No. 12-683

IN THE

# Supreme Court of the United States

VIRGINIA JAMES,

*Appellant,*

*v.*

FEDERAL ELECTION COMMISSION,

*Appellee.*

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

## OPPOSITION TO MOTION TO DISMISS OR AFFIRM

ALLEN DICKERSON
*Counsel of Record*
TYLER MARTINEZ
ZAC MORGAN
ANNE MARIE MACKIN
CENTER FOR COMPETITIVE POLITICS
124 S. West Street, # 201
Alexandria, Virginia 22314
(703) 894-6800
adickerson@campaignfreedom.org

February 14, 2013 *Counsel for Appellant*

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

*Cases*

*Constitutions, Statutes, and Regulations*



*Other Authorities*

## I. All parties agree that this case raises First Amendment issues requiring heightened scrutiny of the legislative scheme.

Before addressing points of disagreement, it is worth pausing to consider where the parties agree. For instance, the FEC recognizes that contribution limits "'impinge on protected associational freedoms' by 'limit[ing] one important means of associating with a candidate.'" FEC Mot. at 7 (quoting *Buckley v. Valeo,* 424 U.S. 1, 22 (1976)). Similarly, the Commission notes that the government may carry the day only if it "demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." *Id.* at 6-7 (quoting *Buckley,* 424 U.S. at 25).[1]

While the parties disagree on certain particulars, they agree on two points. First, that the First Amendment is implicated by contribution limits, including those present here. And second, that as a result, the challenged statute is subject to heightened scrutiny.

---

[1] Appellant believes strict scrutiny is warranted in this case, and preserved that issue below. Mot. P.I. at 11. But her case does not turn on which variety of heightened scrutiny is applied. *Id.* at 13; Juris. Statement at App-46, 47.

## II. Contrary to the Commission's assertions, contributions to candidate committees do not pose the same threat of circumvention as do contributions to parties or political committees.

The Commission and Appellant agree that laws impinging on associational freedom must be "closely drawn" to a "sufficiently important interest." FEC Mot. at 6-7.[2] The FEC gives two reasons why this statute is so tailored. Neither is persuasive.

Candidates may contribute to other candidates, as the FEC notes. FEC Mot. at 12-13. But that does not make candidate committees efficient pass-through vehicles, especially as compared to parties and PACs. For one thing, candidate committees may contribute less money to other candidates than may any other committee type: $2,000 compared to $2,500 (for a PAC) or $5,000 (for a party committee or multicandidate

[2] The Commission maintains that this case is a straightforward application of *Buckley*'s blessing of a single $25,000 aggregate contribution limit. FEC Mot. at 8. But, as Appellant has consistently argued, this is not so. *Buckley* merely upheld an overall ceiling on annual giving to all candidates and committees, it did not—in any way—pass judgment on the sub-aggregate limits imposed under current law. *Buckley*, 424 U.S. at 38. Rather, as Ms. James noted in her Jurisdictional Statement, *Buckley* determined that the only state interest justifying an aggregate contribution limit is to prevent the circumvention of the individual candidate contribution limits. Juris. Statement at 10. This case concerns the application of that principle to a different statutory scheme.

PAC). 76 Fed. Reg. 8368, 8370 (Feb. 14, 2011).[3] For another, there is no dispute that Ms. James could contribute $70,800 to a variety of political committees which could each then contribute to a favored candidate or candidates. The FEC again fails to show why giving those same funds to additional candidate committees poses a greater (or indeed equal) threat of circumvention.

The Commission's second assertion is still weaker. Noting that candidates may "transfer campaign funds to their parties on a massive scale," it argues that "[t]he ease with which contributions to candidates can become contributions to political parties undercuts appellant's argument that the former are less dangerous than the latter." FEC Mot. at 13.

But this makes no sense. It does not matter if candidates may contribute funds to their parties, because Ms. James *could do that directly.* Ms. James may give $70,800 to party committees. It is precisely those funds that she wishes to instead give to candidate committees. Logic dictates that, if she wished to use the parties as a pass-through mechanism to support particular candidates, she would do so, instead of adding the additional – and legally unnecessary – layer of multiple candidate committees.

---

[3] These numbers reflect the limits at the time this action was filed. The Commission has since updated the limits for 2013-2014. 78 Fed. Reg. 8530, 8532 (Feb. 6, 2013).

Appellant has explained why giving money directly to candidate committees, instead of to PACs and parties, lessens the likelihood of contribution limit circumvention.[4] Jurs. Statement at 24. The FEC has failed to explained why contributing to candidates is as dangerous as contributing to other types of committees, much less why such contributions pose a greater risk.

## III. Appellant's reading of Section 441a(a)(3) is correct.

The FEC again argues that "[t]he current version of FECA does not contain a single $117,000 aggregate limit with sub-restrictions on how that money must be spent." FEC Mot. at 9. This is incorrect, for the reasons presented in the Jurisdictional Statement. But certain claims made in the Motion to Dismiss or Affirm require a response.

First, the Commission's argument, and the district court's decision, was based on reading each aggregate sub-limit in isolation, while declining to note their clear, unambiguous, and intended mathematical relationship. But "[i]t is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Nat'l Ass'n of Home Builders v.*

[4] To the extent the Court considers this a question of fact, Appellant is entitled to a trial. The scant procedural history of this case is explained in the Jurisdictional Statement.

*Defenders of Wildlife*, 551 U.S. 644, 666 (2007) (citation and quotation marks omitted). By relying on § 441a(a)(3)(A), and ignoring its relationship to the very next provision, the district court committed the error of "be[ing] guided by a single sentence or member of a sentence" rather than "look[ing] to the provisions of the whole law, and to its object and policy." *United States Nat'l Bank of Or. v. Independent Ins. Agents of Am.*, 508 U.S. 439, 455 (1993) (citation omitted). In short, the plain language of Section 441a(a)(3) supports Appellant's case.

The FEC would generally agree. While it is disconcerting to see a federal agency blithely ignore its own regulations, the FEC cannot dispute that it itself refers to a $117,000 aggregate limit. 11 C.F.R. 110.5(b). While the Commission's regulations do not "alter the statutory scheme," FEC Mot. at 9, they do provide highly persuasive guidance as to the *meaning* of the statute. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 844 (1984) ("considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer") (internal quotation marks and citations omitted).

In attempting to make its regulation disappear, the FEC argues that its rule simply notes that:

> 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. FEC Mot. at 10.

But this argument merely restates that the $117,000 aggregate limit is mathematically required, which is another way of saying that it is implicit in the statute itself.

Indeed, even in its public description of *this case* the FEC notes that: "Ms. James is not challenging the biennial limit as a whole. The plaintiff claims she will abide by the overall aggregate limit of $117,000."[5] *See also Ariz. Free Enter. Club's Freedom Club PAC v. Bennett,* 131 S. Ct. 2806, 2825 n. 10 (2011) (noting that Respondent's website contradicted its argument).

Regardless, the Commission cannot now ignore its own interpretation of the statute. As this Court noted just last year, deference to an agency's litigation position is "undoubtedly inappropriate… when the agency's interpretation is plainly erroneous *or inconsistent with the regulation." Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012) (quoting and applying *Auer v. Robbins*, 519 U.S. 452, 461-462 (1997)) (internal citations omitted) (emphasis added). The FEC's attempt to argue that its $117,000 contribution limit

---

[5] *James v. FEC*, FEDERAL ELECTION COMMISSION, http://www.fec.gov/pages/fecrecord/2012/october/jamesvfec.shtml (last visited Feb. 13, 2013).

is an extraneous nullity is inconsistent with that limit's presence in the regulation.

The Commission also attacks appellant's "isolated statements from the legislative history." FEC Mot. at 10, n. 2. But if those statements are selective, the Commission appears to agree with the selection. Appellant is aware of no countervailing evidence of Congress's intent, and the Commission provides none.

Against these weak responses, Appellant has already explained why the statute contains an overall aggregate limit. This understanding stems from mathematics, the history of FECA as amended, and the clear intention of Congress. Indeed, until this lawsuit, the FEC agreed with Appellant's reading of § 441a(a)(3).

## IV. Appellant's requested relief is both appropriate and within the power of the courts to grant.

Both the district court and the Commission argue that, should Appellant prevail, she "or anyone else would be free to give at least $2.4 million…to candidate committees." FEC Mot. at 11 (internal punctuation omitted). This is nonsense. As Appellant specifically pled her intention to contribute only $117,000—and did so in a sworn[6] complaint—she

[6] Under 28 U.S.C. § 1746 (2013), a verified statement is made under penalty of perjury. *See Bus. Guides, Inc. v. Chromatic Communs. Enters.*, 498 U.S. 533, 562 (1991) (Kennedy, J.,

could not now simply contribute whatever she likes. Nor could anyone else. As-applied challenges, by their nature, may only be relied upon by the plaintiff and those similarly situated. *Compare, e.g., FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 263 (1986) ("*MCFL*") (holding § 441b of FECA unconstitutional as applied to plaintiff because "[s]ome corporations have features more akin to voluntary political associations than business firms, and therefore should not have to bear burdens on independent spending solely because of their incorporated status."); *Citizens United v. FEC*, 130 S. Ct. 876, 891 (2010) ("Citizens United does not qualify for the *MCFL* exemption, however, since some funds used to make the movie were donations from for-profit corporations."). A party giving more than the aggregate limit of $117,000—especially millions more—is manifestly not similarly-situated to the Appellant.

Moreover, the FEC believes that "a declaration that [Appellant may] contribute more than $46,200 but less than $117,000 to candidates in each biennial election cycle… is beyond the district court's power to grant." FEC Mot. at 11. For this proposition, the Commission cites only *Ayotte v. Planned Parenthood,* 546 U.S. 320, 329 (2006). But that case would allow this relief. And this Court has previously approved substantially more invasive as-applied remedies, including in such landmark campaign finance cases as *Buckley* and *MCFL.*

---

dissenting on other grounds) ("Wrongful verification already subjects one to potential prosecution for perjury") (citation omitted).

The analysis for as-applied relief is indeed guided by *Ayotte.* But that case stands for the proposition that courts need *not* "invalidate [a] law wholesale," and may instead "issue a declaratory judgment and an injunction prohibiting the statute's unconstitutional application." *Ayotte,* 546 U.S. at 331. Indeed, the *Ayotte* court was comfortable reading a new clause—a "health of the mother" exception—into a New Hampshire law requiring parental consent before a minor could obtain an abortion. *Id.* at 327. The Court specifically noted a preference for "enjoin[ing] only the unconstitutional applications of a statute while leaving other applications in force." *Id.* at 329 (citations omitted).

A similar remedy is easily reached here because § 441a(a)(3)(A) is unconstitutional only insofar as it limits contributors who wish to give the entire aggregate limit directly to candidates. The remedy is simple: take the aggregate limit for parties and PACs, and declare that those funds may be contributed to candidates in addition to the current candidate aggregate limit. This relief is easily understood. Indeed, in the context of its regulation, the Commission believes this "sum of the two separate aggregate limits" is so apparent that pointing it out has no regulatory force. FEC Mot. at 9-10.

Regardless, *Ayotte* notes, in the context of severability, that legislative intent remains the touchstone. Rather than allowing for Appellant's modest relief, the FEC argues that the district court would have been forced to entirely eliminate any

aggregate limits on candidate contributions, allowing donors to contribute millions of dollars in each election cycle. Implicit in its argument is the premise that Congress could not have desired that result. But *Ayotte* again explains why this is incorrect. "After finding an application or portion of a statute unconstitutional, [courts] must next ask: Would the legislature have preferred what is left of its statute to no statute at all?" *Ayotte*, 546 U.S. at 330 (citations omitted). As the FEC notes, the answer here is almost certainly no.

Rather, this Court should recognize that Congress intended an overall aggregate limit, and that § 441a(a)(3)(A) should be ruled unconstitutional only insofar as it prevents contributors from giving to candidates up to that overall aggregate limit. Such a ruling is consistent with *Ayotte* and vindicates Congress's longstanding interest in limiting the overall amount of money any individual may contribute to candidates, parties, and PACs.

Finally, there is no doubt that this simple, mathematical remedy is far less invasive than what this Court has allowed in some of its most robust and respected campaign finance decisions. *See, e.g., Buckley*, 424 U.S. at 41-42 (reading the phrase "any expenditure…relative to a clearly identified candidate" to mean any expenditure "advocating the election or defeat of a candidate"); 44 n. 52 (determining such advocacy must be express, and listing suggested magic words to that effect); 79 (reading the major purpose requirement into the definition of "political committee"); *see also MCFL,* 479 U.S. at 263-264 (establishing a three-part test

for nonprofit advocacy organizations exempt from the statutory restriction on independent spending).

## Conclusion

While acknowledging that the challenged statutory regime poses First Amendment issues subject to heightened review, the FEC argues that the courts are powerless to intervene. In order to make this assertion, the Commission is forced to interpret the challenged statute in a way that defies mathematical logic, countermands its own regulation, and ignores both the history of FECA and the clear intention of Congress in passing it. This Court should not permit this attempt to avoid legal scrutiny.

For these reasons, and for those given in the Appellant's Jurisdictional Statement, the FEC's Motion to Dismiss or Affirm should be denied.

Respectfully submitted,

ALLEN DICKERSON
*Counsel of Record*
TYLER MARTINEZ
ZAC MORGAN
ANNE MARIE MACKIN
CENTER FOR COMPETITIVE POLITICS
124 S. West Street, Suite 201
Alexandria, Virginia 22314
(703) 894-6846
adickerson@campaignfreedom.org

*Counsel for Appellant*

February 14, 2013