UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LAURA HOLMES, *et al.*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, Defendant.	Civ. No. 14-1243 (RMC) BRIEF

FEDERAL ELECTION COMMISSION'S BRIEF OPPOSING CERTIFICATION AND IN SUPPORT OF SUMMARY JUDGMENT IN FAVOR OF THE COMMISSION

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This case has become moot and, in any event, does not present a substantial constitutional question warranting en banc consideration by every active member of the United States Court of Appeals for the D.C. Circuit. For decades, the Federal Election Campaign Act ("FECA" or "the Act") 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 most recent 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 the 2013-2014 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, in addition to a primary and general election, the combined total amount that an individual could contribute to that candidate was higher.

As this Court previously recognized, "the Supreme Court . . . long ago concluded that [these] restrictions on the amount of money one can contribute per election prevent corruption and the appearance of corruption by allowing candidates to compete fairly in each stage of the political process." *Holmes v. FEC*, No. 14-1243, __ F. Supp. 3d __, 2014 WL 5316216, at *4 (D.D.C. Oct. 20, 2014). In this case, plaintiffs seek to relitigate the constitutionality of that per-election limit based on certain double-the-limit contributions plaintiffs wished to make to individuals who were candidates in the November 2014 general elections. That election has now passed and plaintiffs' claims are thus moot. But even if they were not, plaintiffs' claims are plainly foreclosed by the "analysis and conclusion of the Supreme Court in *Buckley v. Valeo* and its progeny," *id.* at *1, and they therefore raise settled legal questions that do not merit

certification to the en banc Court of appeals under the extraordinary judicial review procedure in 52 U.S.C. § 30110 (formerly 2 U.S.C. § 437h).

Neither of plaintiffs' constitutional claims is substantial. The per-election contribution limit, already upheld by the Supreme Court, easily passes muster under the First and Fifth Amendments, as this Court held in its denial of plaintiffs' request for a preliminary injunction. The limit is closely drawn to prevent actual and apparent corruption. By applying separately to each election within a particular election cycle, the contribution limit sensibly accounts for variations in election procedures among the states and does not impose a free speech burden substantially mismatched to the Congressional anticorruption purpose. And because the limit applies equally to every contributor and candidate, it creates no classification that implicates the Fifth Amendment's guarantee of equal protection. Even if it could be deemed to create some sorts of distinct "classes" of contributors, the limit operates well within constitutional parameters. Indeed, for the same reasons the limit does not violate the First Amendment, it is entirely satisfactory under the Fifth.

In denying plaintiffs' request for preliminary relief, this Court held that plaintiffs were unlikely to succeed on the merits of their claims. Even if plaintiffs' claims were not moot, those claims directly challenge the holdings of the Supreme Court on the very constitutional questions plaintiffs present for certification, are insubstantial, and should not be certified. Instead, this case should be dismissed as moot or summary judgment should be awarded to the Commission.

BACKGROUND

I. THE PARTIES

Defendant Federal Election Commission ("Commission" or "FEC") is the independent agency of the United States government with exclusive jurisdiction to administer, interpret, and

civilly enforce FECA. *See* 52 U.S.C. §§ 30101-30146 (formerly 2 U.S.C. §§ 431-57).[1]

The plaintiffs are Laura Holmes and Paul Jost, a married couple residing in Miami, Florida. (Compl. ¶ 8; FEC's Proposed Findings of Fact / Statement of Material Facts and Constitutional Questions ¶ 1 ("FEC Facts").) Plaintiffs' claims are based on campaign contributions they wanted to make to two individuals who were seeking election to Congress in 2014. (Compl. ¶¶ 18-26; FEC Facts ¶¶ 64-76.) Both plaintiffs admit that they chose not to make any contributions to the primary-election campaigns of those preferred candidates. (Compl. ¶¶ 21, 24, 57, 61; FEC Facts ¶¶ 65, 71.) Instead, plaintiffs sought to contribute the combined maximum amounts permitted for primary and general-election campaigns during the 2013-2014 election cycle — $5,200 — "solely for use in the [November 2014] general election." *Holmes,* 2014 WL 5316216, at *6; Compl. ¶ 26. Plaintiffs thus sought to make general-election contributions in amounts that were double FECA's per-election limit for contributions made during the 2013-2014 election cycle. Compl. ¶¶ 18, 59; FEC Facts ¶¶ 68-69, 74-76; *Holmes*, 2014 WL 5316216, at *4 n.5.

Plaintiff Holmes supported Carl DeMaio, a candidate who sought to represent California's Congressional District 52. (Compl. ¶ 21; FEC Facts ¶ 64.) 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 who receive the most votes, regardless of party preference, proceed to compete in the general election. *Holmes*, 2014 WL 6190937, at *2; *see*

[1] Effective September 1, 2014, the provisions of FECA that were codified in Title 2 of the United States Code were recodified in a new title, Title 52. No text of any provision has been changed. The Office of the Law Revision Counsel has prepared a table summarizing the changes made in the course of creating Title 52. Editorial Reclassification Table, http://uscode.house.gov/editorialreclassification/t52/Reclassifications_Title_52.html. To avoid confusion about the recodification, this submission will use citations to the new provisions of Title 52 with parentheses indicating the former Title 2 citations.

Declaration of Jayci A. Sadio, Mar. 12, 2015 ("Sadio Decl.") Exh. 9. Four candidates were listed on the primary ballot for California's June 3, 2014 congressional primary election: Carl DeMaio, incumbent Representative Scott Peters, and two other candidates. (Sadio Decl. Exh. 10.) Both DeMaio and Peters thus competed directly against three candidates in the primary, including each other. (*Id.*; *contra* Pls.' Mem. of Law in Supp. of Mot. for Prelim. Inj. (Pls.' Prelim. Inj. Mem.) (Docket No. 6-1) at 16 (stating that Peters was "essentially unopposed" in the California primary); Sadio Decl. Exh. 1 (Holmes Interrog. Resp. ¶ 2 (suggesting Peters lacked a "substantial primary opponent" because he lacked an *intraparty* challenger)).) Ultimately, Peters and DeMaio received the largest numbers of votes and were the "top two" finishers in the primary, so they moved on to face each other again in the general election. (Sadio Decl. Exh. 10.) DeMaio later lost the general election to Peters. (Sadio Decl. Exh. 11.).

Plaintiff Holmes chose not to make a primary-election contribution to DeMaio but contributed $2,600 to DeMaio's general-election campaign. (Compl. ¶ 21; Sadio Decl. Exh. 1 (Holmes RFA Resp. ¶ 2); FEC Facts ¶ 65, 68.) 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. Compl. ¶ 21; FEC Facts ¶ 69; *Holmes*, 2014 WL 5316216, at *4 n.5.

Plaintiff Jost supported Mariannette Miller-Meeks, a candidate who sought to represent Iowa's Second Congressional District. (Compl. ¶ 22; FEC Facts ¶ 70.) Miller-Meeks won her 2014 primary election but lost in the general election to incumbent Representative David Loebsack. (Sadio Decl. Exhs. 20-21.) Like Holmes, Jost chose not to make a primary-election contribution to Miller-Meeks, but contributed $2,600 to the candidate's general-election campaign. (Compl. ¶ 24; Sadio Decl. Exh. 2 (Jost RFA Resp. ¶ 1); FEC Facts ¶ 71.) 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 for individual campaign contributions made during the 2013-2014 election cycle . (Compl. ¶ 24; FEC Facts ¶ 74-75.)

As indicated above, the candidates to whom plaintiffs sought to make above-the-limit contributions in connection with those candidates' respective 2014 general-election campaigns each lost their general elections. Plaintiffs have alleged no plans to contribute to any particular candidate in future federal elections.

II. RELEVANT STATUTORY AND REGULATORY PROVISIONS

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

Contribution limits have been one of the principal tools for preventing political corruption in this country for nearly seventy-five years. 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, Senator Carl Hatch introduced, and Congress passed, S. 1871, officially titled "An Act to Prevent Pernicious Political Activities" and commonly referred to as the Hatch Act. S. Rep. No. 101-165, at *18 (1939); *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 560 (1973) ("*Letter Carriers*"); 84 Cong. Rec. 9597-9600 (1939). Congress established individual contribution limits in the 1940 amendments to the Hatch Act, Pub. L. No. 76-753, 54 Stat. 767 (1940). That legislation prohibited "any person, directly or indirectly" from making "contributions in an aggregate amount in excess of $5,000, during any calendar year" to any candidate for federal office. *Id.* § 13(a), 54 Stat. 770. The limit was sponsored by Senator John H. Bankhead, who expressed his hope that it would help "bring about clean politics and clean elections": "We 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 Limits on Contributions to Candidates

By 1971, when Congress began debating the initial enactment of FECA, the Hatch Act's $5,000 individual contribution limit was being "routinely circumvented." 117 Cong. Rec. 43,410 (1971) (statement of Rep. Abzug). In 1974, shortly after the Watergate-era scandals, Congress substantially revised FECA. These amendments established new contribution limits on the amounts that individuals, political parties, and political committees can contribute to candidates, including a $1,000 per-candidate, per-election limit on individual contributions to candidates and their authorized political committees. Fed. Election Campaign Act Amendments of 1974, Pub. L. No. 93-443 § 101(b)(3), 88 Stat. 1263 (first codified at 18 U.S.C. § 608(b)(3)).

The statutory contribution limits challenged here apply on a per-candidate, per-election basis, with "election" defined to include each of the following:

> (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.

52 U.S.C. § 30101(1) (2 U.S.C. § 431(1)). FECA's contribution limits apply both to direct contributions of money and to in-kind contributions of goods or services. *Id.* § 30101(8)(A) (§ 431(8)(A)).

C. The Supreme Court's Affirmance of FECA's Contribution Limits

Shortly after the 1974 amendments to FECA were enacted, the statute was the subject of a broad constitutional challenge in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam). The

Supreme Court affirmed the constitutionality of FECA's individual contribution limits and held that the limits were consistent with both the First and Fifth Amendments. 424 U.S. at 29, 35.

Specifically, the Court found that the limits served the government's important anti-corruption interests. It explained that in the United States, candidates "lacking immense personal or family wealth must depend on financial contributions from others to provide the resources necessary to conduct a successful [electoral] campaign" and that the great "importance of the communications media and sophisticated mass-mailing and polling operations to effective campaigning make the raising of large sums of money an ever more essential ingredient of an effective candidacy." *Id.* at 26-27. At the same time, the Court recognized that "[t]o the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined." *Id.*; *see also id.* at 27 ("Although the scope of such pernicious practices can never be reliably ascertained, the deeply disturbing examples surfacing after the 1972 election demonstrate that the problem is not an illusory one.")

The individual contribution limits were further justified, the *Buckley* Court held, by the "almost equal[ly] concern[ing] . . . impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions." *Id.* at 27. The Court concluded that "Congress could legitimately conclude that the avoidance of the appearance of improper influence 'is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.'" *Id.* at 27 (quoting *Letter Carriers*, 413 U.S. at 565).

The *Buckley* Court also rejected an equal protection challenge to FECA's individual contribution limits. The Court observed that FECA "applies the same limitations on

contributions to all candidates" and rejected arguments that the limits discriminate against major-party challengers to incumbents, explaining that "[c]hallengers can and often do defeat incumbents in federal elections." *Id.* at 31, 32. The Court explained that "the danger of corruption and the appearance of corruption apply with equal force to challengers and to incumbents" and thus found that "Congress had ample justification for imposing the same fundraising constraints upon both." *Id.* at 33.

In addition to its First and Fifth Amendment holdings, the *Buckley* Court found that FECA's then-$1,000 contribution was not unconstitutionally overbroad. *Id.* at 30. The Court rejected the argument that the limit was "unrealistically low" and held that courts should not second-guess Congress's decision regarding the exact dollar figure at which to set a contribution limit. *Buckley*, 424 U.S. at 30.

D. FECA's Current Per-Election Contribution Limit and the Commission's Implementing Regulations

The Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 ("BCRA"), subsequently amended FECA to raise the individual contribution limit and index it for inflation. *See* BCRA § 307(b), 116 Stat. 102-103 (codified at 52 U.S.C. § 30116(a)(3) (2 U.S.C. § 441a(a)(3)); BCRA § 307(d), 116 Stat. 103 (codified at 52 U.S.C. § 30116(c) (2 U.S.C. § 441a(c)(1)). The 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. FEC, *Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold*, 78 Fed. Reg. 8530, 8532 (Feb. 6, 2013).[2]

[2] The FEC recently raised the individual contribution limit for the 2015-2016 election cycle to $2,700 per candidate, per election. FEC, *Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold*, 80 Fed. Reg. 5750, 5751

Because FECA defines "election" to include various types of electoral contests, the total amount that one may contribute to a particular candidate during a particular election cycle depends on how many elections that candidate must participate in to successfully pursue the federal office being sought. *Holmes*, 2014 WL 5316216, at *1. This means that an individual who supported a candidate that participated in one primary election and one general election during the 2013-2014 election cycle was permitted to contribute a total of $5,200 over the course of that election cycle — $2,600 for the candidate's primary-election campaign and $2,600 for the candidate's general-election campaign. *Id.* In an election cycle in which a candidate competes in one or more special elections, runoff 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 over the course of that election cycle is higher. *See infra* pp. 21-24.

Commission regulations "encourage[]" contributors to designate in writing the particular election for which an individual contribution is intended. 11 C.F.R. § 110.1(b)(2)(i). Undesignated contributions count against the donor's contribution limits for the candidate's next election; designated contributions count against the donor's contribution limits for the named election. *Id.* § 110.1(b)(2)(ii).

When a candidate has net debts outstanding from a past election — including a primary election — a contributor may designate a contribution in writing for that past election. Such contributions may only be accepted for the purpose of retiring debt and only up to the extent of the debt. *Id.* §§ 110.1(b)(3)(i), (b)(5)(i)(B). If that candidate's net outstanding debts amount to less than the amount of a contribution designated for a previous election, Commission

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(Feb. 3, 2015). The claims at issue here, however, concern contributions plaintiffs sought to make during the 2013-2014 election cycle. The FEC's arguments in this brief thus refer to the $2,600 limit that applied to plaintiffs' proposed 2014 general election contributions, but would apply with equal force to the current, higher per-election limits.

regulations permit the candidate (or his committee) to refund the contribution, redesignate it (with the donor's written authorization) for a subsequent election, or reattribute the contribution as from a different person. 11 C.F.R. §§ 110.1(b)(3)(i)(A) & (C). A primary contribution that is redesignated for use in the candidate's general election counts against the contributor's general-election limit. 11 C.F.R. § 110.1(b)(5)(iii) ("A contribution redesignated for another election shall not exceed the limitations on contributions made with respect to that election."). If a candidate fails to qualify for the general election, then all general-election contributions received by that candidate must similarly be returned, redesignated, or reattributed. *Id.* § 110.1(b)(3)(i). Past Commission Advisory Opinions and administrative enforcement actions illustrate these constraints that are placed on committees. (*See* FEC Facts ¶¶ 23-30; Sadio Decl. Exhs. 5-8.)

Commission regulations permit general-election candidates with unused primary contributions to use such contributions to pay for general-election expenses. 11 C.F.R. § 110.3(c)(3). General-election candidates are similarly permitted to use general-election contributions to retire outstanding primary-election debts. *Id.* § 110.1(b)(3)(iv). Candidates need not obtain contributor authorization to make such transfers between their primary, general, and any other election accounts, and such transfers by candidates do not change the per-election contribution limits for individual contributors. *Id.* §§ 110.1(b)(3)(iv), 110.3(c)(3); *see generally* Sadio Decl. Exh. 3 at 21 (FEC Campaign Guide for Congressional Candidates and Committees).

E. Procedural History

Plaintiffs filed their complaint challenging FECA's per-election contribution limits on July 21, 2014, and moved for a preliminary injunction one month later. (Docket Nos. 1, 6.) This Court denied plaintiffs' motion, holding that plaintiffs' challenge is foreclosed by "the analysis and conclusion of the Supreme Court in *Buckley v. Valeo* and its progeny." *Holmes*, 2014 WL

5316216, at *1. The Court explained that it did not have the "luxury" of overruling such Supreme Court precedent, which upheld the same statutory per-election limit on individual contributions to candidates. *Id.* at *1.

After ordering plaintiffs to show cause why the Court should not convert the order denying their preliminary-injunction motion into a final appealable order that denied their request to certify constitutional issues to the en banc Court of Appeals, this Court issued an order making two dozen findings of fact and certifying two constitutional questions for consideration by the en banc Court of Appeals. *Holmes v. FEC*, No. 14-1243, __ F. Supp. 3d __, 2014 WL 6190937 (D.D.C. Nov. 17, 2014).

On January 30, 2015, the Court of Appeals remanded the case to this Court with instructions to "complete the functions mandated by § 30110 and described in *Wagner v. FEC*, 717 F.3d [1007, 1009 (D.C. Cir. 2013) (per curiam)]." Order, *Holmes v. FEC*, No. 14-5281 (D.C. Cir. Jan. 30, 2015). On remand, this Court established an expedited schedule for discovery, briefing, and proposed findings of facts, and set a hearing on the issues for March 31, 2015.

ARGUMENT

I. STANDARD OF REVIEW

A. Legal Questions That are Settled, Insubstantial, or Frivolous Must Not Be Certified to the En Banc Court of Appeals

Section 30110 provides a special procedure for certain plaintiffs to bring suits "to construe the constitutionality of any provision of [FECA]," and for the district court to certify questions of constitutionality of the Act to the appropriate court of appeals sitting en banc. This certification procedure was enacted in 1974 to provide expedited consideration of anticipated constitutional challenges to the extensive amendments made to FECA that year. *See* Fed.

Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 208(A), 88 Stat. at 1285-86 (1974).

Section 30110 claims are "circumscribed by the constitutional limitations on the jurisdiction of the federal courts." *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 192 n.14 (1981) ("*Cal. Med.*"). If a section 30110 claim passes that and other threshold inquiries, a district court "should perform three functions. First, it must develop a record for appellate review by making findings of fact. Second, [it] must determine whether the constitutional challenges are frivolous or involve settled legal questions," *Wagner*, 717 F.3d at 1009 (internal citations omitted), or as the Supreme Court phrased it, when the issues presented are "neither insubstantial nor settled," *Cal. Med.*, 453 U.S. at 192 n.14; *see also Mott v. FEC*, 494 F. Supp. 131, 134 (D.D.C. 1980) (section 30110 available "only where a 'serious' constitutional question was presented" (quoting Sen. James L. Buckley, the sponsor of the amendment that became section 30110, 120 Cong. Rec. 10562 (1974))); *Buckley v. Valeo*, 387 F. Supp. 135, 138 (D.D.C. 1975) (section 30110 certification appropriate where "a *substantial* constitutional question is raised by a complaint" (emphasis added)), *remanded on other grounds*, 519 F.2d 817 (D.C. Cir. 1975). And third, only then should it "certify the record and all non-frivolous constitutional questions" to the en banc court of appeals. *Wagner*, 717 F.3d at 1009; *see* 52 U.S.C. § 30110 (2 U.S.C. § 437h).

The Supreme Court narrowly construed section 30110 by assigning the district court in such cases a gatekeeping function, and it did so for good reason. Certifying constitutional questions to courts of appeals sitting en banc necessarily disrupts their dockets. Section 30110 creates "a class of cases that command the immediate attention of . . . the courts of appeals sitting en banc, displacing existing caseloads and calling court of appeals judges away from their

normal duties." *Bread Political Action Comm. v. FEC*, 455 U.S. 577, 580 (1982).[3] Screening for settled questions reduces "the burden [the special review procedure places] on the federal courts" and prevents its "potential abuse." *Cal. Med.*, 453 U.S. at 192 nn.13-14. FECA "is not an unlimited fountain of constitutional questions"; the Court expected that resort to the provision "will decrease in the future" and thus that the special review procedure would not pose "any significant threat to the effective functioning of the federal courts." *Id.* at 192 n.13. Substantiality screening was one of the "restrictions on the use of" the special procedure that led the Court to conclude that the provision would not be subject to "abuse" and would not so "burden" the courts of appeals as to impede "the sound functioning of the federal courts." *Id.* at 192-94 nn.13-14.

In determining whether any constitutional questions should be certified, the court may consider the factual record. The standard for section 30110 certification is "somewhere between a motion to dismiss — where no factual review is appropriate — and a motion for summary judgment — where the Court must review for genuine issues of material fact." *Cao v. FEC*, 688 F. Supp. 2d 498, 503 (E.D. La. 2010). A question is insubstantial, and thus should not be certified under section 30110, if it fails to state a claim upon which relief may be granted. *Goland v. United States*, 903 F.2d 1247, 1257-58 (9th Cir. 1990); *Cao*, 688 F. Supp. 2d at 501-02 & n.1. But even where, unlike here, a constitutional challenge is not foreclosed as a matter of law, the district court undertaking section 30110 review may go beyond the complaint and

[3] Part of the Supreme Court's concern in *Bread Political Action Committee* was the requirement in the statute at that time that section 30110 proceedings be expedited. 455 U.S. at 580. Though the expedition provision has been repealed, section 30110 "continues to pretermit review by district courts and panels of courts of appeals and that pretermission undoubtedly serves the Congress's goal of expedition." *Wagner*, 717 F.3d at 1014 (noting that expedition repeal changed only section 30110's "volume, not its tune"). It thus continues to pose a danger of docket disruption.

review the facts, and only if it "concludes that colorable constitutional issues are raised from the facts" should it certify those questions. *Cao*, 688 F. Supp. 2d at 502 (emphasis omitted) (quoting *Khachaturian v. FEC*, 980 F.2d 330, 331 (5th Cir. 1992) (en banc))).[4]

B. Where There Are No Substantial Constitutional Questions Presented, Summary Judgment Is Appropriate

This Court may grant summary judgment if there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In view of the standard for certification under section 30110, "it follows that any question that the Court finds [insubstantial] is also appropriate for summary judgment." *Cao*, 688 F. Supp. 2d at 503; *see Libertarian Nat'l Comm., Inc. v. FEC*, 930 F. Supp. 2d 154, 162 (D.D.C. 2013) (same), *aff'd*, No. 13-5094, 2014 WL 590973 (D.C. Cir. Feb. 7, 2014) ("*LNC*"). Thus, if this Court determines that plaintiffs have failed to present a question warranting certification, the Court should grant summary judgment to the Commission.[5]

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[4] Portions of the September 28, 2009 order in *SpeechNow.org v. FEC* — which this Court cited in its October 20 certification order — may be misleading if viewed in isolation. When making findings of fact and issuing its final order regarding the certification of constitutional questions, the court in *SpeechNow* did state that its prerogative was "not to answer any constitutional questions, or to render a judgment of any kind." *SpeechNow*, No. 08-0248, 2009 WL 3101036, at *1 (D.D.C. Sept. 28, 2009). But the district court had earlier reviewed briefing from the parties and determined whether the questions plaintiffs sought to have certified were frivolous or insubstantial, as discussed in an unpublished order. *See* Order, *SpeechNow.org v. FEC*, No. 08-0248 (JR) (D.D.C. July 29, 2008) (Docket No. 40) (certifying questions following briefing by the parties regarding frivolousness).

[5] In that event, plaintiffs would retain the right to appeal this Court's decision to a three-judge panel of the D.C. Circuit, but there would be no initial en banc review pursuant to section 30110. *See, e.g.*, *Libertarian Nat'l Comm. v. FEC*, No. 13-5094, 2014 WL 590973, *1 (Feb. 7, 2014) (concluding that "a three-judge panel" of the Court of Appeals had jurisdiction to review denial of a motion to certify).

II. PLAINTIFFS' MOOT CLAIMS ARE NOT CAPABLE OF REPETITION

Plaintiffs' claims concern specific campaign contributions that they sought to make in connection with an election that occurred more than four months ago. The passage of the November 2014 election "makes it impossible for this or any court to grant meaningful relief with respect to" the particular contributions that are the basis of this lawsuit. *Virginians Against a Corrupt Congress v. Moran*, No. 92-5498, 1993 WL 260710, at *1 (D.C. Cir. June 29, 1993) (per curiam); *see Herron for Congress v. FEC*, 903 F. Supp. 2d 9, 13 (D.D.C. 2012) (explaining that the plaintiff's FECA claim concerning a past election was moot because "[o]f course, th[e] court has no power to alter the past"). Plaintiffs may avoid dismissal based on mootness only if they demonstrate that their claims are "capable of repetition yet evading review." *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 463 (2007). To invoke that exception to mootness, plaintiffs must demonstrate a "reasonable expectation" or a "demonstrated probability" that "the same controversy will recur involving the same complaining party." *Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (per curiam). To make this demonstration, courts "[o]rdinarily . . . require plaintiffs to submit evidence suggesting that their controversy is likely to recur." *Herron for Congress*, 903 F. Supp. 2d at 14 (citing *Davis v. FEC*, 554 U.S. 724, 736 (2008); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 463 (2007)).

It is true, as this Court previously found, that "the same limitations [adjusted for inflation] would apply to [plaintiffs'] contributions in the next federal election in which they wish to contribute." *Holmes*, 2014 WL 6190937, at *3. But plaintiffs have not carried their burden of demonstrating that the particulars of their claims are sufficiently likely to recur such that the claims fall within the capable-of-repetition-yet-evading-review exception to mootness. The above-the-limit contributions plaintiffs wished to make in 2014 were directed to specific general-

election candidates whose opponents had purportedly lacked a "substantial primary opponent." (Compl. ¶ 66.) The mere theoretical *possibility* that plaintiffs *could, at some point in the future*, decide to contribute to candidates in materially similar circumstances does not create a "reasonable expectation" or "demonstrated probability." *Murphy*, 455 U.S. at 482; *Herron for Congress*, 903 F. Supp. 2d at 14. Plaintiffs have not made any allegations about future contributions whatsoever, let alone that they intend to contribute to specific candidates whose opponents will have lacked "substantial primary opponents" in future federal elections. Their claims are thus moot and fail to identify any live constitutional questions that can be certified to the en banc Court of Appeals. *See Bois v. Marsh*, 801 F.2d 462, 466 (D.C. Cir. 1986) (finding a claim not capable of repetition because "there are . . . too many variables to allow a prediction that appellant will again be subjected to [an] action of this sort").

III. PLAINTIFFS DO NOT PRESENT A SUBSTANTIAL FIRST AMENDMENT QUESTION

Even if plaintiffs' claims were not moot, their First Amendment challenge to FECA's per-election contribution limit is insubstantial and does not qualify for certification under section 30110. As this Court previously recognized, the Supreme Court "long ago concluded" that the per-election limits "prevent corruption and the appearance of corruption by allowing candidates to compete fairly in each stage of the political process." *Holmes*, 2014 WL 5316216, at *4. Indeed, the per-election limit not only is constitutionally permissible, it is sensible in that it fairly accounts for variations in election procedures that exist among the states.

Recognizing that plaintiffs' First Amendment challenge is foreclosed by "the analysis and conclusion of the Supreme Court in *Buckley v. Valeo* and its progeny," this Court previously determined that plaintiffs are unlikely to succeed on the merits of their First Amendment claims. *Holmes*, 2014 WL 5316216, at *1. "[N]ot every sophistic twist that arguably presents a 'new'

question should be certified.'" *Mariani v. United States*, 212 F.3d 761, 769 (3d Cir. 2000) (en banc) (quoting *Goland v. United States*, 903 F.2d 1247, 1257 (9th Cir. 1990)). Plaintiffs' claims represent nothing more than a "sophistic twist" on a legal question *Buckley* itself settled nearly four decades ago and do not merit certification to the en banc Court of Appeals.

A. FECA's Individual, Per-Election Contribution Limit is Closely Drawn to Prevent Actual and Apparent Corruption

As this Court recognized, contribution limits are subject to a lesser standard of constitutional scrutiny than restrictions on expenditures. *Holmes*, 2014 WL 5316216, at *3-4. 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.'" *Id.* at *4 (quoting *Buckley*, 424 U.S. at 20-21, 25).

Applying that intermediate level of scrutiny, the Supreme Court in *Buckley* upheld the then-$1,000 contribution limit that is the subject of this litigation. 424 U.S. at 23-28; *see id.* at 29 ("We find that, under the rigorous standard of review established by our prior decisions, 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."). The Court held that the limits further the important governmental interests of preventing "the actuality and appearance of corruption resulting from large individual financial contributions." *Id.* at 26; *see also 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)).

The Supreme Court has reiterated these conclusions more recently in addressing the constitutionality of other provisions of FECA. *See, e.g.*, *McCutcheon v. FEC*, 134 S. Ct. 1434, 1451 (2014) (invalidating FECA's aggregate limits on contributions to candidates while emphasizing that the statute's individual, per-election limits on candidate contributions remain "undisturbed" and that those limits are "the primary means of regulating campaign contributions"); *Citizens United v. FEC*, 558 U.S. 310, 359 (2010) (noting that contribution limits "have been an accepted means to prevent *quid pro quo* corruption").

Buckley and the Supreme Court's more recent decisions reaffirming the constitutionality of the individual, per-election contribution limits plainly foreclose plaintiffs' First Amendment claims and demonstrate that plaintiffs have not identified a First Amendment question that warrants certification to en banc Court of Appeals. Their First Amendment challenge is foreclosed because the Supreme Court "long ago concluded" that such restrictions "prevent corruption and the appearance of corruption by allowing candidates to compete fairly in each stage of the political process." *Holmes*, 2014 WL 5316216, at *4.

Plaintiffs have attempted to escape the dispositive impact of the Supreme Court's holdings by labeling their claims as "novel" and "as applied." (*See, e.g.*, Pls.' Prelim. Inj. Mem. at 10; Pls.' Reply Mem. on Mot. for Prelim. Inj. at 2, 4, 8 (Docket No. 13) ("Pls.' Prelim. Inj. Reply").) But their claims are neither. Although plaintiffs characterize their challenge as a "novel" dispute about the "structure" of what they erroneously claim is a $5,200 per-election-cycle limit, they are in fact, as this Court observed, "objecting to the specific base limit on how much an individual may contribute per election" — an endeavor foreclosed by the Supreme Court's holdings directly and explicitly affirming that limit. *Holmes*, 2014 WL 5316216, at *4 n.5. "Plaintiffs' attempt to reframe the issue" by mischaracterizing FECA "falls short," *id.*, and

proves that plaintiffs' complaint does not raise a "colorable constitutional claim[]," *Khachaturian*, 980 F.2d at 332. Summary judgment should thus be granted to the Commission. *Id.* at 331 (explaining that "'questions arising under 'blessed' provisions [of FECA] understandably should meet a higher threshold' of frivolousness" (quoting *Goland*, 903 F.2d at 1257)).

Indeed, plaintiffs' own complaint reveals that their characterization of their challenge as an "as applied" one is inapt. In *Doe v. Reed*, the Supreme Court explained that whether a challenge is facial or as applied depends on the relief sought by plaintiffs: "The label is not what matters. The important point is that plaintiffs' claims 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" is what distinguishes a facial challenge from an as-applied challenge). The provisions that plaintiffs challenge here establish the individual, per-candidate, per-election limits and specify that such limits "shall apply separately with respect to each election." 52 U.S.C. §§ 30116(a)(1)(A), 30116(a)(6) (2 U.S.C. § 441a(a)(1)(A), 441a(a)(6)). Plaintiffs fail to explain how a court could enjoin enforcement of those provisions as applied only to the two individual plaintiffs.

The impropriety of plaintiffs' "as applied" label is especially clear *now*, when the particular individuals to whom plaintiffs sought to contribute are no longer candidates and plaintiffs have failed to identify any comparable above-the-limit general election contributions they wish to make in the future to a candidate facing an opponent who will have lacked a "substantial primary opponent." *See infra* p. 33. Plaintiffs' claims thus necessarily reach beyond

the particular circumstances alleged in their complaint. *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) ("[A]ll [members of the Court] agree that a facial challenge must fail where the statute has a plainly legitimate sweep." (internal quotation marks omitted)).

But even if plaintiffs' claims could somehow be considered "as applied," an as-applied challenge to a law that has been facially upheld can only succeed if it raises a factual circumstance or principle of law that the court did not rely upon in determining that the statute was facially valid. *See, e.g.*, *Republican Nat'l Comm. v. FEC*, 698 F. Supp. 2d 150, 157 (D.D.C. 2010) (three-judge court) ("In general, a plaintiff cannot successfully bring an as-applied challenge to a statutory provision based on the same factual and legal arguments the Supreme Court expressly considered when rejecting a facial challenge to that provision."), *aff'd*, 130 S. Ct. 3544 (2010); *McGuire v. Reilly*, 386 F.3d 45, 61 (1st Cir. 2004) (rejecting as-applied challenges that presented "the same type of fact situation that was envisioned . . . when the facial challenge was denied").

The purported facts and principles of law raised by plaintiffs' challenge do not fall outside the principles established by *Buckley* and its progeny, as this Court previously found. Their proposed general-election contributions to those candidates in amounts that were twice the legal limit implicate precisely the same corruption concerns as above-the-limit contributions made by any other contributors, including contributors who *did* make primary contributions. "Even though the constitutional questions [plaintiffs] present[] in a sense are novel because of the unusual facts, they do not fall outside the principles established in the cases upholding FECA's contribution limits." *Goland*, 903 F.2d at 1253; *see LNC*, 930 F. Supp. 2d at 166 (concluding that the majority of an as-applied challenge to FECA's contribution limits "is

impermissible because it raises issues that the Supreme Court has already addressed" and thus "is not so much an as-applied challenge as it is an argument for overruling a precedent" (internal citation and quotation marks omitted)).

Regardless of how it is labeled, plaintiffs' First Amendment challenge to FECA's per-election contribution limit is foreclosed by the Supreme Court's clear decisions upholding the limit as closely drawn to prevent actual and apparent corruption. Plaintiffs' challenge to a settled legal question should not be certified to the en banc Court of Appeals.

B. FECA's Individual, Per-Election Contribution Limits Sensibly Account for State-by-State Variations in Election Procedures

FECA's establishment of separate contribution limits for each election within an election cycle not only is closely drawn to further the government's important anticorruption interests, it is also an eminently reasonable means of serving that interest. It is, as this Court explained, "a quintessential political decision made by politicians who understand the process far better than the courts and is deserving of deference." *Holmes*, 2014 WL 5316216, at *4.

The separate contribution limits 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 this Court noted, "a necessary part of the election process." *Id.* at *5. "Intimately aware of the financial demands of a modern election campaign," as this Court further explained, "Congress has . . . maintained a per-person, per election contribution limitation." *Id.*

The lack of such uniformity is evident, *inter alia*, in the regular occurrence of primary runoff elections (in addition to primary and general elections) in the ten states that currently provide for runoff contests under varying circumstances. (*See generally* Declaration of Eileen J. Leamon, Mar. 13, 2015 ("Leamon Decl.") Exh. 1 (providing data regarding primary runoff elections or conventions in federal electoral contests between 2003 and 2014).[6]

In Louisiana, by contrast, no congressional primary election is held; the first election for candidates seeking federal office is the November general election. 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. (Sadio Decl. Exh. 4 at 2 n.8; *see, e.g.*, Leamon Decl. Exh. 1 at 31 (identifying results of Louisiana congressional electoral contests featuring only a November election and others featuring a second election in December of the same year).)[7]

And in California — the state in which plaintiff Jost's preferred candidate sought election — as well as in Washington, a candidate who lacks an intraparty primary challenger could still fail to proceed to the general election because all candidates for a particular office are listed on the same primary ballot and the two candidates who receive the most votes, *regardless of party preference*, proceed to compete in the general election. *See supra* p. 3 (describing California's top-two primary system); Sadio Decl. Exh. 9; *id.* Exh. 17.)

The statutory contribution limits thus sensibly permit a candidate who must participate in a primary, runoff, and general election within a single election cycle to receive a greater number

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[6] The citations in this Brief to specific pages of the Exhibits to the Leamon Declaration are to the "Leamon Decl. Exh." page numbers, which were added to the Exhibit documents for the Court's ease of reference.

[7] In 2014, for example, 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. (Sadio Decl. Exh. 4 at 2 n.8.) In the December election, incumbent Democrat Senator Mary Landrieu lost her seat to a challenger, Republican and former Representative Bill Cassidy. (*Id.* Exh. 19.)

of contributions from a particular contributor during that election cycle than candidates who participates only in a primary and general election during that same cycle. *Holmes*, 2014 WL 5316216, at *1. Recent examples illustrate this point.

As we have explained (FEC's Opp'n to Pls.' Mot for Prelim. Inj. at 16-17 (Docket No. 12)), 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. (Leamon Decl. Exh. 1 at 10.) Travis Childers, on the other hand, won the Democratic primary by a sweeping margin and so avoided having to participate in a runoff. (*Id.*) Uniform per-election-cycle limits such as those plaintiffs 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. A per-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* Sadio Decl. Exhs. 24-25) — before proceeding to the general election.

FECA's separate contribution limits for each election within a particular election cycle further account for the occurrence of special elections — including special primary elections, special runoff elections, and special general elections — which are held throughout the country, in accordance with state-specific procedures, in various special circumstances including when necessary to fill a seat vacated by an incumbent who left office before completing the full term that individual was elected to serve. 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. (*See generally* Leamon Decl. Exh 2.)

Notably, plaintiffs themselves recently used the per-election contribution limits to maximize their election-cycle contributions to South Carolina Representative Marshall Sanford. (Sadio Decl. Exh. 1 (Holmes Interrog. ¶ 5); *id.* Exh. 2 (Jost Interrog. Resp. ¶ 5).) Between March and November 2013, plaintiff Jost made contributions to Sanford for Congress, Sanford's authorized campaign committee, totaling $7,800. (*Id.* Exh. 2 (Jost Interrog. Resp. ¶ 5).) 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, in which Sanford competed as an unopposed incumbent. (*Id.*; Sadio Decl. Exhs. 12-14.) Plaintiff Holmes contributed the same amounts to the Sanford campaign committee in connection with each of those three elections. (Sadio Decl. Exh. 1 (Holmes Interrog. Resp. ¶ 5).)

These examples, and the data reflecting similar circumstances in numerous other electoral contests over the past dozen years (Leamon Decl. Exhs. 1 & 2), 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 per-election-cycle limits plaintiffs would prefer. Per-election limits, as this Court explained, "allow[] candidates to compete fairly in each stage of the political process." *Holmes*, 2014 WL 5316216, at *4 (citing *Buckley*, 424 U.S. at 26-27).) Indeed, plaintiffs' proposed election-cycle limits could create some of the same purported disadvantages and inequities about which plaintiffs purport to be concerned.

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 v. Sorrell*, 548 U.S. 230, 249 (2006) (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 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 candidates who are competing against each other").

Setting contribution limits on a per-election basis 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 (quoting *Buckley*, 424 U.S. at 21). FECA's contribution limits allow individuals to associate with a particular candidate with respect to each of the elections that that candidate participates in during a given election cycle. The limits also permit contributors to choose, as plaintiffs have done here, *not* to associate with a candidate in connection with a particular election in which that candidate participates. *Holmes*, 2014 WL 5316216, at *4 ("That plaintiffs *elected* not to exercise their right of free expression before the primary election does not render the law unconstitutional as applied." (emphasis added)).[8]

[8] Even if plaintiffs' anecdotal allegations actually supported their claims that FECA, as opposed to plaintiffs' own voluntary conduct, has restricted their freedom to associate fully with their preferred candidates — and they do not — such allegations would not demonstrate that the per-election contribution limits fail under intermediate scrutiny. *See McCutcheon*, 134 S. Ct. at 1444 (explaining that contribution limits need not pass the strict scrutiny test of using "the least restrictive means" to "promote[] a compelling interest," and that "[e]ven a significant interference with protected rights of political association may be sustained if the [government] demonstrates a sufficiently important interest and employs means closely drawn to avoid

There is thus no merit to plaintiffs' allegations that FECA's separate contribution limits for primary, general, and other types of elections create an "artificial distinction between primary and general elections." (Compl. ¶¶ 18, 26, 37.) Indeed, plaintiffs' own choice to avoid what they considered "'wasting' money" on certain primary elections illustrates the legitimacy and significance of FECA's distinction between the various types of elections within a particular election cycle. *Holmes*, 2014 WL 5316216, at *1. And FECA's per-election contribution limits fairly account for the lack of uniformity in federal electoral contests by sensibly linking the total amount of money one can contribute to a particular candidate to the number of elections in which that candidate participates.

C. The Amount of FECA's Per-Election Limits is Constitutional

Plaintiffs have maintained that they "do not contest" the *amount* of FECA's individual "base" contribution limit, yet they claimed a constitutional right to make general-election contributions to certain federal candidates in amounts that were double the per-election limit. Pls.' Prelim. Inj. Mem. at 10; Compl. ¶ 26; *Holmes*, 2014 WL 5316216, at *4 n.5 ("Plaintiffs are indeed objecting to the specific base limit on how much an individual may contribute per election.") But plaintiffs' claim is clearly contrary to *Buckley* and its progeny. As *Buckley* explained, 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." 424 U.S. at 30 (internal quotation marks and citation omitted).

The Supreme Court has repeatedly reaffirmed this general rule. *See, e.g.*, *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 446 (2001) ("[T]he dollar amount of the limit need not be fine tun[ed] . . . ." (citation and internal quotation marks omitted)); *cf. Davis*, 554

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unnecessary abridgment of associational freedoms" (internal quotation marks and citation omitted)).

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, *inter alia*, *Randall* and *Buckley*)). In the lone instance where the Court invalidated an individual, 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. Plaintiffs make no such showing and their desire to avoid contributing money for certain primary contests, *Holmes*, 2014 WL 5316216, at *1, does not demonstrate the amount of FECA's per-election limits are so low that candidates lack sufficient resources to campaign.

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

The crux of plaintiffs' complaint — that they have a constitutional right to make a $5,200 contribution to a particular candidate's general-election campaign — is contrary to settled law. Indeed, the fundamental premise of their argument is false. According to plaintiffs, Congress and the Supreme Court in *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014), approved of a $5,200 election-cycle base limit, and because *combined* contributions up to that amount may constitutionally be donated over the course of a given election *cycle*, plaintiffs must also have a constitutional right to contribute the combined $5,200 amount in connection with a *single election* within that cycle. (Pls.' Prelim. Inj. Mem. at 13-14.) This Court has already, correctly, rejected that argument: "contrary to Plaintiffs' suggestion, neither Congress nor *McCutcheon* approved contributions of $5,200 for a single election." *Holmes*, 2014 WL 5316216, at *4. Further, neither Congress nor any court has ever suggested that a $5,200 per-election contribution would be "noncorrupting," as plaintiffs claim (Pls.' Prelim. Inj. Mem. at 13-14). On

the contrary, Congress has explicitly provided that "no person shall make contributions" to any candidate or her committee that, during the 2013-2014 election cycle, exceeded $2,600 "with respect to any election for federal office" and it has defined "election" to include as separate elections primary and general elections, as well as special elections, runoffs, and party conventions. *See supra* p. 6.[9]

Plaintiffs' imagined $5,200 election-cycle limit is further belied by the fact that Congress defined "election" to include runoffs, special elections, and party conventions, in addition to primaries and general elections. 52 U.S.C. § 30101(1) (2 U.S.C. § 431(1)). If plaintiffs were correct that Congress created a single, uniform election-cycle base limit, that limit would have to be "trifurcated" ($1733.33 per election) for candidates who must compete in one runoff election, in addition to a primary and general election, and divided by four ($1,300 per election) for candidates who must compete in a primary, general, and two runoff elections. *See supra* p. 6. Plaintiffs' theory fails to account at all for runoff and special elections and the inconsistencies that a uniform election-cycle limit would create for candidates running for similar federal offices in different states.

Further demonstrating that their claims are insubstantial, plaintiffs cannot identify support from a decision of the Supreme Court for their claimed election-cycle constitutional right. Plaintiffs' only *purported* support is the Supreme Court's *McCutcheon* opinion (*see* Pls.' Prelim. Inj. Mem. at 13-14, 20). But that case concerned FECA's *aggregate* limits on the total

[9] Other limits in the Act show that Congress can create an election-cycle (or calendar-year) limit when it so wishes. The aggregate limits that the Supreme Court struck down in *McCutcheon* were election-cycle limits. *See* 52 U.S.C. § 30116(a)(3) (2 U.S.C. § 441a(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 contribution aggregating . . . ."); *see also* 52 U.S.C. §§ 30116(a)(1)(B)-(D) (2 U.S.C. §§ 441a(a)(1)(B)-(D) (setting calendar year limits on contributions by persons to national party committees, state party committees, and other political committees).

amounts that individuals can contribute to all candidates or committees within a particular time period. And the Court there explicitly left "undisturbed" the per-election limit on individual contributions to a particular candidate for a particular election that is the subject of this lawsuit. 134 S. Ct. at 1451; *see id.* at 1442 ("For the 2013-2014 election cycle, the base limits in the Federal Election Campaign Act . . . permit an individual to contribute up to $2600 *per election* to a candidate (*$5200 total for the primary and general elections*)." (emphases added)); *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)). *McCutcheon* thus does not support plaintiffs' arguments, as this Court correctly recognized. *Holmes*, 2014 WL 5316216, at *4.

E. Plaintiffs' Alleged Injuries Were Self-Imposed and Not Caused by FECA

Plaintiffs' constitutional claims are insubstantial for the additional reason that their alleged injuries have resulted not from the challenged statutory provisions but, instead, from their own voluntary choices. (*See* Sadio Decl. Exh. 1 (Holmes RFA Resp. ¶ 2); *id.* Exh. 2 (Jost RFA Resp. ¶ 1).) As this Court correctly explained, plaintiffs' alleged injuries are entirely self-inflicted:

> Plaintiffs have *not* been prevented from supporting their preferred candidates with the full $5,200 contribution authorized by law. They could have contributed $2,600 to any candidate before the primaries, but *chose* not to do so 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.

Holmes, 2014 WL 5316216, at *4 (quoting Pls.' Prelim. Inj. Mem. at 1).

This Court alternatively suggested that perhaps plaintiffs' real dispute is with FEC regulations that permit any *candidate* competing in a general election to transfer "funds unused

for the primary" to the candidate's general-election campaign. *Holmes*, 2014 WL 5316216, at *6 n.8 (citing 11 C.F.R. § 110.3(c)(3)). But as the Court also noted, plaintiffs have not challenged this (or any other) FEC regulation. *Id.* Nor could they in this case in which plaintiffs have invoked section 30110, a provision limited to questions concerning the "constitutionality of any provision of [FECA]." 52 U.S.C. § 30110 (2 U.S.C. § 437h).

It is also far from clear that plaintiffs Holmes and Jost would have standing to challenge the rule anyway, since the transfer provision regulates the activities of *candidates*, not contributors. Plaintiffs would thus be hard-pressed to demonstrate that they have suffered an actual, "concrete and particularized" injury that is "fairly traceable" to rules that permit candidates to use their campaign contributions in a particular manner. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

In sum, plaintiffs' First Amendment claim challenges a provision of law long ago blessed by the Supreme Court and it should not be certified to the en banc court.

IV. PLAINTIFFS' FIFTH AMENDMENT CHALLENGE IS INSUBSTANTIAL

Plaintiffs' Fifth Amendment challenge to FECA's per-election contribution limit also fails to raise any constitutional question sufficiently substantial to warrant certification under section 30110. The limit applies equally to all persons and does not deny plaintiffs or anyone else equal protection of the law.

A. Plaintiffs' Equal Protection Claim Fails Because the Per-Election Limit Does Not Create Any Classifications

The "core concern" of the Constitution's equal protection guarantee is "shield[ing] against arbitrary [government] classifications." *Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 598 (2008) (describing scope of Fourteenth Amendment equal protection guarantee); *see Buckley*, 424 U.S. at 93 ("Equal protection analysis in the Fifth Amendment area is the same as

that under the Fourteenth Amendment."). By contrast, statutory provisions that do not create any classifications whatsoever do not implicate equal protection.

The per-election contribution limit creates no classifications. Its limit on contributions by individuals to candidates applies explicitly to all "persons." It limits all individuals to the same (2013-2014) $2,600 per-election limit. It does not treat any group of candidates or contributors differently from other candidates or contributors. This Court thus correctly concluded that "Plaintiffs have not been treated differently than any other contributor." *Holmes*, 2014 WL 5316216, at *5.

Plaintiffs have conceded that the per-election limit "'on its face' . . . does not appear discriminatory." (Pl's. Mem. at 25.) And where, as here, a challenged provision contains no classification, courts have rejected equal protection claims on that basis alone. *See, e.g.*, *Broussard v. Parish of Orleans*, 318 F.3d 644, 653-54 (5th Cir. 2003) (explaining that equal protection claims of arrestees were "doom[ed]" because challenged bail fee provisions that applied to all arrestees "fail to classify"); *McCoy v. Richards*, 771 F.2d 1108, 1112 (7th Cir. 1985) (rejecting equal protection claim because the statute "contains no classification scheme"); *United States v. Jenkins*, 909 F. Supp. 2d 758, 775 (E.D. Ky. 2012) (explaining that equal protection scrutiny was unnecessary for law that "creates no classifications among citizens, but is neutral on its face"); *United States v. Williams*, No. 02-4990, 2003 WL 21384640, at *4 (N.D. Ill. June 12, 2003) (explaining that equal protection scrutiny is "not appropriate when the challenged law creates no classifications").

Plaintiffs have not argued, and cannot plausibly contend, that a contribution limit that applies equally to all persons is an equal protection violation unless they can demonstrate that it was enacted specifically to further a discriminatory purpose. It is not enough to baldy allege, as

plaintiffs have done here, "disparate impact" (Pls.' Prelim. Inj. Mem. at 25) or "asymmetrical and discriminatory outcome[s]," (*id.* at 6-7, 17). *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) (requiring evidence of "discriminatory intent or purpose . . . to show a violation of the Equal Protection Clause"). "The equal protection component of the Fifth Amendment prohibits only purposeful discrimination, and when a facially neutral federal statute is challenged on equal protection grounds, it is incumbent upon the challenger to prove that Congress selected or reaffirmed a particular course of action at least in part *because of*, not merely in spite of, its adverse effects upon an identifiable group." *Harris v. McRae*, 448 U.S. 297, 323 n.26 (1980) (internal quotations marks and citation omitted) (emphasis added); *Stop Reckless Economic Instability Caused by Democrats v. FEC*, No. 14-397, 2015 WL 867091, at *8 (E.D. Va. Feb. 27, 2015) ("A contribution limit violates the equal protection component of the Fifth Amendment if plaintiffs can show they were treated differently from others who were similarly situated and that the unequal treatment was the result of discriminatory animus.").

The Supreme Court in *Buckley* recognized as much when it rejected a similar argument that FECA's contribution limits invidiously discriminated between incumbents and challengers. 424 U.S. at 30-31. The Court disagreed, explaining "at the outset" that "the Act applies the same limitations on contributions to all candidates . . . . Absent record evidence of invidious discrimination against challengers as a class, a court should generally be hesitant to invalidate legislation which on its face imposes evenhanded restrictions." *Id.* at 31. *Buckley* stressed that it was "important . . . that the Act applies the same limitations on contributions to all candidates regardless of their present occupations, ideological views, or party affiliations." *Id.* at 31.

Plaintiffs have failed to present any evidence of discrimination against general-election challengers to candidates who did not face "significant" primary opposition or individuals seeking to make contributions to support the candidacies of such challengers. Plaintiffs have not alleged, let alone demonstrated, anything to suggest that Congress chose the per-election limit due to animus or a discriminatory purpose.

The frivolousness of their Fifth Amendment claims is further underscored by the vagueness of the shifting de facto "class" of contributors to which plaintiffs claim to have been members during the 2013-2014 election cycle (but not always, *see supra* p. 24). Plaintiffs have alternatively described their claims as pertaining to contributors that "wish to give to candidates challenging incumbents who did not face significant opposition" in their primary elections, (Compl. ¶ 39; *see also id.* ¶¶ 40, 46-47, 67), or, more broadly, pertaining to the alleged "asymmetry posed whenever a candidate who faces a primary challenge competes in the general election against a candidate who ran virtually unopposed during the primary." (Pls.' Opp'n to FEC's Mot. for Remand at 9 (D.C. Cir. Document #1531459) (internal quotation marks omitted).) Plaintiffs recently provided another iteration of their definition of what constitutes a "substantial primary opponent" (Compl. ¶ 66):

> A candidate for office who is a member of the same political party as his or her opponent, must compete in the same primary election, and is sufficiently likely to succeed that his or her candidacy would materially alter the competitive position of a candidate similarly situated to Scott Peters [or David Loebsack] during the 2014 primary.

(Sadio Decl. Exh. 1 (Holmes Interrog. Resp. ¶ 2); *id.* Exh. 2 (Jost Interrog. Resp. ¶ 2).)

Plaintiffs' attempted definition raises more questions than it answers. Plaintiffs have refused to explain how or when their proposed assessment of a candidate's sufficient *likelihood* of success such that his candidacy "would materially alter the competitive position" of his

opponent is to be determined. (*Id.* Exh. 1 (Holmes Interrog. Resp. ¶¶ 2-4); *id.* Exh. 2 (Jost Interrog. Resp. ¶¶ 2-4).) And plaintiffs utterly fail to explain their bizarre suggestion (*id.* Exh. 1 (Holmes Interrog. Resp. ¶¶ 3-4); *id.* Exh. 2 (Jost Interrog. Resp. ¶¶ 3-4)) that the FEC's promulgation of a regulation regarding whether certain communications were functionally equivalent to campaign advertisements demonstrates that the FEC has the legal authority or technical ability to make *predictions* about a particular candidate's likelihood of "success" or probability of "materially alter[ing] the competitive position" of his or her opponent in an upcoming election. Moreover, the Supreme Court criticized the previous Commission regulation to which plaintiffs refer as a "two-part, eleven-factor balancing test" that chilled speech to such an extent that the facial validity of FECA's corporate expenditure ban needed to be reconsidered. *Citizens United*, 558 U.S. at 335-36. The Constitution does not compel that the Court accept plaintiffs' attempt to put the Act's contribution limits on a similar path. Finally, each of plaintiffs' proposed definitions disregards that Scott Peters had *three* primary opponents in the 2014 California congressional primary and that the absence of an *intraparty* opponent in that primary was irrelevant under California's primary system. *See supra* p. 4. Plaintiffs have failed to even identify any classifications that the statute actually creates, let alone make credible allegations of a discriminatory purpose, and their equal protection claims are thus insubstantial.

B. The Per-Election Contribution Limit Easily Satisfies the Applicable Level of Constitutional Review

In its opinion denying plaintiffs' motion for a preliminary injunction, this Court applied an intermediate standard of review. The Court noted that in recent cases challenging restrictions on political contributions, courts had applied "closely drawn," *i.e.*, intermediate scrutiny. *Holmes*, 2014 WL 5316216, at *5 (citing cases). In those cases, unlike here, the courts considered equal protection challenges to provisions that actually created classifications on their

face. *Id.* The per-election limit challenged here, however, applies equally to every contributor and candidate. *Id.* Unlike the laws at issue in the cases mentioned above, FECA's per-election contribution limit contains no classification scheme that would be susceptible to attack under the Fifth Amendment.

In any event, even if the Act's per-election contribution limit could be deemed to create some sort of de facto "class" of contributors — *e.g.*, contributors to candidates whose general-election opponents did not face a "substantial primary opponent" (Compl. ¶ 66) — such a classification would still be subject to nothing more than the most deferential standard of review.[10] Under either the Equal Protection Clause of the Fourteenth Amendment or the Due Process Clause of the Fifth Amendment, "a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against [an] equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313-15 (1993); *see also, e.g.*, *Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2080 (2012) ("This Court has long held that a classification neither involving fundamental rights nor proceeding along suspect lines . . . cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." (internal

[10] Moreover, even if plaintiffs' vague description defines the de facto category of contributors plaintiffs attempt to identify, plaintiff Holmes plainly did not fall within such a category in connection with her contributions to Carl DeMaio. As explained above, it is not true that Representative Peters, who opposed and ultimately defeated DeMaio in California's 2014 general congressional election, "lacked a substantial primary opponent" in the California congressional primary. *See supra* p. 4; *see also Holmes*, 2014 WL 5316216, at *2 n.2; Sadio Decl. Exh. 1 (Holmes RFA Response ¶ 3); Sadio Decl. Exh. 9 at 2; Sadio Decl. Exh. 10 at 76.

quotation marks omitted)); *Heller v. Doe*, 509 U.S. 312, 319-20 (1993) (same); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461 (1981) (same).

The obscure category of contributors that plaintiffs posit is neither a suspect nor a quasi-suspect classification and plaintiffs have offered nothing suggesting otherwise. Indeed, whether a contributor falls within this vaguely defined class depends wholly on the contributor's own decisions about which candidates to support and when, as well as the specific circumstances of a particular electoral contest — factors over which the government has no control. Such affirmative choices by individuals clearly do not implicate the Constitution's equal protection guarantees.

Plaintiffs' claims also do not implicate a fundamental right meriting heightened review. Plaintiffs purport to seek only to "structure" certain candidate contributions in a manner that allows them to limit the scope of their association with their preferred candidates, while increasing their per-election contributions to such candidates to an amount that is double the statutory limit for a single election. But no case has recognized a "fundamental right" or "freedom" to *structure* candidate contributions in whatever manner a contributor desires, and the Supreme Court has made clear that there is no fundamental right to make contributions in whatever *amount* a contributor desires. *E.g.*, *Buckley*, 424 U.S. at 23-29; *see supra* pp. 6-8.

In any event, whether rational-basis review or intermediate scrutiny applies, the per-election contribution limits survive constitutional scrutiny, as this Court determined under the latter, more rigorous standard. *See Holmes*, 2014 WL 5316216, at *5. Just as the per-election limit does not violate the First Amendment, it passes muster under the Fifth for similar reasons. The per-election contribution limit is closely drawn, applies equally to every contributor, and

advances important governmental interests in preventing corruption and its appearance. *Id.*; *supra* pp. 17-27.

C. Variations in Candidates' Campaign Funding Result from the "Vagaries of the Election Process" and Fail to Demonstrate Any Violation of Plaintiffs' Rights to Equal Protection

As previously explained, *see supra* pp. 31-32, equal protection under the Fifth Amendment prohibits purposeful discrimination. Plaintiffs have suggested (Pls.' Prelim. Inj. Mem. at 25), however, that the per-election limit creates a "disparate impact in favor of candidates who do not face a primary challenge." Even if such allegations of "disparate impact" and "asymmetrical outcomes" (*see id.* at 11, 25; Pls.' Prelim. Inj. Reply at 11) were cognizable under equal protection, any "disparate impacts" suffered by plaintiffs are due, as this Court properly concluded, to the "vagaries of the election process," and are not a result of federal law. *Holmes*, 2014 WL 5316216, at *6.

Moreover, while plaintiffs have suggested (Pls.' Prelim. Inj. Reply at 10) that "[o]ther contributors have been permitted to make" $5,200 general-election contributions, that assertion is manifestly wrong. As this Court recognized, "[n]o individual has the power to give $5,200 solely for use in the general election." *Holmes*, 2014 WL 5316216, at *6. Plaintiffs' related assumption (Pls.' Prelim. Inj. Reply at 14) that individuals who contributed to the incumbent candidates in the California and Iowa races underlying plaintiffs' claims could have given $5,200 to those incumbent candidates "with the full and reasonable expectation that the full contribution would be used for the purpose of succeeding in the forthcoming general election" is equally unavailing. Even if plaintiffs' hypotheses regarding other contributors' expectations were relevant — they are not — plaintiffs' speculation is insufficient to provide a basis for certifying constitutional questions to the en banc Court of Appeals. "It is not for this Court to certify to the

en banc Court of Appeals an as-applied question laden with hypotheticals about the constitutionality of contribution limits under FECA, especially when the Supreme Court has already addressed parts of the question in a facial challenge." *LNC*, 930 F. Supp. 2d at 167.

Even if Peters, Loebsack, DeMaio, Miller-Meeks or any other candidate exercised *their* rights under FEC regulations to use unspent primary contributions on general-election expenses, such actions by candidates do not remotely demonstrate any violation by the government of the equal protection rights of individual contributors. As this Court explained, even if a contributor to an unopposed incumbent — or any other candidate — makes a primary contribution "*in anticipation* that it will all be used in the general election[,] [*h]ow the funds are actually spent, of course, is wholly out of the contributor's control*." *Holmes*, 2014 WL 5316216, at *6 (emphasis added). Whatever the *candidate* ultimately does with the contributions he has received, "contributors have not been treated differently." *Id.*

As this Court recognized in denying plaintiffs' preliminary-injunction motion, even if some candidates have unused primary contributions that they use in the general election, while others are do not, that is not the result of any unequal treatment of contributors by FECA. "[A] candidate who participates in an uncontested primary may go into a general election with more money than a candidate who ran in a contested primary." *Holmes*, 2014 WL 5316216, at *5. But such disparities are not a consequence of FECA's contribution limits, but rather are a result of "the vagaries of the election process." *Id.* at *6. "FECA simply makes uniform the amount a person can contribute to a candidate on a per-election basis." *Id.* at *5. "[I]nequity in campaign finances is an inherent part of elections" and does not *ipso facto* give rise to a valid Constitutional claim. *Id.* "[T]here is certainly no rule requiring that all candidates have equal funding." *Id.* (citing *Davis*, 554 U.S. at 742).

Likewise baseless is plaintiffs' contention that FECA prevented them from associating with candidates for as long a period of time as other contributors. (Compl. ¶ 67.) On the contrary, and as plaintiffs admit, Holmes and Jost *voluntarily chose* not to associate with their favored candidates for the full duration of the 2013-2014 election cycle (by declining to make any primary contributions), in an effort to ensure that their contributions could not be "'wasted in an intraparty squabble.'" *Holmes*, 2014 WL 5316216, at *1 (quoting Pls.' Prelim. Inj. Mem. at 1); Sadio Decl. Exh. 1 (Holmes RFA Resp. ¶ 2); *id.* Exh. 2 (Jost RFA Resp. ¶ 2).) Those candid admissions doom plaintiffs' equal protection claims. "The Equal Protection Clause of the Fourteenth Amendment . . . is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). But contributors who choose not to exercise their right to make contributions during a primary are not similarly situated to those who do. Plaintiffs' admission establishes the limited extent of the associational interests at stake in plaintiffs' claims here. (*See supra* pp. 29-30.)

CONCLUSION

Plaintiffs' claims are moot and for that reason alone, this case should be dismissed. But even if this Court finds that plaintiffs' claims are capable of repetition yet evading review, it should still decline to certify any questions to the Court of Appeals and instead grant summary judgment to the Commission. FECA's per-election limits on contributions by individuals to candidates have been upheld by the Supreme Court under the First and Fifth Amendments, are closely drawn to match the sufficiently important interests of preventing actual and apparent corruption, reasonably tie contributions to the number of elections in which candidates compete, and create no classifications from which a valid equal protection claim might arise. The

constitutional questions before this Court are well-settled by Supreme Court precedent and should not be certified for en banc consideration.

Respectfully submitted,

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Dated: March 13, 2015

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HOLMES, *et al.*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, Defendant.	Civ. No. 14-1243 (RMC) DEFENDANT FEDERAL ELECTION COMMISSION'S PROPOSED FACTS AND CONSTITUTIONAL QUESTIONS

DEFENDANT FEDERAL ELECTION COMMISSION'S
PROPOSED FINDINGS OF FACT / STATEMENT OF MATERIAL FACTS
AND CONSTITUTIONAL QUESTIONS

In accordance with the Court's February 10, 2015 Order (Docket No. 24), Defendant Federal Election Commission ("FEC" or "Commission") submits the following proposed findings of fact and constitutional questions for the Court's consideration of certification to the en banc Court of Appeals. For the reasons set forth in the Commission's Brief Opposing Certification and in Support of Summary Judgment in Favor of the Commission, which the FEC is filing concurrently with this submission, the Court should not make findings of fact or certify any constitutional questions to the Court of Appeals pursuant to 52 U.S.C. § 30110 and should instead dismiss the case as moot or grant summary judgment to the Commission. The following facts may serve as the Commission's statement of material facts as to which there is no genuine issue under LCvR 7(h)(1). If, however, the Court finds that this case or a portion of it merits certification, it should make the following findings of fact, which are "necessary" for any full en banc merits review of plaintiffs' constitutional challenge (D.C. Cir. Remand Order at 1) (Docket No. 1535282), and constitutional questions.

Where indicated, the proposed findings below are consistent with those included in the Court's Certification of Questions of Constitutionality of Federal Election Campaign Act (Docket No. 20), *Holmes v. FEC*, No. 14-1243, 2014 WL 6190937 (D.D.C. Nov. 17, 2014) ("Certification Order").

The following table identifies the declarations filed concurrently herewith:

	SHORT NAME
Declaration of Jayci Sadio, March 12, 2015, and its Exhibits	Sadio Decl.
Declaration of Eileen J. Leamon, March 13, 2015, and its Exhibits[1]	Leamon Decl.

PROPOSED FINDINGS OF FACT / STATEMENT OF MATERIAL FACTS

I. THE PARTIES

1. Plaintiffs Laura Holmes and Paul Jost are a married couple, residing in Miami, Florida. Certification Order, 2014 WL 6190937, at *2; Compl. ¶ 8; Sadio Decl. Exh. 1 (Holmes Interrog. Resp. ¶ 8); *id.* Exh. 2 (Jost Interrog. Resp. ¶ 8).[2]

2. Defendant 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. §§ 30101-30146 (formerly 2 U.S.C. §§ 431-57), and other statutes. The Commission is empowered to formulate policy with respect to FECA, *id.* § 30106(b)(1) (§ 437c(b)(1)); to make, amend, and repeal such rules and regulations necessary to carry out FECA, *id.* §§ 30107(a)(8),

[1] The citations in these Proposed Facts to specific pages of the Exhibits to the Leamon Declaration are to the "Leamon Decl. Exh." page numbers, which were added to the Exhibit documents for the Court's ease of reference.

[2] Plaintiffs have not verified the factual allegations in their complaint, technically not even for one paragraph for which they responded to an interrogatory asking them to do so because they failed to manually sign those verifications. To the extent the Commission relies on the complaint and the unsigned verification, however, plaintiffs' allegations are not disputed.

30111(a)(8), 30111(d) (§§ 437d(a)(8), 438(a)(8), 438(d)); and to civilly enforce FECA and the Commission's regulations, *id.* §§ 30106(b)(1), 30109(a)(6) (§§ 437c(b)(1), 437g(a)(6)).

II. REGULATORY FRAMEWORK

A. Statutory Contribution Limits

3. Contribution limits have been one of the principal tools for preventing political corruption in this country for nearly seventy-five years. In 1939, Senator Carl Hatch introduced, and Congress passed, S. 1871, officially titled "An Act to Prevent Pernicious Political Activities" and commonly referred to as the Hatch Act. S. Rep. No. 101-165, at *18 (1939); *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 560 (1973); 84 Cong. Rec. 9597-9600 (1939). Congress established individual contribution limits in the 1940 amendments to the Hatch Act, Pub. L. No. 76-753, 54 Stat. 767 (1940). That legislation prohibited "any person, directly or indirectly" from making "contributions in an aggregate amount in excess of $5,000, during any calendar year" to any candidate for federal office. *Id.* § 13(a), 54 Stat. 770.

4. By 1971, when Congress began debating the initial enactment of FECA, the Hatch Act's $5,000 per-calendar-year individual contribution limit was being "routinely circumvented." 117 Cong. Rec. 43,410 (1971) (statement of Rep. Abzug).

5. A 1974 congressional report identified multiple instances of such circumvention. For example, the dairy industry had avoided then-existing reporting requirements by dividing a $2,000,000 contribution to President Nixon among hundreds of committees in different States, "which could then hold the money for the President's reelection campaign." Final Report of the Select Committee on Presidential Campaign Activities, S. Rep. No. 981, 93d Cong., 2d Sess. 615 (1974) ("*Final Report*"). Shortly thereafter, President Nixon "circumvented and interfered with" the "legitimate functions of the Agriculture Department" by reversing a decision unfavorable to

the dairy industry, and Attorney General John Mitchell (who was also President Nixon's campaign manager) halted a grand-jury investigation of the milk producers' association. *Id.* at 701, 1184, 1205, 1209; *see* Richard Reeves, *President Nixon: Alone in the White House* 309 (2001) (noting the Secretary of Agriculture's estimate that President Nixon's actions cost the government "about $100 million"). On another occasion, a presidential aide promised an ambassadorship to a particular individual in return for "a $100,000 contribution, which was to be split between 1970 Republican senatorial candidates designated by the White House and [President] Nixon's 1972 campaign." *Final Report* at 492. That arrangement was not unique. *Id.* at 501 (describing a similar arrangement with someone else); *see id.* at 493-94 (listing substantial contributions by ambassadorial appointees); *see also* David W. Adamany & George E. Agree, *Political Money: A Strategy for Campaign Financing in America* 39-41 (1975) (collecting instances of large contributors "giving and getting"); Herbert E. Alexander, *Financing Politics: Money, Elections and Political Reform* 124-26 (1976) (describing contributions that gave the appearance of quid pro quo corruption and may have raised "suspicio[ns] about . . . large campaign gifts").

6. Informed by such findings, the 1974 FECA Amendments enacted shortly after the Watergate scandal included tighter limits on the amounts that individuals, political parties, and political committees could contribute to candidates. In particular, Congress established a $1,000 per-candidate, per-election limit on individual contributions to candidates and their authorized political committees. Fed. Election Campaign Act Amendments of 1974, Pub. L. No. 93-443 § 101(b)(3), 88 Stat. 1263 (first codified at 18 U.S.C. § 608(b)(3)).

7. FECA's contribution limits apply both to direct contributions of money and to in-kind contributions of goods or services. 52 U.S.C. § 30101(8)(A) (2 U.S.C. § 431(8)(A)). The

contribution limits apply on a per-candidate, per-election basis, with "election" defined to include each of the following:

> (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.

52 U.S.C. § 30101(1) (2 U.S.C. § 431(1)); Certification Order, 2014 WL 6190937, at *2.

8. The Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 ("BCRA"), amended FECA to raise the individual per-candidate, per-election contribution limit and index it for inflation. *See* BCRA § 307(b), 116 Stat. 102-103 (codified at 52 U.S.C. § 30116(a)(3) (2 U.S.C. § 441a(a)(3)); BCRA § 307(d), 116 Stat. 103 (codified at 52 U.S.C. § 30116(c) (2 U.S.C. § 441a(c)(1)).

9. The 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. FEC, *Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold*, 78 Fed. Reg. 8530, 8532 (Feb. 6, 2013); Certification Order, 2014 WL 6190937, at *1. The FEC recently raised the limit for the 2015-2016 election cycle to $2,700 per candidate, per election. FEC, *Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold*, 80 Fed. Reg. 5750, 5751 (Feb. 3, 2015).

10. Because FECA defines "election" to include various types of electoral contests, the total amount that one may contribute to a particular candidate during a particular election cycle depends on how many elections that candidate must participate in to successfully pursue the federal office being sought. This means that an individual who supported a candidate that

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. Certification Order, 2014 WL 6190937, at *2.

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. 52 U.S.C. §§ 30101(1), 30116(a)(1)(A) (2 U.S.C. §§ 431(1), 441a(a)(1)(A)); Certification Order, 2014 WL 6190937, at *2.

12. Plaintiffs' contributions to Congressman Marshall "Mark" Sanford during the 2013-2014 election cycle illustrate the variability of the number of permitted contributions per election cycle. (*See infra* ¶¶ 13-16 and Exhibits cited therein.)

13. In 2013-14, Sanford successfully pursued the congressional seat vacated by Representative Tim Scott, who had served as the United States Representative for the 1st Congressional District of South Carolina until he was appointed to the United States Senate. (Sadio Decl. Exh. 23; Leamon Decl. Exh. 2 at 95-97, 123-24.)

14. Between March and November 2013, plaintiff Laura Holmes contributed the maximum permissible $2,600 to Sanford for each of the following three elections: (1) the special-runoff election against Curtis Bostic for appearance on the ballot of the special-general election to fill the seat vacated by Representative Scott; (2) the special-general election against Elizabeth Colbert Busch to fill the seat vacated by Representative Scott; and (3) Congressman Sanford's 2014 primary election, in which Sanford competed as an unopposed incumbent. (*Id.* Exh. 1 (Holmes Interrog. Resp. ¶ 5); Leamon Decl. Exh. 2 at 95-97, 123-24.)

15. Plaintiff Paul Jost contributed the exact same amounts during the same time period to the Sanford campaign committee in connection with each of those three elections. (Sadio Decl. Exh. 2 (Jost Interrog. Resp. ¶ 5).)

16. Congressman Sanford was reelected in 2014. No other candidate appeared on the ballot for his primary or general elections. (Sadio Decl. Exh. 14.)

B. FEC Implementing Regulations

17. FEC regulations "encourage[]" contributors to designate in writing the particular election for which an individual contribution is intended. 11 C.F.R. § 110.1(b)(2)(i); Certification Order, 2014 WL 6190937, at *2.

18. Undesignated contributions count against the donor's contribution limits for the candidate's next election; designated contributions count against the donor's contribution limits for the named election. 11 C.F.R. § 110.1(b)(2)(ii); Certification Order, 2014 WL 6190937, at *2.

19. When a candidate has net debts outstanding from a past election — including a primary election — a contributor may designate a contribution in writing for that past election. Such contributions may only be accepted for the purpose of retiring debt and only up to the extent of the debt. 11 C.F.R. §§ 110.1(b)(3)(i), (b)(5)(i)(B); Certification Order, 2014 WL 6190937, at *2.

20. If a candidate's net outstanding debts from a past election amount to less than the amount of a contribution designated for a previous election, Commission regulations permit the candidate (or his committee) to refund the contribution, redesignate it (with the donor's written authorization) for a subsequent election, or reattribute the contribution as from a different person. 11 C.F.R. §§ 110.1(b)(3)(i)(A) & (C); Certification Order, 2014 WL 6190937, at *2.

21. A primary contribution that is redesignated for use in a candidate's general election counts against the contributor's general-election limit. 11 C.F.R. § 110.1(b)(5)(iii) ("A contribution redesignated for another election shall not exceed the limitations on contributions made with respect to that election.").

22. If a candidate fails to qualify for the general election, then all general-election contributions received by that candidate must similarly be returned, redesignated, or reattributed. *Id.* § 110.1(b)(3)(i)(C).

23. Past Commission interpretations illustrate the constraints that are placed on committees with respect to primary- and general-election financing. *See infra* ¶¶ 24-27 and Exhibits cited therein.

24. In Advisory Opinion 1986-17 (Green), the Commission approved a request to raise individual contributions for the general election prior to the date of the primary election where the requestor had pledged to account separately for such general election contributions and to refund all such contributions if the candidate lost the primary election and thus would not participate in the general election. (*See* Sadio Decl. Exh. 5.)

25. The Commission explained in Advisory Opinion 1986-17 that FECA permits a committee to spend general-election contributions "prior to the primary election" where such expenditures are "exclusively for the purpose of influencing the prospective general election" and "it is necessary to make advance payments or deposits to vendors for services that will be rendered" after the candidate's general-election candidacy has been established. (*Id.* at 4.) The Commission further explained that all general-election contributions must be refunded if the candidate does not qualify for the general election. (*Id*.)

26. More recently, in Advisory Opinion 2009-15 (Bill White for Texas), the Commission responded to a series of questions regarding the designation, use, reattribution, redesignation, and potential refund of individual contributions made to an authorized committee of a candidate who intended to run for a Senate seat that was expected to be vacant in the next election cycle, but that might become vacant more immediately upon the anticipated resignation of the incumbent. (*See* Sadio Decl. Exh. 6.) Under the circumstances, any midterm vacancy would have been filled by a special election and, if necessary, a special run-off election. (*Id.* at 1-2.)

27. In Advisory Opinion 2009-15, the Commission explained that the committee could accept contributions for the anticipated special election and special runoff election, but "must use an acceptable accounting method to distinguish between the contributions received for each of the two elections, *e.g.*, by designating separate bank accounts for each election or maintaining separate books and records for each election." (*Id.* at 5 (citing 11 C.F.R. § 102.9(e)(1)).) The Commission further advised the committee that it "must not spend funds designated for the runoff election unless [the candidate] participates in the runoff." (*Id.* at 5 n.6 (citing 11 C.F.R. § 102.9(e)(3)).)

28. The Commission has also pursued enforcement actions in instances where primary-election candidates violated the rules requiring candidates that fail to qualify for a general election to refund (or redesignate or reattribute) any general-election contributions they have received. *See infra* ¶¶ 29-30 and Exhibits cited therein.

29. In *In the Matter of Jim Treffinger for Senate, Inc.*, Matter Under Review 5388, for example, the Commission, in April 2006, entered into a conciliation agreement with the Treffinger for Senate committee and its treasurer to resolve their violations of FECA and FEC

regulations based on their failure to refund, reattribute, or redesignate nearly all of the candidate's more than $200,000 in general-election contributions despite his loss of the primary election. (Sadio Decl. Exh. 7 at 4.) The committee and treasurer admitted the violations and agreed to pay a civil penalty of $57,000. (*Id.* at 5.)

30. Similarly, in *In re Wynn for Congress*, the Commission in 2010 entered into a conciliation agreement with the Wynn for Congress committee and its treasurer to resolve their violations of FECA and FEC regulations based on, *inter alia*, their failure to employ an accounting method to distinguish between primary and general-election contributions and their failure to refund the excessive contributions within sixty days of the candidate's primary-election loss. (Sadio Decl. Exh. 8 at 2-4.) The Committee admitted to the violations and agreed to pay a civil penalty of $8,000.00. (*Id.* at 4.)

31. Commission regulations permit any candidate participating in a general election that has remaining, unused primary contributions to use such unused primary contributions to pay for the candidate's general-election expenses. 11 C.F.R. § 110.3(c)(3).

32. General-election candidates are also permitted to use general-election contributions to pay outstanding primary-election debts. *Id.* § 110.1(b)(3)(iv). Candidates need not obtain contributor authorization to make such payments from their primary, general, and any other election accounts, and such payments by candidates do not change the per-election contribution limits for individual contributors. *Id.* §§ 110.1(b)(3)(iv), 110.3(c)(3); Sadio Decl. Exh. 3 at 21 (FEC Campaign Guide for Congressional Candidates and Committees).

33. An individual contribution is considered to have been "made when the contributor relinquishes control over the contribution." 11 C.F.R. § 110.1(b)(6). Generally, a recipient candidate and his or her campaign may spend contributions to the campaign however the

campaign chooses. Thus, the money can be spent on the candidate's next election campaign, transferred to another committee (within any applicable contribution limits), or used for any "other lawful purpose unless prohibited." 52 U.S.C. § 30114(a) (2 U.S.C. § 439a(a)).

III. PRIMARY AND GENERAL ELECTIONS

34. Primary elections serve the purpose of determining, in accordance with state law, which candidates are "nominated . . . for election to Federal office in a subsequent election." 11 C.F.R. § 100.2(c)(1) (defining "primary election").

35. General elections are those held to "fill a vacancy in a Federal office (*i.e.*, a special election) and which [are] intended to result in the final selection of [] single individual[s] to the office at stake." 11 C.F.R. § 100.2(b)(2) (defining "general election").

36. Nearly all fifty states in the Union use some type of primary elections in their procedures for electing individuals to serve in federal office. Eleven states use "open" primaries, in which any registered voter may vote. Eleven states use "closed" primaries, in which only voters previously registered as members of a political party may participate in the nomination process of their party. Two states use a "top two" primary model. *See infra* ¶ 41 (discussing "top two" systems in California and Washington). And twenty-four states use some "hybrid" primary model, falling somewhere between the "open" and "closed" primary types. (Sadio Decl. Exh. 15; *id.* Exh. 4 at 1-2.)

IV. VARIATIONS IN STATE ELECTION PROCEDURES

37. FECA's separate contribution limits for each election within a particular election cycle account for the lack of uniformity in federal electoral contests — including the races within different political parties for the same particular office.

38. Louisiana, for example, currently follows a unique electoral procedure in which no congressional primary election is held at all. (Sadio Decl. Exh. 4 at 2 n.8.) Only where a candidate fails to win a majority of the vote does the state hold a second election, termed a "runoff," in December of the same year. (*Id.*; *see* Leamon Decl. Exh. 1 at 31 (identifying results of Louisiana congressional electoral contests featuring only a November election and others featuring a second election in December of the same year).)

39. In 2014, for example, the first election for candidates seeking federal office was the general election held on November 4, 2014. Because no candidate won a majority of the vote in Louisiana's November 2014 election for U.S. Senate, the state held a second election on December 6, 2014. (Sadio Decl. Exhs. 18-19.) In the December election, incumbent Democrat Senator Mary Landrieu lost her seat to a challenger, Republican and former Representative Bill Cassidy. (Sadio Decl. Exh. 19.)

40. Between 2008 and 2010, Louisiana followed a different procedure that included regular primary and general elections, as well as runoff elections in instances where no candidate received a majority of the vote in the primary or general contest. (*See, e.g.*, Leamon Decl. Exh 1 at 55, 71.)

41. California — the state in which plaintiff Paul Jost's preferred candidate sought election — and Washington each hold "top two" primary elections in which all candidates, regardless of their party, compete against one another. In both California and Washington, a candidate who lacks an intraparty primary challenger may still fail to proceed to the general election because all candidates for a particular office 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. Sadio Decl. Exhs. 9, 17; *see* Certification Order, 2014 WL

6190937, at *2 (describing top two system in California).

42. Ten states — Alabama, Arkansas, Georgia, Iowa, Mississippi, North Carolina, Oklahoma, South Carolina, South Dakota, and Texas — currently provide for post-primary runoff elections or conventions in federal electoral contests under varying circumstances. (Sadio Decl. Exh. 4 at 1-2.)

43. In the event of post-primary runoff elections or conventions, candidates may receive additional contributions, up to the applicable per-election limit, for their runoff election campaigns. 52 U.S.C. § 30101(1) (2 U.S.C. § 431(1)).

44. Over the course of the last six election cycles, from the 2003-2004 cycle through the 2013-2014 cycle, 95 congressional races have included a primary runoff contest in at least one of the party primaries, averaging more than fifteen primary runoff elections per cycle. *See infra* ¶¶ 45-52 and Exhibits cited therein.

45. During the 2013-2014 election cycle, fifteen congressional races in seven states included at least one primary runoff contest after the party primaries. (Leamon Decl. Exh. 1 at 1-24.)

46. In one primary runoff, six-term incumbent Mississippi Senator Thad Cochran failed to receive enough votes in the Mississippi Republican Senate primary election to avoid having to compete in an additional election — an expensive runoff race (Sadio Decl. Exhs. 24, 25) — against his primary opponent, Chris McDaniel, before proceeding to the general election. (Leamon Decl. Exh. 1 at 10, 12.) In the Mississippi Democratic Senate primary, by contrast, Travis Childers won by a sweeping margin and thus avoided having to participate in a runoff. (Leamon Decl. Exh. 1 at 10.)

47. In another example, in the 2014 primary election for Iowa's Third Congressional District, no Republican primary candidate attained the 35 percent of the vote required under Iowa law to win the primary election. (Leamon Decl. Exh.1 at 8.) The primary election was thus deemed "inconclusive" and the candidates were selected by a political party convention, IA Code § 43.52, for which a separate contribution limit applied, 52 U.S.C. § 30101(1)(B) (2 U.S.C. § 431(1)(B)). (Leamon Decl. Exh. Exh.1 at 7-8; Sadio Decl. Exh. 22.)

48. During the 2011-2012 election cycle, 21 congressional races in seven states included at least one primary runoff contest after the party primaries. (Leamon Decl. Exh. 1 at 25-42.)

49. During the 2009-2010 election cycle, 29 congressional races in nine states included at least one primary runoff contest after the party primaries. (Leamon Decl. Exh. 1 at 43-66.)

50. During the 2007-2008 election cycle, ten congressional races in six states included at least one primary runoff contest after the party primaries. (Leamon Decl. Exh. 1 at 67-.75)

51. During the 2005-2006 election cycle, eight congressional races in five states included at least one primary runoff contest after the party primaries. (Leamon Decl. Exh. 1 at 76-89.)

52. During the 2003-2004 election cycle, twelve congressional races in five states included at least one primary runoff contest after the party primaries. (Leamon Decl. Exh. 1 at 90-102.)

53. FECA's separate contribution limits for each election within a particular election cycle further account for the occurrence of special elections — including special primary

elections, special runoff elections, and special general elections — which are held, in accordance with state-specific procedures, in various special circumstances including when necessary to fill a seat vacated by an incumbent who left office before completing the full term that individual was elected to serve.

54. Over the course of the last six election cycles, from the 2003-2004 cycle through the 2013-2014 cycle, there have been 126 special elections, averaging more than 21 per cycle. *See infra* ¶¶ 55-61 and Exhibits cited therein.

55. During the 2013-2014 election cycle, twelve states held a total of 33 special elections — including special primary elections, special runoff elections, and special general elections — to fill fourteen separate federal offices in those states. (Leamon Decl. Exh. 2 at 93-126.)

56. Plaintiffs have taken advantage of the per-election contribution limits to contribute three of the maximum per-election contributions to a single candidate in one election cycle. *See supra* ¶¶ 12-15 (describing plaintiffs' respective $2,600 contributions in 2013 to then-candidate Mark Sanford in connection with three separate elections during the 2013-2014 election cycle, including the special runoff election and special general election to serve as United States Representative for the 1st Congressional District of South Carolina).

57. During the 2011-2012 election cycle, nine states held a total of seventeen special elections — including special primary elections, special runoff elections, special general elections, and special party caucuses — to fill ten separate federal offices in those states. (Leamon Decl. Exh. 2 at 76-92.)

58. During the 2009-2010 election cycle, eleven states held a total of 25 special elections — including special primary elections, special runoff elections, and special general

elections — to fill sixteen separate federal offices in those states. (Leamon Decl. Exh. 2 at 50-75.)

59. During the 2007-2008 election cycle, eleven states held a total of 27 special elections — including special primary elections, special runoff elections, and special general elections — to fill fifteen separate federal offices in those states. (Leamon Decl. Exh. 2 at 23-49.)

60. During the 2005-2006 election cycle, four states held a total of eighteen special elections — including special primary elections, special runoff elections, and special general elections — to fill thirteen separate federal offices in those states. (Leamon Decl. Exh. 2 at 8-22.)

61. During the 2003-2004 election cycle, five states held a total of six special elections — including special primary elections, special runoff elections, and special general elections — to fill five separate federal offices in those states. (Leamon Decl. Exh. 2 at 1-7.)

62. When candidates do not face an opponent listed on primary or general-election ballots, they are still subject to challenge in most states by potential write-in candidates. *See, e.g.*, Sadio Decl. Exh. 16 (describing varying procedures for write-in candidates).

63. Write-in contenders have won at least seven U.S. Congressional races and two U.S. Senate races. *See, e.g., id.* (describing seven U.S. Congressional races and Strom Thurmond's U.S. Senate victory); *id.* Exh. 26 (State of Alaska's official results showing plurality of write-in votes); *id.* Exh. 27 (describing Alaska Senator Lisa Murkowski's write-in victory).

V. PLAINTIFFS' DESIRED CONTRIBUTIONS AND PROPOSED CONTRIBUTION-LIMIT SCHEME

64. In 2014, Ms. Holmes supported Carl DeMaio, a Republican candidate for California's 52nd Congressional District (CA-52).

65. Ms. Holmes chose not to make any contributions to Mr. DeMaio for the primary election. Certification Order, 2014 WL 6190937, at *3; Compl. ¶ 21; Sadio Decl. Exh. 1 (Holmes RFA Resp. ¶ 2).

66. Mr. DeMaio finished second in California's June 3, 2014 "top two" congressional primary election behind incumbent Congressman Scott Peters, a Democrat. Certification Order, 2014 WL 6190937, at *3; Compl. ¶¶ 19-20; *see* Sadio Decl. Exh. 10 at 76.

67. Under California's "top two" primary system, *see supra* ¶ 41, Congressman Peters and Mr. DeMaio opposed each other again in the general election. Sadio Decl. Exhs. 10-11; *see also id.* Exh. 1 (Holmes RFA Resp. ¶ 3).

68. Ms. Holmes contributed $2,600 to DeMaio's campaign committee for his general-election campaign on or about July 21, 2015. Certification Order, 2014 WL 6190937, at *3; Compl. ¶ 21; Sadio Decl. Exh. 1 (Holmes RFA Resp. ¶ 1).

69. Ms. Holmes wanted to contribute an additional $2,600 to Mr. DeMaio for his general-election campaign but did not do so because that contribution would have exceeded the $2,600 per-election contribution limit established in the Federal Election Campaign Act ("FECA" or "Act") for individual contributions to candidates during the 2013-2014 election cycle. Certification Order, 2014 WL 6190937, at *3; Compl. ¶ 21; *see* FEC, *Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold*, 78 Fed. Reg. 8530, 8532 (Feb. 6, 2013).

70. In 2014, plaintiff Jost supported Marianette Miller-Meeks, a Republican candidate for Iowa's Second Congressional District. Certification Order, 2014 WL 6190937, at *3; Compl. ¶¶ 22-24.

71. Mr. Jost chose not to make any contributions to Dr. Miller-Meeks for the primary election. Certification Order, 2014 WL 6190937, at *3; Compl. ¶ 24; Sadio Decl. Exh. 2 (Jost RFA Resp. ¶ 1).

72. Dr. Miller-Meeks won her primary election on June 3, 2014. So did Congressman Loebsack. Sadio Decl. Exh. 21; Leamon Decl. Exh. 1 at 8; Certification Order, 2014 WL 6190937, at *3.

73. In the general election, Dr. Miller-Meeks faced incumbent Congressman David Loebsack, who had been the only candidate on the ballot in the June 3, 2014 Democratic Party primary for Iowa's Second Congressional District. Sadio Decl. Exh. 20; Certification Order, 2014 WL 6190937, at *3; Compl. ¶¶ 19-20.

74. Mr. Jost contributed $2,600 to Dr. Miller-Meeks's campaign committee for her general-election campaign in July 2014. Certification Order, 2014 WL 6190937, at *3; Compl. ¶ 24.

75. Mr. Jost wanted to contribute an additional $2,600 to Dr. Miller-Meeks for her general-election campaign but did not do so because that contribution would have exceeded FECA's $2,600 per-election contribution limit for individual contributions to candidates during the 2013-2014 election cycle. Certification Order, 2014 WL 6190937, at *3; Compl. ¶ 24; *see* FEC, *Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold*, 78 Fed. Reg. 8530, 8532 (Feb. 6, 2013).

76. In this case, plaintiffs challenge FECA's contribution restriction limiting the amounts Ms. Holmes and Mr. Jost could lawfully contribute to the general election campaigns of their respective candidates — Mr. DeMaio and Dr. Miller-Meeks — to $2,600. They challenge the Act's $2,600 per-election contribution limit grounds as applied to their desires to have

contributed $5,200 (*i.e.*, excess contributions of $2,600) to their respective candidates' 2014 general-election campaigns.

77. Plaintiffs' challenge is based on the alleged "asymmetry posed whenever a candidate who faces a primary challenge competes in the general election against a candidate who ran virtually unopposed during the primary." (Sadio Decl. Exh. 1 (Holmes RFA Resp. ¶ 4); *id.* Exh. 2 (Jost RFA Resp. ¶ 3).)

78. Plaintiffs' challenge is "is not based on an incumbent/challenger distinction." (*Id.* Exh. 1 (Holmes RFA Resp. ¶ 4); *id.* Exh. 2 (Jost RFA Resp. ¶ 3).)

79. Plaintiffs seek to change FECA's separate $2,600 limits for primary, general, and other elections to a single $5,200 per-election-cycle contribution limit in instances in which the recipient candidate's opponent did not face a "substantial primary opponent." Compl. ¶ 66.

80. Neither FECA nor the FEC's regulations define or use the phrase "substantial primary opponent."

81. Plaintiffs seek to have the Court promulgate a definition of a "substantial primary opponent" as "[a] candidate for office who is a member of the same political party as his or her opponent, must compete in the same primary election, and is sufficiently likely to succeed that his or her candidacy would materially alter the competitive position of a candidate similarly situated to Scott Peters during the 2014 primary." (Sadio Decl. Exh. 1 (Holmes Interrog. Resp. ¶ 2); *id.* Exh. 2 (Jost Interrog. Resp. ¶ 2 (substituting "David Loebsack" for "Scott Peters")).)

82. Neither FECA nor the FEC's regulations involve any inquiry regarding whether a candidate is "sufficiently likely to succeed" such that "his or her candidacy would materially alter the competitive position" of another candidate, including one "similarly situated" to Congressmen Peters or Loebsack in their 2014 primary elections.

83. There is currently no context in which the FEC evaluates the substantiality of congressional candidates (either on the ballots or write-ins) or forecasts their election prospects.

84. Plaintiffs identify a class of persons that should be permitted to make "extra" contributions that is defined as follows: "Those able to contribute up to the primary and general election contribution limits to candidates running under competitive circumstances substantially similar to those Scott Peters faced during the 2014 election cycle." Sadio Decl. Exh. 1 (Holmes Interrog. Resp. ¶ 6); *id.* Exh. 2 (Jost Interrog. Resp. ¶ 6 (substituting "David Loebsack" for "Scott Peters")).)

85. Scott Peters competed directly against three candidates in the 2014 California congressional primary election. (Sadio Decl. Exh. 10; *see also id.* Exh. 1 (Holmes RFA Resp. ¶ 3).)

86. In November 2014, Scott Peters won reelection of his seat representing California's 52nd Congressional District in the United States House of Representatives. Congressman Peters defeated Carl DeMaio in the general election held on November 4, 2014. (Sadio Decl. Exh. 11 at 8.)

87. In 2014, Congressman David Loebsack won reelection of his seat representing Iowa's 2nd Congressional District in the United States House of Representatives. Congressman Loebsack defeated Marianette Miller-Meeks in the general election held on November 4, 2014. (Sadio Decl. Exh. 20.)

88. Plaintiffs do not identify or allege with particularity (a) any candidates in a general election they will support who (b) prevailed over a "substantial primary opponent" and (c) will face a candidate who did not face a "substantial primary opponent."

PROPOSED CONSTITUTIONAL QUESTIONS

1. Does FECA's provision limiting individual contributions to candidates to $2,600 on a per-election basis, 52 U.S.C. § 30101(1)(A) (2 U.S.C. § 431(1)(A)); *id.* § 30116(a)(1)(A) (§ 441a(a)(1)(A)), violate plaintiffs' First Amendment associational rights, as applied to their desires to have contributed $5,200 (two times the permitted limit) to the 2014 general election campaigns of candidates on the basis that these candidates' general-election opponents had a fundraising advantage because they did not, in plaintiffs' view, face "substantial primary opponents"?

2. Does FECA's provision limiting individual contributions to candidates to $2,600 on a per-election basis, 52 U.S.C. § 30101(1)(A) (2 U.S.C. § 431(1)(A)); *id.* § 30116(a)(1)(A) (§ 441a(a)(1)(A)), deny plaintiffs equal protection of the law under the Fifth Amendment, as applied to their desires to have contributed $5,200 (two times the permitted limit) to the 2014 general election campaigns of candidates on the basis that these candidates' general-election opponents had a fundraising advantage because they did not, in plaintiffs' view, face "substantial primary opponents"?

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