ORAL ARGUMENT SCHEDULED: OCTOBER 31, 2016, AT 9:30 AM

No. 16-5194

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

LAURA HOLMES AND PAUL JOST,

Plaintiffs/Appellants,

v.

FEDERAL ELECTION COMMISSION,

Defendant/Appellee.

On certification by the United States District Court for the District of Columbia under 52 U.S.C. § 30110

Plaintiffs' Reply Brief

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September 30, 2016

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GLOSSARY OF ABBREVIATIONS

BCRA: Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, 116 Stat. 81 (2002)

FEC or Commission: Federal Election Commission

FECA: Federal Election Campaign Act of 1971, Pub. L. 92-225, 86 Stat. 3 (1972), the Federal Election Campaign Act of 1974, Pub. L. 93-443, 88 Stat. 1263 (1974), and Federal Election Campaign Act Amendments of 1976, Pub. L. 94-283, 90 Stat. 475 (1976).

JA: Joint Appendix

I. STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in Plaintiffs' Opening Brief.

II. SUMMARY OF ARGUMENT

Individual contributions of $5,200 to candidates who have participated in a primary and a general election pose no cognizable risk of corruption. *See McCutcheon v. FEC*, 134 S. Ct. 1434, 1452 (2014). Plaintiffs Laura Holmes and Paul Jost do not seek to give more than that amount. Nevertheless, the Federal Election Campaign Act ("FECA") requires that they divide that non-corrupting contribution and give at least half before the primary election. For that provision to pass closely drawn scrutiny, Defendant Federal Election Commission ("FEC" or "Commission") must show that the artificial bifurcation of a non-corrupting contribution is closely drawn to the anti-corruption interest. *See id.* at 1445-46, 1452, 1456-57. It has not done so.

Instead, the FEC has sought to evade the constitutional issue at the heart of the certified question by mischaracterizing Plaintiffs' claims and arguing against the resulting strawman. Plaintiffs seek neither a single uniform limit for the entire election cycle nor the right to give more than $2,600 to a candidate who has participated in only a single election period. Their challenge is not foreclosed by *Buckley v. Valeo*, 424 U.S. 1 (1976)—as this Court has already held. *Holmes v. FEC*,

823 F.3d 69, 74 (D.C. Cir. 2016). And the FEC's attempt to ground its case, at this late stage, on new governmental interests ignores the fact that the Supreme Court has recognized only the anti-corruption interest, and has specifically rejected others that have been suggested from time to time, including those the Commission advances.

Cutting through these and other distractions, this case is simple. The FEC has not shown that the anti-corruption interest retains any force after other measures—including disclosure requirements and contribution limits—are taken into account. And it has failed to show that the bifurcated contribution requirement does anything whatsoever to prevent corruption. Those are the Commission's burdens, and it has failed to carry them.

III. ARGUMENT

Rather than demonstrating that FECA's bifurcated contribution limits, as applied to Plaintiffs, are closely drawn to the anti-corruption interest,[2] the

[2] Without citing any authority, the FEC repeatedly refers to the standard of review as intermediate scrutiny. Def. Br. at 4, 14-15. The Supreme Court, however, has referred to the standard as "closely drawn" scrutiny. *See Buckley v. Valeo*, 424 U.S. 1, 25 (1976); *McCutcheon v. FEC*, 134 S. Ct. 1434, 1444, 1445 (2014) (Roberts, C.J., controlling opinion); *see also Buckley*, 424 U.S. at 25, 64-65, 66, 75 (citing to the standard from *NAACP v. Alabama*, 357 U.S. 449 (1958), and variously calling it a closely drawn standard, exacting scrutiny, a strict test, or a strict standard of scrutiny). To avoid further confusion in this already-complex area of the law, Plaintiffs will refer to the standard using the terms chosen by the Supreme Court.

Commission's brief mischaracterizes both Plaintiffs' challenge and its own burdens under heightened scrutiny.

A. The FEC mischaracterizes Plaintiffs' challenge

1. The FEC attempts to turn Plaintiffs' as-applied claim into a strawman facial argument

The FEC attempts to turn Plaintiffs' as-applied challenge into a facial challenge. Contrary to the FEC's assertions, however, Plaintiffs have not asked for a uniform election-cycle system of limits, or for any other form of relief extending beyond their circumstances.

First, the FEC repeatedly suggests that Plaintiffs are seeking to tear down the entire per-election structure of FECA and replace it with "[u]niform per-election-cycle limits." Def. Br. at 29, 38; *see also id*. at 30, 33, 35, 41, 49. Plaintiffs ask for no such thing. Moreover, this Court has already rejected the FEC's repeated argument that this case represents a direct challenge to, and is thus foreclosed by, *Buckley*' facial ruling concerning the general validity of contribution limits. *See Holmes v. FEC*, 823 F.3d 69, 74 (D.C. Cir. 2016) ("We do not share this view of *Buckley*.").

In addition, the FEC argues that the district court's factual findings must be reviewed for clear error. Whether that is the correct standard, which appears to be a matter of first impression, is irrelevant here, as the record consists almost entirely of legislative facts that required no evidentiary determinations by the district court. Moreover, the FEC has not challenged any of the district court's findings.

Similarly, despite repeated briefing before the district court, this Court sitting en banc, and a panel of this Court, the Commission continues to mischaracterize Plaintiffs' challenge as one to the specific amounts Congress has determined are non-corrupting, and to recast Plaintiffs' challenge as a demand to contribute $5,200 in *any* single election within an election cycle. *See, e.g.* Def. Br at 40. The FEC fails to cite a single instance, however, in which Plaintiffs have in fact requested such relief.[3]

Congress has determined that candidates who have participated in a primary election and a general election will not be corrupted by contributions from a single person totaling $5,200—$2,600 for each stage of the election—and Plaintiffs do not dispute that amount. *See McCutcheon*, 134 S. Ct. at 1452.[4] Plaintiffs have requested the ability to wait until the general election period—at a time when a candidate has passed through a primary, been selected as a party's nominee, and become eligible to receive up to $5,200 from any individual contributor—and donate the total non-corrupting contribution at that time. No more.

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[3] Given that this is not the relief requested, the FEC's argument that ruling for Plaintiffs would require the Court to usurp legislative authority, *see* Def. Br. at 49, is a red herring.

[4] Unless otherwise noted, all citations to *McCutcheon* are to the Chief Justice's controlling opinion.

Plaintiffs are not challenging the per-election limits, or asking to give $5,200 in any election (including the primary itself). See Def. Br. at 16, 38, 40-41, 48. They are not seeking to donate $5,200 during the general election without respect to a candidate's having participated in a primary, see *id.*, nor to limit candidates who have participated in both a primary and a primary runoff to only $5,200 in total contributions, *see id.* at 29. And the FEC's effort to extend this case to the extraordinarily rare occurrence of elections beyond the general election is entirely unsupported and an obvious distraction. *Id*. at 26-32. In short, none of the exotic situations upon which the FEC relies is contemplated by the Verified Complaint.

Second, the FEC claims that Plaintiffs' challenge is not as-applied because Plaintiffs' relief would reach beyond "their proposed 2014 general-election contributions." Def. Br. at 49-50; *see also id*. at 16-17.[5] But relief does not cease to be as-applied merely because a plaintiff may use it later in similar circumstances.

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[5] To the extent the FEC's references to the 2014 general-election campaign constitute a veiled suggestion of mootness, *see* Def. Br. at 49, this case "fit[s] comfortably within the established exception to mootness for disputes capable of repetition, yet evading review," *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007). As with most cases involving election-law challenges, because of the short timeline surrounding elections, "the challenged action is in its duration too short to be fully litigated prior to cessation or expiration." *Id*. (internal quotation marks omitted). Moreover, "there is a reasonable expectation that [Plaintiffs] will be subject to the same action again." *Id*. (internal quotation marks omitted). FECA's bifurcated contribution limits have not changed, and Plaintiffs "wish to contribute to individual candidates after their primaries." JA 12, ¶ 18; *see also id*. at 14, ¶ 26.

See Nathaniel Persily & Jennifer Rosenberg, *Defacing Democracy?: The Changing Nature and Rising Importance of As-Applied Challenges in the Supreme Court's Recent Election Law Decisions*, 93 Minn. L. Rev. 1644, 1647 (2009) (noting that the remedy in as-applied actions is to "excise the plaintiff and those similarly situated from the statute's constitutional reach"); *cf. FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 469-70 (2007) (creating entire class of ads to which as-applied relief applied); *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 293 (4th Cir. 2008) (holding statute "unconstitutional as applied to [plaintiff] and *all similarly situated entities*" (emphasis added)); *Fender v. Thompson*, 883 F.2d 303, 305 (4th Cir. 1989) (same). That is, a challenge ceases to be as-applied when the requested relief extends to parties that are *not* similarly situated. This case does not do so.

It would, of course, benefit the FEC's case if it could recast Plaintiffs' challenge as a facial one. The burden would then switch to Plaintiffs, requiring them to show that FECA had no "plainly legitimate sweep" justifying its burdens. *Gordon v. Holder*, 721 F.3d 638, 654 (D.C. Cir. 2013) (quoting *Wash. State Grange v. Wash. State Repub. Party*, 552 U.S. 442, 449 (2008)); *Metro. Wash. Airports Auth. Prof'l Fire Fighters Ass'n Local 3217, etc. v. United States*, 959 F.2d 297, 305 (D.C. Cir. 1992) (quoting *Broadrick v. Okla.*, 413 U.S. 601, 615 (1973)). But, such is not the case. Plaintiffs have brought an as-applied challenge, and it is the FEC's burden to "demonstrate[] a sufficiently important interest and [show that the law] employs

means closely drawn to avoid unnecessary abridgement of associational freedoms." *McCutcheon*, 134 S. Ct. at 1444 (internal quotation marks omitted).

2. The FEC attempts to cloud Plaintiffs' challenge with irrelevant examples

Despite having failed to point to any relief Plaintiffs have requested beyond their circumstances, the FEC rests its argument upon a few rare occasions having nothing to do with Plaintiffs' situation. Def. Br. at 26-32. But whatever utility FECA's structure may have in those unusual circumstances, it has none here. After all, even in a facial challenge, a law must have a legitimate sweep, and not simply be helpful in a few rare circumstances. *See Gordon*, 721 F.3d at 654. Here, the FEC's evidence fails to show that the law is constitutional in Plaintiffs' circumstances, even if it might be constitutional in others.

The FEC suggests that relief from FECA as applied to Plaintiffs must be denied because FECA accounts for a "lack of uniformity" in federal elections. Def. Br. at 26-27. The Commission notes that some states permit special elections, but it fails to show that such procedures are anything but exceptions to the overwhelming majority of electoral contests that happen each election cycle. *See id.* at 32 (noting 126 special elections over 12 years, but failing to compare that to the total number of election contests). Moreover, even taking the FEC's examples at face value, none of them describes Plaintiffs' challenge, as there is no variance from the standard election process here.

For instance, the FEC describes one situation in which a challenger in Mississippi faced a primary and runoff election before squaring off against his opponent in the general election, an incumbent who was able to slide through the primary election. *Id*. at 29. The FEC complains that Plaintiffs' requested relief would have required the two general election candidates to be subject to the same limits for the entire cycle. But this scenario is outside Plaintiffs' circumstances, where the candidates all passed through only one primary and one general election.

Furthermore, the Commission fails to explain how Plaintiffs' requested relief would require those two Mississippi candidates to be subject to the same contribution limits. Plaintiffs merely request that, where a candidate has been through a primary and a general election, and thus entitled to receive $2,600 for each of those elections, that contributors be able to give that sum all at once during the general election. In a different case, one involving more than a primary and general election, a court might extend the logic of Plaintiffs' requested relief. The most logical way of doing so would be to permit a contributor to give $5,200 for the primary and general elections, as Plaintiffs request, and an additional $2,600 for a special election, should one occur.

The same considerations apply to the 2015-2016 Congressional races in Oklahoma, Georgia, and Texas, as well as the 2008 Georgia Senate race, which the FEC has pointed to as elections where only one of the candidates faced a primary

runoff. Def. Br. at 29-32. Nothing about Plaintiffs' requested relief would have prevented the Georgia Senate race candidates from receiving additional funding for their post-general election runoff because—again—Plaintiffs have not requested an election-cycle limit. *But see id*. at 30.

3. The FEC attempts to turn Plaintiffs' challenge to FECA into a regulatory challenge

The FEC argues that Plaintiffs are challenging FEC regulations rather than FECA. *Id*. at 46-48. Notably, however, the FEC fails to provide a single citation to Plaintiffs' opening brief where they have done so. This is because Plaintiffs have chosen to be faithful to the law of the case, which is that regulatory challenges are outside the scope of 52 U.S.C. § 30110 and thus not permitted as part of their constitutional challenge.

The FEC permits checks of up to $5,200 in certain circumstances, and Plaintiffs therefore cite to FEC regulations as evidence that the Commission recognizes that donating $5,200 in a single check is not corrupting. *See*, *e.g.*, Opening Br. at 23-24, 27-28. The FEC's only other response to this evidence is to misconstrue it, suggesting that it is an argument for a single election-cycle contribution limit. Def. Br. at 48. As already explained, that is not Plaintiffs' request.

B. The FEC has evaded its burden, failing to demonstrate that bifurcating a non-corrupting contribution meets closely drawn scrutiny

In this as-applied challenge, the FEC has the burden of showing "a sufficiently important interest and [that it has employed] means closely drawn to avoid unnecessary abridgement of associational freedoms." *Buckley*, 424 U.S. at 25. The Supreme Court "has identified only one legitimate governmental interest for restricting campaign finances: preventing corruption or the appearance of corruption," *McCutcheon*, 134 S. Ct. at 1450, and has limited that interest to quid pro quo corruption and its appearance, *id.* at 1451. Consequently, the FEC must demonstrate a close fit between FECA's bifurcated contribution requirements and the anti-corruption interest. *Id.* at 1444-45.

As a panel of this Court has already explained, and contrary to the FEC's assertions, *see, e.g.*, Def. Br. at 38, the per-election division of contribution limits was not foreclosed by *Buckley*—in fact, it was barely mentioned by the *Buckley* Court. *Holmes*, 823 F.3d at 74-75, 76. Consequently, the FEC must show, in this case and on these facts, that when a candidate has passed through a primary election, is sitting in the general election as a party nominee, and is thus eligible to receive up to $5,200 from any individual without triggering the anti-corruption interest, that FECA's compelled bifurcation of that $5,200 non-corrupting contribution is closely drawn to the anti-corruption interest.

After cutting through its attempts to redefine Plaintiffs' challenge, the FEC has failed to meet this burden.

1. The bifurcated structure is not closely drawn to any anti-corruption interest

The FEC has failed to meet the closely drawn standard in two ways: it has not shown that there is an anti-corruption interest supporting the bifurcated limits, and it has not shown that FECA's bifurcation requirements are closely drawn to any anti-corruption interest.

a. The FEC fails to show that there is a strong anti-corruption interest supporting bifurcation

The Supreme Court has recognized only one "sufficiently important interest" for upholding contribution limits: "preventing corruption or the appearance of corruption." *McCutcheon*, 134 S. Ct. at 1444, 1450. But, after taking into account other anti-corruption measures, the FEC has failed to demonstrate that there is any remaining anti-corruption interest sustaining the bifurcated contribution requirements' limitation on associational freedom. Instead, the FEC responds with conclusory statements about the strength of the interest.

For example, the FEC cites to Supreme Court decisions upholding the existence of contribution limits and then states, with no discussion or support, that "[f]ocusing in on the limit's operation per election does not alter the important governmental interest." Def. Br. at 23-24. But this begs the question: what precisely

is the governmental interest? The controlling opinion in *McCutcheon* explained that there remained no cognizable risk of corruption to support other anti-corruption prophylaxes once the base limits and disclosure laws were taken into account. *McCutcheon*, 134 S. Ct. at 1452, 1458; *cf. Coal. for Secular Gov't v. Williams*, 815 F.3d 1267, 1278 (10th Cir. 2016) (noting that the strength of the informational interest varies depending on the amount of information the Government's regulation would provide); *Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1032 (9th Cir. 2009) (same). Accordingly, the FEC has failed to provide any evidence that any portion of its anti-corruption interest remains after the base limits have gone to work.

In still another instance, the FEC seems to state in conclusory fashion that the corruption concern is the same when contributors make "[g]eneral-election contributions in amounts that are double the statutory limit, regardless of whether [they made any] primary contributions." Def. Br. at 50. That is, the FEC appears to argue that, if Plaintiffs contributed $5,200 during the general election but nothing during the primary election, it would "raise the same concerns as similar contributions" by someone who also "ma[d]e primary election contributions." *Id*.

This is a stunning statement. The FEC appears to believe that the risk of corruption to a candidate has *nothing to do* with the amount actually contributed to that candidate. This concession undermines the entire rationale for contribution

limits in the first place; it certainly undermines the FEC's case. After all, if the Commission claims that contributing $7,800 ($2,600 in the primary election *and* $5,200 in the general) is precisely as dangerous as contributing $5,200 (nothing in the primary and $5,200 in the general), the FEC is rejecting Congress's guidance as to the funding level at which an unacceptable corruption risk develops.[6] If that is so, it is not clear on what basis it can claim that Plaintiffs' planned contributions would pose *any* additional risk of corruption.

What is more, this assertion rests on fact-dependent claims that beg for some sort of evidence or substantiation, especially as the Commission appears to reject Congress's supposed expertise. Certainly, the Commission should be required to provide some evidence to substantiate the counterintuitive claim that the corruption concern is the same when a contributor gives 1) $5,200 during the general election campaign and $0 during the primary and 2) $5,200 during the general election campaign and $2,600 during the primary. But, despite insisting that the case be remanded for further fact-finding, the FEC failed to provide any evidence that the corruption concern is the same in these instances, or that there is a heightened risk when a person contributes $5,200 during the primary election or contributes $2,600 the day before the primary and $2,600 the day after.

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[6] The Commission has accused Plaintiffs of doing precisely the same thing but, as already explained, that charge is unfounded. *See supra* at 4.

The FEC's view that the corruption interest is independent of the funds contributed is representative of broader efforts by the FEC, and the Government in general, to police in the name of corruption the entire relationship between citizens and their public servants. For example, the FEC's brief appears to reject any constraint to the anti-corruption interest. That is, rather than demonstrate that FECA's bifurcation provisions are sustained by the anti-corruption interest—as constrained by the Supreme Court to quid pro quo corruption or the appearance of quid pro quo corruption, *see McCutcheon*, 134 S. Ct. at 1450—the FEC attempts to argue that Plaintiffs have impermissibly limited the reach of the anti-corruption interest to just quid pro quo corruption. Def. Br. at 20-24.

Despite the Government's repeated attempts to expand the scope of what might constitute corruption or its appearance, it has been repeatedly rebuffed. In *McCutcheon*, for example, the controlling opinion told the FEC that the quid pro quo limitation of the anti-corruption interest applies to both corruption and its appearance: "And because the Government's interest in preventing the appearance of corruption is *equally confined* to the appearance of *quid pro quo* corruption, the Government may not seek to limit the appearance of mere influence or access." 134 S. Ct. at 1451 (emphasis added); *see also id.* ("The line between *quid pro quo* corruption and general influence may seem vague at times, but the distinction must be respected in order to safeguard basic First Amendment rights.").

Thus, because the limitation to quid pro quo corruption applies to both corruption and its appearance, the explanation of the scope and limitations of quid pro quo corruption in *McDonnell v. United States*, 136 S. Ct. 2355 (2016), is directly relevant here. *But see* Def. Br. at 21-22. Although it may limit the FEC's power, the Commission must nonetheless respect *McDonnell*'s core point: corruption cannot be interpreted to encompass the whole of the relationship between contributing constituents and their representatives. There, as here, "[t]he Government's" desire to secure an expansive interpretation of corruption "could cast a pall of potential prosecution over these relationships." *Id*. at 2372.

Furthermore, *McDonnell* is useful in illuminating the type of argument the FEC is making here. In *McCutcheon*, the Chief Justice stated that the contribution limits were merely a prophylaxis, and that other steps to further protect against corruption, like the artificial bifurcation of contributions here or the aggregate limits there, were merely prophylaxes on prophylaxes. 134 S. Ct. at 1458. In particular, the Chief Justice in *McCutcheon* stated that contributions of $5,200 "or less do not create a cognizable risk of corruption," and that, given that "there is no corruption concern in giving . . . candidates up to $5,200 each," it was difficult to see how additional restrictions built atop that $5,200 limitation could be constitutional. *Id*. at 1452; *see also id*. at 1448 (noting Congress's decision to allow individuals to "give up to $5,200" to a candidate and that an unconstitutional prophylaxis on prophylaxis

further limited contributions even though "all contributions fall within the base limits Congress views as adequate to protect against corruption").

Notwithstanding *McCutcheon*'s controlling opinion, the FEC here argues that a party may nonetheless be corrupted on occasion, regardless of all the prophylaxes in the world, and the Commission cites to several newspaper articles outside the district court's factual findings to that end. Def. Br. at 44-45. It may be true that corruption still happens occasionally despite effective prophylaxes, but that is not an argument to sustain a general restriction on the "right to participate in the public debate through political expression and political association." *McCutcheon*, 124 S. Ct. at 1448; *see also id*. at 1452 ("And—importantly—we have never accepted mere conjecture as adequate to carry a First Amendment burden." (internal quotation marks omitted)). It is an argument for prosecuting actual corruption.

b. The FEC fails to show that the bifurcated contribution requirements are closely drawn

Even assuming that the FEC has shown a correct understanding of the anti-corruption interest, the FEC must still show that FECA's bifurcated contribution limits are narrowly drawn in Plaintiffs' circumstances. In failing to address the law's fit, the FEC incorrectly—and contrary to this Court's holding—argues that the question was foreclosed by *Buckley*. Moreover, it blatantly refuses to address the question, instead labeling it "absurd."

Plaintiffs have simply asked, in circumstances where Congress and the courts have determined that contributions of up to $5,200 are non-corrupting, that the FEC prove a substantial relation between the anti-corruption interest and requiring that contribution to be split into smaller sums made at different times.[7] The FEC's principal response to this question is that Plaintiffs' challenge is foreclosed because *Buckley* upheld the per-election limit. This is an argument that the FEC has repeatedly raised, and which the district court accepted. Def. Br. at 15, 17; JA 173. This Court, however, has rejected the idea that *Buckley* "'contemplated and approved' the Act's per-election contribution limits." *Holmes*, 823 F.3d at 74 (quoting *Holmes v. FEC*, 99 F. Supp. 3d 123, 144 (2016)); *id*. ("We do not share this view of *Buckley*.").

[7] Courts have typically applied strict scrutiny to bans on speech and expenditure limits, *see, e.g. Citizens United v. FEC*, 558 U.S. 310, 340 (2010) and *McCutcheon*, 134 S. Ct. at 1444, and applied to other regulations what they call exacting scrutiny, which requires a substantial relation between a law and a sufficiently important interest, *see, e.g.*, *Citizens United*, 558 U.S. at 366. In *McCutcheon*, the Chief Justice calls the former standard exacting scrutiny and the latter standard, which he applies to contribution limits, the closely drawn standard. 134 S. Ct. at 1444. Regardless of the name, the latter standard requires a "substantial relation between the governmental interest and the" burdens the law imposes upon the parties. *Buckley*, 424 U.S. at 64-65. That is, "[t]hough possibly less rigorous than strict scrutiny, exacting scrutiny is more than a rubber stamp." *Worley v. Cruz-Bustillo*, 717 F.3d 1238, 1249 (11th Cir. 2013) (quoting *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 876 (8th Cir. 2012)).

And while the FEC correctly states that this Court reversed the district court for failing to certify Plaintiffs' First Amendment challenge under § 30110, and that the bar for certification is low, this Court was nevertheless quite categorical in its analysis of *Buckley*. Apart from holding that *Buckley* had not foreclosed the question, and contrary to the FEC's characterization of the opinion, *see* Def. Br. at 45-46, this Court stated that there was an "absence [in *Buckley*] of any analysis of the First Amendment question plaintiffs raise." *Holmes*, 823 F.3d at 74. This was not surprising, because none of the questions certified in *Buckley* addressed the question, and the per-election structure was barely mentioned in a thousand pages of opinions and briefing, and then only to summarize or define the contribution limits. *Id.*

Consequently, Plaintiffs have raised a novel question not foreclosed by *Buckley*. The Commission's arguments to the contrary—including repeated citations to the district court's since-overturned reasoning—are foreclosed by this Court's decision. *See, e.g.*, Def. Br. at 16-17.[8]

Similarly, rather than address the merits, the FEC again suggests that Plaintiffs are seeking two mutually-exclusive aims: either to give $5,200 in any election, regardless of context, or else an overall election-cycle limit of $5,200, again

[8] Moreover, the district court's reasoning in its order on the preliminary injunction is irrelevant here because it was not part of the district court's § 30110 factual findings. Indeed, the district court ruled on that motion long before delving into the facts of the case.

regardless of context. Def. Br. at 44. It then declares that it will not "make the absurd showing, suggested by" Plaintiffs, namely that there be a substantial relation between those restrictions and the Government's interest. Def. Br. at 44. But misstating Plaintiffs' challenge, and then declaring that it would be "absurd" to address that strawman, does not absolve the FEC of its burden with regard to Plaintiffs' true challenge.[9]

In only one instance does the FEC come close to addressing the question at hand, but it does so by misinterpreting Supreme Court precedent. Contrary to the FEC's brief, the plurality opinion in *Randall v. Sorrell*, 548 U.S. 230 (2006), did not

[9] *Amici* Campaign Legal Center, et al., advance one argument attempting to connect the bifurcated contribution restriction to the anti-corruption interest, arguing that the "sticker shock" of seeing a large contribution amount raises the appearance of corruption. *See Amici* Br. at 23. But *Amici*'s argument lacks any evidentiary foundation. We do not know whether seeing a $5,200 contribution—one given for the first time to a candidate during the general election and after her participation in a primary—would raise concerns about the appearance of corruption. Indeed, *Amici* ignore that contributors may already make single, large donations to a candidate without triggering the anti-corruption interest or its anti-circumvention corollary. *See*, *e.g.*, 11 C.F.R. §§ 110.1(b)(5)(ii)(B) and 110.3(c)(3).

On the other hand, it could raise a greater appearance of corruption to see numerous small contributions, whether spread out over time or even on a single day. Someone looking over such fragmented contributions could suspect that a contributor is making numerous small contributions to circumvent limits and the attention of regulatory authorities. We simply do not know. This is an evidentiary question for which the FEC has provided no support whatsoever, and for which it bears the burden of persuasion.

hold "that limiting contributions per election cycle . . . is a danger sign that a limit may not be closely drawn." Def. Br. at 16. *Randall* struck down Vermont's limit as impermissibly low. *Randall*, 548 U.S. at 262. In doing so, the plurality opinion noted that Vermont had election-cycle limits, *id*. at 249, but not to opine on the advantages or disadvantages of per-election limits, much less their constitutionality. Rather, it mentioned them to emphasize how low Vermont's limits really were.

In particular, the plurality opinion in *Randall* stated that "[Vermont's] Act sets its limits per election cycle, which includes both a primary and a general election. Thus, in a gubernatorial race with both primary and final election contests, the Act's contribution limit amounts to $200 per election per candidate." *Id*. But the plurality opinion says this only to simplify the math for the next point: that the "limits are well below the limits th[e] Court upheld in Buckley." *Id*. at 250. Because FECA has a per-election limit, and Vermont set a per-cycle limit, comparing the two cases required a lowest common denominator. The Court does not state that the per-election-cycle limit is itself a "warning sign." The next paragraph, which compares Vermont's limits to those in multiple other states, makes this clear. *See id*. at 250-51. So, too, does the conclusion: "In sum, Act 64's contribution limits are substantially lower than both the limits we have previously upheld and comparable

limits in other States." *Id.* at 253. Thus, the plurality opinion in *Randall* was doing math, not making a constitutional finding about per-election limits.[10]

2. Having failed to show that the bifurcated contribution limits are closely drawn to the anti-corruption interest, the FEC introduces interests not recognized by the Supreme Court

Even though the anti-corruption interest is the only one that matters for contribution limits, *see McCutcheon*, 134 S. Ct. at 1450, the FEC cryptically states that "FECA's per-election limits operate in a manner that is well-matched to the congressional purpose." Def. Br. at 33. In particular, again citing to the district court's superseded preliminary injunction opinion, the FEC argues that Plaintiffs' relief should be denied because bifurcated contribution requirements "allow[] candidates to compete fairly." Def. Br. at 33, 36 (internal quotation marks omitted). As the Supreme Court previously explained to the FEC, however, "[t]he ancillary

[10] The FEC correctly notes, on the other hand, that Justice Thomas's concurrence expressed concern with Vermont's election-cycle contribution limits for their potential to substantially advantage candidates "who did not face a serious primary challenge." *Randall*, 548 U.S. at 268 (Thomas, J., concurring). Ironically, this was the very point that Plaintiffs' made before the district court, when arguing that FECA was unconstitutional under the Fifth Amendment because it disadvantaged candidates who faced serious challengers. *See* Reply at 19, *Holmes v. FEC*, No. 1:14-cv-01243-RMC (D.D.C. Mar. 20, 2015), ECF No. 28. The FEC argued before the district court, however, that such disparate impact arguments were not cognizable because the disparities arise from vagaries of the election process. *See* Opposition to Certification at 30-31, 37-39, *Holmes v. FEC*, No. 1:14-cv-01243-RMC (D.D.C. Mar. 13, 2015), ECF No. 27. The FEC's arguments apply here, and the Commission should respect the law of the case after successfully arguing that such claims should not be brought before this Court.

interest in equalizing the relative financial resources of candidates competing for elective office [is] clearly not sufficient to justify the . . . infringement of fundamental First Amendment rights." *Davis v. FEC*, 554 U.S. 724, 738 (2008) (citation omitted) (internal quotation marks omitted).

The FEC also seems to create a new governmental interest out of the constitutional command that campaign finance laws cannot "prevent candidates from amassing the resources necessary for effective [campaign] advocacy." *Randall*, 548 U.S. at 248 (internal quotation marks omitted). Based on *Randall*, the FEC seems to argue that FECA must be constitutional as-applied to Plaintiffs because it allows sufficient resources for campaign advocacy in other circumstances, and the FEC supplies examples to this effect. *See* Def. Br. at 24, 29-32, 36.

But even assuming that FECA allowed sufficient resources for Plaintiffs' preferred candidates to campaign effectively (and focusing on candidates' rights rather than contributors' rights), this argument is steeped in the fallacy of the inverse. The absence of a condition that sometimes makes a law *un*constitutional does not mean that the law is thereby constitutional. For example, just because an attorney stays sober throughout a trial, it does not necessarily follow that he provided effective assistance of counsel. Here, Plaintiffs have not argued that the law is unconstitutional in their circumstances because it prevents their preferred candidates from amassing the resources for effective advocacy, but rather because the

restrictions on their rights to associate with their preferred candidates do not meet closely drawn scrutiny. And, as discussed above, Plaintiffs do not request an election-cycle limit that would prevent candidates from taking contributions for special elections.[11]

3. Having failed to meet its burden under closely drawn scrutiny, even after insisting on a remand for fact-finding, the FEC seeks to shift its burden to the Plaintiffs

Having failed to meet its burden, the FEC attempts to shift it to Plaintiffs, arguing that it is Plaintiffs' burden to establish not just that the contribution base limits reduce corruption but that the danger of quid pro quo corruption "is removed entirely when contributions are made at or below FECA's limit." Def. Br. at 44. As noted above, the FEC's argument ignores the controlling opinion's explanation in *McCutcheon* that there is no "cognizable risk of corruption," and perhaps "no corruption concern in giving . . . candidates up to $5,200 each." 134 S. Ct. at 1452.

[11] Moreover, the FEC, unlike the parties in *Randall,* has failed to provide any record showing that particular candidates have been unable to amass the resources necessary for effective advocacy. Even if there were a record, the FEC cannot raise such a claim, either on its own or on behalf of other parties. Such arguments are accordingly not properly before this Court. And, if they were, they have been repeatedly rejected by the Supreme Court. *See*, *e.g.*, *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 749 (2011) ("We have repeatedly rejected the argument that the government has a compelling state interest in 'leveling the playing field' that can justify undue burdens on political speech."); *Davis*, 554 U.S. at 737 (denying right "to restrict an opponent's fundraising").

But the argument also ignores that it is the FEC's burden to show that the bifurcation of the contribution limits is constitutional. In particular, it is the FEC's burden to show that there is a sufficient anti-corruption interest—after accounting for the protections provided by the contribution base limits and "statutory safeguards against circumvention," *see id*. at 1446, 1458—to sustain the bifurcated contribution requirements that violate Plaintiffs' associational rights. *See also id*. at 1458 (noting that restrictions "layered on top" of base limits are a "prophylaxis-upon-prophylaxis approach [that] requires that [a court] be particularly diligent in scrutinizing the law's fit" (internal quotation marks omitted)).

C. The FEC erroneously argues that Plaintiffs caused their own harm

Without legal citation, the FEC asserts that "the alleged injury [Plaintiffs] claim resulted not from FECA's contribution limit but, instead, from their own voluntary choices." Def. Br. at 50. Choosing to comply with the law is no choice. Federal law currently prohibits Ms. Holmes and Mr. Jost from fully associating with their preferred candidate—the party nominee—even when abiding by the total amounts created by the base limits. That the Plaintiffs want to structure their contributions the day *after* the primary rather than the day *before* the primary does not matter. That is, Plaintiffs want to associate with their party nominees to the full extent that would be non-corrupting. But, to do so, to contribute $5,200 to the party nominees, Plaintiffs must be able to divine the results of the primary election so that

they can contribute before the primary, or they must violate the law. Thus, the real choice is to break the law or give up their right. *See Va. v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988) (noting that self-censorship is "a harm that can be realized even without an actual prosecution"); *see also Ariz. Free Enter.*, 564 U.S. at 739 (forcing a party to alter the form in which he exercises his First Amendment or forgo that right "contravenes the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message" (internal quotation marks omitted)).

But, even if Plaintiffs truly had an alternative means of attaining their goals, this Court has held that plaintiffs in such circumstances have a cognizable injury when the law limits their choices. For example, in the context of television and Internet service providers, this Court held that "the inability of consumers to buy a desired product may constitute injury-in-fact even if they could ameliorate the injury by purchasing some alternative product." *Consumer Fed'n of Am. v. FCC*, 348 F.3d 1009, 1012 (D.C. Cir. 2003) (internal quotation marks omitted); *see also Competitive Enter. Inst. v. Nat'l Highway Traffic Safety Admin.*, 901 F.2d 107, 112-13 (D.C. Cir. 1990) (injury-in-fact where fuel economy regulations hindered "opportunity to buy larger passenger vehicles").

This concept is so prevalent that when this Court faced a challenge to the Security and Exchange Commission's regulations concerning the membership of

mutual fund boards necessary for certain transactions in *Chamber of Commerce of the United States v. SEC*, 412 F.3d 133, 136 (D.C. Cir. 2005), the Court upheld the litigant's status in just two paragraphs. *Id*. at 138. "Under [this Circuit's] precedent, therefore," Ms. Holmes and Mr. Jost have "suffered an injury-in-fact and, because a favorable ruling would redress that injury, [they have] standing to sue the Commission." *Id*.

IV. CONCLUSION

For the reasons given above, and those given in Plaintiffs' Opening Brief, the Court should conclude that FECA's bifurcated contribution limits are unconstitutional as applied to Plaintiffs.

Respectfully submitted,

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Dated: Sept. 30, 2016

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 6,390 words, according to a word count by Microsoft Word 2016, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Rule 32(a)(5) because it has been prepared in a proportionally-spaced typeface—Times New Roman—using 14-point font.

Respectfully submitted Sept. 30, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2016, I electronically filed the foregoing Plaintiffs' Reply Brief with the Clerk of the United States Court of Appeals for the District of Columbia Circuit using the Court's CM/ECF system.

All participants in the case are represented by counsel of record who are registered CM/ECF users and will be served by the CM/ECF system. Service was made by CM/ECF on the following registered attorneys currently appearing in the case:

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