EN BANC ARGUMENT SCHEDULED FOR OCTOBER 31, 2016

No. 16-5194

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LAURA HOLMES, *et al.*,
Plaintiffs,
v.

FEDERAL ELECTION COMMISSION,
Defendant.

On Certification of Constitutional Question from the
United States District Court for the District of Columbia

BRIEF FOR THE FEDERAL ELECTION COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the Federal Election Commission ("Commission" or "FEC") submits its Certificate as to Parties, Rulings, and Related Cases.

(A) ***Parties and Amici***. Laura Holmes and Paul Jost were the plaintiffs in the district court and are the plaintiffs in this en banc proceeding pursuant to 52 U.S.C. § 30110. The Commission was the defendant in the district court and is the defendant in this Court. No parties participated as amici curiae in the district court. The Campaign Legal Center and Democracy 21 are participating as amici curiae in support of the Federal Election Commission in this Court.

(B) ***Rulings Under Review***. Under 52 U.S.C. § 30110, a district court certifies non-frivolous constitutional questions and makes factual findings but does not rule on the merits; the en banc appellate court answers those questions in the first instance. On June 29, 2016, United States District Judge Rosemary Collyer certified a First Amendment question together with the findings of fact made by the court in its decision of April 20, 2015. The certification appears in the Joint Appendix ("JA") at 197; the factual findings referenced therein appear at JA 142-59.

(C) ***Related Cases***. This case was previously before the en banc Court of Appeals as No. 14-5281 and remanded back to the district court by order of

January 30, 2015 (JA 59). It was subsequently before a panel of the Court of Appeals as No. 15-5120. That panel affirmed the district court's judgment declining to certify a Fifth Amendment question and reversed the district court's decisions not to certify a First Amendment question and to grant summary judgment to the Commission on plaintiffs' First Amendment claim.

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* Authorities upon which we chiefly rely are marked with an asterisk.

Statutes and Regulations

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GLOSSARY

BCRA	=	Bipartisan Campaign Reform Act
FEC	=	Federal Election Commission
FECA	=	Federal Election Campaign Act
JA	=	Joint Appendix

COUNTERSTATEMENT OF JURISDICTION

The district court had jurisdiction to review this action for eligibility for certification to the en banc Court of Appeals under 52 U.S.C. § 30110. *Wagner v. FEC*, 717 F.3d 1007, 1009 (D.C. Cir. 2013) (per curiam) ("*Wagner I*") (concluding that jurisdiction under the provision now codified at 52 U.S.C. § 30110 is mandatory for persons therein enumerated who seek to initiate constitutional challenges to the Federal Election Campaign Act as plaintiffs). On June 29, 2016, the district court certified a First Amendment question and findings of fact to this en banc Court for its consideration in the first instance. (Joint Appendix ("JA") 197.) This Court has jurisdiction under 52 U.S.C. § 30110.

COUNTERSTATEMENT OF ISSUES PRESENTED

The district court certified one constitutional question:

> "When federal law limits individual contributors to giving $2,600 to a candidate for use in the primary election and $2,600 to a candidate for use in the general election and denies Plaintiffs the ability to give $5,200 to a candidate solely for use in the general election, does it violate Plaintiffs' rights of freedom to associate guaranteed by the First Amendment, U.S. Const. amend. I?"

(JA 197.)[1]

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[1] Although the parties agree that this Court has jurisdiction to decide the constitutional question certified by the district court (Pls.' Br. at 1), and that "this case does not present a true appeal" (*id.* at ii), plaintiffs' argumentative "Statement of Issues" (*id.* at 1) improperly departs from the question certified by the district court.

APPLICABLE STATUTES AND REGULATIONS

Portions of the relevant provisions are included in Plaintiffs' Opening Brief at pp. 1-5, and supplemented below.

52 U.S.C. § 30101(1)

When used in th[e] Act:
(1) The term "election" means —
(A) a general, special, primary, or runoff election;
(B) a convention or caucus of a political party which has authority to nominate a candidate;
(C) a primary election held for the selection of delegates to a national nominating convention of a political party; and
(D) a primary election held for the expression of a preference for the nomination of individuals for election to the office of President.

COUNTERSTATEMENT OF THE CASE

I. STATUTORY AND REGULATORY BACKGROUND

A. Congress's Original Enactment of Per-Year Limits on Contributions to Candidates

Limits on contributions to candidates have been a principal tool for preventing political corruption in this country for over seventy-five years. (*See* JA 142-43 ¶ 3.) In the first half of the twentieth century, Congress grew particularly concerned about corruption arising from contributions to candidate campaigns and political parties. In 1939, Congress passed S. 1871, officially titled "An Act to Prevent Pernicious Political Activities" and commonly referred to as the Hatch Act. (*Id.* (citing S. Rep. No. 101-165, at *18 (1939)).) Congress established individual contribution limits in the 1940 amendments to the Hatch Act, which

prohibited "any person, directly or indirectly" from making "contributions in an aggregate amount in excess of $5,000, during any calendar year" to any federal candidate. (*Id.* (internal quotation marks omitted).) The limit was sponsored by Senator John H. Bankhead, who stated that "[w]e all know that large contributions to political campaigns . . . put the political party under obligation to the large contributors, who demand pay in the way of legislation." 86 Cong. Rec. 2720 (1940) (statement of Sen. Bankhead).

B. FECA's Per-Election Limit on Contributions to Candidates

By 1971, when Congress enacted the Federal Election Campaign Act ("FECA" or "Act"), the $5,000 individual contribution limit was being "'routinely circumvented.'" (JA 143 ¶ 4 (quoting 117 Cong. Rec. 43,410 (1971) (statement of Rep. Abzug)); *see* JA 143-44 ¶ 5 (describing congressional findings regarding such circumvention).) In 1974, shortly after the Watergate scandal, Congress substantially revised FECA, adding to it, *inter alia*, a $1,000 per-candidate, per-election limit on individual contributions to candidates and their authorized political committees. (JA 144 ¶ 6 (citing Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 101(b)(3), 88 Stat. 1263).)

The contribution limit challenged here applies on a per-candidate, per-election basis, with "election" defined to include, *inter alia*, general, primary, runoff, and special elections, as well as political party conventions and caucuses.

52 U.S.C. § 30101(1); JA 144 ¶ 8. FECA's individual contribution limit applies separately for each election, except that the contests in various states when presidential candidates are seeking their party's nomination are treated as a single election. (JA 144-45 ¶ 8 (citing 52 U.S.C. § 30116(a)(1)(A), (a)(6)).)

C. The Supreme Court's Decision Affirming the Constitutionality of FECA's Per-Election Contribution Limit

Shortly after Congress passed the 1974 FECA amendments, the Supreme Court, in *Buckley v. Valeo*, affirmed the constitutionality of the individual, per-election limit against both First Amendment and Fifth Amendment equal protection challenges. 424 U.S. 1, 29, 35 (1976) (per curiam). Most relevant here, the Court found that a contribution limit only "marginal[ly]" restricts a contributor's First Amendment rights and therefore applied intermediate, or "closely drawn," scrutiny. *Id.* at 20-21, 25. The Court upheld FECA's per-election limit against the First Amendment challenge, finding that it furthered the government's important interests in limiting actual and apparent corruption, both of which threaten to undermine "the integrity of our system of representative democracy." *Id.* at 23-29.

The *Buckley* Court also found that the then-$1,000 per-election contribution limit was not unconstitutionally overbroad, rejecting an argument that the limit was "unrealistically low" and holding that judicial review of the amount at which limits are set is very narrow. *Id.* at 30. The Court explained that if Congress decides that

"some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000." *Id.* (internal quotation marks omitted).[2]

D. FECA's Current Per-Election Contribution Limit

The Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 ("BCRA"), subsequently amended FECA to raise the per-election limit and index it for inflation. (JA 145 ¶ 9 (citing BCRA § 307(b), (d), 116 Stat. 102-103 (codified at 52 U.S.C. § 30116(a)(3), (c))).) The indexed limit that applied to contributions made to federal candidates during the 2013-2014 election cycle, including the contributions at issue in this case, was $2,600 per candidate, per election. (JA 145 ¶ 10 (citing FEC, *Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold*, 78 Fed. Reg. 8530, 8532 (Feb. 6, 2013)).)

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[2] In addition to these holdings, the Supreme Court in *Buckley* also rejected a Fifth Amendment equal protection challenge to FECA's per-election contribution limit. The Court observed that FECA "applies the same limitations on contributions to all candidates" and stated that "[a]bsent record evidence of invidious discrimination . . . a court should generally be hesitant to invalidate legislation which on its face imposes evenhanded restrictions." 424 U.S. at 31. The Court explained that "the danger of corruption and the appearance of corruption apply with equal force to challengers and to incumbents" and accordingly found that "Congress had ample justification for imposing the same fundraising constraints upon both." *Id.* at 33.

As the district court's factual findings explain, "[b]ecause FECA defines 'election' to include various types of electoral contests, the total amount that an individual may contribute to a particular candidate during a particular election cycle depends on the number of elections in which that candidate participates to pursue the federal office being sought." (JA 145 ¶ 11.) "[A]n individual who supported a candidate who participated in one primary election and one general election during the 2013-2014 election cycle was permitted to contribute a total of $5,200 to that candidate — $2,600 for the candidate's primary-election campaign and $2,600 for the candidate's general-election campaign." (*Id.* at 145-46 ¶ 11.) "In an election cycle in which a candidate competes in one or more runoffs, special elections, or a political party caucus or convention, in addition to a primary and general election, the total amount that an individual may contribute to that candidate is higher." (*Id.* at 146 ¶ 12.)

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Parties

The FEC is the independent agency of the United States with exclusive jurisdiction over the administration, interpretation, and civil enforcement of FECA. 52 U.S.C. §§ 30106(b)(1), 30107(a)(8), 30109(a)(6), 30111(a)(8), (d); *see* JA 142 ¶ 2.

Plaintiffs Laura Holmes and Paul Jost ("Contributors") are a married couple residing in Miami, Florida, who supported certain candidates running in the November 2014 general congressional elections. (JA 142 ¶ 1, 157 ¶ 61, 158 ¶ 70.) Holmes and Jost chose not to make any contributions to those candidates' primary-election campaigns. (*Id.* at 157 ¶ 62, 158 ¶ 71.) But Holmes and Jost wished to contribute the maximum amounts then permitted for primary and general-election campaigns combined — $5,200 — "entirely for the general election." (*See id.* at 14 (Compl. ¶ 26).) In other words, they sought to make general-election contributions in amounts that were double FECA's per-election limit. (*Id.* at 158 ¶¶ 67-68, 159 ¶¶ 74-75.)

Holmes supported Carl DeMaio, a candidate who sought to represent California's Congressional District 52. (JA 157 ¶ 61.) Under California's "Top Two" primary system, all candidates for United States congressional offices are listed on the same primary ballot and the two candidates that receive the most votes, regardless of party preference, proceed to compete in the general election. (*Id.* at 152 ¶ 36.) Four candidates were listed on the ballot for California's June 3, 2014 congressional primary election: Carl DeMaio, incumbent Representative Scott Peters, and two other candidates. (*Id.* at 157 ¶ 63.) DeMaio and Peters thus each faced three candidates in the primary, including each other. (*Id.*) Ultimately, Peters and DeMaio received the most votes and were the "top two" finishers in the

primary. (*Id.* ¶¶ 64-65) DeMaio later lost the general election to Peters. (*Id.* at 158 ¶ 69.)

Holmes chose not to make a primary-election contribution to DeMaio but contributed $2,600 to DeMaio's general-election campaign. (JA 157 ¶ 62; *id* at 158 ¶ 67.) Holmes sought to contribute an additional $2,600 to DeMaio's general-election campaign, so that her total contributions in support of DeMaio's general-election campaign would have amounted to $5,200, twice the statutory limit at the time. (*Id.* ¶ 68.)

Jost supported Mariannette Miller-Meeks, a candidate who sought to represent Iowa's Second Congressional District. (JA 158 ¶ 70.) Miller-Meeks won her 2014 primary election but lost in the general election to incumbent Representative David Loebsack. (*Id.* at 159 ¶¶ 72, 73, 76.) Jost chose not to make a primary contribution to Miller-Meeks, but contributed $2,600 to that candidate's general-election campaign. (*Id.* 158 ¶ 71; *id.* at 159 ¶ 74.) Jost sought to contribute an additional $2,600 to Miller-Meeks's general-election campaign, so that his total contributions in support of Miller-Meeks's general-election campaign would have amounted to $5,200, twice the statutory limit at the time. (*Id.* 159 ¶ 75.)

Contributors have previously averred that they plan to make similar contributions in future election cycles. (JA 163.)

B. Procedural History

1. Preliminary District Court Proceedings

Contributors filed their complaint challenging FECA's per-election contribution limit on July 21, 2014 (JA 8-26), and subsequently moved to preliminarily enjoin the FEC from enforcing FECA's $2,600 per-election limit "as-applied" to their desired $5,200 general-election contributions.

On October 20, 2014, the district court denied Contributors' motion for a preliminary injunction, finding that they were unlikely to succeed on the merits. (JA 38-52.) The court explained that their "wish [was] to contribute $5,200 to the general election alone, as opposed to the $2,600 deemed appropriate by Congress," and they therefore challenged "the specific base limit on how much an individual may contribute per election." (*Id.* at 45 n.5.) The court concluded that such a challenge is foreclosed by Supreme Court precedent, and that the court did not have the "luxury" of overruling "*Buckley v. Valeo* and its progeny." (*Id.* at 38.) Contributors did not appeal the district court's denial of their preliminary injunction motion.

On November 12, 2014, the district court issued its initial decision on Contributors' request for certification of constitutional questions to the en banc Court of Appeals pursuant to 52 U.S.C. § 30110. The court indicated some uncertainty at that time about whether district courts possess a screening role in

cases brought under 52 U.S.C. § 30110 and so, "in an abundance of caution," it certified two constitutional questions for en banc consideration, along with two dozen findings of fact. (JA 53-59.) The Commission filed a motion in this Court for remand so that a record could be developed, the Commission could have an opportunity to be heard on the district court's findings of fact, and the district court could perform its gatekeeping role of determining whether a constitutional question should be certified to this Court sitting en banc. *See* FEC's Mot. For Remand at 9-16, *Holmes v. FEC*, No. 14-5281 (D.C. Cir. Jan. 2, 2015), Doc. # 1529989.[3]

On January 30, 2015, in an en banc order, this Court remanded the case to the district court with instructions to "provide the parties an opportunity to develop, by expedited discovery or otherwise, the factual record" and "complete the functions mandated by section 30110 and described [by this Court] in *Wagner* [*I*, 717 F.3d at 1009]." (JA 60.) The three mandated functions are to "develop a record for appellate review by making findings of fact," "determine whether the constitutional challenges are frivolous or involve settled legal questions," and

[3] Contributors' opening brief mischaracterizes the Commission's arguments in support of the agency's remand request by omitting the third reason listed above. (Pls.' Br. at 7-8, 10 n.6.)

"certify the record and any non-frivolous constitutional questions to the en banc court of appeals." *Wagner I*, 717 F.3d at 1009.[4]

On remand, the parties each proposed findings of fact and submitted briefs regarding whether any questions should be certified for en banc consideration. On April 20, 2015, the district court issued its order and opinion setting forth 76 findings of fact, declining to certify any constitutional questions, and granting summary judgment to the Commission. (JA 138-182.) The district court concluded that Contributors' First and Fifth Amendment claims both challenged issues of settled law and rejected what the court described as Contributors' "veiled attack on the contribution limit set by Congress and upheld by the Supreme Court as a legitimate means to combat corruption." (*Id.* at 139.)

2. Appeal of the District Court's April 2015 Certification Decision

On April 26, 2016, a two-judge panel of this Court reversed the district court's decisions not to certify the question related to Contributors' First Amendment claim and to award summary judgment to the Commission on that claim (*id.* at 184-96), and it affirmed the portion of the decision below declining to certify Contributors' Fifth Amendment equal protection question (JA 194-96).

[4] By omitting the order to complete the functions described in *Wagner*, Contributors' description of this Court's remand order is also incomplete. (*See* Pls.' Br. at 10 n.6 (referencing only the court's order to develop a factual record).)

Chief Judge Garland was a member of the panel for the appellate argument but did not participate in the panel's opinion. (*Id.* at 184.)

The panel's opinion, written by Senior Circuit Judge Randolph and joined by Judge Henderson, relied on *Shapiro v. McManus*, 136 S. Ct. 450 (2015), a decision the Supreme Court had handed down after the district court issued its decision not to certify constitutional questions in this case. *Shapiro* clarified the analogous standard that district courts must apply in determining whether a three-judge court must be convened under 28 U.S.C. § 2284. The panel opinion here concluded that the role of a district court under section 30110 is similar to the single-judge district court's role under 28 U.S.C. § 2284 — i.e., the court may decline to certify a constitutional question that is "'wholly insubstantial,' 'obviously frivolous,' and 'obviously without merit.'" (JA 188 (quoting *Shapiro*, 136 S. Ct. at 456).)

The panel concluded that Contributors' First Amendment challenge cleared that "'low bar'" and thus should have been certified for a determination on the merits by this en banc Court. (JA 188-89.) The Court expressly declined to "take sides on the merits of the dispute." (JA 189.)

In reaching its conclusion that Contributors' First Amendment question should have been certified, the panel viewed as "dicta" this Court's mandate in *Wagner I*, that in performing the district court's screening function under section

30110, a "'district court must determine whether the constitutional challenges are frivolous or involve settled legal questions.'" JA 189 n.5 (discussing *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 192 n.14 (1981) and quoting *Wagner I*, 717 F.3d at 1009); *see supra* pp. 10-11. The panel found that the district court in this case had erred by declining to certify constitutional questions on the basis that the questions presented had been settled by the Supreme Court. (JA 192 ("We therefore do not think a district court may decline to certify a constitutional question simply because the plaintiff is arguing against Supreme Court precedent so long as the plaintiff mounts a non-frivolous argument in favor of overturning that precedent.").) The panel opinion did not explicitly explain how that holding is consistent with *Wagner I* and this en banc Court's remand order, *see* JA 60; *supra* pp.10-11. In any event, the panel also concluded that the "per-election structure" of FECA's contribution limit received too little attention by the Supreme Court to render the First Amendment question here sufficiently "settled" so as to preclude certification. (JA 193.)

With respect to Contributors' Fifth Amendment claim, however, the panel found that claim to be "so clearly a challenge to [FEC] regulations, and therefore outside the scope of § 30110, that it 'fail[s] to raise a substantial federal question for jurisdictional purposes.'" (JA 194 (quoting *Shapiro*, 136 S. Ct. at 455); *see id.* 195 (explaining that section 30110 provides only for certification of "questions of

constitutionality *of this Act*").) The Court of Appeals explained that although Holmes and Jost "frame their Fifth Amendment contention as a 'challenge to the . . . timing of [the Act's] contribution limits," and they "focus on the *timing* of contributions and on candidates' ability to *transfer* campaign funds," "the Act is silent on both subjects." (JA 195 (alterations by the Court).) The panel clarified that FECA "merely sets contribution limits and applies those limits on a per-election basis." (*Id.*)

SUMMARY OF ARGUMENT

For decades, FECA has imposed limits on the amount of money an individual may contribute to a federal candidate in connection with each election in which that candidate participates. During the 2013-2014 election cycle, the Act permitted individuals to contribute up to $2,600 per candidate, per election. Thus, an individual who sought to contribute to a candidate who ran in one primary and one general election during that election cycle could legally contribute $2,600 to that candidate for each of those elections, for a combined total of $5,200. For a candidate who also competed in one or more special elections or runoff contests, the combined total amount that an individual could contribute over the course of a single election cycle was higher.

As the Supreme Court determined more than forty years ago in *Buckley*, contribution limits are subject to "closely drawn" intermediate scrutiny because

they impose only a "marginal restriction" on contributors' First Amendment rights. Under that standard, contribution limits must further important government interests and employ means proportionate to the asserted interests to be upheld. The Court in *Buckley* also established a general rule, which it has since reaffirmed, that it is not the role of courts to second-guess Congress's judgment regarding the appropriate dollar figure at which to set a contribution limit.

FECA's per-election contribution limit furthers the government's important interests in preventing actual and apparent corruption. That was another conclusion in *Buckley* that the Court has continually reiterated. It has even observed that these anticorruption interests may be viewed as compelling.

FECA's contribution limit is also closely drawn. By applying separately to each election within a particular election cycle, the limit sensibly accounts for distinctions between primary and general elections, as well as variations in election procedures among the states. It minimizes the risk and appearance of corruption while at the same time ensuring that candidates have sufficient resources for advocacy in each election contest in which they participate. The conclusion that FECA's per-election limit is closely drawn is, yet again, a holding in *Buckley* that the Supreme Court has reaffirmed a number of times, including in its 2014 decision in *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014). In fact, a per-election basis is a *positive indicator* that a legislature has closely drawn a contribution limit.

In contrast, the Supreme Court noted in *Randall v. Sorrell*, 548 U.S. 230 (2006), that limiting contributions per election cycle, as Contributors prefer, is a danger sign that a limit may not be closely drawn.

This case is a thinly veiled attempt to relitigate these well-settled holdings. Contributors are two individuals who wished to make double-the-limit general-election contributions to certain federal candidates, while at the same time seeking to prevent those candidates from using the contributions in a way the Contributors considered to be "wasted" on those candidates' primary elections (Pls.' Br. at 25). Contributors attempt to escape the dispositive effect of Supreme Court precedent on their legal arguments by characterizing this case as a novel, as-applied challenge to the supposed "bifurcated structure" of FECA's per-election limit. (*E.g.*, Pls.' Br. at 22 n.11.) But no such bifurcation exists and Contributors' factually inaccurate *characterization* of FECA's unambiguous provisions does not demonstrate otherwise. The Act applies to a variety of electoral contests beyond primary and general elections and plainly does not set a single, "bifurcated" limit, as the district court's undisputed factual findings illustrate. Contributors' mischaracterization of the provision they challenge does not render their First Amendment claim "novel."

Nor is Contributors' challenge "as applied," because the relief they request necessarily reaches beyond their own alleged circumstances. As the district court

correctly determined when it denied Contributors' preliminary injunction motion, Holmes and Jost "challenge the analysis and conclusion of the Supreme Court in *Buckley v. Valeo* and its progeny," which preclude Contributors from claiming a right to make general-election contributions in amounts that are double FECA's per-election limit. (JA 38, 44-46.)

Contributors' First Amendment challenge fails for the additional and independent reason that their alleged injuries are entirely self-imposed. Holmes and Jost admit that they *chose* not to exercise their First Amendment rights to the full extent permitted by FECA, because they preferred *not* to associate with their favored candidates until after those candidates' primary elections (Pls.' Br. at 25). That personal choice is not a constitutional injury.

Contributors' request for a court-ordered modification of the structure and amount of FECA's longstanding per-election limit on individual contributions to candidates presents no ground for departing from well-settled, binding precedents and must be rejected.

ARGUMENT

I. STANDARD OF REVIEW

In this case, Contributors ask the Court to answer a constitutional question certified pursuant to 52 U.S.C. § 30110. Under that provision, the Court decides the merits in the first instance; no judgment of the district court is under review.

See Wagner I, 717 F.3d at 1011. The district court's findings of fact "may not be set aside unless clearly erroneous." *Bailey v. Fed. Nat'l Mortg. Ass'n*, 209 F.3d 740, 743 (D.C. Cir. 2000). Contributors have not challenged any of the district court's factual findings.

II. THE PER-ELECTION CONTRIBUTION LIMIT STATISFIES FIRST AMENDMENT SCRUTINY

A. Contribution Limits Are Subject to Intermediate Scrutiny

Contribution limits are subject to a lesser standard of constitutional scrutiny than restrictions on expenditures, as Contributors themselves recognize. (Pls.' Br. 11.) Contribution limits "'entail[] only a marginal restriction upon the contributor's ability to engage in free communication'" and "'may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms.'" JA 43 (denying preliminary injunction and quoting *Buckley*, 424 U.S. at 20-21, 25).

The Supreme Court applies this more deferential standard of review because contributions "lie closer to the edges than to the core of political expression," *FEC v. Beaumont*, 539 U.S. 146, 161 (2003), in contrast to laws limiting campaign expenditures, which "impose significantly more severe restrictions on protected freedoms of political expression and association," *Buckley*, 424 U.S. at 23. As the Court has explained, "[t]he 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." *Buckley*, 424 U.S. at 21. "A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication." *Id.* Contribution limits "'permit[] the symbolic expression of support evidenced by a contribution but do[] not in any way infringe the contributor's freedom to discuss candidates and issues.'" *McCutcheon*, 134 S. Ct. at 1444 (quoting *Buckley*, 424 U.S. at 21; alterations in *McCutcheon*).[5] A contribution limit thus need not pass the strict scrutiny test of being upheld only if it "promotes a compelling interest and is the least restrictive means to further the articulated interest." *McCutcheon*, 134 S. Ct. at 1444; *accord* Pls.' Br. 11. "'Even a significant interference with protected rights of political association may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms.'" *McCutcheon*, 134 S. Ct. at 1444 (quoting *Buckley*, 424 U.S. at 25; internal quotations marks from *Buckley* omitted).

[5] The plurality opinion authored by Chief Justice Roberts is "the holding of the Court" because it rests on narrower grounds than Justice Thomas's opinion concurring in the judgment. *Marks v. United States*, 430 U.S. 188, 193 (1977) (citation and internal quotation marks omitted).

B. The Government's Important Anticorruption Interests Justify FECA's Per-Election Contribution Limit

The Supreme Court in *Buckley* found that the then-$1,000 per-election contribution limit that is the subject of this litigation furthers the important governmental interests of preventing "the actuality and appearance of corruption resulting from large individual financial contributions." 424 U.S. at 26.

More specifically, the Court identified two "weighty interests" that justify the per-election limit on individual contributions to candidates. *Id.* at 29. First, the limit reduces the opportunity to use large contributions "to secure a political quid pro quo from current and potential office holders." *Id.* at 26. Although "the scope of such pernicious practices can never be reliably ascertained," the Court observed that "the deeply disturbing examples surfacing after the 1972 election demonstrate that the problem is not an illusory one." *Id.* at 27. The Court also recognized that "the integrity of our system of representative democracy is undermined" by such corrupt arrangements. *Id.* at 26-27.

Second, and "[o]f almost equal concern," the individual limit reduces "the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions." *Buckley*, 424 U.S. at 27. "Congress," the Court reasoned, "could legitimately conclude that the avoidance of the appearance of improper influence is . . . critical, if confidence

in the system of representative Government is not to be eroded to a disastrous extent." *Id.* (internal quotation marks, ellipsis, and citation omitted).

Contributors appear to suggest (Pls.' Br. at 14-16) that the Supreme Court's decisions in *McCutcheon* and *McDonnell v. United States*, 136 S. Ct. 2355 (2016), have narrowed which government interests are permissible in order for contribution limits to satisfy constitutional scrutiny — i.e., that a contribution limit may be upheld only if it "'target[s] [the] direct exchange of an official act for money.'" (Pls.' Br. at 15 (relying on an incomplete quotation from *McCutcheon*, 134 S. Ct. at 1441).) Those decisions say no such thing. Indeed, the very sentences that Contributors quote from *McCutcheon* include language, which Contributors omitted, making clear that contribution limits may validly target not only "'*quid pro quo*' corruption" itself, but also "its appearance." 134 S. Ct. at 1441. The Court later reiterated that "[i[n addition to 'actual *quid pro quo* arrangements,' Congress may permissibly limit 'the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions' to particular candidates." *Id.* at 1450 (quoting *Buckley*, 424 U.S. at 27). Indeed, the *McCutcheon* plurality observed that the interests in limiting actual and apparent corruption served by the Act's contribution limits are not only substantial but "may properly be labeled compelling." *Id.* at 1445 (internal quotation marks omitted).

Nor does the Supreme Court's decision in *McDonnell*, an inapposite case concerning a criminal bribery statute, not FECA, alter the scope of anticorruption interests that undergird FECA's contribution limits, including the per-election limit obliquely challenged here. *McDonnell* involved "the proper interpretation of the term 'official act'" in 18 U.S.C. § 201(a)(3), the federal criminal bribery statute that the parties had agreed would define elements of the government's criminal charges against former Virginia Governor Bob McDonnell. 136 S. Ct. at 2361, 2367. The context of that decision — interpretation of a different statute, in a criminal prosecution requiring proof beyond a reasonable doubt, and in which the jury received erroneous instructions — is readily distinguishable from the instant constitutional challenge to a civil contribution limit. Tellingly, the *McDonnell* opinion did not cite a single campaign finance decision.

As the Supreme Court has consistently explained, the corruption concerns addressed by FECA's contribution limits extend beyond the criminal quid pro quos of the type at issue in *McDonnell*. *E.g.*, *Citizens United v. FEC*, 558 U.S. 310, 356-57 (2010) (observing that the actual "practices *Buckley* noted would be covered by bribery laws," citing 18 U.S.C. § 201, and explaining that "restrictions on direct contributions are preventative . . . in order to ensure against the reality or appearance of corruption") (internal citations omitted); *Buckley*, 424 U.S. at 27-28 ("Congress was surely entitled to conclude . . . that contribution ceilings were a

necessary legislative concomitant to deal with the reality *or appearance* of corruption" (emphasis added)).

Finally, Contributors' insistence that the Commission must "demonstrate that FECA's bifurcated system of contribution limits is targeted toward a risk of corruption that is not already addressed by the contribution limits in general" (Pls.' Br. at 16) makes no sense. FECA does not have any "bifurcated system of contribution limits" and the Act's per-election limits are not separate from the statute's "contribution limits in general." *See infra* Part II.D. The supposedly separate categories of contribution limits that Contributors pretend to compare are one and the same.

The Supreme Court has repeatedly found that FECA's limit on contributions from individuals to candidates deters "the actuality and appearance of corruption resulting from large individual financial contributions." *Buckley*, 424 U.S. at 26; *see also Citizens United*, 558 U.S. at 359 (noting that contribution limits "have been an accepted means to prevent *quid pro quo* corruption"); *McConnell v. FEC*, 540 U.S. 93, 298 (2003) (Kennedy, J. concurring in the judgment in part and dissenting in part) (observing that *Buckley* recognized Congress's "interest in regulating the appearance of corruption that is 'inherent in a regime of large individual financial contributions'" (quoting *Buckley*, 424 U.S. at 27)), *overruled in part on other grounds by Citizens United*, 558 U.S. 310 (2010). Focusing in on

the limit's operation per election does not alter the important government interest that is furthered.

C. FECA's Per-Election Limit Is Closely Drawn

FECA's establishment of separate contribution limits for each election within an election cycle is a practical, reasonable, and fair means of furthering the government's important anticorruption interests. Far from demonstrating overbreadth or a departure from the stated purpose, it is one of the ways in which Congress drew the provision so that it closely serves the governmental objective.

Setting contribution limits on a per-election basis, as FECA does, fights corruption while also taking a targeted approach regarding the extent to which the limits restrict contributors' freedom of political association and ensuring that candidates are able to "'amass[] the resources necessary for effective advocacy.'" *Randall*, 548 U.S. at 247 (Breyer, J., plurality op.) (quoting *Buckley*, 424 U.S. at 21). The per-election limit allows individuals to make independent decisions whether to associate with a candidate in connection with each electoral contest in which the candidate participates, just as Holmes and Jost have done here. (*See* JA 44.) The separate contribution limits also account for the lack of uniformity in federal electoral contests — including the races in different political parties for the same particular office — and tie the amount of money that a particular candidate can receive (and that the candidate's supporters may contribute) to the number of

elections in which that candidate participates. Congress clearly recognized that being elected to a federal office may be the result of multiple, separate elections, including primary elections, which are, as the district court noted, "a necessary part of the election process." (JA 46.) "Intimately aware of the financial demands of a modern election campaign," as the district court further explained, "Congress has . . . maintained a per-person, per election contribution limitation." *Id.*

1. FECA's Limit Sensibly Distinguishes Between Primary and General Elections

FEC regulations and the district court's undisputed factual findings describe the distinct purposes of primary and general elections: primaries "serve the purpose of determining, in accordance with State law, which candidates are '*nominated* . . . for election to Federal office in a subsequent election.'" (JA 147 ¶ 17 (quoting 11 C.F.R. § 100.2(c)(1)) (emphasis added).) General elections, by contrast, are held to "'fill a vacancy in a Federal office . . . and . . . [are] intended to result in the final selection'" of the individual to serve in that office. (*Id.* ¶ 18 (quoting 11 C.F.R. § 100.2(b)(2).) Far from being essentially meaningless, as Contributors contend (*see, e.g.*, JA 12, 14 (Compl. ¶¶ 18, 26)), the Commission has enforced the separation between primary and general election financing on a number of occasions. JA 150-52 ¶¶ 29-34; *see also* Statement of Reasons in Support of Repayment Determination After Admin. Review, *In the Matter of Gary Johnson and Gary Johnson 2012, Inc.*, LRA 905, at 3, 15 (Apr. 5, 2016),

http://www.fec.gov/audits/2012/Gary_Johnson_2012_Inc/GovernorGaryJohnsonandGaryJohnson2012IncMemorandum.pdf (requiring repayment to the United States Treasury of $332,191 in public funds for primary election due to improper incurring of expenses in connection with general election).

Contributors' own stated intentions highlight the distinctions between primary and general elections: their claims arise out of their desire to associate with certain candidates *only* in connection with those candidates' general-election campaigns, and their corresponding desire *not* to associate with those candidates during their primary-election campaigns. (Pls.' Br. at 25 ("Plaintiffs have no desire to see their contributions wasted [on primary elections], preferring to support their party's ultimate nominees.").) Contributors' own actions thus directly undermine their repeated assertions that FECA's "distinction between primary and general elections" is "artificial." (JA 12, 14, 16, 17, 18 (Compl. ¶¶ 18, 26, 37, 40, 41).)

2. FECA Effectively Accommodates State-by-State Variations in Election Procedures

In addition to recognizing these distinctions between primary and general elections, FECA's per-election limits also "account for the lack of uniformity in federal electoral contests — including the races within different political parties for the same particular office," as the district court's factual findings demonstrate. (JA 152 ¶ 35.) Congress clearly recognized that being elected to a federal office may

be the result of multiple, separate elections, possibly including special and runoff elections, that are a necessary part of the election process. FECA thus defines "election" to include the various types of electoral contests, including "a general, special, primary, or runoff election," and a political party convention or caucus, that "has authority to nominate a candidate." 52 U.S.C. § 30101(1). By establishing separate limits for each of these contests, FECA imposes the same per-election limit on all candidates in each electoral contest in which they participate.

The lack of uniformity in states' electoral procedures is amply demonstrated in the district court's factual findings, which describe, *inter alia*, the regular occurrence of primary runoff elections in ten states under varying circumstances, open primary elections in other states, and special elections when necessary to fill a seat vacated by an incumbent who left office before completing his or her full term. (*See* JA 152-56 ¶¶ 35-58 (detailing frequency and identifying specific examples of electoral contests that included runoff and special elections over the past dozen years).)

In Louisiana, for example, no congressional primary election is held; the first election for candidates seeking federal office is the November general election. (JA 152-53 ¶ 37.) Only if no candidate wins a majority of the vote in the

November election does Louisiana hold a second, "runoff," election in December of the same year. (*Id.*)[6]

In Iowa, which is where one of Contributors' preferred candidates was running (JA 158 ¶ 70), if a party candidate fails to win his primary election by at least 35 percent of the vote, the primary election is deemed "inconclusive" and the candidates are selected by a political party convention, i.e., a separate electoral contest for which the candidates can receive contributions. JA 154 ¶ 45; Iowa Code § 43.52; *see* 52 U.S.C. § 30101(1)(B). This scenario occurred in 2014, when no Republican primary candidate for Iowa's Third Congressional District attained the required 35 percent of the vote and the party nominee was selected by the Iowa Republican Convention. (JA 120-21, 154 ¶ 45.)

FECA's per-election contribution limit thus sensibly permits a candidate who must participate in a primary, runoff, and general election within a single election cycle to receive a greater number of contributions from a particular contributor during that election cycle than candidates who participate only in one primary and one general election. (*See* JA 146 ¶ 12.)

[6] In 2014 no candidate won a majority of the vote in Louisiana's November 2014 election for U.S. Senate. The state thus held a second election on December 6, 2014. (JA 153 ¶ 38.)

3. Recent Examples Illustrate How FECA Closely Adheres to Its Purpose by Permitting Resources for Each Election Contest

A number of recent examples demonstrate how FECA's limit deters corruption while at the same time ensuring that candidate campaigns maintain sufficient resources to run effective campaigns.

During the 2013-2014 election cycle in Mississippi, six-term incumbent Mississippi Senator Thad Cochran failed to receive enough votes in the Mississippi Republican Senate primary election to avoid a runoff election against his primary opponent, Chris McDaniel. (JA 154 ¶ 44; *see also* JA 124-26, 129-31.) Travis Childers, on the other hand, won the Democratic primary by a sweeping margin and so avoided having to participate in a runoff. (JA 154 ¶ 44.) Uniform per-election-cycle limits such as those Contributors propose would have meant Senator Cochran and challenger Childers would have been permitted to receive the same amounts from contributors over the course of the election cycle. An election-cycle limit would have been less suited to those circumstances than a per-election limit given that Senator Cochran, but not challenger Childers, participated in an additional election — an expensive runoff race (*see* JA 124-25 (discussing spending on Republican senate primary)) — before proceeding to the general election.

Uniform election-cycle limits would have had a similarly disparate effect on the candidates competing in the United States Senate race in Georgia in 2008.

Whereas Democrat Jim Martin competed in both a primary and a primary runoff election before proceeding to the general election, the incumbent, Republican Senator Saxby Chambliss, did not have to participate in a runoff election after his primary.[7] Neither Martin nor Chambliss received a majority of the vote in the general election, and both then competed in a post-general-election runoff.[8] Per-election-cycle limits would have deprived Martin of the ability to receive additional contributions for his primary runoff campaign, and would have deprived both Martin and Chambliss of the ability to receive additional contributions to help finance their general-election runoff campaigns.

The single election-cycle limit proposed by Holmes and Jost would have similarly posed increased hardships on certain candidates in the current 2015-2016 election cycle. In Oklahoma's Fifth Congressional District, Democrat Al McAffrey had to win a primary runoff election to proceed to the general election.

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[7] Georgia Sec'y of State, *Georgia Election Results Official Results of the Tuesday, July 15, 2008 General Primary Election*, http://sos.ga.gov/elections/election_results/2008_0715/swfed.htm (last updated Sept. 25, 2008); Georgia Sec'y of State, *Georgia Election Results Official Results of the Tuesday, Aug. 05, 2008 Primary Election Runoff*, http://sos.ga.gov/elections/election_results/2008_0805/swall.htm (last updated Aug. 19, 2008).

[8] Georgia Sec'y of State, *Georgia Election Results Official Results of the Tuesday, Dec. 02, 2008 General Election Runoff*, http://sos.ga.gov/elections/election_results/2008_1202/003.htm (last updated Dec. 16, 2008).

His general-election opponent, incumbent Steve Russell, did not.[9] In Georgia's Third Congressional District, Republican Drew Ferguson had to participate in a primary runoff contest, while his general-election opponent, Democrat Angela Pendley, avoided a similar fate.[10] And in Texas's 18th Congressional District, Democratic incumbent Shelia Jackson Lee won her primary contest comfortably enough to avoid a primary runoff while Republican Lori Bartley did not.[11] If candidates who had to participate in an entire additional election contest to qualify for the general election — like Bartley, Ferguson, and McAffrey — were unable to

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[9] Oklahoma State Election Bd., *Special Legislative Races Runoff Primary Election — August 23, 2016*, https://www.ok.gov/elections/support/20160823_seb.html (last visited Sept. 13, 2016); Oklahoma State Election Bd., *Special Legislative Races Statewide Primary Election — June 28, 2016*, https://www.ok.gov/elections/support/20160628_seb.html (last visited Sept. 13, 2016).

[10] Georgia Sec'y of State, *Statewide Results General Primary and Nonpartisan General Election, May 24, 2016*, http://results.enr.clarityelections.com/GA/60041/174358/en/summary.html (last updated Jul. 29, 2016); Georgia Sec'y of State, *General Primary and Nonpartisan General Runoff, July 26, 2016*, Georgia Secretary of State, http://results.enr.clarityelections.com/GA/62848/174629/en/summary.html (last updated Aug. 5, 2016).

[11] Texas Sec'y of State, *2016 Republican Party Primary Runoff*, http://elections.sos.state.tx.us/elchist316_state.htm (last visited Sept. 13, 2016); *United States House of Representatives Elections in Texas, 2016*, https://ballotpedia.org/United_States_House_of_Representatives_elections_in_Texas,_2016 (last visited Sept. 13, 2016).

fund each election campaign separately, FECA would less effectively ensure the availability of sufficient resources while deterring corruption.

4. FECA Is Structured to Adapt When Special Elections Are Called

FECA's separate contribution limits for each election within a particular election cycle further account for the occurrence of special elections — including special primary, runoff, and general elections — which are held throughout the country, in accordance with state-specific procedures, in special circumstances such as when necessary to fill a seat prematurely vacated by an incumbent. (JA 155 ¶ 51.) Over the course of the last six election cycles, from the 2003-04 cycle through the 2013-14 cycle, there have been 126 special elections, averaging more than 21 per election cycle. (JA 155 ¶ 52.)

Notably, Contributors themselves have donated to candidates' special and runoff election campaigns. Between 2013 and 2014, for example, Contributors used FECA's per-election limits to maximize their election-cycle contributions to South Carolina Representative Marshall Sanford. (*See* JA 146-47 ¶¶ 13-16; JA 74 (Holmes Interrog. Resp. ¶ 5); JA 81 (Jost Interrog. Resp. ¶ 5).) Between March and November 2013, Holmes made contributions to Sanford for Congress, Sanford's authorized campaign committee, totaling $7,800. (JA 146-47 ¶ 15.) The $7,800 total consisted of $2,600 designated for each of Sanford's special runoff and special general election campaigns in 2013, and another $2,600 designated for

Sanford's 2014 primary election campaign. (*Id.*) Jost contributed the same amounts to the Sanford campaign committee in connection with each of those three elections. (JA 146-47 ¶¶ 15-16.) More recently, on June 9, 2014, Holmes and Jost each contributed $2,600 to each of Chris McDaniel's Mississippi Senate primary and primary runoff campaigns.[12]

5. FECA Is Well Matched to Its Purpose

The examples above, as well as data reflecting similar circumstances in numerous other electoral contests over the past dozen years (JA 152-56 ¶¶ 35-58), demonstrate that FECA's per-election limits operate in a manner that is well-matched to the congressional purpose and generally better matched than the uniform election-cycle limits Contributors advocate. Per-election limits, as the district court found, "allow[] candidates to compete fairly in each stage of the political process." JA 45 (denying motion for preliminary injunction); *compare Davis v. FEC*, 554 U.S. 724, 738 (2008) (stating that the Court has "never upheld the constitutionality of a law that imposes different contribution limits for

[12] *See* Friends of Chris McDaniel Second Quarter Report of Receipts and Disbursements, Schedule A (FEC Form 3), *available at*, http://docquery.fec.gov/cgi-bin/fecimg/?14020600949 (disclosing Contributors' contributions for McDaniel's primary runoff campaign); Friends of Chris McDaniel First Quarter Report of Receipts and Disbursements, Schedule A (FEC Form 3), *available at*, http://docquery.fec.gov/cgi-bin/fecimg/?15020094836 (disclosing Contributors' contributions for McDaniel's primary campaign); *see also* JA 125-26, 129-31 (describing 2014 Mississippi Senate primary runoff).

candidates who are competing against each other"). Like the determination as to the proper *amount* at which to set FECA's individual contribution limit, *see infra* pp. 38-40, the per-election *structure* of that limit reflects Congress's "particular expertise in matters related to the costs and nature of running for office." *Randall*, 548 U.S. at 248 (Breyer, J., plurality op.) (internal quotation marks omitted).[13] As the district court concluded in denying Contributors' preliminary injunction motion, Congress's establishment of separate contribution limits for each election "allow[s] expression of First Amendment associational rights in every election in which a candidate runs" and reflects "a quintessential political decision made by politicians who understand the process far better than the courts and is deserving of deference." (JA 45 (citing *Buckley*, 424 U.S. at 29-30).)

The Supreme Court in *Buckley* found that the then-$1,000 per-election contribution limit was "closely drawn" to the anticorruption purpose, explaining that "the weighty interests served by restricting the size of financial contributions to political candidates are sufficient to justify the limited effect upon First Amendment freedoms caused by the $1,000 contribution ceiling." *Id.* at 23-29. The Supreme Court has consistently reaffirmed *Buckley*'s holding that FECA's per-election contribution limit satisfies constitutional scrutiny. *See, e.g.*,

[13] The plurality opinion authored by Chief Justice Breyer is the holding of the Court because it rests on narrower grounds than the other opinions concurring in the judgment. *See supra* p. 19 n.5.

McCutcheon, 134 S. Ct. at 1451 (invalidating FECA's aggregate limits on contributions to candidates while emphasizing that the statute's individual, per-election limit on candidate contributions remains "undisturbed" and that the limit is "the primary means of regulating campaign contributions"); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 397-398 (2000) (upholding Missouri's individual contribution limits, ranging from $250 to $1,000, and noting that "[t]here is no reason in logic or evidence to doubt the sufficiency of *Buckley* to govern this case in support of the Missouri statute"); *cf. Citizens United*, 558 U.S. 310 at 359 (distinguishing independent expenditure restrictions from contribution limits, the latter of which, the Court explained, "have been an accepted means to prevent *quid pro quo* corruption"); *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 437-38, 465 (2001) (explaining the holding in *Buckley* that "the Act's limitations on contributions to a candidate's election campaign were generally constitutional" and upholding limits on party coordinated expenditures that are treated as contributions under FECA).

The per-election operation of the contribution limit offers no reason to deviate from these holdings. Indeed, rather than being preferred, the Supreme Court has indicated that a *per-cycle* limit on contributions to candidates is a "danger sign[]" of potential unconstitutionality as compared to limits that are set per election, precisely the *opposite* of plaintiffs' contentions here. *See Randall*,

548 U.S. at 249 (Breyer, J., plurality op.) (expressing concerns about a state election-cycle-based contribution limit); *see also id.* at 268 (Thomas, J., concurring) (discussing inequities created by election-cycle-based contribution limits and describing election-cycle structure as "constitutionally problematic"); *Lair v. Bullock*, 697 F.3d 1200, 1208 (9th Cir. 2012) (citing Justice Breyer's concern in *Randall* about "limits [that] are set per election cycle, rather than divided between primary and general elections" and upholding state limit partly because the challenged limits "apply to 'each election in a campaign'"); *cf. Davis*, 554 U.S. at 738 (stating that the Court has "never upheld the constitutionality of a law that imposes different contribution limits for candidates who are competing against each other").

Congress permissibly established contribution limits to deter corruption and its choice to impose the limit per election demonstrates that FECA is closely drawn. The per-election basis helps to ensure that the limit does not prevent candidates from "'amassing the resources necessary for effective advocacy'" in each election in which they participate, *Randall*, 548 U.S. at 247 (quoting *Buckley*, 424 U.S. at 21), while "allowing candidates to compete fairly in each stage of the political process." (JA 45.)

D. FECA Contains No "Bifurcated" Election-Cycle Limit

As described above, FECA's unambiguous statutory language, the district court's undisputed factual findings, and Contributors' own first-hand experience with making contributions to candidates' special and runoff election campaigns collectively highlight the falsity of Contributors' basic premise. Despite Contributors' repetitious insistence to the contrary (*e.g.*, JA 12, 14, 16, 17, 18 (Compl. ¶¶ 18, 26, 37, 40, 41); Pls.' Br. at 12, 13, 16, 17, 18, 20, 21, 22, 23, 24), FECA plainly does not establish a single, election-cycle limit that is "artificially bifurcated" or "divided" between primary and general elections.[14] In denying Contributors' motion for preliminary relief, the district court thus flatly rejected Contributors' "bifurcation" argument, explaining that FECA's "limit is not $5,200, as Plaintiffs would have it. The limit is $2,600 *per election* which might, if a run-off occurs, result in an authorized contribution of $7,800." (JA 45 n.5.)

[14] In addition to making clear that FECA's individual contribution limit applies to a variety of electoral contests besides regular primary and general elections, the plain language of the Act demonstrates that Congress can create an election-cycle (or calendar year) limit when that is what it intends. The aggregate limits that the Supreme Court struck down in *McCutcheon* were election-cycle limits. *See* 52 U.S.C. § 30116(a)(3) ("During the period which begins on January 1 of an odd-numbered year and ends on December 31 of the next even-numbered year, no individual may make contributions aggregating . . ."); *see also* 52 U.S.C. § 30116(a)(1)(B)-(D) (setting calendar-year limits on contributions by persons to national party committees, state party committees, and other political committees).

Contributors do not even attempt to reconcile their "bifurcation" argument with the actual statutory language, the district court's factual findings, or even their own political contributions.

E. The Supreme Court Has Upheld the *Amount* of FECA's Per-Election Contribution Limit

Contributors claim that they "do not challenge the specific dollar amount Congress has chosen," and concede that "the Supreme Court has already addressed" that question when it upheld FECA's per-election limit. (Pls.' Br. at 12 & n.8.) But regardless of how Contributors chose to label their challenge, they brought this case claiming a right "to give $5,200 to their party's general-election nominee" exclusively for the candidate's general-election campaign — i.e., to make a contribution in an amount that was double the per-election limit. (*Id.* at 6.) The district court, in denying Contributors' preliminary injunction motion, thus recognized that Contributors "are indeed objecting to the specific base limit on how much an individual may contribute per election." (JA 45 n.5.) This challenge is clearly contrary to *Buckley* and its progeny.

The *Buckley* Court held that FECA's then-$1,000 limit was not unconstitutionally overbroad and rejected an argument that the limit was "unrealistically low because much more than that amount would still not be enough to enable an unscrupulous contributor to exercise improper influence over a candidate or officeholder, especially in campaigns for statewide or national

office." 424 U.S. at 30. The Court explained that even if Congress could have done more "fine tuning" in setting the amount of the limit, its failure to do so did not render the limit unconstitutional. *Id.* Courts lack a "scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000. Such distinctions in degree become significant only when they can be said to amount to differences in kind." *Id.* (internal quotation marks and citation omitted). Contributors themselves concede that "greater judicial deference may be appropriate when reviewing the dollar amount of contribution limits." (Pls.' Br. at 12 n.8 (citing *Randall*, 548 U.S. at 248 (Breyer, J., plurality op.)).)

The Supreme Court has repeatedly reaffirmed *Buckley*'s general rule that courts do not second-guess Congress's decision regarding the exact dollar figure at which to set a contribution limit. *See Randall*, 548 U.S. at 248 (Breyer, J., plurality op.) ("In practice, the legislature is better equipped to make such empirical judgments, as legislators have particular expertise in matters related to the costs and nature of running for office. Thus ordinarily we have deferred to the legislature's determination of such matters." (internal quotation marks and citation omitted)); *Colo. Republican Fed. Campaign Comm.*, 533 U.S. at 446 ("[T]he dollar amount of the limit need not be 'fine tun[ed]' . . . ." (quoting *Shrink Missouri*, 528 U.S. at 387-88, alterations in original)); *cf. Davis*, 554 U.S. at 737 ("When contribution limits are challenged as too restrictive, we have extended a measure of

deference to the judgment of the legislative body that enacted the law." (citing *Randall*, *Shrink Missouri*, and *Buckley*)). In the lone instance where the Supreme Court invalidated a base contribution limit, the Court did so largely because the state contribution limits in question were so low it appeared they would "significantly restrict the amount of funding available for challengers to run competitive campaigns." *See Randall*, 548 U.S. at 253. Contributors have made no such allegation here and their desire to avoid what they call "wast[ing]" contributions on their preferred candidates' primary contests (Pls.' Br. 25) fails to demonstrate that the amount of FECA's per-election limits is constitutionally infirm.

III. CONTRIBUTORS LACK ANY AUTHORITY IN SUPPORT OF THEIR ASSERTED CONSTITUTIONAL RIGHT TO MAKE DOUBLE-THE-LIMIT GENERAL ELECTION CONTRIBUTIONS

A. Neither Congress Nor the Courts Have Recognized a First Amendment Right to Make a $5,200 Contribution for a Single Election

Contributors wrongly assert that because *combined* contributions up to $5,200 could constitutionally be donated over the course of the 2013-2014 election *cycle*, they must also have a constitutional right to contribute the combined $5,200 amount in connection with a *single election* within that cycle, and that both Congress and the Supreme Court have recognized that such a double-the-limit contribution would be "non-corrupting." (Pls.' Br. at 1, 6, 7, 8, 9, 12, 13, 18, 19.)

There is no factual or legal basis for those arguments. Neither Congress nor the Supreme Court has ever recognized an individual right to contribute $5,200 to a candidate *for a single election*. Nor has either ever suggested that such a contribution would not risk actual or apparent corruption.

1. McCutcheon *Does Not Support Contributors' Imagined $5,200 Election-Cycle Contribution Limit*

The Supreme Court's *McCutcheon* decision reaffirmed the constitutionality of FECA's per-election contribution limit and explicitly distinguished that limit from the *aggregate* contribution limits at issue in that case. 134 S. Ct. at 1451. *McCutcheon* supports the Commission's position, not Contributors'. Indeed, although the Court ultimately struck down FECA's aggregate limits on the total amounts that individuals can contribute to all candidates or committees within a particular time period, the Court explicitly left "undisturbed" the *per-election* limit at issue here, and emphasized that FECA's per-election "limits remain the primary means of regulating campaign contributions." *Id.* at 1451. In light of these explicit statements, Contributors' suggestion that *McCutcheon* undermined the heretofore constitutional limits recognized in *Buckley* and its progeny contravenes the principle that Courts do not strike down Congressional enactments or overrule precedent impliedly: "[T]h[e Supreme Court] does not normally overturn, or so dramatically limit, earlier authority *sub silentio*." *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000).

There is simply nothing in the *McCutcheon* opinion that supports Contributors' false characterization (Pls.' Br. 19) that "the Supreme Court has acknowledged[] that the relevant base limit here is $5,200." *McCutcheon* expressly recognized that FECA's individual "base" limits apply on a per-candidate, *per-election* basis. 134 S. Ct. at 1442 ("For the 2013-2014 election cycle, the base limits in the Federal Election Campaign Act . . . permit an individual to contribute up to $2,600 *per-election* to a candidate (*$5,200 total for the primary and general elections*)." (emphases added)); *see id.* at 1448 (explaining that FECA's aggregate limits prevented "an individual from fully contributing to the *primary and general election campaigns* of ten or more candidates" (emphasis added)).

Having calculated that the "total" limit on contributions to a candidate's primary *and* general election campaigns for the 2013-2014 election cycle was $5,200, the Court then proceeded throughout its opinion to refer collectively to FECA's separate limits for primary and general election contributions as the Act's "base" limit. That approach made sense in *McCutcheon*, which concerned the Act's *aggregate* limits on the *total* amount an individual could contribute to candidates and political committees during a particular election cycle. Contributors' assumption (Pls.' Br. at 20) that "[i]f . . . the individual, per-election limits . . . were relevant to the anticorruption interest, the *McCutcheon* court

would have conducted its analysis at the per-election level" is entirely unfounded and disregards the distinct issue that was before the Court in that case.

As the district court explained when it denied Contributors' motion for a preliminary injunction, "[t]he base limit of $5,200 imposed by Congress and upheld by the Court is the total allowable contribution limit for both primary and general elections, i.e., $2,600 each." (JA 45.) Nothing in the *McCutcheon* opinion even hints that Congress or the Court has determined that a higher, $5,200 general-election contribution would be "non-corrupting." (Pls.' Br. 19.) On the contrary, in making clear that *McCutcheon* did "not involve any challenge to the base limits," the Supreme Court stated that it "ha[d] previously upheld [such limits] as serving the permissible objective of combating corruption." 134 S. Ct. at 1442. The Court thus emphasized, in responding to criticism from the dissenting justices, that the individual, per-election limit remains "undisturbed" and "the primary means of regulating campaign contributions." *Id.* at 1451. The Supreme Court's actual discussion of FECA's individual per-election limit in *McCutcheon* thus belies Contributors' assertions (Pls.' Br. 19) that the Supreme Court recognized a single base contribution limit of $5,200, or that such an imagined base limit "was central" to its holding.

Indeed, Contributors try to have it both ways, arguing at one point that "the relevant base limit is $5,200" (Pls.' Br. 19), and at another point comparing the

combined per-election limits to "the unconstitutional *aggregate* limits at issue in *McCutcheon*" (*id* at 24 (emphasis added)). But the per-election limit is neither a $5,200 limit nor an aggregate limit. And because it is not the latter, the Commission is not required to make the absurd showing, suggested by Contributors (Pls.' Br. 24 n.12), that the per-election limit "help[s] fight circumvention" of itself.

Nor can Contributors establish that the danger of quid pro quos is removed entirely when contributions are made at or below FECA's limit. The limit serves to greatly reduce that danger but does not necessarily eliminate it. And Contributors have not demonstrated otherwise. Indeed, commentators have documented apparent quid pro quos involving contributions within limits, particularly on issues that are of low salience to voters. *See, e.g.*, Matthew Mosk, *Wicker's Earmark Elicits Criticism*, Wash. Post (Jan. 16, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/01/15/AR2008011503355.html (describing circumstances in which a United States Senator "obtained a $6 million earmark for a defense contractor whose executives were among his top campaign contributors"); Jerold J. Duquette, *Campaign Finance Reform in the Bay State: Is Cleanliness Really Next to Godliness?*, in *Money, Politics, and Campaign Finance Reform Law in the States* 160 (David Schultz ed., 2002) (describing a state commission's "particularly

disturbing" findings of a connection between lawful campaign contributions and the awarding of government contracts); Philip M. Stern, The Best Congress Money Can Buy 148-49 (1988) (describing circumstances in which a congressman who had initially "vigorously protested" a law that compensated billboard owners for signs that had been torn down pursuant to local laws later came to support the provision after receiving campaign contributions totaling over $12,000 from "the billboard industry and from individuals connected to it"). Contributors repeatedly quote the *McCutcheon* opinion's reference to contributions below base limits "not creat[ing] a cognizable risk of corruption," 134 S. Ct. at 1452, but that shorthand for Congress's linedrawing only spoke of "risk" and whether the "risk" was "cognizable." Though Congress sensibly drew the general line for permissible contributions where there was a more clearly identifiable risk, it does not follow that there is zero possibility of quid pro quos at lower amounts.

2. This Court's Certification Holding Is Not an Endorsement of Contributors' Constitutional Arguments

Contributors emphasize (Pls.' Br. at 13) that a panel of this Court, in reversing the district court's decision declining to certify Contributors' First Amendment question, found that the Supreme Court's discussion of the per-election structure of FECA's individual contribution limit in *Buckley* was too limited to preclude Contributors' First Amendment question from being certified under the "low bar" recognized in *Shapiro*, 136 S. Ct. at 456. (JA at 188, 192-93.)

In that decision, the panel explained that "[e]ven if the Supreme Court had 'contemplated and approved' the per-election contribution limit, as the district court thought, *that is not the proper standard under § 30110*.") (JA at 193 (emphasis added).) The Court's determination that Contributors' First Amendment claim is "not 'obviously frivolous' or 'obviously without merit'" is a far cry from an indication that Contributors' legal arguments have any merit. (*Id.* at 189 (quoting *Shapiro*, 136 S. Ct. at 456).) Indeed, the Court explicitly declined to evaluate the merits the parties' legal arguments, (*id.* ("We do not take sides on the merits of the dispute.")), and thus did not directly consider the legitimacy of Contributors' "bifurcation" argument or evaluate the merit of their unfounded interpretation of *McCutcheon*. As detailed throughout this memorandum, both arguments are factually inaccurate and legally baseless.

3. FEC Regulations Are Not at Issue Here and Do Not Support Contributors' Claimed Right to Make $5,200 Contributions for a Single Election

Contributors suggest (Pls.' Br. at 6-7) that the Court must recognize a constitutional right of individuals to make a $5,200 general-election contribution to a candidate because an FEC *regulation* permits a general-election candidate to spend unused primary contributions on his general-election campaign. This Court has already recognized, however, that Contributors' Fifth Amendment arguments, which were premised on the exact same FEC regulation, are not properly before

this en banc Court in this special proceeding pursuant to 52 U.S.C. § 30110. (JA 194-95.) As the Court of Appeals panel explained in affirming the district court's refusal to certify Contributors' Fifth Amendment question, although Holmes and Jost "frame their Fifth Amendment contention as a 'challenge to the . . . timing of [the Act's] contribution limits," and their court papers "do focus on the *timing* of contributions and on candidates' ability to *transfer* campaign funds," "the Act is silent on both subjects." (JA 195 (alterations by the Court).) The panel clarified that FECA "merely sets contribution limits and applies those limits on a per-election basis," and accordingly concluded that Contributors' objections based on the timing of contributions and candidates' ability to transfer campaign funds are in fact a challenge to "the Commission's regulations" and thus beyond the scope of this section 30110 action. (*Id.*)

Contributors did not seek further review of that determination, and it is now law of the case. *See, e.g.*, *Kimberlin v. Quinlan*, 199 F.3d 496, 500 (D.C. Cir. 1999) (explaining that under the law-of-the-case doctrine, a "'legal decision made at one stage of litigation, unchallenged in a subsequent appeal when the opportunity to do so existed, becomes the law of the case for future stages of the same litigation"); *Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 250 (D.C. Cir. 1987) (same). As such, it may not be challenged before this Court.

In any event, Contributors' suggestion (Pls.' Br. at 6-7, 20) that FEC regulations recognize a $5,200 individual contribution limit is plainly belied by the text of the regulatory provisions they cite, which implement the Act's per-election limit. Commission regulations do not authorize individuals to contribute $5,200 during the primary for the purpose of "covering general election expenses," as Holmes and Jost imply (Pls.' Br. 20). The regulation Contributors cite for this erroneous proposition, 11 C.F.R. § 110.1(b)(5)(ii)(B), permits authorized committees to accept $5,200 checks before the primary and redesignate *part* of that contribution to the general election account provided, *inter alia*, "[s]uch redesignation would not cause the contributor to exceed" any other limitation.

In addition, agency regulations permitting a general-election *candidate* some flexibility in deciding how to *spend* unused primary contributions clearly are not evidence that Congress or the Supreme Court has determined that allowing an *individual* to *contribute* $5,200 to a candidate for a single election campaign poses no risk of actual or apparent corruption.

B. This Is Not an As-Applied Challenge

Contributors seek to avoid the dispositive impact of *Buckley* and the Supreme Court's more recent decisions reaffirming the constitutionality of FECA's per-election contribution limit by labeling their challenge "as-applied." (*E.g.*, Pls.' Br. 11, 13, 21, 22 n.11.) That characterization is, however, plainly inaccurate. In

Doe v. Reed, the Supreme Court explained that whether a challenge is facial or as-applied depends on the requested relief: "The label is not what matters. The important point is that plaintiffs' claim and the relief that would follow . . . reach beyond the particular circumstances of these plaintiffs. They must therefore satisfy our standards for a facial challenge to the extent of that reach." 561 U.S. 186, 194 (2010); *see also Edwards v. Dist. of Columbia*, 755 F.3d 996, 1001 (D.C. Cir. 2014) (explaining that "the breadth of the remedy" determines whether a challenge is facial or as applied).

The relief Contributors seek here makes clear that this challenge is *not* an as applied one. They have requested "[a]n injunction barring enforcement of [FECA's] artificial bifurcation of individual candidate contributions." (JA 25 ¶ C.) Setting aside the factual inaccuracy of Contributors' characterization, such relief would necessarily "reach beyond the particular circumstances" alleged here. *Reed*, 561 U.S. at 194. Holmes and Jost fail to explain how a court *could* enjoin enforcement of FECA's per-election limit as applied only to their proposed 2014 general-election contributions, or to some unspecified future general-election contributions. They also fail to explain how this Court can provide the legislative type of remedy they claim to seek — the Court lacks the legislative authority to rewrite FECA's contribution limit provision in a manner that permits the combined election-cycle limits Contributors seek to make.

The Supreme Court has made clear that "a facial challenge must fail where the statute has a plainly legitimate sweep." *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (internal quotation marks omitted). *Buckley* and subsequent Supreme Court decisions establish that FECA's per-election limit has such a "sweep." Contributors' invention of a "novel" but factually inaccurate *characterization* of the same statutory provision the Supreme Court has already upheld is no basis for this Court to question the Supreme Court's directly applicable holdings.

In any event, even if this Court finds that Contributors' claims are "as applied," their arguments are still unavailing, for all the reasons detailed above. General-election contributions in amounts that are double the statutory limit, regardless of whether Contributors refrained from making primary contributions, raise the same concerns as similar contributions made by any other individuals in any campaign, including, for example, from individuals who *did* make primary-election contributions.

IV. CONTRIBUTORS' ALLEGED INJURIES WERE ENTIRELY SELF-IMPOSED

Contributors' First Amendment challenge is independently and fatally flawed for the additional reason that the alleged injury they claim resulted not from FECA's contribution limit but, instead, from their own voluntary choices. Holmes and Jost protest that "[t]hey simply want[ed] to associate fully with their preferred

candidate[s]" (Pls.' Br. 18), but they admit that, in fact, *they voluntarily chose not to do so* because they did not want "to see their contributions wasted" on those candidates' primary election campaigns (*id.* at 25). As the district court explained when it denied Contributors' preliminary injunction motion, Holmes and Jost "*chose* not to" support their preferred candidates to the full extent permitted by FECA "because of their belief that the money would be 'wasted in an intraparty squabble' as opposed to being used to fight the incumbent in the general election. That Plaintiffs elected not to exercise their right of free expression before the primary election does not render the law unconstitutional as applied." (J.A. 44 (quoting Pls.' Prelim. Inj. Mem. at 1).) Contrary to their assertion (Pls.' Br. 26), Contributors *are* "free to associate with candidates at a time of their own choosing," and, indeed, that is precisely what Holmes and Jost have done.

CONCLUSION

For the foregoing reasons, the Court should answer the certified question in the negative and reaffirm the constitutionality of the Act's individual per-election contribution limit.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 11,422 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

The brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P 32(a)(6) because the brief uses the proportionally spaced typeface Microsoft Word 14-point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of September, 2016, I electronically filed the Brief for Federal Election Commission with the Clerk of the United States Court of Appeals for the D.C. Circuit by using the Court's CM/ECF system. Service was made on the following through CM/ECF:

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I further certify that I also will cause the requisite number of paper copies of the brief to be filed with the Clerk.

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