No. 16-109

In The
Supreme Court of the United States

STOP RECKLESS ECONOMIC INSTABILITY CAUSED BY DEMOCRATS; TEA PARTY LEADERSHIP FUND; and ALEXANDRIA REPUBLICAN CITY COMMITTEE,

Petitioners,

v.

FEDERAL ELECTION COMMISSION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF *AMICUS CURIAE* FOR VENTURA COUNTY REPUBLICAN PARTY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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August 23, 2016

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QUESTION PRESENTED

May the Government categorically cut in half the amount that political committees may contribute to political parties once they have been registered with the FEC for six months, solely on the grounds that it simultaneously (and inconsistently) increases the limit on contributions to candidates at that point, without any explanation as to how that blanket reduction furthers the Government's interest in combatting corruption?

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STATEMENT OF INTERESTS OF *AMICUS CURIAE*[1]

Amicus Curiae VENTURA COUNTY REPUBLICAN PARTY is the official political party organization of the state ballot qualified Republican Party in Ventura County, California. California Government Code section 5100. *Amicus Curiae* is a subordinate political party committee of the state political party, California Republican Party, 52 U.S.C. § 30101(15); 11 C.F.R. 100.14(c). *Amicus Curiae* is subject to contribution limits on contributions it may lawfully accept under 52 U.S.C. § 30116(a)(1)(C) [$5,000 per calendar year per donor aggregate limit] and § 30116(a)(1)(D) [further limited by aggregate limit of $10,000 per calendar year per donor applicable to state political parties and subordinate party committees of a state political party]. Thus, *Amicus Curiae* is directly affected by the application of the limits of 52 U.S.C. § 30116(a)(2)(C) on contributions by "political committees" and "multi-candidate political committees."

SUMMARY OF THE ARGUMENT

Amicus Curiae agrees with the Petitioners that this case also presents a substantive issue of First

[1] Pursuant to Sup. Ct. R. 37.6, *Amicus Curiae* and its counsel state that none of the parties to this case nor their counsel authored this brief in whole or in part, and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief. *Amicus Curiae* files this brief with the written consent of all parties, copies of which are on file in the Clerk's Office, with less than 10 days notice.

Amendment law. The Bipartisan Campaign Reform Act ("BCRA") cuts in half the amount that certain political committees may contribute to political parties once those committees have been registered with the Federal Election Commission ("FEC") for six months. See 52 U.S.C. § 30116(a)(1)-(a)(4). The United States Court of Appeals for the Fourth Circuit ("Fourth Circuit") upheld this temporal reduction in contribution limits on the grounds that BCRA also increases the amount that such committees may contribute to candidates upon reaching that six-month mark. Petitioner's Appendix, A-27 to A-29.

For reasons that follow, *Amicus Curiae* believes that the Fourth Circuit has erred and that such a regulation violates the First Amendment.

Election campaigns invoke the most fundamental of our First Amendment rights. The spending of resources to support candidates in the form of political contributions represents an especially strong invocation of the right to the freedom of speech and association guaranteed by our Constitution. Notwithstanding this Court's repeated instructions to the lower courts to require governments that enact laws that infringe on such speech and associational rights to prove that they are "closely drawn" to combat *quid pro quo* corruption and its appearance, the Fourth Circuit allowed the FEC to rely on a simple balancing of what it perceived to be the benefits and burdens of the law compared to other dissimilar, non-shifting contribution limits that have been held constitutional, without

any reference to *quid pro quo* corruption and its appearance.

Further, the Fourth Circuit rested its decision on a sharp misreading of this Court's decision in *California Medical Association v. Fed. Election Comm'n*, 453 U.S. 182 (1981). In doing so, it expressly diminished the rights of group associations formed to speak together and held that such speech is less protected than that of individuals. Should the Fourth Circuit's opinion below be allowed to stand, lower courts would be free to uphold laws that infringe on the ability of citizens to join together for common political purposes. It would also further starve political parties already disadvantaged by the federal regulatory scheme of resources necessary to disseminate their messages and support the electoral campaigns of their members.

For these reasons set forth more fully below, *Amicus Curiae* respectfully urges this Court to grant the petition for writ of certiorari.

ARGUMENT

I. THE FOURTH CIRCUIT'S DECISION MAKES NO EFFORT TO FOLLOW THIS COURT'S PRECEDENTS IN JUSTIFYING AN IRRATIONAL LAW THAT INFRINGES UNNECESSARILY ON CORE POLITICAL SPEECH.

The First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office." *McCutcheon v. Fed. Election*

Comm'n, 134 S.Ct. 1434, 1441 (2014) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)). Contribution limits burden these fundamental First Amendment interests by restricting the amount a donor may contribute to aid his or her candidate of choice in disseminating an electoral message. *Buckley v. Valeo*, 424 U.S. 1, 24-25 (1976). Therefore, in *Buckley*, the Supreme Court characterized contributions as invoking both the right to freedom of speech and its implied right of association, and determined that limits on such contributions are subject "to the closest scrutiny." 424 U.S. at 25 (quoting *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460-61 (1958)). This close scrutiny applies not only when the contribution limit is directed at an individual donor, but also when it is directed at an association – specifically a political action committee ("PAC"). *Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 495 (1985) ("To say that their collective action in pooling their resources to amplify their voices is not entitled to full First Amendment protection would subordinate the voices of those of modest means as opposed to those sufficiently wealthy to be able to buy expensive media ads with their own resources.").

The law at issue, 52 U.S.C. § 30116(a)(4), cuts in half the amount that multi-candidate PACs can contribute to political party committees once the PAC has been registered with the Federal Election Commission for six months, while simultaneously increasing the amount they can contribute to candidates. While the right to speak, associate and participate in politics "is

not absolute," the government must "demonstrate a sufficiently important interest" for its law and "employ means closely drawn to avoid unnecessary abridgement of associational freedoms." *Buckley*, 424 U.S. at 25 (internal quotations and citations omitted). In the instant case, the Fourth Circuit has absolved the government of the need to put forth a permissible interest to justify the temporal shifting of contribution limits as applied to PACs, and the law's relationship to any permissible government interest in this area is at best irrational.

This Court has repeatedly admonished that "preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances." *Davis v. FEC*, 554 U.S. 724, 741 (2008) (quoting *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496-497 (1985)); *accord McCutcheon v. FEC*, 134 S.Ct. 1434, 1441 (2014). In order to protect the necessary breathing space for core political speech, the anti-corruption interest has been held to be only of one constitutionally-permissible kind, which is to target *quid pro quo* arrangements. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 359 (2010) ("The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt."). That phrase, *quid pro quo*, "captures the notion of a direct exchange of money for favors." *McCutcheon*, 134 S.Ct. at 1441. This Court has additionally made clear that campaign finance regulations that do not aim to prevent *quid pro quo* corruption, but

instead "pursue other objects impermissibly inject the Government into the debate over who should govern. And those who govern should be the *last* people to help decide who *should* govern." *McCutcheon*, 134 S.Ct. at 1441-1442 (emphasis in original).

The Fourth Circuit, however, did not even attempt to explain how reducing the amount that established political committees may contribute to political parties after they have been registered for six months furthers the Government's interest in combatting *quid pro quo* corruption and its appearance. Moreover, the Fourth Circuit's reasoning – that Congress may decrease limits on contributions to political parties because it simultaneously increased limits on contributions to candidates – is inconsistent with this Court's holding in *McCutcheon*, 134 S.Ct. at 1449, that contributors cannot be subjected to such tradeoffs among constitutionally protected activities ("As we have recently admonished, the Government may not penalize an individual for 'robustly exercis[ing]' his First Amendment rights.") (quoting *Davis v. FEC*, 554 U.S. at 739).

The PAC regulation at issue lacks any justification at all. It is an irrational infringement on Petitioners' rights to freedom of speech and association. It is hard to imagine how, and the Fourth Circuit has relieved the government of its obligation to explain why, a political committee that satisfies § 30116(a)(4)'s Receipt and Contribution Requirements and has been registered for six months, experiences inconsistent changes in its speech rights. *Randal v. Sorrell*, 548 U.S. 230, 231 (2006) (government bears the burden of proving

important interest and means closely drawn to achieve it). The amount a PAC may contribute to candidates nearly doubles, while the amount it may contribute to political parties is slashed by nearly half. Thus, the law treats such committees inconsistently once they reach that six-month mark. This is not "closely drawn" to target corruption. No contribution limit ever upheld by this Court has inconsistently shifted in amounts depending on how long the actor has been registered with the government, or for any other reason. The law must therefore be struck.

II. GROUP ASSOCIATIONS INCLUDING POLITICAL ACTION COMMITTEES ARE ENTITLED TO FULL FIRST AMENDMENT PROTECTION AND THEIR RIGHTS TO CORE POLITICAL SPEECH AND ASSOCIATION MAY NOT BE SUBJECT TO A SPECULATIVE BALANCING TEST.

The Fourth Circuit threatens to endanger group speech with its Opinion that subverts associations joined for a common political purpose. In doing so, it relies on a misapplication of this Court's decision in *California Medical Association v. FEC*, 453 U.S. 182 (1981). The Fourth Circuit stated in its Opinion that:

> *California Medical Association* makes clear that limitations on contributions from persons to PACs, even PACs that engage in advocacy and 'proxy speech,' received less First Amendment protections than direct individual contributions to candidates. Because this

> case does not involve an individual contributor, the First Amendment, under these Supreme Court precedents, provides Stop PAC and American Future with limited rights, not offended here, with respect to their ability to make political contributions. Accordingly, the Court concludes that FECA's six-month waiting period, and the limited restriction that it places on financial contributions from PACs, do not constitute a First Amendment violation of Stop PAC and American Future's ability to associate with the candidates whom they support.

Op. at p. 50.

This is patently false and contrary to Supreme Court precedent. This Court has stated that PACs enjoy the same First Amendment protections as individuals. *Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 494 (1985) ("We also reject the notion that the PACs' form of organization or method of solicitation diminishes their entitlement to First Amendment protection. The First Amendment freedom of association is squarely implicated in these cases."). This idea is grounded in this Court's observation that "associations, like individuals, contribute to the discussion, debate, and the dissemination of information and ideas that the First Amendment seeks to foster." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 343 (2010) (quoting *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978)).

Contrary to the Fourth Circuit's conclusion, the court in *California Medical Association* did not hold that contributions to PACs receive lower protections under the First Amendment than direct contributions to candidates. Rather, the court simply held that the fact that contributions to PACs are not given in the first instance to the candidate does not transform it into an expenditure. 453 U.S. 182, 195 ("The type of expenditures that this Court in *Buckley* considered constitutionally protected were those made independently by a candidate, individual, or group in order to engage directly in political speech.").

The California Medical Association ("CMA") had challenged the limit on the amount individuals may contribute to PACs. In doing so, it based its argument on a "speech by proxy" theory – that because its PAC was essentially the mouthpiece of CMA, contributions from CMA members to the PAC were, it argued, essentially expenditures of those members, the limitation of which would violate the rule in *Buckley* ("The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate."). 424 U.S. at 47. This Court rejected CMA's argument because its PAC "is a separate legal entity that receives funds from multiple sources and engages in independent political advocacy." *California Medical Association*, 453 U.S. at 183. The instant case does not challenge this. Petitioners have not argued

that they should be free from any limitations on contributions from their members to their PACs. Rather, they argue that they should be free from *arbitrary limits* that shift depending only on how long the PAC has been registered with the FEC.

California Medical Association is the case on which the Fourth Circuit rests its decision, and, disturbingly, is only relevant to the instant matter in that it involved a limit on amounts that individuals may contribute to PACs. It did not involve a change in those limits over time (or for any other reason), it did not involve a change in the amount that PACs may contribute to a political party committee, and it did not involve a change in the amount that PACs may contribute to candidates. In the relevant aspects, therefore, the case has no application here. Indeed, *California Medical Association* highlights the Fourth Circuit's error. In that case, the court discussed the governmental interest served by the contribution limit – fighting corruption by preventing circumvention of the base limits. *Id.* at 198 ("If appellants' position – that Congress cannot prohibit individuals and unincorporated associations from making unlimited contributions to multicandidate political committees – is accepted, then both these contribution limitations could be easily evaded."). In the instant case, by contrast, no reason has been given for the differing treatment of multi-candidate PACs before and after the six-month registration mark. This means that the law arbitrarily singles out for stricter regulation a form of

speech that impacts its interests in the same way, which is not permissible under the First Amendment.

The Fourth Circuit attempts to draw analogies to the contribution limits at issue in *Buckley* and *California Medical Association* to argue that, under a totality of the circumstances analysis, those at issue here are less burdensome, and therefore must be constitutionally permissible. This conclusion relies on speculation and assumptions about an association's political priorities. In reaching it, the Fourth Circuit again ignores the relevant aspect of this action: that the shifting of contribution limits at the six-month mark makes no sense, regardless of whether it believes the committee is in a more or less advantageous position following the six-month mark than it was before it had been registered with the FEC for six months, or compared to dissimilar non-shifting limits held constitutional as applied to other political actors.

No balancing of benefits and burdens has ever been held sufficient to carry a First Amendment burden in the realm of core political speech. Such a concept lets the government "off the hook" of articulating a specific, concrete interest for the regulation, and proving that its selected means are appropriately tailored. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 392 (2000) ("We have never accepted mere conjecture as adequate to carry a First Amendment burden."); *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 475 (1995) ("[W]hen the Government defends a regulation on speech as a means to . . . prevent anticipated harms, it must do more than simply 'posit the

existence of the disease sought to be cured.' . . . It must demonstrate that the recited harms are real, not merely conjectural."). The FEC may not simply rely on an implied "corruption" interest – the only permissible one that could justify the regulation at issue – and be done with it to justify a burden on the fundamental right to speak and associate via contributing to political committees. *Nixon v. Shrink Missouri Government PAC*, 528 U.S. at 392 (quoting and discussing *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 616 (1996) (opinion of Breyer, J.)). Rather, the government must assert the anti-corruption interest in its proper form and the contribution limit must be appropriately tailored to vindicate that interest, otherwise it is unconstitutional. *McCutcheon*, 134 S.Ct. at 1444; see also *Randall v. Sorrell*, 548 U.S. 230, 248 (2006).

The law at issue here is an irrational means of fighting corruption and its appearance. If a law that restricts political speech does not avoid unnecessary abridgement of First Amendment rights, it cannot survive "rigorous" review. *McCutcheon* at 1446 (quoting *Buckley* at 25). Here, the Fourth Circuit has not argued that a PAC that has reached the six-month registration mark demonstrates an increase in the corruptive nature of its PAC contributions to political parties and at the same time a decrease in the corruptive nature of its PAC contributions to candidates. The concept alone makes one scratch one's head in confusion. Because the law lacks an appropriately-tailored

means of fighting *quid pro quo* corruption and its appearance, it must be struck.

CONCLUSION

Like individuals and other associations, political committees' speech is entitled under our Constitution to the full protection of the First Amendment, the importance of which is amplified in the context of election campaigns. Because the multi-candidate committee rules in 52 U.S.C. § 30116(a)(4) represent an unconstitutionally arbitrary and irrational infringement on this speech, they cannot survive "closely drawn" scrutiny. *Amicus Curiae* urges this Court to hear Petitioners' case so that our precious freedoms are not sacrificed to the Fourth Circuit's wayward "balancing" test which absolves the government of its burden to tread carefully on our core First Amendment rights.

Respectfully submitted.

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