UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

STOP RECKLESS ECONOMIC INSTABILITY CAUSED BY DEMOCRATS, *et al.*, *Plaintiffs*, and AMERICAN FUTURE PAC, *Intervenor-Plaintiff*, v. FEDERAL ELECTION COMMISSION, *Defendant*.	Civ. No. 1:14-397 (AJT-IDD) Judge Anthony John Trenga Magistrate Judge Ivan D. Davis

REBUTTAL MEMORANDUM IN SUPPORT OF PLAINTIFFS' AND AMERICAN FUTURE PAC'S MOTION FOR SUMMARY JUDGMENT

/s/ Michael T. Morley
Michael T. Morley, Esq.
Virginia State Bar # 65762
COOLIDGE-REAGAN FOUNDATION
1629 K Street, Suite 300
Washington, DC 20006
Phone: (202) 603-5397
Fax: (202) 331-3759
E-mail: Morley@coolidgereagan.org
Attorney for Plaintiffs and Putative Plaintiff-Intervenor American Future PAC

/s/ Dan Backer
Dan Backer, Esq.
Virginia State Bar # 78256
DB CAPITOL STRATEGIES PLLC
203 South Union Street, Suite 300
Alexandria, VA 22314
Phone: (202) 210-5431
Fax: (202) 478-0750
E-mail: DBacker@DBCapitolStrategies.com
Attorneys for Plaintiffs Stop PAC, Tea Party Leadership Fund, and ARCC

Jerad Najvar*
NAJVAR LAW FIRM
4151 Southwest Freeway, Suite 625
Houston, TX 77027
Phone: (281) 404-4696
E-mail: jerad@najvarlaw.com
Attorney for Intervenor-Plaintiff American Future PAC
*Motion for *pro hac vice* admission forthcoming

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

ARGUMENT

Many laws are, to be blunt, messy. They incorporate arbitrary cut-offs, hastily drafted or thoughtlessly overbroad language, provisions that lie in logical tension with each other, and compromises based more on expediency than political principle. Concessions that make little sense in light of a bill's overarching purposes often must be made to appease certain interest groups, to allow it to progress through the legislative process. *See* William N. Eskridge, Jr., *Vetogates,* Chevron, *Preemption*, 83 NOTRE DAME L. REV. 1441, 1449-50 (2008). By the time a bill passes through committees in both Houses of Congress, it has been debated and amended on the floors of two legislative chambers, and the White House has weighed in, it often becomes a pastiche of exemptions, exceptions, cutoffs, and other provisions that hang together uncomfortably, if at all. And, in general, all of that is constitutionally permissible. *See Williamson v. Lee Optical*, 348 U.S. 483 (1955).

When a law restricts, limits, or burdens constitutional rights, however, the rules are different. Congress is not as free to treat similarly situated entities differently, or allow them to exercise their rights to different extents. *Police Dep't of the City of Chicago v. Mosley*, 408 U.S. 92, 102 (1972); *see also Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 200 (1981) ("*CalMed*"). Rather, the Government must be able to demonstrate that any distinctions the law imposes on the ability of similar entities to engage in constitutionally protected conduct are demonstrably tailored to furthering important government interests.

It is undisputed that contribution limits burden First Amendment rights and are subject to such intermediate scrutiny (*i.e*, the "closely drawn" test). *Buckley v. Valeo*, 424 U.S. 20, 25, 28-29 (1976); *see also Cal. Med. Ass'n*, 453 U.S. at 200. And to survive such scrutiny, the FEC must prove that the limits and distinctions it seeks to defend are closely drawn, *Buckley*, 424 U.S. at 25,

to preventing actual or apparent *quid pro quo* corruption or circumvention of otherwise permissible contribution limits, *id*. at 26; *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 456 (2001) (hereafter, "*Colorado II*"). The FEC has failed to establish that either: (i) the six-month waiting period on certain political committees' ability to contribute the maximum statutory amount to candidates, or (ii) the precipitous drop in limits on contributions to national, state, and local parties that occurs once those committees reach that six-month mark, survive such heightened scrutiny.

I. THE GOVERNMENT HAS FAILED TO PROVIDE A CONSTITUTIONALLY ADEQUATE BASIS FOR SLASHING THE AMOUNT THAT CERTAIN POLITICAL COMMITTEES MAY CONTRIBUTE TO POLITICAL PARTY COMMITTEES ONCE THEY ARE REGISTERED FOR SIX MONTHS

This Court should invalidate 2 U.S.C. § 441a(a)(1)(B), (D); § 441a(a)(2)(B)-(C); and § 441a(a)(4) to the extent these provisions allow certain political committees[1] that have been registered for less than six months to contribute $32,400 to national political parties and $15,000 to state and local political parties, while permitting such committees that have been registered for more than six months to contribute only $15,000 and $5,000, respectively to those recipients.

The FEC's Response Brief contends that the requirements for multicandidate status set forth in 2 U.S.C. § 441a(a)(4) are protections intended to ensure that only *bona fide* groups, and not sham entities or "'dummy' political committees," are able to take advantage of multicandidate PAC status. *See* FEC Resp. Br. at 16. Under the current law, however, the following types of political committees are entitled to contribute the maximum statutory amount of $32,400 to a national political party committee and $15,000 to a state or local political party committee:

- a two-day old political committee;

[1] For brevity, the phrase "certain political committees" refers to non-candidate, non-party committees that have more than 50 contributors and have contributed to five or more candidates.

- a political committee that has received only a few contributions;
- a political committee that has not contributed to any federal candidates, or any entities other than the national, state, or local party committee to which it wishes to make the large contribution.

Under the statutory scheme, there is only one type of group that finds its ability to contribute to national, state, and local political parties hobbled: multicandidate PACs. As the FEC itself eloquently explains, a multicandidate PAC "is a broad-based group that has contributed to dozens of candidates with funds collected from [numerous] contributors." FEC Resp. Br. at 25. PACs tend to be "well known" because they have "been publically scrutinized in part because [they have] been disclosing information" about themselves in accordance with the FEC's reporting requirements. *Id*. Indeed, the FEC spends the overwhelming majority of its brief explaining why multicandidate PACs purportedly pose ***less*** of a threat of corruption and circumvention than more recently formed political committees that have identical numbers of contributors and supported candidates. Thus, the FEC cannot credibly contend that subjecting multicandidate PACs to ***lower*** limits on contributions to political parties than newly formed entities, entities with only a handful of contributors, and entities that have not made any contributions somehow furthers the Government's interest in combatting *quid pro quo* corruption or circumvention.

By allowing most political committees to contribute $32,400 to national political party committees and $15,000 to state and local party committees, Congress necessarily has determined that such contributions do not raise a sufficient risk of *quid pro quo* corruption or circumvention to warrant prohibiting. *McCutcheon v FEC*, 134 S. Ct. 1434, 1452 (2013) ("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."). To justify the imposition of lower limits on multicandidate PACs,

the FEC must point to some relevant distinction about them that would cause contributions in those same amounts to lead to a greater, intolerable risk of corruption or circumvention. The FEC has made no such showing.

The FEC first contends that multicandidate PACs have alternate ways of associating with and expressing support for candidates, such as contributing lesser amounts, volunteering, or engaging in independent expenditures. FEC Resp. Br. at 28-29. The Court already took into account the availability of such alternative methods of association and speech in settling on an intermediate level of scrutiny, rather than strict scrutiny, for contribution limits. *See Buckley*, 424 U.S. at 22, 25 (imposing "closely drawn" scrutiny on contribution limits because they "limit one important means of associating with a candidate or committee, but leave the contributor free to become a member of any political association and to assist personally in the association's efforts on behalf of candidates"); *see also McCutcheon*, 134 S. Ct. at 1449 (recognizing that the First Amendment burdens of contribution limits are even worse when the regulated entities lack "ready access to alternative avenues for supporting their preferred politicians and policies"). Such alternatives do nothing to show that the Government has a constitutionally valid basis for cutting the contribution limits for certain political committees once they happen to have been registered for six months.

Second, the FEC contends that cutting the amount that multicandidate PACs may contribute to political party committees is constitutional because, compared to individuals, "multicandidate PACs contribute relatively little to political party funding and spend far more of their resources on supporting candidates directly." FEC Resp. Br. at 29. In short, the FEC is defending imposing lower contribution limits on multicandidate PACs than on individuals because multicandidate PACs contribute less to political party committees than individuals. Such

reasoning is both tautological and irrelevant; one wonders what the statistics would be in the absence of disparate and discriminatory contribution limits. In any event, the aggregate amount that multicandidate PACs collectively contribute to national political parties overall has no bearing on whether limiting each individual multicandidate PAC's ability to contribute to political parties is reasonably tailored to furthering the Government's anti-corruption and anti-circumvention interests.

Finally, the Government concludes by essentially arguing that Congress was justified in slashing the amount that certain committees may contribute to political party committees because there's already enough money in politics. FEC Resp. Br. at 29-30 ("[F]urther increases in the limits on contributions to parties were not necessary since the parties have been more than able to raise needed resources . . . ."). The Government may not defend contribution limits on the generalized grounds that, overall, "enough" First Amendment activity is occurring already, or that there is "too much" money involved in politics. As *Buckley* itself teaches, "[T]he mere growth in the cost of federal election campaigns in and of itself provides no basis for governmental restrictions on the quantity of campaign spending and the resulting limitation on the scope of federal campaigns. The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise." *Buckley*, 424 U.S. at 57; *cf. Davis v. FEC*, 554 U.S. 724, 741-43 (2008).

It is also noteworthy that the FEC makes no serious attempt to argue that this precipitous drop in contribution limits is at all reasonably tailored. *Cf*. FEC Resp. Br. at 30. Nor can it. This reduction in contribution limits is the very ***opposite*** of tailored; it universally applies to ***all*** multicandidate PACs, ***regardless*** of their lack of prior campaign finance violations, the complete absence of any indication in their FEC filings that circumvention may be afoot, or their persistent,

bona fide participation in election after election, contributing to a wide range of candidates and political committees. The complete absence of any attempt to impose any limits on the scope of this cut in contribution limits simply underscores its unconstitutionality.

In short, the FEC's position is that, when an entity with 50 contributors and that has contributed to 5 candidates contributes $30,000 to a national political party committee, we cannot know whether that contribution raises enough of a risk of corruption or *quid pro quo* circumvention to warrant prohibiting ***unless*** we first ascertain whether the committee has been registered for six months. Only ***after*** determining that the entity is a multicandidate PAC—in the FEC's words, that it is a "broad-based group" that has "collected funds from [numerous] contributors," has "contributed to dozens of candidates," is "well known," has "been disclosing information" to the FEC, and has been "publically scrutinized"—can we be confident that its contribution must be prohibited. FEC Resp. Br. at 25. In contrast, were the $30,000 contribution to come from ***any other*** type of PAC—including a committee identical in every way to our hypothetical multicandidate PAC, but registered for less than six months—it would be permissible. Such arbitrary and irrational distinctions cannot survive rational basis scrutiny, must less any form of heightened or intermediate scrutiny. Thus, this Court should invalidate the disparate and discriminatory limits on contributions to national, state, and local political party committees as they apply to non-candidate, non-party committees with more than 50 contributors and that have contributed to five or more candidates.

II. THE SIX-MONTH WAITING PERIOD ON CANDIDATE CONTRIBUTIONS VIOLATES THE FIRST AND FIFTH AMENDMENTS

This case ultimately boils down to circumvention. The FEC contends that allowing certain political committees that have been registered for less than six months to contribute only $2,600 per election to a candidate, while allowing materially identical committees that have been registered for more than six months to contribute $5,000 per election to a candidate, is a reasonably tailored means of combatting circumvention of other contribution limits.[2] The FEC's entire argument hinges on a faulty conception of "circumvention."

The FEC explains that the six-month waiting period is necessary because, otherwise, "supporters of a candidate could easily start a PAC, quickly satisfy the 51-contributors and five-contributions requirements, and then use the $5,000 contribution authority reserved for broad-based groups to assist that candidate." FEC Resp. Br. at 17. But so what? The FEC fails to explain why a $5,000 candidate contribution from such an entity is suspect, but would be above reproach if the entity happened to be formed more than six months before the election. A political committee that has been registered for six months and qualifies as a multicandidate PAC is free to support as many or as few candidates as it wishes; it even may choose to support only a single candidate in an election. Since the law permits multicandidate PACs to engage in such conduct, there is no basis for labeling another committee that meets § 441a(a)(4)'s contributor and contribution requirements, but has been registered for less than six months, a "sham," "dummy," or circumvention tool.

[2] The FEC also briefly argues that these disparate limits also promote its interest in ensuring adequate disclosure of information about political committees' supporters. FEC Resp. Br. at 21-22. The Supreme Court has never held, however, that the Government may impose contribution limits in order to obtain more information about a committee's contributors. In any event, contribution limits and waiting periods on making certain contributions would be bizarre, hopelessly indirect, and unconstitutionally overbroad tools for seeking to obtain more information from political committees. A more reasonably tailored means of obtaining the information the FEC desires at a particular time would be to simply require the regulated entity to provide such information at that time.

Perhaps the most fundamental problem with the FEC's reliance on an anti-circumvention interest is that the six-month waiting period does not further any such interest as the Supreme Court defined it in *Buckley v. Valeo*. In *Buckley*, the Court held that Congress may impose requirements for qualifying as a political committee in order to "serve the permissible purpose of ***preventing individuals*** from evading the applicable contribution limits by labeling themselves committees." *Buckley*, 424 U.S. at 35-36 (emphasis added); *see also Buckley v. Valeo*, 519 F.2d 821, 857-58 (D.C. Cir. 1975) (en banc), *aff'd in part and rev'd in part*, 424 U.S. 1 (1977) (upholding the six-month waiting period because it "prevent[s] proliferation of dummy committees, each of a ***few persons***, in support of federal candidacies," because "[o]therwise ***two or three persons*** could acquire the $5,000 [multicandidate PAC] contribution authority . . . merely by organizing themselves as a political committee") (emphasis added).[3]

While the six-month waiting period might complement the other requirements for multicandidate PAC status ***in general***, it does not and cannot play such a legitimate circumvention role ***as applied*** to committees that have more than 50 contributors, and have contributed to more than five candidates. ***By definition***, such entities are not "dummy" or "sham" committees that are comprised of a single "individual[]," *Buckley*, 424 U.S. at 35-36, groups of "two or three persons," or "a few persons," *Buckley*, 519 F.2d at 857-58. Rather, the waiting period simply requires such entities to wait six months before being able to exercise their constitutional rights of association

[3] This discussion also confirms that *Buckley* neither considered nor rejected Plaintiffs' specific as-applied challenge to § 441a(a)(4)'s six-month waiting requirement. *Cf.* FEC Resp. Br. at 8-9. The Court held that such a requirement is facially valid as a way of preventing individuals from evading the applicable contribution limits by labeling themselves committees." *Buckley*, 424 U.S. at 35-36. This as-applied challenge, however, concerns the rights of political committees with more than 50 supporters, and that have contributed to five or more candidates. By definition, it does not raise the possibility of individuals or small groups of people simply "labeling themselves committees" to take advantage of higher contribution limits. *Id*.

and speech to the maximum statutorily authorized extent, by contributing $5,000 per election to the candidates they support.

Finally, the FEC spills much ink attempting to explain how Stop PAC itself confirms the need for a six-month waiting period. FEC Resp. Br. at 17-18. Despite the fact that Stop PAC has contributed thousands of dollars to candidates Dan Sullivan and Joe Heck, and hundreds of dollars to other federal candidates, the FEC suggests that it is simply a "sham" committee created to support Innis. The FEC's argument, however, simply underscores the fact that the six-month waiting period is not, in fact, an anti-circumvention tool. The FEC complains about various aspects of the relationship among Innis, Stop PAC, and certain other individuals, *id*., and suggests that the waiting period performed a valuable function in this case by preventing Stop PAC from contributing $5,000 to Innis.

There are three major problems with this argument. ***First***, the six month waiting period applies to ***all*** committees that satisfy § 441a(a)(4)'s contributor and contribution requirements, not just those that have certain features to which the FEC objects. If the FEC wishes to prevent PAC personnel from having certain relationships with federal candidates or their campaigns, the FEC should seek legislation or promulgate regulations to do so. The FEC's objections to certain aspects of Stop PAC's relationship with Innis are a bizarre basis for defending the constitutionality of a law that does not mention any such relationships, is not triggered by any such relationships, and does not in fact prohibit any such relationships.

Second, a universal prophylactic six-month waiting period on all political committees is a distinctly untailored means of attempting to achieve any legitimate anticircumvention goal the FEC may assert. Indeed, even with regard to Stop PAC itself, the FEC fails to explain how any such goal was purportedly furthered by delaying Stop PAC from contributing $5,000 to candidates

Sullivan or Heck—with whom Stop PAC and its agents lacked any relationship—until its six-month waiting period expired.

Finally, had Innis won the primary, Stop PAC would now be permitted to contribute $5,000 to him in connection with the general election. All of the relationships among Innis, Stop PAC, and certain Stop PAC personnel remain the same, yet the risk of circumvention is not deemed sufficient to warrant prohibiting such a contribution. *Cf. McCutcheon v FEC*, 134 S. Ct. 1434, 1452 (2013) (holding that Congress' decision to refrain from prohibiting certain contributions "indicates its belief that contributions of that amount or less do not create a cognizable risk of corruption"). Since Stop PAC, despite its purported relationships with Innis and connections to him, would be able contribute $5,000 to Innis today, it is unclear why those relationships and connections would be sufficient to warrant prohibiting such a contribution a few weeks earlier, during the six-month waiting period. The FEC fails to explain how the hypothesized risk of corruption or circumvention between a political committee such as Stop PAC and a candidate such as Innis diminishes, just because the political committee's waiting period has expired. Thus, the FEC cannot credibly argue that the six-month waiting period plays an important role in combatting corruption or circumvention.

Thus, this Court should invalidate the disparate and discriminatory limits on contributions to candidates as they apply to non-candidate, non-party committees with more than 50 contributors and that have contributed to five or more candidates.

III. STOP PAC'S CLAIM REMAINS JUSTICIABLE

Although the FEC urges this Court to dismiss Stop PAC's claims as moot, FEC Resp. Br. at 7-8, they remain justiciable because they are "capable of repetition, yet evading review."[4] *S. Pac. Term. Co. v. ICC*, 219 U.S. 498, 515 (1911). In general, a plaintiff cannot invoke this exception to the mootness doctrine unless it faces a risk of being subject to the same challenged provisions in the future. *Murphy v. Hunt*, 455 U.S. 478, 482 (1982). As Justices Scalia and O'Connor recognized, however, some of the Court's "election law decisions differ from the body of [its] mootness jurisprudence . . . in dispensing with the same-party requirement entirely, focusing instead upon the great likelihood that the issue will recur between the defendant and the other members of the public at large without ever reaching [the Supreme Court]." *Honig v. Doe*, 484 U.S. 305, 335 (1988) (Scalia, J., dissenting).

The FEC points out that the Supreme Court did not address this point in *Davis v. FEC*, 554 U.S. 724, 735-36 (2008) (cited in FEC Resp. Br. at 8), and *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 462 (2007) (cited in FEC Resp. Br. at 8). The Court's failure to consider the applicability of this exception to the "same plaintiff" requirement in those cases is understandable, however, because the Court concluded that those plaintiffs' claims remained justiciable under the traditional "capable of repetition" standard. There was therefore no need to discuss or apply this exception to the "same plaintiff" requirement.

In other election-law cases, in contrast, the Court repeatedly has adjudicated their merits despite the fact that the plaintiffs' claims had become moot, and there did not appear to be any reasonable prospect that the plaintiffs would again be subject to the challenged legal provisions.

[4] In any event, even if this Court concludes—despite binding Supreme Court precedent to the contrary—that Stop PAC's claims are moot and non-justiciable, American Future PAC presently has a pending motion to join this case to maintain the justiciability of Stop PAC's claims.

See, e.g., *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974) (holding that a challenge to a waiting period for former political party members to run as independent candidates remained justiciable, even though the election had occurred, and "no effective relief can be provided to the candidates or voters," since "the issues properly presented, and their effects on independent candidacies, will persist as the California statutes are applied in future elections"); *Rosario v. Rockefeller*, 410 U.S. 752, 756 n.5 (1973) ("Although the June primary election has been completed and the petitioners will be eligible to vote in the next scheduled New York primary, this case is not moot, since the question the petitioners raise is 'capable of repetition, yet evading review.'"); *Dunn v. Blumstein*, 405 U.S. 330, 333 n.2 (1972) (adjudicating challenge to "three-month residency requirement" for voting, even though "appellee can now vote," because "the problems to voters posed by the Tennessee residence requirements is "capable of repetition yet evading review"); *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969).

Numerous circuits have recognized that plaintiffs in cases pertaining to some aspect of the electoral process may continue to litigate a lawsuit that has become moot, even if they do not contend that they will be subject to the challenged provisions again. Perhaps the most striking example is *Catholic Leadership Coalition of Tex. v. Reisman*, No. 13-50582, 2014 U.S. App. LEXIS 15558, at *49 (5th Cir. Aug. 12, 2014), in which the plaintiffs challenged a state law imposing waiting periods on certain political committees that wished to make political contributions and expenditures. Despite the fact that the plaintiff's waiting period had elapsed, and it would never again be subject to the waiting period, the Fifth Circuit reached the merits of its claim.

Following Supreme Court precedent, the Fifth Circuit "dispense[d] with the same party requirement" because *Reisman*, although pertaining to campaign finance, was deemed an "election

case[].” *Id*. at *29. The court “focus[ed] instead upon the great likelihood that the issue will recur between the defendant and the other members of the public at large.” *Id*. (quotation marks omitted). The court explained, “[I]n election law cases such as this one, where (1) the state plans on continuing to enforce the challenged provision, and (2) that provision will affect other members of the public, the exception [to the same-party requirement] is met.” *Id*. at *29-30; *see also Lawrence v. Blackwell*, 430 F.3d 368, 372 (6th Cir. 2005). Stop PAC’s claim also arises from a waiting period in campaign finance law, and this Court should follow *Reisman*’s lead and recognize its continued justiciability.

CONCLUSION

For these reasons, this Court should GRANT the Motion of Plaintiffs and Plaintiff-Intervenor American Future PAC for Summary Judgment.

Respectfully submitted,

October 9, 2014

/s/ Michael T. Morley
Michael T. Morley, Esq.
Virginia State Bar # 65762
COOLIDGE-REAGAN FOUNDATION
1629 K Street, Suite 300
Washington, DC 20006
Phone: (202) 603-5397
Fax: (202) 331-3759
E-mail: Morley@coolidgereagan.org
Attorney for Plaintiffs and Putative Plaintiff-Intervenor American Future PAC

/s/ Dan Backer
Dan Backer, Esq.
Virginia State Bar # 78256
DB CAPITOL STRATEGIES PLLC
203 South Union Street, Suite 300
Alexandria, VA 22314
Phone: (202) 210-5431
Fax: (202) 478-0750
E-mail: DBacker@DBCapitolStrategies.com

Jerad Najvar
NAJVAR LAW FIRM
4151 Southwest Freeway, Suite 625
Houston, TX 77027
Phone: (281) 404-4696
E-mail: jerad@najvarlaw.com
Attorney for Putative Plaintiff-Intervenor American Future PAC

*Motion for *pro hac vice* admission forthcoming upon joinder	*Attorneys for Plaintiffs Stop PAC, Tea Party Leadership Fund, and ARCC*

CERTIFICATE OF SERVICE

I, Dan Backer, hereby certify that on this 9th day of October 2014, I did cause a true and complete copy of the foregoing Plaintiffs' Rebuttal Memorandum in Support of Plaintiffs and American Future PAC's Motion for Summary Judgment to be filed via the court's CM/ECF system, which effected service upon:

Kevin Deeley
Harry J. Summers
Holly J. Baker
Kevin P. Hancock
Esther D. Gyory
FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

/s/ Dan Backer
Dan Backer
Virginia State Bar # 78256
Attorney for Plaintiffs