

ORAL ARGUMENT NOT YET SCHEDULED

No. 13-5162

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

WENDY E. WAGNER, *et al.*,

Plaintiffs,

v.

FEDERAL ELECTION COMMISSION,

Defendant.

On Certification from the United States District Court
For the District of Columbia - No. 1:11-cv-08841 (JEB)

SUPPLEMENTAL BRIEF FOR PLAINTIFFS

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Pursuant to this Court's Order of September 11, 2013, plaintiffs submit this supplemental brief addressing the effect on this case of the Supreme Court's decision in *McCutcheon v. FEC*, 134 S. Ct. 1434 (April 2, 2014). In plaintiffs' view, the decision does not change or modify the applicable law, but for reasons set forth below, it provides a valuable reminder and re-enforcement of a number of points made by plaintiffs in their prior submissions to this Court.

SUMMARY OF ARGUMENT

In striking down the aggregate contribution limits at issue in *McCutcheon*, the Court relied on the same "closely drawn" standard relied on by plaintiffs as a basis for setting aside the total ban on contributions applicable to them and all other individual federal contractors. Significantly, *McCutcheon's* application of that standard had real force, rejecting the kind of attenuated argument relied on by the FEC here to justify the ban on contractor contributions. Furthermore, *McCutcheon's* conclusion that the law at issue there involved a "substantial mismatch" underscores the points made by plaintiffs that the ban applicable to them is seriously under- and over-inclusive. Similarly, *McCutcheon's* insistence that current restrictions must be based on current conditions, and that changes in the applicable laws – in this case both federal procurement and campaign finance laws – must be

taken into account in assessing the constitutionality of bans and limitations on political contributions, echoes the points made by plaintiffs in this case.

ARGUMENT

We begin as Chief Justice Roberts began in *McCutcheon*:

There is no right more basic in our democracy than the right to participate in electing our political leaders. Citizens can exercise that right in a variety of ways: They can run for office themselves, vote, urge others to vote for a particular candidate, volunteer to work on a campaign, and contribute to a candidate's campaign. This case is about the last of those options.

134 S. Ct. at 1440-41.

1. *McCutcheon* forecloses the argument that contributions by plaintiffs would give rise to an appearance of corruption.

The holding of *McCutcheon* is that aggregate limits on otherwise lawful contributions to candidates and committees in connection with federal elections violate the First Amendment. As a result, a contributor may now lawfully give approximately \$3.6 million to candidates and parties in a given election, *see* 134 S. Ct. at 1472-73 (Breyer, J., dissenting), plus another \$13.5 million by giving \$5000 to each of the approximately 2700 unconnected political committees that may accept contributions from members of the public. *See id.* at 1453. By contrast, the individual plaintiffs here are barred by 2 U.S.C. § 441c (“section 441c”) from contributing even \$1 to a single federal candidate, party, or committee as long as they hold or

seek a federal contract. And, according to the FEC, plaintiffs are even barred from making independent expenditures (although they have no desire to do that). *See* Opening Brief at 40-41 n.5.

To the extent that the federal laws on campaign contributions are intended to prevent the appearance of corruption, it is hard to imagine that an ordinary citizen, even one familiar with federal contracting, would think that contributions by these plaintiffs would raise such an appearance, but those that the Court has allowed in *McCutcheon* would not. If plaintiffs prevail in this action, and if Congress concludes that large aggregate contributions by government contractors (or their PACs) might create more of an appearance of corruption than equally large contributions by others, it could enact such a provision and have the FEC defend it. But this Court has no authority to re-write section 441c to remove the total ban on the ground that a law limiting large contractor contributions might be defensible if enacted; if the complete ban cannot be upheld, then it must be struck down.

2. *McCutcheon* makes clear that the “closely drawn” standard has teeth and that statutes like section 441c are not closely drawn to serve an anti-corruption goal.

The Court declined to decide whether limits on political contributions are subject to strict scrutiny, or even whether a ban like section 441c must satisfy that standard. 134 S. Ct. at 1445-46. But it did make clear that the

“closely drawn” standard is “rigorous,” and that justifications on contribution limits will be carefully scrutinized to assure a constitutionally adequate fit. *Id.* at 1444. The FEC’s justification in *McCutcheon* for the aggregate limitation of \$123,200 per election cycle was that it prevented circumvention of limits on candidate contributions. *Id.* at 1443. In the end, the Court did not disagree with the FEC and the dissent that some kinds of avoidance schemes were possible, but were “highly implausible.” *Id.* at 1453. Therefore, it concluded that the threat of corruption or the appearance of corruption presented by such schemes could not outweigh the First Amendment rights of contributors, because those schemes would be very complicated to carry out, could only be accomplished through careful planning by a small number of extremely wealthy individuals, and were unlikely to be undertaken at all given all the other money that could be lawfully contributed and spent as independent expenditures. *See id.* at 1452-56; 1457-58. As for the dissent’s examples, the Court described them, in words that precisely capture the reasons offered by the FEC in this case, as “speculation” that “cannot justify the substantial intrusion on First Amendment rights at issue in this case.” *Id.* at 1456.

The requirement of a close connection between prohibited contributions and corruption or the appearance of corruption is most clear in

the Court's insistence that a candidate's "general gratitude" for a contribution – in that case to the candidate's own party or to committees that support the candidate and others in his or her party – is not enough. *See id.* at 1441. To pass muster, the Court held, a "regulation must instead target what we have called 'quid pro quo' corruption or its appearance. . . . a direct exchange of an official act for money." *Id.* (citations omitted). As the Court observed, "This Court has identified only one legitimate governmental interest for restricting campaign finances: preventing corruption or the appearance of corruption." *Id.* at 1450. The Court found the aggregate limits invalid because they "do little, if anything, to address that concern, while seriously restricting participation in the democratic process." *Id.* at 1442. As the Court explained, "[i]n the First Amendment context, fit matters," and a statute like the one at issue there (and like section 441c) cannot be sustained because it is "poorly tailored to the Government's interest in preventing circumvention of the base limits, [and] it impermissibly restricts participation in the political process." *Id.* at 1456-57. *See also id.* at 1460 (rejecting the FEC's broader definition of corruption that would encompass "broad-based support of a political party"); *id.* at 1461 (distinguishing contributions that make the recipient feel "obligated" from those that engender only "grateful" feelings).

The FEC has attempted in this case to portray section 441c as a law barring *quid pro quo* exchanges of contributions for government contracts, and on that theory *McCutcheon* would support, rather than undermine, the FEC's case. The problem with that theory is that none of the recipients of federal political contributions – candidates for President and Congress, political parties, or political committees – has the authority to award contracts, and those who have that authority are not involved in the election of any federal officials. As plaintiffs have shown, the methods by which government contracts are awarded, including the insulation of those who make the awards from persons to whom contributions might be made, effectively prevent *quid pro quo* corruption: contributions to federal candidates and committees might create feelings of gratefulness in the recipients, but the recipients do not award contracts. *See* Opening Brief at 11-13 & 42-48.

Moreover, as much a stretch as it is to assume improper influence from a \$100 contribution to a presidential or congressional candidate and the award of any federal contract, the gulf is far greater when applied to contributions to a political party or a political committee that is not affiliated with any party or candidate, but section 441c bans all contributions to those entities as well. And if the concern is that those with influence over awards

of federal contracts might use their position to solicit contributions for their preferred candidate or party, subsection 441c(a)(2) independently makes it a crime “knowingly to solicit any such contribution from any such person for any such purpose during any such period.”

3. *McCutcheon* supports plaintiffs’ arguments regarding the over- and under-inclusiveness of section 441c.

McCutcheon also found that there was a “substantial mismatch” between the asserted goal of preventing corruption or the appearance of corruption and the means chosen to accomplish it, and that this mismatch was a fatal flaw in the statute. 134 S. Ct. at 1446. The problem is most clearly delineated in section IV C of the opinion *id.* at 1456-59, in which a number of much less restrictive alternatives (some of which the Court suggested might not work or be upheld) were set forth as reasons to reject the aggregate limits being challenged. This is precisely the same type of argument that plaintiffs made in their opening brief (pp. 50-59) in contending that section 441c is both over- and under-inclusive. *McCutcheon* makes clear, contrary to the contentions of the FEC and its *amici*, that the existence of alternative means that do less violence to First Amendment rights is an important aspect of the “closely drawn” analysis when a campaign finance statute is challenged under the First Amendment.

4. *McCutcheon* confirms that statutes that impose current burdens on First Amendment activity must be justified by current circumstances.

Plaintiffs have argued that the dramatic changes in federal contracting laws and procedures over the past 75 years mean that even if section 441c was constitutional when it was enacted, it is no longer constitutional today. Opening Brief at 48-49 (citing *Shelby County v. Holder*, 133 S. Ct. 2612 (2013)). *McCutcheon* provides strong additional support for that argument.

In *McCutcheon*, the very provision at issue had been specifically upheld in *Buckley v. Valeo*, 424 U.S. 1, 38 (1976), when the limit was \$25,000, but was struck down in 2014, even though the aggregate amount of contributions allowed had been increased to \$123,200. But the more significant change was that the danger of circumvention that had been the basis of the Court's reasoning in 1976 had been closed with "more targeted anticircumvention measures," thereby justifying a renewed constitutional examination: "BCRA is a different statutory regime, and the aggregate limits it imposes operate against a distinct legal backdrop." *Id.* at 1446. *See also id.* at 1452 (focusing on regulations "currently in effect.").

Changed circumstances are equally if not more significant in this case. Section 441c was enacted in 1940, when there was no system of campaign finance regulation and no general contribution limits, in contrast to the

current “intricate regulatory scheme that the Federal Election Commission has enacted since *Buckley*.” 134 S. Ct. at 1447. Moreover, as our opening brief shows (pp. 11-13), the federal procurement process was in its infancy when section 441c was enacted, and the many protections against improper influences that exist today had not yet been created. Despite these very significant advances, the only change that Congress has made to section 441c is the addition of subsections (b) and (c) in 1976, which made it possible for corporate contractors to create captive political committees that can lawfully make contributions that the corporation cannot make, while failing to extend the same privilege to individual contractors such as the plaintiffs here (which is one of the bases for plaintiffs’ Equal Protection claims). The justification for section 441c’s complete ban on contributions has been eviscerated just as effectively by changes in the “legal backdrop,” 134 S. Ct. at 1446, over the past 74 years, as the justification for the aggregate cap on contributions was eviscerated by changes in campaign finance law over the past 38 years. And because, unlike in *McCutcheon*, there is no Supreme Court decision sustaining the constitutionality of section 441c, this Court need not wait for the Supreme Court to strike it down.¹

¹ The FEC has emphasized the 70 year history of section 441c in combatting corruption and its appearance as a reason to sustain its constitutionality. FEC Brief at 19. But if a history of 38 years, plus a favorable Supreme

5. *McCutcheon* confirms that theoretical alternatives to making political contributions are not a constitutionally adequate substitute.

The FEC has attempted to defend section 441c's ban on contributions by pointing to other means by which plaintiffs might participate in the political process. FEC Brief at 37-39. As we have demonstrated, these alternatives are both unrealistic and at the same time undermine the FEC's asserted justification for the ban. See Opening Brief at 60-61; Reply Brief at 28-31. But even if those alternatives were more realistic and less inconsistent with the FEC's basic arguments, *McCutcheon* demonstrates that they would not justify a ban on political contributions.

McCutcheon directly rejects the notion that limits on campaign contributions can survive First Amendment scrutiny because they are only a minor restriction on political activity. As the Court pointed out, "personal volunteering is not a realistic alternative for those who wish to support a wide variety of candidates or causes. Other effective methods of supporting preferred candidates or causes without contributing money are reserved for a select few, such as entertainers capable of raising hundreds of thousands of dollars in a single evening." 134 S. Ct. at 1449. Supporting a candidate or a

Court decision, were not enough to uphold the aggregate limits in *McCutcheon*, 70 years with no favorable court ruling cannot save the statute in this case.

party through contributions is, indeed, the only way (besides voting) in which most Americans participate in the federal political process. Restrictions on contributions therefore do have a significant impact on would-be donors: “An aggregate limit on *how many* candidates and committees an individual may support through contributions is not a ‘modest restraint’ at all.” *Id.* at 1448 (emphasis in original). As the Court recognized, contribution limits can “seriously restrict [] participation in the democratic process.” *Id.* at 1442.

The Court observed that “the aggregate limits prohibit an individual from fully contributing to the primary and general election campaigns of ten or more candidates [and thus they] constitute an outright ban on further contributions to any other candidate.” *Id.* at 1448. If those aggregate limits of \$123,200 amounted to an unconstitutional ban, there is surely no basis on which the \$0 limit that section 441c imposes can be upheld.

6. Plaintiffs’ Equal Protection claim is untouched by *McCutcheon*.

In the district court and in this Court, plaintiffs’ have relied heavily on their claim that section 441c violates the Equal Protection component of the Fifth Amendment. Opening Brief at 23-38. The FEC and its *amici* have characterized plaintiffs’ Equal Protection claims as no more than a “repackaging” of their First Amendment argument. *See, e.g.*, FEC Brief at

52. *McCutcheon* was solely a First Amendment case, and thus has no impact on plaintiffs' Equal Protection claim.

Following its decision in *McCutcheon*, the Court denied review in *Iowa Right to Life Committee, Inc. v. Tooker*, No. 13-407, 2014 WL 1343622 (April 7, 2014), in which the lower court had rejected an Equal Protection claim on the merits, not because it was mere surplusage with a First Amendment claim. *See Iowa Right to Life Committee, Inc. v. Tooker*, 717 F.3d 576, 602 (8th Cir. 2013). In assessing the Equal Protection claim in that case on its merits, the Eighth Circuit relied on *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 666 (1990), *overruled on other grounds by Citizens United v. FEC*, 558 U.S. 301 (2010), which specifically reached the plaintiff's Equal Protection claim after rejecting its First Amendment argument. Thus, plaintiffs' Equal Protection claim here must be addressed on its merits and not rejected, as the FEC would have it, as a mere restatement of their First Amendment argument. *Iowa Right to Life* confirms that conclusion, and we call it to the Court's attention as authority not previously cited by plaintiffs.

CONCLUSION

For the foregoing reasons and those set forth in plaintiffs' prior briefs, the Court should enter judgment for the plaintiffs declaring that 2 U.S.C. § 441c violates plaintiffs' rights under the First Amendment and the Equal Protection component of the Fifth Amendment, and should enjoin the defendant from enforcing section 441c against them.

Respectfully submitted,

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April 25, 2014

No. 13-5162**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify this 25th day of April 2014 that the foregoing Supplemental Brief of Plaintiffs has a typeface of 14 points and, as calculated by my word-processing software (Microsoft Word), contains 2840 words and also complies with this Court's Scheduling Order of September 11, 2013, in that it is 13 pages, which is less than the 20 pages allowed by that Order.

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CERTIFICATE OF SERVICE

I hereby certify that I served and filed the Supplemental Brief of the Plaintiffs this 25th day of April 2014 with the Clerk of the Court of United States Court of Appeals for the D.C. Circuit by using the Court's CM/ECF system.

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