

EN BANC ARGUMENT SCHEDULED FOR SEPTEMBER 30, 2013

No. 13-5162

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

v.

FEDERAL ELECTION COMMISSION,
Defendant.

On Certification of Constitutional Questions from the United States District Court
for the District of Columbia

BRIEF FOR THE FEDERAL ELECTION COMMISSION

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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 plaintiffs in this *en banc* proceeding pursuant to 2 U.S.C. § 437h. The Commission was the defendant in the district court and is the defendant in this Court. Campaign Legal Center and Democracy 21 filed a joint amicus memorandum in the district court, and along with Public Citizen, have filed a joint amicus memorandum in this Court. The Center for Competitive Politics and Cato Institute have filed a joint amicus memorandum in this Court.

(B) ***Rulings Under Review.*** Under 2 U.S.C. § 437h, a district court certifies substantial constitutional questions and makes factual findings but does not rule on the merits; the *en banc* appellate court answers those questions in the first instance. In this case, the United States District Judge James E. Boasberg issued an unreported certification order, with certified questions and factual findings, on June 5, 2013. The document appears in the Joint Appendix (“JA”) at 345-357.

(C) ***Related Cases.*** On April 16, 2012, the district court denied plaintiffs’ request for a preliminary injunction. *Wagner v. FEC*, 854 F. Supp. 2d 83 (D.D.C. 2012) (JA 24-49). On November 2, 2012, the district court granted summary

judgment to the Commission. *Wagner v. FEC*, 901 F. Supp. 2d 101 (D.D.C. 2012) (JA 224-42.) On May 31, 2013, a three-judge panel of this Court *sua sponte* vacated on jurisdictional grounds the summary judgment ruling and remanded the case to the district court for proceedings pursuant to 2 U.S.C. § 437h. *Wagner v. FEC*, No. 12-5365, 2013 WL 2361005 (D.C. Cir. May 31, 2013) (JA 243-262). The district court's preliminary injunction ruling was not before this Court. (JA 260.) The Commission knows of no other related cases as that phrase is defined in D.C. Cir. R. 28(a)(1)(C).

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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

The district court certified two constitutional questions in this as-applied challenge brought by individual federal contractors:

“1. Does 2 U.S.C. § 441c(a)(1), which prohibits any person holding a federal contract from making a contribution in connection with a federal election, violate the First Amendment?

2. Does 2 U.S.C. § 441c(a)(1) violate the Fifth Amendment’s equal-protection guarantee as applied to individual contractors?”

(Joint Appendix (“JA”) 348.)

APPLICABLE STATUTES

Relevant statutory provisions appear 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. Plaintiffs (“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, relying in part on its previous denial of the plaintiffs' motion for a preliminary injunction. The district court 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. In rejecting the contractors' Fifth Amendment claim, the court applied intermediate scrutiny and found no equal protection violation.

The contractors timely appealed. On May 31, 2013, a three-judge panel of this Court held that 2 U.S.C. § 437h, under which *en banc* courts of appeals answer certified questions, provides the exclusive means for the categories of plaintiffs specified in that provision to initiate constitutional challenges to FECA. This Court then vacated the district court's summary judgment ruling and remanded the case for findings of fact and certification of constitutional questions pursuant to section 437h. On June 5, 2013, the district court certified two questions to this Court.

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 FECA. *See* 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”). (JA 349 ¶ 5.) Wagner’s contract with ACUS ended in June 2013. (JA 349-350 ¶ 5.) During the process of negotiating and performing her contract with ACUS, Wagner interacted with at least one political appointee, Chairman Paul Verkuil, who was appointed by President Obama and confirmed by the Senate. (JA 350, 353 ¶¶ 6, 16.) Wagner’s contract specified that she would be paid \$12,000 plus \$4,000 for travel and research expenses. (JA 350 ¶ 6.) Wagner’s contract also specified that the ACUS chairman or the contracting officer has the authority to control and deny the publication of her final report. (JA 353 ¶ 17.) The chairman is a member of the ACUS Council, a governing board that includes ten other members, all appointed by the President,

and the chairman sometimes reviews the draft reports of contractors. (JA 353 ¶ 18.)

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 350 ¶ 7.)

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 contract with a total budgeted value of \$884,151. (JA 132 ¶ 5; JA 350-51 ¶ 8.)

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 351-52 ¶¶ 10, 11.) But their 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 352 ¶ 12.) While performing their contracts, Brown and Miller have each had interactions with at least one political appointee. (JA 353 ¶ 16.)

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 “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 upheld many of 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. 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

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.

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 353-354 ¶ 19.) The Commission interprets 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. § 441c was first enacted as part of the 1940 amendments to the Hatch Act of 1939, and incorporated in 1972, with minor modifications, into the Federal Election Campaign Act.² Section 441c(a) derives from former 18 U.S.C. § 611. (JA 285 ¶ 1.) 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

² Amendments to the Hatch Act of 1939, 1940 Ed., § 61m-1 (July 19, 1940, c. 640, § 5, 54 Stat. 772), codified at 18 U.S.C. § 611 (originally 18 U.S.C. § 61m-1).

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 285-86 ¶ 2.) *See generally U.S. Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers*, (“*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 286.) These efforts culminated in the Civil Service Act of 1883, which banned coercing public servants to make political contributions. (JA 286 ¶ 5.) 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 287 ¶ 7.) 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 287 ¶ 8.) 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 288 ¶ 9.) 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 288-89 ¶ 10.) 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 290-91 ¶ 14.) The scheme also coerced government contractors to buy advertising space: “[I]t was either take the space or be blacklisted.” (JA 291 ¶ 15.)

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 289 ¶¶ 11-12.) 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 291-93 ¶ 16.) 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 . . .*, 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.” (JA 141-42 ¶ 30; 289 ¶¶ 11-12.) That provision was the predecessor of 2 U.S.C. § 441c.

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 290 ¶ 13 (emphasis added).)

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 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 356 ¶ 24 (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 “[t]he award and performance of these contracts is not evaluated by a contracting officer.” (*Id.*) 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 296-97 ¶ 28.) According to Professor Schooner, the trend over the last 20 years “has very heavily tilted to what we call an out-sourced government or blended work force so the ratio of contractor personnel to full-time government personnel has increased.” (JA 355 ¶ 22.)

In addition, the full competitive procedures may be bypassed for a wide variety of other contracts, including contracts like plaintiff Wagner’s. (JA 356 ¶ 24.) 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.” (*Id.*)

Despite efforts to insulate federal contracting from political pressure, Professor Schooner stated that it is not uncommon for dissatisfied contractors or potential contractors to allege that they were mistreated due to political influence, although such mistreatment is rarely proven. (JA 355-57 ¶¶ 23, 25.)

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 293-95 ¶¶ 18-23.) 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 293-94 ¶19.) Also, Congress has held hearings on the balance between government employees and contractors in the federal workplace. (JA 294 ¶ 20.) 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 294-95 ¶ 21.)

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. Moreover, recent experience from individual states illustrates the continuing risk of political influence from contractor contributions.

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 299-313 ¶¶ 36-65 (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 299 ¶ 35.) And one government contractor for Wayne County, Michigan, stated: ““You wonder what in the heck would happen if I didn’t give.”” (JA 298 ¶ 34.) 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 only \$1,289 from six companies seeking those contracts. (JA 298 ¶ 33.)

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 308 ¶ 54.) 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 309-11 ¶¶ 58-60.) A Connecticut public opinion poll showed that 76% of voters believed that the campaign contributions influenced the Governor’s awarding of government contracts. (JA 311 ¶ 60.)

New York City has restricted campaign contributions from those doing business with the City since 1988. The City nevertheless suffered additional pay-to-play scandals, and voters approved a referendum with further restrictions in 2007. (JA 305 ¶ 49-50.) According to a City Council report, the new law aimed to eradicate the perception that the City’s elected officials were unduly indebted to contributors doing business with the City. (JA 305 ¶ 50.) 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.), *cert. denied*, 133 S. Ct. 28 (2012).

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 315-25 ¶¶ 70-96.)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 a titanium mine in which Williams held an interest. (JA 320-22 ¶¶ 88-90.) 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 him. (JA 324 ¶ 95.) 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 319-20 ¶ 87.) In exchange, Foxcom had reportedly donated \$50,000 to one of Abramoff's charities. Another bidder

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 315 ¶ 71.)

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 316-317 ¶¶ 77, 79, 81.) The record in this case contains numerous additional examples of actual and apparent corruption in the government contracting process. (JA 316-319 ¶¶ 78-86.)

III. PRIOR COURT PROCEEDINGS

On January 31, 2012, the contractors filed an Amended Complaint alleging that 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.) The contractors invoked federal question jurisdiction under 28 U.S.C. § 1331. On April 16, 2012, the district court denied the contractors’ motion for a preliminary injunction. *Wagner v. FEC*, 854 F. Supp. 2d 83 (D.D.C. 2012) (JA 24-49) (JA 28). On November 2, 2012, the court, adopting much of the reasoning of its preliminary

injunction opinion, granted summary judgment to the Commission. *Wagner v. FEC*, 901 F. Supp. 2d 101 (D.D.C. 2012) (JA 224-42), *vacated on jurisdictional grounds*, 717 F.3d 1007 (D.C. Cir. 2013) (*per curiam*) (JA 243-262.)

In both of its opinions, the district court held 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 29, 228.) The court held that the government’s interest in avoiding corruption and its appearance is such an interest, and that section 441c is closely drawn to serve it. (JA 32-40, 229-40.) The court found that recent experiences of the states “substantiate the corruption worries that attend contributions by government contractors.” (JA 30-37, 232-34.) 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.” (JA 234-35.) The district court rejected the contractors’ over-inclusiveness and under-inclusive arguments, observing that Congress has “the flexibility to attack corruption from multiple flanks” and that “Congress need not solve every problem at once.” (JA 235-39.)

As to the equal protection claim, the court applied intermediate scrutiny, noting the lack of cases in which an equal protection challenge to contribution limits had succeeded where a First Amendment claim had not. (JA 239-42.) The court rejected the claim that individual contractors are treated worse than corporate

contractors, explaining that persons associated with corporate contractors who may contribute have legal identities distinct from the corporations. (JA 47-48, 241.)

The court also rejected the claim that individual contractors are treated worse than federal employees. (JA 47, 242.) And, the court noted, the “dissimilar roles of contractors and employees [] justify the distinct regulatory schemes that the Government has fashioned.” (JA 242.)

The contractors appealed. On May 31, 2013, a three-judge panel of this Court held, contrary to positions the parties took in supplemental briefing the Court ordered *sua sponte*, that 2 U.S.C. § 437h vests exclusive jurisdiction in the *en banc* courts of appeals to hear challenges to the constitutionality of FECA brought by the specified categories of plaintiffs. (JA 243-62.) This Court vacated the district court’s summary judgment decision, remanded the case for findings of fact and certification of constitutional questions within five days, and ordered that the mandate issue immediately. On June 5, 2013, the district court made findings of fact and certified constitutional questions as to plaintiffs’ two claims.⁵ (JA 345-57.)

⁵ The district court limited its findings of fact to information about the parties and some background about federal contracting, but the parties and the district court agreed that, as the court put it, the Commission “may still cite public documents discussing corruption – *e.g.*, legislative history, legal treatises, or media reports – in its appellate briefing.” (JA 348.) The Commission has thus done so through citations to filings in the Joint Appendix. Such public documents are properly taken into account by this Court, as it may take consider legislative facts

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 workforce 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 contractors who are individuals. Section 441c violates neither.

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. It was passed following widespread, outrageous patronage schemes.

or “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).

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, as well as ongoing ethical failures in federal contracting, show that the danger of corruption persists. Section 441c applies equally to all contracting entities, regardless of their form. It allows many other forms of political activity, many more expressive than financial transfers. And it applies only temporarily; indeed, in this case the lead plaintiff's contract has expired and she is now completely unrestricted by section 441c.

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 uphold section 441c and answer both certified questions in the negative.

ARGUMENT

I. STANDARD OF REVIEW

This Court is answering constitutional questions certified pursuant to 2 U.S.C. § 437h. No judgment of the district court is under review.

II. SECTION 441c SATISFIES THE FIRST AMENDMENT

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

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 (“Pls.’ Br.”) at 22-23.) The contractors argue that striking down section 441c on equal protection grounds would be “more narrow” 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. 52.) We therefore address the First Amendment question first, as a decision on that claim should 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).

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, 355-59 (2010) (discussing the two different standards of review); *Buckley*, 424 U.S. at 23 (same). The Supreme Court has explicitly rejected the contractors’ view that “strict scrutiny” is applicable here. (*See* Brief for Plaintiffs (“Pls.’ Br.”) at 39-42.) 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. *Beaumont*,

539 U.S. at 162 (quoting *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 387-88 (2000)) (internal quotation marks omitted); *McConnell v. FEC*, 540 U.S. 93, 138 n.40 (2003) (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 argument for strict scrutiny is contrary to *Beaumont* (Pls.’ Br. 40), 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 in

Citizens United, “the Court . . . explicitly declined to reconsider its precedents involving campaign *contributions* by corporations to candidates for elected office.” *Green Party*, 616 F.3d at 199. 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), *cert. denied*, 133 S. Ct. 1459 (2013); *see also Green Party*, 616 F.3d at 199 (“*Beaumont* . . . remain[s] good law.”).⁷

B. The Government Has Important Interests Related to Contractor Contributions

1. Preventing Actual and Apparent Corruption

The Supreme Court has long found that general contribution limits help prevent corruption and the appearance of corruption in our democratic system. *See, e.g., Buckley*, 424 U.S. at 23-28; *Shrink Missouri*, 528 U.S. at 387-88; *Beaumont*, 539 U.S. at 162. Contributions from contractors pose a particular danger of corruption, because contracting persons have a direct economic stake in a governmental action. As the district court found, it is “a reasonable legislative

⁷ The contractors’ amici attempt to distinguish *Beaumont* — without citation to it — by focusing on section 441c’s application to natural persons, (Corrected Br. of *Amici Curiae* Center for Competitive Politics and Cato Institute (“CCP Br.”) at 9-10), but *Citizens United* makes clear that permissibility under the First Amendment would not differ simply due to the type of speaker. 558 U.S. at 340-41.

judgment that contracting is particularly susceptible to *quid pro quo* arrangements or the appearance thereof.” (JA 46.)

This Court’s sister Circuits have been uniform in finding that limits on contractor contributions further the important interests of combating corruption and its appearance. *See Green Party*, 616 F.3d at 212 (finding the state’s ban “furthers ‘sufficiently important’ government interests” in addressing both the ‘actuality’ and the ‘appearance’ of corruption” (quoting *Beaumont*, 539 U.S. at 162 and citing *Buckley*, 424 U.S. at 26, and *McConnell*, 540 U.S. at 143); *Ognibene*, 671 F.3d at 179, 186 (finding that “eliminating corruption or the appearance thereof is a sufficiently important governmental interest” supporting a New York City law that imposed more restrictive limits on political contributions from individuals who were “doing business with the City”). As the Fourth Circuit explained when addressing a North Carolina law prohibiting contributions from registered lobbyists, who, like contractors, have direct economic interests in their dealings with the government, the State made a “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.” *Preston*, 660 F.3d at 736. “[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)).

2. Promoting a Merit-Based Workforce and Preventing Coercion of Contributions

Section 441c 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 power over other citizens. *See Connick v. Myers*, 461 U.S. 138 (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 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”).

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]nitiat[ing] 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* — avoiding bias,

patronage, and coercion in the awarding and performance of government contracts — and section 441c similarly allows for alternative means of political expression. (See *infra* pp. 37-39). As the Supreme Court noted in *Citizens United*, the law at issue in *Letter Carriers* was constitutional, even though it was a “speech restriction[] that operate[d] to the disadvantage of certain persons,” specifically because it was “based on an interest in allowing governmental entities to perform their functions.” *Citizens United*, 558 U.S. at 341 (citing *Letter Carriers*, 413 U.S. at 557). Section 441c, just like the law upheld in *Letter Carriers*, regulates those performing governmental functions.

C. Section 441c Is Closely Drawn to Match Important Interests

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. 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 show the genuine dangers that section 441c addresses. 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. For all these reasons, section 441c is closely drawn to match the important interests it furthers.

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" or sufficiently addressed by other laws (Pls.' Br. 42-46); 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" (Pls.' Br. 45).

That concession is well-taken, because the contractors fail to demonstrate that pre-Hatch Act schemes such as the advertising or campaign-book rackets (*see supra* p. 8) could not recur if contractor contributions were permitted. Section 441c is not "based on speculation alone" (Pls.' Br. 45), but on a demonstrated historical record. And there is ample evidence that officeholders intervene in federal contracting and that the process remains susceptible to corruption. (JA 319-25 ¶¶ 87-96.) Experience in the states also shows that corruption, the appearance of corruption, and the coercion of contractors remain genuine dangers. JA 298-313 ¶¶ 32-65; *Shrink Missouri*, 528 U.S. at 395 (upholding Missouri's reliance on other jurisdictions' experience for evidence of corruption to justify contribution limits). These recent state pay-to-play scandals, along with the federal

experience that led to section 441c's passage, show that real dangers of corruption persist.

Several recent appellate decisions have found a continuing danger of corruption and its appearance from state and local contractor contributions and as a result have held limits on them to be closely drawn. Connecticut, for example, suffered through 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.” *Green Party*, 616 F.3d at 200. The Second Circuit thus upheld a ban on campaign contributions by government contractors in that state, finding the law “designed to combat both actual corruption and the appearance of corruption caused by contractor contributions” and closely drawn. *Id.* at 200, 204-05. Similarly, in *Preston*, 660 F.3d at 726, the Fourth Circuit upheld the North Carolina law prohibiting contributions from registered lobbyists after finding that the law was needed to prevent actual and apparent corruption in future state political campaigns. *Id.* at 736. And in *Ognibene*, the Second Circuit found a law that imposed more restrictive limits on political contributions from individuals who were “doing business” with New York City would be closely drawn even in the absence of a recent corruption scandal. 671 F.3d at 179, 188. To hold otherwise, the Court found, would be the equivalent of “giving every corruptor at least one

chance to corrupt before anything can be done, but this dog is not entitled to a bite.” *Id.* at 188.⁸

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 — unlike with government contractors — 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

⁸ Because federal contractors have been barred from making contributions for more than 70 years, there exists no direct evidence of the kind of corruption and coercion that would have occurred in the absence of section 441c. The Supreme Court has sensibly noted that courts should take into account that it is difficult to muster evidence to support long-enforced statutes. “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.)). The contractors in this case concede as much. (*See* Pls.’ Br. 47.)

immediate family members, [the Court could not] 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 could be upheld as applied to small contractor contributions even if those small contributions were less likely to lead to corruption than larger ones:

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.

616 F.3d at 205.⁹ Indeed, 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

⁹ The contractors note (Pls.’ Br. 43) that the Second Circuit opinion in *Green Party* struck down a lobbyist contribution ban because that court believed a limit would suffice instead; but as indicated in the quotation above, the same opinion found sufficient reason to uphold the contractor contribution ban.

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

The contractors assert that these cases “are readily distinguishable because the connection between the contract award and the contribution is much closer than it is in the federal system.” (Pls.’ Br. 47.) 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 Serv., 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 319-25 ¶¶ 87-96.)

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. 15 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 325 ¶ 97.) 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 use of soft money to create indebted federal candidates and officeholders was rampant. (JA 325 ¶ 98.) 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 326 ¶ 102.) 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. But BCRA also increased FECA’s “hard-money” contribution limits, so an individual may now give contributions totaling \$74,600 to the national committees of a political party per two-year election cycle. (*See supra* p.5 n.1.)

The contractors suggest that section 441c could be rewritten as a “less restrictive alternative” (Pls.’ Br. 46 n.7; *see also id.* at 46 (“Perhaps a prohibition on making a contribution to an official who is the decision-maker on a government contract ... would 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.* (“NCPAC”), 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, and the contractors’ various proposals to rewrite the statute would still pose risks of corruption and its appearance. For example, the fungibility of money makes unworkable the

contractors' suggestion that section 441c could be limited to funds derived from the contract itself (Pls.' Br. 55).¹⁰

Finally, the contractors assert that the prohibition on contractor contributions is unnecessary because of other procedural safeguards that have been or could be enacted (Pls.' Br. 44, 42 n.6), 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 27-28. 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.

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, including the individual contractor plaintiffs in this case, remain free to speak about candidates,

¹⁰ The contractors' amici rely on *NCPAC* for the broad proposition that contribution limits should be struck down as overbroad if there is any less restrictive alternative. (CCP Br. 13-14.) The provision at issue in *NCPAC* was subject to a higher level of scrutiny than should be applied to section 441c, however, because that case dealt with independent expenditures by political committees rather than contributions.

volunteer for campaigns, raise funds for candidates, parties or PACs, 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”).¹¹

The contractors argue that the ban infringes on their rights because 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” (Pls.’ Br. 19), but 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.

¹¹ Plaintiffs remarkably state that “the FEC has apparently changed its mind” about the relevance of the numerous other means by which federal contractors can express their political views because the paragraphs describing these alternative means of political expression were omitted from the FEC’s proposed facts. (Pls.’ Br. 60.) But that happened because the district court, *at the urging of counsel for the contractors*, instructed the Commission to omit language from statutes and regulations. The Commission’s position has not changed.

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 (finding a ban on lobbyist contributions 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, . . . [and] 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” (Pls.’ Br. 61), but *Letter Carriers* and *Buckley* held that the availability of alternatives bears upon the constitutionality of restrictions on political activity.¹²

¹² The contractors’ implication (at 61) that the Supreme Court has never addressed alternatives in the context of contribution limits is simply wrong. *See Buckley*, 424 U.S. at 22 (“The Act’s contribution ceilings thus limit one important means of associating with a candidate or committee, but leave the contributor free to become a member of any political association and to assist personally in the association’s efforts on behalf of candidates.”)

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. *See Blount*, 61 F.3d at 944-48 (approving contribution ban in part because it applied only “for a relatively short period of time”). In fact, if plaintiff Wendy Wagner wishes to make a campaign contribution, she can do so right now, because her contract has expired. (Pls.’ Br. 14-15.)¹³ Plaintiff Brown’s contract is set to expire later this year, and Miller’s contract will expire in 2016. (Pls.’ Br. 16-18.) And all of the plaintiffs can make contributions in the future so long as they do not choose to enter into new contracts with the federal government. *See, e.g., 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

¹³ For this reason, there is no jurisdiction for plaintiff Wagner’s claim. The contractors try to sidestep this infirmity by asserting that she “expects to have future agency contracts,” (Pls.’ Br. 15.). But as the Supreme Court has held, such inchoate “‘some day’ intentions — without any description of concrete plans, or indeed even any specification of when the some day will be — do not support a finding of the ‘actual or imminent’ injury” required to satisfy Article III standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992). To the extent that Wagner is suggesting that her claim falls into the mootness exception for claims that are capable of repetition but evading review, that argument seems strained as well — contractors may have multiple contracts or lengthy contracts that allow for judicial review of such claims.

abide by a high level of regulatory and ethical requirements focusing on the relationship of lobbyist and public official”). Indeed, this choice element distinguishes section 441c from the discrimination identified in *Citizen’s United*; section 441c applies equally to all types of entities—whether individuals, corporations, partnerships, or associations—based only on the choice to benefit from federal contracts.

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; 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 regarding 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 may be avoided by would-be contributors.

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, without solving every problem at the same time. *See 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 does not bar contributions by recipients of grants, loans, ambassadorships, or admission to military academies (Pls.’ Br. 55-59) is wrong. The state pay-to-play laws that the contractors point to as superior to section 441c similarly do not apply to grantees and loan recipients. Furthermore, recipients of federal grants and loans have their own restrictions on political activities. *See generally* Jack Maskell, “*Political*” *Activities of Private Recipients of Federal Grants or Contracts*, Cong. Research Serv., RL 34725, Oct. 21, 2008, <http://www.fas.org/sgp/crs/misc/RL34725.pdf>.

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 *underinclusiveness* 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), *overruled on other grounds by Citizens United*, 558 U.S. 310; *City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994). Even the contractors acknowledge that the contribution ban at issue here was based on “Congress’ desire to keep politics and government contracting separate” (Pls.’ 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” (Pls.’ Br. 48), relying mainly on *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013). (Pls.’ Br. 48-50). But the Supreme Court took care to note that in *Shelby County* that the Voting Rights Act was “far from ordinary” and was only constitutional when promulgated due to “‘exceptional’ and ‘unique’ conditions.” *Id.* at 2630 (quoting *S.C. v. Katzenbach*, 383 U.S. 301 at 334-35 (1966)). Furthermore, as the contractors acknowledge, “*Shelby County* was not an Equal Protection case,” (Pls.’ Br. 49), and therefore is inapplicable to the question of whether a law like section 441c that was originally constitutional could violate the principles of equal protection merely due to the passage of time.

The contractors also cite 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 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.” (Pls.’ Br. 48.) 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.) Many federal contracts, including personal services contracts like those awarded to the contractors in this case (Pls.’ Br. 16, 18-19) and contracts under \$150,000, are awarded through streamlined processes that dispense with the protections the contractors contend are critical to their case. Plaintiffs fail to show that additional safeguards have made contracting impervious to corruption, or that the new formalities in contracting could not be manipulated to re-create schemes like those that predated the Hatch Act.

There is considerable evidence of the continuing risks to the integrity of federal contracting (*see* JA 41-45 ¶¶ 70-86). To the extent that scandals involving contributions by federal contractors are relatively infrequent, however, 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. Section 441c is still needed and should not become a victim of its own success.

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. (Pls.' Br. 7 (quoting Remarks of Senator Hatch, 86 Cong. Rec. 2563 (March 8, 1940).) Legislative history is relevant in certain circumstances, but 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.” (Pls.’ Br. 62-63.) But no constitutional doctrine requires Congress to periodically reaffirm every statute, nor is it the courts’ role to examine whether Congress has done so. 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. (Pls.’ Br. 11-12.) Both the Hatch Act and FECA have also been amended multiple times since 1940. (*See supra* p. 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

Section 441c satisfies the guarantee of equal protection whether this Court uses the rational basis standard or some heightened level of scrutiny. 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 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). 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." *Minnesota v. Clover Leaf Creamery Co.*, 449

U.S. 456, 464 (1981) (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. The contractors cite no precedent making such a holding.¹⁴ 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

¹⁴ The contractors cite *Buckley* for the proposition that making contributions constitutes a “fundamental right” (Pls.’ Br. 25), but *Buckley* was not an equal protection case, did not apply strict scrutiny, and did not address whether making contributions constitutes a fundamental right that warrants strict scrutiny in an equal protection case.

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); *compare Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 102 (1972) (applying higher level of scrutiny to statute that “discriminat[ed] among pickets . . . 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 (1979)) (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. Rejecting the argument, the Supreme Court 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) (reserving 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. The lack of even a quasi-suspect class distinguishes this case from *United States v Windsor*, 133 S. Ct 2675 (2013), the same-sex marriage opinion that the contractors rely on for the proposition that the equal protection claim should receive “careful consideration.” (Pls.’ Br. 27 (quoting *Windsor*, 133 S. Ct. at 2692.)).

Applying strict scrutiny to 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. Aspiring plaintiffs could, for example, characterize FECA’s different limits for contributions to candidates, political parties, and PACs as unconstitutional differential treatment. This Court should instead follow *Blount*, reject the contractors’ invitation to revisit well-established precedent, and apply rational basis review to their equal protection claims. In any event, as explained below, section 441c is constitutional under any level of scrutiny.

B. Section 441c Does Not Impermissibly Differentiate Individual Contractors from 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.” (Pls.’ 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 (Pls.’ 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. Indeed, *Citizens United*, upon which the contractors rely, explicitly relied on the separation between PACs and corporations. *Citizens United*, 558 U.S. at 337. PAC funds by definition have come from another contributor, not the connected corporation. 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. 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.” *Citizens United*, 558 U.S. at 337.

Moreover, the contractors’ argument (Pls.’ 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 then enter into contracts with the government, leaving the individual free to make contributions.

(*See supra* pp. 5-6; Pls.' Br. 32 (“[T]he agency does not care whether the contract is with the individual personally or with an LLC.”).) And as noted *supra* p. 38, individual contractors can establish and solicit funds for PACs.

The contractors also claim (Pls.' Br. 31-32) 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, individual contractors are not situated similarly to persons associated with corporate contractors. 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. There is generally 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 because

individual personal service contracts are often small, their award could more easily be influenced by an individual's contribution, as compared to higher-profile contracts totaling millions of dollars. 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. (Pls.' Br. 37.) 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. 57-58.) 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. 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).

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.

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 courts defer. Section 441c does not violate the equal protection guarantee of the Fifth Amendment.

CONCLUSION

For the reasons stated above, this Court should uphold 2 U.S.C. § 441c and answer the certified questions in the negative.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 13,917 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.

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CERTIFICATE OF SERVICE

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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.