IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LAURA HOLMES	)	
	)	
and	)	
	)	
PAUL JOST,	)	
	)	
Plaintiffs,	)	
	)	**No. 1:14-cv-01243-RMC**
v.	)	
	)	
FEDERAL ELECTION COMMISSION,	)	
	)	
Defendant.	)	

MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs Laura Holmes and Paul Jost, by and through undersigned counsel, hereby move this Court for a preliminary injunction prohibiting the Federal Election Commission ("FEC") from enforcing the bifurcated individual-to-candidate contribution limit codified at 2 U.S.C. §§ 441a(a)(1)(A) and 441a(a)(6).

As set forth in the accompanying Memorandum of Law in support of this Motion, Plaintiffs are likely to succeed on the merits of their constitutional claims. Plaintiffs will be irreparably harmed if the FEC enforces the bifurcated contribution limit against them, as that limit places an unconstitutional burden on their First and Fifth Amendment rights, and as the 2014 general election is fast approaching. Further, the public interest and the balance of equities favor the entrance of an injunction. Therefore, Plaintiffs satisfy the requirements for entry of a preliminary injunction.

Pursuant to LCvR 7(m) of this Court, on August 18, 2014, undersigned counsel conferred with counsel for the FEC via telephone. The FEC has indicated that it will oppose this motion.

Respectfully submitted this 20th day of August, 2014.

/s/ Allen Dickerson
Allen Dickerson, DC Bar No. 1003781
Center for Competitive Politics
124 S. West Street, Suite 201
Alexandria, VA 22314
Phone: 703.894.6800
Facsimile: 703.894.6811
adickerson@campaignfreedom.org

Counsel for Plaintiffs

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MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Allen Dickerson, DC Bar No. 1003781
Center for Competitive Politics
124 West Street South, Suite 201
Alexandria, Virginia 22314
Phone: 703.894.6800
Facsimile: 703.894.6811
adickerson@campaignfreedom.org

Counsel for Plaintiffs

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INTRODUCTION

Consider two individuals, Adam and Briana, who each seek to contribute in a Congressional election. Adam supports the incumbent, who faces no primary challenger, and Briana does not. Adam gives $5,200 before the primary election to the unchallenged incumbent, earmarking $2,600 for the primary and $2,600 for the general election. Briana waits out the challenging party's primary before contributing, because she wants her money to be used to fight the incumbent rather than being wasted in an intraparty squabble. The result is that the incumbent can use all of Adam's $5,200 contribution for general election purposes, while Briana can now only give $2,600 to the challenging party's nominee.

The Plaintiffs in this case closely mirror Briana is this example.

While Congress may limit the amount a particular individual gives to a particular candidate, its discretion in doing so is not limitless. Lacking "a scalpel to probe" such questions, *Buckley v. Valeo*, 424 U.S. 1, 30 (1976) (*per curiam*), courts will generally defer to the legislature's judgment of the permitted contribution amount. But courts do not rotely defer to any type of restriction the state chooses to impose. It is improper for contribution limits to be artificially divided in ways that are poorly tailored to the prevention of *quid pro quo* corruption or that provide advantages to certain types of candidates. Such schemes violate, respectively, the First and Fifth Amendments.

This is such a case. Congress has stated that an individual may give $5,200 to a candidate for both the general and primary elections, reasoning that such contributions are insufficient to corrupt the receiving candidate. Congress then conditioned that noncorrupting contribution on the timing of the gift: at least half must be given before the primary election, even if only by a day, and even if the entire $5,200 is used for the general election. Conversely, the entire $5,200 may *not* be given *after* the primary election, even if only by a day, and even though the same $5,200 will be used for the same general election.

Congress's per-election bifurcation of a noncorrupting contribution violates both common sense and the Constitution. It should be enjoined.

FACTS

The Federal Election Campaign Act ("FECA") limits monetary contributions to federal candidates. 2 U.S.C. § 441a(a)(1)(A) (2014). Individuals may give $2,600 to a candidate per election, with "election" defined to include "general, special, primary, or runoff" contests for federal office. 2 U.S.C. § 431(1)(A); 11 C.F.R. § 100.2 (defining "election"); FEC Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 78 Fed. Reg. 8530, 8532 (Feb. 16, 2013) (indexing contribution limit imposed by 2 U.S.C. § 441a(a)(1)(A)). Consequently, a separate contribution limit applies to primary and general election contests. 2 U.S.C. § 441a(a)(6) ("the limitations on contributions to a candidate imposed by paragraphs (1) and (2) of this subsection shall apply separately with respect to each election…”). If an individual wishes to give to a candidate for both the primary and general elections, she may give a total of $5,200.

Defendant Federal Election Commission (“FEC’) thoroughly regulates the giving of money for elections. *See* 11 C.F.R. § 110.1(b)(2) (explaining how to determine whether a contribution was earmarked for a specific election). Non-earmarked contributions are presumed to be for the “next election.” 11 C.F.R. § 110.1(b)(2)(ii). But money earmarked for the primary election and given before that election takes place may be used for the general election. Congressional Candidates and Committees, FEDERAL ELECTION COMMISSION at 21 (June 2014), http://www.fec.gov/pdf/candgui.pdf (“Nevertheless, the campaign of a candidate running in the general election may spend unused primary contributions for general election expenses”). By contrast, a contribution earmarked for an election that has already taken place may only be used to retire outstanding debts from that, prior election. 11 C.F.R. § 110.1(b)(3)(i)(A). That is, a contributor who gives $5,200 in earmarked contributions the day before a primary election may functionally give $5,200 for general election purposes. But if she sought to contribute the same amount the day *after* the primary, she would be limited to a single $2,600 contribution for the general election.

Plaintiffs Laura Holmes and Paul Jost are a married couple residing in Florida. Compl. at ¶ 8. Ms. Holmes and Mr. Jost each wish to financially support a candidate in the 2014 general election. *Id.* Both of their preferred candidates face opponents who did not have a significant challenger during their respective primary elections. *Id.* at ¶¶ 20, 23. Ms. Holmes has contributed $2,600 to Carl DeMaio, a general election candidate for California's 52nd Congressional District. *Id.* at ¶ 21. Mr. Jost has contributed $2,600 to Dr. Mariannette Miller-Meeks, a general election candidate seeking election in Iowa's Second Congressional District. *Id.* at ¶ 22. Ms. Holmes and Mr. Jost did not give to either candidate during the primary, and now each wishes to give an additional $2,600 to his or her preferred candidate. *Id.* at ¶¶ 21, 22. Allowing these contributions would merely put Plaintiffs on the same footing as contributors to their preferred candidates' opponents.[1]

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[1] Incumbent Representatives Scott Peters and David Loebsack—Mr. DeMaios' and Dr. Miller-Meeks' respective opponents—each received $2,600 general election contributions from supporters who also gave $2,600 for the primary. Details for Committee ID: C00503110, Itemized Individual Contributions–SCOTT PETERS FOR CONGRESS, FEC Campaign Finance Disclosure Portal, http://www.fec.gov/fecviewer/CandCmteTransaction.do (visited Aug. 19, 2014); Details for Committee ID C00414318, Itemized Individual Contributions–LOEBSACK FOR CONGRESS, FEC Campaign Finance Disclosure Portal, http://www.fec.gov/fecviewer/CandCmteTransaction.do (visited Aug. 19, 2014).

ARGUMENT

I. Standard for Preliminary Relief

In determining whether a preliminary injunction is appropriate, this Court considers four factors: (1) whether there is a substantial likelihood that the moving party will succeed on the merits, (2) whether the moving party will suffer irreparable injury if the Court does not grant the injunction, (3) whether the injunction would substantially injure other interested parties, and (4) whether the injunction is in the public interest. *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 11-12 (D.D.C. 2009) (citing *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006)). S*ee also Gordon v. Holder*, 632 F.3d 722, 724 (D.C. Cir. 2013) (applying these factors as articulated by the Supreme Court in *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008) ("A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest")).

This four-factor test is applied on a sliding scale. "If the showing in one area is particularly strong, an injunction may issue even if the showings [in other areas] are rather weak." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d at 297 (citation omitted).

II. There is a substantial likelihood that Plaintiffs will succeed on the merits of their claims.

When determining whether a preliminary injunction is appropriate, "the most critical" factor is the plaintiff's likelihood of success on the merits. *Carey v. FEC*, 791 F. Supp. 2d 121, 128 (D.D.C. 2011). Thus, we turn first to the merits of the two constitutional claims at issue: that the bifurcated contribution limit of 2 U.S.C. §§ 441a(a)(1)(A) and 441a(a)(6) violates Plaintiffs' constitutional rights under the First and Fifth Amendments.

The Supreme Court has long recognized that contribution limits "implicate fundamental First Amendment interests," especially the "right to associate." *Buckley v. Valeo*, 424 U.S. 1, 23, 25 (1976) (*per curiam*) (citing *NAACP v. Ala. ex rel Patterson*, 357 U.S. 449, 460-61 (1958)). Consequently, statutes limiting such contributions are subject to, at minimum, exacting scrutiny. The bifurcated contribution limit created by 2 U.S.C. §§ 441a(a)(1)(A) and 441a(a)(6) fails this test, because it is not closely drawn to a sufficiently important government interest. Consequently, Plaintiffs are likely to succeed on the merits of their First Amendment claim. The bifurcated contribution limit also allows certain political contributors to associate for a longer period of time and to a greater extent than others. Thus, the limit denies certain contributors—including Plaintiffs—equal protection of the laws. Furthermore, there is no link between this asymmetrical and discriminatory outcome and the elimination of political corruption. Plaintiffs are therefore also likely to succeed on the merits of their Fifth Amendment claim.

A. Courts must carefully scrutinize contribution restrictions to determine whether they are "closely drawn" to a sufficiently important governmental interest.

The Supreme Court's seminal campaign finance decision, *Buckley v. Valeo*, set the parameters for judicial scrutiny of laws that limit political activity. 424 U.S. 1. The opinion first distinguished between limits on expenditures and limits on contributions, while explicitly noting that both such limits "implicate fundamental First Amendment interests." *Id.* at 23. Nevertheless, the Court noted, "contribution limits impose a lesser restraint on political speech because they '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 v. FEC*, 134 S. Ct. 1434, 1444 (2014) (quoting *Buckley*, 424 U.S. at 21) (alterations in original). As a result, the *Buckley* Court found that "even a significant interference with protected rights of political association [including contribution limits] may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms." 424 U.S. at 25 (citations and quotation marks omitted) (alterations supplied).

Thus, it has been the law for nearly four decades that, in cases involving limits on political contributions, government "action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *Id.*; *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 207 (1982) (both citing *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460-61 (1958)). Returning to first principles, *Buckley* reiterated that "[t]he Court's decisions involving associational freedoms establish that the right of association is a basic constitutional freedom, that is closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society." 424 U.S. at 24-25 (citations and quotation marks omitted).

Thus, to determine whether it is constitutional to bifurcate the individual-to-candidate contribution limit, this Court "must assess the fit between the stated governmental objective and the means selected to achieve that objective." *McCutcheon v. FEC*, 134 S. Ct. at 1445. In other words, the means—in this case, the bifurcated limit—must be "closely drawn" to the ends. *Id.* at 1446*; see also McConnell v. FEC*, 540 U.S. 93, 144-45 (2003) (contribution limits are subject to "'heightened judicial scrutiny,'" as they impinge on protected freedoms of expression and association) (quoting *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 391 (2000)).

"Closely drawn" scrutiny involves a measure of deference to legislative determinations setting contribution limits. In upholding the state contribution limit at issue there, the *Shrink Missouri* Court observed that "[w]hile *Buckley*'s evidentiary showing exemplifies a sufficient justification for contribution limits, it does not speak to what may be necessary as a minimum." 528 U.S. at 391. The Court further noted that "*Buckley* upheld contribution limits as constitutional...noting the Court's 'deference to a congressional determination of the need for a prophylactic rule where the evil of potential corruption had long been recognized.'" *Id*. at 393, n. 5 (quoting *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 500 (1985)).

This deference, however, is not akin to *carte blanche* for a legislative body to limit political association in arbitrary or unconstitutional ways. *Nixon v. Shrink Missouri* clarified that, while it had found sufficient evidence to uphold the base limits at issue there, "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Id.* at 391. This ratcheted scale is particularly illuminating when it comes to scrutinizing the artificially bifurcated limit under 2 U.S.C. §§ 441a(a)(1)(A) and 441a(a)(6). Indeed, *Nixon v. Shrink Missouri* considered whether a state's limit on contributions to candidates was too low.[2] In other words, that case involved the mere existence of contribution limits as such, and whether they were set at an appropriate level, neither of which are "novel" questions. On the other hand, the issue here—which is the artificial bifurcation of a total contribution to a single candidate between the primary and general portions of an election cycle—does not merely reflect Congress's judgment that there should be *some* contribution limit set at some amount. Rather, it regulates the *manner* in which the base limit—the amount and existence of which Plaintiffs do not contest—must be given. This question *is* novel. Furthermore, the government's proffered justification is unlikely to be plausible; it must assert that the possibility of corruption systemically varies with whether or not a contribution is made before or after a primary election. Thus, the government must present more evidence than it has in the past in order to justify this restriction upon associational rights.

Moreover, even if a base limit (or another, less-than-novel restriction) were at issue, deference to the legislature is not without limit. In *Randall v. Sorrell*, for example, the Supreme Court considered Vermont's limit on individual-to-candidate contributions during an entire election cycle. 548 U.S. 230, 249 (2006) (Noting that the Vermont law "sets its limits per election cycle, which includes both a primary and a general election”). To ensure that limit was closely drawn to a sufficiently important governmental interest, the *Randall* Court applied a two part test, first determining if the statute showed “danger signs” of putting challengers at a significant disadvantage; and second “review[ing] the record independently and carefully with an eye toward assessing the statute’s tailoring [and]…proportionality.” 548 U.S. at 249 (quotation marks and citation omitted). The Court did *not* defer to the legislature, because it determined that the limit in question was “too low and too strict to survive First Amendment scrutiny.” *Id.* at 248.

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[2] Missouri's contribution limit was, like the federal limit at issue here, calculated on a per-election basis. *Shrink Missouri,* 528 U.S. at 382 (statutory citation omitted). But it was the existence and level of the contribution limit that was challenged not, as here, its bifurcation.

Thus, it is incumbent upon this Court to meaningfully consider whether the bifurcated limit is closely drawn to a sufficiently important interest.

B. The governmental interest is limited to preventing actual or apparent *quid pro quo* corruption.

The Supreme Court has uniformly held that there is only one governmental interest sufficient to justify contribution limits: the prevention of actual or apparent *quid pro quo* corruption. *McCutcheon*, 134 S. Ct. at 1450; *Buckley*, 424 U.S. at 25; *see also Nixon v. Shrink Mo.*, 528 U.S. at 388. Just last term, the Court restated the contours of this *quid pro quo* corruption. The Chief Justice’s historical summary of this standard—and its present application—bears repeating:

> In a series of cases over the past 40 years, we have spelled out how to draw the constitutional line between the permissible goal of avoiding corruption in the political process and the impermissible desire simply

> to limit political speech. We have said that government regulation may not target the general gratitude a candidate may feel toward those who support him or his allies, or the political access such support may afford. Ingratiation and access…are not corruption. They embody a central feature of democracy—that constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns.
>
> Any regulation must instead target what we have called *quid pro quo* corruption or its appearance. That Latin phrase captures the notion of a direct exchange of an official act for money. The hallmark of corruption is the financial *quid pro quo*: dollars for political favors. Campaign finance restrictions that pursue other objectives, we have explained, impermissibly inject the Government into the debate over who should govern. And those who govern should be the *last* people to help decide who *should* govern.

McCutcheon, 134 S. Ct. at 1441-1442 (citations and quotation marks omitted) (emphasis in original).

Consequently, it is beyond dispute that contribution limits must target this understanding of *quid pro quo* corruption. But the government must offer more than a naked assertion of a "corruption" interest to justify a burden on the fundamental right to associate via political contributions. *Nixon v. Shrink Mo.*, 528 U.S. at 392 (citing and discussing *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 616 (1996) (opinion of Breyer, J.)). "In the First Amendment context, fit matters." *McCutcheon*, 134 S. Ct. at 1456. And that is where "closely drawn" scrutiny comes in. A contribution limit must be closely drawn to the government's interest in preventing actual or apparent *quid pro quo* arrangements—dollars for favors. Otherwise, it is unconstitutional. *McCutcheon*, 134 S. Ct. at 1462.

C. 2 U.S.C. §§ 441a(a)(1)(A) and 441a(a)(6) are unconstitutional because they violate Plaintiffs' First Amendment freedom of political association and are not closely drawn to the prevention of *quid pro quo* corruption.

i. Congress has determined that contributions of $5,200 are noncorrupting.

Because this case involves a limit upon the amount an individual may give to a particular candidate, *McCutcheon*'s discussion of closely drawn scrutiny is particularly relevant. *McCutcheon* discussed both types of contribution limits applicable to individuals: base limits (which cap the amount any individual contributor can give to any one candidate) and aggregate limits (which cap the total amount an individual may give to all candidates, parties, and PACs). 134 S. Ct. at 1443. The Court evaluated, as it must, whether these aggregate limits were closely drawn to the prevention of *quid pro quo* corruption. *Id*. at 1452.

The *McCutcheon* Court's consideration of the aggregate limits is beyond the scope of this case. Its discussion of the base limits, however, is instructive. The Court considered the total limit on any one individual's contributions to any one candidate *without respect to the artificial distinction between primary and general elections*. *Id.* at 1448 ("if all contributions fall within the base limits Congress views as adequate to protect against corruption. The individual may give up to

$5,200 each to nine candidates"); 1451 ("under the dissent's view, it is perfectly fine to contribute $5,200 to nine candidates but somehow corrupt to give the same amount to a tenth").

Thus, the Court clarified what Congress had already found in setting the base limit at $5,200: this is the dollar amount at or below which—when given by an individual to a candidate—there is no threat of actual or apparent corruption. That is, *McCutcheon* reiterated that "Congress's selection of a $5,200 base limit indicates its belief that contributions of that amount or less do not create a cognizable risk of corruption." *Id.* at 1452. Thus, preventing Plaintiffs' desired contributions—a total of $5,200 to any given candidate during a general election—does not further an anti-corruption interest. By drawing the line at $5,200, Congress implicitly found that contributions of that size, at least, pose no cognizable risk of corruption.

ii. The bifurcated limit cannot survive constitutional scrutiny, because it is not closely drawn to a sufficiently important governmental interest.

As explored above, under exacting scrutiny, a law infringing upon First Amendment associational rights may only be upheld if it is "closely drawn" to a "sufficiently important" government interest. *Nixon v. Shrink Mo.*, 528 U.S. at 387-388 (citation and quotation marks omitted). When reviewing contribution limits, the Supreme Court has limited this to just one such interest: preventing actual or apparent *quid pro quo* corruption. *Buckley*, 424 U.S. at 26-27. Both Congress and the Supreme Court have recognized that a contribution of $5,200 from a contributor to a candidate during an election cycle is non-corrupting. Thus, the bifurcated limit, as a matter of law, does not prevent actual or apparent corruption. Moreover, even if it did further that interest, the bifurcated limit lacks all semblance of constitutional tailoring, and would therefore still fail First Amendment scrutiny.

The bifurcated limit is not tailored, first because it prevents Plaintiffs and those similarly situated from giving the full, non-corrupting contribution amount at the time they feel is most critical in the electoral cycle. And, as the Supreme Court has noted in the contribution limit context, "[s]uch distinctions in degree become significant…when they can be said to amount to differences in kind." *Buckley*, 424 U.S. at 30 (citations omitted). Such is the case here.

Moreover, if a contributor wishes to fully associate with a candidate up to the $5,200 mark, yet the candidate is running in a competitive primary, the law actually forces contributors to associate with the candidate during a primary election. This is so even in the case of contributors who simply wish to support candidates in the general election along party lines—they are foreclosed from doing so. (Or, at least, must spend significant time and effort learning about primary candidates, then must choose a candidate who may or may not win the contested primary, and then perhaps see their contribution used to attack other candidates from their party in that primary, rather than accomplishing their desired goal: defeating the candidate from the opposing party). This also evidences a lack of tailoring. Like the aggregate limit on individual to candidate contributions at issue in *McCutcheon*, "[a]t that point, the limits deny the individual all ability to exercise his expressive and associational rights by contributing to someone who will advocate for his policy preferences," which is a "clear First Amendment harm[]." *Id.* at 1448-49.

Constitutional tailoring is particularly absent where, as here, both Mr. DeMaio and Dr. Miller-Meeks face opponents who themselves were essentially unopposed during their respective primaries, and who are permitted by federal law to use primary election contributions for general election expenses. The only difference between Plaintiffs desired contributions and contributions to their preferred candidates' opponents is that those other supporters will have given their money earlier. The fact that issues continue to develop during a campaign exacerbates this lack of tailoring. For example, it may be only after the primary that a scandal involving a candidate is revealed, or that a candidate reveals hitherto unknown beliefs or policy preferences that might cause a donor to wish to associate with another candidate.

Furthermore, primaries are at different times in various states. Public Disclosure Division, "2014 Congressional Primary Dates and Candidate Filing Deadlines for Ballot Access," FEDERAL ELECTION COMMISSION (2014), http://www.fec.gov/pubrec/fe2014/2014pdates.pdf. Contributors should not be prevented from supporting their chosen candidates simply because it is difficult to keep up with myriad primary dates.

On the other side of the ledger, there can be no cognizable government interest in encouraging contributors to candidates *without* primary opponents to put a full $5,200 toward the general election. This harms donors like the Plaintiffs. *See Davis v. FEC*, 554 U.S. 724, 750 (2008) (contribution limit unconstitutional under the First Amendment which "ha[d] the effect of enabling [Plaintiff's] opponent to raise more money and to use that money to finance speech that counteracts and thus diminishes the effectiveness of" other candidate speech). Thus, the bifurcated limit must fail First Amendment scrutiny.

D. The asymmetrical contribution limit 2 U.S.C. §§ 441a(a)(1)(A) and 441a(a)(6) impose are unconstitutional because they deny Plaintiffs equal protection of the laws.

Because the bifurcated contribution limit inevitably creates asymmetrical and discriminatory outcomes, it is unconstitutional under the Fifth Amendment's guarantee of equal protection. *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013) ("The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws") (citation omitted).

i. The Supreme Court has largely reviewed constitutional questions involving contribution limits from the perspective of established political entities such as candidates or PACs, not contributors.

In reviewing contribution limits, the Supreme Court has largely considered challenges by candidates or political committees from the perspective of the *recipient* of a contribution, not the contributor herself. The *Buckley* Court's decision to uphold the individual contribution limits in FECA, for instance, was grounded in a record that focused on the candidates and parties involved. 424 U.S. at 33. It did not specifically address the right to equal protection held by *contributors*.

Indeed, the principal cases on the question of contribution limits tend to observe the question regarding "restraint[s] on the right of association…[by] hobbl[ing] the collective expressions of a group." *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 296 (1981). Even when contributors have been attached as plaintiffs, the contributor-plaintiffs generally have mounted a wholesale challenge to the limits themselves—not the asymmetric classification of different types of contributors. *E.g. Randall v. Sorrell*, 548 U.S. at 239-40. Nor has the Supreme Court reviewed bans on contributions by certain persons under the equal protection rubric. *FEC v. Beaumont*, 539 U.S. 146 (2003) (ban on corporate direct contributions to candidates upheld under First Amendment, not Fifth Amendment, principles).

ii. The Supreme Court has not reviewed asymmetric contribution limits under the Fifth Amendment, but has suggested that such review is appropriate.

The Supreme Court has, to date, declined to decide an asymmetric contribution limit case under the equal protection doctrine. The *Buckley* Court only considered a facial challenge to the contribution limits imposed by FECA, and did not consider the effects—plain or disparate—of separate limits for primary and general elections. 424 U.S. at 35 (noting that "the impact of the Act's $1,000 contribution limitation on major-party challengers and on minor-party candidates does not render the provision unconstitutional on its face").

The *Buckley* Court was aware, however, of the danger that contribution limits could work a Fifth Amendment harm, and left open the possibility of subsequent challenges when contribution limits rose to the level of "invidious discrimat[ion]". *Id.* at 31, n. 33. The Court noted that, given that FECA was necessarily designed by incumbents, it was possible that while "the Act, on its face, appears to be evenhanded" that "may not reflect political reality." *Id.*

In 2002, Congress amended FECA by passing the Bipartisan Campaign Reform Act ("BCRA"). BCRA Section 307 doubled the individual contribution limits, and indexed the limits to the consumer price index. 2 U.S.C. § 441a(c).

BCRA left FECA's distinction between primary and general elections undisturbed. 2 U.S.C. § 411a(a)(6). Like FECA, BCRA was quickly challenged facially by a number of plaintiffs. *McConnell v. FEC*, 540 U.S. 93. Nevertheless, no *McConnell* plaintiff challenged the bifurcation of those limits.[3]

However, as discussed *supra*, last Term the Supreme Court struck down the *aggregate* contribution limits imposed on contributors, and in doing so emphasized that the receipt of a $5,200 contribution by a candidate did not pose a threat of corruption or its appearance. *McCutcheon*, 134 S. Ct. at 1451.

Furthermore, the Supreme Court has determined that asymmetric contribution limits can be fatal to a law's constitutionality. The Court has held that, when the rights of contributors are at issue, governments may not succeed by positing a general interest in "reduc[ing] the amount of money in politics" or "restrict[ing] the political participation of some in order to enhance the relative influence of others." *Id.* at 1441. *Davis v. FEC* applied these principles in a candidate challenge to certain BCRA limits. 554 U.S. 724, 744 (2008).

Davis turned on the application of the First Amendment to a BCRA provision informally known as the "millionaire's amendment." 554 U.S. at 729

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[3] A number of plaintiffs challenged BCRA's increase in individual contribution limits, but did not challenge the limit's bifurcation between the primary and general elections. Nonetheless, the *McConnell* Court declined to reach the issue for want of jurisdiction. 540 U.S. at 227-229 (finding plaintiffs challenging increase failed to demonstrate Article III standing).

(discussing BCRA Section 319(a), 2 U.S.C. § 441a(1)(a)). The "millionaire's amendment" permitted candidates facing a self-financing opponent to raise money up to three times the normal contribution limit. *Id.* at 738. Before BCRA's enactment, multiple observers suggested that the overall effect of the provision would be to insulate incumbents from successful challenge. *E.g.* 147 CONG. REC. S. 2542 (Statement of Senator Chris Dodd: "this is what I could call incumbency protection"). The *Davis* plaintiff, a self-financed Congressional candidate, raised both First and Fifth Amendment objections to the "millionaire's amendment." 554 U.S. at 744, n. 9.

The government attempted to justify the amendment as a means of leveling the playing field—permitting non-wealthy candidates to access greater financial resources. *Id.* at 741. The Court rejected this proffered interest, noting that it "ha[d] never upheld the constitutionality of a law that imposes different contribution limits for candidates who are competing against each other." *Id.* at 738. But, while *Davis* was decided under the First Amendment, and the Court did not reach Mr. Davis's Fifth Amendment claims, the Court grounded its analysis in a rejection of the law's asymmetric outcomes. *Id.* at 744 n. 9.

Similarly, in *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett,* the Court struck down an Arizona public financing regime based, in part, on its asymmetric effect, although not specifically under the Equal Protection clause.

131. S. Ct. 2806, 2819 (2011). Arizona's system provided that "a publicly financed candidate would receive roughly one dollar for every dollar spent by an opposing privately financed candidate" or an independent group supporting such a candidate. *Id.* at 2813. In rejecting the state's approach, the Court relied upon *Davis*. *Id.* at 2818 ("The logic of *Davis* largely controls our approach to this case"). But it also noted an asymmetry problem: some Arizona districts, including its state House districts, elected more than one candidate.[4] Consequently, "each dollar spent by the privately funded candidate would result in an additional dollar of campaign funding to *each* of that candidate's publically financed opponents." *Id.* at 2819 (emphasis supplied). The Court stated that, in such circumstances, candidates would be required "to fight a political hydra of sorts." *Id.* This was equally, if not especially, true for independent groups who, in speaking for or against a candidate, would trigger direct cash payments to their opponents. *Id.* ("spending one dollar can result in the flow of dollars to multiple candidates the group disapproves of"). These passages can only be read as expressing the Court's concern, explicitly raised in both *Buckley* and *Davis*, that governments might impermissibly burden political association and expression by providing some with advantages over

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[4] *Id.* at 2815 ("Arizona is divided into 30 districts for purposes of electing members to the State's House of Representatives. Each district elects two representatives to the House biannually. In the last general election, the number of candidates competing for the two available seats in each district ranged from two to seven").

others. Doing so constitutes a First Amendment violation, as explained above. But it is also falls far short of the equal protection of the laws.

iii. Contribution limits which favor one category of candidates over another implicate the constitutional guarantee of equal protection.

Earlier this year, the Tenth Circuit Court of Appeals *did* reach the merits of an equal protection claim brought by contributors. *Riddle v. Hickenlooper*, 742 F.3d 922 (10th Cir. 2014).[5] There, the Court reviewed a statute which, similar to federal law, provided a $200 contribution limit for both the primary and general elections. COLO. REV. STAT. § 1-45-103.7(4) (2010). But, "[f]or money ostensibly given for the primary, the candidate committee could accept the contribution and spend it during the general election." *Riddle*, 742 F.3d at 924. Nonetheless, candidates who did not run in a primary—such as write-in or independent candidates—were prohibited from accepting primary election money. *Id.* at 927. Thus, "[a]fter the primary, a supporter of [a write-in candidate] could give her only $200. At the same time, others could contribute $400 each to the Republican and Democratic candidates, and the [major party] candidates could spend that money in the general election." *Id*. The *Riddle* plaintiffs sought to contribute a full $400 to a write-in candidate for state office, and since the statute prevented them from doing so, they sought relief in federal court. *Id.* at 924.

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[5] While that case was resolved under the Fourteenth Amendment, under longstanding Supreme Court precedent, Fifth Amendment challenges are subject to the same analysis applied in cases implicating the Fourteenth Amendment's Equal Protection Clause. *Buckley*, 424 U.S. at 93.

The *Riddle* Court quickly determined that the "statute does classify contributors in a way that impinges on a fundamental right—the right to contribute as a form of political expression." *Id*. at 927 (citation omitted). The Court observed that this "conclusion would ordinarily require us to apply strict scrutiny." *Id.* (citing *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 666 (1990)). But because "the Supreme Court has applied a less rigorous test for contribution limits" the *Riddle* Court, "[f]or the sake of argument…assume[d] that" the Court's First Amendment scrutiny analysis "applies when contributors challenge contribution limits based on the Fourteenth Amendment's Equal Protection Clause rather than the First Amendment*." Id.* at 928 (citations omitted).

Thus, to determine whether a contribution limit with asymmetric effect survives constitutional review under the doctrine of equal protection, a court "must determine whether it is closely drawn to advance the State's interest in preventing corruption or the appearance of corruption." *Id*. That is, there must be "a link between the differing contribution limits and the battle against corruption, [otherwise] the means chosen are not closely drawn." *Id.* Because the "statute create[d] a basic favoritism between candidates vying for the same office" without any cognizable anti-corruption interest in doing so, the Court found that

Colorado's asymmetric scheme violated the Constitution's guarantee of equal protection. *Id.* at 929, 930.

The instant case deals with a statute which poses Fifth Amendment harm comparable to that found unconstitutional by the *Riddle* Court. Like *Riddle*, where the contribution limit artificially distinguished between two types of candidates, the primary/general bifurcation of the limit works a similar effect. Colorado's statute created different contribution limits for those who ran in a primary election and those who did not. Similarly, the federal scheme does not distinguish between those candidates who must face significant primary challengers and those who do not. While "on its face" the bifurcated scheme does not appear discriminatory, the disparate impact in favor of candidates who do not face a primary challenge—and their supporters—is the clear "political reality." *Buckley*, 424 U.S. at 31, n 33.

Consider the case of Mr. Jost's preferred candidate, Mariannette Miller-Meeks. While incumbent Representative Dave Loebsack ran an uncontested race for the Democratic nomination in his district, Dr. Miller-Meeks ran against two other candidates for the Republican nomination: Mark Lofgren and Matthew Waldren. "Iowa Primary Results", NEW YORK TIMES (June 4, 2014), http://elections.nytimes.com/2014/results/primaries/iowa. Indeed, Miller-Meeks's opponents combined to earn over 50 percent of the Republican vote, with Lofgren earning 38.2 percent and Waldren capturing 12.3 percent. *Id*. Thus, for all intents and purposes, every dollar that Congressman Loebsack has raised this election cycle may be used for general election purposes, a luxury Dr. Miller-Meeks simply does not have. Congressional Candidates and Committees, FEDERAL ELECTION COMMISSION at 21 (June 2014), http://www.fec.gov/pdf/candgui.pdf ("Nevertheless, the campaign of a candidate running in the general election may spend unused primary contributions for general election expenses"). Yet, now that the primary has concluded, Mr. Jost cannot give $5,200 to Dr. Miller-Meeks's campaign for general election purposes. 11 C.F.R. § 110.1(b)(3)(i) ("A contribution designated in writing for a particular election, but made after that election, shall be made only to the extent that the contribution does not exceed net debts outstanding from such election").[6] The government explains neither how this meets the demands of equal protection, nor why it is needed to prevent corruption.

Nor are the instant circumstances unusual. Significant primary challenges to incumbent candidates are extraordinarily rare. Indeed, precious few challengers ever force incumbents to less than 75 percent of the vote—the figure which Dr.

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[6] California's system, while different from Iowa's, worked the same effect for Ms. Holmes's preferred candidate, Carl DeMaio. Four candidates sought to advance to the general election for the 52nd Congressional district: Democratic incumbent Scott Peters, and three Republican candidates. United States Representative in Congress by District, Statewide Direct Primary Election – Statement of Vote, CALIFORNIA SECRETARY OF STATE (June 3, 2014), http://www.sos.ca.gov/elections/sov/2014-primary/pdf/63-congress.pdf.

Robert Boatright of Clark University, a scholar on the subject,[7] considers the "level at which the incumbent might notice a challenger." Andrew Prokop, "Is the Tea Party primary surge a huge myth?", VOX.COM (Aug. 13, 2014), http://www.vox.com/2014/6/25/5837696/is-the-tea-party-primary-surge-a-huge-myth. For example, despite the media coverage of Virginia Congressman Eric Cantor's defeat by a primary opponent in June 2014, "only three times since 1970 has a Virginia incumbent been held to less than 75 percent of the primary vote." John Sides, "An Expert on Congressional Primaries Weighs in on Cantor's Loss," WASHINGTON POST (June 12, 2014) http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/06/12/the-expert-on-congressional-primaries-weighs-in-on-cantors-loss/. Indeed, the high-water mark for primary challenges to House incumbents was 1992, when fewer than 100 challengers managed to force an incumbent to less than 75 percent of the primary vote. Prokop, Fig. 1.1.

Plaintiffs' desire to engage in political expression and association under the equal protection of our campaign finance laws. Their predicament implicates a "fundamental principle: the State must govern impartially." *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 587 (1979). The bifurcated contribution limit is simply not consistent with this principle. The limit's bifurcation favors incumbents generally, and certainly does so in the races wherein Plaintiffs which to associate.

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[7] Robert G. Boatright, Ph.D, "Books: Congressional Primaries", http://wordpress.clarku.edu/rboatright/books/congressional-primaries-2/.

This fact is all the more troubling given that the offending laws were drafted by incumbent candidates for office. *See McCutcheon*, 134 S. Ct. at 1441 ("Campaign finance restrictions that pursue…objectives [other than preventing actual or apparent *quid pro quo* corruption]…impermissibly inject the Government into the debate over who should govern") (citation and quotation marks omitted).

Unless the government can deliver a "closely drawn" justification for allowing some candidates to raise $5,200 from a single contributor for the general election, while prohibiting other candidates from doing the same, the bifurcated limit fails Fifth Amendment scrutiny.

III. Absent the requested preliminary relief, Plaintiffs will suffer irreparable harm.

"The First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office.'" *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)). Thus, the loss, or threatened loss, of associational or expressive freedoms is particularly harmful during an election season. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("[I]njunctive relief is clearly appropriate…[when] First Amendment interests [a]re either threatened or in fact being impaired at the time relief [i]s sought") (citation omitted). "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Id.* (citation omitted).

Elrod also applies to other infringements upon constitutional rights. *See Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.D.C. 2009) (noting, in Fourth Amendment context, "[i]t has long been established that the loss of constitutional freedoms, 'for even minimal periods of time, unquestionably constitutes irreparable injury'") (quoting *Elrod v. Burns*, 427 U.S. at 373). This reasoning necessarily applies to the constitutional right to equal protection of the laws. *See Smith v. Henderson*, 944 F. Supp. 2d 89, 108 (D.D.C. 2013) ("Even assuming that every Equal Protection Clause violation constitutes an irreparable injury…").

In any event, association and expression are particularly time-sensitive in the context of an election year. *Elrod*, 427 U.S. at 374, n. 29 (recognizing timeliness of action in context of political speech) (citing *Carroll v. Princess Anne*, 393 U.S. 175, 182 (1968); *Wood v. Georgia*, 370 U.S. 375, 391-92 (1962)). Every day that Plaintiffs are denied equal protection of the laws, they are further harmed. *O'Donnell Constr. Co. v. Dist. of Columbia*, 963 F.2d 420, 428 (D.C. Cir. 1992) (finding irreparable harm when plaintiff has "little hope of obtaining…corrective relief at a later date if the injunction does not issue") (citation and quotation marks omitted).

Plaintiffs wish to associate one-on-one with particular candidates in this particular election. "Elections are, by nature, time sensitive and finite. While there will be other elections, no future election will be *this* election." *Emineth v. Jaeger*, 901 F. Supp. 2d 1138, 1142 (D.N.D. 2012) (emphasis in original). By contrast, the FEC will not suffer irreparable injury if this Court grants Plaintiffs' motion. No party—least of all a government defendant—can be injured through the lack of enforcement of a statute violating the First and Fifth Amendments. *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013) ("enforcement of an unconstitutional law is always contrary to the public interest") (citations omitted). And the government can hardly be harmed if plaintiffs are able to contribute $5,200 to a candidate, which the government must admit they could have done legally had they timed their contributions differently.

IV. The requested injunction will further the public's interest in protecting First Amendment liberties and guaranteeing equal protection of the laws.

The public interest is furthered when unconstitutional laws—particularly ones that implicate core equal protection and First Amendment political rights—remain unenforced. *See Green v. Kennedy*, 309 F. Supp. 1127, 1139 (D.D.C. 1970) ("Equity properly grants relief when considerations of public interest are involved, as distinguished from purely private interest. This principle is properly invoked by plaintiffs claiming denial of constitutional rights") (citations omitted).

"No long string of citations is necessary to find that the public interest weighs in favor of having access to a free flow of constitutionally protected speech." *ACLU v. Reno*, 929 F. Supp. 824, 851 (D. Pa. 1996); *see also K.H. Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006) ("The public has no interest in enforcing an unconstitutional ordinance") (citation omitted). This simply "acknowledge[s] the obvious: enforcement of an unconstitutional law is always contrary to the public interest." *Gordon v. Holder*, 721 F.3d at 653 (citations omitted).

CONCLUSION

For the foregoing reasons, Plaintiffs request that their motion for a preliminary injunction be granted.

Respectfully submitted this 20th day of August, 2014.

/s/ Allen Dickerson
Allen Dickerson, DC Bar No. 1003781
Center for Competitive Politics
124 S. West Street, Suite 201
Alexandria, VA 22314
Phone: 703.894.6800
Facsimile: 703.894.6811
adickerson@campaignfreedom.org

Counsel for Plaintiffs