UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

STOP RECKLESS ECONOMIC INSTABILITY CAUSED BY DEMOCRATS, *et al.*,	
Plaintiffs,	Civ. No. 1:14-397 (AJT-IDD)
v.	
FEDERAL ELECTION COMMISSION,	RESPONSE IN OPPOSITION TO SUMMARY JUDGMENT MOTION
Defendant.	

DEFENDANT FEDERAL ELECTION COMMISSION'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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Plaintiffs' motion for summary judgment should be denied because their central claim — that the Constitution bars Congress from applying contribution limits to new political committees ("PACs") that differ from the limits applicable to PACs that have earned "multicandidate" status — hinges on a flawed assertion: that new PACs and multicandidate PACs are "identical in every way." But when plaintiff Stop Reckless Economic Instability caused by Democrats ("Stop PAC") was a new PAC, it differed from plaintiff Tea Party Leadership Fund ("Tea Party Fund") in significant ways which show why Congress's set of contribution limits permissibly serves the important government interests in deterring corruption and its appearance.

The Federal Election Campaign Act ("FECA") allows individuals and most groups, including new PACs, to contribute up to $2,600 per election to each federal candidate. But a new PAC can earn a $5,000 limit if, *inter alia*, it is registered with the Federal Election Commission ("FEC" or "Commission") for six months. The Supreme Court has already rejected plaintiffs' claims that this requirement violates the First and Fifth Amendments, explaining that it prevents individuals from circumventing the $2,600 limit. Congress sought to prevent abuse by "dummy"-like PACs set up by a single candidate's supporters. Stop PAC itself was formed by two people working for Niger Innis's then-ongoing congressional campaign. Just three weeks after its registration, only the six-month period prevented Stop PAC from obtaining the $5,000 limit in the key pre-election window. By contrast, the Tea Party Fund was already a *bona fide* multicandidate PAC, a broad-based interest group that had contributed to dozens of candidates with funds from over 100,000 contributors and filed many disclosure reports with the FEC.

While Stop PAC wants the Tea Party Fund's *candidate* contribution limit, the Tea Party Fund wants Stop PAC's *political party* contribution limits. FECA allows a "person" (including individuals and new PACs) to contribute more than multicandidate PACs can to political parties. But that distinction is a quintessential exercise of legislative judgment on how to fight corruption while ensuring that parties have the resources needed for effective advocacy — particularly since individuals are a major source of party funding. This is the kind of fine tuning into which courts have "no scalpel to probe," as the Supreme Court has emphasized.

These FECA provisions are closely drawn to place minimal burdens on plaintiffs, who can, unlike the plaintiffs in many of the cases on which they rely, speak and associate with as many candidates and parties as they wish. Plaintiffs could have, among other things, organized volunteers or spoken extensively on behalf of those they supported. But they did not do so.

For the foregoing reasons, plaintiffs' motion for summary judgment should be denied.

BACKGROUND

On September 19, 2014, the parties cross-moved for summary judgment. (Docket Nos. 56, 57.) In its brief, the FEC detailed this case's legal background, procedural history, undisputed material facts, and the reasons why the FEC is entitled to judgment as a matter of law. (*See* FEC's Mem. in Supp. of Mot. for Summ. J. ("FEC SJ Br.") (Docket No. 57-1).)

RESPONSE TO PLAINTIFFS' ALLEGED UNDISPUTED FACTS

1-3. Admit.[1]

4. Admit. Stop PAC had not yet achieved multicandidate PAC status on April 10, 2014, because it had been registered with the FEC for less than six months.

5-6. Admit.

7. Admit that the Nevada primary occurred less than six months after Stop PAC registered with the FEC, but disputed that Stop PAC was prevented from contributing $5,000 to the Innis campaign because Stop PAC could have registered early enough to become a multicandidate PAC before the primary. (*See* Deposition of Stop PAC ("Stop PAC Dep.") 21:6-

[1] Two declarations cited in support of most of plaintiffs' alleged facts are neither signed nor dated as required by 28 U.S.C. § 1746. (*See* Decl. of Gregory Campbell in Supp. of Pls.' Mot. for Summ. J. at 6 (Docket No. 56-2); Decl. of Michael Gruccio in Supp. of Pls.' Mot. for Summ. J. at 3 (Docket No. 56-3).) Only judges and attorneys may electronically sign documents with "/s/". *See* Eastern District of Virginia, Electronic Case Filing Policies and Procedures Manual at 26-27 (Nov. 1, 2010), http://www.vaed.uscourts.gov/ecf/documents/ECF%20Procedures%20Manual/E-FilingPoliciesandProceduresManualwithTitlePages11-1-13.pdf. It is within the Court's discretion to disregard those declarations due to the violation of section 1746. *See Bonds v. Cox*, 20 F.3d 697, 702 (6th Cir. 1994) (excluding undated declaration from consideration); *Slep-Tone Entertainment Corp. v. Powers*, No. 5:12-CV-53-BO, 2014 WL 2040104, at *7 (E.D.N.C. Apr. 3, 2014) (finding inadmissible a non-attorney declaration with the symbol "/s/" in lieu of a manual signature).

12, 21:13-17, FEC Exhibit ("Exh.") 3.) Dispute that the threat of criminal prosecution inhibited Stop PAC. *See* 52 U.S.C. § 30109(a)(5)(C) (criminal FECA violations require "knowing and willful" intent). Dispute that Stop PAC was prevented from otherwise "more closely associating itself with Innis, demonstrating its support for him," and "assisting his campaign." Stop PAC could have but chose not to make independent expenditures on behalf of Innis or any other candidate. (Stop PAC Resps. to FEC's Disc. Reqs. ("Stop PAC Disc. Resps.") at 4, Interrog. 6, FEC Exh. 2.) Stop PAC also could have organized volunteers to assist the Innis campaign but did not, even though Innis would have welcomed such help. (Stop PAC Dep. 100:2-5, FEC Exh. 3; Deposition of Niger Innis for Congress ("NIFC Dep.") 26:22-27:7, FEC Exh. 4.)

8-9. Admit.

10. Admit that the Alaska primary occurred less than six months after Stop PAC registered with the FEC, but disputed that Stop PAC was prevented from contributing $5,000 to the Sullivan campaign, that the threat of criminal prosecution inhibited Stop PAC, and that Stop PAC was prevented from "more closely associat[ing] itself with [Sullivan], demonstrat[ing] its support for him," and "assist[ing] his campaign." *See* Response to No. 7, *supra*.

11-12. Admit.

13. Disputed that Stop PAC was prevented from contributing $4,400 to the Heck campaign, that the threat of criminal prosecution inhibited Stop PAC, and that Stop PAC was prevented from otherwise "more closely associat[ing] itself with [Heck], demonstrat[ing] its support for him," and "assist[ing] his campaign." *See* Response to No. 7, *supra*. Disputed that Stop PAC was or is prevented from contributing up to $4,400 to the Heck campaign in connection with the November 6, 2014 general election since Stop PAC became a multicandidate PAC on September 11, 2014. (Amended Complaint ("Am. Compl.") ¶ 30 (Docket No. 37).)

14. Admit that Stop PAC's six-month waiting period under 52 U.S.C. § 30116(a)(4) ended on September 11, 2014. (Am. Compl. ¶ 30.) Admit that on September 19, 2014, Stop PAC filed a form with the FEC indicating that it had met the multicandidate PAC qualifications on September 11, 2014. (*See* Stop PAC Form 1-M Notification of Multicandidate PAC Status at

1 (Sept. 19, 2014), http://docquery.fec.gov/pdf/157/14970832157/14970832157.pdf.) Admit that Stop PAC has stated that it intends to contribute an additional $1,800 to Heck. Denied that Stop PAC cannot contribute an additional $1,800 to Heck until "the FEC approves [any] form." A PAC becomes a multicandidate PAC upon satisfying section 30116(a)(4)'s requirements regardless of when or even whether an FEC Form 1-M is filed. 11 C.F.R. § 110.2(a)(1).

15. Admit that Stop PAC is registered with the FEC and lists its address in Virginia. Denied that Stop PAC has few contributors in Nevada. Stop PAC has 78 contributors residing in Nevada (Stop PAC Disc. Resps. at 8, Interrog. 14, FEC Exh. 2), and its founder and chairman also resides in Nevada (*id.* at 1, Interrog. 1).

16. Disputed. Independent expenditures may take many forms and Stop PAC's reported assets as detailed herein are easily sufficient. For example, on April 25, 2014, Stop PAC paid $8,500 to "Rapid Response Television" for "[i]ssue advertising." (*See* Stop PAC Form 3X Report of Receipts and Disbursements at 12 (July 8, 2014), http://docquery.fec.gov/pdf/987/14961526987/14961526987.pdf.) Stop PAC's reports also show that it has made thousands of dollars in disbursements from its segregated bank account reserved for independent expenditures, called a "Carey account." (*See id.* at 15-16.) Stop PAC did not even give serious consideration to helping Innis in ways other than contributions. (Stop PAC Disc. Resps. at 4, Interrog. 6, FEC Exh. 2; Stop PAC Dep. 26:22-27:7, 99:11-13, 99:22-100:5, FEC Exh. 3).)

17. Disputed. As of August 4, 2014, 1,246 users had visited Stop PAC's website. (*See* Email from Timothy Nurnberger to Dan Backer, *et al*. (Aug. 4, 2014), FEC Exh. 16.)

18-24. Admit.

25. Admit that FECA limits the Tea Party Fund's annual contributions to the National Republican Senatorial Committee ("NRSC") to $15,000 and that the Tea Party Fund has stated that it wants to give $32,400 to the NRSC in 2014. Disputed that the threat of criminal prosecution inhibited the Tea Party Fund. *See* Response to No. 7, *supra*. Disputed that the $15,000 contribution limit is chilling the Tea Party Fund's "full exercise" of First Amendment rights. The Tea Party Fund could contribute up to $15,000 immediately to the NRSC, *see* 52

U.S.C. § 30116(a)(2)(B), to obtain the "noncorrupting ingratiation and access" it seeks (Deposition of Tea Party Leadership Fund ("Tea Party Fund Dep.") 45:20-46:5, 92:15-93:3, FEC Exh. 13); yet as of September 3, 2014, it had never contributed to the NRSC (*id.* 47:5-8). The Tea Party Fund could speak independently in favor of any candidate the NRSC supports, and it has experience organizing a volunteer effort to support a candidate, but it has never done those things to support any NRSC candidate. (Tea Party Fund Resps. to FEC's First Set of Disc. Reqs. ("Tea Party Fund Resps.") at 7, Interrogs. 8-9; 11, Resp. to Reqs. for Prod. 8-9, FEC Exh. 15; Tea Party Fund Dep. 84:14-85:6, FEC Exh. 13.)

26-27. Admit.

28. Admit, except that the plaintiff's name is *Alexandria* Republican City Committee.

29-30. Admit.

31. Admit that FECA limits the Tea Party Fund's annual contributions to the Alexandria Republican City Committee ("Alexandria Committee") to $5,000 and that the Tea Party Fund has stated that it wants to give another $5,000 in 2014. Disputed that the threat of criminal prosecution inhibited the Tea Party Fund. *See* Response to No. 7, *supra*. Disputed that the $5,000 contribution limit chills the Tea Party Fund's "full exercise" of First Amendment rights. The Tea Party Fund could speak independently in favor of any candidate, and the Tea Party Fund has experience organizing a volunteer effort to support a candidate, and yet it has never done those things for an Alexandria Committee candidate. *See* Response to No. 25, *supra*.

32. Admit that the Tea Party Fund has said that it wants to contribute $10,000 to the Alexandria Committee in 2014 for the reasons stated, among other reasons. (*See* Am. Compl. ¶¶ 38-39, 41; Tea Party Fund Dep. 92:15-93:3, FEC Exh. 13.)

33-39. American Future PAC is not a plaintiff, and so the FEC objects to the relevance of these proposed facts. Plaintiffs admit these facts are not material if their motion for joinder is denied. (Mem. in Supp. of Pls.' Mot. for Summ. J. ("Pls.' Br.") at 7 n.2 (Docket No. 56-1).)

ARGUMENT

I. THE COURT LACKS JURISDICTION OVER STOP PAC'S CLAIMS

A. Stop PAC Lacks Standing

Stop PAC is not entitled to summary judgment because it lacks standing. As explained in the Commission's opening brief, Stop PAC could have registered more than six months before Innis's June 10 primary election. (*See* FEC SJ Br. at 10-11.) Indeed, starting Stop PAC was "something that ha[d] always interested" its founder Greg Campbell, and he thus thought of the idea for Stop PAC early enough to register more than six months in advance of the primary. (FEC SJ Br. at 6 (FEC's Statement of Undisputed Material Facts ("FEC Facts") ¶ 12).)[2] No law prevented Stop PAC from doing so, as Stop PAC acknowledges. (Stop PAC Disc. Resps. at 8, Interrog. 15, FEC Exh. 2.) Stop PAC's future treasurer and counsel Dan Backer was aware of FECA's six-month period and how it operates.[3] Stop PACs' *choice* to register on March 11, 2014, caused its inability to give in excess of $2,600 to candidates whose elections took place in the subsequent six months. Its alleged injuries were thus self-inflicted and not "fairly traceable" to FECA. *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1152 (2013); *cf. Rosario v. Rockefeller*, 410 U.S.752, 757-59 (1973) (finding challengers to law requiring political-party registration up to 11 months before primary elections caused their own injury because they "clearly could have registered and enrolled in the party of their choice before th[e cutoff] date and been eligible to vote in the [following] primary").

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[2] Campbell's Federal Rule of Civil Procedure 30(b)(6) testimony for Stop PAC on this issue discredits Stop PAC's claim in a previous interrogatory response that Stop PAC could not have registered six months before the June 10, 2014 election because "the idea to create it had not yet arisen." (Stop PAC Disc. Resps. at 8, Interrog. 15, FEC Exh. 2.)

[3] Backer represented plaintiff Tea Party Fund in its 2012-2013 lawsuit against the FEC that also alleged that the six-month period was unconstitutional. *See Tea Party Leadership Fund, et al. v. FEC*, Civ. No. 12-1707, 2012 WL 5382844, at *1 (D.D.C. Nov. 2, 2012); FEC's Mem. in Supp. of Rule 56(d) Mot. at 4-6 (Docket No. 27-1) (explaining the history of that case).

B. Stop PAC's Claims Are Moot and Not Capable of Repetition Yet Evading Review

Even if Stop PAC did initially have standing, its claims are now moot. Stop PAC is no longer subject to the laws it challenges. (*See* FEC SJ Br. at 11.) As of September 11, 2014, six months have passed since Stop PAC registered with the FEC. (*Id.*; *see* Pls.' Facts ¶ 14.) Because Stop PAC has also met the other relevant requirements, it is now a multicandidate PAC, which may contribute up to $5,000 per election to a candidate instead of $2,600. FEC Facts ¶ 1; 52 U.S.C. §§ 30116(a)(2)(A), (a)(4). Stop PAC can now give the additional $1,800 that it wanted to contribute to Heck for the November 6 general election, and Stop PAC says it will do so. (FEC Facts ¶ 5; Pls.' Facts ¶ 14.) Stop PAC had also wanted to give over $2,600 to Innis and Sullivan for their primaries, but those elections are over. (FEC Facts ¶¶ 3-4.) Stop PAC's claims are therefore moot since "the relief sought can no longer be given or is no longer needed." *Incumaa v. Ozmint*, 507 F.3d 281, 287 (4th Cir. 2007) (internal quotation marks omitted).

Stop PAC's moot claims are not capable of repetition yet evading review, as plaintiffs have claimed. (*See, e.g.*, Pls.' Joinder Br. at 1-2 (Docket No. 50-1).) "In the absence of a class action, jurisdiction on the basis that a dispute is capable of repetition, yet evading review is limited to the exceptional situation." *Incumaa*, 507 F.3d at 289 (internal quotation marks omitted). To qualify, the Supreme Court requires the plaintiff to prove "a reasonable expectation that *the same complaining party* will be subject to the same action again." *FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 462 (2007) (emphasis added) (internal quotation marks omitted). But Stop PAC cannot satisfy the "same party" requirement now that it is a multicandidate PAC and will never again be subject to the six-month period or the $2,600 contribution limit. Plaintiffs concede as much. (*See* Pls.' Joinder Br. at 1.) They do incorrectly claim that the rule does not apply to election cases (*id.* at 1-2), but the Supreme Court has consistently applied the requirement in FECA cases, and it last did so just six years ago, *see Davis v. FEC*, 554 U.S. 724,

735-36 (2008); *see also Wisc. Right to Life*, Inc., 551 U.S. at 462.[4] The Court should dismiss counts one and two of the Complaint (Am. Compl. ¶¶ 43-55) for lack of jurisdiction.

II. THE SUPREME COURT HAS ALREADY REJECTED THE CLAIMS STOP PAC MAKES ABOUT THE SIX-MONTH PERIOD AND THE $2,600 CONTRIBUTION LIMIT

Even if this Court has jurisdiction over Stop PAC's claims, those claims fail on their merits because they have already been decided by the Supreme Court in *Buckley v. Valeo*. (FEC SJ Br. at 11-12.) *Buckley* upheld the constitutionality of the six-month period (and other multicandidate PAC qualifying criteria) against both First and Fifth Amendment challenges, 424 U.S. 1, 35-36, 59 n.67 (1976) (*per curiam*), just like those Stop PAC asserts. The Court rejected the argument that the criteria "unconstitutionally discriminate against ad hoc organizations in favor of established interest groups and impermissibly burden free association." *Id.* at 35. And it held that the criteria "serve the permissible purpose of preventing individuals from evading the applicable contribution limitations by labeling themselves committees." *Id.* at 35-36.

Stop PAC's claims are not distinguishable from those rejected in *Buckley*. Stop PAC first attempts to distinguish *Buckley* by asserting that the plaintiffs there challenged all three multicandidate PAC requirements, not just the six-month waiting period. (Pls.' Br. at 17.) That is incorrect. The *Buckley* plaintiffs asked the courts to decide the following question:

> Does [52 U.S.C. § 30116(a)(4)] violate [First and Fifth Amendment] rights, in that it excludes from the definition of "[multicandidate] political committee" committees *registered for less than the period of time prescribed in the statute*?

424 U.S. at 59 n.67 (paragraph 3(h)) (emphasis added); *see also Buckley v. Valeo*, 519 F.2d 821, 857 n.94 (D.C. Cir. 1975) (*en banc*) (same).[5] The *en banc* D.C. Circuit Court of Appeals first

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[4] None of the cases plaintiffs have previously relied upon for this untenable position involve FECA, and the Supreme Court cases they cite all pre-date *Davis v. FEC* and *FEC v. Wisconsin Right to Life*. (*See* Pls.' Joinder Br. at 1-2.)

[5] The questions were so specifically defined because a special judicial review provision in FECA required the *Buckley* district court to "certify all questions of constitutionality of [FECA]" presented by a plaintiff to the *en banc* Court of Appeals. 52 U.S.C. § 30110.

addressed that question, and its reasoning evaluates and upholds the operation of the six-month period *only*. *See* 519 F.2d at 857-58 ("The challenged Act limits such bootstrapping by interposing a six-month protective shield."). The Supreme Court affirmed and expressly answered the certified question above: "NO." 424 U.S. at 59 n.67 (paragraph 3(h)). The Court's reasoning was broad enough to encompass all three multicandidate PAC criteria, but that does not alter the fact that *Buckley* expressly affirmed the validity of the six-month period standing alone, *id.* at 35-36, 59 n.67. Thus, *Buckley* did consider the validity of the six-month period applied to groups like Stop PAC that had satisfied the other two criteria. Indeed, it *had* to, since the six-month period functions *only* when applied to such groups. For a group that has yet to obtain 51 contributors or contribute to five candidates, the six-month period is superfluous.

In any event, the *Buckley* plaintiffs expressly argued that the six-month period discriminates against not just sham groups but "philosophically motivated groups with widely dispersed members who want to respond to an issue as it arises, or who coalesce only near election time." *See* Reply Brief of the Appellants, *Buckley v. Valeo*, Nos. 75-436, 75-437, 1975 WL 171458, at *22 (U.S. Nov. 3, 1975). Stop PAC makes essentially the same argument here. (*See* Am. Compl. at 1 (claiming that the six-month period discriminates against "newly formed grassroots organizations that have spontaneously mobilized in response to emergent political issues and developments"). But *Buckley* rejected plaintiffs' argument that the criteria unconstitutionally discriminate against such "ad hoc organizations." 424 U.S. at 35.

Since *Buckley* controls, Stop PAC's claims cannot and should not be relitigated here. "In general, a plaintiff cannot successfully bring an as-applied challenge to a statutory provision based on the same factual and legal arguments the Supreme Court expressly considered when rejecting a facial challenge to that provision. Doing so is not so much an as-applied challenge as it is an argument for overruling a precedent." *Republican Nat'l Comm. v. FEC*, 698 F. Supp. 2d 150, 157 (D.D.C) (three-judge court), *aff'd mem.*, 130 S. Ct. 3544 (2010). And because *Buckley* is on point, this Court must follow it even if the Court were to accept plaintiffs' erroneous claim that changes in the law since *Buckley* have rendered the six-month period obsolete. (Pls.' Br. at

18-19; *but see infra* Part III.C.2; FEC SJ Br. at 18-19 (discussing why "the six-month period today remains an integral part of the legislative and regulatory anti-circumvention system").) Where the Supreme Court's "precedent has 'direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [courts] should follow the line of cases which directly controls, leaving to [the Supreme] Court the prerogative of overturning its own decisions.'" *United States v. Danielczyk*, 683 F.3d 611, 615 (4th Cir. 2012) (alterations in original) (quoting *Agostini v. Felton*, 521 U.S. 203, 237 (1997)), *cert. denied*, 133 S. Ct. 1459 (2013); *see also Republican Nat'l Comm.*, 698 F. Supp. 2d at 160 ("As a lower court . . . we do not believe we possess authority to clarify or refine [Supreme Court precedent] . . . or to otherwise get ahead of the Supreme Court.").[6]

III. THE SIX-MONTH PERIOD AND $2,600 CONTRIBUTION LIMIT DO NOT VIOLATE THE FIRST AMENDMENT

Should the Court accept plaintiffs' meritless request to disregard *Buckley*, the six-month period and $2,600 contribution limit would still easily survive the intermediate constitutional scrutiny that applies here. (*See* FEC SJ Br. at 12-13.) Those provisions place minimal burdens on PACs' First Amendment rights. *See infra* Part III.A. And they are closely drawn to match Congress's important interests in limiting the risk and appearance of corruption and in preventing circumvention of FECA's limits and disclosure requirements. *See infra* Parts III.B-E.

[6] Plaintiffs attempt to discredit *Buckley*'s rejection of Stop PAC's claims by noting the length of the Court's analysis (Pls.' Br. at 17), as if that would permit a district court to ignore Supreme Court precedent. The parties separately briefed the issue, and *Buckley*'s quick disposal simply reflects the challenge's lack of merit. *See* Brief for Appellees Center for Public Financing of Elections, *et al*., *Buckley v. Valeo*, Nos. 75-436, 75-437, 1975 WL 171457, at *132-33 (U.S. Oct. 20, 1975) ("The six-month rule is merely a condition on the availability of the favorable contribution limit for bona fide organizations." (citing *Rosario*, 410 U.S. at 752)); Brief for the Attorney General and the Federal Election Commission, *Buckley v. Valeo*, Nos. 75-436, 75-437, 1975 WL 171459, at *34, *62-*63 (U.S. Nov. 3, 1975); Brief of the Appellants, *Buckley v. Valeo*, Nos. 75-436, 75-437, 1975 WL 173792, at *141 (U.S. Sept. 30, 1975).

A. The Six-Month Period and $2,600 Contribution Limit Place Minimal Burdens on a PAC's First Amendment Rights and Do Not "Delay" Speech

Contrary to plaintiffs' assertions (Pls.' Br. at 10, 25), the six-month period and $2,600 contribution limit place minimal burdens on a new PAC's First Amendment rights. The six-month period requires new PACs to comply with FECA's most broadly applicable base contribution limit only temporarily. The $2,600 contribution limit also applies to individuals, partnerships, associations, all other non-multicandidate PACs, and some other groups. *See* 52 U.S.C. §§ 30101(11), 30116(a)(1)(A). FECA therefore in no way singles out new PACs. *See McCutcheon v. FEC*, 134 S. Ct. 1434, 1442 n.3 (2014) (plurality) ("PACs that do not qualify as multicandidate PACs must abide by the base limit applicable to individual contributions."). In fact, FECA's equitable treatment of new PACs was recently noted by the Fifth Circuit Court of Appeals when it struck down a much stricter contribution limit for new political committees. *Catholic Leadership Coal. of Tex. v. Reisman*, No. 13-50582, 2014 WL 3930139, at *4 (5th Cir. Aug. 12, 2014) (noting that FECA applies "the *base* per-candidate, per-party, and per-committee contribution limits applicable to individual contributors" to new PACs, and in contrast, "Texas limits newly-formed general-purpose committees to an aggregate $500 in political contributions" while individual contributions are unlimited (emphasis in original)).

While the $2,600 limit is the general rule, the $5,000 limit Stop PAC wanted is the exception — a benefit for the minority of PACs that achieve multicandidate status and an acknowledgment of the key role that such broad-based groups and political party committees play in federal elections. *See* 120 Cong. Rec. H7810 (daily ed. Aug. 7, 1974). Since 2003, only about 22 percent of all PACs to register with the FEC have become multicandidate PACs, and as of a few weeks ago, only 482 of them were active. (*See* Decl. of Paul C. Clark II, Ph.D. ("Clark Decl.") ¶¶ 11, 13, FEC Exh. 11.) Stop PAC did not suffer a "substantial burden" because FECA did not immediately reward it with the higher contribution limit that relatively few ever enjoy.

Second, the $2,600 limit leaves a new PAC free to associate with as many candidates as it likes during the six-month window. A contribution in any amount is a "symbolic act" that is a

"general expression of support for the candidate and his views." *Buckley*, 424 U.S. at 21. Stop PAC associated with and expressed support for Innis and others by contributing $2,600 to their campaigns. (FEC Facts ¶¶ 3-5.) In fact, Stop PAC could have associated with every candidate if it so wished, as there is no aggregate limit on its contributions. *McCutcheon*, 134 S. Ct. at 1442.

Third, a new PAC's inability to contribute an additional $2,400 to a candidate minimally burdens the PAC's rights because an increased contribution does not equal increased speech or association. The "quantity of communication" involved in the symbolic act of contributing "does not increase perceptibly with the size of [the] contribution." *Buckley*, 424 U.S. at 21. Stop PAC was not denied the ability to speak more or "further associat[e]" with Innis (Am. Compl. ¶ 23) to any perceptible degree because its contribution was limited to $2,600 instead of $5,000.

Fourth, FECA only *temporarily* requires a new PAC to comply with the $2,600 contribution limit applicable to most others, and a new PAC controls when that period starts and ends. *Buckley*, 519 F.2d at 857 (stating that the six-month period "only incidentally impedes the freedom of association protected by the First Amendment, because it does not prevent individuals from drawing together to act as a political committee at any time"). On similar grounds, the Supreme Court has upheld a law imposing an 11-month waiting period that did not just limit, but completely barred individuals from voting in a primary election. *See Rosario*, 410 U.S. at 753-54, 760. That law did not unduly burden association because it was "merely a time limitation on when [voters] had to act" and voters were free to "enroll[] in a party in time to participate." *Id.* at 758 (pointing out in addition that "it is clear that [the plaintiffs] could have [enrolled early enough], but chose not to"). Stop PAC was also free to register early enough to contribute up to $5,000 to Innis and Sullivan for their primary elections. *See supra* Part I.A.

Fifth, during the six-month window new PACs are "free to . . . associate actively through volunteering their services." *Buckley*, 424 U.S. at 28. Stop PAC claims it desired to "further associat[e]" with Innis and to "assist[] his campaign." (Am. Compl. ¶ 23; *see also* Pls.' Facts ¶ 7.) And yet it did not ask a single one of its 78 contributors that live in Nevada to volunteer to help Innis's campaign. (*See* Stop PAC Disc. Resps. at 8, Interrog. 14, FEC Exh. 2.) Innis stated

that he would have welcomed volunteer help from PACs. (NIFC Dep. 26:22-27:7, FEC Exh. 4.) His campaign had only 10 volunteers, whose efforts he described as "very important, very important." (*Id.* 22:18-24:15, 25:9-11, FEC Exh. 4.)

Sixth, during the six-month window, new PACs are also "free to engage in independent political expression." *Buckley*, 424 U.S. at 28. Stop PAC registered with the FEC as a "hybrid" PAC, which allows it to accept unlimited funds to make independent expenditures for or against candidates. (FEC Facts ¶ 1; Clark Decl. ¶ 5, FEC Exh. 11.) And yet Stop PAC made no effort to speak independently in support of the Innis campaign (FEC Facts ¶ 3), despite being capable of doing so. Stop PAC claims it raised "around $20,000" in just its first two weeks of existence. (FEC Facts ¶ 12.) Stop PAC's chairman is a blogger for a political website (Deposition of Gregory Campbell 13:12-14:8, FEC Exh. 5), and he has authored a prodigious amount of political content for that site and others (*see* Decl. of Counsel in Supp. of FEC's Mot. Under Rule 56(d) at 5, ¶ 7.b (Docket No. 27-2)). Stop PAC has its own website, which is managed by a sophisticated political consulting firm also hired by the presidential campaigns of John McCain and President George W. Bush. (Stop PAC Dep. 81:15-17.)[7] Simply put, Stop PAC's assertion that it did "not have ready access to alternative avenues for supporting" candidates is not credible. (Pls.' Br. at 27 (internal quotation marks omitted); Pls.' Facts ¶¶ 16-17.)

Finally, contrary to plaintiffs' claims (Pls.' Br. at 25-26), the minimal burdens of the six-month period and $2,600 contribution limit are not like those imposed by "prior restraint" laws to which strict scrutiny applies. FECA creates a temporary, modest, content-neutral limit on contributions of money. But virtually all of the inapposite cases plaintiffs cite address laws featuring (1) *bans*, not mere limits; (2) bans on *speech*, not just association; and (3) grants of discretion to government officials who could prospectively censor speech based on its content.[8]

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[7] *See* Campaign Solutions – About Us, http://www.campaignsolutions.com/about/ (last viewed Oct. 3, 2014).

[8] *See Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 153 (2002) (law banning "door-to-door advocacy" without permit); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 224 (1990) (opinion of O'Connor, J.) (laws requiring licenses for "sexually

B. The $2,600 Contribution Limit Furthers the Important Government Interest of Limiting the Risk and Appearance of Corruption

The six-month period and $2,600 contribution limit are closely drawn to further multiple important government interests. The Court has held that the $2,600 contribution limit is a constitutionally valid method of preventing corruption and the appearance of corruption in federal elections. *Buckley*, 424 U.S. at 23-35. *Buckley* explained that contribution limits help prevent corruption because "[t]o the extent that large contributions are given to secure a political quid pro quo from current and potential officeholders, the integrity of our system of representative democracy is undermined." *Id*. at 26-27. And the Court held that contribution limits also help prevent the appearance of corruption "inherent" in large contributions — the avoidance of which is "critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent." *Id.* at 27 (internal quotation marks omitted).

Most recently in *McCutcheon*, the Supreme Court reaffirmed the validity of FECA's "base limits," which include the $2,600 limit, stating that "[t]hose base limits remain the primary means of regulating campaign contributions." 134 S. Ct. at 1451; *see also id.* at 1441 ("Congress may regulate campaign contributions to protect against corruption or the appearance of

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explicit speech"); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 148 (1969) (law banned public demonstrations without permit); *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1021, 1025-26 (9th Cir. 2009) (law required permit and up to 10 days notice for anti-war protest); *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1027-29 (9th Cir 2006) (laws requiring permits for public marches and street banners); *Grossman v. City of Portland*, 33 F.3d 1200, 1202 (9th Cir. 1994) (defendant was "arrested and handcuffed" for "carr[ying] a sign in [a] protest"); *NAACP, W. Region v. City of Richmond*, 743 F.2d 1346, 1349-50 (9th Cir. 1984) (law requiring permit for parades prevented NAACP from protesting death in police custody); *Rosen v. Port of Portland*, 641 F.2d 1243, 1244 (9th Cir. 1981) (man arrested for "distributing religious literature in the airport" without a permit); *Douglas v. Brownell*, 88 F.3d 1511, 1514 (8th Cir. 1996) (law requiring permit for parades); *Catholic Leadership Coal. of Tex. v. Reisman*, 2014 WL 3930139 at *3-4 (invalidating 60-day aggregate limit of $500 on contributions *and* independent speech by new PACs, and distinguishing it from FECA provision at issue in the current case); *Arlington Cnty. Republican Comm. v. Arlington Cnty.*, 790 F. Supp. 618, 620 (E.D. Va. 1992) (law requiring permit for and limiting number of "temporary signs that may be posed in residential districts"), *vacated in part as moot*, 983 F.2d 587 (4th Cir. 1993).

corruption."). The Court stated that "Congress's selection of a $5,200 base limit" — *i.e.*, the $2,600 per election limit applied to both the primary and general elections — "indicates its belief that contributions of that amount or less do not create a cognizable risk of corruption." *Id.* at 1452. In contrast, the contributions of $5,000 per election to candidates (or, $10,000 for the primary and general elections combined) that FECA allows multicandidate PACs to make clearly *do* carry a "cognizable" corruption risk. Hence, that limit is reserved for the relatively few PACs that earn the limit by satisfying the multicandidate PAC criteria.[9]

C. The Six-Month Period Furthers the Important Government Interest of Preventing Circumvention of the $2,600 Contribution Limit

1. The Six-Month Period Helps Prevent Individuals from Using "Dummy"-Like PACs to Bootstrap Themselves to the Increased Contribution Limit

Plaintiffs assert that Congress had no "legitimate interest" in requiring new PACs to wait six months before earning the almost-doubled contribution limit, but they acknowledge that preventing circumvention of FECA's contribution limits is an important government interest. (Pls.' Br. at 13-14.) The six-month period furthers that interest by preventing circumvention of the $2,600 contribution limit by individuals and groups looking to acquire prematurely the $5,000 contribution limit reserved for *bona fide* multicandidate PACs. (FEC SJ Br. at 13-19.)

As the Commission explained in its summary judgment brief, the 1972 federal election was marred by special interest groups using dummy political committees to circumvent contribution limits and funnel large amounts to the President's re-election campaign in return for political favors. (FEC SJ Br. at 14.) Two years later, in 1974, Congress enacted the three multicandidate PAC criteria, including the six-month period, when setting contribution limits in

[9] Plaintiffs use *McCutcheon*'s reference to a "$5,200 base limit" for *two* elections to misleadingly imply that allowing new PACs to use multicandidate PACs' $5,000 *per election* limit would not create a risk of corruption. (Pls.' Br. at 13.) But a proper comparison would also double the $5,000 limit for multicandidate PACs to $10,000 for two elections, a number that is well in excess of the $5,200 ceiling *McCutcheon* identified with a reduced risk of corruption.

order to ensure that the higher limit was reserved for "broad-based citizen interest groups." 120 Cong. Rec. H7810 (daily ed. Aug. 7, 1974) (statement of Rep. Brademas).

The six-month "protective shield" in particular works to prevent "bootstrapping" — where "two or three persons . . . acquire the $5,000 committee contribution authority . . . merely by organizing themselves" as a "dummy" political committee. *Buckley*, 519 F.2d at 857-58. The other two criteria — that a PAC have at least 51 contributors and contribute to five candidates — require a PAC to have a minimum amount of broad-based financial support and diverse candidate interest. But that is not enough, since those criteria are relatively low thresholds that can be easily achieved, as members of Congress debating the law recognized. Senator Edward Kennedy worried that "individuals and narrow-based political committees — now limited to [$2,600] contributions per candidate — are likely to take on new sources of contributions to their own war chests and new candidate beneficiaries in order to qualify for the $5,000 gifts allowed to be made by broad-based committees." 120 Cong. Rec. S18527 (daily ed. Oct. 8, 1974). Another member feared that "any small special interest group of 50 persons" would be equated with "a broad-based national political party" since both could contribute $5,000 to a candidate under section 30116(a)(2)(A). 120 Cong. Rec. H7814 (daily ed. Aug. 7, 1974) (statement of Rep. Frenzel). Both were right to be worried. Stop PAC got more than 50 contributors and contributed to five candidates just *24 days* after registering. (FEC Facts ¶¶ 12-14.) Non-party American Future PAC met these thresholds in *16 days*. (Pls.' Facts ¶¶ 33-35.)

The risk, however, that a PAC may be a circumvention tool formed by supporters of a particular candidate can persist for much longer than just 16 or 24 days. (FEC SJ Br. at 15-16.) Candidates often start their campaigns well before election day. (*Id.* at 15.) As an election draws near, the number of supporters that begin to concentrate on the election increases, as do the incentives for such supporters to do everything they can to help the candidate win. (*Id.*) And, as data from FEC disclosure reports shows, PACs are often short-lived operations that proliferate just prior to elections and spend significant amounts of money. (FEC Facts ¶¶ 16-20.) It is reasonable to expect that in the absence of the six-month period, this phenomenon would

only increase, as new PACs could obtain the $5,000 contribution authority upon satisfying the 51-contributors and five-contributions requirements in a few weeks or even less.

Accordingly, the six-month period is a constitutionally valid method of limiting circumvention of FECA's contribution limits in order to lessen the risk and appearance of corruption. *Buckley*, 424 U.S. at 35-36; *cf. Rosario*, 410 U.S. at 761.

2. Stop PAC and Its Close Ties with the Innis Campaign Illustrate That the Risk of Circumvention Is Real and Not Merely Hypothetical

Though the six-month period has been the law for about 40 years, experience under that law and the evidence in this case confirm that a serious threat of new PACs circumventing the $2,600 contribution limit still exists. Plaintiffs argue that this risk is "hypothetical" (Pls.' Br. at 19-22), but Stop PAC and its ties to the Innis campaign amply demonstrate how, were it not for the six-month period, supporters of a candidate could easily start a PAC, quickly satisfy the 51-contributors and five-contributions requirements, and then use the $5,000 contribution authority reserved for broad-based groups to assist that candidate (FEC SJ Br. at 16-18).

As explained in more detail in the FEC's summary judgment brief, Stop PAC's chairman, Campbell, and its treasurer and lawyer, Backer, have known Innis since early 2013 through working together at related political organizations. (FEC Facts ¶¶ 6-7.) Innis and Campbell became friends while Backer performed legal services for Innis. (*Id.*) In late 2013, Innis started to consider running for Congress and established his campaign, for which Backer served as treasurer. (*Id.* ¶¶ 8, 10.) Backer and Campbell attended the Innis campaign's first fundraiser in early November 2013. (*Id.* ¶ 9.) And Innis later hired Campbell as his campaign's paid policy director. (*Id.* ¶ 11.) Campbell and Backer worked for the Innis campaign until it ended with Innis's defeat in the June 10, 2014 primary. (*Id.* ¶¶ 10-11.)

During the Innis campaign, Campbell and Backer first discussed and then created Stop PAC. (FEC Facts ¶ 12.) Campbell had always been interested in starting a PAC, and he first discussed his idea with Backer at least as early as November 2013. (*Id.*) Backer suggested that Campbell start the PAC, and then the two registered Stop PAC with the FEC on March 11, 2014.

(*Id.*) Two days later, Backer suggested to Innis that Stop PAC be listed on the invitation for an upcoming fundraiser for Innis that was being held by Nevada billionaire Sheldon Adelson. (*Id.* ¶ 13.) On March 25, just two weeks after registering, Stop PAC had received contributions from at least 51 persons. (*Id.* ¶ 12.) Then on April 4, Stop PAC satisfied the five-candidate contribution requirement by giving $2,600 to Innis and $250 to four other candidates. (*Id.* ¶ 14.)

At that point, just 24 days after its registration, only the six-month period stood between Stop PAC and the ability to contribute $5,000 per election to a candidate like Innis. Even though Stop PAC had satisfied the 51-contributors and five-contributions requirements, it essentially constituted two employees of the Innis campaign, and it was far from being a broad-based interest group akin to a political party. The six-month period exists to stop a single-candidate-related group like this from popping up in the midst of a campaign to bootstrap the $5,000 contribution limit to which it is not yet entitled.

Thus, the evidence demonstrates that the risk of circumvention in the absence of the six-month period is real and far from merely "hypothetical." And as plaintiffs recognize, the correct evidentiary standard here is "'whether experience under the present law confirms a serious threat of abuse'" would exist in the absence of the six-month period. (Pls.' Br. at 21 (quoting *McCutcheon*, 134 S. Ct. at 1457).) This is the appropriate standard because the six-month period has been in place and working to limit circumvention for approximately the last 40 years. *Cf. Wagner v. FEC*, 854 F. Supp. 2d 83, 91 (D.D.C. 2012) ("An absence of corruption does not necessarily mean, however, that [a FECA] ban is no longer needed. It could simply be an indication that the ban is working." (citing *Burson v. Freeman*, 504 U.S. 191, 208 (1992) (opinion of Blackmun, J.) (noting difficulty of mustering evidence to support long-enforced statutes))), *vacated on jurisdictional grounds*, 717 F.3d 1007 (D.C. Cir. 2013). Applying this standard, courts have rejected challenges to FECA limits where there is evidence, as the FEC submits here, showing the abuse that would likely occur in the absence of that limit. *See FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 457 (2001) (upholding FECA's limits on expenditures by parties that are coordinated with candidates); *Wagner*, 854 F. Supp. 2d

at 91 (denying preliminary injunction against FECA's ban on contributions by federal contractors in part because "the suggestion that those seeking federal contracts might 'pay to play' is hardly novel or implausible"); *Libertarian Nat'l Comm. v. FEC*, 930 F. Supp. 2d 154, 166-67 (D.D.C. 2013) (upholding limit on bequests to political party committees in part based on testimony that party would reward family members of decedents who left it large bequests), *summarily aff'd in relevant part*, No. 13-5094, 2014 WL 590973 (D.C. Cir. Feb. 7, 2014).

Nor have the circumvention risks illustrated by Stop PAC's relationship with Innis been "eliminate[d]" by *McCutcheon* or regulatory refinements, as plaintiffs claim. (Pls.' Br. at 14, 18-19.) Plaintiffs categorically proclaim that after *McCutcheon*, "contributions to political committees do not raise substantial circumvention concerns." (Pls.' Br. at 14.) But *McCutcheon*'s holding was far more limited. The Court there found that FECA's aggregate limits were no longer needed to prevent the large-scale channeling of "massive amounts of money" to candidates through networks of PACs. *McCutcheon*, 134 S. Ct. at 1453-54. In contrast here, as the FEC has explained (FEC SJ Br. at 18-19), the six-month period remains an integral part of the legislative and regulatory anti-circumvention system — including measures enacted after *Buckley* upheld the six-month period.

The six-month period works to help prevent smaller-scale circumvention than what was at issue in *McCutcheon*, such as where supporters of a candidate (like Innis) label themselves a committee (like Stop PAC) so that they can give the candidate $5,000 per election instead of $2,600. *See Buckley*, 424 U.S. at 35-36. This circumvention is not prevented by the $5,000 limit on contributions from individuals to PACs, *see* 52 U.S.C. § 30116(a)(1)(C), or by the limits on contributions from individuals to party committees, *see id.* §§ 30116(a)(1)(B), (D), as plaintiffs claim (Pls.' Br. at 18). This type of circumvention also involves no "funneling of money through" multiple PACs or "creating a series of committees" (*id.*), and so FECA's limits on the amount that PACs can give to each other, *see* 52 U.S.C. § 30116(a)(2)(C), and its anti-proliferation provision, *see id.* § 30116(a)(5), also do not do the work of the six-month period. Indeed, the possibility of the Commission deeming new committees "affiliated" under the

Commission's regulations, *see McCutcheon*, 134 S. Ct. at 1454, would not apply to a candidate committee such as Innis's, *see* 11 C.F.R. § 100.5(g)(5) ("[N]o authorized committee shall be deemed affiliated with any entity that is not an authorized [candidate] committee.").

Finally, as plaintiffs acknowledge, *Buckley* upheld the six-month period even though FECA's earmarking provision existed at that time. (Pls.' Br. at 19.) That provision considers contributions from a person to a candidate through an intermediary in certain cases to be a contribution from the original source. 52 U.S.C. § 30116(a)(8). The Supreme Court found the Commission's earmarking regulation would help prevent "a scheme in which a donor routes *millions of dollars* in excess of the base limits to a particular candidate," but specifically distinguished smaller-scale circumventions of the base limit. *McCutcheon*, 134 S. Ct. at 1456 (contrasting past FEC enforcement matters with a hypothetical scenario involving "200 newly created PACs"). Only the large-scale schemes were found to be too implausible. In contrast, plaintiffs have utterly failed to show in this case that the six-month requirement does not serve to prevent circumvention "in any meaningful way." *Id.* at 1452. The Court also found in *McCutcheon* that there was insufficient evidence to "justify the substantial intrusion on First Amendment rights at issue in th[at] case." *Id.* at 1456. But the base limit provisions challenged here do not prevent contributions to as many candidates as Stop PAC prefers, so they hinder association to a much lower degree than the aggregate contribution limits and thus have a lower evidentiary burden. And there is no indication that the limits here further an "impermissible objective," such as "simply limiting the amount of money in political campaigns," *id.*, and plaintiffs have not even alleged any such impermissible legislative motive here.

The six-month period complements and bolsters the earmarking rules by adding a preventative anti-circumvention measure that guards against less blatant and specific attempts to circumvent. *Cf. Buckley*, 424 U.S. at 27-28 (rejecting argument that "the contribution limitations must be invalidated because bribery laws . . . constitute a less restrictive means of dealing with 'proven and suspected quid pro quo arrangements,'" since bribery laws "deal with only the most blatant and specific attempts" to corrupt). And as more fully explained in the next section, the

six-month period also aids detection of attempts to evade the $2,600 limit by requiring new PACs to publicly disclose information about themselves before earning the increased $5,000 limit. *Buckley*, 424 U.S. at 67-68 ("[D]isclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations[.]").

D. The Six-Month Period Also Furthers the Important Government Interest of Promoting Campaign Finance Disclosure

Plaintiffs overlook the government's interest in promoting campaign finance disclosure when they incorrectly claim that the six-month period does not further any important interests. (Pls.' Br. at 13.) The six-month period ensures that a group seeking multicandidate PAC status files at least one disclosure report revealing, *inter alia*, the sources of its funding before it becomes eligible to make candidate contributions of up to $5,000 per election. (*See* FEC SJ Br. at 19-20 (citing *Buckley*, 519 F.2d at 858 (explaining that "[d]uring the waiting period," new PACs "would be subject to the reporting and disclosure provisions" of 52 U.S.C. § 30104)).) Given the risk of corruption associated with contributions in excess of $2,600 per candidate, per election, *see supra* Part III.B, Congress has a legitimate interest in ensuring that the public knows who is behind a group that has obtained the special $5,000 contribution authority.

The six-month period is "responsive to the legitimate fear that efforts would be made, as they had been in the past, to avoid the disclosure requirements by routing financial support of candidates through avenues not explicitly covered by the general provisions of the Act." *Buckley*, 424 U.S. at 76 (footnote omitted). An egregious example of *quid pro quo* corruption from the 1972 presidential election involved the dairy industry creating a series of dummy-like PACs to funnel millions of dollars to the president. (FEC SJ Br. at 14.) A significant number of those contributions "were accomplished with a minimum of public detection before the election [as] all of them took place either after the last preelection reporting date or after the election itself." Final Report of the Select Committee on Presidential Campaign Activities, S. Rep. No. 93-981, 93d Cong., 2d Sess. at 743 (1974). Here, the six-month period similarly prevents individuals from forming a new PAC within 20 days of an election and then influencing that

election with the $5,000 contribution limit without having disclosed information about itself to the public first. (*See* FEC SJ Br. at 20.) The provision thus furthers the government interest in ensuring that PACs cannot evade disclosure before making such contributions to candidates. *Cf. Stop This Insanity, Inc. v. FEC*, 761 F.3d 10 (D.C. Cir. 2014) (upholding solicitation and expenditure limits on corporate connected political committees because they preserve the effectiveness of "disclosure requirements [that] Appellants are endeavoring to avoid"), *petition for cert. filed*, -- U.S.L.W. ---- (U.S. Sept. 29, 2014) (No. 14-____)..

E. The Six-Month Period and 2,600 Contribution Limit Are Closely Drawn

The $2,600 contribution limit and six-month period are closely drawn to the important government interests they serve. (*See* FEC SJ Br. at 20-21.) Plaintiffs claim that the six-month period is not sufficiently tailored simply because it prevents all new PACs "from taking advantage of the $5,000 candidate contribution limit." (Pls.' Br. at 15-16.) But while their argument pays lip service to *Buckley* (*id.* at 15), plaintiffs omit what the FEC pointed out in its opening brief: *Buckley* held that under the intermediate scrutiny that applies to contribution limits, "a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000." 424 U.S. at 30. In today's inflation-adjusted dollars, that constitutionally insignificant difference is $4,180 — far more than the $2,400 difference Stop PAC claims constitutes improper tailoring. (*See* FEC SJ Br. at 20.)

The six-month period is nothing like the aggregate contribution limit that the Court struck down in *McCutcheon*, as plaintiffs contend. (Pls.' Br. at 15.) First, the six-month period applies only to a relatively limited category of political committees that Congress has determined pose a special danger of circumvention, whereas *McCutcheon* involved an aggregate limit that applied broadly, to millions of individuals. *See* 134 S. Ct. at 1442. Moreover, the six-month period is part of a statutory definition that helps determine what "base" contribution limit ($2,600 or $5,000 per election) applies to a PAC. Base limits, like those at issue in this case, "restrict[] how much money a donor may contribute to a particular candidate or committee." *Id. McCutcheon* left the base limits "undisturbed." *Id.* at 1451. In contrast, the aggregate limits *McCutcheon*

struck down "restrict[] how much money a donor may contribute *in total to all* candidates or committees." *Id*. at 1442 (emphasis added). This distinction is critical. Because base limits already work to prevent corruption, *McCutcheon* found that there was no need for aggregate limits to be "layered on top," unnecessarily preventing contributors from giving up to the $2,600 per-election ceiling to as many candidates as they wanted. *Id.* at 1458; *see also id.* at 1452 ("The difficulty is that once the aggregate limits kick in, they ban all contributions of *any* amount."). In contrast, the six-month period is not a second set of limits "layered on top" of base limits, and it does not ban all contributions of any amount. It is a well-tailored mechanism for determining which of the permissible base limits applies to a PAC. *Cf. Catholic Leadership Coal. of Texas*, 2014 WL 3930139, at *17 (holding that "under the logic of *McCutcheon*," a state was "unable to justify" imposing on newly formed PACs "an *aggregate* limit — as opposed to per-candidate, per-committee, and per-party base limits" (emphasis in original)).

Finally, plaintiffs resort to leaning on inapplicable cases applying strict scrutiny to bans on independent expenditures to argue that the laws at issue here are insufficiently tailored. (Pls.' Br. at 16 (citing *Citizens United v. FEC*, 558 U.S. 310, 362 (2010); *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 498 (1985).) But this case involves contribution limits, not spending limits, and as plaintiffs concede elsewhere in their brief, closely drawn scrutiny applies as a result. (*See* Pls.' Br. at 15.) As opposed to strict scrutiny, closely drawn scrutiny does not require that Congress use the "least restrictive means" to further its interests, *McCutcheon*, 134 S. Ct. at 1456-57.

IV. NEITHER THE $2,600 CONTRIBUTION LIMIT NOR THE LIMITS ON MULTICANDIDATE PAC CONTRIBUTIONS TO PARTIES VIOLATES THE FIFTH AMENDMENT

Plaintiffs' equal protection claims must also fail. (*See* FEC SJ Br. at 22-30.) Plaintiffs assert that differences in FECA's contribution limits rise to the level of constitutional violations. They complain that for a temporary period of time, multicandidate PACs may give $2,400 more than a new PAC can to a candidate for an election. (Am. Compl. ¶¶ 43-50.) Plaintiffs also

complain that multicandidate PACs suffer unconstitutional discrimination because new PACs may give $17,400 more to national parties and $5,000 more to state or local parties each year. (*Id.* ¶¶ 56-63.) These differences, however, do not violate equal protection. Instead, they reflect a permissible "judgment by Congress" that different entities "require different forms of regulation in order to protect the integrity of the electoral process." *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 201 (1981). The levels at which the more than a dozen FECA contribution limits are set take into account two important but competing Congressional interests: limiting the risk and appearance of corruption and promoting participation in the political system. As the Supreme Court has recognized, Congress, not a court, is best positioned to engage in the "fine tuning" required to strike the right balance between these interests. *Buckley*, 424 U.S. at 30.

Plaintiffs' two equal protection claims fail for three independent reasons: (1) plaintiffs cannot show they have been discriminated against; (2) new PACs and multicandidate PACs are not similarly situated; and (3) even if FECA did discriminate against similarly situated groups, those laws are sufficiently related to serving important government interests.

A. FECA Does Not Discriminate Against New PACs or Multicandidate PACs

Plaintiffs continue to compare the operation of two isolated FECA provisions to assert their claims of discrimination, but the Supreme Court has rejected this unduly narrow approach and instead has looked to the restrictions imposed by "'the statute as a whole'" to determine whether FECA discriminates and thus triggers equal protection scrutiny. (*See* FEC SJ Br. at 23 (quoting *Cal. Med. Ass'n*, 453 U.S. at 200).) Far from discriminating, FECA *advantages* PACs in comparison to other groups that FECA more strictly regulates. (*Id*. at 23-24.) New PACs and multicandidate PACs each enjoy their own special advantages. In fact, Stop PAC's and the Tea Party Fund's claims of discrimination contradict each other; each wants a specific benefit the other has, but neither wants the disadvantage that accompanies it. Stop PAC claims that the $2,600 limit "dull[s] the impact of spontaneous grassroots democracy" without considering that such grassroots efforts benefit from the higher party contribution limits that new PACs have, and which the Tea Party Fund wants. (Pls.' Br. at 14.) The Tea Party Fund claims it suffers

discrimination due to its relatively lower party contribution limits (Pls.' Facts ¶¶ 18-25), but it is notably silent about how it has enjoyed the ability to give up to $5,000 to the "dozens" of candidates it supports (*id.* ¶ 19) — a benefit that Stop PAC wanted and now also has.

B. New PACs and Multicandidate PACs Are Not Similarly Situated

To the limited extent FECA does treat new PACs and multicandidate PACs differently, it poses no Fifth Amendment problem because the two categories of groups are not similarly situated. *See* FEC SJ Br. at 24-25; *see also Veney v. Wyche*, 293 F.3d 726, 730 (4th Cir. 2002) ("The equal protection requirement does not take [away] all power of classification." (internal quotation marks omitted)).

Stop PAC and the Tea Party Fund fail to look in the mirror when they repeatedly claim that new PACs and multicandidate PACs are "identically situated." (Pls.' Br. at 1, 11-14, 18-20, 22-24.) As a two-year old multicandidate PAC, the Tea Party Fund is a broad-based group that has contributed to dozens of candidates with funds collected from more than 100,000 contributors. (FEC SJ Br. at 25.) It is a well-known group that has been publicly scrutinized in part because it has been disclosing information about its millions in receipts and disbursements to the public for years. *Id.*; *see, e.g.*, Matea Gold, *Tea Party PACs Reap Money for Midterms, but Spend Little on Candidates*, Wash. Post (Apr. 26, 2014) ("The Tea Party Leadership Fund has doled out a quarter of a million dollars to eight consulting firms.").[10]

In contrast, when Stop PAC was a new PAC that had just satisfied the 51-contributor and five-contributions requirements, it displayed all of the hallmarks of a potential dummy-like PAC, justifying stricter regulation. It was just over three weeks old, it had yet to file a disclosure report, and its founder, treasurer, and counsel were working for the campaign of a single congressional candidate to whom Stop PAC contributed the maximum permitted by FECA. *See supra* Part III.C.2; *see also* FEC SJ Br. at 16-18. As a mere two-man show with a close relationship to a candidate possibly indicating a primary purpose to assist that candidate, Stop

[10] *See* http://www.washingtonpost.com/politics/tea-party-pacs-reap-money-for-midterms-but-spend-little-on-candidates/2014/04/26/0e52919a-cbd6-11e3-a75e-463587891b57_story.html.

PAC's "differing structure[] and purposes" more than justified "different forms of regulation in order to protect the integrity of the electoral process." *Cal. Med. Ass'n*, 453 U.S. at 201.

C. Rational Basis Is the Appropriate Level of Scrutiny

If this Court were to determine that plaintiffs are similarly situated and FECA discriminates against them, the FEC need only show that the attacked limits are rationally related to a government interest to demonstrate their constitutionality. (*See* FEC Br. at 25-26.) Plaintiffs argue that the limits must satisfy *Buckley*'s closely drawn standard, but even under that standard the limits do not violate equal protection. In making their argument, however, plaintiffs identify no protected class and cite no case stating that making a campaign contribution is a fundamental right. They cite *Buckley* and *California Medical Association* (Pls.' Br. at 10), but *Buckley* did not state what level of scrutiny (if any) it applied to uphold the six-month period, *see* 424 U.S. at 35-36, and *California Medical Association* declined to apply any scrutiny since it found no discrimination in the first place, *see* 453 U.S. at 200. Accordingly, if this Court finds that it must apply any scrutiny to plaintiffs' equal protection claims, rational basis scrutiny should apply. *See, e.g.*, *Blount v. SEC*, 61 F.3d 938, 946 n.4 (D.C. Cir. 1995).

D. The Contribution Limits Plaintiffs Challenge Are at a Minimum Rationally Related to the Government's Important Interests

1. The $2,600 Contribution Limit for New PACs Is Rationally Related to Lessening the Risk of Circumvention and Promoting Disclosure

As explained above, requiring new PACs to comply temporarily with the generally applicable $2,600 contribution limit places minimal burdens on new PACs. *See supra* Part III.A. At the same time, the limit is rationally related to Congress's important interests of preventing the risk and appearance of corruption, and its temporary application to new PACs helps limit circumvention of FECA's contribution limits and disclosure requirements. (*See* FEC SJ Br. at 27.) As Stop PAC's situation itself illustrates, new PACs are more likely to present increased risks of circumvention of contribution limits and disclosure requirements than older, more established and broad-based PACs like the Tea Party Fund. *See supra* Part III.C; FEC SJ Br. at

27. Thus, the $2,600 contribution limit does not violate the Fifth Amendment for the same reasons that it does not violate the First Amendment.[11]

2. The Limits on Multicandidate PAC Contributions to Political Parties Impose Minimal Burdens While Furthering Important Government Interests

a. Multicandidate PACs Are Minimally Burdened by the Party Contribution Limits

For reasons similar to why FECA only minimally burdens new PACs, the party contribution limits only minimally burden multicandidate PACs. First, the limits do not penalize multicandidate PACs. On the contrary, the $15,000 annual limit on multicandidate PAC contributions to national parties, 52 U.S.C. § 30116(a)(2)(B), is set at a higher level than all but two of all of FECA's contribution limits.[12] And the $5,000 amount of the annual limit on contributions to state and local party committees is FECA's default amount for limits on contributions from most sources to noncandidate committees. Contributions to political committees from individuals, associations, partnerships, national parties, state parties, local parties, non-multicandidate PACs, and campaign committees are all set at the $5,000 level. 52 U.S.C. §§ 30101(11), 30116(a)(1)(C), (a)(2)(C).

Second, the multicandidate PAC-to-party limits leave multicandidate PACs free to associate with as many party committees as they like. As discussed above, a contribution of any amount is an act of association that expresses general support for the recipient. *See Buckley*, 424 U.S. at 21. For example, the Tea Party Fund associated with and expressed support for the Alexandria Committee by giving it $5,000. (FEC Facts ¶ 23.) The Tea Party Fund could

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[11] The FECA provisions plaintiffs attack here are nothing like the one at issue in *Anderson v. Celebrezze*, which plaintiffs cite. (Pls.' Br. at 11.) In that case, a state law "totally exclude[d]" independent candidates from running for president after March of an election year. 460 U.S. 780, 792 (1983). The Court found that the burden imposed by this complete ban "unquestionably outweigh[ed] the State's *minimal* interest in imposing a March deadline." *Id.* at 806 (emphasis added).

[12] *See* 52 U.S.C. §§ 30116(a), (d), (h), 30118, 30119, 30121, 30125.

associate with the NRSC immediately, as it claims it wants to, by giving it up to $15,000 this year, but it has not done so. (Am. Compl. ¶ 41; FEC Facts ¶ 26.)[13] Both limits leave the Tea Party Fund free to associate, via contributions, with any and all other national, state, and local party committees. *See McCutcheon*, 134 S. Ct. at 1442.

Third, a multicandidate PAC's inability to contribute over $15,000 and $5,000 annually to national and state or local party committees is only a minimal burden because higher contributions do not equal a materially greater amount of speech or association. *Buckley*, 424 U.S. at 21 (the "quantity of communication" involved in the symbolic act of contributing "does not increase perceptibly with the size of [the] contribution"). The limits therefore did not deny the Tea Party Fund the ability to "further associat[e]" with the Alexandria Committee, as plaintiffs claim. (Am. Compl. ¶¶ 41.)

Fourth, the party limits leave multicandidate PACs "free to . . . associate actively through volunteering their services." *Buckley*, 424 U.S. at 28. Despite the Tea Party Fund's claimed desire to "assist[] the campaigns in which" the Alexandria Committee and NRSC "are involved" (Am. Compl. ¶ 41), it never made any effort to offer volunteer help to either group or their candidates (FEC Facts ¶ 28). The Alexandria Committee would have been happy to receive volunteers to assist its efforts. (*Id.* ¶ 29.) The Tea Party Fund is clearly capable of offering such help, given that it has previously organized a volunteer effort to assist a candidate in Ohio who opposed speaker of the House John Boehner in the May 6, 2014 primary election. (*Id.* ¶ 28.)

Finally, the party limits leave multicandidate PACs "free to engage in independent political expression." *Buckley*, 424 U.S. at 28. Just like Stop PAC, the Tea Party Fund chose to register with the FEC as a "hybrid" PAC, which allows it to accept unlimited amounts of money for the purpose of making independent expenditures for or against candidates. (FEC Facts ¶ 21; Clark Decl. 5, FEC Exh. 11.) And yet the Tea Party Fund has made no independent expenditures

[13] In paragraph 26 of its Statement of Undisputed Material Facts, the FEC mistakenly stated that the Tea Party Fund could give $20,000 to the NRSC right now, instead of $15,000, which is the limit under 52 U.S.C. § 30116(a)(2)(B).

in support of the Alexandria Committee's or NRSC's candidates (FEC Facts ¶ 28), despite its significant resources and claimed desire to assist such campaigns.

b. The Limits on PAC Contributions to Parties Lessen the Risk and Appearance of Corruption While Allowing Parties to Maintain Their Important Role in the Political System

While the limits on multicandidate PAC contributions to political parties impose minimal burdens, they are at the very least rationally related to striking a balance between two important government interests: (1) limiting the risk and appearance of corruption that the Supreme Court has said can arise from large contributions to political parties, *see McConnell v. FEC*, 540 U.S. 93, 144-45 (2003), *overruled in part on other grounds*, *Citizens United*, 558 U.S. at 365; and (2) allowing the parties to amass the resources necessary for effective advocacy, as the First Amendment requires, *see Randall v. Sorrell*, 548 U.S. 230, 247 (2006). (FEC SJ Br. at 27-30.)

Since 1976, Congress has set limits on contributions to political parties at significantly higher levels than those for candidates and others "to allow the political parties to fulfill their unique role in the political process." H.R. Conf. Rep. No. 94-1057 at 58 (Apr. 28, 1976). When Congress has looked to enhance even further the ability of the parties to raise sufficient funds, it has rationally looked to individuals to do so. (FEC SJ Br. at 29.) Thus, in 1976, Congress allowed "persons" to give up to $20,000 annually to national party committees. (*Id.* at 28.) And in 2002, when Congress banned political parties from accepting soft-money, it compensated for that lost funding by increasing the person-to-national-party limit to $25,000 and providing for it to rise further with inflation. (*Id.* at 28-29.) Congress also increased the amount a person could give to state and local parties from $5,000 to $10,000. (*Id.* at 29.) By contrast, multicandidate PACs contribute relatively little to political party funding and spend far more of their resources on supporting candidates directly. (*Id.* at 30; FEC Facts ¶¶ 32-33.)[14] In any event, further

[14] Footnote 24 on page 29 of the FEC's opening brief (Docket No. 57-1) incorrectly refers to "n.24" instead of n.22. The first four appended Tables in the FEC Press Release cited by note 22 demonstrate that multicandidate PACs had contributed very little of political parties' funding before 2002. *See* FEC Press Release, *Party Committees Raise More Than $1 Billion in 2001-2002* (Mar. 20, 2003), http://www.fec.gov/press/press2003/20030320party/20030103party.html.

increases in the limits on contributions to parties were not necessary since the parties have been more than able to raise needed resources — for example, in the last election cycle, the parties raised more than $1.6 billion in federal funds. (FEC SJ Br. at 29.)

Plaintiffs suggest that "to the extent any such risks [of actual or apparent corruption] exist[]" Congress should have limited only contributions to parties by multicandidate PACs with a "track record" of "suspicious transactions, or other individualized evidence of *quid pro quo* corruption." (Pls.' Br. at 23.) The Supreme Court, however, has never required this level of precision from a base contribution limit — even while applying intermediate scrutiny. As plaintiffs recognize, contribution limits "'are a prophylactic measure.'" (Pls.' Br. at 15 (quoting *McCutcheon*, 134 S. Ct. at 1458).) "[M]ost large contributors do not seek improper influence"; nevertheless, the Court has upheld the base limits as preventative anti-corruption measures because "[n]ot only is it difficult to isolate suspect contributions, but, more importantly, Congress was justified in concluding that the interest in safeguarding against the appearance of impropriety requires that the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated." *Buckley*, 424 U.S. at 30.

CONCLUSION

For the foregoing reasons, plaintiffs' motion for summary judgment should be denied.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

STOP RECKLESS ECONOMIC INSTABILITY CAUSED BY DEMOCRATS, *et al.*,	
Plaintiffs,	Civ. No. 1:14-397 (AJT-IDD)
v.	
FEDERAL ELECTION COMMISSION,	
Defendant.	

CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2014, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing to the following counsel:

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