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

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

DEFENDANT FEDERAL ELECTION COMMISSION'S REBUTTAL IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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Plaintiffs' responsive brief shows that the Court should grant defendant Federal Election Commission's ("FEC" or "Commission") motion for summary judgment. Plaintiffs dispute virtually none of the FEC's evidence, which amply demonstrates that the provisions of the Federal Election Campaign Act ("FECA") that plaintiffs challenge are constitutional.

Plaintiffs fail to distinguish *Buckley v. Valeo*, the Supreme Court ruling that squarely rejected First and Fifth Amendment claims against FECA's six-month PAC waiting period and $2,600 candidate contribution limit that are materially indistinguishable from plaintiffs' claims here. Those claims are therefore foreclosed. Plaintiffs also do not dispute the FEC's showing that the six-month period remains a vital part of FECA's anti-circumvention safeguards.

Even if *Buckley* did not control plaintiffs' claims against the six-month period, the evidence here shows that the period constitutionally furthers Congress's important interests in preventing circumvention of the $2,600 limit and reinforcing FECA's disclosure requirements. That evidence demonstrates that new PACs (ones less than six months old) are generally more likely to be "dummy"-like groups created in the midst of a campaign by a candidate's supporters attempting to evade disclosure and bootstrap the $5,000 candidate contribution limit reserved for broad-based citizen interest groups that have achieved multicandidate PAC status. Plaintiffs assert, without evidence, that new PACs cease to carry these risks once they have obtained 51 contributors. But the evidence shows that Stop PAC itself remained a two-person operation with very close ties to one congressional campaign after it quickly obtained 51 contributors.

Plaintiffs have also failed to save their equal protection claims. It is plaintiffs' burden to prove that FECA discriminates against them relative to similarly situated groups, but plaintiffs have not done so. Indeed, their complementary claims here show that different entities have different advantages and disadvantages under FECA. Overall, PACs enjoy benefits others do not. FECA limits new PACs to $2,600 candidate contributions due to their higher circumvention risks. And it allows "persons" to contribute more than multicandidate PACs to political parties so that parties have the resources they need to play their unique role in the political system.

The Commission's motion for summary judgment should be granted.

ARGUMENT

I. PLAINTIFFS' RESPONSE CONFIRMS THAT THIS COURT LACKS JURISDICTION OVER STOP PAC'S CLAIMS

A. Stop PAC Lacks Standing Because It Does Not Dispute That It Could Have Registered Early Enough to Make the Contributions It Wanted to Make

Plaintiffs' response effectively confirms that plaintiff Stop Economic Instability caused by Democrats ("Stop PAC") lacks standing because its injuries were self-inflicted. It does not deny that it could have registered with the FEC early enough to make the contributions it claims FECA prevented it from making. (*See* Mem. in Opp'n to FEC's Mot. for Summ. J. ("Pls.' Resp.") at 2-4 (Doc. No. 61); *see also* FEC's Mem. in Supp. of Mot. for Summ. J. ("FEC SJ Br.") at 10-11 (Doc. No. 57-1).) In its complaint, Stop PAC alleged that it wanted to contribute in excess of $2,600 to Niger Innis for an election on June 10, 2014; to Dan Sullivan for an August 19 election; and to Representative Joe Heck for the November 6 general election. (Amended Complaint ("Am. Compl.") ¶¶ 20-21, 24-25, 28-30 (Doc. No. 37).) The FEC's evidence shows that Stop PAC could have registered more than six months before the first of those elections on June 10. Stop PAC's founder, Greg Campbell, testified that Stop PAC was something that had "always" interested him, and he had discussions with Stop PAC's future treasurer Dan Backer about starting Stop PAC at least as early as November 2013 — *seven* months before the June 10 election. (FEC SJ Br. at 10-11; FEC's Resp. in Opp'n to Pls.' Mot. for Summ. J. ("FEC Resp.") at 6 (Docket No. 60).) Stop PAC nevertheless waited until March 11, 2014 to register, starting the six-month period just three months before June 10. Stop PAC therefore cannot meet its burden of showing that its alleged injuries are fairly traceable to FECA. *See S. Walk at Broadlands Homeowner's Ass'n, Inc. v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 181 (4th Cir. 2013) ("Plaintiffs bear the burden of establishing standing.").

Stop PAC tries unsuccessfully to escape this result by alleging for the first time that it wanted to contribute to other unnamed "candidates it supported throughout its six month waiting period" in "various primary elections." (Pls.' Resp. at 3.) But that claim is not in the complaint.

In fact, Stop PAC does not cite its own complaint once in arguing it has standing. (*See id.* at 2-4.) It is a plaintiff's alleged injury "[a]s pled" that determines whether standing exists, not a later "shifting characterization" of that injury in briefing or argument. *Doe v. Va. Dep't of State Police*, 713 F.3d 745, 755 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 1538 (2014).

Stop PAC also wrongly asserts that it has standing because of the actions of other PACs that are not parties to this case. (Pls.' Resp. at 3-4.) Stop PAC cites the FEC's evidence showing that in the past hundreds of PACs have not registered until six months or less before a general election. (*Id.* at 3.) And it argues that "[m]ost ordinary people are not especially interested" in starting a PAC until shortly before an election. (*Id.*) But what third parties have done is irrelevant given "the general prohibition against third-party standing." *Childress v. City of Richmond*, 134 F.3d 1205, 1208 (4th Cir. 1998). *Stop PAC* lacks standing because its founder *was* especially interested in starting Stop PAC more than six months before June 10, and yet chose not to do that.

B. Stop PAC Admits Its Claims Are Moot and It Cannot Show Those Claims Are Capable of Repetition Yet Evading Review

Even if Stop PAC did have standing, its claims are now moot. Stop PAC admits that it is no longer subject to the FECA provisions it challenges. (Pls.' Resp. at 4, 17.) It attempts to save its moot claims by arguing that they are capable of repetition yet evading review. But Stop PAC quickly concedes that it cannot meet the "capable of repetition" part of that test because it will never be subject to the laws it challenges again. (*Id.* at 4.) And as the Supreme Court stated just six years ago in a FECA case, there must be "a reasonable expectation that *the same complaining party* will be subject to the same action again" for a case to be capable of repetition. *Davis v. FEC*, 554 U.S. 724, 735 (2008) (emphasis added; internal quotation marks omitted); *see also FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 462 (2007).

Stop PAC nevertheless claims that the same-party requirement does not apply here (Pls.' Resp. at 4-5), but the authority it cites does not support that claim. Stop PAC first relies upon a *dissent* on behalf of *two* Supreme Court justices in a 1988 ruling that long pre-dates *Davis* and

Wisconsin Right to Life, and that did not involve an election or FECA. (Pls.' Resp. at 4 (quoting *Honig v. Doe*, 484 U.S. 305, 335 (1988) (Scalia, J., dissenting)).) That dissent cites two class action lawsuits that Stop PAC also relies upon, and it states that in "some" election law rulings, the same-party requirement has not been applied. *Honig*, 484 U.S. at 335 (Scalia, J. dissenting) (citing *Rosario v. Rockefeller*, 410 U.S. 752, 755 n.4 (1973) and *Dunn v. Blumstein*, 405 U.S. 330, 332 & 333 n.2 (1972)); *see also* Pls.' Resp. at 5 (citing *Rosario* and *Dunn*). Plaintiffs fail to mention, however, that the *Honig* dissent then acknowledges that *Rosario* and *Dunn* have been "limited to their facts" by more recent Court rulings imposing the same-party requirement "in the absence of a class action." *Id.* at 336 (Scalia, J. dissenting). Class actions are different because even if the class representative's claim can no longer repeat, the certified class's claims can repeat, and so the court retains jurisdiction. *See Sosna v. Iowa*, 419 U.S. 393, 399 (1975) ("If appellant had sued only on her own behalf . . . the fact that she now satisfies the one-year residency requirement . . . would make this case moot and require dismissal. But appellant brought this suit as a class action[.]" (citation omitted)); *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 398 (1980) ("When . . . there is no chance that the named plaintiff's expired claim will reoccur, mootness still can be avoided through certification of a class prior to expiration of the named plaintiff's personal claim.").[1] This case is not a class action, of course, and so the same-party requirement applies.

The other cases plaintiffs rely upon (*see* Pls.' Resp. at 4-5) are also distinguishable because they involve plaintiffs who, unlike Stop PAC, could satisfy the same-party requirement. Each of those cases was mooted by the passing of an election, not (as here) a plaintiff's permanent change in legal status. *See Storer v. Brown*, 415 U.S. 724, 726-27 (1974) (plaintiff-candidates challenged state ballot-access laws that they would have been subject to again if they

[1] The Fourth Circuit has similarly emphasized that the capable-of-repetition-yet-evading-review exception is rare outside the class action context. *See Incumaa v. Ozmint*, 507 F.3d 281, 289 (4th Cir. 2007) ("*In the absence of a class action*, jurisdiction on the basis that a dispute is capable of repetition, yet evading review is limited to the exceptional situation." (emphasis added; internal quotation marks omitted)).

chose to run in a future election); *Moore v. Ogilvie*, 394 U.S. 814, 815-16 (1969) (same); *Rosario*, 410 U.S. at 759 (plaintiff-voters challenged a requirement that they enroll in a political party to vote in that party's primary election, which the plaintiffs would have been subject to again if they decided to switch parties before a future election); *Catholic Leadership Coal. of Tex. v. Reisman*, --- F.3d ---, 2014 WL 3930139, at *10 (5th Cir. Aug. 12, 2014) (plaintiff-PACs satisfied the same-party requirement because in future elections they would "again be impacted by [Texas's] treasurer appointment requirement, the 60-day, 500-dollar limit, and the ten-contributor requirement" that they challenged).[2]

As Stop PAC points out, the Fifth Circuit in *Catholic Leadership* held in the alternative that the same-party requirement need not apply in election law cases. 2014 WL 3930139, at *10-11. This out-of-Circuit *dictum*, however, is inconsistent with the Supreme Court's recent application of the same-party requirement to FECA claims in both *Davis* and *Wisconsin Right to Life*. And while the Fourth Circuit has never addressed the issue, other Circuits have rejected the Fifth Circuit's approach. *See Van Wie v. Pataki*, 267 F.3d 109, 114-15 (2d Cir. 2001) (applying same-party requirement in an election law case and distinguishing *Storer*, *Rosario*, and *Dunn*); *Barilla v. Ervin*, 886 F.2d 1514, 1519 n.3 (9th Cir. 1989) (finding that an "examination of [*Storer*, *Rosario*, *Dunn*, and *Moore*, among others] reveals no such categorical exception to the usual mootness rules" in election law cases), *overruled on other grounds by Simpson v. Lear Astronics Corp.*, 77 F.3d 1170, 1174 (9th Cir. 1996).

[2] Plaintiffs place special emphasis on *Catholic Leadership* (Pls.' Resp. at 5-6), but unlike here, one of the plaintiffs there was a corporation that was likely to create more new PACs and so would be affected by the waiting period again. 2014 WL 3930139, at *10. Also, the Texas law at issue, unlike FECA, imposed a "continuing limitation" on a PAC's ability to receive contributions *after* the end of its waiting period that would continue to hinder it in future elections. *Id*. In contrast here, Stop PAC does not contend it will suffer any alleged injury due to the six-month period or the $2,600 limit now that it is a multicandidate PAC, nor could it.

II. PLAINTIFFS CANNOT DISTINGUISH *BUCKLEY*, WHICH FORECLOSES THEIR CLAIMS AGAINST THE SIX-MONTH PERIOD AND THE $2,600 CONTRIBUTION LIMIT

Stop PAC's claims are precluded by *Buckley v. Valeo*, which squarely upheld the constitutionality of the six-month period and other multicandidate PAC qualifications. *See* 424 U.S. 1, 35-36, 59 n.67 (1976) (*per curiam*). That ruling controls because Stop PAC's as-applied claim is "based on the same factual and legal arguments" that *Buckley* "expressly considered when rejecting a facial challenge" to the six-month period. *Republican Nat'l Comm. v. FEC*, 698 F. Supp. 2d 150, 157 (D.D.C.) (three-judge court), *aff'd mem.*, 130 S. Ct. 3544 (2010).

Stop PAC contends that its claim is distinct because it brings an equal protection claim that is "challenging *only* the six-month waiting period, and *only* as it applies to" new PACs that have already satisfied the other two multicandidate PAC requirements (Pls.' Resp. at 7-8), but none of those features distinguishes Stop PAC's claim. Like Stop PAC, the *Buckley* plaintiffs asserted a separate Fifth Amendment equal protection claim against only the six-month period. *See* 519 F.2d 821, 857-58 & n.94 (D.C. Cir. 1975) (*en banc*), *aff'd in relevant part*, 424 U.S. at 59 n.67.

While facially upholding the six-month period, the *Buckley* Court in fact had to consider its validity as applied to groups that had satisfied the other two multicandidate criteria, since the six-month period would affect only those groups. Indeed, the *Buckley* plaintiffs argued that the six-month period discriminates against not one- or two-person sham groups, but "philosophically motivated groups with widely dispersed members who want to respond to an issue as it arises, or who coalesce only near election time[.]" Reply Brief of the Appellants, *Buckley v. Valeo*, Nos. 75-436, 75-437, 1975 WL 171458, at *22 (U.S. Nov. 3, 1975). In response, *Buckley* rejected the argument that the criteria discriminates against such "ad hoc organizations." 424 U.S. at 35. As a result, *Buckley* did not hold that the six-month period was constitutional only as applied to "individuals" or "groups of two or three persons," or "dummy committees," as plaintiffs assert. (Pls.' Resp. at 7 (internal quotations and citations omitted).) It found that the risk of circumvention that such groups present supported the broader facial validity of the six-month

"protective shield" as applied even to philosophically motivated new groups with multiple members, as Stop PAC claims to be. *Buckley*, 519 F.2d at 858.

Finally, as the FEC explained in its opening brief, the six-month period today remains a vital part of FECA's legislative and regulatory anti-circumvention system. (FEC SJ Br. at 18-19.) This is true even though since *Buckley*, Congress and the FEC have enacted additional anti-circumvention safeguards. (*Id.*) Plaintiffs' response does not dispute or otherwise address the FEC's position on this point, and so they have conceded the issue. *See, e.g.*, *McKeel v. United States*, 178 F. Supp. 2d 493, 504 (D. Md. 2001) ("Plaintiff appears to concede this point, as he has failed to respond to the government's argument on this point."); *Mentch v. E. Sav. Bank, FSB*, 949 F. Supp. 1236, 1247 (D. Md. 1997) (holding that failure to address defendant's arguments for summary judgment in opposition brief constituted abandonment of claim).

III. PLAINTIFFS HAVE NOT SHOWN THAT THE SIX-MONTH PERIOD AND THE $2,600 CONTRIBUTION LIMIT VIOLATE THE FIRST AMENDMENT

The six-month period and the $2,600 contribution limit are constitutional because they are closely drawn to match Congress's important interests. (FEC SJ Br. at 12-22; FEC Resp. at 10-23.) Stop PAC concedes that closely drawn scrutiny, which is relatively complaisant, applies to its First Amendment claim. (Pls.' Resp. at 8.) It also does not dispute the FEC's showing that these provisions place "minimal burdens" on a new PAC's ability to associate with candidates and no burden on its ability to speak. (FEC SJ Br. at 21-22.) Finally, Stop PAC does not deny that the $2,600 contribution ceiling is closely drawn to match the important government interest of limiting the risk and appearance of corruption. (*Id.* at 12-13.)

A. Plaintiffs Have Failed to Rebut the FEC's Showing That the Six-Month Period Prevents Circumvention of the $2,600 Contribution Limit

In its response, Stop PAC either concedes or fails to dispute nearly *all* of the FEC's facts showing that new PACs — including those with at least 51 contributors and that have made five contributions — carry an increased circumvention risk justifying the six-month period.

- Stop PAC does not deny that previous scandals involving newly-created dummy-like PACs motivated Congressional action to limit the risk of abuse. (FEC SJ Br. at 14.)
- Stop PAC admits that public interest in an election intensifies as that election approaches (Pls.' Resp. at 11), and it does not dispute that as a result, the likelihood increases during that period that a campaign's supporters will seek all avenues to increase that candidate's odds of winning (*see* FEC SJ Br. at 15).
- Stop PAC does not dispute that starting a PAC is easy and that the 51-contributor and five-contribution requirements "can be satisfied quickly," as Stop PAC and intervenor American Future PAC have demonstrated. (FEC SJ Br. at 14-15; Mem. in Supp. of Pls.' Mot. for Summ. J. ("Pls.' SJ Br.") at 7 (Pls.' Facts ¶¶ 33-35) (Doc. 56-1).)
- Stop PAC concedes that the FEC's statistical data establish that "'[e]ven without the six-month period in place, PACs are often short-lived operations that proliferate just prior to elections and spend significant amounts of money, only to disappear before the next election.'" (Pls.' Resp. at 10-11 (quoting FEC SJ Br. at 16).)
- Finally, Stop PAC does not deny any of the FEC's material facts regarding Stop PAC's close ties with Niger Innis's congressional campaign (*see* Pls.' Resp. at 15-16), which illustrate how easy it would be for a candidate's supporters to start a PAC to circumvent the $2,600 limit *in just three weeks* but for the six-month period (FEC SJ Br. at 16-18).[3]

[3] Plaintiffs' only objection to the FEC's evidence on this point amounts to a claim that Stop PAC chairman Greg Campbell incorrectly recalled the name of his official title with the Innis campaign. Plaintiffs assert that Campbell was "merely a 'scribe' or 'writer' for the campaign." (Pls.' Resp. at 1, ¶ 9.) However, in addition to evidence the FEC already cited regarding Campbell's policy work for the campaign (FEC SJ Br. at 6, ¶ 11), Niger Innis for Congress ("NIFC") reported disbursements to Campbell for "political strategy services," "political consulting," and "political strategy consulting services." *See* NIFC 2014 April Quarterly Report at 38 (Apr. 15, 2014), http://docquery.fec.gov/pdf/568/14960792568/14960792568.pdf; NIFC 2014 Pre-Primary Report at 14 (May 21, 2014), http://docquery.fec.gov/pdf/384/14941274384/14941274384.pdf; NIFC 2014 July Quarterly Report at 13 (July 14, 2014), http://docquery.fec.gov/pdf/152/14961564152/14961564152.pdf. In any event, plaintiffs admit that Campbell was on the Innis campaign's payroll. (Pls.' Resp. at 16; *see also id.* at 1, ¶ 9.)

With essentially all of the facts of the case conceded, Stop PAC's claims amount to a series of scattershot legal arguments that are meritless and often undermined by those admitted facts. First, Stop PAC argues that a PAC with more than 50 contributors is "inherently" a *bona fide* broad-based citizen interest group because that requirement alone ensures the group could not have been organized by "two or three persons" looking to create a dummy PAC. (Pls.' SJ Br. at 9-10 (emphasis and internal quotation marks omitted).) But this argument conflates a PAC's "organizers" and its "contributors." Stop PAC itself illustrates the point. It was *organized* by Campbell and Backer, who then solicited 51 *contributors* in just two weeks by soliciting donations with emails. (FEC SJ Br. at 15.) At that point, Stop PAC was still a two-person operation run by workers for a single congressional campaign; that fact was not changed simply because Campbell and Backer were able to quickly jump through the hoop of obtaining 51 contributors. Stop PAC does not even attempt to argue that it was at that time on par with broad-based groups with many involved organizers.[4]

Second, Stop PAC now contends for the first time that Congress enacted the six-month period not to prevent circumvention, but to impermissibly "tilt the playing field" in favor of "incumbents" with connections to "longstanding, institutionalized power brokers deeply entrenched within the Beltway establishment." (Pls.' Resp. at 11.) Stop PAC cites no facts to support this parade of clichés, which cannot be reconciled with the Tea Party Fund's own status as a multicandidate PAC. That group is anything but part of the "Beltway establishment," as evidenced by its newsworthy support for a high school teacher who ran against Speaker of the House John Boehner.[5] (*See* FEC SJ Br. at 9, ¶ 28.) The legislative history in this case readily

[4] Stop PAC's argument about the 51-contributor requirement is also incorrect as a matter of law. *Buckley* upheld the validity of the six-month provision despite also upholding the 51-contributor requirement. 424 U.S. at 35-36. It would make no sense for the Court to have concluded that the six-month period helps prevent circumvention of the contribution limits if the Court were simultaneously upholding a provision that rendered the six-month period superfluous.

[5] *See* Reid Wilson, *Tea Party Attacks John Boehner at Home*, Wash. Post (Apr. 22, 2014), http://www.washingtonpost.com/politics/tea-party-attacks-boehner-athome/2014/04/22/f0724228-c96f-11e3-95f7-7ecdde72d2ea_story.html.

demonstrates that Congress was rightfully concerned that new PACs would circumvent the $2,600 limit by quickly satisfying the 51-contributor and five-contribution requirements. (FEC Resp. at 16 (citing 120 Cong. Rec. S18527 (daily ed. Oct. 8, 1974).) Thus, the six-month period does not impose "delay for its own sake," as plaintiffs claim. (Pls.' Resp. at 12.)

Third, the six-month period sets a temporary financial limit, but it does not ban speech. Therefore, it stands in stark contrast to the prior restraint laws at issue in the cases upon which plaintiffs again rely. (Pls.' Resp. at 12 (citing prior restraint cases); FEC Resp. at 13-14 (distinguishing those prior restraint cases).)

Fourth, Stop PAC claims that the FEC's position is "contradict[ory]" because the six-month period applies only to a new PAC's candidate contributions and not its contributions to parties (Pls.' Resp. at 12), but the risk of *quid pro quo* corruption is at its peak when a contribution is made directly to a candidate, *see McCutcheon v. FEC*, 134 S. Ct. 1434, 1452 (2014) (plurality) ("[T]here is not the same risk of *quid pro quo* corruption or its appearance when money flows through independent actors to a candidate, as when a donor contributes to a candidate directly."); *Preston v. Leake*, 660 F.3d 726, 736 (4th Cir. 2011). To be sure, contributions to party committees also bear a serious risk of corruption and its appearance that justifies contribution limits. *McConnell v. FEC*, 540 U.S. 93, 144-45 (2003), *overruled in part on other grounds by Citizens United v. FEC*, 558 U.S. 310, 365 (2010). But as the Supreme Court has recently indicated, contributions in excess of just $2,600 per election to a candidate can carry a cognizable risk of corruption. (*See* FEC Resp. at 14-15 (citing *McCutcheon*, 134 S. Ct. at 1452).) Congress was justified, therefore, in establishing the six-month period to prevent circumvention of the default $2,600 candidate contribution limit.

Fifth, although Stop PAC fails to refute the FEC's showing that a PAC's close ties to a single congressional candidate present a circumvention risk, Stop PAC faults the FEC for not also showing "that anyone violated any federal laws or regulations." (Pls.' Resp. at 16.) However, this case is not an FEC enforcement action, and the six-month period is designed to address circumvention in circumstances falling short of otherwise unlawful contributions or

coordinated expenditures. Further, as plaintiffs have acknowledged, to demonstrate that important government interests are served, the FEC need not show actual lawbreaking, but only that "experience under the present law confirms a serious threat of abuse." (Pls.' SJ Br. at 21 (quoting *McCutcheon*, 134 S. Ct. at 1457); *see also* FEC SJ Br. at 13.) To the extent plaintiffs may be arguing that the FEC must show *actual* circumvention, they ask for more than is required by the evidentiary standard they acknowledge applies. *See Wagner v. FEC*, 854 F. Supp. 2d 83, 91 (D.D.C. 2012) ("An absence of corruption does not necessarily mean, however, that [a FECA] ban is no longer needed. It could simply be an indication that the ban is working." (citing *Burson v. Freeman*, 504 U.S. 191, 208 (1992) (opinion of Blackmun, J.)), *vacated on jurisdictional grounds*, 717 F.3d 1007 (D.C. Cir. 2013).

Finally, Stop PAC argues that the six-month period does not work because Stop PAC could have contributed $5,000 to Innis for the general election, even though the "purported concerns about the relationship among Stop PAC, Backer, Campbell, and Innis remain." (Pls.' Br. at 17.) But Stop PAC simply assumes that those concerns would have remained had Innis remained a candidate; they cite no evidence at all. In the months since the June 10 primary election, Stop PAC could have grown into a broader-based citizen interest group. And in any event, the six-month period would have served its purposes for the June 10 primary, even if, like any bright-line objective standard, it might not reach *every* case of potential circumvention. *See NLRB v. Maryland Ambulance Servs., Inc.*, 192 F.3d 430, 434 (4th Cir. 1999) ("While bright-line rules . . . may run the risk of being over or under-inclusive in their coverage, it is generally recognized that the certainty and stability such a rule affords outweighs any harm done when the rule is applied evenly.").

B. Plaintiffs Have Failed to Rebut the FEC's Showing That the Six-Month Period Furthers the Government's Interest in Campaign Finance Disclosure

The D.C. Circuit expressly upheld the six-month period not only because it prevents circumvention but also because "[d]uring the waiting period," new PACs "would be subject to the reporting and disclosure provisions" of FECA. *Buckley*, 519 F.2d at 858, *aff'd in relevant*

part, 424 U.S. at 59 n.67. Those provisions require PACs to file a public report detailing most of their receipts and expenditures at least every six months. 52 U.S.C. § 30104(a)(4)(A). The six-month period therefore ensures that a group seeking multicandidate PAC status files at least one report before becoming eligible to make candidate contributions of up to $5,000 per election.

Stop PAC makes the vague assertion that "the Supreme Court has never held that the Government may . . . limit First Amendment activities, to further an interest in promoting campaign finance disclosure." (Pls.' Resp. at 13.) While disclosure requirements do not prevent anyone from speaking, *Buckley* did find that disclosure can "seriously infringe" on the First Amendment. 424 U.S. at 64. The Supreme Court nevertheless upheld FECA's general disclosure requirements because they (1) "provide[] the electorate with information as to where political money comes from"; (2) deter actual and apparent corruption "by exposing large contributions . . . to the light of publicity"; and (3) aid law enforcement by "gathering the data necessary to detect violations of the contribution limitations[.]" *Buckley*, 424 U.S. at 66-68 (internal quotation marks omitted); *see also Citizens United*, 558 U.S. at 366-67 ("Disclaimer and disclosure requirements may burden the ability to speak," but they are nevertheless "justified based on a governmental interest in 'provid[ing] the electorate with information' about the sources of election-related spending." (alteration in original) (quoting *Buckley*, 424 U.S. at 66)).

Citing the disclosure interest, courts have upheld not only FECA's disclosure provisions but also other parts of FECA — like the provisions plaintiffs challenge here — that prevent evasion of those requirements. *See McConnell*, 540 U.S. at 175 (upholding limit on parties soliciting donations to tax-exempt groups because otherwise "parties would avoid FECA's source and amount limitations, as well as its disclosure restrictions"); *Stop This Insanity, Inc. v. FEC*, 761 F.3d 10, 15 (D.C. Cir. 2014) (upholding solicitation and expenditure limits on corporate connected political committees because they preserve the effectiveness of "disclosure requirements [that] Appellants are endeavoring to avoid"), *petition for cert. filed*, -- U.S.L.W. ---- (U.S. Sept. 29, 2014) (No. 14-____).

C. Plaintiffs Have Failed to Rebut the FEC's Showing That the Six-Month Period and the $2,600 Contribution Limit Are Closely Drawn

Stop PAC admits that intermediate, closely-drawn scrutiny applies to the six-month period and the $2,600 contribution limit. (Pls.' Resp. at 14.) Unlike strict scrutiny, closely-drawn scrutiny does not require Congress to use the least restrictive means to achieve its goals. *McCutcheon*, 134 S. Ct. at 1444. Yet in arguing that the six-month period is not closely drawn, plaintiffs repeatedly and incorrectly claim that the provision is invalid because it applies to some new PACs that do not present risks of circumvention. (Pls.' Resp. at 13-15.) Plaintiffs even go as far as to suggest that the six-month period should apply only to a smaller set of PACs that present an "actual threat or risk" of circumvention. (*Id*. at 14.) But closely drawn scrutiny does not demand this level of precision.

In *Buckley*, the Supreme Court held that the $2,600 contribution limit was closely drawn to prevent the risk and appearance of corruption even though "most large contributors do not seek improper influence[.]" 424 U.S. at 29. The Court explained, first, that "it is difficult to isolate suspect contributions" after the fact, and so a bright-line preventative rule works to limit the overall risk. *Id.* at 30. Second, limiting the *appearance* of corruption "requires that the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated." *Id.* As for the amount of those limits, the Court held that it had "no scalpel to probe" their ideal level under closely drawn scrutiny. *Id.*

Closely drawn scrutiny similarly establishes the degree of fit required between the six-month period and the important interests it serves. That bright-line time period is closely drawn to prevent circumvention of the $2,600 limit even though not *every* new PAC to which it applies presents substantial risks of circumvention. It would be difficult if not impossible to identify in advance which new PACs are circumvention risks and apply the six-month period only to them. The FEC's evidence shows that the 51-contributor requirement is an insufficient proxy for this

determination given the existence of PACs like Stop PAC.[6] (*See* FEC SJ Br. at 16-18.) The evidence also shows that new PACs *as a whole* present an increased risk of circumvention relative to older PACs. (*Id.* at 13-18; FEC Resp. at 15-21; *supra* Part III.A.) Because the circumvention risk is inherent in new PACs, the six-month period is closely drawn to prevent new PACs from forming on the eve of elections and almost immediately obtaining the increased $5,000 limit. Similarly, *Buckley* upheld limits on large contributions because they are "inherent[ly]" a corruption risk, even though "most large contributors do not seek improper influence." 424 U.S. at 29-30.

Stop PAC also inappropriately attempts to fine tune the length of the six-month period by proposing numerous allegedly less restrictive means that it thinks Congress should have used instead to promote its disclosure interest. (Pls.' Resp. at 13 n.5.) But just as a court has no scalpel to probe the precise level of a contribution limit under closely drawn scrutiny, a court cannot micromanage the precise length of the six-month period. (FEC SJ Br. at 21.) In fact, that length approximates the period of time during which candidate supporters are likely to focus more on elections and may be motivated to form dummy-like PACs. The length of the six-month period is also closely drawn to prevent circumvention of FECA's PAC-disclosure requirements, since six months is also the longest a PAC may go without filing a disclosure report. *See* 52 U.S.C. § 30104(a)(4)(A).

IV. PLAINTIFFS HAVE FAILED TO REBUT THE FEC'S SHOWING THAT NEITHER THE $2,600 CONTRIBUTION LIMIT NOR THE LIMITS ON MULTICANDIDATE PAC CONTRIBUTIONS TO PARTIES VIOLATE THE FIFTH AMENDMENT

A. Plaintiffs Do Not Even Attempt to Show FECA Discriminates Against Them

Plaintiffs' equal protection claims fail at the very outset because it is *their burden* to show that they were "treated differently from others with whom [they are] similarly situated and

[6] Indeed, in suggesting that the six-month period is underinclusive, plaintiffs concede that PACs with more than 50 contributors and which have made five contributions could display "suspicious or concerning . . . conduct" justifying regulation. (Pls.' Resp. at 15.)

that the unequal treatment was the result of intentional or purposeful [government decision]," but they cannot meet that burden. *Sansotta v. Town of Nags Head*, 724 F.3d 533, 542 (4th Cir. 2013) (second alternation in original). Plaintiffs do not deny that this is the relevant standard. They do not dispute that to determine whether FECA has discriminated against new PACs or multicandidate PACs, this Court must look to the effect of the statute as a whole on plaintiffs. (FEC SJ Br. at 23 (citing *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 200 (1981).) Plaintiffs do not contest that when considered as a whole, FECA bestows many advantages on all PACs that other contributors do not share. (*Id.* at 23-24.) And finally, plaintiffs do not deny that Stop PAC (when it was a new PAC) and the Tea Party Fund each enjoy benefits that the other wants — a fact that undermines both entities' claims that they suffer as a result of discriminatory animus. (*Id.*)

Plaintiffs' only response to the FEC's argument that FECA does not discriminate against new PACs or multicandidate PACs appears to be their repeated assertions (often in point headings) that FECA is discriminatory. (Pls.' Resp. at 2, 6, 11, 19-20, 21.) This is clearly not enough for plaintiffs to demonstrate that they were discriminated against and thus their claims fail on this ground alone. *See Cal. Med. Ass'n*, 453 U.S. at 200.[7]

B. Plaintiffs Offer No Evidence Showing New PACs and Multicandidate PACs Are Similarly Situated

Without citing a single piece of evidence, plaintiffs assert no less than seven times in their response that new PACs and multicandidate PACs are "materially identical" and "similarly situated," as if through repetition this *ipse dixit* will become true. (Pls.' Resp. at 3, 6-7, 10-11, 18-20.) Plaintiffs had the same opportunity as the FEC to take discovery. And yet all they offer are their assertions, which cannot carry their burden to prove that they were "treated differently from others with whom [they are] similarly situated." *Sansotta*, 724 F.3d at 542.

[7] Plaintiffs also do not deny that the Alexandria Republican City Committee's claim should be dismissed, since it has admitted in discovery that FECA does not treat it differently from any other local party committee. (*See* FEC SJ Br. at 24 n.17 (citing FEC Facts ¶ 13).)

Despite plaintiffs' apparent view that this Court should simply accept that new PACs and multicandidate PACs are "identical in every way" (Pls.' Resp. at 7), plaintiffs themselves concede that new PACs and multicandidate PACs can differ greatly. Plaintiffs admit that they "do not contend that *every single* recently registered political committee with 50 contributors that has contributed to five or more candidates is materially identical to *every single* multicandidate PAC." (*Id.* at 19-20.) In fact, Stop PAC and the Tea Party Fund count themselves among those materially differing PACs, as they do not appear to dispute the FEC's showing that they are "'radically different.'" (*Id.* at 19 (quoting FEC SJ Br. at 25).)

Furthermore, plaintiffs describe new PACs and multicandidate PACs in radically different terms when it suits their purposes elsewhere in their response. In their standing argument, plaintiffs paint new PACs as sympathetic "members of the general public — the true grassroots," while at the same time branding multicandidate PACs as "entrenched, longstanding institutional interests." (Pls.' Resp. at 3-4*; see also id.* at 11 (describing multicandidate PACs as "power brokers deeply entrenched within the Beltway establishment").) Plaintiffs likewise describe new PACs and multicandidate PACs in starkly different terms in their complaint. (Am. Compl. at 1 (describing new PACs as "grassroots organizations that have spontaneously mobilized" and multicandidate PACs as "entrenched institutions").)

These statements demonstrate why new PACs and multicandidate PACs are *not* "in all relevant respects alike." *Veney v. Wyche*, 293 F.3d 726, 730-31 (4th Cir. 2002) (internal quotation marks omitted). And the FEC's evidence, which plaintiffs do not materially dispute, shows that new PACs are often unknown commodities that are more likely than established multicandidate PACs to be tools for circumvention created to assist a particular candidate. (FEC SJ Br. at 13-20; FEC Resp. at 15-22; *supra* Part III.A-B.) These differences justify different contribution limits.

C. Plaintiffs Identify No Authority Holding That Making an Increased Campaign Contribution Is a Fundamental Right and So Rational Basis Scrutiny Applies to Their Claims

If the Court finds it necessary to apply any level of constitutional scrutiny to plaintiffs' equal protection claims, rational basis scrutiny is the proper standard. The FEC's opening brief stated that "we are aware of no court that has ever held that making a contribution is a 'fundamental right' for equal protection purposes." (FEC SJ Br. at 26.) In response, plaintiffs have also not identified any such case; yet they still claim that closely drawn scrutiny should apply. (Pls.' Resp. at 18-19.) In support of that contention, they rely on one case involving a content-discriminatory law banning pickets, not contribution limits. (*Id.* at 18 (citing *Police Dep't of the City of Chicago v. Mosley*, 408 U.S. 92, 102 (1972).) They also cite a FECA case where the Supreme Court did what this Court should do: decline to apply any scrutiny since the plaintiffs failed to carry their burden of proving that the FECA contribution limits they challenge discriminate against them in the first place. *Cal. Med. Ass'n*, 453 U.S. at 200.[8]

The fact that courts apply intermediate scrutiny to First Amendment claims against contribution limits does not require that the same level of scrutiny apply in the equal protection context. The Supreme Court has only applied intermediate scrutiny in equal protection cases involving "quasi-suspect" classes. *See, e.g.*, *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 219 (2000) (noting the existence of intermediate scrutiny for "cases involving classifications on a basis other than race"); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (gender); *Mills v. Habluetzel*, 456 U.S. 91, 98 (1982) (illegitimate children). We are aware of no Supreme Court case that has applied intermediate scrutiny to protect something akin to a quasi-fundamental right, and plaintiffs do not assert — and they cannot show — that new PACs or multicandidate PACs are a "suspect" or "quasi-suspect" class. In the absence of such a right or class, the Supreme Court has applied rational basis review.

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[8] Plaintiffs also rely upon a vacated D.C. district court case that applied intermediate scrutiny to an equal protection challenge to FECA's ban on contributions by federal contractors. (Pls.' Resp. at 19 n.8 (citing *Wagner*, 854 F. Supp. 2d at 96, *vacated on jurisdictional grounds*, 717 F.3d at 1017).)

In the only appellate decision of which we are aware in which a court expressly applied a particular level of scrutiny to an equal protection challenge to a contribution limit, that court applied rational basis scrutiny. *See Blount v. SEC*, 61 F.3d 938, 946 n.4 (D.C. Cir. 1995). Plaintiffs here fault the way the plaintiff in *Blount* raised its equal protection claim (Pls.' Resp. at 19 n.8), but plaintiffs do not dispute that the claim was in fact raised, and that the D.C. Circuit did in fact apply rational basis scrutiny. This Court should do the same.

D. Plaintiffs Have Failed to Show That There Is No Rational Connection Between the $2,600 Contribution Limit and Congress's Important Interests in Lessening the Risk of Circumvention and Promoting Disclosure

On rational basis review, it is plaintiffs' burden "to negative every conceivable basis which might support" the laws they claim are unconstitutional. *FCC v. Beach Commc'ns, Inc*., 508 U.S. 307, 315 (1993) (internal quotation marks omitted). Plaintiffs' response does not contest that it was at the very least rational for Congress to require new PACs to comply temporarily with the $2,600 contribution limit to lessen the risks of circumvention and non-disclosure. As the FEC's undisputed evidence shows, this limit is not only rationally related but closely drawn to promoting those important government interests.

E. Plaintiffs Have Failed to Show That There Is No Rational Connection Between the Limits on Multicandidate PAC Contributions to Political Parties and Congress's Important Interests

The Tea Party Fund puts forth very little opposition (*see* Pls.' Resp. at 20-21) to the FEC's showing that the limits on contributions from multicandidate PACs to political parties serve two important government interests (*see* FEC SJ Br. at 27-30). At the outset, the Tea Party Fund does not deny that that those limits "impose minimal burdens on PACs," as the FEC demonstrated in its opening brief. (FEC SJ Br. at 29-30; *see also* FEC Resp. Br. at 27-29.)

Plaintiffs also do not argue that there is no rational connection between the multicandidate-PAC-to-party limits and the government's important interests in lessening the risk and appearance of corruption and ensuring parties have sufficient funds. Congress limited all contributions to political parties to limit the risk and appearance of corruption that the

Supreme Court has recognized may otherwise result. (*See* FEC SJ Br. at 28 (citing *McConnell*, 540 U.S. at 144-45).) Congress then set the particular limit on contributions from "persons" (including individuals and new PACs) to political parties at a higher level to help the parties maintain sufficient funding to continue to fulfill their unique role in the political process.[9] (*Id.* at 28-29.) Plaintiffs do not dispute that the Constitution required Congress to set contribution limits at levels that would permit the parties to continue to amass the resources necessary for effective advocacy. (*Id.* at 29 (citing *Randall v. Sorrell*, 548 U.S. 230, 247 (2006)).) And plaintiffs do not dispute the FEC's showing that increasing the limit on contributions from persons to parties has in fact worked to provide the parties with needed resources. (*Id.*) Nor do plaintiffs deny that as a result, Congress was justified in concluding that increases to other limits on contributions to political parties have been unnecessary for candidates and parties to advocate effectively. (*Id.*) When determining how to enhance party funding in light of 2002's soft-money ban, Congress rationally decided to increase the limits on contributions from individuals to parties. (*Id.* at 29.) Plaintiffs do not dispute the FEC data demonstrating that multicandidate PACs have generally focused their efforts on directly supporting candidates, not parties. (*Id.* At 30 (citing FEC Facts ¶¶ 32-33).) Nor do plaintiffs dispute the FEC's showing that multicandidate PACs have historically provided parties with relatively little funding as compared to individuals. (*Id.* at 29 & n.22.) Plaintiffs even concede that "individuals play an 'important role . . . in funding political-party activity.'" (Pls.' Resp. at 21 (quoting FEC SJ Br. at 28).)

The *only* objection plaintiffs raise to the FEC's showing is that plaintiffs claim the reason that individuals have played an important role in party funding is "because the FEC allows them to contribute twice as much." (Pls.' Br. at 21.) But the data the FEC relies upon is from the 2001-2002 period when individuals and PACs could make *unlimited* soft-money donations to the

[9] The FEC never argued that Congress imposed limits on contributions to parties in the first place to allow parties to maintain their important role in the political system, as plaintiffs seem to suggest. (Pls.' Resp. at 21.) Preventing the risk and appearance of corruption, of course, is a constitutionally sufficient reason for imposing contribution limits, as plaintiffs recognize.

parties. (*See* FEC SJ Br. at 29 & nn.22, 24 (citing FEC Press Release, *Party Committees Raise More Than $1 Billion in 2001-2002* (Mar. 20, 2003).) Even at that time, individuals contributed far more to parties than multicandidate PACs did.[10] Accordingly, Congress was justified in setting increased limits on contributions from persons to political parties but declining to do the same for other entities including multicandidate PACs. The party limits are thus constitutional under either rational basis or intermediate scrutiny.

CONCLUSION

For the foregoing reasons, the FEC's motion for summary judgment should be granted.

Respectfully submitted,

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October 9, 2014

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[10] *See* http://www.fec.gov/press/press2003/20030320party/20030103party.html. For example, the third table featured in this press release, called "Democratic Nonfederal Accounts," indicates that in 2001 and 2002 the Democratic National Committee raised in excess of $32 million from individuals but just over $500,000 from multicandidate PACs. *Id*.

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

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

CERTIFICATE OF SERVICE

I hereby certify that on October 9, 2014, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing to the following counsel:

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