtedness, and their less  
2 restrictive alternatives don't deal with that.

3 But now going -- if I could, I will try to  
4 address the circumvention problem. You know, they --  
5 what they have done is come up with a whole series of  
6 things that you would have to -- there is not one thing  
7 that you would have to do to take care of this problem.  
8 You would have to say no transfer. You would have to  
9 say segregated accounts. You would have to say no  
10 giving money to PACs who have indicated that they are  
11 going to give money to candidates once you have already  
12 given money. You're going to have to do five or six  
13 things to deal with the risks of corruption. The idea  
14 that that is a less-restrictive means, it seems to me  
15 like a significantly more restrictive means, and it's  
16 going to impose First Amendment costs of its own. I'm  
17 sure the PACs are going to say: What do you mean we  
18 can't say who we want to give money to; we have a right  
19 to do that.

20 JUSTICE SCALIA: General Verrilli, it seems  
21 to me -- it seems to me fanciful to think that the sense  
22 of gratitude that an individual Senator or Congressman  
23 is going to feel because of a substantial contribution  
24 to the Republican National Committee or Democratic  
25 National Committee is any greater than the sense of

1 gratitude that that Senator or Congressman will feel to  
2 a PAC which is spending enormous amount of money in his  
3 district or in his State for his election.

4 I mean, it seems to me the latter is much  
5 more identifiable, and there is nothing in the law that  
6 excludes that. So apparently that's not too much of a  
7 risk.

8 GENERAL VERRILLI: Well, Justice Scalia, I'm  
9 not here to debate the question of whether the Court's  
10 jurisprudence is correct with respect to the risks of  
11 corruption from independent expenditures.

12 JUSTICE SCALIA: It is what it is, though.

13 GENERAL VERRILLI: But we accept it and --  
14 and the line is that there -- in this Court's  
15 jurisprudence, that there is an unacceptable risk when  
16 contributions are too high.

17 And if I may just say this in conclusion --

18 JUSTICE KENNEDY: Okay. But so your answer  
19 to the questions that have been put previously from --  
20 from me and Justice Breyer and Justice Scalia is that's  
21 the law.

22 GENERAL VERRILLI: It's -- well --

23 JUSTICE KENNEDY: I mean, that's -- just to  
24 be fair, that's -- I'm -- I'm coming -- I'm coming off  
25 the bench --

1                   GENERAL VERRILLI: Congress isn't --

2                   JUSTICE KENNEDY: -- with the understanding  
3 that your answer is: Buckley has settled that issue; no  
4 more discussion necessary.

5                   GENERAL VERRILLI: The -- the risk -- we --  
6 we think the risk of corruption is real. And we think  
7 it's in fact profound when you are talking about the  
8 kinds of contributions that can be made if you take --  
9 you take the lid off on aggregate contributions.

10                  If it -- if Justice Scalia's critique of the  
11 situation proves correct and it is deeply disabling to  
12 candidates and parties, Congress can address that by  
13 changing the contribution limits.

14                  JUSTICE KAGAN: And General, I suppose that  
15 if this Court is having second thoughts about its  
16 rulings that independent expenditures are not  
17 corrupting, we could change that part of the law.

18                  (Laughter.)

19                  GENERAL VERRILLI: And far be it from me to  
20 suggest that you don't, Your Honor.

21                  (Laughter.)

22                  JUSTICE BREYER: Well, if it's interrelated.

23                  But the -- the record, as far as I recall it  
24 from several years ago, talked about at length: I don't  
25 like to use the word "corrupting"; I like to use

1 integration, "integrity of the process," that notion of  
2 getting people to think that their First Amendment  
3 speech makes a difference, etcetera.

4 Let's say "corruption." Mostly when it got  
5 to this part, the aggregate, it was about circumvention.

6 And I think you are quite right to say: But  
7 there is a huge corruption aspect to this. But we don't  
8 have a lot of information in the record about that, do  
9 we? If I just -- did I just miss it? Did I miss  
10 something?

11 GENERAL VERRILLI: Well, I -- well, I think  
12 with respect to McConnell, this is --

13 JUSTICE BREYER: Yeah.

14 GENERAL VERRILLI: -- it is really a very  
15 close parallel.

16 JUSTICE BREYER: It is a close parallel when  
17 I think about it, maybe -- or you think about it, but if  
18 you're really talking -- they don't think about it that  
19 way. And so that's why I've been pushing this idea, you  
20 see, of let's go into this, okay? If they want us to go  
21 into it, go into it.

22 GENERAL VERRILLI: I understand that, Your  
23 Honor. I would say that I think the record -- you know,  
24 after all, these aggregate limits were enacted in BCRA,  
25 the same statute that -- to which that legislative

1 record pertains and it really does go to the same  
2 problem. And, therefore, I think it bears upon it and  
3 it's -- it's ample evidence that would justify upholding  
4 these aggregate limits, and I would strongly urge the  
5 Court to do so. Thank you.

6 CHIEF JUSTICE ROBERTS: Thank you, General.

7 Ms. Murphy, you have three minutes  
8 remaining.

9 REBUTTAL ARGUMENT OF ERIN E. MURPHY

10 ON BEHALF OF THE APPELLANTS

11 MS. MURPHY: Thank you, Mr. Chief Justice. Just  
12 a few quick points.

13 First, we haven't heard of the Solicitor General  
14 talk that much about circumvention today, and I think  
15 that's because the circumvention argument just doesn't  
16 really work. It's already addressed by all of the  
17 multiple prophylactic measures that Bicker contains.  
18 And to the extent those aren't sufficient, there are  
19 much narrower, tailored ways to get at this, as the  
20 questions from Justice Alito and the Chief Justice  
21 pointed out.

22 What we're really hearing today is a  
23 corruption argument. But as the questioning revealed,  
24 once you accept the corruption theory that the  
25 Government is putting forward here, there really isn't a

1 way to continue to draw a line between independent  
2 expenditures and the \$3 point million check to all of  
3 these different individuals that is in small based  
4 limited amounts. Because there's certainly going to be  
5 just as much gratitude to the individual who spends  
6 \$3.6 million directly supporting one candidate through  
7 ads on that candidate's behalf.

8                   So what we really have is a system that's  
9 forcing money out of the most transparent way possible  
10 to make contributions which is directly to the  
11 candidates and the parties and the PACs.

12                   If there's no further questions, thank you.

13                   CHIEF JUSTICE ROBERTS: Thank you, counsel.  
14 The case is submitted.

15                   (Whereupon, at 11:02 a.m., the case in the  
16 above-entitled matter was submitted.)

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