

No. 12-683

In the Supreme Court of the United States

VIRGINIA JAMES, APPELLANT

v.

FEDERAL ELECTION COMMISSION

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

MOTION TO DISMISS OR AFFIRM

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QUESTION PRESENTED

Whether the three-judge district court correctly rejected appellant's constitutional challenge to the federal statutory limit on the aggregate amount that an individual may contribute to federal candidates during a two-year election cycle, 2 U.S.C. 441a(a)(3)(A).

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OPINION BELOW

The opinion of the three-judge district court dismissing appellant's complaint (J.S. App. 3-12) is not published in the *Federal Supplement* but is available at 2012 WL 5353565.

JURISDICTION

The decision of the three-judge district court was entered on October 31, 2012. A notice of appeal was filed on November 1, 2012, and the jurisdictional statement was filed on November 30, 2012. The jurisdiction of this Court is invoked under Section 403(a)(3) of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 113-114.

STATEMENT

1. The Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. 431 *et seq.*, places two types of limits on the amounts of money that an individual can contrib-

ute in connection with a federal election. First, FECA imposes base limits on the amounts that an individual can contribute to any one candidate, political party, or non-party political committee. 2 U.S.C. 441a(a); see 2 U.S.C. 431(8)(A) (definition of “contribution”). As inflation-adjusted for the 2011-2012 election cycle, FECA permitted an individual to contribute up to \$2500 per election (counting primary and general elections separately) to “any candidate and his authorized political committees”; up to \$30,800 per year to “the political committees established and maintained by a national political party”; up to \$10,000 per year “to a political committee established and maintained by a State committee of a political party”; and up to \$5000 per year “to any other political committee.” 2 U.S.C. 441a(a)(1)(A)-(D); see *Price Index Adjustments for Contribution and Expenditure Limits and Lobbyist Bundling Disclosure Threshold*, 76 Fed. Reg. 8368, 8369-8370 (Feb. 14, 2011); see also 11 C.F.R. 100.2 (definition of “election”).

Second, FECA imposes aggregate limits on the total amounts that an individual can contribute to all federal candidates and political committees during a two-year election cycle. 2 U.S.C. 441a(a)(3). The aggregate limits serve to “curtail the influence of excessive political contributions by any single person.” 120 Cong. Rec. 27,224 (1974) (statement of Rep. Brademas). The congressional findings accompanying the 1974 enactment of the FECA contribution limits identified instances in which contributions to numerous separate entities had been made at the request of particular candidates. For example, the dairy industry had avoided then-existing reporting requirements by dividing a \$2,000,000 contribution to President Nixon among hundreds of committees in different States, “which could then hold the money for the

President's reelection campaign." *Buckley v. Valeo*, 519 F.2d 821, 839 n.36 (D.C. Cir. 1975) (per curiam). On another occasion, a presidential aide had promised an ambassadorship to a particular individual in return for "a \$100,000 contribution to be split between 1970 senatorial candidates designated by the White House and [President] Nixon's 1972 campaign." *Id.* at 840 n.38.

As inflation-adjusted for the 2011-2012 election cycle, FECA's aggregate limits permitted an individual to contribute \$46,200 to candidates for federal office and another \$70,800 to non-candidate entities, *i.e.*, national political parties, state political parties, and non-party political committees. 2 U.S.C. 441a(a)(3)(A) and (B); 76 Fed. Reg. at 8370. Thus, the total that an individual could lawfully contribute during the election cycle to all candidate and non-candidate entities combined was \$117,000.

2. Appellant is a private individual who alleges that she would like to make contributions to candidates that would exceed the aggregate limit on candidate contributions but would not exceed FECA's total aggregate limits on contributions to all entities. J.S. App. 40; see *id.* at 42-43. In particular, she alleges that during the 2011-2012 election cycle she contributed \$27,000 to candidates and \$5000 to political committees, but that she wanted to make additional contributions to candidates (within the \$2500 per-candidate, per-election base limit) that would have brought her aggregate candidate contributions to more than \$46,200 but less than \$117,000. *Id.* at 42-43.

On August 31, 2012, appellant filed suit against the Federal Election Commission (FEC) in the United States District Court for the District of Columbia, raising facial and as-applied First Amendment challenges to

FECA's aggregate limit on contributions to federal candidates. J.S. App. 5. She moved for a preliminary injunction and requested that a three-judge district court be convened to hear her suit pursuant to Section 403 of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 113-114. J.S. App. 5. Because such a court had already been convened to hear a First Amendment challenge to all of FECA's aggregate contribution limits in *McCutcheon v. FEC*, No. 12-cv-1034, 2012 WL 4466482 (D.D.C. Sept. 28, 2012), appeal docketed, No. 12-536 (Oct. 26, 2012), appellant's suit was assigned to the same three-judge panel. J.S. App. 5. That panel then stayed appellant's case pending the resolution of *McCutcheon*, which had already been briefed and argued. *Id.* at 5-6.

3. On September 28, 2012, the three-judge district court issued its ruling in *McCutcheon*, upholding the constitutionality of FECA's aggregate contribution limits. J.S. App. 16-34. Applying the exacting-scrutiny standard that this Court employs in assessing contribution limits (*id.* at 22-25), the district court observed that this Court has identified two important governmental interests that justify such limits: (1) "preventing corruption or the appearance of corruption"; and (2) "preventing circumvention of contribution limits imposed to further [the government's] anti-corruption interest." *Id.* at 25 (citing *Buckley v. Valeo*, 424 U.S. 1, 26-27, 38 (1976) (per curiam)). The district court additionally observed that, in *Buckley v. Valeo*, *supra*, this Court had upheld the aggregate contribution limit in the then-current version of FECA as "no more than a corollary of the basic individual contribution limitation that [it found] to be constitutionally valid." J.S. App. 28 (quoting *Buckley*, 424 U.S. at 38). The district court conclud-

ed that it would “follow [this] Court’s lead and conceive of the contribution limits as a coherent system” to curb political corruption, in which aggregate limits “prevent evasion of the base limits.” *Id.* at 28-30.

4. On October 1, 2012, the three-judge district court lifted the stay in appellant’s case and ordered the parties to show cause why the suit should not be dismissed under the reasoning of *McCutcheon*. J.S. App. 6. After receiving briefing on that question, the court denied appellant’s request for a preliminary injunction and dismissed her complaint. *Id.* at 1-12.

The district court rejected appellant’s argument that *Buckley*’s anti-circumvention rationale for upholding aggregate limits was applicable only to aggregate limits on contributions to non-candidate entities. J.S. App. 8. The court explained that, if the \$46,200 aggregate limit on contributions to candidates were struck down, appellant and others would be able to circumvent the base contribution limits by contributing millions of dollars to hundreds of federal candidates, who could in turn transfer those funds to certain targeted candidates or to their national political party. *Id.* at 8-9. Appellant had asserted that the “biennial aggregate limit of \$117,000”—which she did not challenge—would prevent such circumvention. *Id.* at 9. The district court observed, however, that FECA contains no independent \$117,000 limit, only a \$46,200 limit on contributions to candidates and a \$70,800 limit on contributions to non-candidate committees. *Ibid.* (citing 2 U.S.C. 441a(a)(3)(A)-(B)). “Remove one of the sublimits,” the court explained, “and there is no higher constraint.” *Ibid.*

Appellant also sought to distinguish her suit from *Buckley* and *McCutcheon* by characterizing her claim as an as-applied rather than a facial challenge. J.S. App. 9-

11. The district court acknowledged that a decision upholding a statute against a facial challenge does not foreclose subsequent as-applied challenges to that statute. *Id.* at 10 (citing *Wisconsin Right to Life, Inc. v. FEC*, 546 U.S. 410 (2006)). The court observed, however, that appellant’s complaint explicitly challenged the facial constitutionality of the statute and that, in any event, she had identified no facts that would differentiate her case from *McCutcheon*. *Id.* at 10-11.

ARGUMENT

The three-judge district court’s unanimous decision reflects a straightforward application of this Court’s precedents. This Court upheld FECA’s aggregate contribution limit in *Buckley v. Valeo*, 424 U.S. 1, 38 (1976) (per curiam), and that holding applies with full force to the aggregate limits in the current version of the statute, including the \$46,200 aggregate limit on contributions to candidates. The appeal should therefore be dismissed for lack of a substantial federal question. In the alternative, the judgment of the district court should be affirmed.

1. In *Buckley*, this Court upheld the constitutionality of various contribution limits in the 1974 version of FECA, including a base limit of \$1000 on contributions by an individual to a candidate and an aggregate limit of \$25,000 on total contributions by an individual in any calendar year. 424 U.S. at 23-38. In doing so, the Court recognized that limits on contributions, unlike limits on expenditures, are not subject to strict scrutiny under the First Amendment. Compare, *e.g.*, *id.* at 24-25, with *id.* at 52-54. Instead, the Court concluded that contribution limits are constitutional so long as the government “demonstrates a sufficiently important interest and

employs means closely drawn to avoid unnecessary abridgment of associational freedoms.” *Id.* at 25.

The Court explained that, “[b]y contrast with a limitation upon expenditures for political expression, a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor’s ability to engage in free communication.” *Buckley*, 424 U.S. at 20-21. That is because “the transformation of contributions into political debate involves speech by someone other than the contributor.” *Id.* at 21. While the contribution itself “serves as a general expression of support for the candidate and his views,” it “does not communicate the underlying basis for the support,” and the “quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing.” *Ibid.* Furthermore, although contribution limits “impinge on protected associational freedoms” by “limit[ing] one important means of associating with a candidate or committee,” they do not preclude other means of association, and they “leave the contributor free to become a member of any political association and to assist personally in the association’s efforts on behalf of candidates.” *Id.* at 22.

Applying the reduced degree of scrutiny appropriate to contribution limits, the Court in *Buckley* identified two “weighty interests * * * sufficient to justify” the then-current \$1000 limit on individual contributions to candidates. 424 U.S. at 28-29. First, the limit reduced the opportunity for individuals to use large contributions “to secure a political *quid pro quo* from current and potential office holders.” *Id.* at 26-27. Second, and “[o]f almost equal concern,” the limit reduced “the ap-

pearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.” *Id.* at 27.

Turning to the \$25,000 aggregate contribution limit, the Court found it to be “no more than a corollary of the basic individual contribution limitation” that the Court had already “found to be constitutionally valid.” *Buckley*, 424 U.S. at 38. The Court accepted that the “overall \$25,000 ceiling does impose an ultimate restriction upon the number of candidates and committees with which an individual may associate himself by means of financial support.” *Ibid.* It reasoned, however, that “this quite modest restraint upon protected political activity serves to prevent evasion of the \$1,000 contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate’s political party.” *Ibid.*

2. In this case, appellant does not challenge the constitutionality of FECA’s base limits on contributions to particular candidates or political committees, nor does she challenge the constitutionality of FECA’s aggregate contribution limits in general. J.S. 2, 17. She instead argues that, even if the base limits are constitutional, and even if Congress may constitutionally impose a \$117,000 *total* aggregate limit, FECA’s \$46,200 aggregate limit on contributions to candidates violates the First Amendment. Appellant contends that, by restructuring FECA to contain two different aggregate limits—a \$46,200 limit on contributions to candidates and a \$70,800 limit on contributions to non-candidate entities, 2 U.S.C. 441a(a)(3)(A)-(B), 76 Fed. Reg. at 8370—Congress has now “require[d]” a donor who wishes to

contribute a total of \$117,000 to candidates to contribute 60% of that amount to non-candidate entities instead. J.S. 5. Asserting that donations to non-candidate entities are more likely to facilitate corruption and circumvention than donations to candidates, J.S. 19-24, appellant asks the Court to strike down the \$46,200 aggregate limit on contributions to candidates and to leave in place a single, undifferentiated \$117,000 aggregate contribution limit, J.S. 2. Appellant’s contentions are flawed in several respects.

a. As the district court observed (J.S. App. 9), appellant’s arguments are premised upon a “fundamental miscomprehension” of the statutory scheme. The current version of FECA does not contain a single \$117,000 aggregate limit with sub-restrictions on how that money must be spent. It instead contains two separate aggregate limits, one on contributions to candidates (2 U.S.C. 441a(a)(3)(A)) and one on contributions to non-candidate entities (2 U.S.C. 441a(a)(3)(B)).

Appellant’s contrary argument lacks merit. She first asserts (J.S. 13-14) that the FEC’s regulation implementing the biennial aggregate limits, 11 C.F.R. 110.5(b), acknowledges the existence of a single overarching aggregate limit.¹ That regulation, however, does not and could not alter the statutory scheme to create a single aggregate limit separate and apart from the two separate limits specified in Sections 441a(a)(3)(A) and 441(a)(3)(B). Rather, the regulation

¹ See 11 C.F.R. 110.5(b)(1) (stating that in a two-year period, “no individual shall make contributions aggregating more than \$95,000, including no more than * * * \$37,500 [in candidate contributions] * * * and * * * \$57,500 in [non-candidate contributions]”); see also 11 C.F.R. 110.5(b)(3) (noting that limits will be indexed for inflation); 76 Fed. Reg. at 8370 (increasing limits for inflation).

simply reflects a recognition that an individual who makes contributions totaling more than the sum of the two separate aggregate limits will necessarily violate FECA, since it would be mathematically impossible to make total contributions of more than \$117,000 without either (a) making contributions to candidates of more than \$46,200, or (b) making contributions to non-candidate entities of more than \$70,800.² If appellant had contributed more than \$117,000 in the 2011-2012 election cycle, however, she would have violated either 2 U.S.C. 441a(a)(3)(A) (the limit on contributions to candidates), 2 U.S.C. 441a(a)(3)(B) (the limit on contributions to non-candidate entities), or both. FECA simply does not contain any overall aggregate limit, distinct from the limits imposed by 2 U.S.C. 441a(a)(3)(A) and (B), that appellant could have violated.

A correct understanding of the relevant aggregate limits undermines appellant's constitutional argument in two distinct ways. First, it refutes her assertion (J.S. 20) that her "claims involve the distribution of funds under [an] aggregate cap, not the existence of the cap itself." By claiming a First Amendment right to make contributions to candidates in excess of \$46,200 during the 2011-2012 election cycle, appellant necessarily challenges the constitutionality of Section 441a(a)(3)(A), which limits an individual's aggregate contributions to candidates. But she presents no argument to support

² The isolated statements from the legislative history on which appellant relies (J.S. 15-16) are best understood to reflect the same understanding. In any event, this Court "do[es] not resort to legislative history to cloud a statutory text that is clear," *Ratzlaf v. United States*, 510 U.S. 135, 147-148 (1994), and FECA's text clearly imposes two separate aggregate limits rather than one, 2 U.S.C. 441a(a)(3)(A)-(B).

that claim—which in any event is meritless in light of *Buckley*. See *McCutcheon v. FEC*, No. 12-cv-1034, 2012 WL 4466482 (D.D.C. Sept. 28, 2012), appeal docketed, No. 12-536 (Oct. 26, 2012); Mot. to Dismiss or Affirm at 7-25, *McCutcheon v. FEC*, *supra*, No. 12-536 (Jan. 2, 2013). Indeed, appellant appears to acknowledge that Congress could constitutionally impose a \$117,000 aggregate limit on contributions to candidates. See, *e.g.*, J.S. 2; J.S. App. 10. She offers no reason why a \$46,200 limit would be unconstitutional when a \$117,000 limit is not, and this Court has generally deferred to legislative determinations of the appropriate size of contribution limits. See, *e.g.*, *Randall v. Sorrell*, 548 U.S. 230, 248 (2006) (plurality opinion); *Davis v. FEC*, 554 U.S. 724, 737 (2008); *Buckley*, 424 U.S. at 30.

Second, the remedy that appellant appears to seek—a declaration that she can contribute more than \$46,200 but less than \$117,000 to candidates in each biennial election cycle, J.S. 2—is beyond the district court’s power to grant. If the \$46,200 aggregate limit on campaign contributions were held to be unconstitutional, appellant “or anyone else” would be free to “give at least \$2.34 million (435 House candidates plus 33 Senate candidates multiplied by \$5,000—that is, \$2,500 for primary and \$2,500 for general election) to candidate committees (or possibly to a joint fundraising committee).” J.S. App. 8-9. Because the statute contains no overarching \$117,000 cap, a court could not impose one if the cap that Congress actually enacted were found to be invalid. Although courts may (in appropriate circumstances) sever unconstitutional portions of statutes, they may not rewrite them. See, *e.g.*, *Ayotte v. Planned Parenthood*, 546 U.S. 320, 329 (2006).

b. In any event, appellant is wrong to suggest (J.S. 17-26) that the anti-circumvention rationale of *Buckley* is inapplicable to aggregate limits on contributions to candidates. The Court in *Buckley* concluded that Congress may enact aggregate contribution limits to further the important governmental interest of preventing a single donor from “contribut[ing] massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate’s political party.” 424 U.S. at 38. That rationale squarely encompasses a situation in which a contributor supplements his contribution to candidate *X* by also contributing to political committees controlled by other candidates, with the expectation that those additional contributions will in turn be given to candidate *X* or to a political party that will contribute to candidate *X*. See 2 U.S.C. 431(5) (defining a candidate’s “principal campaign committee” as one type of political committee).

Appellant does not dispute that candidates can and do transfer funds between each others’ campaign committees. In particular, FEC data show that candidates in “safe” districts (*i.e.*, districts where the outcome of the election is not in doubt) regularly contribute campaign funds to candidates in their party who face more difficult elections. J.S. App. 97-98 (citing FEC data about such contributions). Such transfers could easily circumvent the \$2500 base limit on contributions to candidates, and the aggregate limit is a constitutional means of preventing such circumvention.

Appellant also does not dispute that candidates can and do transfer funds to and from political parties. FECA imposes no limits on contributions from candi-

dates to parties, and FEC data show that candidates transfer campaign funds to their parties on a massive scale, including more than \$24 million to the national Democratic Party and more than \$35 million to the national Republican Party in the 2011-2012 election cycle alone. J.S. App. 99; see *id.* at 97 n.3. Such transfers can in turn finance the parties' activities on behalf of other candidates—not only contributions, but also “coordinated expenditures, which have no ‘significant functional difference’ from * * * direct candidate contributions.” *Id.* at 7 (quoting *FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 464 (2001) (*Colorado II*)); *id.* at 29. Like the single aggregate contribution limit that was upheld in *Buckley*, the current aggregate limit on contributions to candidates helps to prevent the use of contributions to multiple candidates to circumvent limits on contributions to a single preferred candidate. *Id.* at 8-9; see *Buckley*, 424 U.S. at 38; cf. *Colorado II*, 533 U.S. at 459-460 (describing political party's system of “informal bookkeeping * * * to connect donors to candidates through the accommodation of a party”).

The ease with which contributions to candidates can become contributions to political parties undercuts appellant's argument (J.S. 17-26) that the former are less dangerous than the latter. In any event, appellant cites no authority for her assertion (J.S. 24) that the anti-circumvention analysis should be “comparative.” This Court has never suggested that the threat of circumvention posed by direct contributions to political-party committees establishes a baseline against which all anti-circumvention limits must be measured to determine their constitutionality. See, e.g., *California Med. Ass'n v. FEC*, 453 U.S. 182, 197-198 (1981) (upholding, with no mention of political parties, FECA's base limit on con-

tributions to non-party political committees as anti-circumvention provision); cf. *Colorado II*, 533 U.S. at 454-455 (rejecting as “too crude” the argument that political parties’ “power and experience * * * sets them apart from other political spenders”).

c. Even apart from the risk that the base contribution limits may be circumvented by transfers of funds among the various recipients of contributions from a single donor, FECA’s aggregate limit on contributions to candidates serves a direct anti-corruption purpose. As previously explained, the absence of such a limit would permit individuals like appellant to contribute millions of dollars in each election cycle. Congress could reasonably conclude that an individual who made contributions of that magnitude to a party’s overall electoral efforts might acquire actual or perceived “improper influence” (*Buckley*, 424 U.S. at 27) over the party’s elected officials, even if no single contribution was likely to have that effect.

3. Notwithstanding the aggregate limit on contributions to candidates, appellant (or anyone else) remains free to engage in the “symbolic act of contributing,” *Buckley*, 424 U.S. at 21, to every candidate in every federal election. Individuals are limited only in the *amounts* they can give to those candidates: the more candidates to whom they contribute, the smaller their average contributions must be. But that is not a substantial First Amendment burden, for “[t]he quantity of communication by the contributor does not increase perceptibly with the size of his contribution.” *Ibid.*

As previously noted, the Court in *Buckley* did not dispute that the \$25,000 limit at issue there “impose[d] an ultimate restriction upon the number of candidates and committees with which an individual may associate

himself by means of financial support.” 424 U.S. at 38. Notwithstanding that “modest restraint,” the Court upheld the aggregate limit against substantially the same constitutional challenge that appellant asserts in this case. *Ibid.* That holding remains good law, and it required the dismissal of appellant’s complaint.

It is irrelevant that the Court in *Buckley* addressed only a facial constitutional challenge to FECA’s aggregate contribution limit, while appellant describes her own suit as raising an as-applied challenge. See J.S. App. 9. A plaintiff’s characterization of her own challenge is not controlling, *Citizens United v. FEC*, 130 S. Ct. 876, 893 (2010), and appellant identifies no unusual feature of her own circumstances that would render the aggregate limits invalid as applied to her if the limits are generally constitutional. J.S. App. 10.

CONCLUSION

The appeal should be dismissed for want of a substantial federal question. In the alternative, the judgment of the district court should be affirmed.

Respectfully submitted.

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