IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LAURA HOLMES, *et al.,*	)
	)
Plaintiffs,	)
	)
v.	)
	)
FEDERAL ELECTION COMMISSION,	) Civil Action No. 1:14-cv-01243 (RMC)
	)
	)
Defendant.	)
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	)
	)

PLAINTIFFS' REPLY BRIEF SUPPORTING CERTIFICATION AND OPPOSING DEFENDANT FEDERAL ELECTION COMMISSION'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The FEC has consistently treated this case as though it were something other than a narrow challenge to a small part of the Federal Election Campaign Act ("FECA"). Congress's decision to bifurcate the overall limit on contributions from individuals to candidates, and require that such contributions be given on a per-election basis, has never been considered by any court, much less one that binds the Court of Appeals. That fact alone suffices to require certification of Plaintiffs' constitutional claims.

Moreover, Plaintiffs challenge that narrow provision only in a specific, as-applied context. They seek only to give, for the general election, the amount they could have given in the primary and general elections combined—the amount many already give for general election purposes to candidates with the good fortune to run unopposed for their party's nomination. The Commission has cited no case considering that as-applied claim.

Having been given an opportunity to provide evidence that the bifurcation of FECA's contribution limits—rather than the existence of the limits themselves—serves an anticorruption purpose, the FEC has failed to do so. Instead, it has burdened the record with hundreds of irrelevant pages concerning thinly sourced legislative history, primary elections, the frequency of runoff elections, and the like. None of this has anything to do with Plaintiffs' case, but it substantially

burdens both the Parties and this Court, which must sift through those submissions as part of a case singled out for expedition. *See* 52 U.S.C. §30110.

Congress required this Court to certify constitutional questions, and the facts necessary to decide them, to the Court of Appeals. The Commission has failed to provide authority or evidence sufficient to countermand that statutory command.

ARGUMENT

I. Plaintiffs' claims are not mooted by the 2014 general election, because they are "capable of repetition, yet evading review."

This case is so obviously capable of repetition, yet evading review, that this Court previously found as much *sua sponte.* Certification of Questions at 6 (Dkt. 18) ("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."). The FEC asks this Court to reverse itself on that issue. It should not do so.

This is not the first time the FEC has attempted to avoid review of an unconstitutional law by incorrectly claiming that a case is "mooted" by the passage of an election. *FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 462 (2007) ("*WRTL*") (where nonprofit corporation was banned from distributing a communication concerning a particular candidate before a particular election, and election passed before completion of litigation, case "fit comfortably within the established exception to mootness for disputes capable of repetition, yet evading

review"); *Davis v. FEC*, 554 U.S. 724, 735 (where a self-financed candidate for the House of Representatives had challenged BCRA's "Millionaire's Amendment," and lost the election before the case could be litigated to completion, mootness exception applied) (citing *WRTL*, 551 U.S. at 462).

Davis states the parameters of the "capable of repetition but evading review" exception to the mootness doctrine: it "applies where '(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.'" 554 U.S. at 735 (citations omitted). The record here demonstrates both of these elements, and to the extent the FEC attempts to show otherwise, it misunderstands the type and quantum of evidence required.

A. Plaintiffs' case could not reasonably be resolved before the 2014 election concluded.

As the *Davis* Court noted, FEC mootness claims based upon an election's passing typically fail. This is because elections recur every two years; should FECA's per-election bifurcation remain on the books, it will continue to regularly affect Plaintiffs and similarly situated contributors. Nevertheless, litigation is typically a lengthy affair, and it is not uncommon for a case to require more than two years. (This case, for example, was filed on July 1, 2014, under an expedited review provision, and no court has yet reached the merits).

Davis (and its treatment of *WRTL*) illustrates this point:

> In *WRTL*, "despite BCRA's command that the cas[e] be expedited 'to the greatest possible extent,'" WRTL's claims could not reasonably be resolved before the election concluded. Similarly, in this case despite BCRA's mandate to expedite and Davis' request that his case be resolved before the 2004 general election season commenced, Davis' case could not be resolved before the 2006 election concluded, demonstrating that his claims are capable of evading review.

554 U.S. at 735 (characterizing *WRTL*, 551 U.S. at 463). *See also, e.g., First Nat'l Bank* v. *Bellotti*, 435 U.S. 765, 774-75 (1978) (18-months between legislature's authorization of a referendum and its consideration by voters offered "no reasonably foreseeable circumstances" for full judicial review). *Bellotti*'s 18-month timetable is particularly instructive given that federal elections recur biennially.

The Supreme Court in *Citizens United v. FEC* cautioned against this protracted timetable, emphasizing the harm to the political process when litigants must wait out several years of litigation before exercising their political rights.

> The decision to speak is made in the heat of political campaigns, when speakers react to messages conveyed by others. A speaker's ability to engage in political speech that could have a chance of persuading voters is stifled if the speaker must first commence a protracted lawsuit. By the time the lawsuit concludes, the election will be over and the litigants in most cases will have neither the incentive nor, perhaps, the resources to carry on, even if they could establish that the case is not moot because the issue is "capable of repetition, yet evading review." Here, Citizens United decided to litigate its case to the end. Today, Citizens United finally learns, two years after the fact, whether it could have spoken during the 2008 Presidential primary--long after the opportunity to persuade primary voters has passed.

558 U.S. 310, 334 (2010)(citations omitted).

The situation here is no different. Despite expedited proceedings under §30110, this case was not resolved in time for the 2014 general election. The "evading review" prong of this mootness exception plainly applies.

B. This case will repeat during future election cycles.

A controversy is "capable of repetition" when there exists a "reasonable expectation or a demonstrated probability that the same controversy will recur involving the same complaining party." *WRTL*, 551 U.S. at 463 (quotation marks and citation omitted). On this, the parties agree. FEC Cert. Br. (Dkt. 27) at 15.

The 2014 general election has passed. Nevertheless, similar electoral circumstances will recur. As the FEC itself demonstrates, candidates frequently run in uncontested primary elections. Leamon Decl. Ex. 1 (listing candidates across a number of states who ran unopposed in recent primary elections).[1] It is a reality of our two-party system that at least some of those candidates will go on to face the winners of *competitive* primaries.[2] Moreover, the Supreme Court has "recognized

[1] These include (not exhaustively) the following uncontested primaries: Democratic ("D") in AL-3 and AL-6 (p.1); D in NC-3 (p.13); D in NC-10 (p.14); Republican ("R") in NC-13 (p.15); D in OK-3 (p.17); R in AR-1 (p.28); D in KY-6 (p.31); R in NC-5 (p.32); D in NC-7 (p.32); R in SC-3 (p.34); R in SD-At Large (p.35); D in TN-2 (p.35); Democratic, Working Families, Independence for NY-Sen (p.45); D in AL-2 (p.48); R in LA-2 (pre-jungle primary) (p.55), D in LA-3 (p.55); D in MS-1 and MS-2 (p.56); R for GA-Sen (p.68); and D for IL-Sen (p.68).

[2] Iowa's 2014 U.S. Senate race is but one example. Republican Joni Ernst faced three opponents for her party's nomination, while Democrat Bruce Braley ran unopposed. "Iowa Primary Results", N.Y. TIMES (June 4, 2014), available at: http://elections.nytimes.com/2014/results/primaries/iowa. Ernst then defeated

that the capable of repetition, yet evading review exception, in the context of election cases, is appropriate when there are as applied challenges as well as in the more typical case involving only facial attacks. Requiring repetition of every legally relevant characteristic of an as-applied challenge—down to the last detail—would effectively overrule this statement by making this exception unavailable for virtually all as-applied challenges. History repeats itself, but not at the level of specificity demanded by the FEC." *WRTL*, 551 U.S. at 463 (quoting *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974)) (quotation marks omitted). Consequently, the facts here are certain to recur in future elections. The FEC cannot establish mootness by requiring Plaintiffs to read the future, and state precisely how.

Moreover, Plaintiffs have a long record of association via contributions to candidates, including those they supported only in the general election.[3] Further,

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Braley in the general election. "Iowa Election Results", N.Y. TIMES (Dec. 17, 2014), available at: http://elections.nytimes.com/ 2014/iowa-elections. Similarly, in WV-3, incumbent Nick Rahall faced primary opponent Richard Ojeda, who took 33.55% of the vote. WV Sec'y of State, Statewide Results Primary Election–May 13, 2014, http://apps.sos.wv.gov/elections/results/results.aspx?year=2014&eid=14&county=Statewide. In the general, Evan Jenkins, who had not faced a primary challenger, defeated Rahall by 15,000 votes. WV Sec'y of State, Statewide Results General Election–Nov. 4, 2014, http://apps.sos.wv.gov/elections/results/results.aspx?year=2014&eid=21&county=Statewide.

[3] Non-exhaustive examples (which, Plaintiffs note, are within the FEC's custody) include: Paul Jost, in 2008, gave the maximum contribution to candidate Keith Fimian for the general election. http://docquery.fec.gov/cgi-bin/fecimg/?29932009475. Similarly, in 2012, he gave the maximum contribution to Richard Mourdock for the general election: http://docquery.fec.gov/cgi-bin/fecimg/?12021290336. Laura Jost, in 2012, gave the maximum contribution to Jeff Flake for the general

while they have no obligation to do so under any proper understanding of mootness, Plaintiffs specifically state their intent to make such contributions in the future, including to general election candidates they did not support in the primary.[4] Jost Affidavit (Ex. 1); Holmes Affidavit (Ex. 2). Plaintiffs' affidavits to this effect are sufficient to show that this case is not moot. *See, e.g., Davis*, 554 U.S. at 736 (former candidate's public statement of intent to self-finance future congressional bid sufficient to show case was not moot; describing WRTL's as-applied challenge as "capable of repetition where WRTL credibly claimed that it planned on running materially similar future ads") (quotations and citations omitted). Even if this case *were* otherwise moot, "the test is not whether there is in fact a 'future relation' that will be affected, but rather whether 'resolution of an otherwise moot case…h[as] a *reasonable chance* of affecting the parties' future relations.'" *Honeywell Int'l v. NRC*, 628 F.3d 568, 577 (2010) (quotation omitted) (emphasis original). There is certainly a "reasonable chance" that this case will affect whether Plaintiffs may contribute as they wish in the future.

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election: http://docquery.fec.gov/cgi-bin/fecimg/?12021004267. Citations obtained from Candidate and Committee Viewer, Page by Page Report Display, FEC.

[4] Even without Plaintiffs' affidavits, a mootness finding is still inappropriate in this First Amendment context, where courts have considered past patterns of behavior to be predictive of future behavior for purposes of a mootness analysis. *See, e.g., Christian Knights of Ku Klux Klan Invisible Empire, Inc. v. Dist. of Columbia*, 972 F.2d 365, 370-71 (D.C. Cir. 1992) (where parties have not indicated intent to engage in future First Amendment activity, but circumstances of the case are likely to recur, "we do not think this gap in information precludes a prediction" of recurrence for mootness purposes) (collecting cases).

Finally, it would be impossible for Plaintiffs to identify a future candidate who will win a future primary election under circumstances like Miller-Meeks and DeMaio did in 2014, and with whom Plaintiffs will wish to associate during that future general election. *Compare* FEC Cert. Br. at 19-20. The FEC's own complex web of regulations regarding what it means to be a "candidate," and when one crosses that threshold, demonstrates as much. *See* 11 C.F.R. § 100.3(a) ("individual becomes a candidate whenever any of [four]…events occur"); *see also id.* at § 101.3 (rules on "[f]unds received or expended prior to becoming a candidate"); *id.* at § 101.3(b) ("for purposes of determining whether an individual is a candidate… contributions or expenditures shall be aggregated on an election cycle basis). The inability to make this nuanced, delicate determination years before the fact does not render a case like this one unlikely to recur.

Given Plaintiffs' declarations, affidavits, and past behavior, along with the nature of U.S. election cycles generally, the record easily shows a "reasonable expectation or a demonstrated probability that the same controversy will recur involving the same complaining party." *WRTL*, 551 U.S. at 463 (quotation marks and citation omitted).

C. The FEC's cited authority is off-topic and unpersuasive.

The FEC's authority for its mootness claim is unusually weak. For example, it characterizes *Bois v. Marsh* as "finding a claim not capable of repetition because

'there are…too many variables to allow a prediction that appellant will again be subjected to [an] action of this sort'"). FEC Cert. Br. at 16 (quoting 801 F.2d 462, 466 (D.C. Cir. 1986)). In *Bois*, an ex-servicewoman alleged discriminatory practices by the Army and her former commanding officer. The FEC's quotation comes from the court's analysis of whether it would be proper to grant equitable relief in the context of Bois's "sweeping constitutional attack against the Army's grievance procedures." 801 F.2d at 466. The court concluded that, as a civilian who had voluntarily resigned from active duty, Bois had "nothing to gain from the equitable relief she [sought]." *Id.* at 466. The specific variables at play informed the court's decision that Ms. Bois' claim was not capable of repetition: "these variables include the likelihood that she will re-enter active service in the Army…and the likelihood that she would again have occasion to employ the challenged procedures if she were to return. The likelihood that these contingencies will occur is too remote to justify judicial review." *Id.* at 466-67.

Plaintiffs have not "resigned" from the political process. They will continue to contribute, and thus remain subject to the per-election bifurcation of the individual-to-candidate contribution limit. No "variables" will determine whether the regime they challenge will continue to apply. *Bois* is completely inapplicable.

Virginians Against a Corrupt Congress v. Moran, a one-page unpublished order from 1993, is similarly unhelpful. No. 92-5498, 1993 WL 260710 (D.C. Cir.

June 29, 1993) (per curiam). The FEC cites it for the proposition that "[t]he passage of the November 2014 election 'makes it impossible for this or any court to grant meaningful relief with respect to' the particular contributions that are the basis of this lawsuit.") FEC Cert. Br. at 15 (citing *Moran* at *1). But *Moran* presents a very different situation, because the statute challenged there had been repealed. *Moran* at *1. Thus, it was not the passage of an election, but Congress's repeal of legislation, that rendered the possibility of recurrence "insufficiently tangible, concrete, and non-speculative to save [that] case from mootness." *Id.* (citing *Penthouse Int'l, Ltd., v. Meese*, 939 F. 2d 1011, 1019 (D.C. Cir. 1991). If Congress repeals the provision challenged here, Plaintiffs will voluntarily dismiss their case. Until then, *Moran* is beside the point.

Finally, the FEC characterizes *Herron for Congress v. FEC* as finding that a "plaintiff's FECA claim concerning a past election was moot because '[o]f course, th[e] court has no power to alter the past.'" FEC Cert. Br. at 15, 16 (citing 903 F. Supp. 2d 9, 13 (D.D.C. 2012)). As a preliminary matter, this quote precedes that court's analysis of the "capable of repetition" exception. Moreover, *Herron* is distinguishable on a number of grounds. First, that plaintiff indicated that his intention to run for Congress in the future was, at least in part, contingent on the court's ruling. *Herron*, 903 F. Supp. 2d at 14. But Ms. Holmes and Mr. Jost unambiguously intend to associate with candidates in future general elections,

regardless of this litigation's outcome. *Compare Unity08 v. FEC*, 596 F.3d 861, 864 (D.C. Cir. 2010) (controversy capable of repetition where plaintiff had "unambiguously" expressed conditional intent to participate in future elections.)

More importantly, the court noted that, even if Herron ran for office, he would have to show "that he w[ould] be subjected to the *same action* again." *Herron*, 903 F. Supp. 2d at 14 (citations omitted, emphasis original). But he complained only of "a one-time event," specifically, an illegal loan to his opponent. *Id.* at 15. The court went on to note—in no uncertain terms—that the capable of repetition prong is "easily met" when a party "challenges an electoral regulation that remains on the books." *Id.* at 14-15 (citations omitted). Plaintiffs are not complaining of a one-time campaign violation, but an ongoing feature of federal law. Thus, *Herron*'s own language undermines the FEC's position.

This Court was right the first time—this case is a paradigmatic example of the "capable of repetition yet evading review" exception to mootness. The FEC's feeble suggestion to the contrary should be explicitly rebuffed.

II. Standard of Review

The parties agree that "legal questions that are settled, insubstantial, or frivolous" are inappropriate for certification under §30110. FEC Cert. Br. at 11. But the suggestion that "[t]he Supreme Court narrowly construed [§]30110" is without merit. FEC Cert. Br. at 12. The FEC relies upon *Bread PAC v. FEC*, where

a PAC sought to invoke §30110's "unique system of expedited review" even though, as a corporation, it was plainly not one of the "three carefully chosen classes of persons" named in the statute (the FEC itself, national party committees, and natural persons eligible to vote for President). 455 U.S. 577 at 581 (1982). The Court rejected the PAC's "expansive construction" in favor of the statute's "obvious meaning." *Id*. In doing so, *Bread PAC* noted the potential burden Congress placed upon the judiciary, and concluded that in such cases "close construction of statutory language takes on added importance" because "[j]urisdictional statutes are to be constructed with precision and with fidelity to the terms by which Congress has expressed its wishes." *Id.* at 580 (quotation marks and citation omitted). But Congress's wishes—as regards suits brought by the three enumerated categories of potential plaintiffs—are unambiguous. *Bread PAC* simply cannot be read as requiring §30110 to be construed "narrowly"—a characterization the Court never used, and one at odds with the text of the opinion. Instead, that opinion simply emphasized that fidelity to the unambiguous language Congress enacted is paramount in this context.

The FEC's other authority on this point is *Cal. Med. Ass'n. v. FEC,* where it attempted (unsuccessfully) to narrow the scope of §30110 review. 453 U.S. 182 (1981) ("*Cal. Med.*"). The FEC asked the Court to "preclude the use of [§30110] actions to litigate constitutional challenges to the Act that have been or might be

raised as defenses to ongoing or contemplated Commission enforcement proceedings.*"* *Id.* at 189. The Court declined to adopt this "cramped construction of the statute," noting the "all-encompassing language" of §30110. *Id*. at 190, 191; *see also id*. at 190 n.13 ("[§30110] expressly requires a district court to 'immediately…certify *all* questions of the constitutionality of this Act' to the court of appeals." (emphasis original)). It further stated that the FEC's interpretation would "undermine the very purpose" of the statute: "to provide a mechanism for the rapid resolution of constitutional challenges to the Act." *Id*. at 191.

The *Cal. Med.* footnotes the FEC cites are similarly unpersuasive. FEC Cert. Br. at 13 (citing 453 U.S. at 192 nn.13-14). Both contemplate §30110's burdens on the judiciary—burdens that were far heavier when *Cal. Med.* was decided, as they included since-repealed provisions for direct Supreme Court review, and required that cases be "expedited to the greatest possible extent." *See* FEC Cert. Br. at 13 n.3 (noting repeal of "greatest possible extent" provision). Despite those burdens, the very passages the FEC cites chide the *Cal. Med.* dissent for "exaggerat[ing] the burden [§30110] actions have placed on the federal courts." 453 U.S. at 192 n.13. In particular, the Court noted that "only a handful" of such cases had been heard, including six cases during the two years from 1979-80. *Id*.

The *Cal. Med.* Court further opined that any "concerns about the potential abuse of [§30110] are in large part answered by other restrictions on the use of that

section." *Id.* at 192 n.14. Importantly, the restrictions the Court refers to are principally "the constitutional limitations on the jurisdiction of the federal courts," including standing. *Id*. They also include the ability to avoid constitutional issues through "resolution of unsettled questions of statutory interpretation," and the ability to dismiss "frivolous" or "purely hypothetical" claims. *Id*. The FEC would interpret this paragraph by reference solely to the word "insubstantial," shorn of the context demonstrating that word to be merely a synonym for "frivolous" as that term is generally used by the courts. *E.g.,* FEC Cert. Br. at 12.

Taken together (or even reading only the few paragraphs and footnotes upon which the FEC relies), both *Bread PAC* and *Cal. Med.* evidence a determination to give effect to §30110's provisions as Congress enacted them. They cannot be fairly read to create a judicially imposed exemption from the district court's duty to "immediately" certify "all" constitutional questions raised by a party with standing. That is precisely what Plaintiffs ask this Court to do here.

For a question to escape certification it must be necessarily foreclosed—as under FED. R. CIV. P. 12(b)(6),[5]—by a Supreme Court holding. *See*, *e.g., Khachaturian v. FEC*, 980 F.2d, 330, 331 (5th Cir. 1992) ("district court need not certify legal issues that have been resolved by the Supreme Court."). The FEC's

[5] *Goland v. United States*, 903 F.2d 1247, 1257-58 (9th Cir. 1990) (comparing [§30110] certification standard to three judge court provision of 28 U.S.C. § 2284, and describing the showing required as "closely resembl[ing] that applied under Rule 12(b)(6)").

position is largely semantic, calling this threshold one of "substantiality," and characterizing caseslaw as creating a higher bar for certification than actually exists. Nevertheless, because the FEC relies only upon Supreme Court precedent in articulating its threshold, the difference between "foreclosure" and "insubstantiality" is slight, if it exists at all. *See, e.g., Feinberg v. Fed. Deposit Ins. Corp.*, 522 F.2d 1335, 1339 (D.C. Cir. 1975) (constitutional question is "substantial" for purposes of certification to three-judge court unless Supreme Court has "foreclose[d] the subject" and left "no room for the inference that the question sought to be raised can be the subject of controversy"). Moreover, it is the Supreme Court's reasoning—not one specific word versus another—that controls. Under no reasonable reading of *Buckley*[6] or *McConnell*[7] were Plaintiffs' claims

[6] *Buckley v. Valeo* did not contemplate a situation like the Plaintiffs' where FECA itself advantages one individual contributor over another, and both of those contributors wish to associate in the very same electoral race. *Compare* 424 U.S. at 31 (FECA "applies the same limitations on contributions to all candidates.") What's more, the redesignation provision which allows for this result in the first place, 11 C.F.R. § 110.3(c)(3), received not a single mention in the *Buckley* opinion. Most fundamentally, *Buckley* did not consider the bifurcation of FECA's contribution limits. *See also* FEC Cert. Br. at 10 ("transfers [between primary and general election accounts] do not change the per-election contribution limits for individual contributors." (citing 11 C.F.R. §§ 110.3(c)(3), 110.1(b)(3)(iv))

[7] In 2002, Congress amended FECA by passing the Bipartisan Campaign Reform Act ("BCRA"), which doubled the individual contribution limits, and indexed them to the consumer price index. 52 U.S.C. § 30116(c) (formerly 2 U.S.C. § 441a(c)). BCRA left FECA's distinction between primary and general elections undisturbed. 52 U.S.C. § 30116(a)(6) (formerly 2 U.S.C. § 411a(a)(6)). Like FECA, BCRA was quickly challenged facially by multiple plaintiffs. *McConnell v. FEC*, 540 U.S. 93. Many of those plaintiffs challenged the increased limit, but

considered. This is enough for certification under §30110's permissive standard. *Contra* FEC Cert. Br. at 2 (characterizing §30110 as an "extraordinary judicial review procedure").

III. The FEC has not shown that FECA's individual, *per-election* contribution limit is closely drawn to prevent actual or apparent *quid pro quo* corruption. Thus, Plaintiffs' First Amendment claim should be certified.

The FEC can point to no case where the Supreme Court has found that corruption is prevented by a per-election—as opposed to annual or election cycle—individual limit. *See* FEC Cert. Br. at 17 (quoting *Buckley v. Valeo*, 424 U.S. at 23-28) (constitutionality of individual-to-candidate limits generally); FEC Cert. Br. at 17 (quoting *McConnell v. FEC*, 540 U.S. 93, 298 (2003) (Kennedy, J., concurring in part and dissenting in part) (contribution limits generally further anticorruption interest); FEC Cert. Br. at 18 (citing and quoting *Holmes*, 2014 WL 5316216, at *4) ("the Supreme Court 'long ago concluded' that [contribution limits] 'prevent corruption and the appearance of corruption by allowing candidates to compete fairly in each stage of the political process.").

It is important to note that the Supreme Court has never found that "fairness to candidates" is an appropriate justification for contribution limits. *Compare, e.g., Davis v. FEC*, 554 U.S. 724. More to the point, the Supreme Court *has* made clear

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none challenged the limit's bifurcation between the primary and general elections. Further, the Court found it lacked jurisdiction to consider the increase. *Id.* at 227-29 (plaintiffs challenging increase failed to demonstrate Article III standing).

that the only constitutionally cognizable justification for contribution limits is the prevention of actual or apparent *quid pro quo* corruption. *McCutcheon*, 134 S. Ct. at 1450. The FEC asserts that *McCutcheon* "invalidat[ed] FECA's aggregate limits on contributions to candidates while emphasizing that the statute's individual, per-election limits on candidate contributions remain "undisturbed" and that those limits are "the primary means of regulating campaign contributions." FEC Cert. Br. at 18 (citing and quoting *McCutcheon* at 1451).

The Commission fails to consider the whole of the *McCutcheon* analysis, which explicitly contemplated $5,200 as the base limit on individual-to-candidate contributions. The Court found that under "the base limits Congress views as adequate to protect against corruption [t]he individual may give up to $5,200 each to nine candidates." *McCutcheon* at 1448. *See also id.* at 1442 ("base limits [restrict] how much money a donor may contribute to a particular candidate or committee" (citing 2 U.S.C. § 441a(a)(1)) (recodified at 52 U.S. § 30116(a)(1)); *id.* at 1442 ("[f]or the 2013-2014 election cycle, the base limits in the Federal Election Campaign Act of 1971 (FECA), as amended by the Bipartisan Campaign Reform Act of 2002 (BCRA), permit an individual to contribute up to…$5,200 total for the primary and general elections.").

Further, the FEC continues to highlight the unhelpful case of *Randall v. Sorrell*, which struck down a particular state's limit as impermissibly low (and,

thus, does not speak to the federal limit's bifurcation). 548 U.S. 230 (2006). The FEC cites *Randall* for the proposition that the "Supreme Court has indicated that a per-cycle limit on contributions to candidates is a 'danger sign[]' of potential unconstitutionality as compared to limits that are set per election, precisely the *opposite* of plaintiffs' contentions here." FEC Cert. Br. at 24 (citing *Randall v. Sorrell,* 548 U.S. at 249 (Breyer, J., plurality op.) (emphasis FEC's). This characterization is in error.

At that page, Justice Breyer notes that "[t]he Act sets its limits per election cycle, which includes both a primary and a general election. Thus, in a gubernatorial race with both primary and final election contests, the Act's contribution limit amounts to $200 per election per candidate…" *Randall,* 548 U.S. at 249. But the Justice says this in order to simplify the math for his next point: "[t]hese limits are well below the limits th[e] Court upheld in *Buckley*." *Id.* at 250. Because FECA has a per-election limit, and Vermont set a per-cycle limit, comparing the two cases required a lowest common denominator. Justice Breyer does not state that the per-election-cycle limit is *itself* a "warning sign." His next paragraph, which compares Vermont's limits to those in multiple other states, makes this clear. *Id.* at 250-51. So, too, does his conclusion: "[i]n sum, Act 64's contribution limits are substantially lower than both the limits we have previously

upheld and comparable limits in other States." *Id.* at 253. Justice Breyer is doing math, not making a constitutional finding about per-election limits.

The FEC also points to Justice Thomas's concurrence in *Randall.* FEC Cert. Br. at 25. It is true that that Justice Thomas considered the per-election-cycle limit to be one of the Plurality's "danger signs." *Id.*; *Randall* at 268. This is, as just stated, a difficult conclusion to draw from Justice Breyer's text and may reflect misunderstanding of the controlling opinion. In any event, while the FEC notes that the non-controlling opinion "discuss[es] inequities created by election-cycle-based contribution limits and describ[es] election-cycle structure as 'constitutionally problematic,'" FEC Cert. Br. at 24-25, Justice Thomas does so because Vermont's system "substantially advantages candidates in a general election *who did not face a serious primary challenge.*" *Randall* at 268 (emphasis supplied). This is precisely Plaintiffs' point.

Similarly, in *Lair v. Bullock*, cited at page 25 of the FEC's Brief, the Ninth Circuit cited Justice Thomas for the proposition that per-election-cycle limits were a "danger sign[]." 697 F.3d 1200, 1208 (9th Cir. 2012) It then, in a cursory, two sentence-analysis, noted that "Montana['s] contribution limits apply to each election in a campaign, so, the amount an individual may contribute to a candidate doubles when the candidate participates in a *contested* primary. *Id*. (quotation marks, brackets, and citation omitted; emphasis supplied). Again, this concern is

central to Plaintiffs' claims—the case does not help the FEC.

Of course, each of these cases involved a particular contribution limit challenged as impermissibly low. *Randall,* 548 U.S. at 248 ("Following *Buckley*, we must determine whether [Vermont's] contribution limits prevent candidates from amassing the resources necessary for effective [campaign] advocacy; whether they magnify the advantages of incumbency to the point where they put challengers to a significant disadvantage; in a word, whether they are too low and too strict to survive First Amendment scrutiny") (citation, quotation marks omitted). In *Randall*, they were. But that is not Plaintiffs' claim here, and thus, these cases are beside the point.

Moreover, as the most recent Supreme Court decision on point, *McCutcheon v. FEC* is instructive in applying closely drawn scrutiny to the facts here. 134 S. Ct. 1434 (2014). *See e.g.,* Pl. Cert. Br. at 16-20 (Dkt. 25). *Compare* FEC Cert. Br. at 17 (characterizing *Buckley* as applying an "intermediate level of scrutiny," (citing 424 U.S. at 23-28)). Plaintiffs wish to contribute at the time during the election cycle that they find most appropriate, and it is the FEC's burden to demonstrate the *quid pro quo* corruption interest in prohibiting them from doing so under closely drawn scrutiny. They have not made that showing, as the firm rule announced in *McCutcheon* emphasizes: "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." 134 S. Ct. at 1441. Indeed, the Supreme Court "[has] never accepted mere conjecture as adequate to carry a First Amendment burden." *Nixon v. Shrink Missouri G'vt PAC*, 528 U.S. 377, 392 (2000).

The FEC cannot shirk or shift this burden with its arguments about "self-imposed injury." Contributors do not support candidates at the pleasure of the government. *See, e.g., McCutcheon* at 1442 ("those who govern should be the *last* people to help decide who *should* govern") (emphasis original). A contributor's motivation for exercising the First Amendment right to associate is irrelevant; it is the government that must make the requisite constitutional showing before preventing her from doing so. And *Buckley* specifically rejected an intent-and-effects test for purposes of constitutional scrutiny. 424 U.S. at 43-44.

As to the FEC's complaints about administrative inconvenience, this case simply does not request an overhaul of the federal campaign finance regime. *Compare* FEC Cert. Br. at 24 ("FECA's per-election limits operate in a manner that is well-matched to the Congressional purpose and generally better matched than the uniform per-election-cycle limits plaintiffs would prefer.") Plaintiffs simply insist that contribution limits operate constitutionally—not just "generally," but in their particular circumstances.

The FEC's objections concerning different forms of elections are, consequently, quite beside the point. To the extent that Plaintiffs wish to give *later* in the electoral process than the FEC wishes, the complications the FEC raises concerning *earlier* elections are of its own making. (Indeed, bizarrely, the FEC simultaneously argues that the current system is too messy to be predicted, and yet would have Plaintiffs—to combat its mootness allegation—predict the future candidates that will run, and that they will support, in future elections). The curative rule here is easily administered: contributors who give in the general election may give the same money they could have given in the primary.

If Plaintiffs case is truly foreclosed, given the Supreme Court's holding in *McCutcheon*, the FEC has still failed to point to the caselaw foreclosing it. As importantly, it has failed to show how the bifurcated limit can pass closely drawn scrutiny given the facts of this case. Thus, Plaintiffs First Amendment question should be certified to the Court of Appeals.

IV. Plaintiffs' Fifth Amendment challenge should be certified, as it has not been decided, and it presents an opportunity to examine the Supreme Court's suggestion that asymmetrical campaign finance statutes may violate the Equal Protection Clause.

The FEC has spent much of this litigation conflating Plaintiffs' First and Fifth Amendment claims. To the extent that the FEC has not (and cannot) show a *quid pro quo* justification for a bifurcated limit, the Court of Appeals need not reach the merits of Plaintiffs' Fifth Amendment claim.

Nevertheless, *Buckley* did not foreclose equal protection challenges to campaign finance laws which "appear[] to be evenhanded." 424 U.S. at 31 n.33. Instead, it explicitly recognized that this "appearance of fairness…may not reflect political reality." *Id*. *Buckley* also confronted the fact—albeit in the expenditure context—"that an incumbent usually begins the race with significant advantages." *Id*. It thus recognized the prospect of invidious discrimination where laws restrict First Amendment rights. Having invalidated the challenged expenditure limits, the Court declined to "express any opinion with regard to the alleged invidious discrimination resulting from the full sweep of the legislation as enacted." 424 U.S. at 33. But if anything, this leaves open, rather than forecloses, Plaintiffs' equal protection challenge.

Years later, in declining to reach the merits of the Fifth Amendment claim presented there, the *Davis* Court noted that the "Millionaire's Amendment" had 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. 554 U.S. at 750. This holding is instructive. The Court reiterated that it has "never upheld the constitutionality of a law that imposes different contribution limits for candidates who are competing against each other, and [the Court] agree[d] with Davis that this scheme impermissibly burdens his First Amendment right to spend his own money for campaign speech." *Id.* at 738.

Thus, the Supreme Court has not suggested that Fifth Amendment claims like the one Plaintiffs' case presents are frivolous. Quite the opposite—such a claim was in fact brought before the Court in *Davis*. Consequently, the Court of Appeals may wish to reach the merits of Plaintiffs' Fifth Amendment claim. Because it is not foreclosed, it, too, should be certified.

This case is not at the merits stage. Rather, this Court is developing questions for certification. Plaintiffs are aware that other contributors have given $5,200 to their preferred candidates for use in the general election, and will be able to do so in the future. Because the FEC can demonstrate no basis for denying Plaintiffs the same right, the Equal Protection Clause is implicated.

Finally, the only federal court to consider an analogous regime *under the Fifth Amendment* found it unconstitutional as applied, identifying a class of disadvantaged candidates. *Riddle v. Hickenlooper*, 742 F.3d 922, 930 (2014) (invalidating state contribution regime treating two classes of candidates differently).[8] Here the Plaintiffs are *contributors*, whose right to associate is at least as fundamental as a candidate's right to fundraise and seek office. If asymmetrical schemes are unconstitutional in the latter context, they certainly are in the former. This is particularly so where contributors wishing to exercise their associational right are forced to use their money in ways they do not wish.

[8] For a detailed discussion of this case, *see* Pl. Cert. Br. at 27-29.

CONCLUSION

Pursuant to § 30110, the FEC must demonstrate that Plaintiffs' claims are foreclosed. It has not carried that heavy burden, and instead seeks to have this case dismissed a moot, or alternatively expanded into a sprawling facial challenge accompanied by a bloated and irrelevant record. This Court was correct to certify the questions and facts it did.

The FEC has now had its requested opportunity to be heard. Further proceedings should occur in the Court of Appeals, as Congress intended.

Respectfully submitted this 20th day of March, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of March, 2015, I filed the foregoing Plaintiffs' Reply Brief Regarding Certification via this Court's electronic filing system, causing electronic notice to be served on the following:

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