UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

STOP RECKLESS ECONOMIC INSTABILITY CAUSED BY DEMOCRATS, *et al.*,	
Plaintiffs,	Civ. No. 1:14-397 (AJT-IDD)
v.	
FEDERAL ELECTION COMMISSION,	MOTION
Defendant.	

DEFENDANT FEDERAL ELECTION COMMISSION'S
MOTION FOR SUMMARY JUDGMENT

Defendant Federal Election Commission respectfully moves that this Court grant summary judgment in its favor. A Memorandum in Support of Motion for Summary Judgment and Proposed Order are submitted with this Motion.

Respectfully submitted,

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September 19, 2014

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FEDERAL ELECTION COMMISSION,	MEMORANDUM IN SUPPORT OF SUMMARY JUDGMENT MOTION
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DEFENDANT FEDERAL ELECTION COMMISSION'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Lisa J. Stevenson*
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In the Federal Election Campaign Act ("FECA"), Congress implemented a system of carefully calibrated limits on the amount of money that different groups can contribute to candidates, political parties, and others to combat the risk and appearance of corruption arising from large contributions. In this lawsuit, plaintiffs — two political committees ("PACs") and a political party committee — incorrectly assert that the First and Fifth Amendments require this Court to upset this balance and rewrite several of these provisions.

In their first two claims, plaintiffs challenge two provisions that the Supreme Court has already upheld because they prevent individuals from circumventing FECA's $2,600 limit on contributions to candidates. FECA requires newly registered PACs to comply with this $2,600 limit for at least six months before earning an increased $5,000 limit that Congress reserved for *bona fide* "multicandidate" PACs. This six-month period prevents individuals from forming "dummy"-like PACs to quickly obtain the $5,000 limit during the critical pre-election window to assist only one or two candidates — a practice of the Watergate era. This circumvention risk persists today. In fact, the many close ties between the PAC plaintiff making these claims here and the candidate who was initially a plaintiff in the case illustrate the threat. In addition, there is no jurisdiction for these claims, in part because that PAC has now become a multicandidate PAC, with the higher limit.

In their third claim, plaintiffs complain that FECA sets higher limits for contributions to party committees made by persons other than multicandidate PACs. But the statute strikes a constitutional balance between two important interests: ensuring that political parties have sufficient resources and limiting the recognized corruption risks posed by large contributions.

These are reasonable exercises of legislative judgment on how best to fight corruption and its appearance while permitting candidates and parties the resources necessary for effective advocacy. Plaintiffs' myopic complaints of "discrimination" overlook that the Supreme Court has evaluated such claims in the context of FECA as a whole. And in that context, the law treats political committees as a privileged class, granting them benefits not available to other groups.

For all these reasons, the Court should grant the Commission summary judgment.

BACKGROUND

A. Legal Background

In response to the 1972 federal election's "deeply disturbing examples" of large contributions being "given to secure a political quid pro quo from current and potential office holders," Congress enacted FECA, *see* 52 U.S.C. §§ 30101-46 (formerly 2 U.S.C. §§ 431-57), in part "to limit the actuality and appearance of corruption resulting from large individual financial contributions[.]" *Buckley v. Valeo*, 424 U.S. 1, 26-27 (1976).[1] FECA limits contributions to candidates and political committees and requires those persons to file periodic public reports with the FEC disclosing their receipts and disbursements. *See* 52 U.S.C. §§ 30116(a), 30104.[2]

FECA limits over a dozen different types of contributions involving candidates, parties, individuals, and other groups. *See* FEC, Contribution Limits 2013-14.[3] The most broadly applicable limit provides that no "person" shall contribute more than $2,600 per election (primary or general) to a federal candidate. 52 U.S.C. § 30116(a)(1)(A); 78 Fed. Reg. 8530, 8532 (Feb. 6, 2013). "Person" includes individuals, partnerships, associations, and some other groups. 52 U.S.C. § 30101(11). But a "multicandidate" PAC can contribute up to $5,000 per candidate per election. *Id.* § 30116(a)(2)(A). A PAC can qualify for this higher limit if it can demonstrate that it is a *bona fide* multicandidate PAC by (1) receiving contributions from more than 50 persons; (2) making contributions to at least five federal candidates; and (3) being registered with the FEC for at least six months (the "six-month period"). *Id.* § 30116(a)(4).

Soon after these provisions were enacted, the Supreme Court in *Buckley v. Valeo* upheld the constitutionality of the $2,600 limit (which was then $1,000) and the multicandidate PAC

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[1] Effective September 1, 2014, the provisions of FECA that were codified in Title 2 of the United States Code were recodified in a new title, Title 52. *See* Editorial Reclassification Table, http://uscode.house.gov/editorialreclassification/t52/Reclassifications_Title_52.html.

[2] There are different types of political committees. Candidates operate principal campaign committees. 52 U.S.C. § 30102(e)(1). Political parties operate national, state, and local party committees. *See id.* §§ 30101(14)-(15). Committees not sponsored by corporations or unions are called nonconnected committees (hereinafter "PACs"). *Cf. id.* §§ 30101(7), 30103(b)(2).

[3] http://www.fec.gov/pages/brochures/contriblimits.shtml (last viewed Sept. 19, 2014).

requirements. 424 U.S. at 26-29, 35-26. Congress later added higher limits for contributions to national political party committees, allowing annual contributions of up to $20,000 from any person and $15,000 from any multicandidate PAC. FECA Amendments of 1976, Pub. L. No. 94-283 § 112(2), 90 Stat. 475 (codified at 52 U.S.C. §§ 30116(a)(1)(B), (2)(B)).

In 2002, Congress amended FECA to ban unregulated "soft-money" donations to national party committees, and in return, increased FECA's "hard-money" limits on how much persons could contribute to parties and candidates.[4] *See* Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 ("BCRA"). As a result, today a person may contribute $2,600 per election to a candidate (instead of $1,000); $32,400 annually to a national party committee (instead of $20,000); and $10,000 annually to a state or local party committee (instead of $5,000).[5] 52 U.S.C. §§ 30116(a)(1)(A)-(B), (D); 78 Fed. Reg. at 8532.

B. Procedural History

Stop Reckless Economic Instability caused by Democrats ("Stop PAC") contends that the six-month period violates the First Amendment rights of PACs that are less than six months old (hereinafter "new PACs") and have satisfied the other two multicandidate PAC requirements. (Amended Complaint ("Am. Compl.") ¶¶ 51-55 (Doc. No. 37).) Stop PAC also claims FECA violates the Fifth Amendment's equal protection guarantee by applying the $2,600 limit to new PACs before they qualify for the $5,000 limit. (*Id.* ¶¶ 43-50.) Finally, the Tea Party Leadership Fund ("Tea Party Fund") claims that FECA violates equal protection by more strictly limiting contributions to parties from multicandidate PACs than from other persons. (*Id.* ¶¶ 56-63.)

The FEC now moves for summary judgment. *See* Fed. R. Civ. P. 56(a) (summary judgment is appropriate if there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law").

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[4] "Soft money" is money raised outside FECA's restrictions ostensibly for purposes other than influencing a federal election. *McConnell v. FEC*, 540 U.S. 93, 122-23 (2003), *overruled in part on other grounds*, *Citizens United v. FEC*, 558 U.S. 310, 365 (2010).

[5] These limits on contributions to candidate and national party committees are indexed for inflation. 52 U.S.C. § 30116(c)(1)(B)(i); *see* 78 Fed. Reg. at 8532.

STATEMENT OF UNDISPUTED MATERIAL FACTS

A. Plaintiff Stop PAC and Former Plaintiffs Niger Innis and NIFC

1. Plaintiff Stop PAC is a hybrid nonconnected political committee that registered with the FEC on March 11, 2014. (Stop PAC Stmt. of Org. (rec'd Mar. 11, 2014), FEC Exhibit ("Exh.") 1.) FECA limited Stop PAC's contributions to each federal candidate to $2,600 per election until September 11, 2014, when Stop PAC became a multicandidate PAC and was permitted to contribute $5,000. (11 C.F.R. § 110.2(a)(1); Pls.' Joinder Mem. at 1, 6 (Doc. No. 50-1).) Stop PAC's founder and chairman is Greg Campbell. (Declaration of Greg Campbell ("Campbell Decl.") ¶ 4 (Doc. No. 6-2).) Dan Backer is Stop PAC's treasurer, custodian of records, and counsel. (Stop PAC Stmt. of Org. at 3, FEC Exh. 1; Am. Compl. at 17.)

2. Former plaintiff Niger Innis was a candidate in the June 10, 2014 primary election for the Republican Party nomination for the U.S. House of Representatives in Nevada's fourth congressional district. (Am. Compl. ¶ 20.) Former plaintiff Niger Innis for Congress ("NIFC") was Innis's principal campaign committee. (Complaint ("Compl.") ¶ 5 (Doc. No. 1).)

1. Stop PAC's Efforts to Support Innis and Other Candidates

3. On April 4, 2014, Stop PAC contributed $2,600 to the Innis campaign for the June 10, 2014 primary election. (Am. Compl. ¶ 20.) Stop PAC states that it wanted to contribute $2,400 more to Innis for the primary. (*Id.* ¶ 21.) Stop PAC has not made or desired to make any independent expenditures on behalf of Innis or any other candidate. (Stop PAC Resps. to FEC's Disc. Reqsts. ("Stop PAC Disc. Resps.") at 4, Interrog. 6, FEC Exh. 2.) Stop PAC also never considered organizing volunteers to assist the Innis campaign (Deposition of Stop PAC ("Stop PAC Dep.") 100:2-5, FEC Exh. 3), though Innis would have welcomed such help (Deposition of Niger Innis for Congress ("NIFC Dep.") 26:22-27:7, FEC Exh. 4).

4. On June 16, 2014, Stop PAC contributed $2,600 to Dan Sullivan, a candidate in the August 19, 2014 primary election for the Republican Party nomination for Senate in Alaska. (Am. Compl. ¶ 24.) Stop PAC states that it wanted to give Sullivan $2,400 more. (*Id.* ¶ 25.)

5. On July 7, 2014, Stop PAC contributed $2,600 to Rep. Joe Heck for his candidacy in the November 6, 2014 general election for the U.S. House of Representatives in Nevada's third congressional district. (Am. Compl. ¶ 28.) Stop PAC states that it wants to contribute $1,800 more to Heck for the general election (*id.* ¶ 30), and since it has become a multicandidate PAC, it may now do so (*see* FEC Statement of Undisputed Material Facts ("FEC Facts") ¶ 1).

2. Stop PAC's Ties with Niger Innis's Congressional Campaign

6. Campbell and Innis met in 2013 when Innis started work at TheTeaParty.net, an organization related to the Tea Party News Network, a group that had employed Campbell since November 2012. (Deposition of Gregory Campbell ("Campbell Dep.") 9:14-19, 11:1-19, FEC Exh. 5; (Deposition of Niger Innis ("Innis Dep.") 6:13-7:20; 9:14-10:19, FEC Exh. 6.) The two became personal friends, and Innis introduced Campbell to people in Nevada political circles. (Innis Dep. 17:11-19:4, FEC Exh. 6; Campbell Dep. 27:22-28:6, FEC Exh. 5.)

7. Innis met Backer in early 2013 at TheTeaParty.net, where they worked together. Innis later hired Backer to start NigerInnis.com. (Innis Dep. 23:18-25:14, FEC Exh. 6.)

8. In late 2013, Innis started considering a run for Congress and established an exploratory committee. (Innis Dep. 12:18-13:18, FEC Exh. 6) According to Innis, when Campbell learned that Innis might run, Campbell expressed support: "[H]ey, I heard about your candidacy. It's exciting. Whatever I can do to help. I'm there to help." (NIFC Dep. 28:4-9, FEC Exh. 4; *see also* Innis Dep. 14:1-8; 15:7-14, FEC Exh. 6.) Campbell joined the Innis campaign in October or November 2013. (NIFC Dep. 35:16-36:2, FEC Exh. 4.)

9. On November 5, 2013, Innis held a fundraiser for his exploratory committee, and Innis invited Campbell to attend. (NIFC Dep. 35:13-36:7, FEC Exh. 4; Stop PAC Dep. 55:17-18, FEC Exh. 3; Alex Pappas, *Tea Party Activist Niger Innis Considering Congressional Run*, DailyCaller.com (Nov. 7, 2013)[6].) Backer also attended this fundraiser. (NIFC Dep. 40:4-5,

[6] *See* http://dailycaller.com/2013/11/07/tea-party-activist-niger-innis-considering-congressional-run/.

FEC Exh. 4.) Campbell contributed $500 to the Innis campaign two days later. (Itemized Receipts for NIFC at 2-3, FEC Exh. 7; Campbell Dep. 24:20-25:21, FEC Exh. 5.)

10. Niger Innis for Congress was Innis's principal campaign committee. Backer was its treasurer and attorney. (NIFC Stmt. of Org. at 1 (rec'd Jan. 9, 2014), FEC Exh. 8; NIFC Dep. 10:3-4, FEC Exh. 4.)

11. The Innis campaign hired Campbell as its policy director in January 2014, when Innis officially declared his candidacy. (Campbell Dep. 20:18-21:4, FEC Exh. 5; NIFC Dep. 31:10-21, 33:9-19, FEC Exh. 4.) While Campbell consistently stated that he was the campaign's policy director, Innis described Campbell as "policy scribe," "policy writer," and "campaign scribe." (NIFC Dep. 12:12-18, 29:19, 33:15, FEC Exh. 4.) Campbell helped formulate Innis's campaign platform, drafted public statements of Innis's policy positions, wrote op-eds, and drafted speeches. (Campbell Dep. 21:5-10, FEC Exh. 5; NIFC Dep. 29:18-30:11, FEC Exh. 4.) Campbell worked directly with Innis and others in the campaign's "inner circle." (NIFC Dep. 30:12-20, FEC Exh. 4.) As a consultant and vendor for the campaign, Campbell was paid on a regular basis. (*Id.* 32:20-33:5.) Campbell was the campaign's policy director until the June 10 primary election, in which Innis did not prevail. (Campbell Dep. 23:15-18, FEC Exh. 5.)

12. Starting Stop PAC was "something that has always interested" Campbell. (Stop PAC Dep. 21:6-12, FEC Exh. 3.) He first discussed it with Backer "several months prior to the official FEC filing" in March 2014; it was likely in "November, December of 2013." (*Id.* 21:13-17.) After "various discussions" between the two, Backer suggested that Campbell start Stop PAC. (Stop PAC Disc. Resps. at 4-5, ¶ 8, FEC Exh. 2.) Stop PAC registered as a political committee with the FEC on March 11, 2014, after Campbell authorized Backer to submit the necessary paperwork. (*Id.* at 5, ¶ 8.) By March 25, Stop PAC had "over 1000 contributors," raising "around $20,000" using only email solicitations. (*Id.* at 3, ¶ 4; Stop PAC Dep. 23:9-18, FEC Exh. 3; E-mail from Dan Backer to Dave Levinthal at 1 (Apr. 18, 2014), FEC Exh. 9.)

13. Innis was aware of Stop PAC at some point before March 13, 2014, when Backer suggested to Innis that Stop PAC be listed on the invitation for an upcoming fundraiser that was

being held for Innis by Nevada billionaire Sheldon Adelson. (E-mail from Backer to Innis and Julie C. Hereford at 1 (Mar. 13, 2014), FEC Exh. 10; NIFC Dep. 46:13-48:18, FEC Exh. 4.) The Adelson fundraiser occurred on March 26, 2014, and both Campbell and Backer attended. (NIFC Dep. 41:21-42:4, FEC Exh. 4; Stop PAC Dep. 50:6-7, FEC Exh. 3.)

14. Nine days after the Adelson fundraiser, on April 4, 2014, Stop PAC satisfied the second multicandidate PAC requirement by contributing to five federal candidates, which it did in one day. (Declaration of Dan Backer ("Backer Decl.") ¶ 4 (Doc. No. 29-1).) Stop PAC contributed $2,600 to Innis and $250 each to four other candidates. (*Id.*)

15. Stop PAC has stated that federal law "likely" would have barred it from making or hampered its ability to make independent expenditures on behalf of Innis because, according to Stop PAC, its use of "some of the same vendors" would preclude it from being deemed "independent" of the Innis campaign. (Stop PAC Disc. Resps. at 4, Interrog. 6, FEC Exh. 2.)

3. New PACs Often Register with the FEC as Elections Draw Near, Spend Significant Amounts of Money, and Terminate Soon After

16. In presidential election years from 2004 to date, the number of PACs registering with the FEC has significantly increased just before the general election. (Declaration of Paul Clark ("Clark Decl.") ¶ 9, FEC Exh. 11.) Eight of the 10 days in 2012 on which the highest number of PACs registered with the FEC occurred between September and November. (*Id.*)

17. On the dates of the last five general elections, there have been hundreds of active new PACs, *i.e.*, PACs that were less than six months old. For example, there were 464 new PACs at the time of the general election on November 5, 2012. (*Id.* ¶ 10.)

18. New PACs have contributed significant funds to candidates and have made significant independent expenditures in the last several election cycles. For instance, in 2012, the 464 PACs that registered within six months before the general election contributed $154,619 to candidates while making about $5.4 million in independent expenditures. (*Id.*)

19. There is a significant turnover rate among PACs. Since 2008, many PACs have registered in an election year and then closed before the next general election. (*Id.* ¶ 12.)

20. Approximately 77 percent of PACs that have registered with the FEC since 2003 had not become multicandidate PACs as of August 26, 2014. (*Id.* ¶ 11.)

B. Plaintiffs Tea Party Leadership Fund and Alexandria Republican City Committee

21. Plaintiff Tea Party Leadership Fund ("Tea Party Fund") is a hybrid nonconnected multicandidate PAC that registered in 2012. (Am. Compl. ¶ 4; Tea Party Fund Stmt. of Org. at 1-2, 5 (rec'd May 9, 2012), FEC Exh. 12.) The Tea Party Fund's chairman is Todd Cefaratti, and Backer is its treasurer and counsel. (Deposition of Tea Party Fund ("Tea Party Fund Dep.") 10:6-12, 13:2-5, FEC Exh. 13.) Cefaratti attended the late 2013 and early 2014 fundraisers for the Innis campaign. (NIFC Dep. 39:20-21; 54:7-9, FEC Exh. 4.) Cefaratti founded TheTeaParty.net, where Innis is now executive director, reporting to Cefaratti. (Innis Dep. 31:4-20, FEC Exh. 6.) By May 2014, the Tea Party Fund had over 100,000 contributors and had contributed to dozens of candidates. (Declaration of Caitlin Contestable ¶¶ 7-8 (Doc. No. 6-4).)

22. Plaintiff Alexandria Republican City Committee ("Alexandria Committee") is a local political party committee. (Am. Compl. ¶ 5.)

1. The Tea Party Fund's Efforts to Support the Alexandria Committee and the National Republican Senatorial Committee

23. On April 4, 2014, the Tea Party Fund contributed $5,000, the maximum FECA permits, to the Alexandria Committee. (Am. Compl. ¶ 38.) The Tea Party Fund states that it wants to give the Alexandria Committee another $5,000 in 2014. (*Id.* ¶ 39.) The Alexandria Committee's chairman could not recall having ever received a contribution from a multicandidate PAC before. (Alexandria Comm. Dep. 16:2-21, FEC Exh. 14.)

24. The Tea Party Fund states that it wants to give $32,400 in 2014 to the National Republican Senatorial Committee ("NRSC"), a national party committee. (Am. Compl. ¶ 39.)

25. The Tea Party Fund claims that it wants to contribute to the Alexandria Committee and the NRSC "as a way of further associating" with them and "assisting the campaigns in which those entities are involved," among other reasons. (*Id.* ¶ 41.) The Tea Party

Fund also states that it wishes to contribute more to obtain "more constitutionally protected noncorrupting ingratiation and access." (Tea Party Fund Dep. 92:15-93:3, FEC Exh. 13.)

26. Before contributing to the Alexandria Committee, the Tea Party Fund had only once before contributed to a party committee.[7] The Tea Party Fund has never contributed to the NRSC (Tea Party Fund Dep. 47:5-8, FEC Exh. 13), even though FECA permits the Tea Party Fund to give $20,000 to the NRSC right now.

27. The Tea Party Fund has never made any independent expenditures in favor of any candidate supported by the Alexandria Committee or the NRSC. (Tea Party Fund Resps. to FEC's First Set of Disc. Reqsts. ("Tea Party Fund Resps.") at 11, ¶ 9, FEC Exh. 15.)

28. The Tea Party Fund organized a volunteer effort to assist the campaign of J.D. Winteregg in his bid to defeat Speaker of the House John Boehner in the May 6, 2014 primary election for the Republican Party's nomination for the House of Representatives in the 8th district of Ohio. (Tea Party Fund Resps. at 7, ¶ 8, FEC Exh. 15; *see* Reid Wilson, *Tea Party Attacks John Boehner at Home*, Wash. Post (Apr. 22, 2014)[8]). But the Tea Party Fund has never engaged in a similar effort to support candidates supported by any other political committee. (Tea Party Dep. 84:14-85:6, FEC Exh. 13; Tea Party Fund Resps. at 7, ¶ 8, FEC Exh. 15.)

29. Volunteers are essential to the Alexandria Committee's operations and it would be happy to receive volunteers that were organized by a PAC, but the Tea Party Fund has never offered to help its candidates in this way. (Alexandria Comm. Dep. 25:22-26:12, 29:14-35:13, 36:17-22, 38:4-7, FEC Exh. 14.)

30. The Alexandria Committee admits that the FECA provisions it challenges in this case do not treat it differently from any other local party committee or otherwise discriminate against it. (*Id.* 45:1-21.)

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[7] *See* FEC, Disclosure Data Search, Candidate and Committee Viewer, Tea Party Leadership Fund, http://www.fec.gov/fecviewer/CandidateCommitteeDetail.do.

[8] *See* http://www.washingtonpost.com/politics/tea-party-attacks-boehner-at-home/2014/04/22/f0724228-c96f-11e3-95f7-7ecdde72d2ea_story.html.

2. Multicandidate PACs Contribute Directly to Candidates Far More Often Than They Give to Political Parties

31. As of August 3, 2014, there were 482 active multicandidate PACs registered with the FEC. (Clark Decl. ¶ 13, FEC Exh. 11.)

32. From the start of the 2004 election cycle until August 4, 2014, multicandidate PACs contributed in excess of $239.1 million to candidates and approximately $30.1 million to party committees. (*Id.* ¶ 14.) During that same period, multicandidate PACs made in excess of $51.4 million in independent expenditures. (*Id.* ¶ 15.)

33. Since the 2008 election cycle, multicandidate PACs have made many more contributions to candidates than to political party committees. (*Id.* ¶ 16.) Of the 481 multicandidate PACs that have been active during the 2014 election cycle, 366 have made no contributions to political party committees. (*Id.* ¶ 17.) When multicandidate PACs do contribute to party committees, however, they often give the maximum permitted by FECA. (*Id.* ¶ 18.)

ARGUMENT

I. THE COURT LACKS JURISDICTION OVER STOP PAC'S CLAIMS

A. Stop PAC Lacks Standing

Stop PAC's claims should be dismissed for lack of standing, since Stop PAC caused its own alleged injury. *See, e.g.*, *Clapper v. Amnesty Intern. USA*, 133 S. Ct. 1138, 1152-1153 (2013) (finding respondents whose "self-inflicted injuries" were "not fairly traceable to the Government's purported activities" lacked standing). Stop PAC asserts that FECA prevented it from contributing more than $2,600 to candidates in three elections, the first of which was Innis's primary election on June 10, 2014. (Am. Compl. ¶¶ 20-21, 24-25, 28-30.) But the evidence shows that Stop PAC could have registered at least as early as November 2013, early enough to become a multicandidate PAC before that election.[9] And had it done so, Stop PAC

[9] Stop PAC's chairman, Greg Campbell, was aware of the Innis campaign at least as early as November 2013, when he attended an Innis fundraiser. (FEC Facts ¶ 9.) Also as early as November 2013, Campbell first discussed the idea for Stop PAC with its future counsel and treasurer Dan Backer. (*Id.* ¶ 12.) Nothing prevented Campbell and Backer from registering Stop

would have become a multicandidate PAC as early as May 2014. Instead, Stop PAC waited months until March 11, 2014 to register, ensuring that the June 10 and other elections would fall squarely within the six-month window when Stop PAC would be restricted to contributing $2,600 instead of $5,000. It is therefore plaintiff's own delay that caused its injury, not FECA. Such self-inflicted harm cannot support standing. *See, e.g.*, *McConnell*, 540 U.S. at 228 (finding no standing for political candidates whose alleged injury was caused by "their own personal 'wish' not to solicit or accept large contributions").

B. Stop PAC's Claims Are Moot

Even if Stop PAC had standing, it is no longer subject to the FECA provisions it challenges and thus its claims are moot. *See U.S. v. Juvenile Male*, 131 S. Ct. 2860, 2864-65 (2011) (finding respondent's claim moot once he "was no longer subject to the sex-offender-registration conditions he sought to challenge on appeal"). Stop PAC became a multicandidate PAC on September 11, 2014, when six months had passed since it registered with the FEC. (FEC Facts ¶ 1.) Stop PAC may now contribute $5,000 to a candidate per election instead of $2,600. *See* 52 U.S.C. § 30116(a)(2)(A). As a result, FECA no longer prohibits Stop PAC from contributing the additional $1,800 it wishes to give to Representative Joe Heck for the upcoming November 6, 2014 general election. (FEC Facts ¶ 5.) Stop PAC had also wanted to contribute in excess of $2,600 to other candidates, but those elections already occurred in June and August 2014. (*Id.* ¶¶ 3-4.) It is therefore "impossible for the court to grant" Stop PAC "any effectual relief" and so its claims are moot. *Incumaa v. Ozmint*, 507 F.3d 281, 286 (4th Cir. 2007).

II. THE SUPREME COURT HAS ALREADY REJECTED THE CLAIMS STOP PAC MAKES ABOUT THE SIX-MONTH PERIOD AND THE $2,600 CONTRIBUTION LIMIT

Stop PAC's claims fail as a matter of law because in *Buckley v. Valeo*, the Supreme Court directly affirmed the constitutionality of the six-month period (and other qualifying criteria) for

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PAC then to start the six-month clock. *See* 11 C.F.R. § 104.1(b) (groups may register at any time). In fact, starting Stop PAC was "something that ha[d] always interested" Campbell. (*Id.*)

groups seeking to become multicandidate PACs and take advantage of the $5,000 limit on contributions to candidates. *See* 424 U.S. at 35-36. The Court recognized that these criteria "serve the permissible purpose of preventing individuals from evading the applicable contribution limitations by labeling themselves committees." *Id*. And the Court rejected the argument that the criteria "unconstitutionally discriminate against ad hoc organizations in favor of established interest groups and impermissibly burden free association." *Id.* at 35. As a result, the Court denied First *and* Fifth Amendment challenges to the six-month registration requirement. *Id.* at 35-36, 59 n.67. The Court's ruling affirmed the D.C. Circuit, which had similarly observed that the six-month period is a constitutionally valid

> loophole-closing provision intended to prevent proliferation of dummy committees, each of a few persons, in support of federal candidacies. Otherwise, two or three persons could acquire the $5,000 committee contribution authority . . . merely by organizing themselves as a political committee. The challenged Act limits such bootstrapping by interposing a six-month protective shield.

Buckley v. Valeo, 519 F.2d 821, 857-58 (D.C. Cir. 1975) (*en banc*), *aff'd in relevant part and rev'd in part*, 424 U.S. 1 (1976). The Supreme Court's holding controls Stop PAC's claims in their entirety. For this reason alone, plaintiffs' motion should be denied. *See, e.g.*, *Republican Nat'l Comm. v. FEC*, 698 F. Supp. 2d 150, 160 (D.D.C. 2010) (three-judge court) ("As a lower court . . . we do not believe we possess authority to clarify or refine [Supreme Court precedent] . . . or to otherwise get ahead of the Supreme Court."), *aff'd mem.*, 130 S. Ct. 3544 (2010).

III. THE SIX-MONTH PERIOD AND $2,600 CONTRIBUTION LIMIT DO NOT VIOLATE THE FIRST AMENDMENT

Even if *Buckley* did not foreclose Stop PAC's claims, the six-month period and $2,600 contribution limit would still easily survive constitutional scrutiny. Because contribution limits impose only "marginal restriction[s]" on contributors' First Amendment rights, courts assess the constitutionality of those limits under only an intermediate level of scrutiny. *Buckley*, 424 U.S. at 20, 25. That standard is satisfied if a law is "closely drawn" to further an "important government interest." *Id.* at 25. The Supreme Court has repeatedly upheld FECA's base

contribution limits because they further two important interests: reducing the opportunity for contributors "to secure a political *quid pro quo* from current and potential office holders" in exchange for large contributions, and reducing "the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions." *Id.* at 26-27; *see also, e.g.*, *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014); *FEC v. Beaumont*, 539 U.S. 146, 152-56 (2003); *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 198-99 & n.19 (1981) (plurality). These interests also justify laws that prevent circumvention of the limits on direct contributions to candidates. *See, e.g.*, *McCutcheon*, 134 S. Ct. at 1452; *FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 456 (2001) ("*Colorado II*"). "Having been taught the hard lesson of circumvention by the entire history of campaign finance regulation," Congress has the power to "[p]revent[ ] corrupting activity from shifting" to take advantage of gaps in FECA's statutory regime. *McConnell*, 540 U.S. at 165-66; *see also Cal. Med. Ass'n*, 453 U.S. at 198 n.18; *Colorado II*, 533 U.S. at 464.

The six-month period and $2,600 contribution limit have been the law for approximately 40 years. Therefore, to show that those provisions continue to further the anti-corruption interests by limiting circumvention, the FEC need only demonstrate that "experience under the present law confirms a serious threat of abuse" still exists. *Colorado II*, 533 U.S. at 457 (citing *Burson v. Freeman*, 504 U.S. 191, 208 (1992) (opinion of Blackmun, J.) (noting difficulty of mustering evidence to support long-enforced statutes)).

A. The Six-Month Period Limits Circumvention of FECA's Candidate Contribution Limit

1. The Six-Month Period Helps Prevent Individuals from Using "Dummy"-Like PACs to Bootstrap Themselves to the Increased Contribution Limit

The "six-month protective shield" works to prevent a circumvention scheme the D.C. Circuit has called "bootstrapping," in which "two or three persons . . . acquire the $5,000 committee contribution authority . . . merely by organizing themselves" as a "dummy" political

committee. *Buckley*, 519 F.2d at 857-58. Congress imposed the increased $5,000 limit on multicandidate PAC contributions to candidates to acknowledge the important role that party committees and other "broad-based citizen interest groups" play in federal elections. 120 Cong. Rec. H 7810 (Aug. 7, 1974). Requiring groups seeking a nearly doubled contribution limit to meet each of the three statutory criteria for multicandidate PAC status — including the six-month period — ensures that such groups are legitimate broad-based citizen interest groups rather than dummy organizations created during a campaign to circumvent the $2,600 limit.

One of the most egregious examples of *quid pro quo* corruption that motivated Congress to enact the six-month period involved dummy PACs. In the two-week period before the 1972 presidential election, the dairy industry funneled $2 million in support for President Nixon into $2,500 contributions made to hundreds of "dummy" political committees. *Buckley*, 519 F.2d at 839 n.36; Final Report of the Select Committee on Presidential Campaign Activities, S. Rep. No. 93-981, 93d Cong., 2d Sess. at 615 & n.44, 736-42 (1974) ("Final Report"). Those dummy committees then contributed the money to the Republican Party, which passed the money on to the President's re-election campaign. Final Report at 738. In return, the administration reversed the Agriculture Department's two-week old decision not to increase milk price supports. *Id.* at 1209. This transaction reportedly cost the American public about $100 million. Richard Reeves, *President Nixon: Alone in the White House* 309 (Simon & Schuster 2001).

2. PACs That Are Less than Six Months Old Present an Increased Risk of Circumvention

The six-month period is an essential aspect of the multicandidate PAC criteria. The other two requirements — that a PAC have at least 51 contributors and have made at least five candidate contributions — help limit the risk of circumvention by ensuring that a PAC has a bare minimum threshold amount of broad-based financial support and diverse candidate interest before earning the $5,000 limit. But those two requirements alone are insufficient because they can be satisfied quickly, and the risk of circumvention can persist long after that time.

Starting a PAC is easy. It requires just two people, one bank account, and one form. *See* 11 C.F.R. §§ 100.5(a), 102.1(d), 102.7(a), 103.2.[10] Satisfying the first two requirements for multicandidate PAC status can also be done quickly; Stop PAC took only 24 days to do so after its registration. Stop PAC obtained not just 51, but "over 1000 contributors," raising "around $20,000," within just *two weeks* of its registration using nothing but emails. (FEC Facts ¶ 12.) Stop PAC then contributed to five candidates in one day, when it gave $2,600 to Innis but only $250 to four other candidates. (*Id.* ¶ 14.) Thus, but for the six-month period, Stop PAC would have obtained the increased contribution limit in just over three weeks.

However, the risk that a PAC is not a real *multi*candidate PAC and instead is simply a circumvention tool formed by supporters of a particular candidate can persist for much longer — and increase as an election draws near. *Cf. Citizens United*, 558 U.S. at 334 ("It is well known that the public begins to concentrate on elections only in the weeks immediately before they are held."). In the throes of election season, a campaign's supporters commonly seek all avenues to increase the candidate's odds of winning. *See, e.g.*, Nicholas Confessore & Derek Willis, *2012 Election Ended with Deluge of Donations and Spending*, N.Y. Times (Dec. 7, 2012).[11] Candidates often start their campaigns long before an election. *See, e.g.*, Harry Enten, *If Hillary Clinton Runs for Present, When Might She Announce?*, FiveThirtyEight.com (June 19, 2014) ("Most [presidential] candidates in most years have declared *more than 200 days* before the Iowa caucus since 1980 — and sometimes double that." (emphasis added)).[12] And thus the six-month

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[10] The FEC's website provides instructions on the process, *see* FEC, Nonconnected PAC Registration Toolkit, http://www.fec.gov/info/toolkit.shtml#nonconnected (last visited Sept. 19, 2014), which is so simple that the *Washington Post* recently reported on a 17-year-old "and his buddies" who said they started a PAC "as a joke" just "because we could." Colby Itkowitz, *How to Start a Super PAC Because You Can*, Wash. Post (Apr. 10, 2014) (reporting that the teen said, "This can't really be this easy"), http://www.washingtonpost.com/blogs/in-the-loop/wp/2014/04/10/how-to-start-a-super-pac-because-you-can/.

[11] *See* http://thecaucus.blogs.nytimes.com/2012/12/07/2012-election-ended-with-deluge-of-donations-and-spending/?_php=true&_type=blogs&_r=0.

[12] *See* http://fivethirtyeight.com/datalab/if-hillary-clinton-runs-for-president-when-might-she-announce/.

protective shield is critical for limiting dummy PAC circumvention schemes that are motivated by a particular candidate's campaign in the height of the election season.

Even with the six-month period in place, PACs are often short-lived operations that proliferate just prior to elections and spend significant amounts of money, only to disappear before the next election. (*See* FEC Facts ¶¶ 16-20.) For example, in 2012, 464 PACs registered within six months before the November 6 general election and contributed in excess of $154,000 to candidates. (*Id.* ¶ 18; Clark Decl. ¶ 10, FEC Exh. 11.) The pace of PAC registrations increased significantly in the weeks prior to the election. In September and October alone, 305 PACs registered. (FEC Facts ¶ 16; Clark Decl. ¶ 9, FEC Exh. 11.) Then in November, another 207 PACs registered in time to make contributions on or before the November 6 general election — and 100 of those PACs registered in just one day. (*Id.*) And of all the PACs that registered in 2012 in time to make contributions for the 2012 general election, at least 97 have already terminated their operations prior to this year's general election. (FEC Facts ¶ 19; Clark Decl. ¶ 12, FEC Exh. 11.) Previous election years show similar patterns. (*Id.*) With a higher contribution limit, the incentive to create PACs for circumvention purposes would nearly double.

3. Stop PAC and Its Close Ties with the Innis Campaign Illustrate How the Six-Month Period Prevents Potential Circumvention

The Court need not look beyond the parties to this case for a paradigmatic example of the risks that a candidate's supporters might establish dummy PACs to bootstrap the $5,000 limit, were it not for the six-month period. Stop PAC and the congressional campaign of former plaintiff Niger Innis share extraordinarily close ties. The Innis campaign's paid policy director, Greg Campbell, founded and is the chairman of Stop PAC. (FEC Facts ¶¶ 1, 11.). The Innis campaign's treasurer, custodian of records, and counsel (Dan Backer) is also the treasurer, custodian of records, and counsel for Stop PAC. (*Id.* ¶¶ 1, 10.) Around the same time that Innis began exploring his run for Congress, Campbell first discussed the idea for Stop PAC with Backer, and he formed it at Backer's urging right in the midst of Innis's campaign. (*Id.* ¶ 9, 12.)

After Campbell and Innis met in 2013, Innis introduced Campbell to others in Nevada political circles, and the two worked at related groups. (FEC Facts ¶ 6.) During his work at TheTeaParty.net, Innis also met Backer, an attorney for that group. (*Id.* ¶ 7.) In November 2013, Innis held a fundraiser and invited Campbell, who then donated to the campaign. (*Id.* ¶ 9.) Soon after declaring his candidacy, Innis hired Campbell as policy director. (*Id.* ¶ 11.)

Around the time of Innis's November 2013 fundraiser, Campbell discussed the idea for Stop PAC with Backer. (FEC Facts ¶¶ 9, 12.) Backer advised Campbell that he should start the PAC. (*Id.* ¶ 12.) Stop PAC registered with the FEC on March 11, 2014 (*id.* ¶ 1), about three months before Innis's June 10 primary (*id.* ¶ 2). By March 25, just two weeks later, Stop PAC had at least 51 contributors, satisfying the first multicandidate PAC requirement. (*Id.* ¶ 12.)

The next day, Nevada billionaire Sheldon Adelson held a fundraiser for Innis, which Campbell and Backer attended. (FEC Facts ¶ 13.) During the planning for the event, Backer suggested to Innis that Stop PAC be listed on the fundraiser's invitation, but Innis declined to have committees on the invitation. (*Id.*) Nine days later, on April 4, 2014, Stop PAC satisfied the second multicandidate PAC requirement by contributing to five federal candidates in one day. (*Id.* ¶ 14.) One of the candidates was Innis, to whom Stop PAC gave $2,600. (*Id.*) Before the election, there were two donors who had given the maximum to both Innis and Stop PAC.[13]

As of April 4, 2014, over two months before Innis's primary election, the only thing standing between Stop PAC and the $5,000 contribution benefit reserved for "broad-based citizen interest groups" was the six-month period. Even though Stop PAC had satisfied the other two multicandidate PAC requirements, the new PAC and the Innis campaign were so intertwined that Stop PAC itself has stated that it feared it would not be considered legally "independent" of the Innis campaign. (FEC Facts ¶ 15.) This scenario illustrates precisely the risk of potential

[13] The two donors were the Tea Party Fund and Shaun McCutcheon, both with extensive ties to the Innis campaign's treasurer. (*See* Stop PAC Report of Receipts and Disbursements at 7-8 (July 8, 2014): http://docquery.fec.gov/cgi-bin/fecimg/?14961526994; NIFC Report of Receipts and Disbursements at 25, 34 (Aug. 27, 3014), http://docquery.fec.gov/cgi-bin/fecimg/?14970730473.)

circumvention that Congress intended the six-month "protective shield" to guard against. *Buckley*, 519 F.2d at 857-58.[14] The donors who had maxed out to the Innis campaign could certainly utilize a new PAC like Stop PAC to provide additional support to the candidates of their choice without violating any other FECA provisions, as explained below.

4. The Six-Month Period Remains a Vital Part of FECA's Anti-Circumvention Safeguards

Since *Buckley*, Congress and the FEC have enacted a number of additional anti-circumvention safeguards that supplement the six-month period. In 1976, Congress limited contributions to political committees to $5,000 per calendar year. *See* 52 U.S.C. §§ 30116(a)(1)(C), (a)(2)(C)). Congress also enacted an "anti-proliferation" provision that treats contributions from PACs that are "established or financed or maintained or controlled" by the same person or entity as contributions from a single PAC. *Id.* § 30116(a)(5). Also, the FEC promulgated regulations implementing FECA's earmarking provision, *id.* § 30116(a)(8), which in certain cases considers contributions made to a candidate through an intermediary to be a contribution from the original source, *see* 11 C.F.R. §§ 110.1(h)(1)-(2), 110.6(b)(1).

As the Supreme Court recently explained in *McCutcheon*, this post-*Buckley* anti-circumvention framework limits large-scale circumvention schemes involving donors who seek to "channel[] massive amounts of money" to candidates "through a series of contributions to PACs" that intend to support those candidates. 134 S. Ct. at 1453-54 (internal quotation marks omitted). Thus, a donor no longer may flood a series of affiliated PACs that intend to contribute to one candidate with large sums of money earmarked for that candidate. *See id.*

These post-*Buckley* provisions, however, do not effectively prevent smaller-scale circumvention similar to, though possibly less blatant than, the type *Buckley* said justifies the six-

[14] Indeed, Stop PAC may be an authorized committee of, and share contribution limits with, the Innis campaign. *See* 11 C.F.R. § 100.5(f)(1). The FEC was not asked to address this question in the course of this constitutional challenge, but in any event, the facts here demonstrate the circumvention risk for this and other schemes that incorporate more individuals, including individuals less closely involved in a candidate's campaign, in a new PAC's creation.

month period: where "individuals . . . evad[e] the applicable contribution limitations by labeling themselves committees." 424 U.S. at 35-36. The $5,000 limit on individual contributions to PACs, 52 U.S.C. § 30116(a)(1)(C), does not prevent this scenario. Nor would the anti-proliferation provision, *id.* § 30116(a)(5), as the new PAC could not be deemed affiliated with the candidate's campaign, 11 C.F.R. § 100.5(g)(5). Finally, the six-month period complements and bolsters the protections offered by the FEC's earmarking regulations by ensuring disclosure by new PACs before they become multicandidate PACs, *see infra* Part III.B, which aids the detection and enforcement of violations, *Buckley*, 424 U.S. at 67-68.

As a result, the six-month period today remains an integral part of the legislative and regulatory anti-circumvention system, standing alongside Congress's and the FEC's efforts to prevent other types of circumvention. *Cf. Cal. Med.*, 453 U.S at 199 n.20 (rejecting argument that limit on contributions to PACs was "superfluous" in light of other anti-circumvention provisions, since "Congress could reasonably have concluded § [30116](a)(1)(C) was a useful supplement to the other antifraud [FECA] provisions").

B. The Six-Month Period Promotes Campaign Finance Disclosure

The six-month period also furthers the government's important interests in promoting the disclosure of the sources of campaign funds by ensuring that groups seeking multicandidate PAC status file at least one disclosure report before becoming eligible to make candidate contributions of up to $5,000 per election. *See Buckley*, 424 U.S. at 66-68 (FECA disclosure requirements justified by, *inter alia*, the need to "provide the electorate with information as to where political campaign money comes from" (internal quotation marks omitted)); *accord Citizens United*, 558 U.S. at 369 (affirming the government's informational interest in disclosure of "who is speaking about a candidate shortly before an election"). The D.C. Circuit upheld the six-month period in part because "[d]uring the waiting period," new PACs "would be subject to the reporting and disclosures provisions" of 52 U.S.C. § 30104. *Buckley*, 519 F.2d at 858. FECA requires PACs to file a disclosure report at least every six months. 52 U.S.C. § 30104(a)(4)(A). In these reports, a PAC must reveal most of its receipts and disbursements, and the identities of those

who contribute more than $200 in a calendar year. *Id.* § 30104(b). FECA requires PACs to file disclosure reports more frequently in election years, *see, e.g., id.* § 30104(a)(4)(A)(ii) (requiring a "pre-election report" that covers financial activity up to 20 days before an election), but even those reports provide a nearly three-week pre-election window in which a dummy-like PAC could form, become an ostensible multicandidate PAC, and affect election results without having first provided any disclosure about who it is or where it gets its funds until a month after the election, *see id.* § 30104(a)(4)(A)(iii). Given the high number of PACs that already register at the eleventh hour before an election (*see* FEC Facts ¶ 16), the last minute proliferation of new PACs with undisclosed donors is a threat to the integrity of the campaign finance system.

C. The Six-Month Period and $2,600 Contribution Limit Are Closely Drawn

The six-month period and $2,600 contribution limit strike an appropriate balance between giving PACs a unique opportunity for increased electoral participation while guarding against circumvention by first requiring just six months to pass. Under closely-drawn scrutiny's "relatively complaisant" level of review, *Beaumont*, 539 U.S. at 161, this Court may not second-guess Congress's judgment that a temporary six-month contribution limit of $2,600 (instead of $5,000) is an appropriately tailored means of achieving those goals.

In *Buckley*, the Supreme Court rejected an argument similar to the one plaintiffs assert here: that the $2,600 limit (which was then $1,000) was "unrealistically low" because larger contributions allegedly would not cause corruption. 424 U.S. at 30. The Court explained that Congress need not engage in this kind of "fine tuning" — if Congress is "satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000." *Id.* (internal quotation marks omitted). That constitutionally insignificant $1,000 difference in 1976 amounts to $4,180 in today's dollars.[15] And yet Stop PAC complains that its temporary inability to give an extra $2,400 violates the First Amendment. It does not. Congress has determined that different types of contributions present certain risks of

[15] Bureau of Labor Statistics, CPI Inflation Calculator, http://data.bls.gov/cgi-bin/cpicalc.pl?cost1=1000&year1=1976&year2=2014 (last viewed Sept. 19, 2014).

corruption and has set limits accordingly. *See* 78 Fed. Reg. at 8530 (noting current limits ranging from $2,000 to $45,400). It is not the courts' role to second-guess legislative judgments about the exact levels of these limits. Closely-drawn scrutiny is designed to "provide[] Congress with sufficient room to anticipate and respond to concerns about circumvention of regulations designed to protect the integrity of the political process." *McConnell*, 540 U.S. at 137.

To the extent plaintiffs challenge the length of the registration period, the Court should similarly defer to Congress's judgment — which both the Supreme Court and D.C. Circuit have affirmed — regarding how long a PAC must exist to demonstrate its multicandidate *bona fides*. Courts are not in a position to determine "with any degree of exactitude the precise restriction necessary to carry out the statute's legitimate objectives. In practice, the legislature is better equipped to make such empirical judgments." *Randall v. Sorrell*, 548 U.S. 230, 248 (2006). Because the registration period furthers the government's important anti-circumvention interest, the First Amendment does not require that period to be any specific length that plaintiffs might prefer. *Cf. Rosario v. Rockefeller*, 410 U.S. 752, 762 (1973) (upholding state law requiring voters to be registered with a political party for at least 30 days to be eligible to vote in primary).

D. The Six-Month Period and $2,600 Contribution Limit Place Minimal Burdens on a New PAC's Ability to Speak and Associate with a Candidate

The restrictions Stop PAC challenges place a relatively minimal burden on new PACs' ability to associate with candidates and *no* burden on new PACs' ability to speak. *Buckley* analyzed the First Amendment implications of contribution limits, noting that they restrict "one aspect of the contributor's freedom of political association" but do not prevent a contributor from speaking. 424 U.S. at 24, 28. Specifically, the Court held that the speech value of a contribution lies in its function as a "symbolic act" that provides "a general expression of support for the candidate and his views." *Id.* at 21. But because a contribution does not "communicate the underlying basis for the support[,] . . . [t]he quantity of communication by the contributor does not increase perceptibly with the size of his contribution." *Id.* Thus, contribution limits leave contributors free to engage in the "symbolic act of contributing," while in no way inhibiting their

ability to conduct other political activity, such as "discuss[ing] candidates and issues" or "becom[ing] a member of any political association and . . . assist[ing] personally in the association's efforts on behalf of candidates." *Id.* at 21-22.

Nevertheless, plaintiffs complain that the provisions they attack place a "substantial burden" on their ability to "associate with and demonstrate their support for candidates in a timely manner." (Am. Compl. ¶ 54.) But Stop PAC has already contributed to Innis and other candidates, and thus Stop PAC *has* associated with those candidates. The "general expression of support" conveyed by Stop PAC's contributions would "not increase perceptibly with the size of [Stop PAC's desired increased] contribution." *Buckley*, 424 U.S. at 21. And so FECA's requirement that Stop PAC wait a few months before contributing more to those same candidates imposes no substantial burden on its ability to associate. Stop PAC's claims also ring hollow in light of its failure to use alternative ways to support candidates. (FEC Facts ¶ 3.)

IV. NEITHER THE $2,600 CONTRIBUTION LIMIT NOR THE LIMITS ON MULTICANDIDATE PAC CONTRIBUTIONS TO PARTIES VIOLATES THE FIFTH AMENDMENT

Congress' ability to "weigh competing constitutional interests" while setting contribution limits is "an area in which it enjoys particular expertise." *McConnell*, 540 U.S. at 137. FECA limits more than a dozen different types of contributions in amounts ranging from $2,000 to $45,400 per election, each reflecting a balance between promoting participation in the political system and limiting the risk and appearance of corruption.[16] The Fifth Amendment does not prevent Congress from exercising its expertise, nor does it require FECA to treat different groups the same, as plaintiffs ask in their equal protection claims (Am. Compl. ¶¶ 43-50, 56-63).

Plaintiffs must show that they were "treated differently from others who were similarly situated and that the unequal treatment was the result of discriminatory animus." *Equity in Athletics, Inc. v. Dep't of Educ.*, 639 F.3d 91, 108 (4th Cir. 2011). They cannot. But even if they

[16] *See* FEC, Contribution Limits 2013-14, http://www.fec.gov/pages/brochures/contriblimits.shtml (last viewed Sept. 19, 2014).

could make that showing, the "discrimination" they allege would easily be justified under rational basis review, which applies here since there is no suspect class or fundamental constitutional right at stake. *See, e.g.*, *U.S. v. Pruess*, 703 F.3d 242, 247 (4th Cir. 2012). And even if "closely drawn" scrutiny applied, these limits would satisfy it. *Cf. Buckley*, 424 U.S. at 95 (rejecting equal protection challenge to provision that discriminated between candidates of different parties because it was in furtherance of sufficiently important governmental interests").

A. FECA Does Not Discriminate Against New PACs or Multicandidate PACs

The first reason that plaintiffs' equal protection claims fail is that FECA does not discriminate against new PACs or multicandidate PACs. Stop PAC and the Tea Party Fund each complain that they want a specific benefit the other has. Stop PAC wants the Tea Party Fund's $5,000 per election candidate contribution limit. The Tea Party Fund wants Stop PAC's higher party contribution limits. They both miss the bigger picture: PACs as a whole are generally a privileged class among FECA-regulated entities. And as plaintiffs' own claims highlight, new PACs and multicandidate PACs each enjoy benefits under FECA not available to others.

Plaintiffs can claim discrimination only by narrowly focusing on isolated FECA provisions. But FECA is a much broader statute, and the Supreme Court has rejected plaintiffs' myopic approach in determining whether FECA limits violate equal protection. In *California Medical Association v. FEC*, an association argued that FECA's $5,000 limit on its contributions to multicandidate PACs violated equal protection because FECA permits corporations to give unlimited amounts to their connected political committees for administrative and certain other purposes. 453 U.S. at 200. But the Court held that this did not qualify as "discrimination" given that plaintiffs' "claim of unfair treatment ignores the plain fact that the statute as a whole imposes far *fewer* restrictions on . . . associations than it does on corporations and unions." *Id.*

Similarly, FECA as a whole bestows many *advantages* on new and multicandidate PACs that other contributors do not enjoy. First, while PACs may contribute $2,600 or $5,000 per election to candidates and tens of thousands annually to parties, other groups like corporations, unions, and foreign nationals may not contribute at all to candidates or parties. *See* 52 U.S.C. §§

30118, 30121. Second, the opportunity that PACs have to make $5,000 contributions to candidates is a benefit that only political parties share — individuals, partnerships, and associations are always limited to $2,600 per candidate. *Id.* §§ 30101(11), 30116(a)(1)(A). Third, new and multicandidate PACs may register as "hybrid" PACs that can accept unlimited contributions from nearly any source to fund unlimited independent expenditures, as Stop PAC and the Tea Party Fund have done. (FEC Facts ¶ 1, 21; Clark Decl. ¶ 5, FEC Exh. 11.) In contrast, political parties and *connected* political committees, like those linked to candidates or corporations, may not accept such unlimited funds. *See Stop This Insanity Inc. v. FEC*, --- F.3d ---, 2014 WL 3824225 (D.C. Cir. Aug. 5, 2014); *Republican Nat'l Comm.*, 698 F. Supp. 2d at 150. This is a nuanced structure that grants different groups an increased ability to participate in the political process consistent with their particular corruption risk.

Plaintiffs have not suffered discrimination at the hands of FECA and thus their equal protection claims fail on this ground alone.[17] *See Cal Med.*, 453 U.S. at 200.

B. New PACs and Multicandidate PACs Are Not Similarly Situated

Plaintiffs' equal protection claims also fail because new PACs and multicandidate PACs are not similarly situated. "Similarly situated" requires that the subjects of the claimed differential treatment "are in all relevant respects alike." *Veney v. Wyche*, 293 F.3d 726, 730-31 (4th Cir. 2002). But plaintiffs' own complaint effectively acknowledges that they do not meet that standard by describing new PACs as "grassroots organizations that have spontaneously mobilized" but multicandidate PACs as "entrenched institutions." (Am. Compl. at 1.)

In addition, new PACs are more likely than multicandidate PACs to be tools for circumvention created at the behest of a candidate or his or her supporters. *See supra* Part III.A. This is particularly true during the critical six months leading up to an election when both PAC registrations and the incentive to funnel funds to a candidate may increase. *Id.* Furthermore,

[17] Plaintiff Alexandria Committee admitted in discovery that the FECA provisions it challenges do not treat it differently from any other local party committee (FEC Facts ¶ 30), and so its claim should be dismissed as well.

new PACs are less likely to have disclosed any information to the public, and they are more likely to be unknown than *bona fide* multicandidate PACs are. *See supra* Part III.A-B.

Stop PAC and the Tea Party Fund themselves are radically different. On April 4, 2014, when it first had more than 50 contributors and had made at least 5 candidate contributions, Stop PAC was still the paradigmatic example of a circumvention risk. *See supra* Part III.A.3. It was a little over three weeks old, had yet to file a disclosure report, and its founder, treasurer, and counsel were also working for the Innis campaign, to whom Stop PAC contributed the maximum permitted by FECA. *Id.* Two maximum contributors to the Innis campaign had also contributed the maximum to Stop PAC, providing a significant portion of Stop PAC's receipts. *See supra* p. 18 n.14. In stark contrast, the Tea Party Fund appears to be a model of the "broad-based citizen interest groups" to which Congress intended the $5,000 limit apply. By May 2014, the Tea Party Fund had over 100,000 contributors and had contributed to "dozens" of federal candidates. (FEC Facts ¶ 21.) The Tea Party Fund has filed scores of disclosure reports, reflecting millions in receipts and disbursements.[18] It has also engaged in prominent campaigns to oust Speaker of the House John Boehner from office and to recruit former Vice Presidential candidate Sarah Palin to run for Senate in Alaska.[19] New and multicandidate PACs are therefore not similarly situated.

C. Rational Basis Is the Appropriate Level of Scrutiny

Because the limits plaintiffs challenge do not discriminate against similarly situated groups, this Court need not consider the "second question" of "whether the discrimination alleged . . . is justified." *Cal. Med.*, 453 U.S. at 200; *accord Veney*, 293 F.3d at 730-31 (declining to ask if "the disparity in treatment can be justified under the requisite level of

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[18] *See* FEC, Disclosure Data Search, Candidate and Committee Viewer, Tea Party Leadership Fund, http://www.fec.gov/fecviewer/CandidateCommitteeDetail.do.

[19] *See* Reid Wilson, *Tea Party Attacks John Boehner at Home*, Wash. Post (Apr. 22, 2014), http://www.washingtonpost.com/politics/tea-party-attacks-boehner-at-home/2014/04/22/f0724228-c96f-11e3-95f7-7ecdde72d2ea_story.html; Justin Sink, *Tea Party Group Hopes to Draft Sarah Palin for Senate Run in Alaska*, The Hill (May 1, 2013), http://thehill.com/blogs/ballot-box/senate-races/297129-tea-party-group-hopes-to-draft-palin-for-senate-run.

scrutiny" because the plaintiff had not shown discrimination). If this Court does find it proper to apply constitutional scrutiny, however, the deferential "rational basis" standard should apply because this case involves no suspect class or fundamental right. *See FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313-15 (1993); *Pruess*, 703 F.3d at 247.

Plaintiffs could not reasonably contend that PACs constitute a "suspect class" akin to a racial- or gender-based classification. Also, we are aware of no court that has ever held that making a contribution is a "fundamental right" for equal protection purposes. Such a holding would be inappropriate in light of the Supreme Court's acknowledgment that contributions are not akin to pure speech as independent expenditures are; instead, they are "symbolic acts" that provide a "general expression" of support for a candidate, but do not "communicate the underlying basis" for that support. *Buckley*, 424 U.S. at 21; *see also McCutcheon*, 134 S. Ct. at 1441 (noting that right to make contributions is "not absolute"); *Beaumont*, 539 U.S. at 161 (contributions "lie closer to the edges than to the core of political expression").

In a similar context, the D.C. Circuit has upheld contribution limits against an equal protection claim applying only rational-basis scrutiny. *Blount v. SEC* considered a law prohibiting municipal securities professionals from contributing to certain state political campaigns. 61 F.3d 938 (D.C. Cir. 1995). The petitioner claimed that the law "violate[d] … the due process clause of the Fifth Amendment" because it did not also apply to "bank officers and bankcontrolled political action committees." *Id*. at 946 n.4. The court found it "unnecessary to evaluate this contention," however, because the "Fifth Amendment requires only that the government have a rational basis for its distinction . . . and rational-basis review requires, if anything, less 'mathematical nicety' . . . than the First Amendment requires." *Id.* (quoting *Vance v. Bradley*, 440 U.S. 93, 109 (1979)).

D. The Contribution Limits Plaintiffs Challenge Are at a Minimum Rationally Related to the Government's Important Interests

Under rational basis review, a court is not to judge the "wisdom, fairness, or logic of legislative choices." *Beach Commc'ns*, 508 U.S. at 313. A statute cannot be struck down simply

because it draws a classification that "is not made with mathematical nicety or because in practice it results in some inequality." *Heller v. Doe*, 509 U.S. 312, 321 (1993) (internal quotation marks omitted). Rational-basis review requires a court to accept a legislature's rationale for enacting a law, "even when there is an imperfect fit between means and ends." *Id.* Accordingly, it is plaintiffs' burden "to negative every conceivable basis which might support" the laws they claim are unconstitutional. *Beach Commc'ns*, 508 U.S. at 315 (internal quotation marks omitted).

1. The $2,600 Contribution Limit for New PACs Is Rationally Related to Lessening the Risk of Circumvention and Promoting Disclosure

The "differing restrictions" that FECA places on new and multicandidate PACs, like other varied limits in FECA, "reflect a judgment by Congress that these that these entities have differing structures and purposes, and that they therefore may require different forms of regulation in order to protect the integrity of the electoral process." *Cal. Med.*, 453 U.S. at 201. As explained in detail above, *see supra* Part III.A, PACs that are less than six months old present an increased risk of circumvention, and that risk increases further as an election draws near. Indeed, Stop PAC's many close ties with the Innis campaign illustrate how easily that risk could appear in the midst of a campaign. *See supra* Part III.A.3. In contrast, older PACs like the Tea Party Fund present less risk of bootstrapping. Such PACs are typically more established, have disclosed more information, are supported by a broader base of contributors and have supported a broader range of candidates. *See supra* Part IV.B. Thus, FECA's requirement that new PACs prove their *bona fides* for a six-month period is rationally related to the important interests in deterring circumvention and promoting disclosure.

2. The Limits on Contributions to Parties Lessen the Risk and Appearance of Corruption While Allowing Parties to Maintain Their Important Role in the Political System

FECA's limits on contributions from multicandidate PACs to political parties strike a balance between two important Congressional interests. On the one hand, those limits are set at

levels that help parties carry out their important electoral functions of selecting and supporting candidates for office. On the other hand, as the Supreme Court has held, reasonable ceilings on contributions to parties are justified to prevent parties from becoming "agents for spending on behalf of those who seek to produce obligated officeholders." *McConnell*, 540 U.S. at 145 (internal quotation marks omitted).[20] FECA's PAC-to-party limits are calibrated to accommodate the corruption risks posed by contributions and the constitutionally compelled need to ensure adequate resources, and include special high limits on contributions from persons in recognition of the important role that individuals play in funding political-party activity.

In 1976, Congress first limited contributions from individuals and PACs to political parties. Congress found it "appropriate to set a higher limit" on contributions "persons" may make to parties than it set on their contributions to candidates so as "to allow the political parties to fulfill their unique role in the political process." H.R. Conf. Rep. No. 94-1057 at 58 (Apr. 28, 1976); *cf. Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 618 (1996) (noting Congress's "general desire to enhance . . . an important and legitimate role for political parties in American elections"). Thus, while contributions from persons and multicandidate PACs to a candidate were limited to just $1,000 and $5,000 per election at the time, Congress allowed persons to give up to $20,000 annually, and multicandidate PACs $15,000 annually, to the national party committees.[21]

In 2002, Congress enacted BCRA, which ended the parties' practice of accepting so-called "soft money" contributions — a then-major source of party funding. *McConnell*, 540 U.S. at 122-26, 133. In the last election cycle before BCRA went into effect, nearly half of the money

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[20] Because political parties and their candidates and officeholders share "a special relationship and unity of interest," contributions to a party "threaten to create — no less than would a direct contribution to the candidate — a sense of obligation" on the part of the candidate. *McConnell*, 540 U.S at 144. As a result, the "idea that large contributions to a national party can corrupt or, at the very least, create the appearance of corruption of federal candidates and officeholders is neither novel nor implausible." *Id.*

[21] State and local party committees were limited to receiving $5,000 annually.

raised by party committees reporting to the FEC came in the form of soft money.[22] To ensure that political parties and candidates would still have sufficient funds, Congress increased FECA's limits on contributions from persons to party committees.[23] Congress rationally looked to individuals to replace those funds, as multicandidate PACs had contributed very little of political parties' funding pre-BCRA.[24] The person-to-national-party limit was raised from $20,000 to $25,000 per year (and indexed for inflation), and the person-to-state-and-local-party limit was raised from $5,000 to $10,000 per year. BCRA §§ 102, 307(a)(1)-(2) (codified at 52 U.S.C. § 30116(a)(1)(A)-(B), (D)). Congress thus enabled the parties to continue to "amass[] the resources necessary for effective advocacy" — a constitutional requirement when legislatures enact limits. *Randall*, 548 U.S. at 247 (quoting *Buckley*, 424 U.S. at 21)).

Because these increases were sufficient to provide the parties with needed resources, the limits on multicandidate PAC contributions to parties remained at their already generous levels. And more than a decade later, it is clear that no additional contribution limits need to be raised in order for candidates and parties to advocate effectively. In the last election cycle, candidates raised nearly $1.9 billion and political parties more than $1.6 billion in federal funds.[25]

The lower limits on multicandidate PAC contributions to political parties help limit corruption while imposing minimal burdens on PACs. PAC contributions to parties are "general expressions of support" that do "not increase perceptibly with the size of [the] contribution." *Buckley*, 424 U.S. at 21. Therefore, the Tea Party Fund's inability to give the Alexandria Committee an extra $5,000 does not burden its associational rights. *Cf. supra* Part III.D.

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22 *See* FEC Press Release, *Party Committees Raise More Than $1 Billion in 2001-2002* (Mar. 20, 2003), http://www.fec.gov/press/press2003/20030320party/20030103party.html.

23 148 Cong. Rec. S2153 (2002) (statement of Sen. Feinstein) ("The soft money ban will work because we came to a reasonable compromise with regard to raising some of the existing hard money contribution limits by modest amounts, and indexing those limits for inflation.").

24 *See, e.g.*, *supra* n. 24 (first four appended Tables).

25 FEC Press Release, *FEC Summarizes Campaign Activity of the 2011-2012 Election Cycle* (Apr. 19, 2013), http://www.fec.gov/press/press2013/20130419_2012-24m-Summary.shtml.

Also, the lower limits have not imposed any substantial burden on multicandidate PACs generally or the Tea Party Fund in particular. Multicandidate PACs have generally focused their efforts on directly supporting candidates, not parties. (*See* FEC Facts ¶¶ 32-33.) For example, from the start of the 2004 election cycle, multicandidate PACs have contributed in excess of $239.1 million to candidates and only $30.1 million to party committees. (*Id.* ¶ 32.) The Tea Party Fund had only ever contributed once to a party committee before its contribution to the Alexandria Committee for this case. (*Id.* ¶¶ 23, 26.) At the same time, the Tea Party Fund has made no effort to assist the Alexandria Committee in other ways. (*Id.* ¶¶ 28-29.)

Thus, Congress constitutionally permits "persons" under FECA to make higher contributions to party committees to ensure those committees have sufficient resources.

CONCLUSION

For the reasons above, the FEC's motion for summary judgment should be granted.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

STOP RECKLESS ECONOMIC INSTABILITY CAUSED BY DEMOCRATS, *et al.*,	
Plaintiffs,	Civ. No. 1:14-397 (AJT-IDD)
v.	
FEDERAL ELECTION COMMISSION,	
Defendant.	

CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2014, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing to the following counsel for plaintiff:

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