No. 15-1455

In the
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,

Appellants,

and

AMERICAN FUTURE PAC,

Intervenor-Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA AT ALEXANDRIA

APPELLANTS' AND INTERVENOR-APPELLANT'S REPLY BRIEF

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I. THE SIX-MONTH WAITING PERIOD AND DISCRIMINATORY CONTRIBUTION LIMITS ARE UNCONSTITUTIONAL

The Supreme Court repeatedly has held that laws limiting the amount a person or group may contribute to political candidates are constitutional only if they are "closely drawn" to combatting actual or apparent *quid pro quo* corruption. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1450-51 (2014); *see also Buckley v. Valeo*, 424 U.S. 1, 25 (1976). In this case, the FEC has tied itself into knots attempting to defend an irrational, and ultimately incoherent, system that creates two statutory groups of materially identical entities:

- those that satisfy § 30116(a)(4)'s Receipt and Contribution Requirements,[1] but have been registered with the FEC for ***less*** than six months (hereafter, "Newer Committees"); and
- those that satisfy § 30116(a)(4)'s Receipt and Contribution Requirements, and have been registered with the FEC for ***six or more*** months (hereafter, "Established Committees").

Newer Committees are permitted to contribute only $2,700 to candidates throughout their first six months of existence. 52 U.S.C. § 30116(a)(1)(A).[2] After

[1] 52 U.S.C. § 30116(a)(4) establishes three requirements a political committee must satisfy to qualify as a multicandidate PAC. First, it must have "receipted contributions from more than 50 persons" (hereafter, "Receipt Requirement"). Second, it must have "made contributions to 5 or more candidates for federal office" (hereafter, "Contribution Requirement"). Finally, it must have been registered with the FEC "for a period of not less than 6 months" (hereafter, "Six-Month Requirement"). 52 U.S.C. § 30116(a)(4).

that six-month waiting period has expired, they may contribute the full statutory maximum of $5,000 per election to each candidate. *Id.* § 30116(a)(2)(A). This limit nearly doubles at the end of the committee's six-month waiting period, even if the committee did not make contributions to any other candidates after satisfying the Contribution Requirement, receive contributions from any other people after satisfying the Receipt Requirement, or engage in any other activity at all throughout that time. Indeed, the limit increases to $5,000 regardless of how suspicious or objectionable the FEC finds the committee's operations to be.

At the very same time, after a Newer Committee hits the six-month mark—and the law deems it sufficiently trustworthy to contribute nearly twice as much to federal candidates—the amount the committee may contribute to political parties is slashed roughly in half. During its six-month waiting period, a Newer Committee may contribute $10,000 annually to state and local political parties, *id.* § 30116(a)(1)(D), and $33,400 in unrestricted funds to national political parties, *id.* § 30116(a)(1)(B); *see also* 80 FED. REG. at 5,752, as well as an additional $102,200 to each of the national party's three special segregated funds, *see* 52 U.S.C. § 30116(a)(1)(B), (a)(9). Throughout that time, the committee is required to file numerous reports with the FEC detailing nearly all of the committee's

[2] *See also* FEC, *Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold*, 80 FED. REG. 5,750, 5,752 (Feb. 3, 2015) (adjusting statutory limit for inflation).

contributions and expenditures, *see generally* 52 U.S.C. § 30104; any person who suspects the committee of wrongdoing may file a complaint against it with the FEC, *see generally id*. § 30109(a); and the FEC can observe its track record of operations.

Nevertheless, even if a committee's reports are pristine, its conduct above reproach, and its operations completely innocent, after six months the amount it may contribute to political parties gets slashed to $5,000 for state and local parties, *id*. § 30116(a)(2)(C), and §15,000 in unrestricted funds to national parties, *id*. § 30116(a)(2)(D) (as well as an additional $45,000 to each of the national party's three special segregated funds, *see* 52 U.S.C. § 30116(a)(2)(B), (a)(9)).

This statutory scheme fails for four main reasons. ***First***, because contribution limits are constitutionally permissible only to combat actual or apparent *quid pro quo* corruption, the FEC cannot argue that, once an entity reaches the six-month mark, it simultaneously presents ***both*** a higher and lower risk of corruption, warranting concurrent increases and decreases in various contribution limits.

Second, the FEC is attempting to use the time that a committee has been registered as a proxy for its risk of corruption. Basing contribution limits on such a categorical, blanket standard is not at all "closely tailored" to preventing corruption. ***Third***, the changes in limits that occur at the six-month period are

completely arbitrary; the FEC has not presented any record evidence to show that Newer Committees pose a categorically greater risk of corruption than Established Committees, or *vice versa*. ***Finally***, the holding in *Buckley* upon which the FEC primarily relies underscores the fact that, as applied to committees that satisfy the Receipt Requirement and Contribution Requirement, the six-month waiting period is unconstitutional.

A. At the Very Least, This Court Must Invalidate the Reduction in Limits on Contributions to Local, State, and National Parties to Which Committees are Subject After Being Registered for Six Months

Most basically, the FEC cannot have it both ways. Either Newer Committees raise a higher risk of actual or apparent *quid pro quo* corruption than Established Committees, or they do not. The FEC spends the bulk of its brief arguing that the six-month waiting period is necessary to prevent nefarious wrongdoers bent on bribing federal officials from forming new political action committees ("PACs") to circumvent contribution limits. *See, e.g.*, FEC Br. at 36-37. In effect, the FEC contends that, notwithstanding the First Amendment, the Government may treat Newer Committees as suspect, and prevent them from exercising their First Amendment rights to the statutorily maximum extent until they have "proven" that they are not shams or fronts (which they apparently can do simply by existing for six months).

Should this Court accept the FEC's reasoning, these arguments underscore the invalidity of the reduction in limits on contributions to local, state, and national parties that occurs at the six-month mark. After committees have existed for six months, thereby somehow establishing they are not "shams," there is no basis for arguing that they nevertheless pose an increased risk of corruption with regard to political parties that warrants slashing their contribution limits in half. *See* FEC Br. at 38 ("[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.").

The FEC's primary response is that it is free to impose reduced limits on Established Committees' contributions to political parties at the six-month mark as a kind of tradeoff for their receipt of increased limits on contributions to candidates. FEC Br. at 50. But the Government may not seek to limit the total amount of First Amendment activity in which an entity engaged by reducing some limits in "exchange" for increased in other limits. *Cf. McCutcheon*, 134 S. Ct. at 1448-49 (holding that a person who contributes the maximum statutory amount to nine candidates may not be subject to a lower limit on contributions to a tenth candidate). The only constitutionally valid basis for reducing contributions from Established Committees to political parties once they have been registered for six months is demonstrating that such a reduction is necessary to combat actual or

apparent *quid pro quo* corruption. *Id*. at 1550-51. And the FEC has made no such showing.[3]

The FEC also argues that the current statutory scheme is motivated by the Government's interest in enhancing the role of political parties by allowing them to accept large amounts of money from individuals and Newer Committees in order to amass the resources "'necessary for effective advocacy.'" FEC Br. at 55 (quoting *Randall v. Sorrell*, 548 U.S. 230, 247 (2006)); *see also id*. at 56 ("The differences at issue in this case were also created by Congress to enhance the functioning of the parties."); *id*. at 58 ("Congress's increase of the limits on what a person could give to party committees was the most effective way to ensure the parties could continue to amass the necessary funds.").

The FEC's argument is exactly backwards. The challenged statutory provision slashes roughly in half the amount that certain PACs may contribute to political parties once those PACs have been registered for six months. It is literally

[3] The FEC continues to emphasize the differences between Appellant Stop PAC (which had been a Newer Committee) and Appellant Tea Party Leadership Fund (an Established Committee) to argue that Newer and Established Committees are different types of entities that should be treated differently. FEC Br. at 51-53. As Appellants' Opening Brief points out, the issue here is not whether those particular Appellants are similarly situated, but rather the two groups created by statute—Newer Committees and Established Committees—which differ only in the length of time they have been registered with the FEC, are sufficiently similarly situated for Equal Protection purposes. *See Califano v. Boles*, 443 U.S. 282, 293-94 (1979) (holding that "equal protection analysis . . . must begin with the statutory classification itself").

impossible to argue that Congress was promoting its interest in helping political parties raise funds by precipitously cutting the amount a PAC may contribute once it has been registered for six months. In the course of this very discussion, the FEC declares, "[D]emocracy benefits from PACs that have grown into broad-based interest groups that can represent the views of citizens during elections." FEC Br. at 60. Yet it is precisely when a group reaches that point—becomes an Established PAC—that federal law slashes its limit on contributions to political parties. Thus, even if one embraces the FEC's argument that Congress has an important interest in promoting political parties and helping them amass resources, the drop in PACs' contribution limits to political parties that occurs at the six-month mark actively undermines that interest. Even from the FEC's perspective, this Court would be further promoting Congress' goals by invalidating the restriction.

B. The Length of Time a Committee Has Been Registered is a Poorly Tailored Proxy for the Risk of Corruption it Poses

For committees that satisfy § 30116(a)(4)'s Receipt Requirement and Contribution Requirement, *see supra* note 1, the amount it may contribute to a candidate or political party rests exclusively on whether it has been registered for six months. The length of time a PAC has existed and been registered, in essence, is used as a proxy for the risk of actual or apparent *quid pro quo* corruption (including circumvention of other base limits) that PAC purportedly poses. The length of time a PAC has been registered, however, is a terrible proxy for

determining the risk of corruption it poses. The six-month waiting period is therefore not a "closely drawn" restriction and must be invalidated. *See Buckley*, 424 U.S. at 25; *see also Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 200 (1981) (hereafter, "*CalMed*"); *Police Dep't of the City of Chicago v. Mosley*, 408 U.S. 92, 102 (1972) (same in Equal Protection context); *see, e.g.*, *Wagner v. FEC*, 854 F. Supp. 2d 83, 96 (D.D.C. 2012) ("[T]o survive an equal protection challenge, § 441c's ban on contributions by federal contractors must be closely drawn to match a sufficiently important interest.") (quotation marks omitted), *vacated on jurisdictional grounds*, 717 F.3d 1007 (D.C. Cir. 2013).

The length of time a committee has been registered with the FEC tells the Government very little about that committee. The FEC emphasizes that Newer Committees that satisfy § 30116(a)(4)'s Receipt Requirement and Contribution Requirement might not have received contributions from more than the bare statutory minimum number of people (that is, 51), and might not have contributed to more than the mere statutory minimum number of candidates (that is, 5). *See* FEC Br. at 36-37. The FEC also points out that such committees might receive the bulk of their contributions from only one or two people, and might make large contributions to only one or two candidates. The same is true, however, of Established Committees. As both Stop PAC and American Future PAC themselves demonstrate, even after a committee has existed for six months and

qualifies for increased limits on contributions to candidates, it need not have raised funds from more people, decided to contribute to more candidates, or reduce its dependence on a few main contributors.

In short, the FEC is using length of time a committee has been registered as a blanket and overbroad proxy for the factors about committees it ***really*** cares about: number of contributors, size of the staff, staff affiliations, dependence on only a few contributors, focus on only a few candidates, relationship to candidates, etc. *See* FEC Br. at 38 ("A six-month old PAC is also likely to have more members, more contributors, more contributions to candidates, and as discussed below, will have publicly disclosed information to the FEC about itself."). It is ***those other factors*** that are actually thought to suggest a committee's risk of corruption. And the FEC has not shown that those other underlying factors are reliably correlated to a PAC's length-of-registration.[4]

[4] To the extent the FEC seeks to justify the six-month waiting period on the grounds that there is information about the PAC that has not yet been made public, *see* FEC Br. at 38, 44-45, a far more reasonably tailored solution would be to increase the reporting requirements on PACs that satisfy the Receipt Requirement and Contribution Requirement and wish to contribute the statutory maximum of $5,000 per election to each candidate, rather than flatly prohibiting all such PACs from taking advantage of that increased contribution limit. PACs already must file pre-election reports, post-election reports, quarterly or monthly reports, and annual reports, 52 U.S.C. § 30104(a)(4), and candidate committees—in addition to their numerous other reporting requirements, *id*. § 30104(a)(2), must publicly report within 48 hours any contributions received within 20 days of an election, *id*. § 30104(a)(6).

The FEC emphasizes that various features of Appellant Stop PAC—including the identities of the people who run it, its pattern of contributions, and the candidates it supports—confirm the need for the six-month waiting period. *See* FEC Br. at 40-43. Yet, the blanket six-month waiting period does not target groups with such characteristics, but rather applies across-the-board to ***all*** Newer Committees. Rather than categorically reducing all Newer Committees' contribution limits throughout the first six months of their existence, the "closely tailored" solution would be to focus on entities that actually have characteristics the FEC finds troubling. Indeed, even though Stop PAC retains the features that the FEC claims to find objectionable, now that its six-month waiting period has expired, it is permitted to contribute the maximum statutory amount of $5,000 per election to each candidate.

Thus, almost by definition, basing contribution limits on the length of time a committee has been registered with the FEC is a poorly tailored solution, because the law instead could focus on the underlying factors for which length-of-registration is acting as a highly inaccurate proxy.

The invalidity of the current statutory scheme is most glaringly apparent with regard to the reduced limits on contributions to political parties by Established Committees. As discussed earlier, an Established Committee must file detailed reports with the FEC concerning nearly all of its contributions and expenditures,

see generally 52 U.S.C. § 30104, and anyone who suspects it of wrongdoing may file a complaint against it with the FEC, *see generally id*. § 30109(a). Thus, every Established Committee has a half-year track record, and the FEC has voluminous information about each Established Committee it could scrutinize to develop individualized suspicion about particular entities.

Rather than attempting to identify some sub-group of Established Committees that appear to pose an increased risk of corruption, however, the law categorically slashes roughly in half the amount that ***all*** such committees may contribute to national, state, and local parties. Again, such a blunderbuss categorical approach is the very antithesis of "careful tailoring."

C. The FEC Has Failed to Adduce Any Record Evidence Concerning the Risk of Corruption Associated with Newer Committees or Established Committees.

The FEC defends the statutory scheme based on overbroad assumptions about the supposed risk of corruption that a committee which has satisfied § 30116(a)(4)'s Receipt Requirement and Contribution Requirement poses throughout the first six months of its existence, and the apparently different risk of corruption that Established Committees pose. The Supreme Court, however, has "never accepted mere conjecture as adequate to carry a First Amendment burden," *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 392 (2000); *see also Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) ("When the Government

defends a regulation on speech as a means to . . . prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured.") (internal citation and quotation marks omitted).

A burden on First Amendment rights cannot rest on "a hypothetical possibility and nothing more." *FEC v. Nat'l Conservative Pol. Action Comm.*, 470 U.S. 480, 498 (1985) ("*NCPAC*") (invalidating limit on PACs' expenditures where the Government failed to introduce any evidence suggesting that "an exchange of political favors for uncoordinated expenditures" was likely to occur). "The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Shrink Missouri*, 528 U.S. at 391. The Court has excused the Government from presenting actual evidence to meet this burden only where "there is little reason to doubt" that the targeted act involves "the evil of potential corruption." *NCPAC*, 470 U.S. at 500; *Shrink Missouri*, 528 U.S. at 395.

The convoluted statutory scheme at issue here, in which various contribution limits soar or plummet in different directions once a committee hits the six-month mark, surely requires at least some evidence to support those inexplicably disparate and contradictory changes. The FEC, as the entity responsible for enforcing federal campaign finance law, is uniquely situated to reveal its experience in dealing with different types of PACs over the past half-century, and share the

evidence of different types of corruption it has uncovered. Nevertheless, the record completely lacks any evidence to suggest that:

- Newer Committees pose a greater risk of actual or apparent *quid pro quo* corruption concerning contributions to candidates than Established Committees (thereby justifying higher limits for the latter);

- Newer Committees' contributions to candidates (for which Newer Committees must wait six months before being permitted to contribute the statutory maximum amount) pose a greater risk of corruption than their contributions to local, state, or national parties (for which Newer Committees may immediately contribute the statutory maximum amount);

- Established Committees pose a greater risk of actual or apparent *quid pro quo* corruption concerning contributions to parties than Newer Committees (thereby justifying higher limits for the latter);

- Established Committees' contributions to political parties (for which the limit is reduced once the committee reaches the six-month mark) pose a greater risk of corruption than their contributions to candidates (for which the limit is nearly doubled once the committee reaches the six-month mark).

This kind of arbitrary give-and-take is unlikely to survive even rational-basis scrutiny. Examined under a heightened standard, however, it becomes clear there is no evidentiary basis for this scheme.

Tellingly, the FEC itself does not even contend that the scheme of increasing and decreasing contribution limits is the product of a deliberate congressional decision. It does not provide a shred of evidence from anywhere in the legislative history to suggest that Congress expressly intended that, just as a PAC's six-month

waiting period elapsed and its limit on contributions to candidates was increasing, its limit on contributions to political parties should be slashed. *Cf.* FEC Br. at 55-57 (discussing legislative history). Rather, the FEC relies on *post hoc* rationalizations for a dubious statutory scheme that abridges First Amendment rights in ways that, by all appearances, are at least somewhat accidental.

D. *Buckley* Supports, Rather Than Precludes, This As-Applied Challenge

Finally, the FEC renews its argument that *Buckley* precludes Appellants' challenge. As Appellants' Opening Brief pointed out, *Buckley* involved a broad, facial Equal Protection challenge to all of the requirements for qualifying as a multicandidate PAC. *Buckley*, 424 U.S. at 35-36. The plaintiffs argued that the law impermissibly discriminated between multicandidate PACs and "ad hoc organizations." *Id*. at 35. The *Buckley* Court rightly pointed out that some limits on multicandidate PAC status were necessary to "prevent[] individuals from evading the applicable contribution limits by labeling themselves committees." *Id*. at 35-36. The narrow as-applied Equal Protection challenge at issue here, in contrast, is fundamentally different. *Cf. Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2771 (2011) (Breyer, J., dissenting) ("California's statute is consequently constitutional on its face--though litigants remain free to challenge the statute as applied in particular instances."). Appellants here challenge a legal provision that distinguishes between two different groups of entities that have satisfied

§ 30116(a)(4)'s Contribution and Receipt Requirements—that is, committees that have received 51 or more contributions, and that have contributed to five or more candidates—based solely on whether they have been registered for six months. Nothing in *Buckley* precludes this claim. *Cf. McCutcheon*, 134 S. Ct. at 1446-47 (holding that "three sentences" in *Buckley* that briefly addressed aggregate contribution limits "do[] not control" because "appellants' challenge raises distinct legal arguments that *Buckley* did not consider" and BCRA dramatically changed the "legal backdrop" for campaign finance restrictions).

II. ALL CLAIMS IN THIS CASE REMAIN JUSTICIABLE

All claims in this case remain justiciable. Section A confirms that Stop PAC and American Future PAC have standing to challenge the six-month waiting period. Section B demonstrates that their claims remain justiciable and should not be deemed moot. Section C similarly shows that Appellant Tea Party Leadership Fund's ("The Fund") and Alexandria Republican City Committee's ("ARCC") challenges to the discriminatorily low limits on contributions to political party committees remain live, as well.

A. Stop PAC and American Future PAC Have Standing to Challenge the Six-Month Waiting Period

First, the FEC claims that Stop PAC lacks standing to challenge the six-month waiting period on the grounds that its "claimed injury was 'self-inflicted.'"

FEC Br. at 19. The FEC contends that Stop PAC's founders should have created it more than six months before the 2014 elections. In the FEC's view, entities that wish to fully exercise their constitutional rights to the maximum extent permitted by law must plan at least a half-year in advance.

As Appellants pointed out in their opening brief, the issue in this case is whether the First Amendment and Equal Protection Clause permit the Government to require entities such as Stop PAC (*i.e.*, political committees that satisfy the Receipt and Contributor Requirements) to wait six months before being permitted to contribute the statutory maximum amount to candidates. The delay and discrimination are the alleged injuries-in-fact, and they exist regardless of when the entity is created. And that delay and discrimination stem from federal law, 52 U.S.C. § 30116(a)(4), not Stop PAC's actions.

B. Stop PAC's and American Future PAC's Claims Remain Justiciable Because They Are "Capable of Repetition, Yet Evading Review."

Second, the FEC contends that Stop PAC's and American Future PAC's claims have become moot, because their six-month waiting periods have expired. As Stop PAC and American Future PAC explained in their opening brief, the Supreme Court repeatedly has adjudicated constitutional challenges to election-related laws that would apply to other entities in the future, despite mootness concerns, regardless of whether the same plaintiffs would again be subject to them.

See, e.g., *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974); *Rosario v. Rockefeller*, 410 U.S. 752, 756 n.5 (1973); *Dunn v. Blumstein*, 405 U.S. 330, 333 n.2 (1972); *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969).

Two Justices of the Supreme Court have expressly recognized this doctrine. *Honig v. Doe*, 484 U.S. 305, 335 (1988) (Scalia, J., dissenting) ("[E]lection 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].").

And several circuits, applying these precedents, have likewise held that a challenge to an election-related statute remains justiciable, so long as the challenged provision may be applied to other people or entities in future elections. *Catholic Leadership Coalition of Tex. v. Reisman*, 764 F.3d 409, 422-24 (5th Cir. 2014) (affirming justiciability of challenge to waiting period on political contributions and expenditures, even after it expired, despite the fact that the plaintiffs could never be subject to it again); *Majors v. Abell*, 317 F.3d 719, 723 (7th Cir. 2003); *Lawrence v. Blackwell*, 430 F.3d 368, 372 (6th Cir. 2005); *Schaefer v. Townsend*, 215 F.3d 1031, 1033 (9th Cir. 2000).

The FEC points out that, in *Davis v. FEC*, 554 U.S. 724, 735 (2008), and *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007), the Supreme Court held that

the case remained justiciable, despite mootness concerns, if the issue is capable of repetition with "the same complaining party." FEC Br. at 22-23. The FEC does not suggest, however, that any party or amicus argued that the general "same party" requirement of the "capable of repetition, yet evading review" standard was inapplicable to constitutional challenges to election laws. And the Supreme Court did not need to reach the issue in *Davis* or *Wisconsin Right to Life*, because it concluded that the plaintiff in those cases *could* again be subject to the challenged provisions. Moreover, nothing in *Davis* or *Wisconsin Right to Life* suggested that the Court was overturning or repudiating the practice or doctrine set forth in *Storer*, 415 U.S. at 737 n.8; *Rosario*, 410 U.S. at 756 n.5; *Dunn*, 405 U.S. at 333 n.2; or *Moore*, 394 U.S. at 816. Nor does the FEC suggest that this Court actually grappled with the issue in *Lux v. Judd*, 651 F.3d 396, 401 (4th Cir. 2011), or *N.C. Right to Life Comm. Fund for Indep. Pol. Expenditures v. Leake*, 524 F.3d 427, 435 (4th Cir. 2008). *See* FEC Br. at 23.

This Court should not allow the FEC to repeatedly delay adjudication of challenges to the six-month waiting period in order to have them dismissed for lack of justiciability. The FEC points out that, prior to this case, Appellant Tea Party Leadership Fund ("The Fund") had previous challenged the constitutionality of the six-month waiting period for making candidate contributions in the U.S. District Court for the District of Columbia. *See* FEC Br. at 14; *Tea Party Leadership Fund*

v. FEC, No. 12-1707 (D.D.C.). Shortly after satisfying the Recipient Requirement and Contribution Requirement, The Fund immediately moved for a preliminary injunction to allow it to begin contributing $5,000 to the candidates it supported. The FEC argued that a preliminary injunction was a "particularly inappropriate" vehicle in which to raise these issues because it would "upend the status quo by preventing the Commission from enforcing statutory provisions that have been in place for almost 40 years." FEC Opposition to Plaintiffs' Motion for Preliminary Injunction, *Tea Party Leadership Fund v. FEC*, No. 12-1707, Doc. #8 (D.D.C. filed Nov. 1, 2012). On November 2, the district court decided to consolidate the preliminary injunction motion with cross-motions for summary judgment, and set a briefing deadline that would end five months later, on March 29, 2013, after The Fund's waiting period expired. *Tea Party Leadership Fund v. FEC*, No. 12-1707, Doc. #10 (D.D.C. Nov. 2, 2012).

In light of the FEC's objections in that case concerning interim relief, Appellants filed the instant case on April 14, 2014, and filed a Motion for Summary Judgment a few weeks later, on May 6, 2014. The FEC opposed, arguing that rapid summary judgment was inappropriate because it needed discovery in order to demonstrate the constitutionality of the law it has been enforcing for the past half-century. *See* Docket #26, at 3 (May 23, 2014). Later, as Stop PAC neared the end of its six-month waiting period, and sought to allow

American Future PAC to join this lawsuit to alleviate potential justiciability concerns, the FEC opposed the motion, claiming at one point that it would need to extend the discovery schedule by 128 days to take discovery from this newly-formed entity. *See* Docket #50, at 2 (discussing meet-and-confer with FEC concerning joinder motion).[5] In its proposed scheduling order to the district court, filed on July 2, 2014, the FEC argued that dispositive briefing should not conclude until mid-November—after the expiration of Stop PAC's waiting period. Joint Proposed Discovery Plan, Docket #34, at 17 (setting forth FEC's position).

This case presents pure questions of law that turn on legislative facts. The FEC has affirmatively opposed rapid adjudication of this issue on the merits at every turn, regardless of the procedural posture—preliminary injunction or summary judgment—in which it has arisen. Since First Amendment rights are at stake in the fundamentally important area of federal elections, this Court should apply the election exception to the "same party" requirement, and hold that this case is justiciable because the waiting period will continue to apply to other entities, yet—in large part due to the FEC's intransigence—will evade review. In

[5] Indeed, the FEC's proposed briefing schedules in both The Fund's previous case and the instant case were calculated to have dispositive briefing complete at, or after, the expiration of the plaintiffs' or intervenors' six-month waiting periods. *See Tea Party Leadership Fund v. FEC*, Doc. #7, at 3-4 (suggesting, on Oct. 25, 2012, that summary judgment briefing be complete more than five months later, on Mar. 29, 2013); on July 2, 2014, that summary judgment briefing be complete in mid-November).

the alternative, Stop PAC may have associational standing to litigate this issue on behalf of its Treasurer and contributors. *See United Food & Commer. Workers Union Local 751 v. Brown Group*, 517 U.S. 544, 552 (1996) (discussing "the modern doctrine of associational standing, under which an organization may sue to redress its members' injuries, even without a showing of injury to the association itself"); *see also Warth v. Seldin*, 422 U.S. 490, 511 (1975). It is reasonably possible that at least one of those individuals will face this issue again, as another Newer Committee which they form, join, or contribute to is subject to the six-month waiting period. The fact that none of these individuals has affirmatively expressed a present intention to do so does not bar such a claim. *See N.C. Right to Life Comm. Fund v. Leake*, 524 F.3d 427, 435 ("[W]e reject, as other circuits have, the argument that an ex-candidate's claims may be 'capable of repetition, yet evading review' only if the ex-candidate specifically alleges an intent to run again in a future election.").

C. The Fund's and ARCC's Claims Remain Justiciable

The FEC's desperation to avoid adjudication of this issue on the merits is particularly clear with regard to its argument that The Fund's and ARCC's challenge to the discriminatorily lower limits on contributions to political parties—limits to which The Fund is ***permanently*** subject—has somehow become moot. FEC Br. at 25-26. This argument fails for three reasons. First, the FEC complains

that the "allegations of the complaint" do not show that the Fund ever intends to contribute the statutory maximum amount to a political party again. *Id*. at 25. Since the district court resolved this case on cross-motions for summary judgment, however, the allegations of the complaint are irrelevant for standing purposes. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992). To determine the justiciability of The Fund's claim, this Court must consider the evidence before it. In light of the FEC's justiciability argument, the Fund will proceed with its motion to supplement the record to prove that it contributed the statutory maximum amount of $5,000 to Appellant ARCC in calendar year 2015, and that it continues to wish to contribute a total of $10,000 to ARCC, as well as $33,400 in unrestricted funds to the National Republican Senatorial Committee, a national political party committee.

Second, even if this Court denies The Fund's motion to supplement the record, at a minimum its claim is "capable of repetition, yet evading review." The Fund is an Established Committee that has hundreds of thousands of contributors and has actively participated in several elections. As in *Leake*, 524 F.3d at 435, even in the absence of a specific, express allegation in the record that The Fund intends to contribute the statutory maximum amount to a political party in the future, there remains a "reasonable expectation that the challenged provisions will be applied against [The Fund] during future election cycles." Thus, even if this

Court applies the "same party" requirement for the "capable of repetition, yet evading review" test, The Fund's claims fall comfortably within that exception.

Finally, regardless of The Fund's standing, currently law makes it permanently illegal for ARCC to accept contributions in excess of $5,000 from Established Committees. This Court therefore should adjudicate the Fund's and ARCC's challenges on their merits.

CONCLUSION

For these reasons, Appellants and Appellant-Intervenor respectfully request that this Court REVERSE the district court's judgment in favor of the FEC and REMAND for entry of judgment in their favor and an injunction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 28.1(e) or 32(a)

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Attorney for: Appellants and Appellant-Intervenor

Dated: August 24, 2015

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I certify that on August 24, 2015, 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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