ORAL ARGUMENT NOT YET SCHEDULED

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

SUPPLEMENTAL BRIEF FOR THE FEDERAL ELECTION COMMISSION

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The Federal Election Commission ("FEC" or "Commission") files this brief addressing the effect of the Supreme Court's decision in *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014), on this case, pursuant to this Court's order of September 11, 2013 (Doc. No. 1455905). The Court's opinion confirms that the "closely drawn" standard of constitutional scrutiny applies to contribution limits like the one at issue here, and plaintiff's request for the application of strict scrutiny should be rejected. The application of the "closely drawn" standard in *McCutcheon*, on the other hand, is of only limited relevance here because the provisions at issue differ greatly. *McCutcheon* struck down the limit on the total amount of campaign contributions an individual could make to all federal political committees, a statutory measure designed to prevent circumvention of recipient-specific "base" limits. But this case concerns the longstanding ban on contributions by federal contractors, a special category that the extensive historical record shows poses unique threats to the integrity of the political system — threats that 2 U.S.C. § 441c addresses directly. *McCutcheon* did not address the reasons that the contractor contribution ban is justified, such as avoiding "pay-to-play" arrangements and promoting a merit-based federal workforce. The case also involved only First Amendment claims; there was no Fifth Amendment equal protection challenge, as plaintiffs in this case have made.

I. CONTRIBUTION RESTRICTIONS REMAIN SUBJECT TO "CLOSELY DRAWN" SCRUTINY

Plaintiffs ("the contractors") have argued in this case that the federal contractor contribution ban at 2 U.S.C. § 441c should be subject to strict scrutiny. (Brief for Plaintiffs ("Pls.' Br.") at 39-42.) The Commission showed, however, that restrictions on campaign contributions, including outright bans, have always been subject to the lower standard of "closely drawn to match a sufficiently important interest." (Brief for the FEC ("FEC Br.") at 22-24 (quoting, *inter alia*, *Citizens United v. FEC*, 558 U.S. 310, 355-59 (2010); *FEC v. Beaumont*, 539 U.S. 146, 161 (2003); *Buckley v. Valeo*, 424 U.S. 1, 23 (1976).) The *McCutcheon* plurality opinion confirmed that this more deferential level of scrutiny is appropriate.[1]

Since *Buckley*, laws that restrict campaign expenditures have been subject to strict scrutiny, while laws that restrict campaign contributions (like the provisions in both *McCutcheon* and this case) have been reviewed under a more deferential standard. *See Buckley*, 424 U.S. at 23. The plurality opinion in *McCutcheon* discussed the history of this distinction and its consistent application over time. *McCutcheon*, 134 S. Ct. at 1444-45 (citing *Buckley*, 424 U.S. at 25-29). Chief

[1] The plurality opinion is "the holding of the Court" because it rests on narrower grounds than Justice Thomas's opinion concurring in the judgment. *Marks v. United States*, 430 U.S. 188, 193 (1977) (citation and internal quotation marks omitted).

Justice Roberts noted that the parties and amici in that case had debated extensively whether the Court should change the level of review applicable to contribution limits. *Id.* at 1445. But the Court declined to make any such change. *Id.* ("[W]e see no need in this case to revisit *Buckley*'s distinction between contributions and expenditures and the corollary distinction in the applicable standards of review."). Therefore, this Court remains bound by the Supreme Court's consistent guidance, from *Buckley* through *McCutcheon*, that contribution restrictions like the federal contractor contribution ban at issue here are constitutional as long as they are closely drawn to match a sufficiently important government interest. The contractors' argument for application of strict scrutiny should be rejected.

II. *MCCUTCHEON*'S APPLICATION OF THE "CLOSELY DRAWN" STANDARD OF REVIEW SUGGESTS THAT SECTION 441C IS CONSTITUTIONAL

The plurality opinion's analysis in *McCutcheon* is instructive not only in confirming the appropriate standard of review, but also in understanding the manner in which that standard is to be applied. The Court struck down the aggregate contribution limit at issue in *McCutcheon* because it found a "substantial mismatch between the Government's stated objective and the means selected to achieve it." 134 S. Ct. at 1446. The careful steps that the Supreme Court took in

reaching that conclusion provide this Court with a roadmap in applying the same standard to the federal contractor contribution ban.

The *McCutcheon* plurality analyzed the aggregate limit in three steps. First, the Court considered which potential objectives of the statute would be sufficiently important to support a contribution restriction. 134 S. Ct. at 1450-52 (concluding that only the prevention of *quid pro quo* corruption and its appearance could support the aggregate limit); *see also id.* at 1460-61 (dispensing with a different potential objective). Next, the *McCutcheon* plurality examined whether the aggregate limit "serve[d] that function in any meaningful way," in other words, whether the law actually advanced the governmental interest at issue. *Id.* at 1452, 1452-56 (concluding that the aggregate limit, which was designed to prevent circumvention of the base contribution limits, did not appreciably prevent *quid pro quo* corruption or its appearance). Lastly, the *McCutcheon* plurality examined whether there was an adequate "fit" between the professed objective of the law and what it actually did. *Id.* at 1456-60 (concluding that the aggregate limit restricted too much speech given that it only prevented unlikely means of circumvention).

The federal contractor contribution ban is constitutional under this analysis. One objective of 2 U.S.C. § 441c is the governmental interest in preventing *quid pro quo* corruption and its appearance, which *McCutcheon* approved. (*See infra* Part II.B.) Another objective is the governmental interest in promoting a merit-

based federal workforce, an interest that the Supreme Court has recognized as sufficiently important for decades and that the Court discussed approvingly as recently as 2010 in *Citizens United*. (*See infra* Part II.A (citing *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548 (1973) ("*Letter Carriers*") and *Citizens United*, 558 U.S. 310.) Section 441c meaningfully serves these sufficiently important interests and there is an adequate fit between the breadth of the measure and its objectives. (*See infra* Part II.C.)

A. The Government's Interest in a Merit-Based Federal Workforce, Which Section 441c Serves, Remains a Critically Important One

One of the governmental interests that section 441c serves is the promotion of a merit-based workforce and the prevention of political coercion in government work. The Supreme Court has repeatedly invoked that interest as sufficiently important to justify restricting the political activity of public employees. (FEC Br. at 26-29 (citing, *inter alia*, *Letter Carriers*, 413 U.S. at 564-66).) The *McCutcheon* plurality opinion does state that the only governmental interest that can support a restriction on political speech is the prevention of corruption or its appearance, *see, e.g.*, 134 S. Ct. at 1450, as the Court has previously, *see Davis v. FEC*, 554 U.S. 724, 741 (2008); *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985). The *McCutcheon* plurality was not, however, silently reconsidering the Court's acceptance of a different interest in the specific context

of government functions in *Letter Carriers*. Depoliticizing federal contracting remains a sufficiently important interest.

First, just four years ago, the Court approvingly cited *Letter Carriers* and its merit-based workplace justification in distinguishing that rationale from the interests under review in *Citizens United*. The *Citizens United* opinion stated that 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," 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). Nothing in the analysis of *McCutcheon* provides a reason to believe the Court has already reconsidered that distinction.

Second, when the Court considered *McCutcheon*, it was faced with a generally-applicable contribution limit, and had no occasion to consider any of the circumstances unique to federal contractors or any other narrower category of potential contributors. *McCutcheon* thus did not narrow the justification for contribution limits solely to the prevention of *quid pro quo* corruption and its appearance in discrete special contexts. For example, the Court had no occasion to consider the unique justifications supporting the prohibition of campaign contributions from foreign nationals, which the Court upheld just two years ago in *Bluman v. FEC*, 132 S. Ct. 1087 (2012), *summarily aff'g* 800 F. Supp. 2d 281, 287

(D.D.C. 2011) (holding that the contribution ban for foreign nationals is constitutional because "the government may exclude foreign citizens from activities intimately related to the process of democratic self-government" (internal quotation omitted)).

Third, the plurality opinion in *McCutcheon* discussed unacceptable governmental objectives for restricting campaign contributions in great detail. *See e.g.*, 134 S. Ct. at 1441 ("Congress may not regulate contributions simply to reduce the amount of money in politics, or to restrict the political participation of some in order to enhance the relative influence of others.") (citation omitted); *id.* (noting the unconstitutionality of laws justified by "the impermissible desire simply to limit political speech"); *id.* ("[G]overnment regulation may not target the general gratitude a candidate may feel toward those who support him or his allies, or the political access such support may afford."); *id.* at 1450 ("No matter how desirable it may seem, it is not an acceptable governmental objective to 'level the playing field' or to 'level electoral opportunities,' or to 'equaliz[e] the financial resources of candidates." (citations omitted)). Yet the plurality said nothing about interests or objectives that apply only to narrower categories that present special concerns, such as the governmental interest in a merit-based workforce. The silence on this issue in the plurality opinion (and in the dissent) belies any claim that *McCutcheon* intended to exclude the justification supporting the *Letter Carriers* decision. The

government continues to have a valid and substantial interest in preventing political coercion and bias in the federal workforce.

B. Section 441c Protects Against *Quid Pro Quo* Corruption and Its Appearance, the Interest Expressly Approved by *McCutcheon*

The *McCutcheon* plurality affirmed that the governmental interest in preventing *quid pro quo* corruption and its appearance is sufficiently important to justify restrictions on campaign contributions. 134 S. Ct. at 1441. The history of the contractor contribution ban currently at 2 U.S.C. § 441c makes clear that avoiding "pay-to-play" was an interest that motivated Congress to enact the ban in the first place. As discussed in the Commission's earlier brief, one prominent scandal that played a key role in the law's passage was the Democratic "campaign-book racket," in which government contractors who purchased and advertised in campaign books at highly inflated prices were rewarded with government contracts. (FEC Br. at 8.)

Extensive evidence, including from state and local jurisdictions, demonstrates that the danger of *quid pro quo* corruption and its appearance from contractor contributions is an ongoing threat. (*See* Joint Appendix ("JA") 298-325.) This case is thus distinguishable from *McCutcheon*, where the Court noted a lack of evidence of corruption from states without comparable aggregate limits (134 S. Ct. at 1451 n.7). Recent examples of contractor corruption abound. The owner of a corporation that received millions of dollars in government contracts

has pled guilty to making and soliciting illegal contributions to support District of Columbia Mayor Vincent Gray and other elected officials. (JA 155-56; *see also* Statement of Offense, *United States v. Thompson*, Crim. No. 14-49 (CKK) (D.D.C. Mar. 7, 2014) *available at* http://s3.documentcloud.org/documents/1067941/jeffrey-e-thompson-statement-of-offense.pdf.) On April 3, 2014, California State Senator Leland Yee was indicted for, *inter alia*, accepting illegal campaign contributions to help a software business obtain state grants and contracts. Indictment at Count 43, *United States v. Kwok Cheung Chow, et al.*, CR-14-196 (N.D. Cal. Apr. 3, 2014). Other recent corruption examples have included former Illinois governor Rod Blagojevich being convicted in 2011 after having solicited and received campaign contributions from companies that were then rewarded with state contracts. (FEC Br. at 13-14; JA 308.)

The *McCutcheon* court cited the governmental interest in addressing even the *appearance* of *quid pro quo* corruption as a sufficient justification for contribution restrictions, and the record is replete with apparently corrupt government contractor arrangements. (JA 298-325.) Indeed, the mere existence of contributions flowing from federal contractors to elected officials creates the appearance of *quid pro quo* corruption, even for contracts where such corruption does not exist. (*See* FEC Br. at 32-34.) Thus, it is well within Congress's discretion to conclude that such an appearance creates too grave a danger to the

integrity of the nation's democratic system of government.

C. Section 441c Meaningfully Advances These Objectives and Its Scope Properly Matches Them

The federal contractor contribution ban also satisfies the second and third parts of the "closely drawn" analysis because it meaningfully serves its government interests and has a proportionate scope. The threats of contractor corruption and the politicization of federal contracting persist today, as evidenced both by past experiences in federal contracting and recent "pay-to-play" scandals in other jurisdictions. (FEC Br. at 30-37.) Section 441c's obvious advancement of the asserted objectives thus distinguishes it from *McCutcheon*, in which the plurality was skeptical that circumvention of base limits would be likely in the absence of the challenged aggregate limit. 134 S. Ct. at 1452-56.

There is also an adequate fit between the breadth of the federal contractor ban and its objectives. Unlike the aggregate limit at issue in *McCutcheon*, which regulated the political activity of all citizens at all times, the restriction at issue in this case applies solely to a specific group of people who choose to benefit from a direct economic relationship with the government (federal contractors) and only during a limited period of time (the negotiation and performance of their federal contracts). Indeed, of the three contractors who are the plaintiffs in this case, one has been free to make political contributions since June 2013, and the other two will no longer be subject to the ban in section 441c within the next couple of years,

unless they elect to continue their contractual relationship with the federal government. (Pls.' Br. at 14-20.)

Consistent with *McCutcheon*'s analysis, the Supreme Court has rarely struck down contribution limits. When the Court has examined such limits under the "closely drawn to a sufficiently important interest" standard, it has usually upheld the limits, deferring to the legislature's expertise about how best to combat corruption and its appearance. *See, e.g.*, *RNC v. FEC*, 130 S. Ct. 3544 (2010), *summarily aff'g* 698 F. Supp. 2d 150 (D.D.C.) (upholding limits on contributions to political parties); *Beaumont*, 539 U.S. 146 (upholding corporate contribution ban); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000) (upholding $1,075 limit on contributions to Missouri state auditor candidates); *Cal. Med. Ass'n v. FEC*, 453 U.S. 182 (1981) (upholding $5,000 limit on contributions to multicandidate political committees); *Buckley*, 424 U.S. 1 (upholding various contribution limits in the Federal Election Campaign Act, currently codified at 2 U.S.C. §§ 431-57 ("FECA")).

The Court has struck down contribution limits in only limited situations. One involved a measure targeted to preventing a form of circumvention of the individual contribution limits for which "scant evidence" existed, and that appeared to unnecessarily restrict more contributions than needed to address the feared circumvention. *See McConnell v. FEC*, 540 U.S. 93, 133-89, 231-32 (2003)

(striking down ban on contributions by individuals under 18 years of age, while upholding restrictions on the raising of "soft money" donations). Another involved a set of state contribution limits that were so low they "prevent[ed] candidates from 'amassing the resources for effective [campaign] advocacy.'" *Randall v. Sorrell*, 548 U.S. 230, 248 (2006) (plurality opinion) (quoting *Buckley*, 424 U.S. at 21, second alteration in original). A third involved an illegitimate legislative objective, seeking to "level electoral opportunities" through differing contribution limits for competing candidates. *Davis*, 554 U.S. at 741 (citation and internal quotation marks omitted) (striking down provision related to self-financing candidates). The Court in *McCutcheon* concluded that the statute at issue suffered from the first and third of these infirmities, regarding evidence of the danger of corruption and furthering an impermissible goal. *See* 134 S. Ct. at 1456 ("The improbability of circumvention indicates that the aggregate limits instead further the impermissible objective of simply limiting the amount of money in political campaigns."). But these failings are inapplicable to the federal contractor contribution ban, which is supported by substantial evidence of corruption, directly combats corruption, and furthers permissible objectives.[2]

[2] With good reason, the contractors do not assert that the current federal scheme of general and specific contribution limits prevents the amassing of sufficient resources for effective campaign advocacy. *See* FEC, *FEC Summarizes Campaign Activity of the 2011-2012 Election Cycle* (Apr. 19 2013) http://www.fec.gov/press/press2013/20130419_2012-24m-Summary.shtml

Section 441c also does not unnecessarily restrict more contributions than needed to counteract the *quid pro quo* danger. Plaintiffs in this case have consistently focused on small contribution amounts in arguing that 2 U.S.C. § 441c is unconstitutionally restrictive (*see, e.g.*, Pl.'s Br. at 2 ("[T]hey are forbidden by section 441c from making a contribution of even $1 . . . ."); Reply Brief for Plaintiffs at 5 (claiming that "a $100 contribution from a federal contractor is a felony"), but their legal claims are not limited to small contributions. If they were, given the potential for rent-seeking endemic to government contracts, even relatively small contributions can appear corrupt and constitute the *quid* of a corrupt arrangement. An Ohio official, for example, was charged with ethics violations after accepting gifts of a little over $1,200 and then awarding over $10 million in unbid contracts. (JA 149-50 ¶53; *see also id.* at 152 ¶63 (describing New Mexico's payment of $16 million in fees to poorly performing financial managers after contributions of a little over $15,000); *id.* at 162 ¶88 (reporting a $10,000 bribe from a representative of a company that received a nearly $500,000 contract from an Ohio school district); *id.* at 163 ¶90 (reporting that a company lobbyist gave a $25,000 campaign check shortly after signing a $95 million no-bid contract with the state of California); *id.* at 168 ¶107 (describing awarding of

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(summarizing the more than $7.1 billion in receipts by federal candidates, political parties, and other political committees in the 2011-12 election cycle). The Court's holding in *Randall* is not relevant here.

phone contract following gift of a roundtrip airplane ticket); *id.* at 169 ¶111 (describing $9,300 bribe for award of contract).)

Many people who have been insiders in the federal system have confirmed that contractor limits need to be set very low. (*See, e.g.*, JA 165-66 ¶ 96 (quoting former lobbyist Jack Abramoff's view that contractors "*shouldn't be permitted to give one penny to any elected official or staff*") (emphasis added); Sam Stein and Paul Blumenthal, *There Is One Campaign Finance Regulation That Rand Paul Supports*, Huffington Post (Apr. 23, 2014) (quoting Senator Rand Paul's view that government contractors should not be permitted to make campaign contributions).) Congress has consistently viewed contractors as different from ordinary contributors because of their close connection to the operation and integrity of government, which is why section 441c effectively imposes base limits of $0 on their contributions to candidates and parties. Given the special economic incentives of government contractors and the acute danger of corruption in that context, section 441c's low limit represents a suitable scope.

III. MUCH OF *MCCUTCHEON* IS INAPPLICABLE HERE DUE TO SUBSTANTIAL DIFFERENCES BETWEEN THE PROVISIONS AT ISSUE

With the exception of the subjects discussed above, the holding and reasoning of the *McCutcheon* plurality opinion is inapplicable here.

A. *McCutcheon* Was About Circumvention, but Section 441c Directly Targets Corruption and Promotes the Integrity of the Federal Workforce

The *McCutcheon* plurality found that the aggregate limit was not closely drawn because "Congress's selection of a $5,200 base limit indicates its belief that contributions of that amount or less do not create a cognizable risk of corruption." *McCutcheon*, 134 S. Ct. at 1452. The Court reasoned that if Congress felt that $5,200 from a contributor to each of nine federal candidates would not be corrupting, it similarly would not corrupt a tenth candidate either. *Id.* But none of this reasoning applies to 2 U.S.C. § 441c.

The objective of section 441c is not to prevent circumvention of other limits; rather, the contractor contribution ban directly addresses threats to the integrity of government, and it operates essentially as a set of base limits for contractors. The provision is not the sort of "prophylaxis-upon-prophylaxis approach" that the Supreme Court has found to be constitutionally suspect. (*McCutcheon*, 134 S. Ct. at 1458 (quoting *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 479 (2007)).) In this case, Congress believed that the base limits applicable to most individual contributors were too high and posed too great a corruption risk when applied to federal contractors. Accordingly, Congress created lower limits to protect the government in this special situation, and the extensive record compiled in this case shows that those limits serve a critical governmental interest.

B. Disclosure Would Not Be Sufficient to Address the Special Risks Posed by Federal Contractor Contributions

The *McCutcheon* plurality opinion indicated that aggregate limits are less necessary than in the past because "disclosure of contributions minimizes the potential for abuse of the campaign finance system," the public can now obtain data through the Internet, and "disclosure is effective to a degree not possible at the time *Buckley*, or even *McConnell*, was decided." *McCutcheon*, 134 S. Ct. at 1459-60. However, while more effective disclosure may reduce some of the corruption dangers associated with contributions by the general population, it would be far less effective in preventing the unique dangers associated with contributions by federal contractors.

It may not be difficult today to obtain lists of campaign contributors above the disclosure thresholds online, but there is no similar means by which the public can easily determine whether a given contributor is a federal contractor. In fact, the parties to this case were unable even to estimate the number of federal contractors affected by the contribution ban, even though one witness in the case was a law professor who specializes in federal contracting. (JA 195 (deposition of Professor Steven L. Schooner).) So if there were ongoing contractor corruption, it would not be apparent from the contributions listed on the FEC's website. To the extent that such contractors are actually known to the public, disclosure would not ameliorate concerns about the appearance of corruption – it would not tell the

public whether a particular contractor obtained the contract based on merit or based on campaign contributions. And disclosure would not assure a depoliticized federal workforce; in fact, it would likely have mixed effects on that effort, given the potential for coercion when contracting decision-makers in government have the ability to police campaign giving records. While the disclosure of campaign contributions helps to diminish corruption concerns generally, the opacity and coercion danger of the federal contracting system mean that disclosure would be less effective at ending contractor corruption and promoting merit-based government work.

C. Section 441c Addresses Concerns About Corruption and Government Integrity That Are Not Addressed by Other Statutes and Regulations

The *McCutcheon* plurality struck down the aggregate limit in part because it found that subsequent legislation and regulations made the law superfluous in combating circumvention, 134 S. Ct. at 1446-47, but that reasoning is inapplicable here. In particular, *McCutcheon* noted that Congress had amended FECA to prohibit one easy means of circumvention — donors "creating or controlling multiple affiliated political committees." *Id.* (citing 2 U.S.C. § 441a(a)(5); 11 C.F.R. § 100.5(g)(4)). The Court also discussed the "intricate regulatory scheme" that the Commission has established to prevent circumvention through the process of earmarking. *Id.* at 1447 (citing §§ 110.1(h)(1)-(2) and 11 C.F.R. § 110.6(b)(1)).

As the Commission explained, however, "the dangers associated with federal contracting have grown considerably since 1940," as federal spending and reliance on contractors has skyrocketed. (FEC Br. at 45.) The FEC has not adopted any regulatory scheme to combat those dangers, nor has Congress enacted protections against contractor corruption that make section 441c unnecessary. The contractors in this case have argued that procurement regulations such as 48 C.F.R. § 1.601(a) make *quid pro quo* corruption less likely and that criminal bribery statutes such as 18 U.S.C. §§ 601, 603, 606, and 610 either "already protect contractors [from coercion], or could be amended to do so." (Pls.' Br. at 42 n.6, 44.) But the record here shows that many of the types of contracts at issue in this case, those granted to individual contractors rather than corporations, are awarded through streamlined processes that dispense with these protections. (FEC Br. at 45.) General contribution limits were first enacted into federal law at the same time as, not after, the contractor contribution ban. *See* Amendments to the Hatch Act of 1939, 1940 Ed., (July 19, 1940, ch. 460, § 4, 54 Stat. 770).[3] And anti-bribery statutes pre-date limits on contractor contributions – it was precisely because of the challenges associated with enforcing those statutes, along with the

[3] Congress subsequently did overhaul the campaign-finance laws in the early 1970s through the Federal Election Campaign Act of 1971 ("FECA"), Pub. L. No. 92-225, 86 Stat. 3 and its 1974 Amendments, Pub. L. No. 93-443, 88 Stat. 1263. With the exception of the years between 1971 and 1974, federal law has contained contribution limits for the last 74 years.

potential appearance of corruption, that such a ban was necessary. *Cf. Buckley*, 424 U.S. at 27-28 ("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.").

D. Federal Contractors Have Many Viable Alternatives for Political Activity Besides Making Financial Contributions

The Commission's earlier brief points out that section 441c is closely drawn in part because it "allows ample alternative forms of political activity for persons who choose to become federal contractors." (FEC Br. at 37; *see id*. at 37-39 (quoting, among other cases, *McConnell*, 540 U.S. at 138; *Buckley*, 424 U.S. at 22; and *Blount v. SEC*, 61 F.3d 938, 944-48 (D.C. Cir. 1995)).) The *McCutcheon* plurality cited such reasoning approvingly. 134 S. Ct. at 1449 ("In the context of base contribution limits, *Buckley* observed that a supporter could vindicate his associational interests by personally volunteering his time and energy on behalf of a candidate.").) *McCutcheon* went on to distinguish the special situation in that case, in which an individual wished to support more than nine candidates but could not make further contributions because of the aggregate limit. *Id.* ("Such personal volunteering is not a realistic alternative for those who wish to support a wide variety of candidates or causes."). It was only because the plaintiff in *McCutcheon* expressly desired to provide financial support to so many candidates, however, that alternative political activity was inadequate to vindicate his First Amendment

rights. That unique set of circumstances is inapplicable here. There is no indication in the record of this case that these contractors, or individual federal contractors generally, wish to support so many candidates that it would be impractical for them to volunteer for all of them. And nothing prevents the contractors from engaging in other forms of political activity, such as advocacy and fundraising, for larger groups of candidates and parties. (FEC Br. at 37-39.)

CONCLUSION

For the reasons stated above and in the Commission's earlier brief, 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 SERVICE

I hereby certify that on this 2nd day of May 2014, I caused the Federal Election Commission's supplemental brief in *Wagner v. FEC*, No. 13-5162, to be filed with the Clerk of the Court by the electronic CM/ECF System, thereby effectuating service on the following:

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

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