No. 15-1455

In the
United States Court of Appeals
for the Fourth Circuit

STOP RECKLESS ECONOMIC INSTABILITY CAUSED BY DEMOCRATS, TEA PARTY LEADERSHIP FUND, and ALEXANDRIA REPUBLICAN CITY COMMITTEE,

Appellants,

and

AMERICAN FUTURE PAC,

Intervenor-Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA AT ALEXANDRIA

APPELLANTS' AND INTERVENOR-APPELLANT'S OPENING BRIEF

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

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No. 15-1455 Caption: Stop Reckless Economic Instability Caused by Democrats v. FEC

Pursuant to FRAP 26.1 and Local Rule 26.1,

Stop Reckless Economic Instability Caused by Democrats,
Tea Party Leadership Fund,
Alexandria Republican City Committee, and
American Future PAC*

who are Appellants (American Future PAC is Intervenor-Appellant), make the following disclosure:

1. Is the party/amicus a publicly held corporation or other publicly held entity? ____YES __X__NO

2. Does party/amicus have any parent corporations? ____YES __X__NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3.	Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? If yes, identify all such owners:	____YES __X__NO
4.	Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? If yes, identify entity and nature of interest:	____YES __X__NO
5.	Is party a trade association? (amici curiae do not complete this question) If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:	____YES __X__NO
6.	Does this case arise out of a bankruptcy proceeding? If yes, identify any trustee and the members of any creditors' committee:	____YES __X__NO

Signature: /s/ Michael T. Morley Date: July 5, 2015

Counsel for: Appellants and Appellant-Intervenor

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JURISDICTIONAL STATEMENT

This case arises under the First and Fifth Amendments of the U.S. Constitution. U.S. Const. amend. I, V. It concerns the constitutionality of certain provisions of federal campaign finance law. *See* 52 U.S.C. § 30116. The U.S. District Court for the Eastern District of Virginia had original jurisdiction over this case under 28 U.S.C. § 1331.

The district court entered final judgment in this case, disposing of all parties' claims, on February 27, 2015. JA 521; DE 78 at 1. Appellants and Appellant-Intervenor filed their Notice of Appeal from that final judgment on April 22, 2015. JA 523; DE 82 at 1. This Court has appellate jurisdiction over this case pursuant to 28 U.S.C. § 1291. This appeal is timely under Fed. R. App. P. 4(a)(1)(B)(ii).

ISSUES PRESENTED

Political committees that meet certain statutory requirements, and have been registered with the FEC for less than six months, may contribute $10,000 annually to a state or local political party committee and $33,400 to a national party committee. Under 52 U.S.C. § 30116(a)(2), however, once such committees have been registered for six months, those limits drop to $5,000 and $15,000, respectively.

1. Does 52 U.S.C. § 30116(a)(2) violate the Fifth Amendment's Equal Protection guarantees by imposing different limits on such committees'

contributions to political parties, based solely on whether they have been registered for six months, thereby halving the amount a committee may contribute once it reaches that six-month mark?

52 U.S.C. § 30116(a) permits political committees that meet certain statutory requirements, but have been registered for less than six months, to contribute only $2,700/election to candidates. In contrast, political committees that meet those same requirements, but have been registered for six or more months, may contribute $5,000/election to candidates.

2. May Appellant Stop PAC and Appellant-Intervenor American Future PAC maintain their challenges to the six-month waiting period, even though their waiting periods have expired, under the "capable of repetition, yet evading" review exception to the mootness doctrine, as it applies in election law cases?

3. Does § 30116(a)'s six-month waiting period violate the First Amendment, as applied to political committees that meet all other statutory requirements for fully exercising their First Amendment associational rights by contributing $5,000/election to candidates?

4. Does 52 U.S.C. § 30116(a) discriminate in violation of the Fifth Amendment's Equal Protection guarantees, as applied to committees that satisfy those other statutory requirements, by imposing different candidate contribution limits based solely on whether a committee have been registered for six months?

STATEMENT OF THE CASE

A. The Challenged Statutes

"[T]he practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process." *Citizens Against Rent Cont. / Coal. for Fair Hous. v. Berkeley*, 454 U.S. 290, 294 (1981). In the modern era, individuals who wish to get involved in the political process may form, join, or contribute to "political committees." *See* 52 U.S.C. § 30101(4). Political committees exist on all sides of the political spectrum, from the National Resources Defense Council Action Fund to the National Rifle Association Political Victory Fund. They allow individuals to group together to collectively associate with their favored candidates, demonstrate their support for those candidates, and attempt to assist in their election. Political committees that are not created or operated by a candidate, officeholder, or political party are often referred to as "political action committees" or "PACs."

Section 30116(a)(4) provides that a political committee which meets the following three requirements is a "multicandidate PAC":

i. it received contributions from more than 50 persons [hereafter, "Receipt Requirement"];

ii. it made contributions "to 5 or more candidates for Federal office" [hereafter, "Contribution Requirement"]; and

iii. it has been registered with the FEC for six or more months.

52 U.S.C. § 30116(a)(4).[1]

Multicandidate PACs are subject to the following contribution limits:

- $5,000 per election limit on contributions to a candidate, 52 U.S.C. § 30116(a)(2)(A);
- $15,000 annual limit on contributions to a national political party committee, *id.* § 30116(a)(2)(B);[2]
- $5,000 annual limit on contributions to a state or local political party committee, *id.* § 30116(a)(2)(C).

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[1] At the time this lawsuit was filed, federal campaign finance law was codified in Title 2 of the U.S. Code. The challenged restrictions were set forth at 2 U.S.C. § 441a. Federal campaign finance law has since been recodified in Title 52. This brief will use the new, currently applicable citations.

[2] After this lawsuit was filed, Congress amended the law to allow national political parties to create three special segregated funds, each of which may be used exclusively for a specific purpose: (i) presidential nominating conventions, (ii) purchase or upkeep of party headquarters buildings, and (iii) election recounts and contests. *See* Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. No. 113-235, Div. N, § 101(a), 128 Stat. 2130, 2772-73 (Dec. 16, 2014), *codified at* 52 U.S.C. § 30116(a)(2)(B), (a)(9)(A)-(C). In addition to contributing $15,000 annually in unrestricted funds to a national party committee, a multicandidate PAC also may contribute $45,000 annually to each of the national party's three segregated funds, as well. 52 U.S.C. § 30116(a)(2)(B).

These limits on contributions to national parties' segregated funds are just as discriminatory as the general limit on contributions to national party committees. A multicandidate PAC may contribute $45,000 to each such segregated fund. *Id.* In contrast, a political committee that, like a multicandidate PAC, satisfies § 30116(a)(4)'s Receipt and Contribution Requirements, but has been registered for less than six months, may contribute $100,200 annually to each such fund. 52 U.S.C. § 30116(a)(1)(B). In other words, the amount a committee may contribute to a segregated fund is halved once that committee has been registered for six months. And materially identical committees are subject to dramatically different contribution limits based solely on whether they have been registered for six months.

Other political committees—including committees that satisfy § 30116(a)(4)'s Receipt and Contribution Requirements, but have not yet been registered for six months—are treated as "persons" under campaign finance law. Such newer committees are subject to the following contribution limits:

- $2,700 per election limit on contributions to candidates, 52 U.S.C. § 30116(a)(1)(A); *see also* FEC, *Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold*, 80 FED. REG. 5,750, 5,752 (Feb. 3, 2015) (adjusting statutory limit for inflation);[3]

- $33,400 annual limit on contributions to a national political party committee, 52 U.S.C. § 30116(a)(1)(B);[4] *see also* 80 FED. REG. at 5,752 (adjusting statutory limit for inflation).

- $10,000 annual limit on contributions to a state or local political party committee, 52 U.S.C. § 30116(a)(1)(D).

[3] Since the time this lawsuit was filed, the amounts that a "person" may contribute to a candidate and a national party committee have been adjusted for inflation. *Cf.* FEC, *Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold*, 78 FED. REG. 8,530, 8,532 (Feb. 6, 2013) (specifying former limits).

[4] As noted earlier, in addition to the general contribution limit of $33,400 in unrestricted funds, a "person" also may contribute $100,200 annually to each of a national party committee's three special segregated funds. 52 U.S.C. § 30116(a)(1)(B); *see also supra* note 2.

As the chart below demonstrates, the contribution limits that apply to political committees that satisfy § 30116(a)(4)'s Receipt and Contribution Requirements depend ***exclusively*** on whether those committees have been registered with the FEC for six months:

Contribution Recipient	**Identity of Contributor**	
	Political committee has been registered for **less than six (6) months**	Political committee has been registered for **six (6) or more months**
Candidate	$2,700 per election	$5,000 per election
State or Local Political Party Committee	$10,000 annually	$5,000 annually
National Political Party Committee	$33,400 annually	$15,000 annually
Special Segregated Fund of National Political Party[5]	$100,200 annually per fund	$45,000 annually per fund

This chart also demonstrates a puzzling feature of the current scheme: once a political committee that satisfies § 30116(a)(4)'s Receipt and Contribution Requirements has been registered for six months, the amount it may contribute to ***candidates*** nearly doubles, while the amount it may contribute to ***political parties***

[5] Because Congress did not establish separate contribution limits for national party committees' segregated funds until after the litigants in this case cross-moved for summary judgment below, *see supra* note 2, this lawsuit does not directly challenge such limits.

is slashed by nearly half. Thus, the law does not even treat such committees consistently once they reach that six-month mark.

B. The Appellants and Appellant-Intervenor

1. Stop PAC—Appellant Stop Reckless Economic Instability Caused by Democrats ("Stop PAC") is a hybrid political committee based in Alexandria, Virginia, that was formed and registered with the FEC on March 11, 2014. JA 504; DE 76 at 4. Within a month of its formation, Stop PAC had satisfied § 30116(a)(4)'s Receipt and Contribution Requirements by receiving over 150 contributions and contributing to five candidates. *Id*. Nevertheless, until its six-month waiting period expired on September 11, 2014, Stop PAC was permitted to contribute a maximum of only $2,600 per election to each candidate. *Id*. (citing 52 U.S.C. § 30116(a)(1)(A)).[6]

Among its other contributions, in early April 2014, Stop PAC contributed the statutory maximum amount of $2,600 to Niger Innis, a candidate for the Republican nomination to the U.S. House of Representatives from Nevada. JA 504; D E76 at 4. Innis' primary election was to be held on June 10, 2014, before the end of Stop PAC's six-month waiting period. *Id*. Stop PAC wished to contribute an additional $2,400 to Innis in connection with that primary (for a total of $5,000), but § 30116(a)(1)(A) "prohibited it from doing so because Stop PAC

[6] The limit has since been adjusted for inflation to $2,700. 80 FED. REG. at 5,752.

had not been registered with the FEC for more than six months." *Id.* It is undisputed that another political committee that was materially identical to Stop PAC in every way (*i.e.*, same number of contributors, same assets, same number of employees, same mission, etc.), but that had been registered for six months or longer, would have been permitted to contribute a total of $5,000 per election to Innis or any other candidate at that time.

Stop PAC filed the instant lawsuit in mid-April, shortly after satisfying § 30116(a)(4)'s Receipt and Contribution Requirements, to challenge the six-month waiting period and discriminatory contribution limits. JA 13; DE 1 at 1. Innis' primary election occurred before the trial court rendered judgment, however; *see* JA 504; DE 76 at 4. He lost.

In mid-June 2014, while this lawsuit was pending, Stop PAC contributed the statutory maximum of $2,600 to Dan Sullivan, a candidate for the Republican nomination for U.S. Senate in Alaska. *Id.* Sullivan's primary was to be held on August 19, 2014. *Id.* As the district court explained, "Stop PAC wished to contribute an additional $2,400 to Sullivan in connection with the Alaska Primary, but [§ 30116(a)(1)(A)] prohibited it from doing so because it had not been registered for more than six months . . . . The Alaska Primary occurred before Stop PAC's six-month waiting period expired." *Id.* Again, had Stop PAC been registered for six months at the time it contributed to Sullivan—even if everything

else about the committee were exactly the same—it would have been allowed to contribute $5,000 to him in connection with his primary.

Finally, in early July 2014, Stop PAC contributed the statutory maximum of $2,600 to Congressman Joe Heck in connection with the November 2014 general election. JA 505; D 76 at 5. It wished to contribute an additional $1,800 to Heck at that time, but was prohibited from doing so until the end of its six-month waiting period. *Id*. Shortly after Stop PAC's waiting period expired, on October 3, 2014, it contributed $1,800 more to Heck. *Id*.[7]

2. The Fund and the ARCC—Appellant Tea Party Leadership Fund ("The Fund") is a hybrid political committee that qualifies as a multicandidate PAC because it satisfied § 30116(a)(4)'s Receipt and Contribution requirements and has been registered with the FEC for more than six months. JA 506, DE 76 at 6. In 2014, the Fund contributed the statutory maximum of $5,000

[7] In its summary judgment briefing, the FEC emphasized that Greg Campbell, Stop PAC's founder and chairman, had contributed to Innis and performed work for the Innis campaign. The FEC pointed to deposition testimony that he acted as a "policy director" for the campaign, JA 271; DE 57-6 at 21, but the record also contained substantial evidence that he was a political consultant for the campaign who acted as a "scribe" or "writer," assisting with speeches, op-eds, and other public statements, JA 216-19, 221; DE 57-6 at 28-31, 33. The district court made no factual findings on this issue, and it played no role in the court's ruling.

The FEC further pointed out that Stop PAC's counsel in this case and treasurer, Dan Backer, also had served as counsel and treasurer for Innis' campaign committee. JA 206; DE 57-6, at 10. Backer attended a fundraiser for Innis and helped Innis with his website. Again, the district court made no findings on these points and did not base its ruling upon them.

to Appellant Alexandria Republican City Committee ("ARCC"), a local political party committee affiliated with the Virginia State Republican Party.[8] JA 506; DE 76 at 6 (citing 52 U.S.C. § 30116(a)(2)(C)). The Fund wished to contribute a total of $10,000 to the ARCC that year, but federal law prohibited it from doing so. "If the Fund had been registered with the FEC for less than six months," however, "it would have . . . been permitted to contribute up to $10,000" to the ARCC and any other state or local party committees. *Id*. (citing 52 U.S.C. § 30116(a)(1)(D)). Similarly, a political committee that, like the Fund, had satisfied § 30116(a)(4)'s Receipt and Contribution Requirements, but had been registered for less than six months, also would have been permitted to contribute $10,000 to the ARCC. *See* 52 U.S.C. § 30116(a)(1)(D).

Additionally, the Fund wishes to contribute $32,400 to the National Republican Senatorial Committee ("NRSC"), a national party committee. JA 506; DE 76 at 6. Under the 2014 contribution limits, a political committee that satisfied § 30116(a)(4)'s Receipt and Contribution Requirements, but was registered for less than six months, would have been permitted to contribute $32,400 to a national party committee such as the NRSC. *Id*. (citing 52 U.S.C. § 30116(a)(1)(B)); that limit has since been adjusted for inflation to $33,400, 80 FED. REG. at 5,752.

[8] Appellants will be filing a motion to supplement the record with this Court, seeking leave to provide evidence that the Fund also made a $5,000 contribution to ARCC in 2015, well after the trial court entered final judgment.

Because the Fund has been registered for more than six months, however, it may contribute a maximum of only $15,000 annually to the NRSC. JA 506; DE 76 at 6. (citing 52 U.S.C. § 30116(a)(2)(B)).

3. American Future PAC—Appellant-Intervenor American Future PAC is a political committee that formed and registered with the FEC on August 11, 2014. JA 505; DE 76 at 5. "Its purpose is to 'stand for veterans who have secured our freedom.'" *Id*. Within two weeks, American Future satisfied § 30116(a)(4)'s Receipt and Contribution Requirements by receiving 54 contributions and contributing to five candidates.[9] Nevertheless, until its six-month waiting period expired on February 11, 2015, American Future was permitted to contribute only $2,600 per election to each candidate. *Id*. (citing 52 U.S.C. § 30116(a)(1)(A)).

In August 2014, American Future contributed $2,600 to Tom Cotton in connection with his November general election for U.S. Senate. *Id*. It wished to immediately contribute another $2,000 to him in connection with that election, but was prohibited from doing so "because it had not been registered with the FEC for six months." *Id*. As discussed below, the district court granted American Future leave to intervene in this lawsuit and join in Stop PAC's challenge to the six-month waiting period and discriminatory contribution limits. JA 461; DE 62 at 1.

[9] American Future received a total of $5,473 in contributions, including a single contribution of $5,000. JA 505; DE 76 at 5.

The November election occurred before American Future's waiting period expired. On February 11, 2015, after the waiting period elapsed, American Future qualified as a multicandidate PAC. JA 505; DE 76 at 5.

C. Procedural History

Appellants Stop PAC, the Fund, and ARCC commenced this lawsuit in the Eastern District of Virginia on April 4, 2014. JA 13; DE 1 at 1. Niger Innis and his campaign committee, Niger Innis for Congress ("NIFC"), also were among the original plaintiffs. The Complaint contained three counts:

- **Count I** (brought by Stop PAC, Innis, and NIFC)—Fifth Amendment equal protection challenge to the different candidate contribution limits that apply to political committees that satisfy § 30116(a)(4)'s Receipt and Contribution Requirements, based solely on whether they have been registered with the FEC for six months.

- **Count II** (brought by Stop PAC, Innis, and NIFC)—First Amendment challenge to 52 U.S.C. § 30116(a)(4)'s six-month waiting period for political committees that satisfy § 30116(a)(4)'s Receipt and Contribution requirements before they may contribute the maximum statutorily permitted amount of $5,000 per election to candidates.

- **Count III** (brought by the Fund and ARCC)—Fifth Amendment equal protection challenge to the precipitous drop in limits on contributions to local, state, and national political parties that occurs once a political committee that satisfies § 30116(a)(4)'s Receipt and Contribution Requirements has been registered for six months.

JA 22-25; DE 1 at 10-13.

Stop PAC's challenge to the six-month waiting period, by its very nature, was time-sensitive. And, among other things, Stop PAC wished to contribute a

total of $5,000 to Niger Innis in connection with his impending primary election. Arguing that this case presented pure questions of law, and that the FEC already had any pertinent evidence in its possession, Appellants moved for summary judgment in early May, approximately three weeks after filing and serving the Complaint. JA 29; DE 6 at 1. The district court denied that motion without prejudice and granted the FEC's cross-motion under Rule 56(d) to allow time for discovery. JA 47; DE 33 at 1.

After Innis lost his primary, he and NIFC moved to voluntarily dismiss their claims without prejudice. The court granted their motion on July 24, 2014, and permitted Appellants to file an Amended Complaint containing just the claims of Stop PAC, the Fund, and ARCC. JA 79; DE 47 at 1. The Amended Complaint also alleged additional facts concerning contributions Stop PAC had made (to Dan Sullivan and Joe Heck) after the original complaint was filed.

In late August, as Stop PAC was nearing the end of its six-month waiting period, Appellant-Intervenor American Future moved to join or intervene in the lawsuit and adopt Stop PAC's First Amendment and Equal Protection challenges (Counts I and II). American Future's motion included as exhibits its proposed Rule 26(a) initial disclosures, as well as responses to all of the requests for admission, interrogatories, and document requests that the FEC had served upon Stop PAC, as they would apply to American Future. JA 95-96; DE 50 at 1-2.

American Future also agreed to immediately begin accepting discovery requests by e-mail and provide complete responses within six days. *Id.* The court allowed American Future to intervene in the lawsuit and allowed the FEC a few extra weeks to seek further discovery from it. JA 461; DE 62 at 1.

On September 19, 2014, Appellants and the FEC cross-moved for summary judgment. JA 117, 131; DE 56 at 1, 57 at 1. The court held oral argument on October 31, 2014, and permitted the parties to submit supplemental briefing concerning American Future, JA 463; DE 67 at 1, which had been permitted to "adopt[], join[] in, and incorporate[] by reference" Stop PAC's arguments, JA 507; DE 76 at 7. On February 27, 2015, the court denied Appellants' motion, and granted the FEC's motion, JA 519; DE 77 at 1, entering final judgment in the FEC's favor, JA 521; DE 78 at 1.

D. District Court Ruling

1. Justiciability—The court began by considering whether Stop PAC and American Future had standing to challenge the six-month waiting period and discriminatory limits on candidate contributions. It acknowledged that "there is no doubt that [they] have been affected by the challenged contribution limits." JA 508; DE 76 at 8. The court expressed concern, however, over "whether that injury satisfies the constitutional requirements for standing, given the ability of entities such as Stop PAC and American Future to control the timing of their

registrations relative to any particular election." JA 508-09; DE 76 at 8-9. In other words, Stop PAC and American Future may lack standing to challenge the six-month waiting period, because each of them (or, more precisely, its founder) was able to determine when its particular waiting period would occur, based on when it registered with the FEC. Despite these concerns, the court "assume[d], without deciding," that they possessed standing. JA 508; DE 76 at 9.

The court went on to consider whether Stop PAC's and American Future's claims were moot, since their six-month waiting periods had expired and they were no longer subject to the $2,600 limit on candidate contributions. It recognized that an exception to the mootness doctrine exists where "the underlying dispute is capable of repetition, yet evading review." JA 509; DE 76 at 9. But this exception generally applies only where "'the same complaining party will be subject to the same action again.'" *Id*. (quoting *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 462 (2007)). Neither Stop PAC nor American Future can ever again be subject to the six-month waiting period, since it is triggered only when a political committee first registers with the FEC.

The court then suggested, however, that under *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974), and the Fifth Circuit's ruling in a highly analogous case, *Catholic Leadership Coalition of Texas v. Reisman*, 764 F.2d 409, 422-23 (5th Cir. 2014), this "same plaintiff" requirement might not apply in the context of an

election-related case such as this. JA 509-10; DE 76 at 9-10 ("[I]t is unclear under the existing election case law whether the 'capable of repetition' prong applies under the circumstances of this case."). The court concluded, "Given the election law context, the Court assumes, without deciding, that the circumstances presented here satisfy both prongs of the mootness exception." JA 510; DE 76 at 10.

2. First Amendment claims—Turning to the merits of Stop PAC's and American Future's challenges, the Court rejected their First Amendment claim. It began by holding that contribution limits impose only "'marginal restrictions'" on First Amendment rights, because they "'involve little restraint' on contributors' ability to express their own political views." JA 511; D 76 at 11 (quoting *Buckley*, 424 U.S. at 20-21). The court further opined that Stop PAC and American Future were not even entitled to full protection of their First Amendment rights, since they were not individuals. It explained that PACs "receive less First Amendment protection than direct contributions to candidates. Because this case does not involve an individual contributor, the First Amendment . . . provides Stop PAC and American Future with limited rights, not offended here, with regard to their ability to make political contributions." JA 514; DE 76 at 14.

Based on this cramped and misguided conception of the First Amendment interests at stake, the Court held that § 30116(a)(1)(A)'s $2,700 candidate contribution limit could not be unconstitutional, since it was higher than the limits

upheld in *Buckley v. Valeo*, 424 U.S. 1 (1976). JA 512; DE 76 at 12. Likewise, the six-month waiting period on contributing the full statutory amount of $5,000 to candidates did not raise First Amendment concerns, because numerous other ways existed for entities such as Stop PAC and American Future to engage in "independent political expression." JA 513; DE 76 at 13. Thus, "Stop PAC and American Future cannot show that they have suffered a cognizable constitutional injury as a result of the waiting period, even if they would have made a higher contribution, had they been permitted to do so." JA 512; DE 76 at 12.

The district court's First Amendment analysis did not subject the six-month waiting period to any form of heightened scrutiny. Even more remarkably, despite the Supreme Court's admonition that "preventing corruption or the appearance of corruption" is the "only . . . legitimate governmental interest for restricting campaign finances," *McCutcheon v. FEC*, 134 S. Ct. 1434, 1450 (2014), the district court's First Amendment discussion completely fails to even mention "corruption." To the contrary, the word does not appear in the court's opinion until a fleeting reference in the penultimate paragraph. JA 517; DE 76 at 17.

3. Equal Protection claims—The court also rejected all of the Appellants' Equal Protection claims. It began by declaring that, because Stop PAC is a "'grassroots organization,'" it "is precisely the type of instrumentality that

lends itself to a circumvention of the contribution limits applicable to individuals." JA 515-16; DE 76 at 15-16. It did not cite any evidence to support this assertion.

Then, rather than comparing the ***statutory categories*** the law creates, the court went on to compare Stop PAC ***itself*** with the Fund. Because Stop PAC had received only 150 contributions, with most of its resources coming from two contributors, while the Fund "had over 100,000 contributors," the court concluded that the two committees were not "similarly situated" for Equal Protection purposes. JA 516; DE 76 at 16.

The court further noted that, "[e]ven if the PACs were similarly situated," it would reject Appellants' Equal Protection claims "under either rational basis or intermediate scrutiny." *Id.* It cited *Montana Right to Life Ass'n v. Eddleman*, 343 F.3d 1085, 1091 (9th Cir. 2003), for the proposition that it "'need not be overly concerned with the precise standard of scrutiny to be applied.'" JA 516-17; DE 76 at 16-17. Combining its rational basis and intermediate scrutiny analyses, the court declared that the challenged contribution limits serve the government's interest in reducing the risk of corruption and circumvention of other restrictions. JA 517; DE 76 at 17. The court did not address the second prong of an intermediate scrutiny analysis, by examining whether basing contribution limits on the length of time a committee has been registered with the FEC is an "appropriately tailored" means of achieving the Government's goals. *McCutcheon*, 134 S. Ct. at 1457.

Most notably, as mentioned above, the court emphasized the purported threat of circumvention that new, small, grassroots organizations such as Stop PAC supposedly pose. JA 515-16; DE 76 at 15-16. It did not explain why, once a committee that satisfies § 30116(a)'s Receipt and Contribution Limits has been registered for six months, the Government has a valid interest in slashing the amount it may contribute to local, state, and national party committees in half.

SUMMARY OF ARGUMENT

Political contributions are a protected form of association and speech under the First Amendment. This case concerns whether Congress constitutionally may impose different contribution limits on certain political committees (colloquially, "PACs"), based ***solely*** on whether they have been registered with the FEC for at least six months.

Two different types of contribution limits are at issue here: limits on contributions to candidates, and limits on contributions to national, state, and local political party committees. The candidate contribution limits discriminate against newer political committees. Certain committees that have been registered for six months or more may contribute nearly twice as much to their favored candidates as identical committees that were created more recently. Yet the record below lacks any evidence that such newer committees categorically pose a greater risk of corruption than older ones. This discriminatory treatment also effectively imposes

a six-month waiting period on such newer committees before they may exercise their First Amendment rights to the maximum extent permitted by federal law.

The limits on contributions to political parties, in contrast, discriminate against more established political committees. Once certain political committees have been registered for six months, the amount they may contribute to local, state, and national party committees is slashed by roughly half. Again, the record below lacks any evidence to suggest that a political committee that has existed for six months poses a greater risk of engaging in corruption with political parties (while simultaneously posing a reduced risk of engaging in corruption with candidates). Congress thus lacks a valid basis for reducing the amount such committees may contribute to political parties after six months.

Each set of contribution limits, on its own, impermissibly discriminates among political committees based on whether they have been registered for six months. Considered together, the contradictory changes in contribution limits that occur at the six-month mark are incoherent and undermine the validity of the whole system. The law's blunderbuss attempt to combat corruption through a blanket, six-month waiting period is completely untailored, particularly in light of the extensive particularized information about each individual political committee the FEC has at its disposal. Because the assumed—and unproven—correlation between the length of time a political committee has existed and the risk of

corruption it poses cannot survive intermediate scrutiny, this Court should invalidate both sets of discriminatory restrictions.

At the very least, this Court must invalidate one of the contradictory changes in contribution limits that occur at the six-month mark. A political committee cannot simultaneously pose both a greater risk of corruption ***and*** a reduced risk of corruption after six months. At least one of the challenged provisions must fall.

ARGUMENT

I. EQUAL PROTECTION PRINCIPLES PROHIBIT CONGRESS FROM IMPOSING LOWER LIMITS ON CONTRIBUTIONS TO POLITICAL PARTIES FROM PACS THAT HAVE BEEN REGISTERED FOR SIX OR MORE MONTHS.

The district court erred in granting the FEC's motion for summary judgment on Count III.[10] The Fifth Amendment's Equal Protection guarantee prohibits the Government from subjecting PACs to different limits on the amount they may contribute to political parties, based solely on whether those PACs have been registered for six months. In particular, the Government may not slash the amount a PAC may contribute to a political party, simply because it has been registered for six months. Thus, 52 U.S.C. § 30116(a)(2)(B)-(C)'s reduced contribution limits ($5,000 to state parties and $15,000 to national parties) are unconstitutional as

[10] This court "review[s] the district court's disposition of cross-motions for summary judgment—including its determinations regarding standing—de novo, viewing the facts in the light most favorable to the non-moving party." *Bostic v. Schaefer*, 760 F.3d 352, 370 (4th Cir. 2014).

applied to committees that satisfy § 30116(a)(4)'s Receipt and Contribution Requirements, and have been registered for six or more months.

The Fifth Amendment's Due Process Clause imposes Equal Protection restrictions on the federal government equivalent to those the Fourteenth Amendment imposes on the states. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). Under Equal Protection principles, a court must "treat[] as presumptively invidious those classifications that . . . impinge upon the exercise of a fundamental right." *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (quotation marks omitted); *Att'y Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898, 906 n.6 (1986) (opinion of Brennan, J.) (holding that a law that disparately "infringes constitutionally protected rights" for different groups is subject to "heightened scrutiny").

In *Buckley v. Valeo*, 424 U.S. 1, 22, 24 (1976), the Supreme Court held that contributing to candidates and political parties is an important aspect of the freedom of association protected by the First Amendment. "The right to join together 'for the advancement of beliefs and ideas' is diluted if it does not include the right to pool money through contributions, for funds are often essential if 'advocacy' is to be truly or optimally 'effective.'" *Id.* at 65-66 (quoting *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958)). Moreover, "[m]aking a contribution, like joining a political party, serves to affiliate a person with a

candidate" and "enables like-minded persons to pool their resources in furtherance of common political goals." *Id*. at 22.

Because contribution limits substantially burden a contributor's right to associate with candidates and political parties while leaving the contributor free to associate with those candidates and parties in other ways, *id*. at 22, such limits are subject to heightened or "close[]" scrutiny, instead of strict scrutiny, *id*. at 25 (quotation marks omitted). The district court's assertion that contribution limits impose only "marginal restriction[s]" on First Amendment rights, JA 511; DE 76 at 11, overlooks their impact on associational rights.

A campaign finance law "violates the equal protection component of the Fifth Amendment," if it "burdens the First Amendment rights of [some] persons . . . to a greater extent than it burdens the same rights" of other entities, and "such differential treatment is not justified." *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 200 (1981) (hereafter, "*CalMed*"). To survive heightened scrutiny, such differential treatment must further "a sufficiently important interest and employ[] means closely drawn to avoid unnecessary abridgement of associational freedoms." *Buckley*, 424 U.S. at 25; *accord Wagner v. FEC*, 854 F. Supp. 2d 83, 96 (D.D.C. 2012) ("[T]o survive an equal protection challenge, § 441c's ban on contributions by federal contractors must be closely drawn to match a sufficiently important interest.") (quotation marks omitted), *vacated on jurisdictional grounds*,

717 F.3d 1007 (D.C. Cir. 2013); *see also Police Dep't of the City of Chicago v. Mosley*, 408 U.S. 92, 102 (1972) (holding that, under the Equal Protection Clause, a court must determine whether a "selective restriction on expressive conduct" is "far greater than is essential to the furtherance of [a substantial] interest"). The discriminatory limits on contributions to political parties fail this test.

The district court, however, declined to subject any reduced contribution limits to heightened scrutiny on the grounds that people can express support for candidates in numerous ways other than making contributions, such as by "volunteering their time to work on candidates' campaigns" and speaking "independently in favor of, or organizing volunteer efforts to support candidates of their choice." JA 513; DE 76 at 13. *Buckley* expressly relied on such considerations, however, in deciding that limits on campaign contributions should be subject to intermediate or "close" scrutiny, rather than strict scrutiny.

Buckley recognized that contribution limits constrain "one important means of associating with a candidate or committee, but leave the contributor free to become a member of any political association and to assist personally in the association's efforts on behalf of candidates." 424 U.S. at 22; *see also id*. at 28 (reiterating that contribution limits "leav[e] persons free to engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and

committees with financial resources"). Despite these numerous other ways in which people can get involved in political campaigns, *Buckley* still subjected limits on campaign contributions to heightened scrutiny. 424 U.S. at 25 (assessing whether contribution limits further a "sufficiently important interest" and "employ[] means closely drawn to avoid unnecessary abridgement of associational freedoms").

A. An Equal Protection Analysis Must Focus on the Statutorily Created Categories, Rather Than Other Characteristics of the Particular Appellants in This Case

Federal law divides political committees that satisfy § 30116(a)'s Receipt and Contribution Requirements[11] into two categories:

- those that have been registered for ***less than six months***, and therefore may contribute $10,000 annually to state party committees and $33,400 annually to national party committees, 52 U.S.C. § 30116(a)(1)(B), (D); and

- those that have been registered for ***six or more months***, and therefore may contribute only $5,000 annually to state party committees and $15,000 annually to national party committees, *id*. § 30116(a)(2)(B)-(C).

The only pertinent question is whether committees in the latter group categorically pose ***more*** of a threat of corruption or circumvention concerning contributions to political parties than those in the first group.

[11] In other words, committees that have received more than 50 contributions and contributed to five or more candidates. 52 U.S.C. § 30116(a)(4).

The district court's approach to this issue was methodologically flawed. It held that an Equal Protection analysis was inapplicable because Stop PAC was very different from, and therefore not "similarly situated" with, the Fund. JA 516; DE 76 at 16. The court's focus on these particular appellants, rather than the statutory classifications themselves, was erroneous. *See Califano v. Boles*, 443 U.S. 282, 293-94 (1979) (holding that "equal protection analysis . . . must begin with the statutory classification itself").

Moreover, all of the differences between Stop PAC and the Fund upon which the district court fixated are statutorily irrelevant. For example, the court stated that Stop PAC "is comprised of approximately 150 contributors," while the Fund "had over 100,000 contributors." JA 516; DE 76 at 16. This distinction is statutorily irrelevant; once a political committee has received more than 50 contributions, the law does not further consider the number of contributors it has. 52 U.S.C. § 30116(a)(4). Likewise, the court noted that Stop PAC has "contributed to five candidates for federal office," while the Fund has contributed to "dozens of federal candidates." JA 516; DE 76 at 16. Again, so long as a political committee has made more than five contributions, the law does not further take the number of contributions it makes into account. 52 U.S.C. § 30116(a)(4). The court noted that two of Stop PAC's "largest contributors provid[ed] a

significant portion of Stop PAC's receipts," while the Fund is more "broad-based." JA 516; DE 76 at 16. The statutory scheme, however, ignores such considerations.

In *CalMed*, 453 U.S. at 200, an unincorporated association brought an equal protection challenge against a provision that imposed lower contribution limits on such entities than on certain corporations. Unincorporated associations could contribute only $5,000 to their affiliated PACs, *id.* at 195 (citing 2 U.S.C. § 441a(a)(1)(C)), whereas corporations could contribute an unlimited amount to their affiliated "segregated funds," *CalMed*, 453 U.S. at 200 (citing 2 U.S.C. §§ 431(8)(B)(vi), 441b(b)(2)(C)). The Court held that these different limits were permissible under Equal Protection because unincorporated associations and corporations "have differing structures and purposes," and therefore "may require different forms of regulation in order to protect the integrity of the electoral process." *Id.* at 201.

This case, in contrast, is an as-applied Equal Protection challenge to the disparate contribution limits the law imposes on political committees that satisfy § 30116(a)(4)'s Receipt and Contribution Requirements, based solely on whether those committees have been registered for six months. Unlike in *CalMed*, it is impossible to contend that the two statutorily defined groups of committees "have differing structures and purposes" and therefore "require different forms of

regulation." *Id*. "[D]ifferential treatment" of candidate contributions from materially identical political committees "is not justified." *Id*.

In short, the district court is attempting to distinguish between Stop PAC and the Fund based on factors that Congress itself did not deem sufficiently pertinent to incorporate into federal law. Groups such as Stop PAC and groups such as the Fund are "similarly situated" in the manner Congress deemed relevant because they both satisfy § 30116(a)(4)'s Receipt and Contribution Requirements. For Equal Protection purposes, the issue is whether expiration of a group's six-month waiting period is a constitutionally valid basis for substantially reducing the amount it may contribute to political parties.

B. Allowing Established Political Committees to Contribute Less to Political Parties Than Newer Political Committees May Contribute Does Not Further a Valid Governmental Interest

For political committees that satisfy § 30116(a)(4)'s Receipt and Contribution Requirements, the precipitous drop in limits on contributions they experience at the six-month mark does not further a valid government interest. The Supreme Court has held that there are only three "constitutionally sufficient justification[s]" for contribution limits: preventing *quid pro quo* corruption, *McConnell v. FEC*, 540 U.S. 93, 297 (2003) (opinion of Kennedy, J.); avoiding the appearance of such quid pro quo corruption, *Buckley*, 424 U.S. at 26; and preventing circumvention of other constitutionally proper limits, *FEC v. Colo.*

Republican Fed. Campaign Comm., 533 U.S. 431, 456 (2001) (hereafter, "*Colorado II*").

Imposing discriminatorily low limits on the amount that established committees may contribute to political parties furthers none of these goals. To the contrary, the district court concluded that a newer "'grassroots organization'" is "precisely the type of instrument that lends itself to a circumvention of the contribution limits applicable to individuals," and that the "risk of circumvention is particularly great during the initial months of a PAC's creation." JA 515-16; DE 76 at 15-16. Thus, even accepting the district court's reasoning, multicandidate PACs categorically pose less of a circumvention risk than newer political committees, and therefore should not be subject to lower contribution limits.

Likewise, by permitting newer committees to contribute $10,000 annually to state and local parties, and $33,400 annually to national parties, Congress has effectively determined that contributions in those amounts do not give rise to a risk of actual or apparent *quid pro quo* corruption. *Cf. McCutcheon*, 134 S. Ct. at 1452 ("Congress's selection of a $5,200 base limit [for candidate contributions, including both primary and general elections] indicates its belief that contributions of that amount or less do not create a cognizable risk of corruption."). There is no reason to believe that contributions in those same amounts from more established committees to political parties would somehow pose a greater risk of corruption.

Cf. id. (holding that, "[i]f there is no corruption concern" in allowing individuals to make $5,200 contributions to nine different candidates, "it is difficult to understand" how a tenth such contribution would be potentially corrupting).

C. Distinguishing Among Committees Based on Whether They Have Been Registered for Six Months is a Poorly Tailored Means of Achieving the Government's Goals.

Distinguishing among political committees based on whether they have been registered for six months also is not a "closely drawn" means of furthering any valid interests the Government may have in preventing quid pro quo corruption, the appearance of quid pro quo corruption, or circumvention of contribution limits. *Buckley*, 424 U.S. at 25. Under *Buckley*'s "closely drawn" standard, the Government may not seek to advance its goals through overbroad means that "unnecessar[ily] abridg[e]" First Amendment rights. *Buckley*, 424 U.S. at 25. A campaign finance restriction must be invalidated when only an "attenuated" relationship exists between the actual or apparent quid pro quo corruption the Government constitutionally may prevent, and the specific conduct it wishes to prohibit. *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 616 (1996) ("*Colorado I*").

Moreover, the Government may not prohibit a broad range of constitutionally protected conduct in order to reach a narrow sliver of conduct that raises the specter of quid pro quo corruption. *See, e.g.*, *Citizens United v. FEC*,

558 U.S. 310, 362 (2010) (holding that the Government may not prohibit independent expenditures from all corporations as a means of "preventing foreign individuals or associations from influencing our Nation's political process"); *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 498 (1985) ("*NCPAC*") (invalidating prohibition on independent expenditures by PACs because, "[e]ven were we to determine that the large pooling of financial resources [by PACs] did pose the potential for corruption or the appearance of corruption," the challenged statute was "not limited to multimillion dollar war chests," but rather "appl[ied] equally to informal discussion groups that solicit neighborhood contributions").

Slashing the amount a political committee may contribute to a political party simply because it has been registered for six months is a poorly tailored means of furthering the Government's anti-corruption goals. The district court opinion itself reveals that the six-month mark is not intrinsically important, but rather serves as a highly attenuated and unreliable proxy for the factors the district court ***really*** deems relevant, including the size of a political committee, the number of contributors it has, the amount of assets it has, whether most of its income comes from only a few contributors, and the number of different candidates it has supported. JA 516; DE 76 at 16.

If Congress or the FEC believe that political committees with certain characteristics pose an increased risk of corruption or circumvention, the constitutionally valid solution is to craft provisions that at least attempt to focus on such problematic committees. Congress may not categorically reduce limits on contributions to political parties after six months for all committees, on the grounds that some bad apples inevitably will get caught up in the dragnet. Such a blunderbuss approach is particularly inappropriate because, by the time a committee hits the six month mark, it will have submitted six months' worth of filings to the FEC, disclosing virtually everything about its finances, income, and expenditures. Rather than reflexively reducing all committees' contribution limits, the FEC is in a uniquely advantageous position to identify and target just those committees that have engaged in suspicious behavior.

Indeed, under the current system, the most concerning political committees that raise the biggest potential risk of corruption and circumvention will ***not*** have their limits on contributions to political parties reduced after six months. As explained earlier, to qualify as a multicandidate PAC (which is subject to reduced party contribution limits, *see* 52 U.S.C. § 30116(a)(2)(B)-(C)), a committee must satisfy § 30116(a)(4)'s Receipt and Contribution Limits ***and*** be registered for six months. Even if a political committee has been registered for six months, if it has received less than 50 contributions, or contributed to less than 5 candidates, it still

qualifies as a "person" rather than a "multicandidate PAC," and therefore may contribute $10,000 annually to state and local parties, and $33,400 annually to national parties. Thus, party contribution limits for true multicandidate PACs are cut after six months, while committees with only a handful of contributors, or that are focused exclusively on one or two candidates—***the very committees the district court suggests pose the greatest risk of corruption***—may take advantage of § 30116(a)(1)(B), (D)'s higher party contribution limits indefinitely. This Court cannot put its constitutional imprimatur on such a fundamentally backwards system.

II. STOP PAC AND AMERICAN FUTURE'S CLAIMS ARE JUSTICIABLE

The district court expressed doubt over whether Stop PAC and American Future had standing to assert their constitutional challenges, and whether their claims remained justiciable following the expiration of their respective six-month waiting periods. JA 509-10; DE 76 at 9-10. Section A confirms their standing, while Section B shows their claims fall within an exception to the mootness doctrine as it applied to election law cases such as this.

A. Stop PAC and American Future Have Standing to Pursue Their Constitutional Challenges

Temporarily setting aside potential mootness concerns, Stop PAC and American Future had standing to challenge the six-month waiting period for

contributing the maximum statutorily authorized amount of $5,000 to candidates. As the district court explained, to establish standing, a plaintiff must show "(1) it has suffered an 'injury in fact,' (2) the injury is 'fairly traceable' to the actions of the defendant, and (3) the injury will likely be redressed by a favorable decision." JA 508; DE 76 at 8 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). Stop PAC and American Future satisfy each of these requirements.

First, they suffered two constitutionally cognizable injuries-in-fact:

(i) they were unconstitutionally subjected to different candidate contribution limits than materially identical PACs that had been registered for six months or more, *see Time Warner Cable, Inc. v. Hudson*, 667 F.3d 630, 636 (5th Cir. 2012) ("Discriminatory treatment at the hands of the government is an injury long recognized as judicially cognizable.") (quotation marks omitted); and

(ii) they were forced to wait six months before being permitted to exercise their First Amendment right to associate with candidates through their contributions to the fullest extent permitted by federal law, *see Quaker Action Group v. Hickel*, 421 F.2d 1111, 1116 (D.C. Cir. 1999) (adopting district court's ruling that "'any delay in the exercise of First Amendment rights constitutes an irreparable injury to those seeking such exercise'").

Second, these injuries were clearly traceable to the six-month waiting period and discriminatory contribution limits. And ***third***, removing those limits would adequately redress Stop PAC's and American Future's injuries.

The district court nevertheless expressed doubt over their standing, because they could "control the timing of their registrations relative to any particular election." JA 508-09; DE 76 at 8-9. The court is correct that the six-month waiting period has a much greater practical effect on committees that register within six months of a primary or general election. The fact remains, however, that Stop PAC and American Future would have been subject to the challenged six-month waiting period, and the concomitant discriminatory contribution limits, regardless of when they registered. Even if no elections were scheduled within the six months following their registration, they reasonably could have wished to exercise their First Amendment rights by contributing the maximum permitted amount of $5,000 to candidates immediately upon satisfying § 30116(a)'s Receipt and Contribution Requirements, rather than having to wait a half-year. Thus, Stop PAC and American Future are not complaining about a self-inflicted injury, and they have standing to maintain their claims.

B. Stop PAC's and American Future's Claims Remain Justiciable

Although Stop PAC's and American Future's six-month waiting periods have expired, their claims remain justiciable because the underlying issues are

"capable of repetition, yet evading review." *S. Pac. Term. Co. v. ICC*, 219 U.S. 498, 515 (1911). In general, a plaintiff cannot invoke this exception to the mootness doctrine unless it faces a risk of being subject to the same challenged provisions in the future. *Murphy v. Hunt*, 455 U.S. 478, 482 (1982). As Justices Scalia and O'Connor recognized, however, several of the Supreme Court's "election law decisions differ from the body of [its] mootness jurisprudence . . . in dispensing with the same-party requirement entirely, focusing instead upon the great likelihood that the issue will recur between the defendant and the other members of the public at large without ever reaching [the Supreme Court]." *Honig v. Doe*, 484 U.S. 305, 335 (1988) (Scalia, J., dissenting).

Honig properly recognized that the Supreme Court repeatedly has reached the merits of election-law cases, even though the plaintiffs' claims had become moot and there was no indication that the plaintiffs would again be subject to the challenged legal provisions. *See, e.g.*, *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974) (holding that a challenge to a waiting period that prevented former political party members from running as independent candidates remained justiciable, even though the election had occurred, and "no effective relief can be provided to the candidates or voters," since "the issues properly presented, and their effects on independent candidacies, will persist as the California statutes are applied in future elections"); *Rosario v. Rockefeller*, 410 U.S. 752, 756 n.5 (1973) ("Although the

June primary election has been completed and the petitioners will be eligible to vote in the next scheduled New York primary, this case is not moot, since the question the petitioners raise is 'capable of repetition, yet evading review.'"); *Dunn v. Blumstein*, 405 U.S. 330, 333 n.2 (1972) (adjudicating challenge to a "three-month residency requirement" for voting, even though "appellee can now vote," because "the problems to voters posed by the Tennessee residence requirements is "capable of repetition yet evading review"); *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969).

Numerous circuits, following these cases, have likewise held that election law cases can be capable of repetition, yet evading review, even if the presumptive "same plaintiff" requirement of the "capable of repetition" standard is not satisfied. As the Seventh Circuit explained in *Majors v. Abell*, 317 F.3d 719, 723 (7th Cir. 2003) (citations omitted):

> [W]hile canonical statements of the exception to mootness for cases capable of repetition but evading review require that the dispute giving rise to the case be capable of repetition by the same plaintiff, the courts, perhaps to avoid complicating lawsuits with incessant interruptions to assure the continued existence of a live controversy, do not interpret the requirement literally, at least in abortion and election cases . . . .

Perhaps the most striking example of this approach is *Catholic Leadership Coalition of Tex. v. Reisman*, 764 F.3d 409 (5th Cir. 2014), in which the plaintiffs challenged a state law imposing waiting periods on certain political committees

that wished to make political contributions and expenditures. Despite the fact that the plaintiff's waiting period had elapsed, and the plaintiff could never again be subject to it, the Fifth Circuit reached the merits of its claim.

Following Supreme Court precedent, the Fifth Circuit "dispense[d] with the same party requirement" because the plaintiffs' challenge to campaign finance laws was deemed to be an "election case[]." *Id*. at 423. The court "focus[ed] instead upon the great likelihood that the issue will recur between the defendant and the other members of the public at large." *Id*. (quotation marks omitted). The court explained, "[I]n election law cases such as this one, where (1) the state plans on continuing to enforce the challenged provision, and (2) that provision will affect other members of the public, the exception [to the same-party requirement] is met." *Id*. at 424; *see also Lawrence v. Blackwell*, 430 F.3d 368, 372 (6th Cir. 2005) (citing and following *Rosario*, 410 U.S. at 756 n.5, and *Dunn*, 405 U.S. at 333 n.2); *Schaefer v. Townsend*, 215 F.3d 1031, 1033 (9th Cir. 2000) (quoting and following *Dunn*, 405 U.S. at 333 n.2).

In *Lux v. Judd*, 651 F.3d 396, 401 (4th Cir. 2011) (quoting *N.C. Right to Life Comm. Fund v. Leake*, 524 F.3d 427, 435 (4th Cir. 2008)), this Court stated, "Election-related disputes qualify as 'capable of repetition' when 'there is a reasonable expectation that the challenged provisions will be applied against the plaintiffs again during future election cycles.'" In both *Lux*, 651 F.3d at 401, and

Leake, 524 F.3d at 435, however, the plaintiffs made a sufficient showing that they might again be subject to the challenged statutes, so there was no need to consider whether to recognize an exception to the same-plaintiff requirement for election law cases. Perhaps more importantly, nothing in this Court's opinions suggests that the litigants asked this Court to recognize or apply such an exception to the same-plaintiff requirement, or that this Court has yet considered the implications of the binding Supreme Court authorities above (as well as other persuasive precedents) in this context.

Thus, despite language in *Lux* and *Leake*, it does not appear that the Fourth Circuit has ever considered and ruled on the existence of an exception to the same-plaintiff requirement in election law cases. This Court should follow the lead of the Supreme Court and other circuits—particularly the Fifth Circuit's remarkably analogous ruling in *Reisman*, 764 F.3d at 423-24—and hold that Stop PAC's and American Future's claims remain justiciable, even though their six-month waiting periods have expired.

III. EQUAL PROTECTION PRINCIPLES PROHIBIT CONGRESS FROM IMPOSING LOWER LIMITS ON CONTRIBUTIONS TO CANDIDATES BASED ON WHETHER A PAC HAS BEEN REGISTERED FOR SIX MONTHS

The district court erred in granting summary judgment to the FEC on Stop PAC's and American Future's Equal Protection challenge, for many of the same

reasons that apply to the Fund's challenge. Federal law imposes different candidate contribution limits on political committees that satisfy § 30116(a)(4)'s Receipt and Contribution Requirements, based solely on whether those committees have been registered for six months. Newer committees may contribute only $2,700 per election to each candidate, 52 U.S.C. § 30116(a)(1)(A), while older committees may contribute $5,000 per election to each candidate, *id.* § 30116(a)(2)(A).

The Supreme Court has held that contribution limits burden the contributor's fundamental First Amendment right of association. *Buckley*, 424 U.S. at 22, 25. Thus, by definition, these discriminatory limits "burden[] the First Amendment rights of [some] persons . . . to a greater extent than [they] burden[] the same rights" of others. *CalMed*, 453 U.S. at 200. Thus, this Court must consider whether "such differential treatment is justified." *Id.*

The district court concluded that newer political committees pose a categorically greater risk of circumventing campaign finance laws than more established committees. JA 515-16; DE 76 at 15-16. It explained that Stop PAC had 150 contributors, but received "a significant portion" of its funding from only two of them and had contributed to only five candidates. JA 516; DE 76 at 16. The Fund, in contrast, "had over 100,000 contributors and had contributed to dozens of candidates." *Id.*

The district court thus distinguished between committees which receive most of their support from only a few contributors and contribute to only a few candidates, and committees with more extensive support that contribute to many more candidates. That is not the distinction 52 U.S.C. § 30116(a)(4) creates, however, and therefore is not the distinction at issue here. Under 52 U.S.C. § 30116, newer committees are prohibited from contributing more than $2,700 per election to a candidate throughout the first six months of their existence, ***regardless*** of how many contributions they've received or how many other candidates they support. Likewise, once a committee reaches the six-month mark, it is permitted to contribute $5,000 per election to each candidate, even if it maintains only 51 contributors and contributes to only 5 candidates. Indeed, Stop PAC itself may now take advantage of this higher contribution limit, even though it still has approximately the same number of contributors and has contributed to the same number of candidates as before it achieved multicandidate PAC status.

Thus, the six-month waiting period is not an "appropriately tailored" basis for distinguishing among political committees. *McCutcheon*, 134 S. Ct. at 1457. At best, it is a grossly overbroad and highly attenuated proxy for attempting to identify other characteristics of political committees that are believed to be more directly tied to a potential risk of corruption or circumvention—the type of

"'prophylaxis-upon-prophylaxis approach'" that this court must be "particularly diligent in scrutinizing." *McCutcheon*, 134 S. Ct. at 1458.

Despite the FEC's argument to the contrary below, Plaintiffs' claim is entirely consistent with *Buckley v. Valeo*. In *Buckley*, 424 U.S. at 35-36, the plaintiffs had raised a much broader, generalized equal protection challenge to various limits on contributions from different types of entities. They argued that § 441a(a)(4)'s[12] requirements for qualifying as a multicandidate PAC—including the Receipt Requirement, Contribution Requirement, and six-month waiting period—"unconstitutionally discriminate[d]" against unspecified "ad hoc organizations in favor of established interest groups and impermissibly burden free association." *Id*. at 35. The Court rejected this argument in a single sentence in its 144-page opinion, stating, "Rather than undermining freedom of association, the basic provision enhances the opportunity of bona fide groups to participate in the election process, and the registration, contribution, and candidate conditions serve the permissible purpose of preventing individuals from evading the applicable contribution limitations by labeling themselves committees." *Id*. at 35-36.

The facial Equal Protection challenge in *Buckley* involved an attempted comparison between an entity that qualified as a multicandidate PAC under § 441a(a)(4) and other unspecified "ad hoc organizations," *Buckley*, 424 U.S. at 35,

[12] 52 U.S.C. § 30116 was previously codified as 2 U.S.C. § 441a.

including groups that might have been a front for a single contributor or sought to funnel all of their funds to a single candidate. The instant suit, in contrast, involves a narrower, as-applied challenge to § 30116(a)(4)'s six-month waiting period, specifically as it applies to political committees that satisfy § 30116(a)(4)'s other requirements for being recognized as multicandidate PACs.

Not only is the instant case easily distinguishable from the Equal Protection claim in *Buckley*, but the *Buckley* Court's reasoning is patently inapplicable to this suit. A group that has more than 50 contributors, by definition, cannot be a façade through which a single individual is attempting to evade other contribution limits. *Cf. Buckley*, 424 U.S. at 35-36. Moreover, there is no reason to believe that a recently formed group with more than 50 contributors that has contributed to five or more candidates is any less "bona fide" than a materially identical group that has existed for more than six months. *Cf. id*. at 35.

Additionally, as the Supreme Court recently recognized in *McCutcheon*, campaign finance law has changed dramatically since *Buckley* in ways that already ensure that individuals cannot use PACs to evade contribution limits, making § 30116(a)(4)'s six-month waiting period "particularly heavy-handed." *McCutcheon*, 2014 U.S. LEXIS 2391, at *28 ("[S]tatutory safeguards against circumvention have been considerably strengthened since *Buckley* was decided, through both statutory additions and the introduction of a comprehensive

regulatory scheme" that establish "more targeted anticircumvention measures"). Unlike pre-*Buckley* FECA, the law now limits the amount that an individual may contribute to a political committee (including multicandidate PAC), 52 U.S.C. § 30116(a)(1)(C), as well as to local, state, and national political party committees, *id*. § 30116(a)(1)(B), (D). "Because a donor's contributions to a political committee are now limited, a donor cannot flood the committee with 'huge' amounts of money so that each contribution the committee makes is perceived as a contribution from him." *McCutcheon*, 134 S. Ct. at 1446.

The law also now limits the amount that political committees can contribute to each other, 52 U.S.C. § 30116(a)(2)(C), thereby preventing people from circumventing the new limits on contributions to a particular PAC by funneling money through other such entities. Additionally, anti-proliferation restrictions ensure that a person cannot circumvent these limits by simply creating a series of committees that will, in turn, contribute to a particular candidate. *McCutcheon*, 134 S. Ct. at 1438. All contributions from political committees that are established, financed, or controlled by the same corporation, union, or person—including an entity's parents, subsidiaries, branches, divisions, departments, or local units—are now "considered to have been made by a single political committee." *Id*. § 30116(a)(5).

Finally, anti-earmarking rules prohibit a person from evading contribution limits by channeling contributions through a PAC or party committee to a specific candidate. All contributions that a person makes "either directly or indirectly, on behalf of a particular candidate, including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate" are "treated as contributions from such person to such candidate." *Id.* § 30116(a)(8). The intermediary is required to report to the FEC both the contributor and the intended recipient of the contribution. *Id.* "Although the earmarking provision. . . . was in place when *Buckley* was decided, the FEC has since added regulations that define earmarking broadly." *McCutcheon*, 134 S. Ct. at 1447. Thus, the Supreme Court's cursory rejection of the plaintiffs' poorly crafted facial challenge in *Buckley* does not foreclose Stop PAC's and American Future's claims here.

The Fifth Amendment's Equal Protection guarantee bars the Government from discriminating among political committees concerning their First Amendment rights based on broad, unproven assumptions. *See Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 392 (2000) (noting that Supreme Court has "never accepted mere conjecture as adequate to carry a First Amendment burden"). While a more reasonably crafted scheme for distinguishing among political committees and

subjecting potentially problematic ones to lower contribution limits could be permissible, discriminating based on a six-month waiting period is not.

IV. THE SIX-MONTH WAITING PERIOD VIOLATES THE FIRST AMENDMENT

Finally, § 30116(a)(4)'s six-month waiting period violates the First Amendment as applied to political committees that satisfy § 30116(a)(4)'s Receipt and Contribution Requirements. That waiting period forces such committees to wait a half-year before being able to fully exercise their First Amendment associational rights by contributing the maximum statutorily permissible amount of $5,000 per election to the candidates they support. *See Buckley*, 424 U.S. at 21, 24-25 (recognizing that political contributions are an important means of associating with a candidate).

The courts have repeatedly recognized that delays and waiting periods impose substantial burden on First Amendment rights, particularly in the political realm. *See Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 167 (2002) (invalidating ordinance that "effectively banned" a "significant amount of spontaneous speech"). "Timing is of the essence in politics. . . . When an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all." *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 163 (1969) (Harlan, J., concurring). "A delay 'of even a day or two'

may be intolerable when applied to 'political speech in which the element of timeliness may be important.'" *NAACP, Western Region v. Richmond*, 743 F.2d 1346, 1356 (9th Cir. 1984) (quoting *Carroll v. Comm'rs of Princess Anne*, 393 U.S. 175, 182 (1968)).

In some cases, delay may "stifle spontaneous expression," *Rosen v. City of Portland*, 641 F.2d 1243, 1247-48 (9th Cir. 1981), and "permanently vitiate the expressive content" of First Amendment activity, *NAACP*, 743 F.2d at 1356; in other cases, "the change in timing will alter the potential impact of the[] speech," *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1046 (9th Cir. 2006). Thus, "undue delay results in the unconstitutional suppression of protected speech." *FW/Pbs, Inc. v. Dallas*, 493 U.S. 215, 228 (1990) (opinion of O'Connor, J.)

Under the First Amendment, the Government may not require entities to wait or delay before engaging in constitutionally protected expression and association. *See, e.g., Watchtower Bible*, 536 U.S. at 167-68 (invalidating ordinance that required people to wait until a license was issued before they engaged in door-to-door solicitations, including for political or religious reasons); *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1038 (9th Cir. 2009) (invalidating ordinance that required groups to wait at least 24 hours after notifying municipality before holding a "spontaneous" gathering); *Douglas v.*

Brownell, 88 F.3d 1511, 1524 (8th Cir. 1996) (invalidating ordinance requiring people to provide at least 5 days' notice before holding a parade); *Rosen*, 641 F.2d at 1244 (invalidating ordinance that required groups to wait at least 24 hours after notifying municipality before distributing literature); *see also Arlington Cnty. Republican Comm. v. Arlington Cnty.*, 790 F. Supp. 618, 629-30 (E.D. Va. 1992) (holding that a thirty-day waiting period for posting political signs violated the First Amendment), *vacated in part as moot*, 983 F.2d 587, 595 (4th Cir. 1993).

The constitutional infirmities of delays on First Amendment activities are exacerbated when they "burden[] substantially more speech than is necessary to further the government's legitimate interests." *Grossman v. City of Portland*, 33 F.3d 1200, 1205 (9th Cir. 1994) (quotation marks omitted). In *Rosen*, 641 F.2d at 1247-48, the court invalidated a one-day waiting period on the distribution of literature at airports, because the challenged ordinance "regulates far more than mass conduct that necessarily interferes with the use of public facilities." *See also Douglas*, 88 F.3d at 1524 (invalidating ordinance requiring people to provide at least five days' notice before holding a parade, because it "restrict[ed] a substantial amount of speech that does not interfere with the city's asserted goals of protecting pedestrian and vehicle traffic, and minimizing inconvenience to the public"); *Long Beach Area Peace Network*, 574 F.3d at 1038 (invalidating restriction on "spontaneous" assemblies, in part because it "is not narrowly tailored to regulate

only events in which there is a substantial governmental interest in requiring such advance notice," extending to "places where there is no threat of disruption of the flow of pedestrian or vehicular traffic").

Again, Congress already has determined that contributions from multicandidate PACs to candidates of $5,000 per election do not pose a risk of corruption or circumvention. 52 U.S.C. § 30116(a)(2)(A); *cf. McCutcheon*, 134 S. Ct. at 1452 (holding that Congress's selection of a particular contribution limit "indicates its belief that contributions of that amount or less do not create a cognizable risk of corruption"). The district court pointed to no record evidence to suggest that such a contribution poses a greater risk of corruption or circumvention, simply because it is made by a committee that (like a multicandidate PAC) satisfies § 30116(a)'s Receipt and Contribution Requirements, but has been registered for less than six months.

The Supreme Court has recognized that, although making a contribution is only one way of associating with a candidate, *Buckley*, 424 U.S. at 22, the First Amendment burden of contribution limits "is especially great for individuals who do not have ready access to alternative avenues for supporting their preferred politicians and policies," *McCutcheon*, 134 S. Ct. at 1449. For small committees such as Stop PAC and American Future, means of association other than making contributions generally will be impractical. The whole point of associating

through a PAC is to allow people to join together to collectively further a political cause. *Citizens Against Rent Cont.*, 454 U.S. at 294. Many PACs' contributors are spread across the country, far from most of the candidates their PACs support. It would be prohibitively expensive and impractical for a PAC's contributors to travel together to associate with a candidate by personally working on her campaign. *McCutcheon*, 134 S. Ct. at 1449 ("[P]ersonal volunteering is not a realistic alternative for those who wish to support a wide variety of candidates or causes.").

Other traditional methods of association—wearing pins or other apparel, displaying bumper stickers, erecting lawn signs—will be effectively meaningless for most PAC members, who live far from the supported candidate, where most people are unfamiliar with the referenced race. Committees that lack substantial staffs and war chests will also generally be unable to fund independent expenditures on the radio or television. Thus, contributions to candidates are a crucial means through which most political committees associate with them. This Court should invalidate § 30116(a)'s six-month waiting period on such contributions.

REQUEST FOR ORAL ARGUMENT

Appellants and Appellant-Intervenor respectfully request oral argument in this case, as it presents numerous important issues of constitutional law and may have a substantial impact on the upcoming 2016 election cycle.

CONCLUSION

For these reasons, Appellants and Appellant-Intervenor respectfully request that this Court REVERSE the district court's judgment in favor of the FEC and REMAND for entry of judgment in their favor and an injunction.

Respectfully submitted,

/s/ Michael T Morley

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CERTIFICATE OF COMPLIANCE WITH RULE 28.1(e) or 32(a)

Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. **Type-Volume Limitation:** Appellant's Opening Brief, Appellee's Response Brief, and Appellant's Response/Reply Brief may not exceed 14,000 words or 1,300 lines. Any Reply or Amicus Brief may not exceed 7,000 words or 650 lines. Counsel may rely on the word or line count of the word processing program used to prepare the document. The word-processing program must be set to include footnotes in the count. Line count is used only with monospaced type.

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/s/ Michael T. Morley

Attorney for: Appellants and Appellant-Intervenor

Dated: July 8, 2015

ADDENDUM

U.S. Const., amend. I

Congress shall make no law . . . abridging the freedom of speech . . . .

U.S. Const., amend. V

No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

52 U.S.C. § 30116

(a) Dollar limits on contributions.

(1) Except as provided in subsection (i) and section 315A [52 USCS § 30117], no person shall make contributions—

(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $ 2,000;

(B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year which, in the aggregate, exceed $ 25,000, or, in the case of contributions made to any of the accounts described in paragraph (9), exceed 300 percent of the amount otherwise applicable under this subparagraph with respect to such calendar year;

(C) to any other political committee (other than a committee described in subparagraph (D)) in any calendar year which, in the aggregate, exceed $ 5,000; or

(D) to a political committee established and maintained by a State committee of a political party in any calendar year which, in the aggregate, exceed $ 10,000.

(2) No multicandidate political committee shall make contributions--

(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $5,000;

(B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year, which, in the aggregate, exceed $ 15,000, or, in the case of contributions made to any of the accounts described in paragraph (9), exceed 300 percent of the amount otherwise applicable under this subparagraph with respect to such calendar year; or

(C) to any other political committee in any calendar year which, in the aggregate, exceed $ 5,000.

* * *

(4) The limitations on contributions contained in paragraphs (1) and (2) do not apply to transfers between and among political committees which are national, State, district, or local committees (including any subordinate committee thereof) of the same political party. For purposes of paragraph (2), the term "multicandidate political committee" means a political committee which has been registered under section 303 [52 USCS § 30103] for a period of not less than 6 months, which has received contributions from more than 50 persons, and, except for any State political party organization, has made contributions to 5 or more candidates for Federal office.

* * *

(9) An account described in this paragraph is any of the following accounts:

(A) A separate, segregated account of a national committee of a political party (other than a national congressional campaign committee of a political party) which is used solely to defray expenses incurred with respect to a presidential nominating convention (including the payment of deposits) or to repay

loans the proceeds of which were used to defray such expenses, or otherwise to restore funds used to defray such expenses, except that the aggregate amount of expenditures the national committee of a political party may make from such account may not exceed $ 20,000,000 with respect to any single convention.

(B) A separate, segregated account of a national committee of a political party (including a national congressional campaign committee of a political party) which is used solely to defray expenses incurred with respect to the construction, purchase, renovation, operation, and furnishing of one or more headquarters buildings of the party or to repay loans the proceeds of which were used to defray such expenses, or otherwise to restore funds used to defray such expenses (including expenses for obligations incurred during the 2-year period which ends on the date of the enactment of this paragraph).

(C) A separate, segregated account of a national committee of a political party (including a national congressional campaign committee of a political party) which is used to defray expenses incurred with respect to the preparation for and the conduct of election recounts and contests and other legal proceedings.

CERTIFICATE OF SERVICE

I certify that on July 8, 2015, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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/s/ Michael T. Morley — July 8, 2015
Signature — date