No. 15-1455

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

STOP RECKLESS ECONOMIC INSTABILITY CAUSED BY DEMOCRATS, TEA PARTY LEADERSHIP FUND, and ALEXANDRIA REPUBLICAN CITY COMMITTEE,

Plaintiffs-Appellants,

and

AMERICAN FUTURE PAC,

Intervenor-Appellant,

v.

FEDERAL ELECTION COMMISSION,

Defendant-Appellee.

APPELLANTS' MOTION FOR PANEL REHEARING AND REHEARING *EN BANC*

Introduction and Statement of Purpose

Appellants respectfully request panel rehearing and rehearing *en banc* of the district court's grant of summary judgment to Appellee Federal Election Commission ("FEC") on Count III because, in counsel's judgment, the panel opinion is in conflict with decisions of the U.S. Supreme Court and the conflict is not addressed in the opinion. *See* Fed. R. App. P. 35(b)(1)(A), 4th Cir. R. 40(b)(iii). Specifically, the panel's ruling concerning Count III conflicts with two holdings in the Supreme Court's latest campaign finance case: *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014).

1. In *McCutcheon*, 134 S. Ct. at 1448-49, the Court invalidated aggregate contribution limits on the total amount of money a contributor may give to all recipients during an election cycle, *see* 52 U.S.C. § 30116(a)(3). In the instant case, the panel concluded that Congress may reduce by half the amount that certain groups may contribute to local, state, and national political parties once those groups have been registered with the FEC for six months and qualify as "multicandidate political committees" ("MPCs").[1] Slip op. at 30. This reduction in limits on contributions to political parties is constitutional, the panel concluded, because the same statute also increases the amount that those groups may contribute to candidates upon reaching that six-month mark. *Id*. Thus, the panel justified a reduction in certain contribution limits as a tradeoff for an increase in other limits. This reasoning is directly contrary to *McCutcheon*'s holding that Congress may not limit the amount that a contributor may give to certain recipients, simply because that contributor may give more money to others. *McCutcheon*, 134 S. Ct. at 1448-49, 1452; *see also Davis v. FEC*, 554 U.S. 724, 739 (2008).

2. In *McCutcheon*, the Court also reiterated that it has "identified only one legitimate governmental interest for restricting campaign finances: preventing

[1] A "multicandidate political committee" (often referred to as a "multicandidate PAC") is a political committee that has received contributions from more than 50 persons, made contributions to five or more candidates, and has been registered with the FEC for at least six months. 52 U.S.C. § 30116(a)(4).

corruption or the appearance of corruption." 134 S. Ct. at 1450; *accord Davis*, 554 U.S. at 741-42. The panel, however, held that Congress was justified in reducing the amount that MPCs may contribute to political parties after they have been registered for six months ***because*** the amount MPCs may contribute to candidates simultaneously increases at that point. Slip op. at 30. The panel did not explain why an MPC poses a greater risk of corruption with regard to political parties after it has been registered for six months than throughout the first six months of its existence. Nor did it explain why MPCs pose a greater risk of corruption with regard to political parties than with regard to candidates (for which MPCs' contribution limits are increased after six months). Indeed, the panel ruling literally does not even mention the word "corruption." Thus, the panel ruling violates *McCutcheon*'s imperative that contribution limits are valid only when reasonably tailored to combating actual or apparent *quid pro quo* corruption. *McCutcheon*, 134 S. Ct. at 1450. The bizarre and internally inconsistent statutory scheme governing MPCs does not further any anti-corruption interest; to the contrary, it appears to have been an unintended accident that abridges First Amendment rights.

Background

1. Statutory Framework—Count III is an Equal Protection challenge to Congress' disparate treatment of two materially identical groups: MPCs, and

political committees that meet all the requirements set forth in 52 U.S.C. § 30116(a)(4) for MPC status, except they have been registered for less than six months (hereafter, "Newer Committees"). Slip op. at 29-30. Federal law imposes the following disparate contribution limits upon these groups:

Contribution Recipient	**Identity of Contributor**	
	Newer Committees	MPCs
Candidate	$2,700 per election	$5,000 per election
State or Local Political Party	$10,000 annually	$5,000 annually
National Political Party	$33,400 annually	$15,000 annually

See 52 U.S.C. § 30116(a)(1) (limits for Newer Committees), (a)(2) (limits for MPCs); *see also* Slip op. at 5 n.1 (noting that some Newer Committee limits are adjusted for inflation).

This chart demonstrates a puzzling feature of the current scheme: once a Newer Committee has been registered for six months, thereby qualifying as an MPC, the amount it may contribute to ***candidates*** nearly doubles, while the amount it may contribute to ***political parties*** is slashed by half or more. Critically, as discussed in Part II below, the panel did not identify any reason—much less any constitutionally valid reason—for this inconsistent treatment.

2. Plaintiffs-Appellants' Constitutional Challenge—Count III alleged that the Equal Protection component of the Fifth Amendment's Due Process

Clause, *see Bolling v. Sharpe*, 347 U.S. 497, 499 (1954), prohibits Congress from cutting the amount that certain committees may contribute to political parties once they have been registered for six months, thereby allowing MPCs to contribute only half as much to political parties as Newer Committees. Such inconsistent treatment is especially unjustified in light of Congress' determination that Newer Committees must wait until they qualify as MPCs before being able to contribute the full statutory amount of $5,000 per election to candidates.

The Supreme Court has held that statutes which impose different restrictions on similarly situated entities concerning their ability to exercise their First Amendment rights, including the right to make campaign contributions, are subject to intermediate scrutiny. *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 200 (1981) (hereafter, "*CalMed*").[2] Appellants argued that the arbitrary discrimination in limits on contributions to political parties from MPCs and Newer Committees cannot survive such heightened scrutiny. *Slip op.* at 27. Such discrimination is especially senseless because it places much lower limits on MPCs than on Newer Committees, despite the fact that MPCs are established entities. Unlike Newer Committees, MPCs have filed numerous reports with the FEC disclosing their

[2] *Accord Wagner v. FEC*, 854 F. Supp. 2d 83, 96 (D.D.C. 2012), *vacated on jurisdictional grounds*, 717 F.3d 1007 (D.C. Cir. 2013); *see also Police Dep't of the City of Chicago v. Mosley*, 408 U.S. 92, 102 (1972); *cf. Austin v. Mich. State Chamber of Comm.*, 494 U.S. 652, 667-68 (1990), *overturned on other grounds*, *Citizens United v. FEC*, 558 U.S. 310 (2010).

finances and thus, in the FEC's view, should pose less of a corruption risk. *See, e.g.*, Response Brief of Appellee Federal Election Commission, Doc #21, at 38 (Aug. 10, 2015) ("[A] PAC that has existed for at least six months is more likely to be a *bona fide* group. After six months, a PAC is more likely to be a known commodity to donors and donees. . . . A six-month old PAC is also likely to have more members, more contributors, more contributions to candidates, and . . . will have publicly disclosed information to the FEC about itself.").

3. The panel ruling—The panel affirmed the district court's grant of summary judgment to the FEC on Count III. Relying exclusively on the Supreme Court's 35-year-old ruling in *CalMed*, the panel rejected the MPC's Equal Protection claim because:

> [T]he ***decrease*** in the amount of contributions that political committees, once they become MPCs, can make annually to state party committees or their local affiliates (from $10,000 to $5,000) and to national party committees (from $32,400 to $15,000) is more than counterbalanced by the ***increase*** in the limits in the amount of contributions that MPCs can make to individual candidates (from $2,600 to $5,000). . . . Appellants cannot demonstrate that [federal law] discriminates against MPCs . . . .

Slip op. at 30 (emphasis in original).

Summary of Argument

The panel overlooked the numerous conflicts between its reasoning and the Supreme Court's recent holding in *McCutcheon*, 134 S. Ct. 1434, in which the Court invalidated aggregate contribution limits. *McCutcheon* expressly repudiates

the notion that Congress can impose tradeoffs upon contributors concerning the amounts they may contribute to different recipients. *Id*. at 1448-49, 1452. *McCutcheon* likewise rejected the panel's premise that Congress may validly seek to limit or reduce the amount that a contributor may give to one recipient, on the grounds that the contributor gave more money to other recipients. *Id*.

The panel's reasoning also effectively exempts the Government from any obligation to articulate a valid purpose for reducing the amount that MPCs may contribute to local, state, and national political parties once they have been registered for six months. The panel held that limits on contributions from MPCs to political parties may be slashed ***because*** Congress simultaneously increased the limits on contributions from MPCs to candidates. *McCutcheon* expressly reaffirmed, however, that contribution limits are valid only if they further the Government's interest in fighting actual or apparent *quid pro quo* corruption. 134 S. Ct. at 1441.

Regardless of whether the "total" amount of liberty MPCs enjoy has been reduced, the Government still must articulate an anti-corruption rationale for this reduction in limits. Under *McCutcheon*, Congress may not restrict the amount that a committee may give to certain recipients, simply to limit the overall amount of money it contributes over the course of an election cycle. *Id*. at 1450. *McCutcheon*'s reasoning makes it virtually impossible for the Government to

demonstrate that a contribution from a political committee to a political party poses a greater risk of corruption once that committee has been registered for six months. *Id*. at 1452.

ARGUMENT ON PETITION FOR REHEARING AND REHEARING EN BANC

I. THE PANEL'S REASONING IS INCONSISTENT WITH *MCCUTCHEON*'S REPUDIATION OF AGGREGATE CONTRIBUTION LIMITS

In *McCutcheon v. FEC*, 134 S. Ct. 1434, the Supreme Court invalidated 52 U.S.C. § 30116(a)(3)'s aggregate contribution limits on the total amount a person may contribute to all candidates, and all political committees, over the course of an election cycle. The Court recognized that, once a person had contributed the maximum permissible amount to nine candidates, she would hit her aggregate contribution limit and be prohibited from making any more candidate contributions. *McCutcheon*, 134 S. Ct. at 1448-49. It explained:

> It is no answer to say that the individual can simply contribute less money to more people. To require one person to contribute at lower levels than others because he wants to support more candidates or causes is to impose a special burden on broader participation in the democratic process. . . . [T]he Government may not penalize an individual for 'robustly exercis[ing]' his First Amendment rights.

Id. at 1449 (quoting *Davis v. FEC*, 554 U.S. 724, 739 (2008)).

Thus, *McCutcheon* rejects the notion that the Government can force contributors to make tradeoffs among the recipients of their contributions. In this

case, the panel recognized that the law imposes such a tradeoff on MPCs: although the limits on contributions from MPCs to candidates increases after six months, it is only at the cost of having the limits on contributions from MPCs to political parties dramatically reduced. *Slip op*. at 30. *McCutcheon* does not permit the Government to require an MPC "to contribute at lower levels" to political parties simply because it has the opportunity to "robustly exercis[e]" its First Amendment rights by giving more to candidates. *McCutcheon*, 134 S. Ct. at 1449 (quotation marks omitted). The panel ruling, however, did not address *McCutcheon*.

The Court's reasoning is similarly inconsistent with *Davis v. FEC*, 554 U.S. 724 (2008). Suppose Congress had enacted a statute subjecting MPCs to the same contribution limits as Newer Committees, but stating that, if an MPC ***chooses*** to contribute between $2,701-$5,000 per election to a candidate, then the amount it may contribute to political parties gets cut in half. Under this scheme, MPCs that choose to exercise their right to contribute additional funds to candidates "must shoulder a special and potentially significant burden if they make that choice." *Davis*, 554 U.S. at 739. The resulting reduction in limits on contributions to political parties would be a "penalty on any [committee] who robustly exercises [its] First Amendment right" by giving additional funds to candidates. *Id*. at 738-39.

Under *Davis*, 554 U.S. at 739, such a "statutorily imposed choice" would likely be held unconstitutional due to the "resulting drag on First Amendment rights." *Davis* prohibits the Government from requiring people to choose between "abid[ing] by a limit" on First Amendment rights and "endur[ing] [a] burden that is placed on that right by the activation of a scheme of discriminatory contribution limits." *Id.* at 740; *cf. Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 736, 739 (2011) (holding that a state may not "forc[e] that choice—trigger matching funds, change your message, or do not speak" upon candidates or PACs).

The challenged provisions in this case are even harsher than the hypothetical statute discussed above, because MPCs do not have a choice. Congress has forced upon them increased limits on contributions to candidates while dramatically reducing their ability to contribute to political parties—even for MPCs that wish to associate with parties rather than individual candidates. In the course of allowing MPCs to more "robustly exercise [their] First Amendment rights" through candidate contributions, Congress has simultaneously required them to "endure" a new "burden" on their ability to associate with political parties. *Davis*, 554 U.S. at 738-39. Such a scheme is not permissible because it is foisted upon unwilling MPCs, rather than the result of a "statutorily imposed choice." *Id.*

Because the panel ruling endorses the type of tradeoffs among First Amendment activities that *McCutcheon* and *Davis* emphatically reject, without recognizing or addressing these issues, this Court should grant rehearing or rehearing *en banc*.

II. THE PANEL'S REASONING IS INCONSISTENT WITH *MCCUTCHEON*'S HOLDING THAT CONTRIBUTION LIMITS ARE VALID ONLY WHEN TIED TO COMBATTING ACTUAL OR APPARENT *QUID PRO QUO* CORRUPTION

The panel's ruling also should be reconsidered because it relieves the Government of its obligation to articulate a constitutionally valid purpose for reducing the amount that MPCs may contribute to political parties after they have been registered for six months. *McCutcheon* reiterated that "Congress may regulate campaign contributions to protect against corruption or the appearance of corruption. . . . ***Any regulation must instead target*** what we have called 'quid pro quo' corruption or its appearance." *McCutcheon*, 134 S. Ct. at 1441 (emphasis added); *accord Davis*, 554 U.S. at 741 ("[P]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances" (quoting *Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496-497 (1985))).

Here, the panel did not identify any anti-corruption interest that is served by slashing the amount that an MPC may contribute to political parties after the MPC

has been registered for six months. *Cf.* Slip op. at 29-30. Instead, the panel upheld that reduction ***because*** the amount MPCs may contribute to candidates simultaneously increases at that point. *Id*. at 30. The Supreme Court has never held, however, that a group's First Amendment right to make political contributions to certain recipients may be curtailed simply because Congress has chosen to expand its ability to contribute to other recipients. Indeed, as discussed above, such tradeoffs run counter to *McCutcheon* and *Davis*.

Moreover, the panel does not explain why a contribution of $10,000 to a local or state party, or $33,400 to a national party, from an MPC is potentially corrupting and therefore may be prohibited, when Congress did not believe that such contributions from materially identical groups that have been registered for less than six months raised enough of a risk of corruption to prohibit. The Supreme Court's campaign finance rulings consistently reject such selective prohibitions.

McCutcheon, for example, holds:

> 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. If there is no corruption concern in giving nine candidates up to $5,200 each, it is difficult to understand how a tenth candidate can be regarded as corruptible if given $1,801, and all others corruptible if given a dime.

134 S. Ct. at 1452.

Likewise, in *Davis*, the Court held:

> [G]iven Congress' judgment that liberalized limits for non-self-financing candidates do not unduly imperil anticorruption interests, it is hard to imagine how the denial of liberalized limits to self-financing candidates can be regarded as serving anticorruption goals sufficiently to justify the resulting constitutional burden.

554 U.S. at 741.

In this case, Congress's selection of $10,000 and $33,400 as base limits on contributions from Newer Committees to political parties "indicates its belief that contributions of th[ose] amount[s] or less do not create a cognizable risk of corruption." 134 S. Ct. at 1452. "If there is no corruption concern" in such contributions, "it is difficult to understand how" identical contributions from the very same entities "can be regarded as corruptible" once those entities hit the six-month mark and qualify as MPCs. *Id.* "Given Congress' judgment that liberalized limits" for Newer Committees "do not unduly imperil anticorruption interests, it is hard to imagine how the denial of liberalized limits to [materially identical MPCs] can be regarded as serving anticorruption goals sufficiently to justify the resulting constitutional burden." 554 U.S. at 741.

Thus, the reduction in limits on contributions from MPCs to political parties that occurs at the six-month mark does not further any valid anti-corruption interest. Contributions that were permissible when made by a committee that has been registered for only five months do not become more suspect, and therefore

more susceptible to regulation, once the committee has been registered for seven months, or seven years. Neither the panel nor the FEC has identified any reason why such longer-established committees pose more of a risk of corruption with regard to political parties than their newer counterparts. Quite the contrary—the longer a committee has existed, the more that is known about it, the more FEC reports it has filed, the more "established" it becomes, the more of a reputation it develops, and the more opportunity the FEC has to investigate it. Response Brief of Appellee Federal Election Commission, Doc #21, at 38 (Aug. 10, 2015). Likewise neither the panel nor the FEC has explained why this risk of corruption increases ***with regard to political parties*** after six months, while simultaneously decreasing ***with regard to candidates*** at that point (thereby justifying an increase in limits on contributions from MPCs to candidates).

Thus, while the panel recognized that federal campaign finance law forces MPCs to essentially "trade off" their ability to contribute to political parties in exchange for a greater ability to contribute to candidates, *slip op*. at 30, it failed to identify any constitutionally valid reason for the reduction in limits on contributions to political parties that tradeoff entails. The Supreme Court has never held that a limit on one type of contribution may be lowered solely to offset additional rights granted by an increase in a different limit. Such tradeoffs in freedom are anathema to the First Amendment.

CONCLUSION

Because the panel ruling does not address, and is inconsistent with, the Supreme Court's holdings in *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014) (and *Davis v. FEC*, 554 U.S. 724 (2008)), Plaintiffs-Appellants respectfully request that this Court grant either panel rehearing, or rehearing *en banc*.

Respectfully submitted,

/s/ Michael T Morley

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CERTIFICATE OF SERVICE

I certify that on April 8, 2016, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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