ORAL ARGUMENT NOT YET SCHEDULED

No. 12-5365

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WENDY E. WAGNER, *et al.*,
Appellants,

v.

FEDERAL ELECTION COMMISSION,
Appellee.

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR THE FEDERAL ELECTION COMMISSION

Anthony Herman
General Counsel

Lisa J. Stevenson
Deputy General Counsel - Law

David Kolker
Associate General Counsel

Harry J. Summers
Assistant General Counsel

Holly J. Baker
Seth Nesin
Attorneys

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463
(202) 694-1650

February 20, 2013

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Cir. R. 28(a)(1), the Federal Election Commission ("Commission") submits its Certificate as to Parties, Rulings, and Related Cases.

(A) ***Parties and Amici***. Wendy E. Wagner, Lawrence M. E. Brown, and Jan W. Miller were the plaintiffs in the district court and are the appellants in this Court. The Commission was the defendant in the district court and is the appellee in this Court. Campaign Legal Center and Democracy 21 filed a joint amicus memorandum in the district court, and they have indicated that they intend to file an amicus brief in this Court, together with Public Citizen.

(B) ***Rulings Under Review***. Plaintiffs appeal the November 2, 2012, final order of the United States District Court for the District of Columbia (Boasberg, J.) granting the Commission's motion for summary judgment. That order incorporates by reference the district court's earlier order denying plaintiffs' motion for a preliminary injunction (Boasberg, J.), which was entered on April 16, 2012. The district court's opinions are available at *Wagner v. FEC*, 854 F. Supp. 2d 83 (D.D.C. 2012), and *Wagner v. FEC*, 2012 WL 5378224 (D.D.C. Nov. 2, 2012), and the opinions are reproduced at pages 24-49 and 224-242 of the appendix.

(C) ***Related Cases***. The Commission knows of no "related cases" as that phrase is defined in D.C. Cir. R. 28(a)(1)(C).

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

*Cases and Authorities chiefly relied upon are marked with an asterisk.

Statutes and Regulations

Miscellaneous

GLOSSARY

ACUS	Administrative Conference of the United States
FEC	Federal Election Commission
FECA	Federal Election Campaign Act
LLC	Limited Liability Corporation
MSPB	Merit Systems Protection Board
PAC	Political Action Committee
SSF	Separate Segregated Fund
USAID	United States Agency for International Development

COUNTERSTATEMENT OF ISSUES PRESENTED

Whether the district court correctly held that the ban on federal campaign contributions by all federal contractors in 2 U.S.C. § 441c satisfies the First Amendment as applied to contractors who are individuals.

Whether the district court correctly held that 2 U.S.C. § 441c as applied to individual federal contractors satisfies the equal protection guarantee of the Fifth Amendment.

APPLICABLE STATUTES

Relevant statutory provisions are included in an Addendum bound with this brief.

COUNTERSTATEMENT OF THE CASE

This case challenges the constitutionality of a statutory ban on campaign contributions by federal contractors that has been in effect for more than 70 years. Enacted originally as an amendment to the Hatch Act of 1939 to prevent "pay-to-play" arrangements and protect federal contractors from political coercion, the provision was incorporated into the Federal Election Campaign Act ("FECA") in 1972 and codified at 2 U.S.C. § 441c. Appellants ("the contractors") allege that the provision violates the First Amendment and the equal protection guarantee of the Fifth Amendment as applied to contractors who are individuals.

On November 2, 2012, the district court granted summary judgment to the Commission. The court first upheld section 441c against the First Amendment challenge, concluding that the statute was closely drawn to serve the important government interests in avoiding corruption and its appearance. The court found sufficient evidence of contractor corruption in the scandals that led to the passage of the ban in 1940 as well as in relevant recent experience in the states. The court also concluded that the statute is neither over- nor under-inclusive, noting that its fit need not be perfect or even narrowly tailored. In rejecting the contractors' Fifth Amendment claim, the court applied intermediate scrutiny and found no equal protection violation. The contractors timely appealed.

COUNTERSTATEMENT OF THE FACTS

I. BACKGROUND

A. The Parties

The Federal Election Commission ("Commission" or "FEC") is the independent agency of the United States government with exclusive jurisdiction to administer, interpret, and civilly enforce the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §§ 431-57.

The contractors are three individuals who have chosen to enter into contracts with the federal government. Wendy Wagner is a law professor who agreed to write a report on the intersection of science and regulation for the Administrative

Conference of the United States ("ACUS"). (Joint Appendix ("JA") 131 ¶ 2.) That type of task-specific contract can also be entered into with a limited liability corporation ("LLC") for which one of the LLC principals would carry out the specific task. (JA 132-33 ¶¶ 6, 9.) During the process of negotiating and performing her contract with ACUS, Wagner has interacted with at least one political appointee, Chairman Paul Verkuil, who was appointed by President Obama and confirmed by the Senate. (JA 131, 133-34 ¶¶ 3, 10, 12.) Wagner's contract specifies that she will be paid $12,000 plus $4,000 for travel and research expenses. (JA 131-32 ¶ 3.)

Lawrence Brown is a former federal employee who, after retiring and while collecting a federal government pension, entered into a two-year personal services contract, with three one-year renewal options, as a human resources adviser with the United States Agency for International Development ("USAID"). That contract has a total estimated value of $865,698. Brown has held personal services contracts with USAID since October 2006. (JA 132 ¶ 4.)

Jan Miller is an attorney who, after retiring from USAID in 2003 and while collecting a government pension, has signed contracts to work as an annuitant-consultant with USAID. Most recently, in 2010, Miller executed a five-year personal services consulting contract with USAID. (JA 132 ¶ 5.) The total

budgeted value of his contract is $884,151, although he works only part-time for USAID. (*Id.*)

Brown and Miller are retired annuitants whose federal agencies have special authority to hire them back under a personal services contract, a type of government contract whereby an agency may hire an individual to perform specific services on a regular basis. (JA 132-33 ¶ 7; *see* JA 146-49 ¶¶ 42-50.) But Brown's and Miller's contracts specify that they are not afforded the statutory protections of the Merit Systems Protection Board ("MSPB"), 5 U.S.C. §§ 1201-1209, which protects federal employees. (JA 133 ¶ 8.) While performing their contracts, Brown and Miller have each had interactions with at least one political appointee. (JA 134 ¶ 13.)

B. Relevant Statutory and Regulatory Provisions

FECA restricts how much individuals can contribute to federal candidates, political parties, and other political committees. *See* 2 U.S.C. § 441a(a).[1] FECA also prohibits corporations and labor organizations from making contributions, except through their separate segregated funds (also known as political action committees or PACs). *Id.* §§ 441b(a), (b)(2)(C). FECA defines "contribution" as

[1] Currently, individuals may contribute $2,600 per election to a federal candidate, $32,400 annually to a national party committee, and a total of $123,200 per two-year election cycle — with no more than $74,600 going to all PACs and parties per cycle. *See* 2 U.S.C. § 441a(a); FEC Announces 2013-2014 Campaign Cycle Contribution limits, http://www.fec.gov/press/press2013/20133001_2013-14ContributionLimits.shtml.

"any gift, subscription, loan, advance, or deposit of money or anything of value made … for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i). In 1976, the Supreme Court generally upheld FECA's contribution limits against a facial challenge. *See Buckley v. Valeo*, 424 U.S. 1, 23-38 (1976) (per curiam).

FECA prohibits any person who is negotiating or performing a contract with the United States government or its agencies from making a contribution to any political party, political committee, or federal candidate. *See* 2 U.S.C. § 441c(a). FECA defines "person" to include "an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons" other than the federal government. 2 U.S.C. § 431(11). The contribution ban only applies to the individual or entity that enters into the government contract — an individual can use a corporate form such as an LLC to enter into contracts with the government and remain free to make individual contributions. (JA 181-82 ¶¶ 143-46.)

Section 441c(a)(2) prohibits any person from soliciting a contribution from a federal contractor during the period of the contract. The Commission has interpreted section 441c to apply only to contributions made in connection with federal elections, not state or local elections, 11 C.F.R. § 115.2, and to allow spouses of federal contractors to make contributions in their own names, 11 C.F.R.

§ 115.5. *See* Explanation and Justification, Part 115 Federal Contractors, 1977; 41 Fed. Reg. 35,963 (Aug. 25, 1976).

The contractor contribution ban now codified at 2 U.S.C. § 441(c) was first enacted as part of the 1940 amendments to the Hatch Act of 1939, and later incorporated in 1972, with minor modifications, into the Federal Election Campaign Act of 1971.[2] The statutory language of section 441c(a) is based on former 18 U.S.C. § 611. (JA 135 ¶ 14.) The predecessor of the current section 441c was amended in 1976 to include subsections (b) and (c), and the whole was re-designated as section 441c. (*See* Addendum for full text of section 441c.)

II. MEASURES TO COMBAT CORRUPTION IN GOVERNMENT CONTRACTING

A. History of the Ban on Political Contributions in the Federal Workforce

Efforts to establish a merit-based government workforce, insulated from coercive political activity, date back nearly to the founding of the nation. For example, in 1801 President Thomas Jefferson issued an executive order to the heads of federal departments stating that while it was the right of an officer to vote at elections, "it is expected that he will not attempt to influence the votes of others nor take part in the business of electioneering, that being deemed inconsistent with the spirit of the Constitution and his duties to it." (JA 135 ¶ 15.) *See generally*

[2] Amendments to the Hatch Act of 1939, 1940 Ed., § 61m-l (July 19, 1940, c. 640, § 5, 54 Stat. 772), codified at 18 U.S.C. § 611 (originally 18 U.S.C. § 61m-l).

U.S. Civil Service Comm'n v. Nat'l Ass'n of Letter Carriers, AFL-CIO ("*Letter Carriers*"), 413 U.S. 548, 557-63 (1973) (discussing early background of Hatch Act).

Following the Civil War, a civil service reform movement further sought to substitute merit for party allegiance in government hiring. (JA 135-36 ¶¶ 16, 17.) These efforts culminated in the Civil Service Act of 1883, which banned coercing public servants to make political contributions. (JA 136 ¶ 18; *see also* JA 136-37 ¶¶ 19-20.) In 1925, Congress passed the Federal Corrupt Practices Act, c. 368, § 312, 43 Stat. 1053, 1073 (formerly codified at 18 U.S.C. § 208; now 18 U.S.C. § 602), prohibiting any promise of employment in return for political support or opposition. (JA 137 ¶ 21.) Members of Congress, federal employees, and officers whose salaries came from the United States Treasury were prohibited from soliciting or receiving contributions from each other. (*Id.*)

Despite such early reform efforts, most federal agencies continued to hire staff through political patronage. (JA 137-38 ¶ 22.) To further curb the spoils system, Senator Carl Hatch in 1939 introduced a bill — titled "An Act to Prevent Pernicious Political Activities" but commonly known as the Hatch Act — which extended earlier restrictions to the entire federal service. (JA 138 ¶ 23.) In particular, Congress sought to eliminate the political use of participants in federal work relief programs, such as the exploitation that occurred in the 1936 and 1938

elections. (JA 138-39 ¶ 24.) These abuses included requiring "destitute women on sewing projects … to disgorge" part of their wages as political tribute or be fired, and requiring WPA workers to make political contributions by depositing $3-$5 from their $30 monthly pay under the Democratic donkey paperweight on the supervisor's desk. (*Id.*) Of particular prominence in congressional debates regarding the Hatch Act was the Democratic "campaign-book racket," in which a government contractor was required to buy campaign books — "the number varying in proportion to the amount of Government business he had enjoyed" — at exorbitant prices in order to assure future opportunities for government business. (JA 140-41 ¶¶ 28, 29.) The scheme also coerced government contractors to buy advertising space: "[I]t was either take the space or be blacklisted." (JA 141 ¶ 29.)

An integral part of Congress's efforts to create a merit-based workforce through the Hatch Act of 1939 and its 1940 amendments was regulation of federal contractors. (JA 139-40 ¶¶ 25-27.) Federal contractors were viewed as similar to federal employees in that both benefited from government employment; both, some argued, should be prohibited from making contributions. (JA 141-42 ¶ 30.) Senator Brown observed that "the Government clerk, if he is not under the civil service, is interested in keeping in power the party that is in power and that gave him a job, ... I can apply the same principle to the tariff … to quotas … to loans … *to contractors who are doing business with the government* of the United States."

(*Id*. (emphasis added).) Responding to detractors, Senator Brown further explained: "The requirement of the amendment is that if a man's profits depend upon Government tariffs, *if he desires to continue a contract he has with the Government* or to borrow from it, he may not, by pernicious political activity, attempt to influence the Government." (*Id.* (emphasis added).)[3]

Congress ultimately passed an amendment barring "any person or firm entering into a contract with the United States … or performing any work or services for the United States … if payment is to be made in whole or part from funds appropriated by Congress … to make such contribution to a political party, committee or candidate for public office or to any person for any political purpose or use." (*Id.*) That provision was the predecessor of 2 U.S.C. § 441c.

B. Recent Changes in Government Contracting and Anti-Corruption Measures

Congress amended the Hatch Act in 1966 and extensively revised it in 1993. (JA 142-43 ¶¶ 31-32.) Following the 1993 amendments, which relaxed certain restrictions, most federal employees are permitted to make contributions but remain subject to other limits on their political activity. *See* 5 U.S.C. § 7323 (*see* Addendum); JA 142-43, 181 ¶¶ 31-33, 142. However, Congress did not amend the

[3] Similarly, during House debates of the 1939 statute, Congressman Ramspeck emphasized the grave threat to the nation posed by "political corruption, based upon traffic in jobs and in *contracts*, by political parties and factions in power." (JA 139-40 ¶ 27 (emphasis added).)

contractor contribution ban in the 1993 Hatch Act amendments or in the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. 107-155, 116 Stat. 81 (2002), which extensively amended FECA. (JA 143-44 ¶¶ 34-35.)

To help minimize political influence in federal contracting, the awarding of contracts is generally handled by contracting officers trained to act independently. (JA 146-47 ¶ 43.) However, the contracting process is not uniform across all federal agencies and types of contracts, the typical procedures have many exceptions, and not every contracting decision is equally insulated from political pressure. (JA 147 ¶¶ 44-46 (testimony of contractors' witness Steven Schooner).) For example, many personal service contracts "are not covered by the Federal Acquisition Regulation[;] [i]n other words, they would not be subject to full and open competition and the full range of rights and responsibilities that follow that," and so "the award and performance of those types of contracts is not being evaluated by a contracting officer." (JA 148 ¶ 49 (testimony of Steven Schooner).) In general, personal services contracts are prohibited unless there is specific statutory authority for them, but as Professor Schooner noted, "many of the personal services prohibitions today are dead letter[;] [t]here is no effort to enforce the personal services prohibition and most agency officials acknowledge that agencies frequently play fast and loose with the distinction." (JA 147-48 ¶ 47.) "In the last 20 years the growth of personal services contracts explicitly and

implicitly has been one of the most dramatic changes in how the government operates today." (JA 148 ¶ 48.)

In addition, the full competitive procedures may be bypassed for a wide variety of other types of contracts, including contracts for expert witnesses and alternative dispute resolution mediators, and contracts like appellant Wagner's. (JA 147, 148-49 ¶¶ 46, 50.) For contracts less than $150,000, "there are streamlined competitions, where the government can call two or three people on the phone and operate in a very informal manner." (JA 148-49 ¶ 50.)

Concern about federal government contracting has intensified as the use of contractors and the privatization of the federal workforce has expanded in the last two decades. (JA 144 ¶ 36.) In March 2009, President Obama issued an Executive Order directing the Office of Management and Budget to develop guidance on the use of government contracts. The Executive Order stated that the line between inherently governmental functions performed by government employees and private contractors' functions had been "blurred," that the amount spent on government contracts had grown to $500 billion annually by 2008, and that agencies had placed "excessive reliance" on contracts. (JA 144-45 ¶ 38.) Also, Congress has held hearings on the balance between government employees and contractors in the federal workplace. (JA 145 ¶ 39.) During hearings in 2010, one Senator expressed frustration that the Oversight Committee could not even

determine the size of the federal contractor workforce because the use of federal contractors had become so ubiquitous and complex. (JA 145-46 ¶ 40.)

C. The Continuing Potential for Corruption and Its Appearance in Government Contracting

Although the prohibition on federal contractor contributions has been in place for more than 70 years, recent experience from individual states illustrates the continuing risk of political influence from contractor contributions. In addition, the potential influence of federal officeholders and political appointees over government contracts, as well as numerous reports of legal and ethical violations by federal employees in awarding contracts, show an ongoing potential for corruption.

Many states and municipalities have passed statutes limiting or banning contractor contributions, and many have done so in the wake of pay-to-play scandals. (JA 149-63 ¶¶ 52, 57-90 (outlining scandals from New Mexico, Hawaii, District of Columbia, New York, Illinois, New Jersey, Connecticut, Ohio, and California).) For example, a state senator from Ohio, commenting in 2005 on a scheme to use campaign contributions to obtain the right to invest government funds, reportedly said: "It is one thing to have pay-to-play. I think they are at a point that they don't even know it's wrong anymore." (JA 150 ¶ 55.) And one government contractor for Wayne County, Michigan, stated: "'You wonder what in the heck would happen if I didn't give.'" (JA 150 ¶ 54.) Even relatively small

contributions can fuel corruption. For example, in 2004, the Executive Director of the Ohio School Facilities Commission was charged with state ethics violations for awarding millions of dollars in contracts after accepting $1,289 from six companies seeking those contracts. (JA 149-50 ¶ 53.)

One highly publicized recent scandal involved Governor Rod Blagojevich of Illinois. Blagojevich had reportedly received 235 checks for $25,000 each between 2000 and 2008, and about 75% of such contributions "came from companies or interest groups who got something — from lucrative state contracts to coveted appointments to favorable policy and regulatory actions." (JA 159 ¶ 78.) Blagojevich explained that "it was easier for governors to solicit campaign contributions because of their ability to award contracts and give legal work, consulting work, and investment banking work to campaign contributors." (*Id.*)

Similarly, Connecticut passed a contractor contribution ban in 2005 in the wake of a major pay-to-play scandal involving Governor John Rowland's directing $76,000 from a state contractor to his reelection campaigns and Republican organizations in return for influencing the award of more than $100 million in state contracts. *See Green Party of Conn. v. Garfield*, 616 F.3d 213, 219 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 3090 (2011); JA 160-61 ¶¶ 83-84. A Connecticut public opinion poll showed that 76% of voters believed that the campaign contributions influenced the Governor's awarding of government contracts. (JA 161 ¶ 85.)

Although New York City had restricted since 1988 campaign contributions from those doing business with the City, in 2007 voters approved a referendum with further restrictions after pay-to-play scandals. (JA 156-58 ¶¶ 73-76.) A City Council report stated that the new law aimed to "eradicate this perception" that contributors doing business with the City "have a higher level of access to the City's elected officials" and to "reduce the appearance of undue influence associated with the contributions from individuals doing business with the City." (JA 157 ¶ 74.) In upholding the law, the Second Circuit found that "there is direct evidence of a public perception of corruption." *Ognibene v. Parkes*, 671 F.3d 174, 189-90 & n.15 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 28 (2012); JA 157 ¶ 75.

Despite statutes and rules designed to protect the integrity of federal contracting, federal officeholders and political appointees have influenced the selection of corporate and individual federal contractors, sometimes in exchange for payments or other financial favors. (JA 167, 171-76 ¶¶ 100-03, 115-24.)[4] As part of the Abscam government sting, for example, Senator Harrison Williams of New Jersey was convicted in 1981 of bribery for offering to use his influence to obtain government contracts for operatives posing as Arab sheiks in return for financing for a titanium mine in which Williams held an interest. (JA 171-73

[4] Numerous political appointees may be able to influence federal contracting; the 2008 edition of the Government Printing Office's "Plum Book" listed about 8,000 political positions in the executive and legislative branches. (JA 166 ¶ 99.)

¶¶ 116-18.) In 2005, Representative Randy Cunningham pled guilty to taking bribes from contractors, including a defense contractor who bought Cunningham's house for an inflated price in exchange for Cunningham's pressing the Pentagon to award contracts to the defense contractor. (JA 175 ¶ 123.) In 2006, Representative Robert Ney of Ohio pled guilty to various criminal charges related to lobbyist Jack Abramoff's activities on Capitol Hill. Ney had used his influence to ensure the award of a multimillion-dollar contract in 2002 to Abramoff client Foxcom Wireless to install part of a wireless system in the House of Representatives. (JA 171 ¶ 115.) In exchange, Foxcom had reportedly donated $50,000 to one of Abramoff's charities. Another bidder reportedly complained to Ney about the "highly politicized selection process." (*Id.*)

Criminal and ethical violations persist in federal contracting. In *The Encyclopedia of Ethical Failure*, a training handbook developed by the Department of Defense, examples include the Sergeant-at-Arms of the United States Senate, the body's chief purchasing agent, recommending the purchase of an AT&T telephone system for the Capitol Police in exchange for a round-trip ticket to Hawaii, and a Department of the Treasury employee's funneling of training contracts valued at more than $139,000 to companies owned by her husband. (JA 167-69 ¶¶ 105, 107, 109.) The record in this case contains numerous additional examples of actual and apparent corruption in the government contracting process.

(JA 167-70, ¶¶ 104-14.)

III. PROCEEDINGS IN THE DISTRICT COURT

On January 31, 2012, the contractors filed an Amended Complaint alleging that the ban on federal contractor contributions at 2 U.S.C. § 441c violated the First Amendment and the equal protection guarantee of the Fifth Amendment as applied to individual contractors. (JA 8-17.) Soon thereafter, the contractors filed a motion for a preliminary injunction, which the district court denied on April 16, 2012. *Wagner v. FEC* ("*Wagner I*"), 854 F. Supp. 2d 83 (D.D.C. 2012); JA 24-49. After limited discovery, the parties filed cross-motions for summary judgment. The court granted summary judgment to the Commission on November 2, 2012. *Wagner v. FEC* ("*Wagner II*"), No. Civ. 11-1841, 2012 WL 5378224 (D.D.C. Nov. 2, 2012); JA 224-42.

The district court first noted that contribution bans like 2 U.S.C. § 441c satisfy the First Amendment if they are "closely drawn to match a sufficiently important interest." (JA 228.) The court held that the government's interest in avoiding corruption and its appearance is sufficiently important to sustain the ban on contractor contributions, including contributions to parties and other groups permitted to coordinate expenditures with candidates. (JA 229-32.)

The district court also concluded that the contractor contribution ban is closely drawn to serve the government's anticorruption interest. (JA 232-40.) The

court noted that the statute was passed in 1940 in response to corruption scandals involving contractors. (JA 232-33.) Thus, the court noted, there had been no recent experience of legal contractor contributions at the federal level; however, the court concluded that the recent experiences of the states "substantiate the corruption worries that attend contributions by government contractors," citing scandals from Connecticut, New York, and Illinois. (JA 233-34.) The court explained that "Congress need not roll back its longstanding ban and wait for a scandal to arise in order to provide evidence that § 441c prevents corruption: 'There is no reason to require the legislature to experience the very problem it fears before taking appropriate prophylactic measures.'" (JA 234-35 (quoting *Ognibene*, 671 F.3d at 188).)

The district court also rejected the contractors' over-inclusiveness arguments, acknowledging the claim that other rules also guard against corruption but observing that Congress has "the flexibility to attack corruption from multiple flanks," citing *Buckley*, 424 U.S. at 23-38. (JA 235-36). The court also stated that the contractors had raised hypothetical scenarios in which corruption was unlikely, but "Section 441c need not be a perfect fit [] or even narrowly tailored … [to be] 'closely drawn' to the anticorruption interests it furthers." (JA 236). And the court rejected the contractors' claim that section 441c is underinclusive because it does

not cover others who receive government funds or benefits, explaining that "Congress need not solve every problem at once." (JA 238.)

Turning to the contractors' claim that section 441c violates the Equal Protection Clause, the court applied the same intermediate scrutiny it had applied to the First Amendment claims and upheld the statute. (JA 239-42.) The court noted that the contractors had conceded that they knew of no case in which an equal protection challenge to contribution limits had succeeded where a First Amendment claim had not. (*Id.*) The court rejected the claim that individual contractors are treated worse than corporate contractors because corporate PACs, officers, employees, and shareholders may make legal contributions; the court explained that "individual contractors are not similarly situated under the law to corporate contractors' PACs or their officials" because they have distinct legal identities. (JA 241.) The court also rejected the contractors' claim that individual contractors are treated worse than federal employees and concluded that the restrictions on contractors "are different from those on federal employees, but not necessarily more severe." (JA 242 (quoting *Wagner I*, 854 Supp. 2d at 98).) And the "dissimilar roles of contractors and employees [] justify the distinct regulatory schemes that the Government has fashioned." (*Id.*)[5]

[5] The FEC's Statement of Material Facts (JA 128-83) includes many legislative facts, and the contractors filed a motion to strike paragraphs 14-151 of those facts (JA 222). The district court directed that the disputed facts be regarded

SUMMARY OF ARGUMENT

For more than 70 years, the prohibition on campaign contributions by federal contractors has deterred corruption and its appearance, as well as limited patronage and coercive political activity that had previously tainted federal contracting. Congress's efforts to protect its work force from political influence and pressure through the Hatch Act of 1939 and other statutes have greatly reduced the practice and perception of pay-to-play in the federal system.

The contractors in this case, who have chosen to reap the benefits of contracting with the federal government, now seek to topple one of the long-standing pillars supporting this important regulatory structure. They argue that the contractor contribution ban at 2 U.S.C. § 441c violates both the First Amendment and the equal protection guarantee of the Fifth Amendment as applied to

---

as a "supplement" to the FEC's summary judgment brief. (*Id.*) In any event, the court may take judicial notice of these legislative facts, which are "general facts which help the tribunal decide questions of law and policy." *Friends of the Earth v. Reilly*, 966 F.2d 690, 694 (D.C. Cir. 1992) (internal quotation marks and citation omitted); *accord Ass'n of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1161-62 (D.C. Cir. 1979). The Supreme Court has relied on legislative facts based on materials such as academic studies, news articles, and polling data. *See, e.g., FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 470 n.6 (2007) (relying on a national survey for the legislative fact that most citizens could name their congressional candidates); *McConnell v. FEC*, 540 U.S. 93, 129-32, 145-52 (2003) (relying extensively on legislative facts detailing how national party committees solicit "soft-money" donations); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002).

contractors who are individuals. But as the district court held, section 441c is constitutional.

The federal contractor contribution ban satisfies the First Amendment because it is closely drawn to serve the important government interests in reducing political coercion of federal contractors and combating corruption and its appearance. Recent pay-to-play scandals in various states confirm the continuing risks of contractor corruption. And although there have been a limited number of similar recent scandals involving campaign contributions at the federal level — with the contribution ban in place — the potential influence of federal officeholders and political appointees on contracts, as well as ongoing ethical failures in federal contracting, show that the danger of corruption persists.

The contractor contribution ban also satisfies the guarantee of equal protection because it is a rational measure that involves no fundamental right or suspect class. The contractors complain that they are treated worse than corporate contractors (and persons associated with such corporations) and federal employees. But corporate contractors are subject to the same ban that individual contractors are, and the individual contractors here are not situated similarly to the other persons they name. The different roles and features of those who deal with the federal government justify the regulatory structure that Congress has crafted in a quintessential exercise of legislative line-drawing.

The Court should affirm the district court's grant of summary judgment to the FEC.

ARGUMENT

I. STANDARD OF REVIEW

"This Court reviews the district court's grant of summary judgment *de novo*." *Johnson v. Exec. Office for U.S. Attorneys*, 310 F.3d 771, 774 (D.C. Cir. 2002). The district court's findings of fact, however, "may not be set aside unless clearly erroneous," even if they are "based on documentary evidence or inferences from other facts." *Bailey v. Fed. Nat'l Mortg. Ass'n*, 209 F.3d 740, 743 (D.C. Cir. 2000). Summary judgment is appropriate where "there is no genuine issue as to any material fact and … the movant is entitled to judgment as a matter of law." *Tate v. District of Columbia*, 627 F.3d 904, 908 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 2886 (2011) (citations and internal quotation marks omitted).

II. SECTION 441c SATISFIES THE FIRST AMENDMENT BECAUSE IT IS CLOSELY DRAWN TO SERVE IMPORTANT GOVERNMENT INTERESTS

The contractor contribution ban at 2 U.S.C. § 441c survives First Amendment scrutiny because it is a temporary restriction that is closely drawn to serve important government interests while leaving contractors ample alternative

means to engage in political activity.[6] The ban helps prevent "corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office." *Buckley*, 424 U.S. at 25. The statute also helps ensure that federal contractors are not coerced into political participation and that government contracts are awarded based on merit and carried out free of political bias.

A. Section 441c Is a Contribution Limit That Must Be Upheld If It Is Closely Drawn to Match a Sufficiently Important Interest

Laws that limit campaign contributions, like section 441c, are reviewed under a more deferential standard than laws that restrict campaign-related expenditures. *See, e.g., Citizens United v. FEC*, 558 U.S. 310, 130 S. Ct. 876, 908-09 (2010) (discussing the two different standards of review); *Buckley*, 424 U.S. at 23 (same). The Supreme Court has explicitly rejected the contractors' view

---

[6] The contractors urge this Court to consider their equal protection claim first, thereby potentially allowing the Court to avoid the First Amendment claim. (Brief for Plaintiffs-Appellants ("App. Br.") at 23-24.) The contractors argue that striking down section 441c on equal protection grounds would be "narrower" than striking it down for violating the First Amendment. To the contrary, because the Supreme Court has long analyzed campaign finance restrictions primarily through the lens of the First Amendment, the contractors' equal protection analysis is in tension with longstanding jurisprudence and, if successful, could have far-reaching consequences. (*See infra* p. 53.) We therefore address the First Amendment question first, as the district court did; indeed, a decision on that claim may largely resolve the equal protection claim. *See DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 411 n.7 (6th Cir. 1997) ("In cases such as this [challenging a law regulating adult establishments], the Equal Protection Clause adds nothing to the First Amendment analysis ....") (citations omitted).

that "strict scrutiny" is applicable here. (*See* Brief for Plaintiffs-Appellants ("App. Br.") at 38-40.) To the contrary, laws limiting campaign contributions receive a "relatively complaisant review under the First Amendment." *FEC v. Beaumont*, 539 U.S. 146, 161 (2003). The Court applies this more lenient standard because giving money to a political committee "lie[s] closer to the edges than to the core of political expression," in contrast to laws limiting campaign expenditures, which "impose significantly more severe restrictions on protected freedoms of political expression and association… ." *Buckley*, 424 U.S. at 23.

Thus, a contribution limit or ban "passes muster if it satisfies the lesser demand of being closely drawn to match a sufficiently important interest," and it need not satisfy the "narrowly tailored" requirement of strict scrutiny. *Id.* at 162 (quoting *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 387-88 (2000)) (internal quotation marks omitted); *McConnell*, 540 U.S. at 138 n.40 (applying "closely drawn" standard to contribution limit). The Supreme Court has expressly held that this lower standard applies not only to contribution limits, but also to complete bans on contributions:

> [The would-be contributor] argues that application of the ban on its contributions should be subject to a strict level of scrutiny, on the ground that § 441b does not merely limit contributions, but bans them on the basis of their source.... [I]nstead of requiring contribution regulations to be narrowly tailored to serve a compelling governmental interest, a contribution limit involving significant interference with associational rights passes muster if it satisfies the lesser demand of being closely drawn to match a

> sufficiently important interest.... It is not that the difference between a ban and a limit is to be ignored; it is just that the time to consider it is when applying scrutiny at the level selected, *not in selecting the standard of review itself.*

Beaumont, 539 U.S. 161-62 (internal quotation marks and citations omitted; emphasis added) (reviewing 2 U.S.C. § 441b, which bans contributions by corporations and unions); *see also Preston v. Leake*, 660 F.3d 726, 735 (4th Cir. 2011) (applying "closely drawn" standard to review state ban on lobbyist contributions).

The contractors concede that their position that strict scrutiny applies is contrary to *Beaumont* (App. Br. 39), but they argue that *Citizens United* "casts doubt on the continued viability of *Beaumont*…." (*Id.*) However, only the Supreme Court can overturn its own decisions, *Agostini v. Felton*, 521 U.S. 203, 237 (1997), and nothing in *Citizens United* suggests that *Beaumont's* scrutiny of contribution limits has been overturned. Indeed, the Fourth Circuit recently rejected a similar argument that *Citizens United* had implicitly overruled *Beaumont*'s analysis of contribution limits. *United States v. Danielczyk*, 683 F.3d 611, 618-19 (4th Cir. 2012), *petition for cert. filed*, 2012 WL 5451444 (U.S. Nov. 8, 2012); *see also Green Party*, 616 F.3d at 199 ("*Beaumont* … remain[s] good law. Indeed, in the recent *Citizens United* case, the Court … explicitly declined to reconsider its precedents involving campaign *contributions* by corporations to candidates for elected office.").

B. The Government Has Important Interests Not Only in Preventing Corruption and Its Appearance But Also in Promoting a Merit-Based Federal Workforce

The Supreme Court has long upheld contribution limits against First Amendment challenges as permissible measures to prevent corruption and the appearance of corruption in our system of democratic governance. *See, e.g.*, *Buckley*, 424 U.S. at 23-28; *Shrink Missouri*, 528 U.S at 387-88; *Beaumont*, 539 U.S. at 162. Section 441c not only furthers these goals but also promotes a merit-based workforce and helps prevent government contractors from being coerced to engage in political activity against their principles. Regarding these latter interests, the government's authority to manage those it hires as employees or contractors exceeds its authority to manage ordinary citizens. *See Connick v. Myers*, 461 U.S. 138, 151 (1983); *Waters v. Churchill*, 511 U.S. 661, 668 (1994) (quoting *Connick*, 461 U.S. at 142, and *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205,Will Cnty., Ill.*, 391 U.S. 563, 568 (1968) ("[a government] employee's interest in expressing herself … must not be outweighed by any injury the speech could cause to 'the interest of the State, as an employer, in promoting the efficiency of the public services it performs….'")). In conducting this careful balancing of interests, the Supreme Court has "consistently given greater deference to government predictions of harm used to justify restriction of employee speech than to

predictions of harm used to justify restrictions on the speech of the public at large." *Waters*, 511 U.S. at 673.

Because government contractors are similar to government employees in many (but not all) respects, the Court has extended this deference to review of speech restrictions on government contractors. *See Bd. of Cnty. Comm'rs, Wabaunsee Cnty., Kan. v. Umbehr*, 518 U.S. 668, 684-85 (1996) (applying deferential review of municipal action against trash hauling contractor because "[i]ndependent government contractors are similar in most relevant respects to government employees…. [T]he same form of balancing analysis should apply to each.").

Consistent with these principles, the Supreme Court in *Letter Carriers* rejected a First Amendment challenge to the Hatch Act's prohibition on "active participation in political management or political campaigns" by federal employees in the executive branch. 413 U.S. at 551. At that time, those employees were prohibited from, among other things: "[o]rganizing or reorganizing a political party organization or political club"; "soliciting … contributions, or other funds for a partisan political purpose"; "[e]ndorsing or opposing a partisan candidate for public office or political party office in a political advertisement"; "[a]ddressing a convention, caucus, rally, or similar gathering of a political party in support of or in opposition to a partisan candidate for public office or political party office"; and

"[i]nitiating or circulating a partisan nominating petition." *Id.* at 576 n.21 (quoting 5 C.F.R. § 733.122).

The Court upheld the law based on several "obviously important interests." 413 U.S. at 564. The Court found that the Hatch Act's restrictions combated corruption and bias, noting that employees should act "without bias or favoritism for or against any political party or group or the members thereof" and that "the rapidly expanding Government work force should not be employed to build a powerful, invincible, and perhaps corrupt political machine." *Id.* at 565. The Court determined that the statute also served the related but distinct interest of avoiding even the *appearance* of corruption and bias, because federal employees must "appear to the public to be avoiding [practicing political justice], if confidence in the system of representative Government is not to be eroded to a disastrous extent." *Id.* And a third interest "as important as any other" was ensuring that civil service jobs were obtained and kept based on merit, not politics. *Id.* at 566. The Court explained that the restrictions were necessary to "make sure that Government employees would be free from pressure and from express or tacit invitation to vote in a certain way or perform political chores in order to curry favor with their superiors rather than to act out their own beliefs," adding that "federal service should depend upon meritorious performance rather than political service, and that the political influence of federal employees on others and on the

electoral process should be limited." *Id.* at 566, 557. The Court found it significant that, although certain political expression was restricted, the employee "retains the right to vote as he chooses and to express his opinion on political subjects and candidates." *Id.* at 575-76.

The contractor contribution ban in section 441c serves the same "sufficiently important interests" that the Court identified in *Letter Carriers* — helping to assure that contractors are not pressured to make campaign contributions to obtain or keep their government contracts — and section 441c similarly allows for alternative means of political expression. (*See infra* pp. 39-41). In fact, the restrictions on federal employees' political expression at the time of *Letter Carriers* were arguably more burdensome than those that section 441c now places on contractors. Thus, *Letter Carriers* demonstrates that the contractors are wrong to assert that the "Supreme Court has recognized only one interest sufficiently important to outweigh the First Amendment interests implicated by contributions for political speech: preventing corruption or the appearance of corruption." (App. Br. 41 (citation omitted).)[7] Although the district court in this case cited *Letter Carriers*

[7] Indeed, the Supreme Court recently affirmed a holding that protecting the integrity of the federal government from improper outside influence is an adequate basis, by itself, to justify a complete ban on contributions by certain individuals. *See Bluman v. FEC*, 800 F. Supp. 2d 281, 292 (D.D.C. 2011) (three-judge court) (upholding ban on foreign national contributions and expenditures in 2 U.S.C. § 441e), *aff'd*, 132 S. Ct. 1087 (2012).

repeatedly in its two opinions (JA 30, 229, 239, 242), the contractors here make no attempt to distinguish it.[8]

C. Section 441c Is Closely Drawn to Match Important Interests Because It Addresses Continuing Threats of Corruption, Allows Ample Alternatives for Political Expression, and Applies Only Temporarily to Those Who Choose to Benefit from Government Contracts

Section 441c is a viewpoint-neutral financing restriction that bars contributions by those who choose to enter into federal contracts, while leaving many alternative means of political expression. When examining contribution limits, the Supreme Court has been willing to assume that most contributors do not seek improper influence, but has nevertheless generally upheld such limits, both because it is "difficult to isolate suspect contributions" and because "Congress was justified in concluding that the interest in safeguarding against the appearance of impropriety requires that the opportunity for abuse … be eliminated." *Buckley*, 424 U.S. at 29-30; *see also United Public Workers of Am. v. Mitchell*, 330 U.S. 75, 101 (1947) (upholding Hatch Act restrictions on political activity by a plaintiff whose job was unlikely to cause corruption due to the "cumulative effect on

---

[8] The contractors also suggest that this Court should not even consider the merit-based workforce rationale for section 441c because "the District Court did not rely on it." (App. Br. 41 n.5.) But the district court did not reject this interest; rather, it stated that it need not consider it because other governmental interests sufficed to sustain the law. (JA 229-30.) In any event, the Commission can defend its victory on any ground it raised below, even if not decided by the district court. *Nat'l Fed'n of Fed. Employees v. Greenberg*, 983 F.2d 286, 289 (D.C. Cir. 1993).

employee morale of political activity by all employees who could be induced to participate actively.").

Moreover, because federal contractors have been barred from making contributions for more than 70 years, there exists no direct evidence of the kind of corruption that would have occurred in the absence of section 441c. "Since there is no recent experience with [contractor contributions], the question is whether experience under the present law confirms a serious threat of abuse. … It clearly does." *FEC v. Colo. Republican Fed. Campaign Comm. ("Colorado Republican")*, 533 U.S. 431, 457 (2001) (upholding restrictions on political parties' coordinated spending, which had been limited for many years) (citing *Burson v. Freeman*, 504 U.S. 191, 208 (1992) (opinion of Blackmun, J.) (noting difficulty of mustering evidence to support long-enforced statutes)); *see also Citizens United*, 130 S. Ct. at 908 (contribution limits are preventative because the scope of quid pro quo corruption "'can never be reliably ascertained'" (quoting *Buckley*, 424 U.S. at 27)). The contractors in this case concede as much. (App. Br. 45 ("It is true that section 441c has been in effect since 1940, and so recent evidence of the kind supporting the ban in *Green Party* is unlikely to exist.").)

Nevertheless, the corruption associated with federal contracting before the contractor contribution ban, the recent experience of states and municipalities with pay-to-play scandals, and the continuing vulnerability of the federal contracting

process to corrupting influences clearly show the critical problems that section 441c continues to address. Because the ban restricts contractors only while they are negotiating or performing a contract, and even then permits contractors to engage in a wide range of other political activity, it is closely drawn to match those important interests.

1. The Threats of Corruption and the Politicization of Federal Contracting Persist Today

The danger that politics can infect the federal contracting process remains real and immediate, even if elected officeholders do not formally approve most government contracts. The contractors' primary First Amendment argument is that the threats that section 441c is intended to address are now "attenuated," based on "speculation," or sufficiently addressed by other laws (App. Br. 40-46); however, the contractors concede "it is *possible* that, despite the laws and procedures that take politics out of contracting, *some* individuals may break the rules" (App. Br. 43).

In fact, there is ample evidence that officeholders intervene in federal contracting and that the process remains susceptible to corruption. (*See* JA 171-76 ¶¶ 115-24; JA 236 (rejecting the suggestion that "the People's elected [federal] representatives are impotent in the contracting process").) Experience in the states also shows that corruption, the appearance of corruption, and the coercion of contractors remain genuine dangers. *See* JA 149-66 ¶¶ 51-97; *Shrink Missouri*,

528 U.S. at 395 (upholding Missouri's reliance on other jurisdictions' experience for evidence of corruption to justify contribution limits). As the district court found, recent state pay-to-play scandals, along with the pre-Hatch Act Democratic campaign-book racket, are sufficient to show that "corruption worries" persist. (JA 232-34.)

Recent federal appellate decisions upholding state laws that limit contractor contributions have relied on the government's continuing interest in combating corruption and its appearance. In *Green Party*, 616 F.3d at 189, the Second Circuit upheld a ban on campaign contributions by Connecticut government contractors. The court found that the law was "designed to combat both actual corruption and the appearance of corruption caused by contractor contributions" in response to a series of scandals in which "contractors illegally offered bribes, 'kick-backs,' and campaign contributions to state officials in exchange for contracts with the state." *Id.* at 200. Noting that the Supreme Court had repeatedly recognized that "laws limiting campaign contributions can be justified by the government's interest in addressing both the 'actuality' and the 'appearance' of corruption," *id.* (citing *Buckley*, 424 U.S. at 26, and *McConnell*, 540 U.S. at 143), the Second Circuit concluded that the state's ban on contractor contributions "furthers 'sufficiently important' government interests," *id.* (quoting *Beaumont*, 539 U.S. at 162).

Similarly, in *Preston*, 660 F.3d at 726, the Fourth Circuit upheld a North Carolina law prohibiting contributions from registered lobbyists, who, like contractors, have direct economic interests in their dealings with the government. The court pointed to the "rational judgment" that the law was needed "as a prophylactic to prevent not only actual corruption but also the appearance of corruption in future state political campaigns." *Id.* at 736. The court explained that "'[c]ourts simply are not in the position to second-guess' [legislative judgments] especially 'where corruption is the evil feared.'" *Id.* (quoting *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 716 (4th Cir. 1999), and *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 210 (1982)).

Likewise, in *Ognibene*, the Second Circuit addressed a law, passed in the wake of a series of scandals, that imposed more restrictive limits on political contributions from individuals who were "doing business" with New York City. 671 F.3d at 179. The court reiterated that "eliminating corruption or the appearance thereof is a sufficiently important governmental interest to justify the use of closely drawn restrictions on campaign contributions." *Id.* at 186.

The governmental interest in addressing the *appearance* of corruption is also essential, separate and apart from the interest in combating actual corruption. *Shrink Missouri*, 528 U.S. at 390 ("Leave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could

jeopardize the willingness of voters to take part in democratic governance."); *Buckley*, 424 U.S. at 30. Most Americans lack familiarity with the complexities of federal contracting, and they could easily view *any* contributions by contractors with suspicion. It is Congress's role to decide how best to prevent corruption and its appearance, even when the risk is relatively small. *See Buckley*, 424 U.S. at 53 n.59 (upholding limit on contributions to candidates from family members because "[a]lthough the risk of improper influence is somewhat diminished in the case of large contributions from immediate family members, we cannot say that the danger is sufficiently reduced to bar Congress from subjecting family members to the same limitations as nonfamily contributors.").

Similarly, the decision in *Green Party* explained that a statute banning contractor contributions — even small ones — could be upheld as an effort to combat the appearance of corruption even if the law could not be justified as a direct anti-corruption measure:

> Even if small contractor contributions would have been unlikely to influence state officials, those contributions could have still given rise to the appearance that contractors are able to exert improper influence on state officials…. [The statute's] *ban* on contractor contributions … unequivocally addresses the perception of corruption brought about by Connecticut's recent scandals. By totally shutting off the flow of money from contractors to state officials, it eliminates any notion that contractors can influence state officials by donating to their campaigns.

Green Party, 616 F.3d at 205. As the district court here recognized, the contractor's role is "'especially susceptible to public suspicion of corruption. *Any payment* made by' a contractor 'to a public official, whether a campaign contribution or simply a gift, calls into question the propriety of the relationship.'" (JA 234 (quoting *Preston*, 660 F.3d at 737 (emphasis in *Preston*)).)

The contractors assert that these cases "are readily distinguishable because the connection between the contract award and the contribution was much closer than it is in the federal system." (App. Br. 45.) But even contributions made to officeholders without a direct role in the contracting process can breed corruption and its appearance. Federal elected officials are not prohibited by law from suggesting or recommending contractors to an agency, and some do. *See* Morton Rosenberg and Jack Maskell, Congressional Intervention in the Administrative Process: Legal and Ethical Considerations, Congressional Research Service, Sept. 25, 2003, http://www.fas.org/sgp/crs/misc/RL32113.pdf, at 80. Recent scandals involving figures including Jack Abramoff, Randy Cunningham, and others show that federal officeholders are hardly immune from the temptation to intervene in federal contract decisions on behalf of financial supporters. (JA 171-76 ¶¶ 115-24.)

Indeed, the danger of bias and coercion exists throughout the government because political appointees are ubiquitous. The majority of agency officials who

oversee the awarding of contracts pursuant to 48 C.F.R. § 1.601(a) are political appointees who owe their own jobs to the current Administration; many were previously employed as campaign operatives. There are about 8,000 such political appointee positions in the executive and legislative branches. (*See supra* p. 14 n.4.) A political appointee seeking to reward political loyalty could be tempted to award or renew contracts only for those who make contributions to a favored candidate or party.

Moreover, the Supreme Court has recognized the history of political parties' role as go-betweens for donors who seek to influence government decisions:

> Parties thus perform functions more complex than simply electing candidates; whether they like it or not, they act as agents for spending on behalf of those who seek to produce obligated officeholders. It is this party role, which functionally unites parties with other self-interested political actors ….

Colorado Republican, 533 U.S. at 452. Thus, the potential for contractors to make large contributions to political parties poses a special danger of corruption because the national party committees are "inextricably intertwined" with their officeholders and candidates. (JA 176 ¶ 125.) The history of "soft money" exemplifies this phenomenon. Prior to 2002, it was lawful to make donations to national parties that were not subject to the source and amount prohibitions of FECA ("soft money"). The trading of soft money for access to and influence over federal candidates and officeholders was rampant. (JA 177 ¶ 129.) As a former

Senator explained: "Who, after all, can seriously contend that a $100,000 donation does not alter the way one thinks about … an issue?" (JA 178 ¶ 133.) In 2002, Congress passed BCRA, which prohibited national party committees from soliciting, receiving, directing, or spending any soft money. *See* 2 U.S.C. § 441i; JA 177 ¶ 127. But BCRA also increased FECA's "hard-money" contribution limits, so an individual may now give contributions totaling $123,200 per two-year election cycle, including a total of $74,600 to the national committees of a political party (but no more than $32,400 to any one national party committee in a single year). (*See supra* p. 4 n.1.)

These dangers may be especially great for the many federal contracts, including those awarded to the contractors in this case, that are awarded through streamlined processes that dispense with open formal bidding procedures. (App. Br. 15 (describing Wagner as being "initially approached by an agency because the agency has concluded that [she was] able to fill a particular need"); App. Br. 16-18 (Miller was awarded personal service contract not through formal bidding, but "based on the agency's knowledge of his work") App. Br. 49-50 n.7 (describing sole-source contracts in which the contractor "does not even know there is a possible contract under consideration").) Congress is not required to wait until corruption occurs before taking appropriate prophylactic measures to prevent it. *Ognibene*, 671 F.3d at 188 ("Appellants essentially propose giving every corruptor

at least one chance to corrupt before anything can be done, but this dog is not entitled to a bite."); JA 234-35 (same).

The contractors suggest that section 441c could be rewritten as a "less restrictive alternative" (App. Br. 44 n.6; *see also id*. at 44 ("Perhaps a prohibition on making a contribution to an official who is the decision-maker on a government contract for which the contributor is currently bidding could be justified.")), but the appropriate standard of review here is not whether a less restrictive alternative is available; it is whether the law is closely drawn to a sufficient government interest. Congress is better equipped to make empirical judgments about which alternatives are best to achieve its objectives. *See FEC v. Nat'l Conservative Political Action Comm*., 470 U.S. 480, 500 (1985); *Nat'l Right to Work Comm.*, 459 U.S. at 210; *Buckley*, 424 U.S. at 30. In light of the continuing risks of corruption and coercion in the federal contracting system, Congress's choices here are permissible. Indeed, as the district court observed, the contractors' proposals to rewrite the statute are inadequate; all of the contractors' proposed "menu of ways to narrow § 441c's ban [] still present the danger of corruption." (JA 237.)

Finally, the contractors assert that the prohibition on contractor contributions is unnecessary because of other procedural safeguards that have been or could be enacted (App. Br. 42-44), but virtually the same argument failed in *Buckley*. The Court rejected the suggestion that FECA's contribution limits were

unconstitutional because the government's interest in preventing corruption was adequately addressed by bribery and disclosure laws. *Buckley*, 424 U.S. at 27. The Court recognized that "laws making criminal the giving and taking of bribes deal with only the most blatant and specific attempts of those with money to influence governmental action," *id.* at 27-28; as the district court here noted, Congress has "the flexibility to attack corruption from multiple flanks," JA 235.

2. Section 441c Is Closely Drawn Because It Allows Contractors to Engage in Many Other Forms of Political Expression

Section 441c allows ample alternative forms of political activity for persons who choose to become federal contractors. Federal contractors remain free to speak about candidates, volunteer for campaigns, raise funds for candidates or parties, and engage in numerous other activities in which they can express their views of candidates or public issues. *See* 2 U.S.C. § 431(8)(B); 11 C.F.R. §§ 100.74-100.77. By focusing on contractor contributions, Congress has carefully drawn section 441c to address the activity it deems most likely to be used by contractors to "pay" to "play" — and most likely to be used by officeholders and political appointees to coerce contractors — leaving contractors a very broad range of alternative means of political expression. *See McConnell*, 540 U.S. at 138 (holding that contribution limits "have only a marginal impact on the ability of contributors … to engage in effective political speech").

The contractors argue that the ban infringes on their rights because, for example, at least one of them wants to "be on record as giving money to those that he believes would best represent him and his views and values" (App. Br. 18), but in light of their alternatives, the contractors have countless ways to "be on record" as supporters of a particular candidate or party. Indeed, the alternatives available to the contractors are far more expressive than the largely symbolic act of making a contribution.

Courts have relied heavily on the availability of such expressive alternatives in upholding contribution bans under the "closely drawn" standard. *See, e.g.*, *Blount v. SEC*, 61 F.3d 938, 944-48 (D.C. Cir. 1995) (regulation barring contributions by finance professionals to state officials with whom they do business is "closely drawn" because "the rule restricts a narrow range of their activities for a relatively short period of time…. [M]unicipal finance professionals are not in any way restricted from engaging in the vast majority of political activities."); *Preston*, 660 F.3d at 740 (ban on lobbyist contributions is closely drawn because lobbyists can still "volunteer with campaigns, … display[] signs or literature … engage in door-to-door canvassing and contribute other time to get the vote out … attend a fund raiser on behalf of a candidate, … host a fund raiser …"). The contractors argue that "the Government does not have the right to determine in what manner and by what means individuals will exercise their First Amendment

rights" (App. Br. 56), but *Letter Carriers* and *Buckley* held that the availability of alternatives bears upon the constitutionality of comparable restrictions on political activity.

3. Section 441c Is Closely Drawn Because It Applies Only Temporarily to Those Who Have Chosen to Receive the Benefits of Government Contracts

Section 441c is a modest burden on political expression because it applies only to those who have freely chosen to work for the federal government as contractors, and only during the period of time that they are performing or negotiating the contract. For example, if contractor Wagner wishes to make campaign contributions in future elections, she can easily do so by not entering into additional contracts with the federal government after her current contract expires this June. (App. Br. 14.) Contractor Brown's contract is also set to expire later this year, and contractor Miller's contract will expire in 2016. (App. Br. 16-17.) As the district court noted, "Plaintiffs voluntarily chose to become federal contractors and are only subject to the ban for as long as they continue to make that choice." JA 38 (citing *Preston*, 660 F.3d at 740); *see Blount*, 61 F.3d at 944-48 (approving contribution ban in part because it applied only "for a relatively short period of time").

Similarly, in *Buckley* the Supreme Court ruled that the campaign expenditure limitations for presidential candidates receiving public funding did not violate the

First Amendment because the candidates could choose to decline public funding and thereby avoid the otherwise unconstitutional expenditure restrictions. 424 U.S. at 57 n.65; *cf. Preston*, 660 F.3d at 740 (upholding lobbyist ban in part because "[plaintiff] freely chose to become a registered lobbyist, and in doing so agreed to abide by a high level of regulatory and ethical requirements focusing on the relationship of lobbyist and public official"). *See also Selective Serv. Sys. v. Minn. Pub. Interest Research Group*, 468 U.S. 841, 856-57 (1984) (Fifth Amendment rights of college students who had not registered for the draft were not infringed by financial aid form questions asking their draft status because students could simply choose not to apply for financial aid); *Lyng v. Int'l Union*, 485 U.S. 360 (1988) (First Amendment rights of striking workers were not infringed by law exempting strikers from obtaining food stamps, because they were not compelled to apply for food stamps); *Wyman v. James*, 400 U.S. 309, 317-18, 324 (1971) (Fourth Amendment rights of welfare recipients were not infringed by required home visits by social workers, because recipients were not required to continue receiving aid).

Thus, the contribution restriction in section 441c is closely drawn because it is temporary and easily avoided.

D. Section 441c Is Constitutional Even Though It Does Not Address Every Potential Avenue for Corruption

Congress may address the problems it perceives as the most egregious and "need not solve every problem at once." (JA 238; *see also Nat'l Right to Work*

Comm., 459 U.S. at 209 ("This careful legislative adjustment of the federal electoral laws, in a 'cautious advance, step by step,' ... warrants considerable deference ...." (internal citation omitted)).) Thus, the contractors' argument that section 441c is underinclusive because it bars contributions by federal contractors but not by recipients of grants, loans, ambassadorships, or admission to military academies (App. Br. 51-55) is wrong.

This Court rejected a similar underinclusiveness argument in *Blount*. In that challenge to a statute barring municipal securities professionals from contributing to the campaigns of state officials with whom they did business, the plaintiff argued that the provision did not prevent "*all* possible methods by which underwriters may curry favor" nor apply to "chief executive officers of banks with municipal securities departments or subsidiaries." 61 F.3d at 946. The Court held:

> [A] regulation is not fatally underinclusive simply because an alternative regulation, which would restrict *more* speech or the speech of *more* people, could be more effective. The First Amendment does not require the government to curtail as much speech as may conceivably serve its goals…. [W]ith regard to First Amendment *under*inclusiveness analysis, neither a perfect nor even the best available fit between means and ends is required.

Id. (citations and internal quotation marks omitted); *see also Ruggiero v. FCC*, 317 F.3d 239, 246 (D.C. Cir. 2003) (rejecting argument that FCC regulation was underinclusive because it prohibited only some criminals from receiving FCC licenses).

The contractors rely on two Supreme Court decisions that suggest that courts may in limited circumstances consider underinclusiveness in evaluating whether a law violates the First Amendment, but in both cases the Court considered underinclusiveness merely to assess whether the purported justification for the law was credible. *See Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 665 (1990) ("excluding from the statute's coverage unincorporated entities that also have the capacity to accumulate wealth does not undermine its justification for regulating corporations") (internal quotation marks omitted), *overruled on other grounds by Citizens United*, 558 U.S. 310; *City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994) ("Exemptions from an otherwise legitimate regulation of a medium of speech may be noteworthy [because]… [t]hey may diminish the credibility of the government's rationale for restricting speech in the first place."). Even the contractors acknowledge that the contribution ban at issue here was based on "Congress' desire to keep politics and government contracting separate" (App. Br. 6), and this motive is no less credible simply because Congress did not extend the ban to other recipients of government benefits.

E. The Constitutionality of the Contractor Contribution Ban Has Not Eroded Over Time

The contractors make the novel argument that "even if section 441c was defensible when it was enacted, it cannot withstand this First Amendment challenge today" (App. Br. 46), relying on a 1935 Supreme Court case stating that

"[a] statute valid when enacted may become invalid by change in the conditions to which it is applied." *Nashville, C. & St. L. Ry. v. Walters*, 294 U.S. 405, 415 (1935). But the legislative purpose behind the statute at issue in that case (which imposed construction costs on railroads to promote motor vehicles as a new form of transportation) had been completely eradicated by technological advances. *Id.* at 416. The Court therefore remanded the case to the Tennessee Supreme Court to determine whether, in light of these changes, the state highway commission had deprived a railroad of property without due process of law in violation of the Fourteenth Amendment when it required the railroad to pay half the cost of constructing an underpass for a new highway. *Id.* at 426-28.

The government plainly continues to have an interest in preventing corruption, the appearance of corruption, and political patronage. The contractors claim that changes in federal procurement law have "so fundamentally altered that process that whatever dangers there may have been that contributions would influence the awarding of federal contracts in 1940 have been so diminished that section 441c can no longer be sustained as a means of avoiding even the appearance of pay-to-play." (App. Br. 46.) To the contrary, the dangers associated with federal contracting have grown considerably since 1940. Federal spending has increased dramatically, the government relies heavily on contractors, and agencies spend more on contracting than ever before. (*See supra* pp. 11-12.)

In fact, the record in this case contains considerable evidence of the continuing risks to the integrity of federal contracting (JA 166-70 ¶¶ 98-114), but to the extent that scandals involving contributions by federal contractors are relatively infrequent, that suggests that Congress's efforts to depoliticize the government contracting process have been largely effective. Any time a statute modifies behavior and helps make compliance the norm — whether it is a reduction in race or gender discrimination, increase in seatbelt use, or decrease in corruption in federal contracting — a cultural shift in social expectations is likely to work in tandem with the law to create a virtuous cycle of increasing compliance. But that cycle could turn vicious if the law that started the improvements in the first place were suddenly overturned. Plaintiffs' attempt to strike down a provision that has served the nation well for more than 70 years amounts to little more than the untenable claim that the provision has worked so well that it is no longer needed and the conclusory assertion that other safeguards have made federal procurement impervious to corruption.

The contractors also argue that section 441c is unconstitutional based upon statements of Senator Hatch in 1940 that suggest he may have relied on a flawed constitutional analysis when he expressed support for the law prior to its passage. (App. Br. 7 (quoting Remarks of Senator Hatch, 86 Cong. Rec. 2563 (March 8, 1940).) Legislative history is relevant in certain circumstances, but as the district

court noted (JA 239), it makes no difference whether Congress was wrong about why a particular law is constitutional. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2598 (2012) (upholding the Affordable Care Act on a constitutional basis other than the one relied upon by Congress because "[t]he 'question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise'" (quoting *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948))).

Lastly, the contractors appear to suggest that the federal contractor contribution ban is unconstitutional because Congress has forgotten it exists. They characterize the ban as "one of happenstance that has never been considered, let alone reconsidered in light of other directly relevant changes in campaign finance and federal procurement law since the ban was enacted in 1940." (App. Br. 58.) But no constitutional doctrine requires Congress to periodically reaffirm every statute, nor is it the courts' role to examine whether Congress has done so — a principle of constitutional review that would be unworkable and raise serious separation of power concerns. The contractors themselves list seven times since 1948 that Congress has passed or amended laws to insulate the federal procurement process, undercutting their own claims of congressional inattention to contractor regulation. (App. Br. 11-12.) Both the Hatch Act and FECA have also been amended multiple times since 1940. (*See supra* pp. 6-10.) Congress's

decision to amend these other provisions — while leaving the contractor contribution ban intact — indicates that Congress believes that the provision continues to serve important interests. *Cf. United States v. Fausto*, 484 U.S. 439, 453 (1988) ("[I]t can be strongly presumed that Congress will specifically address language on the statute books that it wishes to change.")

III. SECTION 441C SATISFIES THE EQUAL PROTECTION GUARANTEE OF THE FIFTH AMENDMENT

Although the Court should review the contractors' equal protection challenge under the "rational basis" standard, section 441c satisfies review under both that standard and intermediate scrutiny, the standard applied by the district court. Section 441c regulates no suspect class or fundamental right, and it reflects a careful legislative judgment about how to regulate the political activity of government contractors and other categories of persons in light of their respective roles.

A. The Court Should Employ Rational Basis Review

Courts use at least three different standards when reviewing claims that legislation violates the Constitution's guarantee of equal protection: rational basis review, intermediate scrutiny, and strict scrutiny. The appropriate standard here is rational basis review, not strict scrutiny as the contractors advocate, because the contractors' desire to make campaign contributions involves neither a fundamental right nor a suspect class.

Rational basis review is the default standard for reviewing equal protection challenges. *See, e.g.*, *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313-15 (1993); *Heller v. Doe*, 509 U.S. 312, 320 (1993); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461 (1981). Under this highly deferential standard, a court should not judge the "wisdom, fairness, or logic of legislative choices." *Beach Commc'ns*, 508 U.S. at 313. Instead, "those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Clover Leaf Creamery*, 449 U.S. at 464 (quoting *Vance v. Bradley*, 440 U.S. 93, 111 (1979)). An individual seeking to strike down a law under rational-basis review has the burden "to negative every conceivable basis which might support it." *Beach Commc'ns*, 508 U.S. at 315 (citation and quotation marks omitted); *see also Heller*, 509 U.S. at 321 ("[C]ourts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends.").

Strict scrutiny is appropriate only if a law "operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973). The contractors do not assert that they are part of a suspect class, and the ability to make campaign contributions is not a fundamental right for

purposes of equal protection analysis. Indeed, the contractors cite no precedent holding that individuals have a "fundamental right" to make campaign contributions; rather, such financial transfers "lie closer to the edges than to the core of political expression," *Beaumont*, 539 U.S. at 161. Moreover, the Supreme Court has refused to extend the narrow category of "fundamental rights," even to important interests that are related to specific rights enumerated in the Constitution. *See San Antonio Indep. Sch. Dist.*, 411 U.S. at 17 (employing rational basis review regarding law providing unequal education funding).

Although campaign contributions include a symbolic speech component, there is no "fundamental right" to make such contributions for purposes of equal protection analysis; rather, a contribution limit is only a "marginal restriction upon the contributor's ability to engage in free communication," *Buckley*, 424 U.S. at 20. More generally, speech restrictions that are viewpoint neutral, like section 441c, receive rational basis review when challenged on equal protection grounds. *See McGuire v. Reilly*, 260 F.3d 36, 49-50 (1st Cir. 2001) (upholding restriction on speech outside abortion clinics against equal protection challenge under rational basis review); *cf. Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 102 (1972) (applying higher level of scrutiny to statute that prohibited all protests except labor picketing near a school because "the discrimination among pickets is based on the content of their expression").

This Court and the Supreme Court have declined to apply strict scrutiny in challenges similar to the contractors' equal protection claims. In *Blount*, this Court considered a law prohibiting contributions from municipal securities professionals to political campaigns of certain state officials. The petitioner argued that the law "violate[d] … the due process clause of the Fifth Amendment" with its "disparate treatment" because it applied to municipal securities professionals but not to "bank officers and bank-controlled political action committees." 61 F.3d at 946 n.4. The Court found it "unnecessary to evaluate this contention" because the "Fifth Amendment requires only that the government have a *rational basis* for its distinction … and rational-basis review requires, if anything, less 'mathematical nicety' than the First Amendment requires." *Id.* (quoting *Vance*, 440 U.S. at 109) (emphasis added). And in *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), claimants argued that a state law restricting political activity by state employees violated the Equal Protection Clause "by singling out classified service employees for restrictions on partisan political expression while leaving unclassified personnel free from such restrictions." *Id.* at 607 n.5. The Supreme Court rejected the argument and explained that "the legislature must have some leeway in determining which of its employment positions require restrictions on partisan political activities and which may be left unregulated." *Id.* The Court's cursory

treatment of the claim forecloses any credible suggestion that it applied strict scrutiny.

The Supreme Court has sometimes employed an intermediate level of scrutiny in equal protection cases involving quasi-suspect classes, rather than actual suspect classes. *See, e.g.*, *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 219 (2000) (noting the existence of intermediate scrutiny for "cases involving classifications on a basis other than race"); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (gender); *Mills v. Habluetzel*, 456 U.S. 91, 98 (1982) (illegitimate children). The contractors do not, and cannot, argue that they are part of any quasi-suspect class. Although the Supreme Court appears to have limited its use of intermediate scrutiny in equal protection cases only to those involving quasi-suspect classes, the court below evaluated the contractors' equal protection claim with the same intermediate level of scrutiny it employed under the First Amendment — "closely drawn to match a sufficiently important interest." (JA 228, 240.) Even though the district court erred by applying intermediate scrutiny in its equal protection analysis, the court correctly held that section 441c can satisfy such scrutiny.

In any event, strict scrutiny for the contractors' equal protection claim would be entirely unprecedented and would run counter to decades of Supreme Court jurisprudence regarding campaign finance statutes. *Buckley* and its progeny have

reviewed FECA primarily under the First Amendment — subjecting contribution limits and disclosure provisions to intermediate scrutiny, and expenditure limits to strict scrutiny. That longstanding precedent could be jeopardized if litigants could gain strict scrutiny by repackaging their claims as equal protection challenges by, for example, characterizing FECA's different limits for contributions to candidates, political parties, and PACs as unconstitutional differential treatment. This Court should follow *Blount*, reject the contractors' invitation to revisit well-established precedent, and apply rational basis review to their equal protection claims. As explained below, however, and as the district court found, even under intermediate scrutiny section 441c is constitutional.

B. Equal Protection Is Not Violated by Any Differential Treatment Between Individual Contractors and Corporate Entities or Persons Associated with Those Entities

The Supreme Court has long acknowledged that "the 'differing structures and purposes' of different entities 'may require different forms of regulation in order to protect the integrity of the electoral process.'" *Nat'l Right to Work Comm.*, 459 U.S. at 210 (quoting *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 201 (1982))). "The governmental interest in preventing both actual corruption and the appearance of corruption" may be "accomplished by treating unions, corporations, and similar organizations differently from individuals." *Id.* at 210-11 (citations omitted). As *Buckley* noted in discussing FECA's disparate treatment of major and

minor parties, "[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike… ." 424 U.S. at 97-98 (internal quotation marks and citation omitted).

The contractors erroneously argue that Section 441c violates the equal protection clause because individual contractors purportedly are treated less favorably than (1) corporate contractors; (2) their "directors, officers, employees and shareholders"; and (3) "individual LLCs." (App. Br. 28-33.) Contrary to the contractors' argument, however, corporate contractors and individual contractors are treated almost identically under section 441c. Both corporate and individual contractors are prohibited from making contributions. 2 U.S.C. §§ 441b(a), 441c.

The contractors nonetheless assert (App. Br. 28) that they are treated less favorably than corporate contractors because only a corporation may establish a "separate segregated fund" ("SSF," also known as a PAC) and solicit money from the corporation's "stockholders and their families and its executive or administrative personnel and their families" for the purpose of making contributions. *See* 2 U.S.C. §§ 441b(b)(4)(A)(i); 441c(b). But SSFs exist to ensure that the corporation is *not* the entity making the contribution, as the terms "separate" and "segregated" make abundantly clear. The Supreme Court has upheld the requirement that corporations establish an SSF to make contributions, rather than making them from their corporate treasuries. *See Beaumont*, 539 U.S.

at 147-49. And as the district court noted (JA 241), the holding in *Citizens United* rested in part on the Court's determination that "[a] PAC is a separate association from the corporation." 130 S. Ct. at 897. The Court held that a PAC's ability to make independent expenditures was insufficient to alleviate the First Amendment burdens on corporations because the PAC option still "does not allow corporations to speak." *Id.*

Moreover, the contractors' argument (App. Br. 28) that individual contractors "do not have [the] option" to establish an SSF, though accurate, ignores similar options that are available to individual contractors. A contractor can establish and use a corporate form, such as an LLC; the LLC may enter into contracts with the government; and the individual would remain free to make contributions. (*See supra* p. 5; App. Br. 32 ("[T]he agency does not care whether the contract is with the individual personally or with an LLC.").) Moreover, as the district court noted (JA 241), section 441c does not bar contributions by spouses or other close relatives of individual contractors.

The contractors also claim (App. Br. 30-31) that they are being unfairly treated in comparison to corporate directors, officers, employees and shareholders, but as a matter of law, a corporation is a separate legal entity from the individuals who operate and own it. Corporate officers, directors, employees, and shareholders, for example, cannot in ordinary circumstances be held accountable

for the debts or misconduct of the corporation. 1 William Meade Fletcher, Cyclopedia of the Law of Corporations § 25 (rev. ed. 2012). The contractors in this case are being treated differently from individuals associated with corporate contractors because the latter individuals do not have contracts with the government.

Thus, as the district court held, "individual contractors are not similarly situated under the law to corporate contractors' PACs or their officials." (JA 241.) Congress might have rationally concluded that there is a lower risk of corruption or its appearance when the person receiving the government contract is different from the person making the contribution. Congress might have concluded that there is a lower risk of corruption when an employee or shareholder of a major federal contractor such as Boeing makes a contribution to a federal candidate as compared to an individual who is actually a party to the contract. And Congress might have concluded that individual personal service contracts are small enough that their award might be influenced by an individual's contribution, but that it is unlikely that a corporate contract totaling millions of dollars would be steered in a particular direction merely because an employee or stockholder of that company made an individual contribution. Thus, section 441c's focus on the individual or entity actually contracting with the government satisfies the equal protection requirement of the Fifth Amendment.

C. Equal Protection Is Not Violated by Any Differential Treatment Between Individual Contractors and Federal Employees

Federal employees and federal contractors are not the same and therefore are justifiably treated differently in numerous ways. The contractors "do not argue that the situations [of federal contractors and federal employees] are identical," but that the two groups are "sufficiently close" that the different treatment of contractors violates equal protection. (App. Br. 36.) Especially in light of the many different occupations and functions of workers *within* the two categories (federal employees versus federal contractors), the contractors' conclusory assertion cannot override Congress's discretion. Indeed, the Hatch Act establishes different restrictions even among federal employees of different agencies. (*See infra* pp. 58-59.) It is Congress's role to draw lines in these complex and difficult areas; the courts have "no scalpel to probe" with such specificity. *Buckley*, 424 U.S. at 30.

One critical distinction between federal employees and contractors is that only the former are protected by the MSPB, which has the power to hear and decide complaints when an agency is alleged to have violated Merit System Principles governing federal employment. *See* 5 U.S.C. §§ 1201-1209, 1214-15, 2301(b)(1)-(2). Two such Merit System Principles are that "[a]ll employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation" and that

"[e]mployees should be … protected against … coercion for partisan political purposes …." 5 U.S.C. §§ 2301(b)(2), (b)(8)(A). No institution comparable to the MSPB protects federal contractors. Congress could have concluded that the important government interests section 441c promotes, including protecting workers from coercion, were already being served adequately with respect to federal employees, but that a ban on contributions was necessary to protect contractors.

More fundamentally, the contractors cannot demonstrate that, overall, federal employees receive more favorable treatment. (*See* JA 242.) In some ways, federal employees are subject to more severe restrictions than federal contractors. Unlike federal contractors, for example, federal employees are generally *not* permitted to solicit campaign donations or invite people to political fundraisers. *See* 5 U.S.C. § 7323; 5 C.F.R. § 734.303. And federal employees who work at "further restricted" agencies (other than those appointed by the President and confirmed by the Senate) are prohibited from other political speech, including addressing political party conventions or campaign rallies, endorsing candidates in political advertisements, or circulating partisan nominating petitions. 5 U.S.C. § 7323; 5 C.F.R. §§ 734.408-12. In addition to the above restrictions, most FEC employees are prohibited from making campaign contributions to many federal campaigns. 5 U.S.C. § 7323(b)(1).

As the district court recognized in rejecting this portion of the contractors' equal protection challenge (JA 242), the Supreme Court has made clear that in evaluating claims of disparate treatment, a court must look at the totality of circumstances and not just one provision in isolation. In *California Medical Association*, the Supreme Court took that approach in reviewing an equal protection claim against a different provision of FECA. An unincorporated association challenged the limits on the contributions it could make to political committees. The plaintiffs argued that corporations were treated more favorably due to the corporations' ability to spend unlimited sums for the administrative and solicitation expenses of their SSFs. 453 U.S. at 200; *see also* 2 U.S.C. § 441b(b). After concluding that there was no First Amendment violation, the Court also rejected the equal protection claim: "Appellants' claim of unfair treatment ignores the plain fact that *the statute as a whole* imposes far *fewer* restrictions on individuals and unincorporated associations than it does on corporations and unions." *Cal Med. Ass'n*, 453 U.S. at 200 (first emphasis added). The Court then described other parts of the statute that favored the plaintiffs' interests over those of corporations and noted that "differing restrictions placed on individuals and unincorporated associations, on the one hand, and on unions and corporations, on the other, reflect a judgment by Congress that these entities have differing

structures and purposes, and that they therefore may require different forms of regulation in order to protect the integrity of the electoral process." *Id.* at 201.

Likewise, the "dissimilar roles of contractors and employees … justify the distinct regulatory schemes that the Government has fashioned" regarding political activity. (JA 242.) Congress has chosen to place somewhat different limits on the political activity of contractors and others who interact with the government. That delicate balancing of interests is a legislative judgment to which the courts defer. Section 441c does not violate the equal protection guarantee of the Fifth Amendment.

CONCLUSION

For the reasons stated above, this Court should affirm the district court's grant of summary judgment to the Commission.

Respectfully submitted,

Anthony Herman
General Counsel
aherman@fec.gov

Lisa J. Stevenson
Deputy General Counsel - Law
lstevenson@fec.gov

David Kolker
Associate General Counsel
dkolker@fec.gov

Harry J. Summers
Assistant General Counsel
hsummers@fec.gov

Holly J. Baker
Attorney
hbaker@fec.gov

Seth Nesin
Attorney
snesin@fec.gov

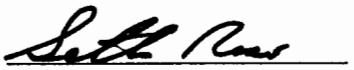
FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463
(202) 694-1650

February 20, 2013

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 13,977 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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



Seth Nesin
Attorney
Federal Election Commission

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of February 2013, I caused the Federal Election Commission's brief in *Wagner v. FEC,* No. 12-5365, to be filed with the Clerk of the Court by the electronic CM/ECF System, thereby effectuating service on the following:

Alan B. Morrison
George Washington University Law School
2000 H Street, N.W.
Washington, DC 20052
abmorrison@law.gwu.edu

Arthur B. Spitzer
ACLU of the Nation's Capital
4301 Connecticut Ave., N.W., Suite 434
Washington, DC 20008
artspitzer@aclu-nca.org

J. Gerald Hebert
The Campaign Legal Center
215 E. Street, N.E.
Washington, DC 20002
ghebert@campaignlegalcenter.org

Fred Wertheimer
Democracy 21
2000 Massachusetts Avenue, N.W.
Washington, DC 20036
fwertheimer@democracy21.org

Scott Nelson
Public Citizen
1600 20th Street N.W.
Washington, DC 20009
snelson@citizen.org

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

February 20, 2013

Seth Nesin
Attorney
Federal Election Commission

ADDENDUM TABLE OF CONTENTS

Page

2 U.S.C. § 441c, Contributions by government contractors

(a) Prohibition

It shall be unlawful for any person--

(1) who enters into any contract with the United States or any department or agency thereof either for the rendition of personal services or furnishing any material, supplies, or equipment to the United States or any department or agency thereof or for selling any land or building to the United States or any department or agency thereof, if payment for the performance of such contract or payment for such material, supplies, equipment, land, or building is to be made in whole or in part from funds appropriated by the Congress, at any time between the commencement of negotiations for and the later of (A) the completion of performance under; or (B) the termination of negotiations for, such contract or furnishing of material, supplies, equipment, land, or buildings, directly or indirectly to make any contribution of money or other things of value, or to promise expressly or impliedly to make any such contribution to any political party, committee, or candidate for public office or to any person for any political purpose or use; or

(2) knowingly to solicit any such contribution from any such person for any such purpose during any such period.

(b) Separate segregated funds

This section does not prohibit or make unlawful the establishment or administration of, or the solicitation of contributions to, any separate segregated fund by any corporation, labor organization, membership organization, cooperative, or corporation without capital stock for the purpose of influencing the nomination for election, or election, of any person to Federal office, unless the provisions of section 441b of this title prohibit or make unlawful the establishment or administration of, or the solicitation of contributions to, such fund. Each specific prohibition, allowance, and duty applicable to a corporation, labor organization, or separate segregated fund under section 441b of this title applies to a corporation, labor organization, or separate segregated fund to which this subsection applies.

(c) “Labor organization” defined

For purposes of this section, the term “labor organization” has the meaning given it by section 441b(b)(1) of this title.

5 U.S.C. § 7323, Political activity authorized; prohibited

(a) Subject to the provisions of subsection (b), an employee may take an active part in political management or in political campaigns, except an employee may not--

(1) use his official authority or influence for the purpose of interfering with or affecting the result of an election;

(2) knowingly solicit, accept, or receive a political contribution from any person, unless such person is--

(A) a member of the same Federal labor organization as defined under section 7103(4) of this title or a Federal employee organization which as of the date of enactment of the Hatch Act Reform Amendments of 1993 had a multicandidate political committee (as defined under section 315(a)(4) of the Federal Election Campaign Act of 1971 (2 U.S.C. 441a(a)(4)));

(B) not a subordinate employee; and

(C) the solicitation is for a contribution to the multicandidate political committee (as defined under section 315(a)(4) of the Federal Election Campaign Act of 1971 (2 U.S.C. 441a(a)(4))) of such Federal labor organization as defined under section 7103(4) of this title or a Federal employee organization which as of the date of the enactment of the Hatch Act Reform Amendments of 1993 had a multicandidate political committee (as defined under section 315(a)(4) of the Federal Election Campaign Act of 1971 (2 U.S.C. 441a(a)(4))); or

(3) run for the nomination or as a candidate for election to a partisan political office; or

(4) knowingly solicit or discourage the participation in any political activity of any person who--

(A) has an application for any compensation, grant, contract, ruling, license, permit, or certificate pending before the employing office of such employee; or

(B) is the subject of or a participant in an ongoing audit, investigation, or enforcement action being carried out by the employing office of such employee.

(b)(1) An employee of the Federal Election Commission (except one appointed by the President, by and with the advice and consent of the Senate), may not request or receive from, or give to, an employee, a Member of Congress, or an officer of a uniformed service a political contribution.

(2)(A) No employee described under subparagraph (B) (except one appointed by the President, by and with the advice and consent of the Senate), may take an active part in political management or political campaigns.

(B) The provisions of subparagraph (A) shall apply to--

(i) an employee of--

(I) the Federal Election Commission or the Election Assistance Commission;

(II) the Federal Bureau of Investigation;

(III) the Secret Service;

(IV) the Central Intelligence Agency;

(V) the National Security Council;

(VI) the National Security Agency;

(VII) the Defense Intelligence Agency;

(VIII) the Merit Systems Protection Board;

(IX) the Office of Special Counsel;

(X) the Office of Criminal Investigation of the Internal Revenue Service;

(XI) the Office of Investigative Programs of the United States Customs Service;

(XII) the Office of Law Enforcement of the Bureau of Alcohol, Tobacco, and Firearms;

(XIII) the National Geospatial-Intelligence Agency; or

(XIV) the Office of the Director of National Intelligence; or

(ii) a person employed in a position described under section 3132(a)(4), 5372, 5372a, or 5372b of title 5, United States Code.

(3) No employee of the Criminal Division or National Security Division of the Department of Justice (except one appointed by the President, by and with the advice and consent of the Senate), may take an active part in political management or political campaigns.

(4) For purposes of this subsection, the term "active part in political management or in a political campaign" means those acts of political management or political campaigning which were prohibited for employees of the competitive service before July 19, 1940, by determinations of the Civil Service Commission under the rules prescribed by the President.

(c) An employee retains the right to vote as he chooses and to express his opinion on political subjects and candidates.