

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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HOLMES, <i>et al.</i> ,)	
)	
	Plaintiffs,)	
)	
	v.)	Civ. No. 14-1243 (RMC)
)	
FEDERAL ELECTION COMMISSION,)	RESPONSE TO
)	PROPOSED FACTS
	Defendant.)	
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**DEFENDANT FEDERAL ELECTION COMMISSION’S
RESPONSE TO PLAINTIFFS’ PROPOSED FINDINGS OF FACT**

In accordance with the Court’s February 10, 2015 Order (Docket No. 24), Defendant Federal Election Commission (“FEC” or “Commission”) responds to Plaintiffs’ Proposed Facts for Certification (Docket No. 26). For the reasons set forth in the Commission’s Brief Opposing Certification and in Support of Summary Judgment in Favor of the Commission (Docket No. 27) (the FEC’s “opening brief”) and its Brief in Response to Plaintiffs’ Opening Brief Regarding Certification, which the FEC is filing concurrently with this submission, the Court should not make any factual findings or certify any constitutional questions. The case is both moot and insubstantial.

In the event the Court disagrees and concludes that this case, or a portion of it, does merit certification, the FEC previously filed its Proposed Findings of Fact / Statement of Material Facts and Constitutional Questions (Docket No. 27, ECF pages 48-69) (“FEC Facts”). While these facts and plaintiffs’ proposed facts contain some overlap, the FEC respectfully submits that, if the Court decides to make factual findings and certify constitutional questions pursuant to 52 U.S.C. § 30110 (formerly 2 U.S.C. § 437h), it should either adopt the FEC’s facts and

proposed constitutional questions or supplement plaintiffs' proposed facts with the additional material from the FEC Facts, which is necessary to render plaintiffs' proposal complete and accurate.

As set forth in more detail below, a number of the facts proposed by plaintiffs are incomplete, inaccurate, or misleading. Moreover, contrary to plaintiffs' suggestion that the FEC has not justified the challenged contribution limit with "evidence" (Pls.' Opening Br. Regarding Certification at 17 (Docket No. 25)), the FEC has in its own submission proposed numerous evidentiary facts that go beyond those plaintiffs propose. (*See generally* FEC Facts ¶¶ 1-88.) These facts clarify the operation of the statutory contribution limit plaintiffs purport to challenge and provide necessary context. If this Court determines that the en banc Court of Appeals must engage in a fulsome review of FECA's individual, per-election contribution limit, then it should certify the full record that the FEC has proposed. (*See* D.C. Cir. Remand Order at 1 (Document #1535282) (Court is to prepare "the factual record necessary for en banc review").)

* * *

The FEC responds to plaintiffs' proposed facts and constitutional questions as follows:

PLAINTIFFS' PROPOSED FACTS

Plaintiffs' Proposed Paragraph 1: The Federal Election Commission (FEC) is a federal government agency charged with administering, interpreting, and enforcing the Federal Election Campaign Act (FECA), 2 U.S.C. §§ 431-57. Cert. Order at 2.

FEC's Response: This paragraph is undisputed. However, FEC Facts ¶ 2 more fully sets forth the FEC's functions, including its rulemaking function, which is relevant because plaintiffs have raised questions about FEC implementing regulations, including those concerning redesignations and transfers of individual campaign contributions by candidates and their committees. *See* FEC Facts ¶¶ 17-33. If the Court adopts this paragraph in lieu of the FEC's, it

should supplement it with (or otherwise include) information from FEC Facts ¶ 2, including the correct citations to FECA as recodified in Title 52 (*see* Plaintiffs' Proposed Paragraph 2).

Plaintiffs' Proposed Paragraph 2: Effective September 1, 2014 the provisions of FECA codified in Title 2 were recodified at 52 U.S.C. § 30101-30146. Cert. Order at 2.

FEC's Response: Undisputed. *See* FEC's opening brief at 3 n.1.

Plaintiffs' Proposed Paragraph 3: Under FECA as amended, *in 2014*, individual persons *could* contribute no more than \$2,600 per candidate, per federal election. *See* 52 U.S.C. § 30116(a); FEC, *Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold*, 78 Fed. Reg. 8530, 8532 (Feb. 6, 2013) (FEC Price Index Adjustments) (limit on individual contributions to federal candidates in the 2013-2014 election cycle is \$2,600 per candidate, per election). Cert. Order at 2 (proposed changes to Certification Order here reflect the price index adjustments to the contribution limits as of February 3, 2015. 80 Fed. Reg. 5750, 5752, available at http://fec.gov/law/cfr/ej_compilation/2015/notice2015-01.pdf).

FEC's Response: Undisputed. *See* FEC Facts ¶ 9.

Plaintiffs' Proposed Paragraph 4: An election is defined as “a general, special, primary, or runoff election.” 52 U.S.C. § 30101(1)(A). Cert. Order at 3.

FEC's Response: This paragraph is undisputed. However, FEC Facts ¶ 7 sets forth FECA's *complete* definition of “election,” which includes, in addition to the quoted portion of the definition, other relevant kinds of elections, including political party caucuses or conventions. If the Court adopts this paragraph in lieu of the FEC's, it should supplement it with (or otherwise include) information from FEC Facts ¶ 7.

Plaintiffs' Proposed Paragraph 5: *Under the text of FECA as amended, the individual contribution limits apply separately with respect to each election.* 52 U.S.C. §§ 30116(a)(1)(A); 30116(a)(6).

FEC's Response: This paragraph is undisputed. However, if it is included, it should be revised to reflect section 30116(a)(6)'s nuance 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)(6).

Plaintiffs’ Proposed Paragraph 6: The 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. If the candidate must also participate in a runoff election, an individual may contribute an additional \$2,600 for that election campaign, for a total possible contribute of \$7,800. *See* 52 U.S.C. § 30116(a); FEC Price Index Adjustments, 78 Fed. Reg. at 8532. Cert. Order at 3.

FEC’s Response: Undisputed (with the caveat that the second “contribute” in the last textual sentence should be changed to “contribution”). *See* FEC Facts ¶¶ 10-11. However, if the Court adopts this paragraph in lieu of the FEC’s, it should supplement it with (or otherwise include) information from FEC Facts ¶¶ 12-16, which use the examples of plaintiffs’ *own* greater-than-\$5,200 cumulative contributions to Congressman Mark Sanford to illustrate the per-election operation of FECA’s individual contribution limit. These facts are necessary to evaluate plaintiffs’ apparent proposed revision of FECA to provide for a single, \$5,200 individual contribution limit in each two-year election cycle.

Plaintiffs’ Proposed Paragraph 7: FEC has adopted regulations on how contributions are to be allocated among these elections. Contributors “are encouraged to designate their contributions in writing for particular elections.” 11 C.F.R. § 110.1(b)(2)(i). Cert. Order at 3.

FEC’s Response: Undisputed. *See* FEC Facts ¶ 17.

Plaintiffs’ Proposed Paragraph 8: If a contribution is not so designated, it is presumed to be for “the next election for that Federal office after the contribution is made.” *Id.* § 110.1(b)(2)(ii). If a contribution is designated for an election that has already occurred, it can be used to satisfy outstanding net debts from that election. To the extent that a contribution to a past election exceeds that amount, it must be refunded, redesignated to a future election, or reattributed as from another contributor. 11 C.F.R. § 110.1(b)(2)(i). Cert. Order at 3.

FEC’s Response: This paragraph is undisputed but incomplete. FEC Facts ¶¶ 18-33 more fully explain other relevant aspects of the cited and other FEC regulations, including FEC interpretations and enforcement applications. For example, these facts additionally show that: (1) contributions that are expressly designated for a particular election count against the donor’s

contribution limits for the named election (*id.* ¶ 18); (2) contributions designated for a previous election, including for the purpose of satisfying debt from a primary election, must be so designated in writing (*id.* ¶ 19); (3) such contributions may only be used to satisfy such debt (*id.*); (4) the circumstances in which unused contributions may be refunded, redesignated for a subsequent election, or reattributed by a committee (*id.* ¶ 20); (5) a primary election contribution redesignated for use in a general election counts against the contributor’s general-election limit (*id.* ¶ 21); (6) general-election candidates are permitted to use general-election contributions to retire outstanding primary-election debts, may do so without contributor authorization, and such use does not alter the applicability of FECA’s per-election contribution limits for the contributor (*id.* ¶ 32); (7) contributions are deemed made when the contributor relinquishes control over the funds (*id.* ¶ 33); and (8) candidates generally have wide discretion over the use of contributions (*id.*). If the Court adopts this paragraph in lieu of the FEC’s, it should supplement it with (or otherwise include) information from FEC Facts ¶¶ 18-33.

Plaintiffs’ Proposed Paragraph 9: “Redesignation” means that a candidate running in a general election “may spend unused primary contributions for general election expenses;” however, those contributions “continue to apply toward the contributors’ limits for the primary” and do not prevent the same contributor from giving \$2,600 for the general election campaign. FEC, CAMPAIGN GUIDE: CONGRESSIONAL CANDIDATES AND COMMITTEES June 2014 at 21, available at <http://www.fec.gov/pdf/candgui.pdf> (citing 11 C.F.R. § 110.3(c)(3)) (last visited Oct. 20, 2014) (retained in Court file). Cert. Order at 3-4.

FEC’s Response: This paragraph is incorrect in part, conflating the Commission’s *redesignation* regulations with the regulation permitting general-election candidates to *transfer* unused primary contributions to their general-election accounts. FEC Facts ¶¶ 21, 31 set forth the Commission’s redesignation and transfer regulations correctly. A primary contribution that is *redesignated* for use in a candidate’s general election counts against the contributor’s general-election limit. FEC Facts ¶ 21 (citing 11 C.F.R. § 110.1(b)(5)(iii)). It is the *transfer* regulation

set forth in 11 C.F.R. § 110.3(c)(3) that permits a candidate participating in a general election to use unused primary contributions to pay for the candidate's general-election expenses. FEC

Facts ¶ 31. The Court should adopt FEC Facts ¶¶ 21, 31.

Plaintiffs' Proposed Paragraph 10: As a result of the rules on redesignation, if a party candidate has no 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. Cert. Order at 4.

FEC's Response: This paragraph is incorrect and conflates the FEC's regulations in the same way described above regarding Plaintiffs' Proposed Paragraph 9. FEC Facts ¶¶ 10, 31 set forth the operation of the individual contribution limits and transfer regulation correctly. In 2014, a contributor was permitted to contribute \$2,600 to a candidate for the candidate's primary election campaign and another \$2,600 for the candidate's general election campaign, for a total of \$5,200. FEC Facts ¶ 10. No contributor in 2014 could contribute \$5,200 to a candidate solely to be used on general-election expenses. FEC Facts ¶ 18, 21 (designated and redesignated contributions count against the limit for the designated election). And no contributor could have contributed \$2,600 to a candidate's primary election and another \$2,600 to the same candidate's general election campaign and be assured or have actual knowledge that the candidate would then use that combined amount of \$5,200 solely on the candidate's general-election expenses. FEC Facts ¶ 33 (candidate, not contributor, controls use of contributions); *see also Holmes v. FEC*, No. 14-1243, 2014 WL 5316216, at *6 (D.D.C. Oct. 20, 2014) (observing that “[p]laintiffs’ perceived inequality in contribution limits is not imposed by FECA or its regulations, but by the vagaries of the election process”).

Under the FEC's transfer regulation, 11 C.F.R. § 110.3(c)(3), any general-election candidate — not merely a party candidate that had no opposition in the primary election — could spend unused primary contributions to pay for general-election expenses. FEC Facts ¶ 31.

Plaintiffs have failed to offer anything to substantiate their ipse dixit that, in the 2013-2014 election cycle or any other one, any candidate's campaign committee — even where the candidate was unopposed or “substantially” unopposed — *in fact* retained a contributor's \$2,600 primary-election contribution and then received another \$2,600 general-election contribution from the same contributor, and then went on to spend both contributions solely on the general election. The Commission served discovery requests asking plaintiffs to state the factual basis for their assertion that this happened with respect to the 2014 campaigns of Scott Peters and David Loeb sack, but plaintiffs could not do so. (Declaration of Jayci A. Sadio (Docket No. 27-1) Exhs. 1-2 (Holmes/Jost Interrog. Resp. ¶ 1) (“Sadio Decl.”).) Plaintiffs' failure of proof underscores that their challenge is based solely on the *theoretical* possibility that such a sequence of contributions, transfers, and expenditures could occur. Accordingly, if the Court decides to find “facts” along the lines of plaintiffs' notion that a contributor's separate \$2,600 contributions for primary and general elections could end up all being spent on a general election, it should indicate that plaintiffs' challenge is based entirely in theory — not actual evidence — and requires a precise sequence of actions by contributors and campaigns acting independently.

Finally, the paragraph is misleading because it fails to account for different states' primary election procedures. *See, e.g.*, FEC Facts ¶¶ 37-63. For example, to the extent the proposed paragraph purports to include within its scope the 2014 primary-election campaign of Scott Peters, plaintiffs' suggestion that Peters was substantially unopposed in that election is incorrect. Indeed, plaintiffs themselves now admit that, in fact, under California's “top two” system, Peters was *opposed* by Carl DeMaio and two other candidates in the primary election. (Sadio Decl. Exh. 1 (RFA Resp. ¶ 3).)

The Court should adopt FEC Facts ¶¶ 10, 31.

Plaintiffs' Proposed Paragraph 11: It is on the basis of the rules allowing redesignation that Plaintiffs complain that some individuals can contribute \$5,200 to candidates general election whereas they, who chose not to contribute to candidates facing opposition in their primary campaigns, could not. Cert. Order at 4.

FEC's Response: This paragraph contains some inaccuracies (and it is also appears to be missing the words "in a" between "candidates" and "general election"). It is true that plaintiffs chose not to contribute to their respective candidates' primary-election campaigns. FEC Facts ¶¶ 65, 71. It is also correct that "[i]t is on the basis of the" FEC's regulation allowing candidates to spend unused primary contributions to pay for their general-election expenses that plaintiffs "complain."

Plaintiffs are incorrect, however, that that provision, 11 C.F.R. § 110.3(c)(3), or any other provision permits any "individuals [to] contribute \$5,200 to candidates general election." No contributor in 2014 could contribute \$5,200 to a candidate solely to be used on general-election expenses. *See* FEC's Response to Plaintiffs' Proposed Paragraph 10. And to the extent that a candidate in 2014 could have retained the funds attributable to a contributor's \$2,600 primary contribution, transferred an equivalent amount of funds to a general-election account, and then spent those funds, in addition to another \$2,600 general-election contribution from the same contributor, on his or her general election campaign, that *theoretical* possibility was also open to the candidates plaintiffs supported. It was plaintiffs that prevented such a possibility by declining to make any primary-election contributions.

In any event, this section 30110 case is not a case in which plaintiffs may properly make that "complain[t]," — *i.e.*, challenge 11 C.F.R. § 110.3(c)(3).

Finally, this paragraph conflates the FEC's redesignation and transfer regulations in the same way described above regarding Plaintiffs' Proposed Paragraph 9.

The Court should adopt FEC Facts ¶ 76 (summarizing plaintiffs' challenge).

Plaintiffs' Proposed Paragraph 12: Plaintiffs Laura Holmes and Paul Jost are a married couple, residing in Miami, Florida. Cert. Order at 4.

FEC's Response: Undisputed. See FEC Facts ¶ 1 (same).

Plaintiffs' Proposed Paragraph 13: *Plaintiffs are citizens of the United States, and reside at 1500 Ocean Drive, Unit 1105, Miami Beach, Florida 33139.* Compl. ¶ 8; Holmes Decl. ¶ 3 (ECF 6-2); Jost Decl ¶ 3 (ECF 6-3).

Plaintiffs' Proposed Paragraph 14: *Plaintiffs were eligible to vote in the 2012 presidential election.* Compl. ¶ 8; Holmes Decl. ¶ 5 (ECF 6-2); Jost Decl ¶ 5 (ECF 6-3).

Plaintiffs' Proposed Paragraph 15: *Plaintiff Laura Holmes sometimes uses the name "Laura Holmes-Jost" when contributing to candidates.* Compl. ¶ 8.

FEC's Responses to Paragraphs ¶¶ 13-15: Undisputed.

Plaintiffs' Proposed Paragraph 16: Ms. Holmes supported Carl DeMaio, a general election candidate for California's 52nd Congressional District (CA-52). Cert. Order at 4.

FEC's Response: Undisputed. See FEC Facts ¶ 64 (same but noting the relevant detail that Ms. Holmes's support occurred in 2014).

Plaintiffs' Proposed Paragraph 17: *During the 2014 primary election on June 3, 2014, there were four candidates on the ballot to represent California Congressional District 52 ("CA-52"): Scott Peters, a Democrat and the incumbent; Carl DeMaio, a Republican; Kirk Jorgensen, a Republican; and Fred J. Simon, Jr., a Republican.* California Secretary of State, Statement of Vote, June 3, 2014, Statewide Direct Primary Election at 24, available at <http://elections.cdn.sos.ca.gov/sov/2014-primary/pdf/2014-complete-sov.pdf>.

FEC's Response: Undisputed. See FEC Facts ¶ 66.

Plaintiffs' Proposed Paragraph 18: *Peters finished first in the June 3, 2014 primary election, receiving 53,926 votes (approximately 42.3%). DeMaio finished second, receiving 44,954 votes (approximately 35.5%). Jorgensen finished third receiving [sic] 23,588 votes (approximately 18.5%), and Simon, Jr. finished fourth, receiving 5,040 votes (approximately 4%).* California Secretary of State, Statement of Vote, June 3, 2014, Statewide Direct Primary Election at 24, available at <http://elections.cdn.sos.ca.gov/sov/2014-primary/pdf/2014-complete-sov.pdf>. See also Cert. Order at 4.

FEC's Response: Undisputed. Compare FEC Facts ¶ 66. (The percentage for Mr. DeMaio appears to contain an immaterial error. The cited source uses the percentage "35.3%," not "35.5%.")

Plaintiffs' Proposed Paragraph 19: Under California's "Two Two" primary system, all candidates for the United States Congress are listed on the same primary ballot and the two candidates who receive the most votes, regardless of party affiliation, compete in the general election. *See* No Party Preference Information, California Secretary of State, <https://www.sos.ca.gov/elections/no-party-preference.htm> (last visited Nov. 7, 2014). Cert. Order at 4-5.

FEC's Response: This paragraph is undisputed (with the caveat that the quoted phrase should be "Top Two"). However, FEC Facts ¶¶ 41, 66-67 more clearly sets forth the additional relevant information that Scott Peters and Carl DeMaio were *opponents* during the primary election, as plaintiffs admit. (Sadio Decl. Exh. 1 (Holmes RFA Resp. ¶ 3).) If the Court adopts this paragraph in lieu of the FEC's, it should supplement it with (or otherwise include) information from FEC Facts ¶¶ 41, 66-67.

Plaintiffs' Proposed Paragraph 20: *DeMaio and Peters were the only candidates to represent CA-52 on the ballot on November 4, 2014.*

FEC's Response: Undisputed. *See* FEC Facts ¶ 86.

Plaintiffs' Proposed Paragraph 21: Ms. Holmes did not make any contributions to Mr. DeMaio before the primary election but contributed \$2,600 to his general election campaign. Cert. Order at 5.

FEC's Response: Undisputed. However, FEC Facts ¶ 65 reflects the additional, relevant detail that Ms. Holmes *chose* not to make any primary contributions to Mr. DeMaio. (Sadio Decl. Exh. 1 (Holmes RFA Resp. ¶ 2).) This detail should be included.

Plaintiffs' Proposed Paragraph 22: Mr. Jost supported Marionette Miller-Meeks, a general election candidate for Iowa's Second Congressional District. Cert. Order at 5.

FEC's Response: Undisputed. *See* FEC Facts ¶ 70 (same but noting the relevant detail that Mr. Jost's support occurred in 2014).

Plaintiffs' Proposed Paragraph 23: *During the 2014 primary election, Dr. Miller-Meeks was on the ballot with two other candidates from the Republican Party, Mark S. Lofgren and Matthew C. Waldren. Miller-Meeks received 15,043 votes, Lofgren received 11,634 votes, and Waldren received 3,746 votes, out of a total of approximately 33,662 votes cast. Iowa Secretary*

of State, 2014 Primary Election Results, Official Canvass by County at 10, available at <https://sos.iowa.gov/elections/pdf/2014/primary/canvsummary.pdf>.

FEC's Response: Undisputed. *Compare* FEC Facts ¶ 72 (including the additional fact that David Loeb sack also won his primary election).

Plaintiffs' Proposed Paragraph 24: Mr. Jost contributed \$2,600 to Dr. Miller-Meeks only after she won the primary election; he made no contribution to any candidate in the Iowa primary. Cert. Order at 5.

FEC's Response: Undisputed. However, FEC Facts ¶¶ 71, 74 reflect the additional, relevant detail that Mr. Jost *chose* not to make any primary contributions to Dr. Miller-Meeks. (Sadio Decl. Exh. 2 (Jost RFA Resp. ¶ 1).) This detail should be included.

Plaintiffs' Proposed Paragraph 25: During the general election campaign, Dr. Miller-Meeks faced incumbent David Loeb sack, who was the only candidate on the ballot in the Democratic Party primary for Iowa's Second Congressional District. Cert. Order at 5.

FEC's Response: Undisputed. *See* FEC Facts ¶ 73 (same).

Plaintiffs' Proposed Paragraph 26: Ms. Holmes wanted to contribute an additional \$2,600 to Mr. DeMaio and Mr. Jost wanted to contribute an additional \$2,600 to Dr. Miller-Meeks during the general election campaigns but they were prevented from doing so by FECA and FEC regulations. Cert. Order at 5.

FEC's Response: The statement that "FECA and FEC regulations" "prevented" plaintiffs from making contributions is less complete than the Commission's proposed facts. FEC Facts ¶¶ 69, 75 more clearly state that plaintiffs did not make the contributions because those contributions would have exceeded FECA's \$2,600 per-election contribution limit. As noted above, no contributor in 2014 could contribute \$5,200 to a candidate solely to be used on general-election expenses. FEC's Response to Plaintiffs' Proposed Paragraph 10. If the Court adopts this paragraph in lieu of the FEC's, it should revise the "prevented" phrasing along the lines of FEC Facts ¶¶ 69, 75.

Plaintiffs' Proposed Paragraph 27: Plaintiffs did not want to exceed the contribution limit of \$5,200 for the combined primary and general election periods, but each wanted to give \$5,200 solely for use in the general election. Cert. Order at 5.

FEC's Response: It is undisputed that plaintiffs "each wanted to give \$5,200 solely for use in the general election" even though no contributor in 2014 could contribute \$5,200 to a candidate solely to be used on general-election expenses. This paragraph is disputed to the extent that it identifies a nonexistent "combined" "contribution limit of \$5,200." *See* FEC Facts ¶¶ 69, 75 (plaintiffs did not want to exceed FECA's \$2,600 general-election contribution limit); *Holmes*, 2014 WL 5316216, at *4 n.5 ("The limit is not \$5,200, as Plaintiffs would have it. The limit is \$2,600 *per election* . . ."). If the Court adopts this paragraph in lieu of the FEC's (FEC Facts ¶¶ 69, 75), it should revise the language to describe the per-election contribution limit correctly.

Plaintiffs' Proposed Paragraph 28: Plaintiffs filed suit on July 21, 2014, alleging that FECA's contribution limit of \$2,600 per individual/per candidate/per election is unconstitutional as applied to them, where Plaintiffs wanted to contribute no money to any primary candidate and contribute a full \$5,200 to general election candidates. *See* Compl. [Dkt. 1]. Cert. Order at 5.

FEC's Response: This paragraph is incorrect and misleading to the extent that the phrase "a full \$5,200" suggests that a statutory contribution limit of \$5,200 exists. *See* FEC's Response to Plaintiffs' Proposed Paragraph 27. If the Court adopts this paragraph, it should substitute the words "make an excess, double-the-limit contribution in the amount of \$5,200" for the words "contribute a full \$5,200" in order to accurately describe what plaintiffs wished to do in 2014.

Plaintiffs' Proposed Paragraph 29: Plaintiffs sought a declaratory judgment and injunction barring enforcement against them of the per-election provisions of FECA and the FEC regulations in the 2014 federal elections. *Id.* Cert. Order at 6.

Plaintiffs' Proposed Paragraph 30: On August 28, 2014, Plaintiffs filed a motion for a preliminary injunction [Dkt. 6]. Cert. Order at 6.

Plaintiffs' Proposed Paragraph 31: After full briefing, this Court denied the motion for a preliminary injunction on October 20, 2014 [Dkt 15]. Cert. Order at 6.

FEC's Responses to Paragraphs ¶¶ 29-31: Undisputed. (Plaintiffs filed their preliminary-injunction motion on August 20, 2014.)

Plaintiffs' Proposed Paragraph 32: In response to the Court's Order to Show Cause, Plaintiffs sought certification of two constitutional questions to the D.C. Circuit [Dkt. 17]. Cert. Order at 6.

FEC's Response: This paragraph is misleading to the extent that it suggests that plaintiffs have ever identified particular questions they believe should be certified to the en banc Court of Appeals. *See infra* FEC's Response to Proposed Constitutional Questions.

Plaintiffs' Proposed Paragraph 33: 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. Cert. Order at 6.

FEC's Response: This paragraph is inaccurate. Even though the individual contribution limit continues to apply to plaintiffs (as it does to all individuals) on a per-election basis, plaintiffs' complaint is moot for reasons the FEC has explained. *See* FEC's opening brief at 15-16; FEC's Response Brief at 2.

Plaintiffs' Proposed Paragraph 34: *On January 30, 2015, the United States Court of Appeals for the District of Columbia Circuit granted the FEC's Motion to Remand this case "in order to provide the parties an opportunity to develop, by expedited discovery or otherwise, the factual record necessary for en banc review of the plaintiffs' constitutional challenge."* Order Granting Motion for Remand, Dkt. 22 (citing *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 192 n.14 (1981); *Wagner v. FEC*, 717 F.3d 1007, 1009 (D.C. Cir. 2013)).

FEC's Response: This paragraph is incomplete and misleading. Plaintiffs' selective quotation of the D.C. Circuit's Remand Order suggests that the Court *must* recertify the case after providing the parties with the opportunity to develop the necessary record. Not so. The D.C. Circuit instructed the Court to "complete the functions mandated by § 30110 and described in *Wagner v. FEC*, 717 F.3d [1007, 1009 (D.C. Cir. 2013) (per curiam)], including" the record

development function that is the subject of plaintiffs' excerpt from the Remand Order. Order, *Holmes v. FEC*, No. 14-5281 (D.C. Cir. Jan. 30, 2015) (Docket No. 21) ("Remand Order"). The "functions" mandated on page 1009 of *Wagner* go beyond merely developing a record, however: "First, [the district court] must develop a record for appellate review by making findings of fact. *Second, the district court must determine whether the constitutional challenges are frivolous or involve settled legal questions. Finally, the district court must immediately certify the record and all non-frivolous constitutional questions to the en banc court of appeals.*" *Wagner*, 717 F.3d at 1009 (citations omitted) (emphasis added). Contrary to plaintiffs' suggestion in the proposed paragraph, the second and third functions — screening for frivolousness or whether the legal questions are settled and certifying only "non-frivolous" constitutional questions — are mandatory functions this Court is required to perform before determining, by April 24, 2015, if plaintiffs have presented *any* constitutional questions requiring certification to the en banc Court of Appeals.

PROPOSED CONSTITUTIONAL QUESTIONS

Proposed Constitutional Question 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?

Proposed Constitutional Question 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?

FEC's Responses to Proposed Constitutional Questions: As explained above and in the FEC's opening brief and Reply, the Court should not certify any constitutional questions. But to the extent the Court concludes otherwise, the proposed constitutional questions above, which this Court previously certified and plaintiffs ask this Court to recertify, are undisputed.

However, the FEC respectfully submits that its versions of the questions more accurately reflect (a) the purportedly as-applied nature of plaintiffs' challenge, and (b) that their challenge involves elections that have already taken place.

It is telling that plaintiffs themselves have never attempted to articulate any precise constitutional questions concerning the relief they request. The FEC submits that this is because plaintiffs cannot articulate any sensible relief that they still desire, beyond the (now-moot) permission to have made excess contributions in elections that have passed. If they simply seek to strike the contribution limits of section 30116(a)(1)(A), that is the same facial challenge that the Supreme Court rejected in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), which neither this Court nor the Court of Appeals can overrule. *Holmes*, 2014 WL 5316216, at *1 (this Court lacks the "luxury" of contradicting *Buckley* and its progeny). If plaintiffs wish to challenge the FEC's transfer regulation, 11 C.F.R. § 110.3(c), they have not properly done so and *cannot* do so in this case, and they appear to lack standing to do so as individual contributors in *any* case. And if plaintiffs want the Court of Appeals to rewrite FECA to alter the per-election operation of the individual contribution limits, based upon plaintiffs' subjective notion that some candidates do not face "substantial" opponents in their primary elections, that is a request that should be directed to Congress, not the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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