Do Aggregate Limits on Contributions to Political Candidates and Committees Violate the First Amendment?

CASE AT A GLANCE

Federal law imposes two kinds of limits on political contributions by individuals. *Base limits* restrict the amount of money an individual may contribute to a particular candidate committee and to particular noncandidate political committees. These limits are designed to reduce and prevent actual and apparent political corruption. *Aggregate limits* restrict the total amount of money that an individual may contribute to all committees and candidates. These limits are designed to prevent individuals from circumventing base limits by funneling contributions in excess of base limits through a political committee and to a particular candidate. This case tests whether *aggregate contribution limits* violate the First Amendment.

McCutcheon v. Federal Election Commission
Docket No. 12-536

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INTRODUCTION

Shaun McCutcheon and the Republican National Committee seek to contribute and to receive contributions, respectively, beyond the limits set by federal law on aggregate contributions. They argue that the aggregate contribution limits restrict their free speech and associational rights and serve no valid anticorruption or anticircumvention purpose. They claim that the aggregate limits therefore violate the First Amendment.

ISSUE

Do federal limits on aggregate contributions to political committees and candidates violate the First Amendment?

FACTS

In 1974, Congress passed amendments to the Federal Election Campaign Act, or FECA, that created two kinds of limits on campaign contributions in federal elections. First, the amended law imposed a $1,000 base limit on an individual's contributions to any single candidate seeking federal office (or seeking party nomination for such an office) or to a committee controlled by that candidate, with respect to any given election (or set of elections within a single calendar year). Next, the amended law imposed a $25,000 aggregate limit, or "ceiling," on all contributions by an individual, whether to candidates or other entities, within a single calendar year. (Contributions in nonelection years counted toward the limit for the years in which the next election occurred.)

Congress imposed the $25,000 aggregate limit (on top of the $1,000 base limit) in order to address a problem that arose under the previous campaign contribution restriction. That previous restriction, in the Hatch Act, imposed a $5,000 base limit on contributions to any candidate for federal office or to any committee or organization that promoted the nomination or election of any candidate for federal office or the success of any national political party. But the restriction imposed no aggregate limit. As a result, individuals could, and did, contribute $5,000 to many organizations supporting a single candidate, and thus effectively contribute well over the base limit to a single candidate. The $25,000 aggregate limit addressed this problem. The Supreme Court upheld both the base limit and the aggregate limit against a First Amendment challenge in *Buckley v. Valeo,* 424 U.S. 1 (1976).

In 1976, Congress enacted additional contribution limits. In particular, Congress imposed an annual limit of $20,000 on contributions to "political committees established and maintained by a national political party" and an annual limit of $5,000 on contributions to any single nonparty political committee, or political action committee (a PAC). Congress also reenacted the $25,000 aggregate limit.

In 2002, Congress enacted the Bipartisan Campaign Reform Act, or BCRA. Under BCRA, Congress restructured and increased FECA's contribution limits, including the aggregate contribution limit, and provided for certain automatic future adjustments to account for inflation.

In its current form, and as inflation-adjusted for the 2013–2014 election cycle, FECA's base contribution limits allow an individual to contribute up to $2,600 to any candidate and his or her authorized political committee per election (counting the primary and general

election separately); up to $32,400 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 $5,000 per year to "any other political committee." FECA's current aggregate contribution limits allow an individual to contribute a total of $123,200 per election cycle.

Taking the base contribution limits and aggregate contribution limits together, an individual can contribute $48,600 to candidates for federal office and their authorized political committees. Individuals can contribute another $74,600 to noncandidate committees (including national political party committees, state political party committees, and nonparty political committees), so long as no more than $48,600 of that amount is given to state political parties or nonparty political committees, or PACs.

Shaun McCutcheon is an Alabama resident who wanted to make contributions in excess of the aggregate limits in the 2011–2012 election cycle. By the time he sued, McCutcheon contributed a total of $33,088 to 16 different candidates for federal office in amounts ranging from $1,776 to $2,500; $1,776 each to the Republican National Committee, or RNC, the National Republican Senatorial Committee, or NRSC, and the National Republican Congressional Committee, or NRCC; $2,000 to a nonparty political committee; and $20,000 to the federal account of the Alabama Republican Party. But he wanted to contribute more. In particular, he wanted to contribute $1,776 to 12 other candidates and $25,000 each to the RNC, the NRSC, and the NRCC. McCutcheon's additional candidate contributions would have brought his total to $54,400, and his additional party committee contributions would have brought his total to noncandidate recipients to $97,000, exceeding the aggregate limits then in place. Moreover, McCutcheon now seeks to contribute a total of more than $60,000 to candidates intending to run in the 2013–2014 election cycle, as well as a total of at least $75,000 to the three Republican national party committees, exceeding the aggregate limits now in place.

The RNC wanted to receive contributions from individuals such as McCutcheon that would be permissible under the base limits but would violate the aggregate limit on contributions to party committees. The RNC argued that because of the aggregate limit it has both refused and returned contributions. The RNC also said that others would contribute to it but for the aggregate limit.

McCutcheon and the RNC challenged both the aggregate limit on candidate contributions and the aggregate limit on other contributions under the First Amendment. A three-judge district court ruled against them and upheld the limits. McCutcheon and the RNC appealed to the Supreme Court.

CASE ANALYSIS

The Supreme Court upheld both FECA's original base contribution limit ($1,000 per candidate, per election cycle) and its aggregate contribution limit ($25,000 per election cycle) in *Buckley v. Valeo.* As to the base contribution limit, the Court held that Congress could cap contributions in order to reduce the opportunity for individuals to use large contributions "to secure a political quid pro quo from current and potential officer holders." As to the aggregate limit, the Court said that this was "no more than a corollary of the basic individual contribution limitation" and validly served "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." In other words, the aggregate contribution limit was valid because it reduced circumvention of the base contribution limit.

In upholding the contribution limits, the Court in *Buckley* distinguished FECA's *contribution* limits from its *expenditure* limits. In particular, the Court said that *contribution* limits implicate important First Amendment associational values that can be regulated "if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." But on the other hand, *expenditure* limits, which "restrict the quantity of campaign speech," implicate core First Amendment freedom of political expression and therefore require even more exacting scrutiny. In the years since *Buckley,* the Supreme Court has consistently reaffirmed the contribution/expenditure dichotomy and clarified that *expenditure* limits must satisfy strict scrutiny, while *contribution* limits must satisfy a slightly lower standard of review (sometimes called "exacting scrutiny"). In practice, this means that *expenditure* limits are invalid, while reasonable *contribution* limits are valid so long as they are appropriately tailored to reduce or prevent actual or apparent quid pro quo corruption.

The parties both focus first on the correct standard to apply and second on the application of the standard as to the aggregate contribution limits. (Neither the RNC nor McCutcheon challenges the base contribution limits.) On the standard, the RNC and McCutcheon argue that the Court should apply strict scrutiny to the aggregate limits and overturn them because the aggregate limits operate more like expenditure limits than contribution limits. (The RNC goes a step further and argues, though weakly, that the Court should abandon the *Buckley* contribution/expenditure dichotomy altogether.) On the application, the RNC and McCutcheon claim that the aggregate limits do not serve the interest of corruption or apparent corruption because other features of federal law control for circumvention of base limits, and therefore the aggregate limits do not serve a valid anticircumvention purpose under *Buckley*. The government disputes these claims, both on the standard and the application.

The RNC first focuses on the correct standard of review. It claims that the aggregate limits should be subject to strict scrutiny under *Buckley*. It says that the purpose of aggregate limits is different than the purpose of base limits, and that aggregate limits look more like expenditure limits than contribution limits. The RNC also claims that aggregate limits impose greater burdens on speech and association rights than base limits, justifying strict scrutiny. Alternatively, the RNC calls on the Court to jettison the contribution/expenditure dichotomy in *Buckley* and to apply strict scrutiny because the aggregate limits impose a substantial burden on protected political speech. But whether the Court applies strict scrutiny (for the reasons the RNC argues) or the less-rigid exacting scrutiny (for contribution limits under *Buckley*), the RNC says that the aggregate limits fail.

The RNC further argues that the $74,600 aggregate limit on contributions to noncandidate committees is unconstitutional as applied to national party committees. It claims that *Buckley*'s holding—that the old aggregate $25,000 contribution ceiling does not violate free speech on its face—does not control this case. But it argues that *Buckley*'s reasoning does. In particular, the RNC argues that the Court in *Buckley* upheld the aggregate limit because the government could show that the limit was designed to foreclose large "conduit-contribution risk," that is, the risk that contributors would circumvent the $1,000 base limit by funneling massive additional contributions to a particular candidate through a political committee or PAC. (The RNC calls this circumvention a "conduit contribution"; it calls the political party or PAC a circumvention "mechanism"; and it calls the *Buckley* Court's reason for upholding the aggregate contribution limit an "anti-circumvention" interest [in contrast to the *Buckley* Court's reason for upholding the base limit, an "anti-corruption interest"].) But the RNC claims that Congress closed any conduit-contribution mechanism when, after *Buckley,* it added base limits for contributions from individuals to political committees and from "multicandidate committees" to political committees and limited the proliferation of political committees. The RNC contends that these new post-*Buckley* limits (along with some other features of post-*Buckley* law) solved the problem of massive conduit contributions and thus eliminated the justification, under *Buckley,* for the aggregate limit on contributions to national party committees.

The RNC claims that the aggregate limit cannot be justified on other grounds, such as preventing corruption or curtailing the influence of excessive political contributions by a single person. It says that the anticorruption interest applies only to contributions to candidates, not national political parties. And it contends that the Court in *Buckley* rejected limits in the interest of equalizing the influence of contributors.

The RNC next argues that if the aggregate limit on contributions to noncandidate committees is unconstitutional as applied to national party committees (as above), then that same aggregate limit to noncandidate committees and the aggregate $48,600 limit on contributions to state party committees and PACs must also fall. The RNC says that if the aggregate limit to national party committees is unconstitutional, then that same limit is substantially overbroad and facially unconstitutional. And it claims that if that is true, then the aggregate limit on contributions to state party committees and PACs, which is intertwined with the aggregate $74,600 limit and thus nonseverable, must also fall.

Finally, the RNC argues that the aggregate $48,600 limit on contributions to all candidates is unconstitutional. The RNC says that candidate committees posed no conduit-contribution risk under *Buckley,* and they pose none today. And it says that the aggregate limit does not serve an anticorruption interest because there is no quid pro quo risk when one candidate learns that a contributor also contributed to another candidate.

McCutcheon argues that the aggregate contribution limits are subject to rigorous review, and because of their special nature are especially hard for the government to justify. In particular, McCutcheon says that in contrast to contribution limits, which limit *the extent* to which an individual may associate himself or herself with a single candidate or political party committee, aggregate contribution limits preclude an individual from associating with, supporting, or assisting *too many* candidates, parties, or political committees. For this reason, and because there is a practical limit to how a single individual can support many different candidates, parties, or political committees with on-the-ground efforts (as opposed to contributions), McCutcheon argues that the government bears a particularly heavy burden in justifying aggregate limits.

McCutcheon next argues that the government cannot meet this burden. He claims that the government cannot justify aggregate limits with an anticorruption rationale because individual contributions under the base limit (as they must be) to any number of candidates cannot raise a cognizable risk of corruption. The base limits already control for corruption, and the aggregate limits add nothing to that control. Moreover, McCutcheon claims that the government cannot justify aggregate limits in order to prevent circumvention of base limits because post-*Buckley* changes to FECA (some of which are discussed above) already control for circumvention. And McCutcheon says that the government's hypothetical circumvention scenarios under current law are only just that—hypothetical, and nothing more.

Finally, McCutcheon argues that even if the aggregate limits serve an anticorruption or anticircumvention purpose for some small sliver of contributions, the aggregate limits are not closely enough drawn to pass constitutional muster. McCutcheon claims that Congress cannot impose aggregate limits on a mere hunch that some contributors might sidestep existing statutory controls to prevent circumvention. And he says that if Congress were truly concerned about joint fundraising committees or transfers of funds between candidates, political party committees, or PACs, then Congress could devise a better tailored solution to those problems.

The government argues that aggregate limits are not subject to strict scrutiny. The government says that *Buckley* held as much, and that there is no good reason to deviate from *Buckley*'s holding or to overturn it. The government claims that the RNC has it wrong when it argues that base contribution limits and aggregate contribution limits have different purposes: it contends that the *Buckley* Court described both limits as serving the same ultimate anticorruption objectives. The government also says that the RNC and McCutcheon have it wrong when they argue that aggregate limits restrict how many entities an individual may support; on the contrary, an individual may support as many entities as he or she likes, but at a low level of contribution. The government contends that aggregate limits do not restrict the total amount of money available for political expression; instead, they require candidates and political committees to raise funds from a greater number of individuals. The government says that under current law, any individual can spend as much as he or she likes—on his or her own independent advocacy.

The government argues next that today's aggregate contribution limits are fully constitutional under *Buckley*. The government says that the current aggregate limits serve the same purpose as the $25,000 aggregate limit upheld in *Buckley*—to prevent circumvention of the base contribution limits. Indeed, the government contends that this purpose is more important today than it was in *Buckley* because it is even easier today for an individual to funnel massive contributions through political committees to particular candidates. For example, an individual could contribute $5,000 each

to an unlimited number of political committees, each of whom could then give money directly or indirectly to particular candidates. And more, the individual could also give more than $3.6 million to party candidates and to state and national party committees, much of which could be used to support a specific candidate or set of candidates. The government says that even if the contributions were not funneled to a particular candidate or small group of candidates, the solicitation and contribution of massive sums can still cause actual and apparent corruption.

The government argues that nothing in the post-*Buckley* changes to FECA undermines *Buckley*'s application to today's aggregate limits. In particular, the government claims that the changes highlighted by the RNC and McCutcheon—such as base limits on contributions to political committees and restrictions on affiliated political committees—would prevent the kind of circumvention that FECA's original aggregate contribution limit, upheld in *Buckley,* was designed to prevent.

SIGNIFICANCE

McCutcheon comes on the heels of five recent decisions in which the Roberts Court has consistently struck in the name of free speech state and federal restrictions designed to control the influence of money in politics, or to equalize the campaign finance playing field. Some of these rulings were momentous. For example, the sharply divided Court in *Citizens United v. FEC,* 558 U.S. 310 (2010), held that restrictions on independent campaign spending violated the First Amendment. That ruling, along with the D.C. Circuit's *SpeechNow.com v. FEC,* 2009 WL 3101036 (D.D.C. 2009), opened the door for unfettered independent campaign spending and a flood of new money in politics. Others of these rulings were less consequential. For example, the Court in *Randall v. Sorrell,* 548 U.S. 230 (2006), struck Vermont's very low contribution limits. That ruling may have telegraphed something about the Court's views on campaign finance restrictions, but its effect was relatively minimal. Still, there is a clear trend: in cases both big and small, the Roberts Court has consistently ruled that state and federal efforts to control the amount of money in politics, or to equalize the campaign finance playing field, violate the First Amendment.

McCutcheon is just the latest in this series of cases and probably falls somewhere between the monumental and the relatively unimportant. On the one hand, it is probably not as significant as *Citizens United.* That is because *McCutcheon* is limited to just one kind of contribution limits, aggregate contribution limits; it does not take on base contribution limits (or anything else). If the Court strikes the aggregate contribution limits, certainly more money may flow into and around politics, but the result is unlikely to be as dramatic as the result from *Citizens United* and *SpeechNow.com.* For one thing, individuals can already spend as much as they want in independent advocacy. For another, some say that if the Court strikes the limits, the result could be to decrease the *relative* influence of independent expenditures because more money could flow to candidates and political party committees. And any challenge the case poses to the long-standing contribution/expenditure dichotomy may be resolved on narrow grounds. That is, a minimalist majority could strike the aggregate contribution limits without disturbing the dichotomy by simply holding that aggregate limits operate more like expenditure limits, or that aggregate limits do not serve an anti-corruption purpose.

On the other hand, *McCutcheon* is certainly more important than *Randall v. Sorrell.* That is because far more is at stake: *McCutcheon* deals with a federal limit, not a state limit (and a small state limit, at that); and striking the aggregate contribution limits would allow far more money to flow into politics. Striking the limits would also almost certainly mean that a smaller group of very wealthy contributors could exert a greater influence on parties and candidates—an obviously significant result.

That said, the case has predictably attracted a healthy group of amici curiae on both sides. Amici favoring the RNC and McCutcheon are traditionally conservative organizations and politicians; amici in support of the government are traditionally progressive. There are few, if any, surprises among the amici, but there is one notable kind of argument among the amici for the government—an originalist argument. The Brennan Center for Justice, Professor Larry Lessig, and the Constitutional Accountability Center weighed in arguing that the founders had a broad view of political corruption and were concerned with combating it. The argument is notable because constitutional originalism is so often associated with conservatives (although that is changing). In the end, though, it is not clear that originalism will work its way into the case in any serious way.

Based on the previous five campaign finance cases before the Roberts Court, it seems likely that the four conventionally progressive justices—Justices Ginsburg, Breyer, Sotomayor, and Kagan—are likely to vote to uphold the aggregate contribution limits. It seems equally likely that Justices Kennedy, Scalia, and Thomas will vote to strike them. If so, then the case will turn on Chief Justice Roberts and Justice Alito. They have voted with the majority in consistently striking campaign finance restrictions, but they have not (yet) explicitly called for overturning *Buckley*'s contribution/expenditure dichotomy. (Justices Kennedy, Scalia, and Thomas, on the other hand, have criticized the dichotomy and explicitly called for overturning it and applying strict scrutiny to contribution limits. This approach would almost surely mark the end of the aggregate limits at issue in this case.)

Of course, the Court need not overturn the dichotomy in order to strike the aggregate limits. Indeed, as mentioned above, the Court could preserve the dichotomy but still strike the aggregate limits on the basis that they operate more like expenditure limits or that they are not necessary to prevent circumvention of the base limits (because of other features in federal law). That is the judicially minimalist way to strike the aggregate limits, and it may well be the way a closely divided Court, led by Chief Justice Roberts, rules in *McCutcheon*.

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