ORAL ARGUMENT SCHEDULED: MARCH 30, 2015 AT 9:30 AM

No. 14-5281

In the

United States Court of Appeals
for the District of Columbia Circuit

LAURA HOLMES, ET. AL,

Plaintiffs,

v.

FEDERAL ELECTION COMMISSION,

Defendant.

On questions certified by the United States District Court
for the District of Columbia under 52 U.S.C. § 30110

Plaintiffs' Principal Brief

Allen Dickerson
CENTER FOR COMPETITIVE POLITICS
124 S. West Street, Suite 201
Alexandria, Virginia 22314
Telephone: 703.894.6800
Facsimile: 703.894.6811
adickerson@campaignfreedom.org

Counsel for Plaintiffs

January 12, 2015

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GLOSSARY

BCRA	Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, 116 Stat. 81 (formerly codified in scattered sections of 2 U.S.C., now recodified in sections of 52 U.S.C.
FEC	Federal Election Commission
FECA	Federal Election Campaign Act

JURISDICTIONAL STATEMENT

The district court had jurisdiction because this action requested a declaratory judgment that certain provisions of the Federal Election Campaign Act ("FECA"), as applied to Plaintiffs, are unconstitutional under the First and Fifth Amendments. 28 U.S.C. §§ 1331; 2201, 2202. Under 52 U.S.C. § 30110 (formerly 2 U.S.C. § 437h),[1] the district court had jurisdiction to make necessary findings of fact and certify constitutional questions to this *en banc* Court. Plaintiffs properly invoked 52 U.S.C. § 30110 because they are eligible to vote in an election for President of the United States.[2] The district court certified questions on November 17, 2014. This Court has jurisdiction to consider those questions under 52 U.S.C. § 30110. Plaintiffs file this brief pursuant this Court's January 8, 2015 order.

STATEMENT OF THE ISSUES

Plaintiffs wished to give $5,200 to their preferred candidates for use during the 2014 general election. They were prohibited from doing so by federal law. Meanwhile, contributors to the opponents of Plaintiffs' preferred candidates were permitted to contribute $5,200 for each of those opponents' use during that same general election. In the words of the district court: "if a party candidate has no

[1] Effective September 1, 2014, the provisions codified at 2 U.S.C. §§ 431-57 were transferred to 52 U.S.C. §§ 30101-30146. This case was filed in before that date, thus, citations below were to Title 2. Plaintiffs now adopt the updated codification.
[2] *See, e.g.*, Holmes Decl., ¶ 5 (JA 25); Jost Decl., ¶ 5 (JA 28).

opposition in the primary election, an individual can contribute $2,600 for the primary campaign and $2,600 for the general election campaign and the candidate can use both amounts ($5,200) in the general election campaign alone." JA 60.

Plaintiffs argue that this violates their rights under the First and Fifth Amendments. As certified by the district court, the questions before this Court are:

> 1. When federal law limits individual contributors to giving $2,600 to a candidate for use in the primary election and $2,600 to a candidate for use in the general election and denies Plaintiffs the ability to give $5,200 to a candidate solely for use in the general election, does it violate Plaintiffs' rights of freedom to associate guaranteed by the First Amendment, U.S. Const. amend, I?
>
> 2. When federal law limits individual contributors to giving $2,600 to a candidate for use in the primary election and $2,600 to a candidate for use in the general election and denies Plaintiffs the ability to give $5,200 to a candidate solely for use in the general election, does it violate Plaintiffs' rights to Due Process, in the context of equal protection of the law, guaranteed by the Fifth Amendment, U.S. Const. amend. V?

JA 62-63.

STATUTES AND REGULATIONS

The pertinent statutes and regulations related to this case are as follows:

> The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.

52 U.S.C. § 30110.

* * * * *

(a) Dollar limits on contributions.

> (1) Except as provided in subsection (i) and section 315A [52 USCS § 30117], no person shall make contributions—
>
> > (A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $2,000; […]
>
> (6) The limitations on contributions to a candidate imposed by paragraphs (1) and (2) of this subsection shall apply separately with respect to each election, except that all elections held in any calendar year for the office of President of the United States (except a general election for such office) shall be considered to be one election.

52 U.S.C. §§ 30116(a)(1)(A); 30116(a)(6)

* * * * *

> (1) The term "election" means--
>
> > (A) a general, special, primary, or runoff election;

52 U.S.C. § 30101(1)(A)

* * * * *

The $2,000 limit was indexed to $2,600 before the 2014 general election. FEC Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 78 Fed. Reg. 8530, 8532 (Feb. 16, 2013).

* * * * *

(c) Permissible transfers. The contribution limitations of 11 CFR 110.1 and 110.2 shall not limit the transfers set forth below in 11 CFR 110.3(c) (1) through (6) – […]

> (3) Transfers of funds between the primary campaign and general election campaign of a candidate of funds unused for the primary;

11 C.F.R. § 110.3(c)(3)

STATEMENT OF THE CASE

FECA limits monetary contributions to federal candidates. Individuals may give $2,600 to a candidate per election, with "election" defined to include "general, special, primary, or runoff" contests for federal office. 52 U.S.C. § 30101(1)(A); 11 C.F.R. § 100.2 (defining "election"); FEC Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 78 Fed. Reg. 8530, 8532 (Feb. 16, 2013) (indexing contribution limit). Consequently, a separate contribution limit applies to primary and general election contests. 52 U.S.C. § 30116(a)(6) ("the limitations on contributions to a candidate imposed by paragraphs (1) and (2) of this subsection shall apply separately with respect to each election…"). If an individual wishes to give to a candidate for both the primary and general elections, she may give a total of $5,200.

Defendant Federal Election Commission ("FEC') is the federal agency charged with administering, interpreting, and enforcing FECA, including its per-election contribution limit. JA 58; *see* 11 C.F.R. § 110.1(b)(2) (explaining how to determine whether a contribution was earmarked for a specific election). Non-earmarked contributions are presumed to be for the "next election." 11 C.F.R. § 110.1(b)(2)(ii). But money earmarked for the primary election and given before that election takes place may be "redesignated," and used for the general election. Congressional Candidates and Committees, FEDERAL ELECTION COMMISSION at

21 (June 2014), http://www.fec.gov/pdf/candgui.pdf ("Nevertheless, the campaign of a candidate running in the general election may spend unused primary contributions for general election expenses"). By contrast, a contribution earmarked for an election that has already taken place may only be used to retire outstanding debts from that prior election. 11 C.F.R. § 110.1(b)(3)(i)(A). Consequently, a contributor who gives $5,200 in earmarked contributions the day before a primary election may functionally give $5,200 for general election purposes. *E.g.*, JA 60. But if she sought to contribute the same amount the day *after* the primary, she would be limited to a single $2,600 contribution.

Plaintiffs Laura Holmes and Paul Jost are a married couple residing in Miami, Florida. JA 60. Holmes and Jost each wished to associate with a candidate in the 2014 general election by means of campaign contributions. JA 60-61. Ms. Holmes contributed $2,600 to Carl DeMaio, a general election candidate for California's 52nd Congressional District. JA 60 Mr. Jost contributed $2,600 to Dr. Mariannette Miller-Meeks, a general election candidate for Iowa's Second Congressional District. JA 61. Ms. Holmes and Mr. Jost did not give to either candidate during the primary; instead, each wished to give an additional $2,600 to their preferred candidates after each candidate *won* his or her primary. JA 61.

Neither of the candidates Miller-Meeks and DeMaio challenged faced opposition from within their own party at the primary stage. Nevertheless, both were

considered to have "participated" in a primary election for purposes of collecting contributions. JA 61. Thus, Plaintiffs wanted to structure their contributions so that they could associate with their preferred candidates to the same extent as contributors to their preferred candidates' opponents.[3] *See* JA 59 ("[t]he total amount that an individual may contribute to a particular candidate during a full election cycle depends on the number of elections in which that candidate runs. For example, if the candidate runs in both a primary and a general election, an individual may contribute a total of $5,200—$2,600 for the primary campaign and $2,600 for the general election campaign"). Federal law denied them the opportunity to do so.

On October 20, 2014, the district court issued its Memorandum Opinion and Order denying Plaintiffs' motion for a preliminary injunction. JA 41. Subsequently, on November 17, 2014, it certified facts and questions of law to this Court. JA 57.

SUMMARY OF THE ARGUMENT

Consider two individuals, Adam and Briana, who each seek to contribute in a Congressional election. Adam supports the incumbent, who faces no primary

[3] Incumbent Representatives Scott Peters and David Loebsack—Mr. DeMaio's and Dr. Miller-Meeks' respective opponents—each received $2,600 general election contributions from supporters who also gave $2,600 for the primary. Details for Committee ID: C00503110, Itemized Individual Contributions–SCOTT PETERS FOR CONGRESS, FEC Campaign Finance Disclosure Portal, http://www.fec.gov/fecviewer/CandCmteTransaction.do (visited Aug. 19, 2014); Details for Committee ID C00414318, Itemized Individual Contributions–LOEBSACK FOR CONGRESS, FEC Campaign Finance Disclosure Portal, http://www.fec.gov/fecviewer/CandCmteTransaction.do (visited Aug. 19, 2014).

challenger, and Briana does not. Adam gives $5,200 before the primary election to the unchallenged incumbent, earmarking $2,600 for the primary and $2,600 for the general election. Briana waits out the challenging party's primary before contributing, because she wants her money to be used to fight the incumbent rather than in an intraparty squabble. The result is that the incumbent can legally use all of Adam's $5,200 contribution for general election purposes, while Briana can only give $2,600 to the challenging party's nominee for that same general election.

The Plaintiffs in this case closely mirror Briana in this example. While Congress may limit the amount a particular individual gives to a particular candidate, its discretion in doing so is not limitless. Lacking "a scalpel to probe" such questions, *Buckley v. Valeo*, 424 U.S. 1, 30 (1976) (*per curiam*), courts will generally defer to the legislature's judgment of the permitted contribution amount. But courts do not rotely defer to any type of restriction the state chooses to impose. It is improper for contribution limits to be artificially divided in ways that are not tailored to the prevention of *quid pro quo* corruption or that provide advantages to certain types of candidates. Such schemes violate, respectively, the First and Fifth Amendments.

This is such a case. Congress has stated that an individual may give $5,200 to a candidate for both the general and primary elections, reasoning that such contributions are insufficient to corrupt the receiving candidate. Congress then conditioned that noncorrupting contribution on the timing of the gift: at least half

must be given before the primary election, even if only by a day, and even if the entire $5,200 is used for the general election. Conversely, the entire $5,200 may *not* be given *after* the primary election, even if only by a day, and even though the same $5,200 will be used for the same general election. The conditional timing of this noncorrupting contribution violates both common sense and the Constitution.

ARGUMENT

I. Standard of Review

This Court reviews questions certified under 52 U.S.C. § 30110 *de novo*. *See, e.g, Republican Nat'l Comm. v. FEC* (*In re Anh Cao*), 619 F.3d 410, 415 (5th Cir. 2010); *Goland v. United States*, 903 F.2d 1247, 1252 (9th Cir. 1990).

II. Federal contribution limits are structured so that some contributors may give $5,200 to a single candidate for use in the general election, yet Plaintiffs may not. This does not prevent *quid pro quo* corruption, and consequently violates the First Amendment.

A. To pass constitutional muster, limits on contributions—structural, quantitative, or otherwise—must be "closely drawn" to a sufficiently important governmental interest.

Plaintiffs do not dispute that the government may limit individual political contributions. *Buckley v. Valeo*, the touchstone campaign finance case, facially upheld such restrictions. 424 U.S. 1 (1976). *Buckley* first distinguished between limits on expenditures and limits on contributions, noting that both "implicate fundamental First Amendment interests." *Id.* at 23. Nevertheless, on their face,

"contribution limits impose a lesser restraint on political speech because they 'permit[ ] the symbolic expression of support evidenced by a contribution but do[ ] not in any way infringe the contributor's freedom to discuss candidates and issues.'" *McCutcheon v. FEC*, 134 S. Ct. 1434, 1444 (2014) (quoting *Buckley*, 424 U.S. at 21) (alterations original).

While contribution limits are not subject to strict scrutiny, it has long been recognized that government "action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *Buckley*, 424 U.S. at 25; *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 207 (1982) (both citing *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460-61 (1958)). As a result, *Buckley* placed the burden of persuasion upon the state, holding that "even a significant interference with protected rights of political association [including contribution limits] may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms." 424 U.S. at 25 (citations and quotation marks omitted) (alterations supplied).

When ensuring that contribution limits are "closely drawn," a measure of judicial deference is appropriate as regards the dollar amount of such limits. *See, e.g.*, *Randall v. Sorrell*, 548 U.S. 230, 248 (2006) (Breyer, J., plurality op.) ("In practice, the legislature is better equipped to make such empirical judgments, as legislators have particular expertise in matters related to the costs and nature of

running for office. Thus ordinarily we have deferred to the legislature's determination of such matters") (quotation marks and citation omitted); *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 446 (2001) ("[T]he dollar amount of the limit need not be 'fine tun[ed]'…") (quoting *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 387-88 (2000)) (alterations original); *cf. Davis v. FEC*, 554 U.S. 724, 737 (2008) ("When contribution limits are challenged as too restrictive, we have extended a measure of deference to the judgment of the legislative body that enacted the law") (citations omitted).

This deference concerning the *level* of a contribution limit, however, does not allow legislative body to limit political association in arbitrary or unconstitutional ways. *Nixon v. Shrink Missouri* clarified that "[t]he 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." *Id.* at 391. This ratcheted scale is particularly illuminating here, where the bifurcation of the federal limit—and not the limit itself—is challenged. 52 U.S.C. §§ 30116(a)(1)(A) and 30116(a)(6). *Nixon v. Shrink Missouri* is a classic example: it considered the *existence* of contribution limits, and whether they were set at an appropriate level. That was not a "novel" question. The issue in Plaintiffs' case—bifurcation of a total contribution to a single candidate for use in the general election—does not merely reflect Congress's judgment that there ought to be a limit on the amount of money

an individual may give a candidate. Rather, it regulates the *manner* in which the base limit—the amount and existence of which Plaintiffs do not contest—must be given. This question *is* novel, at least as applied to federal law.

To determine whether it is constitutional to bifurcate the individual-to-candidate contribution limit, this Court "must assess the fit between the stated governmental objective and the means selected to achieve that objective." *McCutcheon v. FEC*, 134 S. Ct. at 1445. In other words, the means—the bifurcated limit—must be "closely drawn" to the end—the prevention of *quid pro quo* corruption. *Id*. at 1446*; see also McConnell v. FEC*, 540 U.S. 93, 144-45 (2003) (contribution limits subject to "'heightened judicial scrutiny,'" as they impinge upon protected expression and association) (quoting *Shrink Missouri*, 528 U.S. at 391).

B. This governmental interest is limited to preventing actual or apparent *quid pro quo* corruption.

The Supreme Court has held that there is only one governmental interest sufficient to justify contribution limits: preventing actual or apparent *quid pro quo* corruption. *McCutcheon*, 134 S. Ct. at 1450; *Buckley*, 424 U.S. at 25; *see also Shrink Missouri*, 528 U.S. at 388. Just last term, the Court restated the contours of this interest. The Chief Justice's historical summary of this standard—and its present application—bears repeating:

> In a series of cases over the past 40 years, we have spelled out how to draw the constitutional line between the permissible goal of avoiding corruption in the political process and the impermissible desire simply

> to limit political speech. We have said that government regulation may not target the general gratitude a candidate may feel toward those who support him or his allies, or the political access such support may afford. Ingratiation and access…are not corruption. They embody a central feature of democracy—that constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns.
>
> Any regulation must instead target what we have called *quid pro quo* corruption or its appearance. That Latin phrase captures the notion of a direct exchange of an official act for money. The hallmark of corruption is the financial *quid pro quo*: dollars for political favors. Campaign finance restrictions that pursue other objectives, we have explained, impermissibly inject the Government into the debate over who should govern. And those who govern should be the *last* people to help decide who *should* govern.

McCutcheon, 134 S. Ct. at 1441-1442 (citations and quotation marks omitted) (emphasis original).

Consequently, it is beyond dispute that contribution limits must target this understanding of *quid pro quo* corruption. This is where "closely drawn" scrutiny comes in: a contribution limit must be closely drawn to the government's interest in preventing actual or apparent *quid pro quo* arrangements—dollars for favors. Otherwise, it is unconstitutional. *McCutcheon*, 134 S. Ct. at 1462. Moreover, the government bears the burden of demonstrating that a particular law is "closely drawn" to this interest. *E.g.*, *Shrink Missouri*, 528 U.S. at 392 (referring to "government's burden to justify limits on contributions.")[4] To accomplish this, it

[4] In fact, strict scrutiny may apply to a differential limit. *Davis v. FEC*, 554 U.S. 724, 739 (2008) (applying strict scrutiny to a differential contribution limit that forced

must offer more than a naked assertion of a "corruption" interest. *Shrink Missouri*, 528 U.S. at 392 (citing and discussing *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 616 (1996) (opinion of Breyer, J.)). "In the First Amendment context, fit matters." *McCutcheon*, 134 S. Ct. at 1456.

This is particularly so in an as applied case like this one. *See, e.g, Wisconsin Right to Life, Inc. v. FEC*, 546 U.S. 410, 411-12 (2006) (in upholding a BCRA provision against a facial attack, the Supreme Court "d[oes] not purport to resolve future as-applied challenges.") Again, Plaintiffs do not dispute that "[e]ven a significant interference with protected rights of political association may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms." *Buckley*, 424 U.S. at 25 (citations and quotation marks omitted). In the Plaintiffs' case, however, the FEC has not—and cannot—meet this burden.

C. Congress has established that a contributor may give $5,200 to a single candidate for use in the general election. The FEC cannot demonstrate an *anti-corruption* interest in requiring Plaintiffs to give half of that $5,200 before the primary.

Courts may lack a "scalpel to probe" the propriety of an exact dollar amount at which a contribution limits is set.[5] Nevertheless, both Congress and the Supreme

candidates to "choose between the First Amendment right to engage in unfettered political speech and subjection to discriminatory fundraising limitations").

[5] *See Buckley*, 424 U.S. at 30.

Court have recognized that a contribution of $5,200 from a contributor to a candidate does not threaten actual or apparent *quid pro quo* corruption. Moreover, even if requiring contributors to structure their contributions in a certain way did further the governmental interest in avoiding such corruption, the bifurcated limit is poorly tailored to that end given the specifics of Plaintiffs' desired contributions. This is precisely why Plaintiffs' as-applied challenge is novel: they do not challenge the amount they may give to candidates, merely when and how they must give it.

According to the district court, "neither Congress nor *McCutcheon* approved contributions of $5,200 in a single election" JA 48. Yet precisely those contributions are allowed here—not for Plaintiffs, but for supporters of those who opposed Plaintiffs' preferred candidates. Contributors to David Loebsack and Scott Peters could (and did) give each of these candidates $5,200 to spend in the general election. N. 3, *supra*. Plaintiffs wished to give the same amount to those legislators' opponents, for the same general election. Because of federal law, they could not.

If anything, the facts of this case emphasize that *Buckley* did not contemplate a situation like the Plaintiffs'—where (1) FECA itself is creating an unfair advantage, and (2) that unfair advantage belongs to certain *contributors* over others. Indeed, the redesignation provision which allows for this asymmetrical treatment of contributors, 11 C.F.R. § 110.3(c)(3), was not addressed by the *Buckley* Court.

More importantly, the only governmental interest at issue is the prevention of *quid pro quo* corruption. One cannot corrupt an abstract concept such as an "election," or enter into a *quid pro quo* with a particular portion of the calendar. What may be corrupted is a *candidate.* From that standpoint, a limit on how much money may be given to candidates may well further Congress's legitimate interest. But no additional work is being done by artificially bifurcating that limit, especially where, in the not-uncommon instance of a candidate facing little or no primary opposition, that bifurcation is itself illusory.

i. Congress and the Supreme Court have determined that contributions of $5,200 from one contributor to one candidate do not cause actual or apparent *quid pro quo* corruption.

The bifurcated limit is not tailored because it prevents Plaintiffs and those similarly situated from giving the full, non-corrupting contribution amount at the time they feel is most critical in the electoral cycle. If a contributor wishes to fully associate with a candidate who must run in a competitive primary, the bifurcated limit forces that contributor to associate with the candidate during a primary election. This is so even for contributors who simply wish to support candidates in the general election (when, after all, one's representatives are actually elected) along party lines. This evidences a lack of tailoring. As the Supreme Court has noted in the contribution limit context, "[s]uch distinctions in degree become significant…when they can be said to amount to differences in kind." *Buckley*, 424 U.S. at 30 (citations

omitted). Like the aggregate limit on individual contributions considered in *McCutcheon*, "[a]t that point, the limits deny the individual all ability to exercise his expressive and associational rights by contributing to someone who will advocate for his policy preferences," a "clear First Amendment harm[]." *Id.* at 1448-49.

Constitutional tailoring is particularly absent where, as here, both Mr. DeMaio and Dr. Miller-Meeks faced opponents who were essentially unopposed during their respective primaries, and who were permitted by federal law to use primary election contributions for general election expenses. The only difference between Plaintiffs' desired contributions and contributions to these opponents is that supporters of the latter would have made their contributions just one day earlier. There is no anti-corruption interest furthered by requiring contributions to be given earlier in the election cycle. In both cases, the candidate receives the same amount of money from the same contributor for the same election.

Moreover, issues continue to develop during a campaign. For example, it may be only after the primary that a scandal involving a candidate is revealed, or that a candidate reveals hitherto unknown beliefs that might cause a donor to wish to associate with another candidate. Perhaps most obviously, one knows in advance that an unchallenged primary candidate will advance to the general election, but will not know which challenged candidate will do so. Contributors should be permitted to structure their contributions to take account of these obvious facts.

Furthermore, primaries are at different times in various states. *E.g.*, Public Disclosure Division, "2014 Congressional Primary Dates and Candidate Filing Deadlines for Ballot Access," FEDERAL ELECTION COMMISSION (2014), http://www.fec.gov/pubrec/fe2014/2014pdates.pdf. Contributors should not be prevented from supporting their chosen candidates simply because it is difficult to follow this schedule.

On the other side of the ledger, there can be no cognizable government interest in encouraging only contributors to candidates *without* primary opponents to put a full $5,200 toward the general election. This harms donors like the Plaintiffs. *See Davis*, 554 U.S. at 750 (contribution limit unconstitutional under the First Amendment which "ha[d] the effect of enabling [Plaintiff's] opponent to raise more money and to use that money to finance speech that counteracts and thus diminishes the effectiveness of" other candidate speech).

ii. As recently as last Term, the Supreme Court reiterated that Plaintiffs' desired contributions do not threaten actual or apparent *quid pro quo* corruption.

Because this case involves a limit upon the amount an individual may give to a particular candidate, the Supreme Court's recent *McCutcheon* decision is particularly relevant. *McCutcheon* discussed both types of contribution limits applicable to individuals: base limits (which cap the amount an individual contributor can give to any one candidate) and aggregate limits (which cap the total

amount an individual may give to all candidates, parties, and PACs). 134 S. Ct. at 1443. As noted previously, the Court evaluated the aggregate limits under closely-drawn scrutiny. *Id*. at 1456.

While *McCutcheon*'s consideration of the aggregate limits is beyond the scope of this case, its discussion of the base limits is instructive. The Court considered the total limit on any one individual's contributions to any one candidate *without respect to the distinction between primary and general elections*. *Id.* at 1448 ("if all contributions fall within the base limits Congress views as adequate to protect against corruption. The individual may give up to $5,200 each to nine candidates"); 1451 ("under the dissent's view, it is perfectly fine to contribute $5,200 to nine candidates but somehow corrupt to give the same amount to a tenth"). Thus, the Court clarified what Congress had already found in setting the base limit at $5,200: this is the dollar amount at or below which—when given by an individual to a candidate—there is no threat of actual or apparent corruption. That is, *McCutcheon* reiterated that "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." *Id.* at 1452. Thus, preventing Plaintiffs' desired contributions—a total of $5,200 to any given candidate during a general election—does not further an anti-corruption interest. By drawing the line at $5,200, Congress implicitly found that contributions of that size, at least, pose no cognizable risk of corruption.

In sum, *Buckley* nowhere reviewed the per-election element of the base contribution limits. Neither did any subsequent case. How can the same $5,200 be more corrupting if given the day after the primary election rather than the day before, especially in light of the Supreme Court's reasoning in *McCutcheon*? While it is true that Congress has the authority to set contribution limits, and courts owe some deference to the amount of such limits, none of the Commission's possible arguments satisfactorily answers this question. There is no anti-corruption interest served by bifurcating the federal limit, and consequently no constitutional excuse for forcing Plaintiffs to bifurcate their contributions.

III. The asymmetrical contribution limit is unconstitutional as applied, because it operates to deny Plaintiffs equal protection of the laws.

As applied to Ms. Holmes and Mr. Jost, the bifurcated contribution limit works an outcome so asymmetrical as to be unconstitutional. This unequal treatment infringes upon the "liberty protected by the Fifth Amendment's Due Process Clause…against denying to any person the equal protection of the laws." *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013); *News Am. Publ'g, Inc. v. FCC*, 844 F.2d 800, 804 (D.C. Cir. 1988) ("Although the Equal Protection Clause appears only in the [Fourteenth] Amendment, which applies only to the states, the Supreme Court has found its essential mandate inherent in the Due Process Clause of the Fifth Amendment[,] and therefore applicable to the federal government"); *see also* JA 50 (citing U.S. CONST. amend. V).

Accordingly, Ms. Holmes and Mr. Jost will prevail on their equal protection claim if they are similarly situated to other contributors, and the bifurcated limit unconstitutionally infringes upon their Fifth Amendment rights. *Yick Wo v. Hopkins*, 118 U.S. 356, 373-374 (1886) (equal protection doctrine's "broad and benign provisions" render invalid any law which may "itself be fair on its face and impartial in appearance, yet...is applied…so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights").

A. Plaintiffs are similarly situated to other contributors.

The Constitution's guarantee of equal protection is designed to prevent "governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (citation omitted). Here, the government has implicitly classified contributors based upon whether or not their preferred candidate faces a primary challenger. It also classifies contributors based upon whether they give money to a campaign committee for the general election by a particular (arbitrary) date.

In 2014, the only difference between the Plaintiffs and contributors to the their preferred candidates' general election opponents was that a contributor to Congressman Loebsack or Congressman Peters could give $5,200 solely for use in the general election. Mr. Jost and Ms. Holmes were denied that same ability. "Contributors to the legislative race were alike in all respects because no relevant

distinctions existed between an individual wanting to donate money to [David Loebsack] and another individual wanting to donate to [Loebsack]'s opponent." *Riddle v. Hickenlooper*, 742 F.3d 922, 926 (10th Cir. 2014) (quotation marks omitted). This will remain the case in future elections where Plaintiffs and those similarly situated seek to associate with general election candidates for federal office. JA 62 ("Plaintiffs' complaint is not mooted by the November 4, 2014 election inasmuch as the same limitations would apply to their contributions in the next federal election in which they wish to contribute to a candidate").

B. The right to associate by making political contributions is a fundamental freedom, which is threatened by the law's asymmetrical outcomes for Plaintiffs and those similarly situated.

The First Amendment's protective scope encompasses the freedom to associate, which the Supreme Court has long considered a "basic constitutional freedom" that "lies at the foundation of a free society." *Buckley*, 424 U.S. at 25 (citation and quotation marks omitted). This is black letter law. *E.g.*, *Shrink Missouri*, 528 U.S. at 386 (limits on the right to contribute implicate "the constitutional guarantee" of associational liberty, which "has its fullest and most urgent application precisely to the conduct of campaigns for political office") (citing *Buckley*, 424 U.S. at 15-16, (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971))). Indeed, just last Term, the Supreme Court noted that "[t]here is no right more basic in our democracy than the right to participate in electing political

leaders…[such as by] contribut[ing] to a candidate's campaign." *McCutcheon*, 134 S. Ct. at 1440-41. While the Court has yet to weigh in on the specific question presented here—hence the need for the unusual review process of 52 U.S.C. § 30110—it *has* determined that where contribution limits work asymmetrical effects, they threaten fundamental freedoms and may be unconstitutional.

In 2008, *Davis v. FEC* considered a BCRA provision commonly called the "millionaire's amendment," which permitted candidates facing a self-financed opponent to raise money in increments triple the normal base limit. 554 U.S. at 729, 738. Before BCRA's enactment, observers noted that the provision's inevitable effect would be asymmetric treatment in favor of a specific class of candidate—in that case, incumbents. 147 Cong. Rec. S. 2542 (Statement of Senator Chris Dodd: "this is what I could call incumbency protection"). The *Davis* plaintiff, a self-financed Congressional candidate, raised both First and Fifth Amendment objections. 554 U.S. at 744, n. 9. Ultimately, Davis prevailed—though the Court did not reach his Fifth Amendment claim—on the ground that such an asymmetric outcome offends the Constitution. *Id.* at 738 ("We have never upheld the constitutionality of a law that imposes different contributions for candidates who are competing against each other, and we agree with Davis that this scheme impermissibly burdens his First Amendment right to spend his own money for campaign speech").

Similarly, in *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, the Supreme Court struck down an Arizona public financing regime under the First Amendment based, in part, upon its asymmetric effect. 131 S. Ct. 2806, 2819 (2011). Arizona's system provided for "a publicly financed candidate" to "receive roughly one dollar for every dollar spent by an opposing privately financed candidate" or independent group supporting such a candidate. *Id*. at 2813. Relying on "the logic of *Davis*" the Court rejected this approach as unconstitutional. *Id*. at 2818. In its opinion, the Court also pointed to a further asymmetry: some Arizona districts, including its state House districts, elected more than one candidate. Consequently, "each dollar spent by the privately funded candidate would result in an additional dollar of campaign funding to *each* of that candidate's publicly financed opponents." *Id*. at 2819 (emphasis supplied). The Court stated that, in such circumstances, candidates would be required "to fight a political hydra of sorts." *Id.*

This was equally (if not especially) true for independent groups which, in speaking about candidates, would trigger direct cash payments to those candidates' opponents. *Id.* ("spending one dollar can result in the flow of dollars to multiple candidates the group disapproves of"). These passages can only be read to express the Court's concern—explicitly raised in both *Buckley* and *Davis*—that governments might impermissibly burden political association and expression by advantaging

some over others. This violates the First Amendment, as explained above. It also falls far short of the Fifth Amendment's equal protection guarantee.

Indeed, the Court's concern that contribution limits may cause Fifth Amendment injury stems from *Buckley* itself. *Buckley* merely considered a facial challenge to FECA's contribution limits, and did not consider the effects of separate limits for primary elections. 424 U.S. at 35 ("the impact of the Act's $1,000 contribution limitation on major-party challengers and on minor-party candidates does not render the provision unconstitutional on its face"). The Court left the door open for subsequent challenges where those limits work "invidious discriminat[ion]." *Id*. at 31, n. 33. This was particularly important given that, because FECA was necessarily designed by incumbents, it was possible that "the Act, [might] on its face appear[] to be evenhanded" but this appearance "may not reflect political reality." *Id*.; *see McCutcheon*, 134 S. Ct. at 1441-42 ("[T]hose who govern should be the *last* people to help decide *who* should govern") (emphasis original).

C. The bifurcated contribution limit fails Fifth Amendment scrutiny.

If a statute implicates a right "fundamental to our constitutional system, statutory classifications impinging upon that right must be narrowly tailored to serve a compelling governmental interest." *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 666 (1990) (citing *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 101 (1972); *overruled on other grounds, Citizens United v. FEC*, 558 U.S. 310. But

as the district court determined in its opinion denying Plaintiffs' motion for a preliminary injunction, "[t]he Supreme Court…has not addressed the scrutiny applicable to a challenge to restrictions on political contributions under an equal protection rubric." JA 50. At least one federal Court of Appeals has determined that *Buckley*'s "closely drawn" scrutiny applies in the equal protection context, just as in the First Amendment context. *Riddle*, 742 F.3d at 928 ("For the sake of argument, we can assume that this form of intermediate scrutiny applies when contributors challenge contribution limits passed on the…Equal Protection Clause rather than the First Amendment"); *id.* at 931 (Gorsuch, J, concurring) ("In the Fourteenth Amendment's equal protection context, the Supreme Court has clearly told us to apply strict scrutiny not only to governmental classifications resting on certain inherently grounds (paradigmatically, race) but also governmental 'classifications affecting fundamental rights'") (citing *Clark v. Jeter*, 486 U.S. 456, 461 (1988)).[6]

Even if Fifth Amendment challenges do not require strict scrutiny, the bifurcated contribution limit is still invalid because it is not closely drawn to a

[6] Before the 2014 election, Plaintiffs sought a preliminary injunction in district court. The district court agreed with the reasoning of the *Riddle* majority, and also noted that the U.S. District Courts of the District of Maine and the District of Columbia had also "applied the same 'closely drawn' scrutiny to equal protection challenges." JA 50-51 (citing *Riddle*; *Woodhouse v. Me. Comm'n on Governmental Ethics & Election Practices*, 2014 U.S. Dist LEXIS 117926 at 18 (D. Me. Aug. 22, 2014); *Wagner v. FEC*, 901 F. Supp. 2d 101, 112-113 (D.D.C. 2012), *vacated on other grounds*, 717 F.3d 1007 (D.C. Cir. 2013)).

sufficiently important governmental interest. *McCutcheon*, 134 S. Ct. at 1445-1446 ("Because we find a substantial mismatch between the Government's stated objective and the means selected to achieve it, the aggregate limits fail even under the 'closely drawn test.' We therefore need not parse the differences between the two standards in this case"). Indeed, as demonstrated *supra*, the government cannot show that bifurcation of the $5,200 contribution is "a means [closely drawn] to achieve…the stated governmental objective" of fighting *quid pro quo* corruption. *Id*.

While neither the Supreme Court nor this Court has reached the merits of any contributor's equal protection challenge to an asymmetrical contribution limit, the Tenth Circuit has. *Riddle*, 742 F.3d at 930. While *Riddle* contemplated a slightly different factual posture, it addressed a parallel constitutional claim, where a contribution limit that operated asymmetrically violated the guarantee of equal protection. The case involved a Colorado law permitting uncontested major party candidates to receive contributions for the primary and general elections—just as federal law permits now. *Id*. at 924 (Contributions for both elections allowed "even when there is only one candidate seeking the nomination" of a major party). These primary and general election contributions could—as in the federal system—all be spent in the general election. *Id*. at 926; Congressional Candidates and Committees, FEDERAL ELECTION COMMISSION at 21 ("Nevertheless, the campaign of a candidate running in the general election may spend unused primary contributions for general

election expenses"). But candidates seeking the nomination of other, non-major parties, could receive primary contributions "only when multiple candidates vie for the nomination." *Id*. at 926. Other candidates who did not run in a primary—such as independent or write-in candidates—were also barred from accepting primary election money. *Id*. at 927.

The *Riddle* plaintiffs, like Ms. Holmes and Mr. Jost, sought to contribute the full primary and general election amounts to a general election candidate (in *Riddle*, a write-in candidate). The Tenth Circuit found no cognizable anti-corruption interest in "creat[ing] a basic favoritism between candidates vying for the same office," and determined that Colorado's asymmetric scheme violated the U.S. Constitution's requirement that citizens be treated equally under the law. *Id*. at 929, 930. Specifically, the Tenth Circuit determined that because "[a]fter the primary, a supporter of [the write-in candidate] could give" half as much money for the general election as other candidates, "the statute treated contributors differently based on the political affiliation of the candidate being supported. And by treating the contributors differently, the statute impinged on the right to political expression." *Id*. at 927.

Plaintiffs challenge a statute that in operation causes a Fifth Amendment harm comparable to the one identified in *Riddle*. As in *Riddle*, where the contribution limit distinguished between two types of candidates, the primary/general election bifurcation works a similar effect. Colorado's statute created different contribution

limits for those who ran in a primary election and those who did not. Similarly, the federal scheme does not distinguish between those candidates who must face significant primary challengers and those who do not. While "on its face" the bifurcated scheme does not appear discriminatory, the disparate impact in favor of candidates who do not face a primary challenge—and their supporters—is the clear "political reality." *Buckley*, 424 U.S. at 31 n. 33.

Thus, a "fundamental principle: [that] the State must govern impartially" is at risk. *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 587 (1979). Unless the government has a "closely drawn" justification for allowing some contributors to give $5,200 for the general election, while prohibiting other candidates from doing the same, the bifurcated limit fails the Fifth Amendment analysis.

D. Ruling in favor of the Plaintiffs will neither upend nor destabilize the federal campaign finance regime.

It bears repeating that the Plaintiffs do not bring a facial challenge to FECA's contribution limits. Such challenges have long been foreclosed. *Buckley*, 424 U.S. at 30. Indeed, in the equal protection context, it is "the preferred course of adjudication" to strike down a law only as it applies to those unconstitutionally burdened. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) (zoning ordinance invalid insofar as it necessitated a special permit for a particular group home for the mentally handicapped). Simply because "the distinction between [primary and general]…elections undoubtedly is valid for some purposes does not

resolve whether it is valid as applied here." *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 187 (1985) (striking down "Illinois Election Code…insofar as it requires independent candidates and new political parties to obtain more than 25,000 signatures in Chicago").

Ruling for Plaintiffs would not lift the contribution limits, and would do no more than allow Ms. Holmes and Mr. Jost to do what contributors to Congressmen Loebsack and Peters were already permitted to do in 2014 —write $5,200 checks with the knowledge that they will be used to further a general election campaign. This is, all things considered, a rather modest result, and one that would eliminate the unequal treatment of similarly situated Americans seeking to exercise their fundamental right to associate.

CONCLUSION

For the forgoing reasons, Plaintiffs request that this Court find the bifurcated contribution limit unconstitutional as applied to them and their desired contributions.

Respectfully submitted this 12th day of January, 2015,

/s/ Allen Dickerson
Allen Dickerson (D.C. Cir. No. 54137)
Center for Competitive Politics
124 S. West Street, Suite 201
Alexandria, VA 22314
(703) 894-6800
adickerson@campaignfreedom.org

Counsel for Plaintiffs

CERTIFICATE OF LENGTH AND COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 7,089 words, according to a word count by Microsoft Word 2010, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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Dated: January 12, 2015

/s/ Allen Dickerson
Allen Dickerson

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HOLMES, *et al*.	)	
Plaintiffs,	)	
v.	)	No. 14-5281
FEDERAL ELECTION COMMISSION,	)	CERTIFICATE OF FILING AND SERVICE
Defendant.	)	

I hereby certify that on the 12th day of January, 2015, I electronically filed the foregoing Plaintiffs' Brief and Appendix with the Clerk of the United States Court of Appeals for the District of Columbia Circuit using the Court's CM/ECF system, and hand delivered 30 copies of the same to the Clerk's office.

Service was made upon the following via CM/ECF:

Lisa J. Stevenson
Deputy General Counsel – Law

Kevin Deeley
Acting Associate General Counsel

Erin Chlopak
Acting Assistant General Counsel

Steve Hajjar
Attorney

FEDERAL ELECTION COMMISSION
999 E Street, NW
Washington, DC 20463
(202) 694-1650

/s/ Allen Dickerson
Allen Dickerson
Counsel for Plaintiffs