**ORAL ARGUMENT SCHEDULED FOR SEPTEMBER 30, 2013**

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**No. 13-5162**

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

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**WENDY E. WAGNER, *et al.*,**

Plaintiffs,

v.

**FEDERAL ELECTION COMMISSION,**

Defendant.

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

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# REPLY BRIEF FOR PLAINTIFFS

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## SUMMARY OF ARGUMENT

Despite plaintiffs' best efforts to be clear in their Opening Brief, the FEC and its amici persist in suggesting that plaintiffs are taking a variety of positions that they have never urged. In Point I, we respond to those mistaken claims regarding (A) whether there is any possibility that improper influences may be used by some would-be contractors (of course there is, but that is not the proper question); (B) whether the state experiences with contracting abuses and their solutions are irrelevant (of course they are not, but their relevance is quite limited); (C) whether Congress is required to

respond all at once to all of the ways in which campaign contributions may influence decision-makers (of course not, but that does not mean that it can do nothing regarding individual contractors and section 441c for 70 years, despite massive changes in federal contracting and in the regulation of campaign financing in federal elections); and (D) whether there are differences between a corporation and its political committee, and between a corporation and its officers and major shareholders (of course there are, but the proper question is whether those differences are relevant in analyzing the constitutionality of section 441c, and they are not).

Point II analyzes a series of arguments contained in the FEC's brief that undermine other positions that it is taking and/or demonstrate the weakness of those other positions. These include the contention that the Court should apply the more relaxed "rational basis" standard of scrutiny to plaintiffs' Equal Protection claim, rather than even an intermediate standard, resembling the more rigorous "closely drawn" standard that would apply even if there were no preferential treatment of corporate contractors, their affiliates, and federal employees.

In Point III we demonstrate that, while First Amendment and Equal Protection challenges are similar in some situations, that is not the case here. The reason is that here the principal difference in treatment – between

individual and corporate contractors – does not result from a complex interrelation among various operative provisions of a larger law. Rather, because the preference for corporate PACs is embedded in section 441c, it is eminently sensible to view that discrimination under an Equal Protection analysis.

Finally, in Point IV, we show that, despite the FEC's grandiose claims about how contractors have a "broad range" of "numerous" alternatives to making political contributions, there is really only one: contractors may engage in fundraising on behalf of a candidate or political party. But that option, which allows a contractor to spend up to $1000 and to raise unlimited amounts of money for the candidates or parties of the contractor's choice, undermines the theory on which section 441c is defended since it permits contractors to accumulate far larger amounts of political indebtedness from elected officials than direct contributions that are subject to the statutory limits.[1]

[1] Note 13 of the FEC's brief (p. 40) questions plaintiff Wagner's continued standing. The Court need not decide whether she still has standing: as long as one plaintiff has standing, the standing of the others need not be considered. *See e.g. Camreta v. Greene*, 131 S. Ct. 2020, 2034 n.9 (2011).

# ARGUMENT

## I. WHAT PLAINTIFFS ARE *NOT* ARGUING, AND WHAT THEY ARE ARGUING INSTEAD.

### A. The Problem with Section 441c Is Not the Absence of the Possibility of Corruption in Contracting, but its Lack of Fit.

The theme of much of the briefs of the FEC and its amici is that plaintiffs are arguing that there was no need for Congress to take any steps to guard against those interested in obtaining federal contracts from using political contributions, as well as gifts, bribes, and other means, to gain an undue advantage in the process. That is not plaintiffs' position. Plaintiffs recognize that there is a danger that the process may be corrupted, or may have the appearance of corruption. Their argument is that section 441c as applied to them is so ill-fitting that it cannot meet the First Amendment standard that at least requires section 441c to be "closely drawn" to address the problem.[2]

As plaintiffs argued in their Opening Brief, the first question, to which the FEC still has no answer, is why a total ban is needed and why the contribution limits applicable to everyone else do not suffice to prevent

[2] The FEC agrees that section 441c must be closely drawn, while plaintiffs urge the Court to apply strict scrutiny to this absolute ban on contributions by individuals (Pls. Br. 24-28). The decision applying the closely drawn standard to a ban, *FEC v. Beaumont*, 539 U.S. 146 (2003), involved a corporation, and should not be extended to registered voters like plaintiffs.

abuses by federal contractors. That question is not limited to a comparison of contributions by ordinary citizens who have no special business before the federal government. It includes federal grantees, who are more numerous than contractors and who are in precisely the same position in terms of seeking advantages as are plaintiffs, but are not covered. The same question applies to those who not only give "large contributions" (FEC Br. 35), but also bundle many thousands more in the hopes of gaining ambassadorships and other high positions in the executive or legislative branches. Moreover, there is full public disclosure of all contributions in excess of $200, which raises the further unanswered question of why a $100 donation is not important enough to be disclosed, but a $100 contribution from a federal contractor is a felony. And while it is correct that those who attend the military academies have to serve their country after doing so (just as contractors have to perform their contracts), the need for a specific nomination from an elected federal official may suggest to some parents a special need to make a contribution to support that official's re-election.

Although the FEC has argued that claims of under-inclusion are irrelevant, this Court, sitting en banc in *Sanjour v. EPA*, 56 F.3d 85 (D.C. Cir. 1995), struck down a ban on outside reimbursement of certain travel expenses of federal employees. It did so because of "the obvious lack of

'fit' between the government's purported interest and the sweep of its restrictions. There is a patent incongruity between the two that features both an 'underinclusive' and an 'overinclusive' component [with the] most troubling feature" being under-inclusiveness." *Id.* at 95. Federal employees were permitted to receive reimbursement if their agency approved the presentation; the problem was that "the benefit accruing to an employee from a week relaxing in four-star hotels and regaling on five-course feasts at the expense of a private party is in no way diminished by first obtaining agency approval." *Id.* As in this case, the government had "not even attempted to regulate a broad category of behavior"– there, not banning reimbursement for approved employee appearances, and here, not banning contributions by others with an economic stake in government decisions. The Court explained that, because the exclusion gave rise to "precisely the harm that supposedly motivated it to adopt the regulations, we have trouble taking the government's avowed interest to heart." *Id.*

The Court also found that "the regulations are nearly as troublingly overinclusive as they are underinclusive." *Id*. at 97. The problem was that if "the government has a substantial interest with respect to only a subcategory of the restricted speech, then its interest will not readily outweigh the burden imposed on the larger category of speech subject to regulation." The same

over-inclusion problem exists here, where the ban applies to many situations in which the government has little if any interest in banning contributions, such as small contributions, small contracts, and contributions to independent political committees and minor parties and candidates, to mention only the most obvious. Although the Court in *Sanjour* applied a slightly different First Amendment test than the closely drawn one applicable to political contributions, both tests require a significant fit between ends and means, and section 441c cannot satisfy that requirement because it too is both under- and over-inclusive.[3]

### B. The Experience of the States Is of Limited Relevance.

The FEC and its amici devote much of their briefs to showing that problems of corruption arise in state and local contracting. From that they seek to establish that the remedies used by states and localities, some of which have been upheld by the courts, support section 441c. Plaintiffs do not contend that the state experience is wholly irrelevant, but instead argue that decisions upholding state laws are not good guides because of four

[3] The FEC continues to rely heavily on *Buckley v. Valeo*, 424 U.S. 1 (1976), and *McConnell v. FEC*, 540 U.S. 93 (2003), even though the contribution laws upheld in those cases were contribution limits, not bans. Moreover, the ban on contributions by those under age 18 in *McConnell* was stricken as being overly broad, *id.* at 231-32, the same contention that plaintiffs make here.

significant differences between the federal system and those found in the states.

First, the contracting systems are very different, with many states assigning specific roles to their governors and legislatures for different contracts, as evidenced by Connecticut's ban which is "branch specific." *Green Party v. Garfield*, 616 F.3d 189, 194 (2nd Cir. 2010). In the South Carolina law cited by amici (Br. 6, n.10), the ban applies only to an "official [who] was in a position to act on the contract's award." S.C. Code Ann. § 8-13-1342 (also excluding "contracts awarded through competitive bidding practices"). In contrast, the federal system is quite decentralized and is governed by a number of statutes that have produced a complex and highly regulated process. *See* Pls. Br. 11-13.[4]

Second, a state comparison is significant only if the existing state system of regulating of campaign finance is comparable to that under the Federal Election Campaign Act, 2 U.S.C. §§ 431 *et seq* ("FECA"). That includes modest contribution limits applicable to everyone, full disclosure,

[4] The FEC (Br.10-12) relies on the deposition of Professor Steven Schooner, who teaches government contracts and has worked on government contracts from inside the government and been a federal contractor himself. His deposition, read as a whole, paints a very different picture from the one suggested by the FEC; in his view the process is carefully regulated, and in most cases reaches decisions on the merits and without outside influence, although he sensibly acknowledges that no contracting system can be perfect. JA 208 (pp. 98-99); 213 (p. 117).

and an agency with powers to issue rules and take enforcement actions. In addition, federal elections are only for President and Congress, whereas states generally elect many other officeholders who have various contracting responsibilities.

Third, there is also no indication in any of the decided cases that any of the state laws actually cover individuals like plaintiffs Brown and Miller, who function as employees, even though they are technically contractors. Indeed, there is no indication that states or localities routinely hire back retirees as contractors, instead of as part-time employees, as USAID, the FBI, and other federal agencies do. Moreover, as far we have been able to determine, states do not have a significant number of individuals hired as contractors to perform functions like those that plaintiff Wagner performed on a part-time basis, or that are carried out by the many other individuals who are hired as federal contractors for other positions that are covered by section 441c. *See* JA 106.

Fourth, state and local laws on contractor contributions have generally been instituted after lesser measures have failed and scandals resulted. *Green Party*, 616 F.3d at 193*; Ognibene v. Parkes*, 671 F. 3d 174, 178-80 (2nd Cir.), *cert. denied*, 133 S. Ct. 28 (2012). Indeed, in *Green Party*, the court struck down a similar ban on contributions by lobbyists because there

had been no scandals involving them, as there had been with contractors. 616 F. 3d at 205-07. By contrast, section 441c was enacted before the intricate and well-developed federal systems regulating contracts and campaign finance were in place, and it has not changed since then.

Plaintiffs do not suggest that the experience in the states is irrelevant, or that the opinions in cases challenging state laws should be disregarded entirely. Rather, unless the four factors discussed above line up with those in the federal system – and they do not – the lessons to be learned from state systems and cases challenging them are quite limited. Plaintiffs' Opening Brief also pointed out distinguishing features of the other laws relied on by the FEC, such as exemptions and exclusions that are not found in section 441c, and they will not be repeated here. For these four reasons, the Court should proceed with great caution before relying on what other courts have ruled in cases involving systems that are quite different from the one at issue here.

### C. The Courts Must Act in Light of the Deficiencies in Section 441c That Congress Has Failed to Correct.

The FEC and its amici respond in two ways to plaintiffs' argument that the Court must step in because Congress has failed to remedy the deficiencies that plaintiffs have identified regarding the ban on individual contractor contributions. First, the FEC quoted the District Court, which

concluded that "Congress need not solve every problem at once." Br. 16, quoting JA 238. Its amici accuse plaintiffs of insisting, contrary to *Buckley*, 424 U.S. at 105, that Congress not be allowed to "take one step at a time" (Br. 30). Second, the FEC suggests that plaintiffs contend that Congress can save section 441c only by addressing "**Every Potential Avenue for Corruption"** (Br. 42, boldface in original heading). Neither response accurately characterizes plaintiffs' position.

As to the one-step-at-a-time argument, it is not plaintiffs' position that Congress must solve all of the problems at once. But the one-step-at-a-time doctrine does not trump the constitutional requirement that a statute banning political contributions must be narrowly tailored to serve a compelling interest, or at least closely drawn to address a sufficiently important interest. And the appropriate standard must be applied to the statute that exists today and the world in which it operates today, not the statute as it was enacted seventy years ago and the federal contracting world of 1940. Since section 441c was enacted, the only change Congress has made has been to add a provision enabling corporate contractors to avoid its impact, thus creating a statute that can no longer be viewed as closely drawn (if it ever was) because it fails to address what is undoubtedly a major part of the problem it is said to address.

Nor can section 441c be viewed as closely drawn today in light of the major changes in federal contracting law and the massive increase in the use of federal grants that have taken place since its enactment. It is not the "first step" with which plaintiffs find fault (although they doubt that there was a justification for a total ban even in 1940). Instead it is the failure of Congress to make any changes – except a major retrogressive change – in section 441c in light of the significant changes in the relevant facts since that first step was taken, that precludes a finding that section 441c is closely drawn.[5]

Congress' action and inaction are particularly noteworthy following this Court's approval of the quite different and much more tailored system that the SEC created for dealing with the appearance that multi-million dollar municipal bond contracts were being influenced by campaign contributions. *See Blount v. SEC*, 61 F.3d 938 (D.C. Cir. 1995). Among its features are exceptions for small donations; its application only to contributions to individuals who are part of the bond contracting process; and its focus on the contracting side rather than the contribution side, by

[5] The FEC (Br. 42) cites Jack Maskell, *"Political" Activities of Private Recipients of Federal Grants or Contracts*, Cong. Research Serv., RL 34725, Oct. 21, 2008, for the proposition that federal grant recipients are also subject to restrictions. But none of those restrictions include bans on political contributions by grantees, and all of them apply only to the use of grant money and not to other funds of the recipient. *Id.* at 23-25.

forbidding those who made contributions from receiving a contract for a period after the contribution was made, rather than banning contributions by those who already have contracts and may not seek another. It also banned contributions by a corporate PAC and other individuals directly involving in the municipal bond business for the would-be underwriter.

The SEC rule shows how a carefully crafted solution can address the corruption or appearance of corruption problem used to justify section 441c in a way that can be upheld by the courts, while also protecting the First Amendment rights of contractors. Although the FEC contends that the statutory lines between the permitted and the forbidden are part of "a reasonable legislative judgment" to which this Court should defer (FEC Br. 24-25), there is not the slightest evidence that Congress has ever looked at section 441c with contemporary circumstances in mind. The FEC also argues (Br. 36) that "Congress is better equipped to make empirical judgments about which alternatives are best to achieve its objectives," but that argument rests on the false assumption that Congress has made an empirical judgment about the world of today; Congress cannot simply rest on what it did in the very different world of 1940 and expect the courts today to defer to what it did then. Thus, contrary to the FEC's claim (FEC Br. 59), this is not a case of a "delicate balancing of interests [as part of] a legislative

judgment to which courts defer." Instead, there are 70 years of congressional neglect in solving these problems, while adding subsection 441c(b) that created the PAC loophole for contractor corporations, thereby making the situation comparatively worse for individual contractors like plaintiffs. This history confirms that section 441c is not closely drawn now, if it ever was.

As for the contention that plaintiffs are insisting that section 441c is unconstitutional unless it includes all of the features found in other laws that reduce their harsh impact, that is also not plaintiffs' position. Rather, it is the failure to include *any* of them, either to bring equality to plaintiffs in comparison with corporate contractors and federal grantees (among others), or to create exclusions for small contracts, small donations, donations to minor parties, or donations to independent political committees, or to fix to any of the other obvious defects in the law, that makes it unconstitutional under the First Amendment and the Equal Protection guarantee of the Fifth Amendment.

Nonetheless, the FEC and its amici contend that plaintiffs' objections about the sufficiency of the tailoring of section 441c should be addressed to Congress, not the courts. The same could be said of any First Amendment case in which insufficient tailoring is asserted, yet that has never sufficed to

prevent this Court from stepping in where the government has acted unconstitutionally. *See, e.g., Sanjour, supra.* The same is true for Equal Protection: Congress can always redraw the lines to eliminate inequality, but that does not preclude courts from protecting those who have been afforded second class treatment by the legislative branch. *See, e.g., Craig v. Boren*, 429 U.S. 190 (1976) (striking down law treating women and men under age 21 differently in terms of their ability to purchase alcoholic beverages); *Reed v. Reed*, 404 U.S. 71 (1971) (striking down law treating women and men differently in terms of their ability to administer the estate of an intestate decedent). Thus, whether a statute like section 441c satisfies the relevant constitutional standard is for the courts to judge and not just for the legislature to repair. Given the history of section 441c and Congress' failure to correct its obvious and long-standing problems of both over- and under-inclusion, this is decidedly not a "regulatory structure that Congress has crafted in a quintessential exercise of legislative line-drawing." FEC Br. 20.

### D. Based on the Purposes that Allegedly Support Section 441c, Corporate Contractor PACS Are Legally Indistinguishable From their Corporate Sponsors.

The FEC defends the exclusion of corporate contractors' PACs from section 441c on the ground that a corporation and its PAC are legally

distinguishable entities, and hence individual and corporate contractors are in fact being treated equally. Plaintiffs do not argue that corporate PACs, established by federal contractors to make political contributions, are legally indistinguishable in all respects from the corporations that establish them. They recognize that there are many ways in which those entities are properly accorded different treatment under the law, ranging from which entity is the employer of an individual, to which forms it has to file with the IRS and the FEC, to which entity is responsible for which debts, to name just a few. But the question for this case is whether that difference matters in the context of this constitutional challenge.

This case involves a law that is intended to prevent contributions that give the appearance of providing a contributor an advantage in obtaining federal contracts. The question is whether that purpose is served or disserved by treating a contribution from the Boeing PAC as if it had no connection to its sponsor and major federal contractor, Boeing Co. In our view, the FEC has provided the most succinct explanation of why it is wholly illogical to treat the PAC of a corporate contractor as not covered by section 441c: "Most Americans lack familiarity with the complexities of federal contracting, and they could easily view *any* contributions by contractors with suspicion." (FEC Br. 32) (emphasis in original). By the

same token, most Americans lack familiarity with FECA, and they would naturally view political contributions from Boeing PAC as contributions from Boeing Co. The fact that corporate sponsors use corporate treasury funds to pay the costs of establishing, administering, and soliciting for their PACs, *see* 2 U.S.C. § 441b(b)(2)(C), and that PACs must bear the name of their corporate sponsors, 2 U.S.C. § 432(e)(5), further supports the correctness of this natural perception. In analyzing a law that is all about perceptions, perceptions that are obviously reasonable cannot be ignored.

The FEC then goes on to suggest that Congress has drawn this line with care, along with the other lines under challenge in this case. There is, however, no evidence that Congress has given the question the slightest thought, or that the American public would agree that the distinction between contributions from a corporate contractor and those from its PAC eliminates the kind of appearance of corruption on which the constitutionality of section 441c depends to survive plaintiffs' Equal Protection challenge. Indeed, the SEC Rule and the Connecticut law at issue in *Green Party*, as well as the laws in other states, include in their coverage of contractor contributions, those of its PAC, its principal officers, and significant shareholders.

The FEC correctly observes that the Supreme Court has refused to equate corporate PACs and their sponsors in other campaign finance cases, and argues that this Court should follow that path here. But in those cases – *Citizens United v. FEC*, 558 U.S. 310 (2010), and *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) ("*MCFL*") – the FEC argued that the availability of a PAC permitted Congress to treat the corporation less favorably and deny it the right to make independent expenditures. By contrast, under section 441c, the existence of a corporate PAC is being used to deny third parties – plaintiffs and other individual contractors – the right to make contributions that the contractor PAC could make. In short, the FEC's argument turns this aspect of *Citizens United* and *MCFL* on their heads.

The FEC similarly argues, and plaintiffs agree, that for most purposes the law properly treats a corporation's officers, directors, and shareholders as separate from the corporation itself. But the issue here is whether, in assessing plaintiffs' Equal Protection challenge, that separate treatment makes sense for all officers and shareholders for all corporate contractors, given the appearance of corruption justification that supports section 441c. It does not make sense, we submit, because in appearance, if not reality, political contributions by corporate officers and directors will often be made

for the interest of the contractor. Thus, at least a contribution from the CEO of Boeing or its chief federal contracting official, whose compensation and even job retention are heavily dependent on the performance of Boeing in the federal contracting market, would sensibly be seen as a contribution for the benefit of Boeing the federal contractor. This inference is reinforced because the law requires contributors to identify their employers with every reportable contribution. *See* 2 U.S.C. §§ 434(b)(3)(A) & 431(13)(A).

Plaintiffs do not contend that every contribution by every shareholder or even every officer of a federal contractor will be attributed to the corporation in the public eye. But such attribution is especially likely, and entirely proper, when the corporation is an LLC, like that of plaintiffs' declarant, Jonathan Tiemann, whose LLC has an expert witness contract with the Department of Labor, under which he will do all the work, and the sole shareholders are Mr. Tiemann and his wife. JA 78, ¶ 5. Whatever appearance of corruption a contribution by such an LLC may engender, it is not lessened one iota if it comes from a PAC that the LLC has or from its shareholder-officer personally. Yet, under section 441c, the legality of the contribution turns on whether the federal contract is with the individual who will do the work – in which case it will be a felony – or with the LLC, in

which case it will be legal as long as the check is not drawn on the LLC's own account.[6]

Moreover, under the rationale of section 441c, it is not just what the public thinks, but also what those who are making the contracting decisions think. Thus, if making contributions could help Jonathan Tiemann or Wendy Wagner obtain contracts for themselves, those same contributions could be of equal assistance if the contracts were given to Jonathan Tiemann LLC or to an LLC that plaintiff Wagner might create. While the connection may be less direct when the contribution comes from some corporate officers or shareholders of public companies, that cannot be said if the contributor is the sole owner of an LLC with a federal contract.

Accordingly, even if the distinction between a corporate contractor on the one hand, and its PAC, officers, directors and major shareholders on the other, may make sense in other contexts, the question in this case is whether it makes sense in the context of plaintiffs' constitutional challenge to section 441c, given the purposes of that statute. It does not.

[6]The costs of establishing and maintaining a PAC were found to be a constitutionally impermissible barrier to requiring that independent expenditures be made by a PAC instead of a corporation itself in both *Citizens United* and *MCFL*. Yet here, the FEC's brief (at 54-55) fails to note the not-insignificant expenses to an individual contractor of establishing and maintaining an LLC, which could then establish a PAC (JA 76-77, ¶ 3).

## II. A NUMBER OF THE FEC'S ARGUMENTS UNDERMINE ITS DEFENSE OF SECTION 441C.

- The FEC contends that one of the goals of the Hatch Act, and section 441c that followed it, is to prevent workers (and contractors) from being coerced into making political contributions. FEC Br. 8. It also cites the pre-*Buckley* decision in *Civil Service Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548 (1973), as a basis for upholding the ban here. The problem is that federal employees are not, and have never been, subject to the contribution ban in section 441c or any comparably broad restriction under the Hatch Act or any other provision of federal law. The anti-coercion protections that are available to them are contained in 18 U.S.C. §§ 601, 603, 606, & 610, all of which either protect federal contractors from exploitation or could easily be amended to do so. If coercion is a justification, the ban in section 441c is plainly not closely drawn in light of these alternatives.

- Despite the fact that section 441c applies to elections for officials who have no official role in federal contracting, the FEC tries to justify it by pointing to the fact that political appointees of the elected President do have such roles (albeit constrained by statutes and regulations from politicizing the contracting process). The irony of this assertion is that many of those political appointees obtained their jobs by making the kinds of "large

contributions" (FEC Br. 35) that the FEC decries when made by contractors, not to mention the frequent roles of would-be appointees as bundlers of large contributions from others. If Congress were serious about preventing contributions from those who "have a direct economic stake in a governmental action" (FEC Br. 24), it would have applied the principal of section 441c to individuals who seek appointment to government positions, as well as to individuals who have a similar stake in receiving federal grants or other economic benefits from the government. Once again, there is no fit between the stated rationale and the vast under-inclusiveness of section 441c.

- The FEC also continues to try to justify the ban on contributions by plaintiffs on the ground that they have "freely chosen" to become federal contractors (FEC Br. 40). That argument appears to have been the constitutional justification for enacting section 441c in 1940 (Pls. Br. 7-8). But if "choice" alone were a proper basis for upholding a ban, it would also apply to any occupational choices that involve the receipt of some government benefit (such as federal employees, political appointees, and federal grantees) without any need whatsoever for a policy justification. Accepting the FEC's theory would also mean that the PACs of corporate contractors could be eliminated tomorrow because corporations "choose" to

become federal contractors and thereby surrender the right, applicable to non-contractor corporations under 2 U.S.C. § 441b(b), to make political contributions through a PAC. But as plaintiffs explained in their Opening Brief, whatever constitutional significance a person's choice in accepting government benefits may once have had, it is no longer the law that choosing to work for the government is automatically determinative. *See, e.g., United States v. National Treasury Employees Union*, 513 U.S. 454 (1995) (striking down an Act of Congress restricting federal employees' First Amendment rights). "Even though respondents work for the Government, they have not relinquished the First Amendment rights they would otherwise enjoy as citizens." *Id*. at 465 (internal quotation marks omitted).

There are also significant distinctions between this case and the more recent "choice" cases cited by the FEC (Br. 41): if plaintiffs fail to comply with section 441c, they can go to jail, whereas the plaintiffs in the FEC's cases only lost financial benefits, such as financial aid, food stamps, or welfare payments. Those losses may be significant to those plaintiffs, but they are not equivalent of being a convicted felon. More important, in each of those cases, the Court sustained the law on the basis of an independent

valid congressional purpose served by the provision being challenged and never hinted, let alone held, that "choice" alone controlled the outcome.[7]

- The FEC urges this Court to apply the rational basis test to plaintiffs' Equal Protection claims (FEC Br. 48-52), although it admits that the test under the First Amendment is whether the law is closely drawn, a standard that the FEC characterizes as "intermediate" (FEC Br. 52). Thus, according to the FEC, section 441c is *less* vulnerable to an Equal Protection challenge than to a First Amendment challenge, even though since 1976 section 441c has explicitly treated corporate contractors more favorably than individual contractors, by allowing only corporate contractors to establish PACs. Even if plaintiffs' Equal Protection claim is not entitled to strict scrutiny, although

[7] In *Buckley*, 424 U.S. at 57 n.65 & 93-96 the limit of spending by candidates who accepted federal funding was essential to support the goals of eliminating private sources of influence and controlling expenditures. In *Selective Serv. Sys. v. Minn. Pub. Interest Research Group*, 468 U.S. 841, 849-50 (1984), the requirement that male students seeking financial aid had to affirm that they had complied with the draft registration requirement was designed to advance the valid purpose of encouraging compliance with that law. In *Lyng v. Int'l Union*, 485 U.S. 360, 372 (1988), the law preventing strikers from obtaining food stamps was designed to assure that the federal government maintained labor neutrality. And in *Wyman v. James*, 400 U.S. 309, 314, 318 (1971), the requirement that an AFDC beneficiary consent to home visits was upheld because it was needed to assure protection of children covered by the benefits and to determine whether there had been changes in the family situation that affected those benefits. Those justifications were challenged on various grounds, but the fact that the Court found them to be valid is what is essential to the analysis here under the First Amendment closely drawn test.

they believe it is, there is no conceivable basis on which their claim of discriminatory treatment regarding the First Amendment protected activity of making political contributions is entitled to a less searching review than a claim in which all those subject to the law are treated the same and that must be examined under the intermediate or closely drawn standard.

## III. PLAINTIFFS' EQUAL PROTECTION CLAIMS ARE NOT REPACKAGED VERSIONS OF THEIR FIRST AMENDMENT CLAIM.

The FEC argues that plaintiffs' Equal Protection claim is nothing more than a "repackaging" of their First Amendment claim under a different label (FEC Br. 52), and that the Court's decision on the First Amendment claim should therefore control the outcome on the Equal Protection claim. Some courts have treated some Equal Protection claims in that manner and in some instances there would be no change in the outcome. Thus, the ban on contributions by persons under the age of 18 that was struck down in *McConnell* as a First Amendment violation could also have been viewed as an Equal Protection case of discrimination against minors, and would have fared no differently. But there is no rule that discrimination in an expressive context must be analyzed only under the First Amendment. Indeed, in *Buckley*, 424 U.S. at 93, and *Lyng*, 485 U.S. at 363-64, both cited by the FEC, the Court analyzed the challenged law under both First Amendment

and Equal Protection principles, and their ruling on the First Amendment claim did not render their Equal Protection claim redundant, as the FEC argues.

In this case, plaintiffs could have emphasized the more favorable treatment of corporate contractors, through their PACs and corporate officers, as part of the First Amendment claim that section 441c was underinclusive, just as they argued that FECA was underinclusive by omitting grantees, bundlers seeking appointed positions, and others who stand to benefit by supporting winning candidates or political parties. But that does not mean that their Equal Protection claim is nothing more than a re-packaged version of the First Amendment claim. Thus, if Congress applied section 441c to grantees and campaign bundlers, and allowed for small contributions and fixed many of the other defects identified by plaintiffs, plaintiffs might no longer have a First Amendment claim. But if section 441c still treated corporate contractors more favorably than individual contractors, plaintiffs would still have an Equal Protection claim. Moreover, when the unequal treatment of two similarly situated groups is explicit on the face of the statute at issue – whether there originally or added subsequently – Equal Protection is the most sensible and obvious way to challenge that discrimination.

It is equally sensible to consider the discrimination in favor of corporate officers and shareholders as compared to individual contractors, as well as that favoring federal employees over individual contractors, under an Equal Protection analysis. Once again, the fact that these discriminations can be seen as further evidence of the lack of the fit required by the First Amendment is irrelevant: there is no law forbidding courts from also examining them as claimed Equal Protection violations. In the case of the corporate officers and shareholders, especially with respect to LLCs and the top officers of major contractors, it is just as artificial to treat them separately from their corporation as it is to treat a corporate sponsored PAC that way.

As for the comparison with federal employees, both plaintiffs Miller and Brown were federal employees in the same agency in which they are now contractors and they have always worked interchangeably with federal employees, both as co-workers and as sometimes supervisors and sometimes supervisees. JA 64-66, ¶¶ 3-6; 54-55, ¶¶ 3-6. Indeed, plaintiff Brown asked the FEC for a ruling that he could make political contributions precisely because he considered that he was not being treated equally with the federal employees with whom he worked. JA 57-59. As for plaintiff Wagner, former ACUS research director Jeffrey Lubbers testified that the decision on

whether a project of the kind that she did was to be done in-house or by a contractor was determined by factors that have nothing to do with why contractors, but not federal employees are subject to the ban in section 441c. JA 70, ¶ 6.

Plaintiffs do not agree with the FEC's "either/or" position, but if it were correct, then the case that section 441c as applied to plaintiffs does not fit the closely drawn standard under the First Amendment would be further strengthened by the inequalities that form the Equal Protection claim.[8]

## IV. THERE ARE NO REASONABLE ALTERNATIVES TO THE BAN IN SECTION 441C THAT CAN SAVE IT.

The FEC's brief promises that, despite the ban in section 441c, the law "allows many other forms of political activity, many more expressive than financial transfers" and claims that plaintiffs may "engage in numerous other activities in which they can express their views of candidates or public issues. *See* 2 U.S.C. § 431(8)(B); 11 C.F.R. §§ 100.74-100.77. . . . leaving contractors a very broad range of alternative means of political expression." FEC Br. 20, 38. Plaintiffs assume that the FEC has provided those assurances because it believes that meaningful alternatives to the ban in

[8] The FEC correctly notes that employees (but not political appointees) have the protections of the Merit Systems Protection Board, but that contractors such as plaintiffs do not (Br. 56-57). That overlooks the fact that contractors have other judicial remedies (JA 217-19, pp. 136-42).

section 441c would help sustain it. It is that proposition with which plaintiffs first take issue.[9]

The basic flaw in the FEC's position is that it is inconsistent with the principle that, in the realm of political speech, it is the right of the individual, not the government, to select which method of speaking will be most effective and efficient for that individual. *Texas v. Johnson*, 491 U.S. 397, 399 (1989) (upholding Johnson's choice of burning an American flag, although there were many other ways in which he could have "protest[ed] the policies of the Reagan administration"). To be sure, various methods of expression may be subject to reasonable restrictions of time, place, and manner, but those do not include a total ban. *See United States v. Grace*, 461 U.S. 171, 182 (1983).

Even if reasonable alternatives were relevant, there are none that remotely fit that description. Thus, if one examines the FEC's brief, all that plaintiffs can do is (i) volunteer their time or (ii) hold a fundraiser for a candidate, party, or political committee of their choice. There is nothing else in the cited provisions that applies to individuals such as plaintiffs. As for volunteering their time, if that were a constitutionally adequate alternative, it

[9] The FEC does not mention making independent expenditures, which plaintiffs have no desire to do. But if they did, the FEC has stated that they would also be banned by section 441c, despite *Citizens United*. *See* Pls. Br. at 40-41, n. 5.

would be a green light for banning all contributions by everyone, or at least making all contribution limits automatically constitutional, which they are not. *Randall v. Sorrell*, 548 U.S. 230 (2006).

The problem with the fundraiser exception is not that it is meaningless, but that its existence seriously undermines the rationale for section 441c: to avoid the appearance of pay-to-play. We will not revisit what we said in our Opening Brief on this subject (Pls Br. 60), except to retract our assumption that the FEC had backed off from relying on the fundraiser exception, which it has now re-embraced (FEC Br. 38, n.11). We were mistaken, it appears, to think that the FEC had reconsidered the import of its argument, which is that a contractor can spend $1000 to support a fundraising event for a candidate at which many others may contribute up to $2600 each (or one for a political party at which attendees could contribute up to $32,400 each), and that this would not create even the appearance of pay-to-play, but that if a contractor wrote a check to a candidate or a party for $100, it would create such an appearance. If the FEC is correct about the right of plaintiffs to hold fundraisers, it is further confirmation that section 441c is seriously underinclusive, in addition to its other defects that establish that it is so ill-fitting that it cannot meet even the closely drawn standard

under the First Amendment.[10]

## CONCLUSION

For the foregoing reasons and those set forth in plaintiffs' Opening Brief, judgment should be entered for plaintiffs.

Respectfully submitted,

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August 23, 2013

[10] There was a solicitation ban applicable to contractors in *Green Party* that was set aside, not because the court of appeals did not recognize that solicitation presented the same kind of problems as did making contributions, especially as applied to bundlers, but that the form of the solicitation ban was too broad to be sustained. 616 F. 3d at 195-96, 207-10.

**No. 13-5162**

## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Civil Procedure 32(a)(7)(C), I hereby certify this 23rd day of August 2013 that the foregoing Reply Brief of Plaintiffs, has a typeface of 14 points and, as calculated by my word-processing software (Microsoft Word), contains 6970 words.

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## CERTIFICATE OF SERVICE

I hereby certify that I served and filed the Reply Brief of the Plaintiffs this 23rd day of August 2013 with the Clerk of the Court of United States Court of Appeals for the D.C. Circuit by using the Court's CM/ECF system. Service was made on the following through the CM/ECF system:

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