No. 12-536

IN THE

Supreme Court of the United States

SHAUN MCCUTCHEON, *ET AL.*, *Appellants*,

v.

FEDERAL ELECTION COMMISSION, *Appellee*.

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

Brief *Amicus Curiae* of Downsize DC Foundation, DownsizeDC.org, Free Speech Coalition, Inc., Free Speech Defense and Education Fund, U.S. Justice Foundation, Gun Owners Foundation, Gun Owners of America, Inc., English First, English First Foundation, Lincoln Institute for Research and Education, Abraham Lincoln Foundation, Institute on the Constitution, Western Center for Journalism, Policy Analysis Center, Conservative Legal Defense and Education Fund, Libertarian National Committee, Inc. and Constitution Party National Committee in Support of Appellants

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INTEREST OF THE *AMICI CURIAE*[1]

Amici Downsize DC Foundation, Free Speech Defense and Education Fund, U.S. Justice Foundation, Gun Owners Foundation, English First Foundation, The Lincoln Institute for Research and Education, Western Center for Journalism, Policy Analysis Center, and Conservative Legal Defense and Education Fund are nonprofit educational organizations, exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code ("IRC"). *Amici* DownsizeDC.org, Free Speech Coalition, Inc., Gun Owners of America, Inc., English First, and Abraham Lincoln Foundation are nonprofit social welfare organizations, exempt from federal income tax under IRC section 501(c)(4). Institute on the Constitution is an educational organization. *Amici* Libertarian National Committee, Inc. and Constitution Party National Committee are national political parties.

Each of these *amici* have filed *amicus curiae* briefs in this and other courts, and each is interested in the proper interpretation of state and federal constitutions and statutes. Various of these *amici* have filed briefs in several prior campaign finance cases in this Court:

Jeremiah W. Nixon v. Shrink Missouri Government

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

PAC, 528 U.S. 377 (2000).[2]

FEC v. Christine Beaumont, et al., 539 U.S. 146 (2003).[3]

FEC v. Wisconsin Right to Life, 551 U.S. 449 (2007).[4]

Citizens United v. FEC, 558 U.S. 310 (2009).[5]

Arizona Free Enterprise Club's Freedom Club PAC, *et al.* v. Ken Bennett, 2011 U.S. LEXIS 4992 (June 27, 2011).[6]

William P. Danielczyk, Jr., *et al.* v. United States (cert. denied), 2013 U.S. LEXIS 1810 (Feb. 25, 2013).[7]

SUMMARY OF ARGUMENT

The aggregate limits on individual electoral contributions under the Federal Elections Campaign Act, as amended, reflect the distinction drawn in

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[2] http://lawandfreedom.com/site/election/shrinkpac.html.

[3] http://lawandfreedom.com/site/election/Beaumont.pdf.

[4] http://lawandfreedom.com/site/election/WRTL%20II%20amicus.pdf.

[5] http://lawandfreedom.com/site/election/CU_amicus.pdf.

[6] http://lawandfreedom.com/site/election/AFEC_Amicus.pdf.

[7] http://lawandfreedom.com/site/election/DanielczykvUS_Amicus.pdf.

Buckley v. Valeo between contributions and expenditures. Expenditures were said to be protected by the freedom of speech, thereby deserving greater First amendment protection than electoral contributions which were only protected by the freedom of association. That distinction was wrong then, and it is wrong now. As Chief Justice Warren Burger pointed out in dissent in Buckley, the freedoms of speech and association are "two sides of the First Amendment coin," enjoying equal constitutional protection. Twenty-four years later, the Chief Justice's view was vindicated in Citizens United v. FEC wherein this Court applied strict scrutiny to the FECA ban on corporate speech, not on the ground of free speech, but freedom of association. Thus, this Court overruled Austin v. Michigan Chamber of Commerce on the ground that Government may not ban "political speech simply because the speaker is in an association that has taken on the corporate form." This right of association is based on the right of the people to peaceably assemble, a right long protected from government discrimination. Limited to content- and speaker-neutral time, place, and manner regulations, the Government may take only actions aimed at protecting the physical peace. Thus, the ban on electoral contributions, like the ban on electoral expenditures, unconstitutionally elevates government officials above the people.

Instead of deferring to incumbent lawmakers who set the rules which govern the financing of federal election campaigns, this Court should not be taken in by Congress's claim that campaign finance regulations are designed to "promote fair practices in the conduct

of the election campaigns for federal office." To the contrary, this Court should be wary of the claims of incumbent officeholders whose self-interest is directly at stake when making the rules governing the financing of campaigns waged by challengers seeking to replace them. Even though this Court has, from Buckley to the present, recognized this conflict of interests, it has failed to exercise its judicial role to say what the law of the First Amendment is, as applied to electoral communications.

Instead, this Court has allowed exceptions to fixed speech, press, assembly and petition principles to be overridden by balancing tests, permitting violations of those principles if it is perceived that the Government has strong enough interests. Citizens United scuttled this balancing approach, imposing a categorical First Amendment rule against all bans on speech and association based upon the identity of the speaker or the content of the communication, regardless of any asserted overriding interest, compelling or otherwise.

ARGUMENT

I. THE AGGREGATE LIMITS ON INDIVIDUAL ELECTORAL CONTRIBUTIONS ARE BASED UPON THE UNCONSTITUTIONAL DISTINCTION BETWEEN CONTRIBUTIONS AND EXPENDITURES DRAWN IN BUCKLEY v. VALEO.

Appellants urged the three-judge court below to apply the same strict scrutiny used to review

regulation of electoral expenditures to the aggregate limits on contributions to political candidates and parties fixed by the Federal Election Campaign Act, as amended, "because laws burdening political speech are subject to [such] scrutiny and the aggregate limits "'similarly burden" *First Amendment* rights.'" *See* McCutcheon v. FEC, 2012 U.S. Dist. LEXIS 139651 *1, *9 (D.D.C. 2012). The court below refused, accepting the distinction adopted in this Court's decision in Buckley v. Valeo, 424 U.S. 1 (1976):

> The difference between contributions and expenditures is the difference between giving money to an entity and spending the money directly on advocacy. Contribution limits are subject to lower scrutiny because they primarily implicate First Amendment rights of association, not expression, and contributors remain able to vindicate their associational interests in other ways. [McCutcheon, 2012 U.S. Dist. LEXIS 139651 at *12].

According to Buckley, since limits on the contributions of money "primarily implicate associational rights rather than rights of expression," they "impose only a 'marginal' restriction on a contributor's 'ability to engage in free communication.'" *See* McCutcheon at *12. In contrast, again according to Buckley, independent expenditures are "money injected directly into the nation's political discourse" whereas contributions are "money [that] goes into a pool from which another entity draws to fund its advocacy." *Id.*

By these distinctions, the Buckley Court

diminished the right of the people to associate together to engage in political speech, as if it were less worthy of First Amendment protection than the right of an individual, acting alone, to engage in speech. The Court thereby relegated associational speech to a second-class status. The distinction is not supported by the First Amendment text which, on its face, applies equally to laws that abridge the freedoms of the press and speech, and the rights of assembly and petition. In disregard of the plain text, Buckley established an artificial hierarchy of First Amendment rights. It was wrong for this Court to have done so then, and it is wrong now. Thankfully, this Court has laid the foundation to correct Buckley's error in Citizens United v. FEC, 558 U.S. 310 (2010). This case provides this Court with the opportunity to reverse that wrong and restore the right of the people peaceably to assemble — the source of the people's right of association — to the equal station to which that right is entitled according to the original First Amendment text.

A. Buckley Wrongly Distinguished Electoral Contributions from Electoral Expenditures, Granting Them Lesser Constitutional Protection.

In his prescient dissent in Buckley, Chief Justice Warren Burger rejected the Buckley majority's distinction between contributions and expenditures, charging his colleagues with having ignored "the reasons it finds so persuasive" to strike down limits on expenditures, "when it approves similarly stringent limitations on contributions." Buckley, 424 U.S. at

241. Finding that "contributions and expenditures are two sides of the same First Amendment coin," the Chief Justice noted that "limiting campaign contributions ... restricts the amount of money that will be spent on political activity – and it does so directly," as even the government argued, when it contended that contribution "limits will 'act as a brake on the skyrocketing cost of political campaigns.'" *Id.* at 242.

To further illustrate this point, Chief Justice Burger chided his colleagues for assuming that the contribution limit was so low that it would have only a marginal effect on the "amount of political activity and debate that the Government will permit to take place." *Id.* In response, the Chief Justice asserted that the majority's "logic ignores the disproportionate influence large contributions may have when they are made early in a campaign; 'seed money' can be essential, and the inability to obtain it may effectively end some candidacies before they begin." *Id.* at 242 n.5. In a further critique of the majority's facile assumption that the contribution limit will fall equally on all political discourse throughout the United States, the Chief Justice noted that a single limit on contributions in all federal campaigns is "clearly arbitrary – Congress [having] imposed the same ceiling on contributions to a New York or California senatorial campaign that it has put on House races in Alaska or Wyoming." *Id.* at 242 n.6.

The Chief Justice also debunked the majority's assumption that, unlike limits on independent expenditures, limits on contributions "'involve[] speech

by someone other than the contributor.'" *Id.* at 243. "The premise," the Chief Justice declared, "is demonstrably flawed." *Id.* Dismissing the majority's distinction as a mere "word game," he observed that "candidates and contributors spend money on political activity because they wish to communicate ideas, and their constitutional interest in doing so is precisely the same whether they or someone else utters the words." *Id.* at 244.

Next, the Chief Justice faulted the majority for denigrating "freedom of association" in comparison with "freedom of speech," contending that he had "long thought [the two freedoms] were two peas from the same pod." *Id.* By lowering the constitutional bar, to limit contributions as merely an exercise of the lesser "freedom of association," the Chief Justice charged the Buckley majority with affording less protection of political speech than of obscenity and pornography which enjoy the greater protection of "freedom of speech." *Id.* at 245.

Finally, the Chief Justice questioned whether the limit on contributions, with all its exceptions, would serve its purported goal of preventing corruption or the appearance of corruption:

> [T]he Act's distinction between contributions in money and contributions in services remains, with only the former being subject to any limits[:] "The classification created only regulates certain types of disproportional influences[,] services are excluded from contributions. This allows the housewife to

> volunteer time that might cost well over $1,000 to hire on the open market, while limiting her neighbor who works full-time to a regulated contribution. It enhances the disproportional influence of groups who command large quantities of these volunteer services and will continue to magnify this inequity by not allowing for an inflation adjustment to the contribution limit. [*Id.* at 253-54.]

Notwithstanding the Chief Justice's critique, the Buckley distinction between contributions, as an associational right, and expenditures, as an individual speech right, stood for nearly 35 years, until Citizens United v. FEC.

B. The Buckley Distinction Between Contributions and Expenditures Conflicts With Citizens United.

Although the Citizens United Court rehearsed the Buckley Court's rule approving contribution limits, it refrained from reaffirming that rule. *See* Citizens United, 558 U.S. at 356-57. As the Court observed, "Citizens United has not made direct contributions to candidates, and it has not suggested that the Court should reconsider whether contribution limits should be subjected to rigorous First Amendment scrutiny." *Id.* at 359. So the Court addressed only the question regarding the constitutionality of the absolute ban on corporations making independent expenditures in support of, or in opposition to, a person's candidacy for election to federal office. In conducting its review, the

Court did not hesitate to apply "strict scrutiny," and in the process of that review, to address the question before it not only as one implicating freedom of speech, but also the freedom of association.

Indeed, at the very outset of its discussion of the constitutionality of the corporate ban under the First Amendment, Citizens United forecast that the "ban on corporate speech" would not be salvaged by the argument that a "PAC created by a corporation can still speak." *Id.* at 337. Rather, the Court observed not only that the "PAC is a separate association from the corporation," but also that PACs were "burdensome alternatives ... expensive to administer and subject to extensive regulations." *Id.* And, the Court declared, "[g]iven the onerous restrictions, a corporation may not be able to establish a PAC in time to make its views known regarding candidates and issues in a current campaign." *Id.* at 339. The Court found that this associational burden, in turn, "necessarily" burdens the quantity and quality of political speech because "'effective public communication requires the speaker to make use of the services of others.'" *Id.* Thus, the Court concluded that the ban on corporate speech was "'subject to strict scrutiny.'" *Id.* at 340.

The Court identified the threshold issue as whether First Amendment protected speech could be conditioned upon the identity of the speaker as a corporate body. *See id.* at 341-344. Citing a lengthy string of cases extending speech protection to corporations, the Court concluded that it consistently had "rejected the argument that political speech of

corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'" *Id.* at 343. At stake, then, was whether the First Amendment protected the right of persons to associate in whatever lawful way the people in their sovereign judgment chose. *See id.* at 344. Relying heavily on First National Bank of Boston v. Bellotti,[8] decided two years after Buckley, the Court concluded "that the Government lacks the power to ban corporations from speaking." *Id.* at 347.

Only Austin v. Michigan Chamber of Commerce[9] stood in the way of this settled principle. But the Citizens United Court swept Austin away, not as a violation of the freedom of speech, but as a violation of the freedom of association:

> If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech. If the antidistortion rationale were to be accepted ... it would permit Government to ban political speech simply because the speaker is an association that has taken on the corporate form. [*Id.* at 349.]

Enlisting even Buckley itself, Citizens United concluded that "the concept that government may

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[8] 435 U.S. 765 (1978).

[9] 494 U.S. 652 (1990).

restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Id.* at 350. Thus, not surprisingly, Citizens United found in the media exemption a perfect illustration of "differential treatment [that] cannot be squared with the First Amendment," a discrimination that would:

> [A]llow a conglomerate that owns both a media business and an unrelated business to influence or control the media in order to advance its overall business interest. At the same time, some other corporation, with an identical business interest but no media outlet in its ownership structure, would be forbidden to speak or inform the public about the same issue. [*Id.* at 352-53.]

In conclusion, Citizens United hearkened back to the founding era when the First Amendment principles mandated "no limits on the sources of speech and knowledge [—] '[a]ny number of people could join in such proliferating polemics, and rebuttals could come from all sides.'" *Id.* at 353. Thus, the First Amendment, as originally understood and written, secured not only the freedoms of press and speech, but also the rights of the people to assemble and to petition the government for redress of grievances" — **not** as weak-add-ons, but as equal partners in the First Amendment's protection of an open marketplace of ideas.

C. The Aggregate Limit on Contributions to Political Campaigns and Parties Violates the Right of the People to Assemble and to Petition the Government for Redress of Grievances.

Seventy-six years ago this Court affirmed that "[t]he right of peaceable assembly is a right **cognate** to those of free speech and free press and is **equally** fundamental." DeJonge v. Oregon, 299 U.S. 353, 364 (1937) (emphasis added). Quoting from United States v. Cruikshank[10] decided sixty-two years before, the DeJonge Court affirmed that "'[t]he very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for redress of grievances.'" *Id.* Indeed, this Court found that the best safeguard against "incitements to the overthrow of our institutions by force or violence" was to:

> [P]reserve inviolate the constitutional rights of free speech, free press, and free assembly in order to maintain the opportunity for free political discussion, to the end that the government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government. [*Id.* at 365.]

Having acknowledged this foundation, the DeJonge

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[10] 92 U.S. 542, 552 (1875).

Court held that "peaceable assembly for lawful discussion cannot be made a crime." *Id.* Further, the Court ruled that "[t]hose who **assist** in the conduct of such meetings cannot be branded as criminals on that score." *Id.* (emphasis added). Finally, the Court concluded that:

> The question, if the rights of free speech and peaceable assembly are to be preserved, is **not as to the auspices** under which the meeting is held **but as to its purpose**; **not** as to the **relations** of the speakers, **but whether their utterances transcend the bounds of freedom of speech** which the Constitution protects. [*Id.* (emphasis added).]

The aggregate limits imposed on contributions to political candidates and parties directly violate these principles. As the Buckley Court conceded, the original $25,000 aggregate 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." Buckley, 424 U.S. at 38. Knowingly and willfully exceeding the aggregate amounts prescribed by statute was then, and still is, severely punished as a felony by fine and imprisonment. *See* 2 U.S.C. § 437g(d). In justification of this felony prohibition, the Buckley Court ruled that the contribution limits did not shut the door to other ways, for individuals to associate themselves in support of a campaign, including "independent political expression" and "volunteering their services." *Id.*, 424 U.S. at 28. Additionally, Buckley noted that individuals could contribute money

to PACs. *Id.* at 28 n.31.

By providing such alternative ways of associating in the overall political debate surrounding a federal election campaign, the Buckley Court assumed that the Government had afforded the people numerous meaningful avenues of participation. In support of this assumption, Buckley relied heavily on CSC v. Letter Carriers, 413 U.S. 548 (1973), which upheld a statute that limited the right of federal employees to associate in partisan political campaigns in order to better ensure "'fair and effective government.'" *See* Buckley, 424 U.S. at 27 and n.29. As then-Associate Justice William Rehnquist pointed out in his concurring and dissenting opinion in Buckley:

> The statute before us was enacted by Congress, not with the aim of managing the Government's property nor of regulating the conditions of Government employment, but rather with a view of regulation of the citizenry as a whole. [Buckley, 424 U.S. at 291 (Rehnquist, J., concurring and dissenting).]

Thus, as Citizens United has pointed out, Letter Carriers, and other similar precedents, "are inapposite ... stand[ing] only for the proposition that there are certain governmental functions that cannot operate without some restrictions on particular kinds of speech." Citizens United, 558 U.S. at 341. Decoupled from the voluntarily assumed duties of government employment, it is the sovereign right of the people to determine whether to associate, and with whom, so long as their association is peaceable and for a lawful

purpose. *See* DeJonge, 299 U.S. at 465-66. It is not for the Government to decide whether the limits that it has placed on certain associational rights in connection with federal elections may be constitutionally offset by other available associational opportunities to influence the outcome of a federal election. *See* Citizens United, 558 U.S. at 340-41, 344.

Nor is it within the powers of the Government to curtail citizen assemblies and associations because they allegedly "corrupt" the political process, much less create the "appearance" of such corruption. The constitutional right of the sovereign people to assemble is subject only to the condition that the assembly be "peaceabl[e]." Campaign finance reform laws are not subject-matter neutral "time, place and manner restriction[s] on speech," like the law upheld in Thomas v. Chicago Park District, 534 U.S. 316 (2002). Rather, campaign finance regulations singled out certain kinds of political speech — campaign or campaign-related — and, until Citizens United, required people who were associated with each other in a corporate entity to form a separate PAC in order to engage in certain electoral communications. Such an extra burden had, as its "purpose and effect[,] to silence entities whose voices the Government deem[ed] to be suspect." *Id.* at 340. Further, by providing exemptions, such as the one favoring media corporations, the Government impermissibly chose to enhance the electoral voices with which Congress wished to curry favor. *See id.* at 354-56.

Under the guise of a professed concern about corruption and the appearance of corruption of money

in politics, Congress seeks to preserve political peace, creating a system of campaign finance that strips the people of their sovereign power to associate voluntarily with one another in one of its "most pristine and classic form[s]."[11] Since the founding of the American constitutional republic, the people have had the right to join together in support of candidates for office without first having to register to obtain permission from the Government, and to report back. But, as the system of campaign finance regulation has been so chillingly and accurately described:

> Campaign finance regulations now impose "unique and complex rules" on "71 distinct entities." ... These entities are subject to separate rules for 33 different types of political speech. The FEC has adopted 568 pages of regulations, 1,278 pages of explanations and justifications for those regulations, and 1,771 advisory opinions since 1975. [Citizens United at 334.]

No longer a right of the people, running for political office in America is allowed by government "condescension." *See* St. George Tucker, Views of the Constitution of the United States, p. 238 (Liberty Fund: 1999). Such a system of electoral speech has no place in a republican form of government where the people are sovereign, and the government officials are their servants.

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[11] The phrase is taken from Edwards v. South Carolina, 372 U.S. 229, 235 (1963).

II. THIS COURT SHOULD NOT DEFER TO INCUMBENT LAWMAKERS IN SETTING THE RULES GOVERNING THE FINANCING OF CAMPAIGNS WAGED TO UNSEAT THEM.

A. The District Court Erroneously Accepted the Premise that the Congressional Purpose Stated in the Federal Election Campaign Act is Benign and Accurate.

The district court below based its opinion on the assumption that:

> Congress enacted the Federal Elections Campaign Act of 1971 (FECA) to "**promote fair practices** in the conduct of the election campaigns for Federal political offices," Pub. L. No. 92-225, preamble, 86 Stat. 3,3 (1972). [McCutcheon v. FEC, 2012 U.S. Dist. LEXIS 139651 (Sept. 28, 2012) (emphasis added).]

Throughout its opinion, the court deferred to the oft-repeated claim that campaign finance laws are designed to "prevent[] corruption or the appearance of corruption." *Id.* at 13. At no point did the district court ever examine Congress' motives, and the truthfulness of the Act's claimed purpose. When the plaintiffs argued that the current aggregate contribution limits were unconstitutionally low and overbroad, the Court simply deferred, stating "[i]t is not the judicial role to parse legislative judgment about what limits to impose" (*id.* at 19), citing Randall v. Sorrell, 548 U.S. 230, 248 (2006).

However, campaign finance laws are not like other laws. Campaign finance laws allow incumbents to write the rules by which they are challenged for re-election. Yet the court below acknowledged no judicial responsibility to scrutinize the effect of campaign finance legislation, its only reference to how the law might affect differently the campaigns of incumbents and challengers being:

> 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.... [*Id.* at 22 (citations omitted).]

A corollary of this statement by the district court is that, while the challenged aggregate limits on individuals adversely affect challengers, such limits do not entirely preclude their ability to wage an effective campaign. As in pinball, the fact that the table could have been tilted even more aggressively is no justification for ignoring the tilt that has occurred. Moreover, in the 2010 Congressional elections, individuals (who are subject to the aggregate statutory limitations being challenged) still "account[ed] for about two-thirds of the money going to Senate candidates and about half the money going to House candidates."[12] A restriction on aggregate individual contributions, therefore, is no small matter. Under those limits, the most that one individual may give to

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[12] "The Top 10 Things Every Voter Should Know About Money-in-Politics," Open Secrets.org, http://www.opensecrets.org/resources/dollarocracy/04.php

all House and Senate races in one election cycle is $46,200.[13] Based on a $2,600 per election contribution limit, this aggregate amount would be exhausted with maximum donations to fewer than 18 campaigns, precluding contributions to any others.

However, it is a political axiom that money is more important to challengers than it is to incumbents. Compared to challengers, incumbents have the advantage of established name identification, prior experience in running for Congress, experience in complying with intentionally complex and often vague federal campaign finance laws, government paid staff in Washington, D.C. and their district, newsletter funds, and accessibility to the media, to name just a few.[14] Although challengers rarely can raise as much money as incumbents, they do not need to raise more money than incumbents to win. Challengers only need to raise enough money to convince the press, their volunteers, and the public that they are running a campaign that could win. Incumbents seek to keep

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[13] The Republican and Democratic Parties have been beneficiaries of the aggregate contribution limit, as federal law permits much more, $70,800, to be given to party committees than to candidate committees. Large contributions to other political parties (*e.g.,* Constitution Party, Libertarian Party, Green Party) are relatively rare.

[14] For a more complete list of incumbent advantages, *see* Amicus Brief of Gun Owners of America, Lincoln Institute for Research and Education, National Citizens Legal Network (Citizens United), U.S. Border Control, and Policy Analysis Center, pp. 17-21 (June 7, 1999) in Nixon v. Shrink Missouri Government PAC, 528 U.S. 377 (2000), http://www.lawandfreedom.com/site/election/shrinkpac.html.

challengers' fund raising below the level required to be considered credible. The Campaign Finance Institute reported that:

> winning challengers ($2.0 million) did not raise as much as the incumbents they defeated ($2.6 million). As has been true almost every election since disclosure, **challengers did not need to raise or spend as much as incumbents to win, as long as they had enough to be heard**. [Campaign Finance Institute, Early Post-Election Look at Money in the House and Senate Elections of 2012 (Nov. 9, 2012) (emphasis added).][15]

A hypothetical explains the significant effect of this incumbent tilt. Assume there were 70 House races which were seriously contested in a given election cycle.[16] Further assume just 200 persons believed the Congress was leading the country in the wrong direction and wanted to contribute the maximum amount of $2,600 to challengers in each of these races — a total of $182,000 per contributor — certainly not an extraordinary amount of money to

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[15] http://www.cfinst.org/Press/PReleases/12-11-09/Early_Post-Election_Look_at_Money_in_the_House_and_Senate_Elections_of_2012.aspx.

[16] *See, e.g.,* J. Campbell & S. Jurek, The Decline of Competition and Change in Congressional Elections (2003). (Based on a study of House elections from 1920 to 2000, "fewer than one-fifth of House seats in a typical year could be characterized as marginal.") http://www.acsu.buffalo.edu/~jcampbel/documents/Congress02.pdf.

many. The contributions received by each campaign from just this group of donors would be $520,000 — about 25 percent of the average amount of money spent in a successful challenge to a House incumbent in 2012. For many of these races, an extra 25 percent infusion of funds could be the difference in the race, particularly since money means so much more to challengers than incumbents.[17] The change in the outcome of a half-dozen, dozen, or more races could have a dramatic affect on the direction of the country. But under current law, these donors are limited to making maximum contributions to fewer than a quarter of these genuinely contested races.[18]

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[17] The constitutionality of the $2,600 cap on individual contributions has not been questioned in this case, but it is part of the multifaceted plan by incumbents to make it more difficult for challengers. In the context of Presidential politics, Eugene McCarthy became a lifelong critic of the Federal Election Campaign Act of 1971, explaining how its provisions criminalized the very fund raising which made possible his successful challenge to President Lyndon Johnson just three years before. *See generally* G. Will, "The Poet Who Took on LBJ," Washington Post (Dec. 13, 2005). ("McCarthy's audacious challenge to an incumbent president was utterly dependent on large early contributions from five rich liberals. Stewart Mott's $210,000 would be more than $1.2 million in today's dollars.")

[18] Another aspect of federal election law makes this scenario less likely: many donors fear the retribution that could come to them or their businesses through the compelled disclosure of their support for challengers. Of course, that is why incumbents, often with governmental power to reward or punish, deride anonymous speech, wanting disclosure of the names, addresses, and occupations of those who would have the temerity to support their challengers. *See generally,* Citizens United, 130 S. Ct. at 980-82 (Thomas, J., dissenting).

It is beyond question that aggregate individual contribution limits benefit incumbents over challengers. That is, after all, why incumbents enacted those limits.

B. Courts Have An Obligation to Do More than Just Recognize the Risk of Campaign Finance Laws Being Written to Favor Incumbents.

Even in Buckley v. Valeo, 424 U.S. 1 (1976), this Court demonstrated some sensitivity to the problems created by rules written by incumbents:

> Since an incumbent is subject to these limitations to the same degree as his opponent, the Act, on its face, appears to be evenhanded. The **appearance of fairness**, however, may not reflect **political reality**. Although some incumbents are defeated in every congressional election, it is axiomatic that an incumbent usually begins the race with significant advantages. In addition to the factors of voter recognition and the status accruing to holding federal office, the incumbent has access to substantial resources provided by the Government.... Where the incumbent has the support of major special-interest groups ... and is further supported by the media, **the overall effect of the ... limitations enacted by Congress could foreclose any fair opportunity for a successful challenge.** [*Id.* at 31 n.33 (emphasis added).]

The Buckley Court apparently believed it acceptable that "the limitations may have a significant effect on particular challengers or incumbents" because the record did not demonstrate that the constraints met the remarkably high and arbitrary threshold that they "will **invariably** and invidiously **benefit incumbents** as a class." *Id.* at 33 (emphasis added). Yet, because the Court struck certain of the FECA restrictions, it concluded that "we need not express any opinion with regard to the alleged invidious discrimination resulting from the full sweep of the legislation as enacted." *Id.*

Even in Nixon v. Shrink Missouri Government PAC, 528 U.S. 377 (2000), where this Court deliberately chose to defer to Congressional "expertise," it recognized that its deference was somewhat circumscribed:

> Where a legislature has significantly greater institutional expertise, as, for example, in the field of election regulation, the Court in practice defers to empirical legislative judgments — at least **where that deference does not risk such constitutional evils as, say, permitting incumbents to insulate themselves from effective electoral challenge**. [*Id.* at 402 (emphasis added).]

And even more recently, in McConnell v. FEC, 540 U.S. 93 (2003), at least three justices in dissent concluded that Title I of the Bipartisan Campaign Reform Act:

> begins to look very much like an **incumbency protection plan**. *See* J. Miller,[19] Monopoly Politics 84-101 (1999) (concluding that regulations limiting election fundraising and spending constrain challengers more than incumbents. [*Id.* at 306 (Kennedy, J., dissenting).]

The Kennedy dissent concluded that the "more lenient treatment accorded to incumbency-driven politicians than to party officials who represent broad national constituencies must render all the more suspect Congress' claim that the Act's sole purpose is to stop corruption." *Id*. at 307. There was good reason for members of this court to question the motives of Congress, as during debate on BCRA, "Senator Feingold advised his colleagues that they were required to **cite corruption**, **regardless of whether it existed**, to satisfy the demands of the *Buckley* Court." R. Bauer, "Campaign Finance After McCain-Feingold," 153 U.PENN. L.R. 5, 29 (2004) (emphasis added).

What the Buckley Court felt that it "need not" do in 1974 has not been done in any intervening case, and certainly was not done by the district court below.

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[19] Former Federal Trade Commission Chairman James Miller had appeared as an expert witness in the McConnell case on behalf of the challenge to BCRA filed by Congressman Ron Paul, Gun Owners of America, Inc., Gun Owners of America Political Victory Fund, RealCampaignReform.org (now DownsizeDC.org), Citizens United, Citizens United Political Victory Fund, Michael Cloud, and Carla Howell. http://www.lawandfreedom.com/site/election/Witness/Miller.pdf.

However, this case presents this Court with an opportunity to take action upon the problem it has recognized for nearly 40 years — the "political reality" of campaign finance laws — without deference to the self-interested incumbents who wrote those laws.

C. Rather than Defer to the Political Branches, the Federal Judiciary has a Duty to Protect the Prerogatives of The People to Remove Incumbent Office Holders.

In Buckley, the Court found "[t]here is no such evidence to support the claim that the contribution limitations in themselves discriminate against major party challengers to incumbents." Buckley, at 32. Much such evidence now exists. An economic analysis of the anti-competitive effect of federal campaign finance law was presented in the McConnell litigation through the testimony of Dr. James Miller. (*See* note 19, *supra*.) And, since then, more studies attest to the success of such laws achieving their intended purposes. For example, a detailed study of "Reelection Rates of Incumbents in the U.S. House, First through 108th Congress,"[20] was published in 2006. This study concluded that the trend in reelection rates from the 64th Congress (1915-1917) through the 108th Congress (2003-2005) "indicates a gradual increase in reelection rates ... consistent with the view that the inherent advantages held by incumbents seeking reelection (vis-a-vis any challengers) may have increased over time."

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[20] http://www.thirty-thousand.org/documents/QHA-08.pdf.

Id. at § 2.4.1.

The desire of those in office to retain their position is not new. As Edmund Burke explained: "Those who have been once intoxicated with power, and have derived any kind of emolument from it, even though but for one year, never can willingly abandon it."[21] There is no reason to believe that much has changed with our modern Congress. In his law review article on judicial deference, subtitled "When 'the POLS make the calls,'" former White House Counsel for President Obama, Robert F. Bauer, explained that "expressions of incumbents' attention to their own welfare surfaced" on multiple occasions during the consideration of BCRA. He specifically cited the fact that "both the Democratic Leader and the ranking Democratic Member of the Rules Committee noted during floor debate that the plain effect of the [BCRA Millionaire's Amendment] was 'incumbent protection.'" R. Bauer, "Campaign Finance," pp. 27-28. It is with good reason that the Congress is called one of the "political" branches, and no reason to believe that incumbents would write such laws without regard to their political effect. There is no reason for the Court to trust a political branch not to be political.

The rationale for the judiciary to defer to the political branches is rooted in the fact the Congress and Presidency serve during terms of years, and, unlike the federal judiciary, can be voted out by the people. Yet any law which artificially enhances the

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[21] http://quotes.dictionary.com/those_who_have_been_once_intoxicated_with_power

power of the incumbent political class diminishes a challenger's chance of success and thereby constitutes an encroachment on the sovereignty of the people to elect leaders of their own choosing.

The judiciary serves during periods of "good Behavior" (Art. III, Sec. 1) due to a constitutional provision which Alexander Hamilton described as an:

> excellent barrier to the encroachments and oppressions of the representative body.... [I]t is the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws. [A. Hamilton, Federalist No. 78, G. Carey & J. McClellan, The Federalist, Kendall Hunt (1990) 401.]

It was to correct injustices such as incumbent protection laws that the "good Behavior" clause was written into the Constitution. First Amendment rights are not matters that were entrusted to judges to be compromised away through the use of artificial balancing tests which may give the appearance of constitutional analysis, but instead have served as legal cover for reaching the result judges prefer.

III. THE AGGREGATE CONTRIBUTION LIMITS CONFLICT WITH THE CATEGORICAL PRINCIPLE APPLIED IN CITIZENS UNITED.

A. The Lower Court Erroneously Relied on Supreme Court Decisions Preceding Citizens United.

The court below upheld the challenged electoral contribution limits based on this Court's decisions which preceded Citizens United v. FEC, 558 U.S. 310 (2010). *See* McCutcheon v. FEC, 2012 U.S. Dist. LEXIS 139651, *9-13 (D.D.C. 2012) (citing Buckley v. Valeo, 424 U.S. 1 (1976); Cal. Med. Ass'n v. FEC, 453 U.S. 182 (1981); and McConnell v. FEC, 540 U.S. 93 (2003)). Thus, it applied the lower level of scrutiny established in Buckley that "contribution limits will be valid as long as they satisfy 'the lesser demand of being closely drawn to match a sufficiently important interest.'" *Id*. at *9.

Although urged to apply strict scrutiny based on the proffered theory that Citizens United had erased the distinction between electoral expenditures and contributions, the court below demurred, refusing to require proof of a compelling state interest. While it "acknowledge[d] the constitutional line between political speech and political contributions grows increasingly difficult to discern," the district court "declined Plaintiffs' invitation to anticipate the Supreme Court's agenda." *Id.* at *10.

As demonstrated in Section I, *supra*, appellants

are correct that Citizens United has destroyed the constitutional dichotomy between electoral expenditures and contributions, undermining the basis for applying different levels of scrutiny. But Citizens United has done more than that. It has discarded interest-balancing tests altogether, substituting therefor fixed categorical principles derived from the original First Amendment text and history.

B. Citizens United Embraced a Categorical Approach to First Amendment Rights for Different Speakers, Rejecting Judicial Interest Balancing.

Prior to Citizens United, campaign finance regulation, including the Constitutional right of corporations to engage in political speech, was subject to balancing tests, whereby the Government was required to demonstrate a sufficiently strong interest to override a person's right to full participation in the free marketplace of ideas, as secured by the First Amendment. *See generally* Citizens United v. FEC, 558 U.S. 340-62 (2010). Even when applying the most stringent "strict scrutiny" test, requiring a "compelling state interest" which was "narrowly tailored" and using the "least restrictive means," this Court permitted governmental restrictions on political speech, notwithstanding the First Amendment's general categorical ban on discriminatory laws based on the identity of the speaker. *See id.*, 558 U.S. at 340-41.

In Citizens United, this Court took the initiative to revisit the exception for electoral communications to

the general rule, addressing the question of whether Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990), should be overruled, because "Austin had held that political speech may be banned based on the speaker's corporate identity." *See* Citizens United, 558 U.S. at 319.[22] Austin relied on the "strict scrutiny" test and found that the State of Michigan had "a compelling governmental interest in preventing 'the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.'" *See* Citizens United, 558 U.S. at 348.

Although the Citizens United Court stated that "[l]aws that political speech are 'subject to strict scrutiny...'" (*id.* at 340), it did not overrule Austin on the ground that it failed to apply correctly the strict scrutiny test. Rather, the Court abandoned the use of the "strict scrutiny" test, refusing to apply any balancing test, strict, exact, or otherwise. Instead, it stated: "The Government may commit a constitutional wrong when by law it identifies certain preferred speakers," and asserted that "*Austin* interferes with the 'open marketplace' of ideas protected by the First Amendment." *Id.* 558 U.S. at 340, 354. In essence, the Citizens United Court reasoned that:

> [t]he First Amendment does not permit

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[22] At the request of the Court in Citizens United, the issue of overruling Austin and portions of McConnell v. FEC, 540 U.S. 93 (2003), was set for reargument (174 L.Ed.2d 599 (2009)), and then reargued on September 9, 2009.

> Congress to make ... categorical distinctions based on the corporate identity of the speaker and the content of the political speech. [*Id.*, 558 U.S. at 364.]

By overruling Austin, the Court "return[ed] to the principle":

> that the Government may not suppress political speech on the basis of the speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations. [*Id.*]

Under Citizens United, no court can justify any law that discriminates on the basis of the speaker's identity, no matter how strong the government's countervailing interest.

This Court made this understanding of the Citizens United holding crystal clear in American Tradition Partnership, Inc. v. Bullock, 567 U.S. ___, 132 S. Ct. 2490 (2012). In that case, the Montana State Supreme Court had attempted to cabin Citizens United as a narrow factual ruling where Congress had failed to demonstrate a compelling interest to impose a nationwide ban on corporate electioneering communications with respect to federal election campaigns. The state court found that Montana's ban on corporate speech rested upon a very different factual base — Montana's special historic experience of corporate corruption of state elections of government officials. *See* Western Tradition Partnership, Inc. v. Attorney General, 363 Mont. 220, 271 P.3d 1, 11-48

(2011). The Montana court explained:

> *Citizens United* was decided under **its facts** or lack of facts.... Therefore, the **factual record** before a court is critical in determining the validity of a governmental provision **restricting speech**.... The Supreme Court held [in Citizens United] that laws that burden political speech are subject to **strict scrutiny**, which requires government to prove that the law furthers a compelling state interest and is narrowly tailored to that interest. The Court ... clearly endorsed an analysis of restrictions on speech, placing the burden upon the government to establish a compelling interest.... Here the government met that burden. [*Id.*, 271 P.3d at 15 (emphasis added).]

In its opinion announcing summary reversal, this Court relied first upon the Constitution's Article VI supremacy clause, thereby verifying that the Citizens United "holding" rested upon a fixed rule of law, not upon a flexible standard of review dependent upon variances of fact. *See* American Tradition, 132 S. Ct. 2490 at 2491. Second, the Court explained that "Montana's arguments in support of the judgment below either were already rejected in *Citizens United*, or fail to meaningfully distinguish that case." *Id.* In a last-ditch effort to preserve the power of the courts to balance government interests against First Amendment rights, Justice Breyer dissented, protesting that:

> this Court's legal conclusion [in Citizens United] should not bar the Montana Supreme Court's finding, made on the record before it, that independent expenditures by corporations did in fact lead to corruption or the appearance of corruption in Montana. Given the history and political landscape in Montana, that court concluded that the State had a **compelling interest** in limiting independent expenditures by corporations. [*Id.* (emphasis added).]

By refusing even to entertain arguments based upon the Montana ruling, this Court sent an unequivocal message that Citizens United had not been decided on the ground that there was insufficient factual evidence of a compelling governmental interest. Rather, the Court ruled that, because corporate expenditures do not, per se, constitute "*quid pro quo* corruption," such speech could not be found to be outside the protection of the First Amendment. *See* Citizens United, 558 U.S. at 357-61. Indeed, this Court found that "[a]n outright ban on corporate political speech during the critical preelection period is not a permissible remedy," Congress having "created categorical bans on speech that are asymmetrical to preventing *quid pro quo* corruption." *Id.* at 361.

To be sure, although Citizens United mentioned the distinction between expenditures and contributions, it did not directly decide (much less affirm) that distinction. Indeed, as this Court noted, "Citizens United ... has not suggested that the Court should reconsider whether contribution limits should

be subjected to rigorous First Amendment Scrutiny."[23] Citizens United, 558 U.S. at 359. Thus, this case presents this Court with the first opportunity to apply a categorical approach to contribution limits.

The Citizens United holding undermined Buckley's distinction between campaign contributions and expenditures. Not only is the distinction a form of speaker discrimination, it is also a form of content discrimination. Citizens United did not apply judicial balancing tests to these forms of discrimination, but rather struck them down categorically as a breach of the First Amendment guarantees. "The First Amendment does not permit Congress to make these categorical distinctions based on the corporate identity of the speaker and the content of the political speech." Citizens United, 558 U.S. at 364.

C. The Court Should Return to the Text of the First Amendment to Determine the Constitutionality of the Aggregate Contribution Limits.

This Court should take the opportunity presented by this case to reconsider entirely its use of and reliance on interest balancing, and whether it is indeed a proper function of the judiciary. The balancing of interests is a determination of whether a particular governmental action (or inaction) is the most

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[23] Although this Court mentioned the distinction in a post-Citizens United decision, Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2817 (2011), that mention was merely *dicta*.

appropriate as among other potential courses of action. This type of determination is primarily a function of the legislature. "If a certain means to carry into effect any of the powers, expressly given by the constitution to the government of the Union, be an appropriate measure, not prohibited by the constitution, the degree of its necessity is a question of legislative discretion, not of judicial cognizance." McCulloch v. Maryland, 17 U.S. 316 (1819).

Returning to a constitution's basic rule, former Oregon Supreme Court Justice Hans Linde explained (prior to Citizens United):

> The Constitution directs governments how to act and how not to act. The Constitution does not say that a government may act contrary to those directives if judges believe that the government has good enough reasons to do so. Yet that is the current doctrine in the United States Supreme Court. What is good enough reason has become the subject of an elaborate structure of formulas. [H. Linde, "Who Must Know What, When, and How: The Systemic Incoherence of 'Interest' Scrutiny," printed in Public Values in Constitutional Law, p. 219 (S. Gottlieb, ed.) (Univ. of Mich. Press 1993).]

Justice Linde explained how judicial "formulas" work in the context of campaign finance regulation:

> A 1990 decision, *Austin v. Michigan Chamber of Commerce*, serves as one of many examples

> of the current formula. The chamber challenged a Michigan law against using corporate funds in political campaigns under the First Amendment and under the equal protection clause. The Court stated the First Amendment question to be whether the restrictions "burden the exercise of political speech and, if they do, whether they are narrowly tailored to serve a compelling state interest." Coming to the chamber's claim of unequal treatment, the Court recited in identical terms that, for fundamental rights like political speech, statutory classifications "must be narrowly tailored to serve a compelling state interest." [*Id.*, p. 220.]

However, the balancing tests, or judicial "formulas," are useful for just one thing — masking the agenda of an activist court to inject its own policy preferences into what should be a categorical constitutional issue:

> Any formula that scrutinizes laws as a means toward ends presupposes an instrumentalist or utilitarian test for valid laws.... Many of [the Court's] decisions do not turn on calculations of social utility.... They turn instead on undisguised value judgments between a constitutional claim and an opposing governmental policy. [*Id.*, p. 232.[24]]

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[24] Justice Linde's statement is supported by the outcome in the case that marked the beginning of judicial interest balancing. In the ignominious Korematsu decision, this Court held that an order

Instead of repeating errors of the past, this Court should eschew interest balancing as it did in Heller to determine that the gun control laws in the District of Columbia violated the Second Amendment guarantee. *See* Heller v. District of Columbia, 554 U.S. 570 (2008). During oral argument, Chief Justice Roberts led the way with the observation:

> [T]hese various phrases under the different standards that are proposed, "compelling interest," "significant interest," "narrowly tailored," none of them appear in the Constitution.... Isn't it enough to determine the scope of the existing right that the amendment refers to ... and determine ... how this restriction and the scope of this right looks in relation to [it].... I'm not sure why we have to articulate some very intricate standard. I mean, these standards that apply in the First Amendment just kind of developed over the years as sort of baggage that the First

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excluding over 100,000 Japanese-Americans from certain areas of the country was constitutional, passing "the most rigid scrutiny." Korematsu v. United States, 323 U.S. 214 (1944). This decision is now considered a blemish on the American legal system, frequently listed with such decisions as Dred Scott and Plessy v. Ferguson. *See*, *e.g.*, G. Will, "Korematsu and the dangers of waiving constitutional rights," Washington Post (Apr. 24, 2013). Even the U.S. Department of Justice has now confessed error with respect to the facts that were presented by it to this Court for "balancing." *See* Confession of Error: The Solicitor General's Mistakes During the Japanese-American Internment Cases, Neal Katyal (Mar. 20, 2011), http://blogs.justice.gov/main/archives/1346.

> Amendment picked up. [Transcript of Oral Argument, p. 44, Dist. of Columbia v. Heller, 554 U.S. 570 (2008).]

Justice Breyer's dissent insisted on a "judge-empowering 'interest-balancing inquiry'" for future Second Amendment cases, but the Court rejected it:

> The very enumeration of the right takes out of the hands of the government — even the Third Branch of Government — the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the **people** adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad. [Heller, 554 U.S. at 634-35 (bold added).]

As explained herein, the Court should re-analyze the contribution limits based on the text of the First Amendment, without reference to judicially created interest-balancing tests. Instead of engaging in interest balancing, this Court should cast off the "baggage" that has collected around the First Amendment. If it does that, it can reach no conclusion other than that the federal election contribution limits at issue herein are unconstitutional, as demonstrated in section I.C., *supra*.

CONCLUSION

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

Respectfully submitted,

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