No. 15-1455

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

STOP RECKLESS ECONOMIC INSTABILITY CAUSED BY DEMOCRATS PAC, TEA PARTY LEADERSHIP FUND, ALEXANDRIA REPUBLICAN CITY COMMITTEE,
Plaintiffs-Appellants,

AMERICAN FUTURE PAC,
Plaintiff-Intervenor-Appellant,

v.

FEDERAL ELECTION COMMISSION,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Virginia

RESPONSE BRIEF OF APPELLEE FEDERAL ELECTION COMMISSION

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JURISDICTIONAL COUNTERSTATEMENT

This Court lacks jurisdiction over all claims under Article III of the U.S. Constitution because appellants lack standing and their claims are moot, as explained below. *See infra* pp. 19-27. Otherwise, the Court would have had jurisdiction for the reasons stated in appellants' jurisdictional statement.

COUNTERSTATEMENT OF THE ISSUES

(1) **Justiciability**. Appellants are political committees that wanted to contribute more money than the Federal Election Campaign Act ("FECA") permitted to certain federal candidates and political parties last year. The 2014 elections are over, and FECA either allowed or now allows appellants to contribute the amounts they wanted to contribute. Have appellants failed to present an Article III case or controversy?

(2) **First Amendment**. In *Buckley v. Valeo*, the Supreme Court upheld FECA's requirement that a political committee be registered with the Federal Election Commission for six months before it can contribute $5,000 instead of $2,700 per election to candidates. Appellants challenge the same six-month provision. Should their claims be denied under this directly applicable Supreme Court authority given that the six-month period does not significantly burden appellants' rights and is closely drawn to serve important government interests?

(3) **Equal Protection**. Congress may set contribution limits at levels that treat different political actors differently, based on multiple factors including the risk of corruption and the recipient's need for funds to advocate effectively. Appellants failed to prove they are situated similarly to committees with the higher contribution limits they prefer, and they ask the courts to rewrite Congress's limits based on just one factor. Did the district court correctly hold that their claims fail under the intermediate scrutiny that applies?

COUNTERSTATEMENT OF THE CASE

I. LEGAL BACKGROUND

A. The Federal Election Campaign Act and Its Contribution Limits

The FEC is an independent federal agency that is responsible for administering, interpreting, and civilly enforcing the Federal Election Campaign Act of 1971 ("FECA"), 52 U.S.C. §§ 30101-46 (formerly 2 U.S.C. §§ 431-57).[1] In 1974, Congress revised FECA in response to the Watergate scandal and the "deeply disturbing" reports from the 1972 federal elections of contributors giving large amounts of money to candidates "to secure a political quid pro quo." *Buckley v. Valeo*, 424 U.S. 1, 26-27 (1976); *see also Buckley v. Valeo*, 519 F.2d 821, 839-

[1] Last year, FECA was moved from Title 2 to Title 52 of the United States Code. *See* Editorial Reclassification Table, http://uscode.house.gov/editorialreclassification/t52/Reclassifications_Title_52.html (last visited Aug. 10, 2015).

40 (D.C. Cir. 1975). With that revision, Congress intended to "limit the actuality and appearance of corruption resulting from large individual financial contributions." *Buckley*, 424 U.S. at 26. To that end, FECA limits contributions to candidates for federal office and to political committees. *See* 52 U.S.C. § 30116(a). FECA also requires candidates and political committees to disclose publicly what they spend and receive through reports filed with the FEC. *See id.* § 30104.

Shortly after Congress revised FECA, the Supreme Court upheld the new law's contribution limits and disclosure requirements against First and Fifth Amendment challenges in the seminal campaign finance ruling *Buckley v. Valeo*. The Court found that a contribution limit only "marginal[ly]" restricts a contributor's First Amendment rights. 424 U.S. at 20-21. The Court therefore applied "closely drawn" scrutiny, a form of intermediate (not strict) scrutiny. *Id.* at 25. *Buckley* then upheld FECA's $1,000 limit on contributions to candidates, finding that it furthered the government's important interests in limiting the risk and appearance of corruption. *Id.* at 23-29.

Following *Buckley*, courts including this Court have routinely upheld federal and state contribution limits. *See, e.g.*, *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 193-99 (1981); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 390-98 (2000); *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 456-65 (2001)

("*Colorado II*"); *FEC v. Beaumont*, 539 U.S. 146, 152-63 (2003); *McConnell v. FEC*, 540 U.S. 93, 133-89 (2003), *overruled in part on other grounds by Citizens United v. FEC*, 558 U.S. 310, 365 (2010); *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 713-18 (4th Cir. 1999); *Preston v. Leake*, 660 F.3d 726, 729 (4th Cir. 2011); *United States v. Danielczyk*, 683 F.3d 611, 615-19 (4th Cir. 2012); *Wagner v. FEC*, --- F.3d ---, No. 13-5162, 2015 WL 4079575, at *2-27 (D.C. Cir. July 7, 2015).

The *Buckley* Court also concluded that when Congress creates a contribution limit, it has broad discretion to determine the appropriate amount of that limit. *See* 424 U.S. at 30. The plaintiffs in *Buckley* had argued that the amount of FECA's $1,000 limit was unconstitutionally low. *Id.* But the Court rejected that claim and stated that if Congress decides 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). Congress's discretion ends, the Court explained, only where a contribution limit becomes so restrictive that it prevents candidates or political committees from "amassing the resources necessary for effective advocacy." *Id.* at 21.

Today, FECA's system of limits regulates more than a dozen different types of contributions involving individuals, candidates, political parties, other political committees including "PACs," corporations, labor unions, and other groups. *See*

52 U.S.C. §§ 30116, 30118-19, 30121. The amounts of those limits vary widely, from $21.6 million to zero. *Id.*; 80 Fed. Reg. 5750-02, 5751 (Feb. 3, 2015); 77 Fed. Reg. 9925-01, 9926 (Feb. 21, 2012). The chart below lists selected FECA contribution limits:

FECA Contribution Limits				
	To Candidate Committee	**To Nat'l Party Committee**	**To State or Local Party Committee**	**To Any Other PAC**
From "Person" (includes individuals and new PACs)	**$2,700*** (per election)	**$33,400*** (per year for any use) **Up to $334,000*** (per year for particular uses)	**$10,000** (per year; combined limit)	**$5,000** (per year)
From Multi-Candidate PAC	**$5,000** (per election)	**$15,000** (per year for any use) **Up to $150,000** (per year for particular uses)	**$5,000** (per year; combined limit)	**$5,000** (per year)
From National Party Committee	**$5,000** (per election) **$21.6 million**** (to 2012 presidential nominee; in the form of coordinated expenditures)	**Unlimited** (within same party)	**Unlimited** (within same party)	**$5,000** (per year)

From National Party Committee (cont.)	**From $48,000 to $2.84 million**** (to 2015 Congressional nominees; in the form of coordinated expenditures)			
From State or Local Party Comm.	**$5,000** (per election) **From $48,000 to $2.84 million**** (from state parties to 2015 Cong-ressional nominees; in the form of coordinated expenditures)	**Unlimited** (within same party)	**Unlimited** (within same party)	**$5,000** (combined limit)
From Candidate Committee	**$2,000** (per election)	**Unlimited**	**Unlimited**	**$5,000** (per year)
From Corp-oration	**Prohibited**	**Prohibited**	**Prohibited**	**Prohibited**
From Labor Union	**Prohibited**	**Prohibited**	**Prohibited**	**Prohibited**
From Federal Contractor	**Prohibited**	**Prohibited**	**Prohibited**	**Prohibited**
From Foreign National	**Prohibited**	**Prohibited**	**Prohibited**	**Prohibited**

*Indexed for inflation
**Indexed for inflation and adjusted for the relevant jurisdiction's voting age population

B. Political Committees

A political committee is any group of persons whose major purpose is the nomination or election of a federal candidate and which has contributed or spent at least $1,000 to influence a federal election. 52 U.S.C. § 30101(4)(A); *Buckley*, 424 U.S. at 79. Once a group meets those criteria, it must register as a political committee with the FEC, though it may voluntarily register at any time beforehand. 11 C.F.R. § 104.1(b).

There are different types of political committees. Some are associated with a candidate or entity; for example, candidates operate political committees called "principal campaign committees." 52 U.S.C. § 30102(e)(1). Also, political parties operate national, state, and local "party committees." *Id.* § 30101(14)-(15). Political committees that are not associated with any candidate, party, labor union, or corporation are "nonconnected" political committees (often called "PACs").

C. FECA's Limits on Contributions from PACs to Candidates

A contribution from a PAC to a candidate is subject to FECA's most generally applicable contribution limit. It currently limits any "person" from giving more than $2,700 per election (primary or general) to a federal candidate. 52 U.S.C. § 30116(a)(1)(A); *see also* 80 Fed. Reg. at 5751 (adjusting the statutory limit of $2,000 to $2,700 for inflation). "Person" includes individuals, PACs, and

other "organization[s]," such as partnerships and associations. 52 U.S.C. § 30101(11).

Of these "persons," FECA grants only PACs a chance to qualify for a special $5,000-per-election limit on contributions to candidates. 52 U.S.C. § 30116(a)(2)(A). To qualify, a PAC must: (1) receive contributions from more than 50 persons; (2) contribute to at least five federal candidates; and (3) be registered with the FEC for at least six months (the "six-month period"). *Id.* § 30116(a)(4). A PAC that meets these criteria is called a "multicandidate political committee." *Id.* The Supreme Court upheld the constitutionality of these requirements in *Buckley*. 424 U.S. at 35-36.

D. FECA's Limits on Contributions from PACs to Political Parties

FECA also limits contributions from PACs to political party committees. *See* 52 U.S.C. § 30116(a)(1)(B), (D), (a)(2)(B)-(C). These limits are set at higher levels than the limits on contributions to candidates or to PACs to allow the parties to amass the funds necessary to carry out their important role in the political process. *See infra* pp. 55-61. The Supreme Court has upheld the constitutionality of limits on contributions to political parties. *McConnell*, 540 U.S. at 133-89. At the start of this litigation in April 2014, persons and multicandidate PACs could contribute the following amounts to party committees:

Limits on Contributions From PACs to Political Parties	To National Party Committee	To State or Local Party Committee
From "Person" (includes individuals and new PACs)	**$32,400*** (per year)	**$10,000** (per year; combined)
From Multicandidate PAC	**$15,000** (per year)	**$5,000** (per year; combined)

*Adjusted for inflation to $33,400 today.

Eight months later, in December 2014, Congress drastically increased the amounts that contributors could give to national party committees for certain purposes. The national committees may now create up to three new accounts to pay for their convention, building-headquarters, and election-related-legal expenses. *See* Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. 113-235, Div. N, § 101, 128 Stat. 2130, 2772-73 (Dec. 16, 2014) (codified as amended at 52 U.S.C. § 30116(a)(1)(B), (a)(2)(B), (a)(9)). Contributors may give each of these new accounts up to three times the amount they could previously give to a national party committee. *Id.* As a result, now a person may contribute $334,000 annually to a national party committee, and $233,800 annually to a Congressional party committee. *See id.* A multicandidate PAC may now contribute $150,000 annually to a national party committee, and $105,000 annually to a Congressional party committee. *See id.*

Effect of the Dec. 2014 Party Limit Increases	**To National Party Committees**				
Use of Contribution:	**Any**	**Convention***	**Building**	**Legal**	**(Total)**
From "Person" (includes individuals and new PACs)	**$33,400 per yr**	**$100,200 per yr**	**$100,200 per yr**	**$100,200 per yr**	**$334,000 per yr**
From Multicandidate PAC	**$15,000 per yr**	**$45,000 per yr**	**$45,000 per yr**	**$45,000 per yr**	**$150,000 per yr**

*Account not available to Congressional campaign committees.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Appellants' Claims

Appellants consist of three PACs and one local political party committee (collectively, the "Political Committees"). (JA 51, 461.)[2] Their complaint challenges the particular amounts of three of FECA's contribution limits. In counts I and II, the Political Committees assert that the First and Fifth Amendments bar Congress from requiring PACs to be registered with the FEC for at least six months before they can contribute $5,000 (instead of $2,700) per election to a candidate. (JA 59-62.) In count III, the Political Committees claim that the Fifth Amendment requires Congress to allow multicandidate PACs to

[2] Pursuant to Local Rule 25(a)(1)(D), the FEC has filed the full joint appendix in searchable electronic form under option (i) with this brief. The FEC has added searchable page numbers to the version of the joint appendix filed by appellants.

contribute $33,400 (instead of $15,000) per calendar year to a national party committee, and $10,000 (instead of $5,000) per calendar year to state and local party committees. (JA 62-63.)

The Political Committees asked the district court to permanently enjoin the FEC from applying the six-month period and lower contribution limits to them. They wanted the district court to "requir[e] the FEC to instead apply" the higher limits that apply to other types of PACs. (JA 64.) The Political Committees also requested a declaratory judgment. (JA 63-64.)

B. Appellant Stop PAC and Former Plaintiffs Niger Innis and Niger Innis for Congress

Appellant-plaintiff Stop Reckless Economic Instability caused by Democrats ("Stop PAC") is a PAC that registered with the FEC on March 11, 2014. (JA 51, 144.) Stop PAC asserts counts I and II of the complaint. (JA 59-61.) At the time it sued the FEC in April 2014, Stop PAC had met the criteria for becoming a multicandidate PAC, except that it had not yet been registered for at least six months (hereinafter, a PAC in this situation is referred to as a "new PAC"). (JA 19, 55.) It alleged that it had contributed $2,600 (the inflation-adjusted maximum then allowed under section 30116(a)(1)(A)) to its then co-plaintiff, federal candidate Niger Innis. (JA 19-20, 55-58.) Innis was a candidate in the June 10, 2014 election for the Republican nomination for the U.S. House of Representatives in Nevada's fourth congressional district. (JA 19, 55.) Stop PAC alleged that it

wanted to give Innis more than $2,600 (and up to $5,000) for that election, but it could not because it was then still a new PAC. (JA 19-20, 55-56.)

Innis lost the election. (DE 35-1 at 4.) Stop PAC then moved in July 2014 to amend the complaint and to dismiss Innis and his campaign committee as plaintiffs. (DE 35, 36.) Stop PAC's new allegations stated that it had contributed $2,600 each to two additional federal candidates to whom Stop PAC also wanted to give in excess of $2,600. (JA 56-57.) Those candidates were Dan Sullivan, a candidate in the August 19, 2014 primary election for the Republican nomination for U.S. Senate in Alaska, and Joe Heck, a candidate in the November 4, 2014 general election for U.S. House of Representatives in Nevada's third congressional district. (*Id.*) The court granted the motions and gave the parties approximately two months to conduct discovery. (JA 73, 77-79.)

On September 11, 2014, the day before discovery concluded, Stop PAC became a multicandidate PAC and thus able to contribute $5,000 per election to candidates. (Appellants' and Intervenor-Appellant's Opening Br. ("PACs' Br.") at 7 (Docket No. 17).) By that point, the primary elections involving Innis and Sullivan had already taken place. But nearly two months remained before the November 4 general election, and so Stop PAC contributed an additional $1,800 to Heck on October 3, using its newly acquired multicandidate status. (*Id.* at 9.)

Eight days after Stop PAC became a multicandidate PAC, on September 19, the parties cross-moved for summary judgment. (DE 56-57.)

C. Appellant-Intervenor American Future PAC

On October 6, 2014, nearly a month after Stop PAC became a multicandidate PAC, and in the midst of summary judgment briefing, American Future PAC was allowed by the district court to intervene to also assert counts I and II of the complaint. (JA 461-62.) The court also granted the parties a short period of discovery relating to American Future PAC. (JA 462.)

At that point, American Future PAC had been registered with the FEC for approximately two months. (DE 50-4 at 3.) The Political Committees did not amend their complaint to add any allegations regarding American Future PAC. But American Future PAC did state in briefing and other filings that it had contributed $2,600 to Tom Cotton's general election campaign for U.S. Senate from Arkansas in August 2014, and that it wanted to give Cotton $2,000 more but could not because it was still a new PAC. (DE 50-3 at 2; 56-1 at 7.)

Approximately four months later, on February 11, 2015, American Future PAC became a multicandidate PAC and thus able to contribute $5,000 per election to federal candidates. (PACs' Br. at 12.)

D. Appellants Tea Party Leadership Fund and Alexandria Republican City Committee

Appellant-plaintiff Tea Party Leadership Fund ("Tea Party Fund") is a PAC that registered with the FEC in May 2012. (JA 51.) In October 2012, when it was still a new PAC, the Tea Party Fund challenged the constitutionality of the six-month period in a lawsuit against the FEC in the District of Columbia. *See Tea Party Leadership Fund v. FEC*, No. 12-1707 (D.D.C.). That suit ended after the Tea Party Fund and its co-plaintiffs stipulated to a voluntary dismissal with prejudice. *See id.* (DE 50). The Tea Party Fund became a multicandidate PAC in November 2012. (*See* JA 51.)

In this suit, the Tea Party Fund asserts count III of the complaint with appellant-plaintiff Alexandria Republican City Committee ("Alexandria Committee"), a local political party committee. (JA 62.) The Tea Party Fund contributed $5,000 (the maximum FECA permits annually) to the Alexandria Committee in April 2014 and alleged that it wanted to give the Alexandria Committee another $5,000 in 2014. (JA 58-59.) The Tea Party Fund also alleged that it wanted to contribute $32,400 to the National Republican Senatorial Committee (a national party committee), which is in excess of FECA's applicable $15,000 limit. (JA 59.)

III. THE DISTRICT COURT'S RULING DENYING THE POLITICAL COMMITEES' CLAIMS

On February 27, 2015, the district court granted summary judgment to the FEC and denied it to the Political Committees. JA 501-21; *see also* --- F. Supp. 3d ---, 2015 WL 867091 (E.D. Va. Feb. 27, 2015). The court first expressed doubt as to whether Stop PAC and American Future PAC's claims were justiciable. There were "substantial issues concerning" whether the six-month period injured those PACs, the court said, since both could "control the timing of their registrations relative to any particular election." (JA 508-09.) The district court also pointed out that Stop PAC and American Future PAC had become multicandidate PACs during the litigation and that it was "unclear" whether their claims would qualify for the mootness exception for claims that are capable of repetition yet evading review. (JA 509-10.)

Despite its doubts, the district court "assume[d], without deciding," that it had jurisdiction and evaluated the Political Committees' claims. (JA 501.) First, it denied Stop PAC and American Future PAC's First Amendment claim (count II) because those PACs "cannot show that they have suffered a cognizable constitutional injury as a result of the [six-month] waiting period." (JA 510-14.) The court explained that *Buckley* "makes clear" that "restrictions on the size of financial contributions" do not violate the First Amendment when "within jurisprudential limits not exceeded here." (JA 513.)

The district court then denied the Political Committees' equal protection claims (counts I and III). (JA 514-17.) The court found that new PACs are not situated similarly to multicandidate PACs, such as the Tea Party Fund. (JA 515-16.) The evidence showed that a new PAC like Stop PAC "is precisely the type of instrumentality" that individuals could use to circumvent the $2,700 contribution limit to obtain the $5,000 limit reserved for multicandidate PACs, the court found. (*Id.*) In any event, the court concluded, the differences in contribution-limit amounts that the Political Committees challenge would survive closely drawn scrutiny since they further Congress's anti-corruption interests. (JA 516-17.)

SUMMARY OF ARGUMENT

The district court's ruling should be affirmed. The Political Committees ask this Court to rewrite a portion of FECA's system of contribution limits to their liking because in some cases they cannot contribute as much as other, different PACs can. These claims are not justiciable since the Political Committees lack standing, and in any event, their claims are now moot.

But even if their claims were justiciable, they would fail for multiple reasons. Chief among those reasons is that the Supreme Court already denied the claims the Political Committees make against the six-month period and the $2,700 contribution limit (counts I and II) nearly 40 years ago in *Buckley*.

The Political Committees' claims also lack merit because they cannot show that the incremental differences in FECA's contribution limits significantly burdened their First or Fifth Amendment rights. Each claim is founded on the assumption that a lower contribution limit places a heavy burden on the contributor's speech and association if there is a higher one in place for other entities. That assumption is incorrect. Because a contribution is a symbolic act, the Court has explained, the contributor's speech does not perceptibly increase with the size of the contribution. Nor does the degree of association with the intended recipient materially change. As a result, the district court correctly held that the lower contribution-limit amounts that the Political Committees object to do not burden their rights significantly more than the higher amounts they admit are constitutional. The Political Committees have also not even attempted to prove that they are situated similarly to the PACs that have the higher contribution limits that they desire. Indeed, the Political Committees ask this Court to strike down four-decade-old election laws on the basis of no evidence.

In any event, each FECA provision at issue is constitutional under the intermediate, closely drawn scrutiny that the Political Committees concede applies. As the lower court's review of the evidence demonstrated, FECA's six-month period ensures that the special $5,000 contribution limit is reserved for *bona fide* groups of persons, while lessening the risk that individuals could circumvent the

general $2,700 limit by labeling themselves a PAC. Also, FECA's limits on contributions from new PACs and multicandidate PACs to political parties indisputably further Congress's interests in lessening the risk and appearance of corruption. The higher limits for certain contributions to political parties serve the important First Amendment interest of ensuring that the parties can amass the resources necessary for effective advocacy and other critical party functions.

The Political Committees do not dispute that the more deferential closely drawn scrutiny applies, but nevertheless they assert that the courts may perfectly tailor the amounts of contribution limits on the basis of just one factor. The Supreme Court, however, has made clear that Congress has the discretion to perform this multi-factored task and that courts have "no scalpel to probe" the precise amounts of FECA's contribution limits.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews *de novo* the district court's grant of summary judgment to the FEC, and the Court may affirm that ruling on any ground supported by the record. *Bryant v. Bell Atl. Md., Inc.*, 288 F.3d 124, 132 (4th Cir. 2002).

II. THE POLITICAL COMMITTEES' CLAIMS ARE NOT JUSTICIABLE

The district court was right to doubt its jurisdiction: No Article III case or controversy exists here since the Political Committees lack standing or their claims are now moot. Even though the district court declined to dismiss this case on jurisdictional grounds, this Court can and should do so. *See, e.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-110 (1998).

A. Stop PAC Caused Its Own Alleged Injury

Stop PAC lacks standing; its claimed injury was "self-inflicted" and thus is not "fairly traceable" to FECA. *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1152-53 (2013); *see also McConnell*, 540 U.S. at 228 (finding no standing for candidates whose alleged injury was caused by "their own personal 'wish' not to solicit or accept large contributions").

Stop PAC alleges that the six-month period prevented it from contributing more than $2,600 to candidates in three 2014 elections. (JA 55-57.) But as the district court correctly noted, Stop PAC could "control the timing of [its] registration[] relative to any particular election." JA 508-09; *see* 11 C.F.R. § 104.1(b). And, as the record shows, Stop PAC's founders had the idea for their PAC early enough to register it more than six months before the first of those three elections, Niger Innis's June 10, 2014 primary election. Stop PAC's founder and chairman, Gregory Campbell, and its treasurer, custodian of records, and attorney,

Dan Backer, discussed the idea for Stop PAC at least as early as November 2013 — seven months before Innis's election. (JA 145-46, 163.) In fact, Campbell testified that creating a PAC like Stop PAC was "something that ha[d] always interested" him. (JA 163.) And Backer was aware of the six-month period, since he had previously represented the Tea Party Fund in its 2012 lawsuit against the FEC challenging that requirement. *See supra* p. 14.

Nevertheless, Campbell and Backer waited until March 11, 2014 — just three months before Innis's election — to register Stop PAC. (JA 134, 145-46.) Their choice, not FECA, ensured that Stop PAC would be unable to contribute more than $2,600 to Innis before June 10 or to Dan Sullivan before his August 19, 2014 primary election. By contrast, Stop PAC was able to contribute $1,800 in excess of $2,600 to the third candidate it supported, Joe Heck, since Stop PAC had registered early enough to become a multicandidate PAC before Heck's November 4, 2014 election. PACs' Br. at 9; *cf. Rosario v. Rockefeller*, 410 U.S. 752, 758 (1973) (holding that plaintiffs' alleged disenfranchisement was not caused by the voter registration waiting period they challenged, but by their "own failure to take timely steps to effect their enrollment").

Stop PAC does not deny that it could have registered early enough to contribute more than $2,600 to Innis and Sullivan. Instead, it claims that even had it registered earlier, and no elections occurred during its six-month period, FECA

nevertheless would have caused it injury because Stop PAC "reasonably *could have* wished" to make contributions during that time. (PACs' Br. at 35 (emphasis added).) But no such wish is expressed in the complaint. (JA 49-65.) It is a plaintiff's alleged injury "[a]s pled" that determines whether standing exists, not a later "shifting characterization" of that injury in briefing or argument. *Doe v. Va. Dep't of State Police*, 713 F.3d 745, 755 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 1538 (2014).

B. Because Stop PAC Lacks Standing, American Future PAC's Later Intervention Did Not Revive Stop PAC's Claims

Because Stop PAC lacks standing, the district court never had jurisdiction over its claims (counts I and II), including when American Future PAC later intervened to assert those claims. This Court, however, has held that "intervention is ancillary to the underlying cause of action" and "it is well-settled law that intervention presupposes pendency of an action in a court of competent jurisdiction." *See Hous. Gen. Ins. Co. v. Moore*, 193 F.3d 838, 840 (4th Cir. 1999) (internal quotation marks omitted). Once an "action is terminated, for whatever reason, there no longer remains an action in which there can be intervention." *Black v. Cent. Motor Lines, Inc.*, 500 F.2d 407, 408 (4th Cir. 1974). American Future PAC's subsequent intervention therefore "may not be allowed to give life to a lawsuit which does not actually exist." *Becton v. Greene Cnty. Bd. of Educ.*, 32

F.R.D. 220, 222-23 (E.D.N.C. 1963) (denying "leave to intervene as plaintiffs in an action that admittedly has become moot").

C. Counts I and II Are Moot Because Stop PAC and American Future PAC Are No Longer Subject to the Six-Month Period or $2,700 Limit

The six-month periods for both Stop PAC and American Future PAC have expired. (PACs' Br. at 7, 12.) Both PACs may now contribute more than $2,700 and up to $5,000 per election to federal candidates; in fact, Stop PAC did just that by contributing a total of $3,400 to Heck. (*Id.* at 9.) Counts I and II of the complaint are therefore moot because it is "impossible for the court to grant" Stop PAC or American Future PAC "any effectual relief." *Incumaa v. Ozmint*, 507 F.3d 281, 286 (4th Cir. 2007) (internal quotation marks omitted).

Stop PAC and American Future PAC's claims are not capable of repetition yet evading review, as they assert. (PACs' Br. at 35-39.) Like many election law claims, counts I and II "evade review" due to the short duration of the six-month period. But they are not capable of repetition, since there can be no "reasonable expectation that *the same complaining party* will be subject to the same action again." *Davis v. FEC*, 554 U.S. 724, 735 (2008) (emphasis added; internal quotation marks omitted); *see also FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007) (same). Stop PAC and American Future PAC admit that neither of

them "can ever again be subject to the six-month waiting period." (PACs' Br. at 15.)

The Supreme Court has applied the same-complaining-party requirement in two FECA cases in the last eight years, *see Davis*, 554 U.S. at 735; *Wis. Right to Life, Inc.*, 551 U.S. at 462, and yet the Political Committees assert that there is a categorical exception to that requirement in election-law cases (PACs' Br. at 36-39). The Political Committees have no explanation for *Davis* and *Wisconsin Right to Life*. (*See id.*) And they concede that this Court has applied the same-complaining-party requirement in two recent election-law cases. (*Id.* at 38-39 (citing *Lux v. Judd*, 651 F.3d 396, 401 (4th Cir. 2011); *N.C. Right to Life Comm. Fund for Indep. Political Expenditures v. Leake*, 524 F.3d 427, 435 (4th Cir. 2008)).) These rulings highlight that there is no election-law exception to the same-complaining-party requirement, as the Second and Ninth Circuits have explicitly held. *See Van Wie v. Pataki*, 267 F.3d 109, 114-15 (2d Cir. 2001) (applying same-party requirement in an election law case and distinguishing cases the Political Committees cite here); *Barilla v. Ervin*, 886 F.2d 1514, 1519 n.3 (9th Cir. 1989) (finding that an "examination . . . reveals no such categorical exception to the usual mootness rules" in election-law cases), *overruled on other grounds by Simpson v. Lear Astronics Corp.*, 77 F.3d 1170, 1174 (9th Cir. 1996).

The Political Committees rely upon a series of cases that are distinguishable because they involve plaintiffs who could in fact satisfy the same-complaining-party requirement. (PACs' Br. at 36-38.) Two of those cases were class actions. *See Rosario*, 410 U.S. at 755 n.4; *Dunn v. Blumstein*, 405 U.S. 330, 333 n.2 (1972). In a class action, the certified class's claims remain capable of repetition even when the class representative's claims do not. *See U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 398 (1980) ("When . . . there is no chance that the named plaintiff's expired claim will reoccur, mootness still can be avoided through certification of a class prior to expiration of the named plaintiff's personal claim."); *see also Honig v. Doe*, 484 U.S. 305, 336 (1988) (Scalia, J., dissenting) (acknowledging that *Rosario* and *Dunn* have been "limited to their facts" given that they were class actions). In other cases relied upon by the Political Committees, the plaintiffs were candidates who were capable of being subject to the election laws they challenged again if they chose to run in a future election. *See Storer v. Brown*, 415 U.S. 724, 726-27 (1974); *Moore v. Ogilvie*, 394 U.S. 814, 815-16 (1969); *Lawrence v. Blackwell*, 430 F.3d 368, 371 (6th Cir. 2005); *Majors v. Abell*, 317 F.3d 719, 722-23 (7th Cir. 2003); *Schaefer v. Townsend*, 215 F.3d 1031, 1033 (9th Cir. 2000). In the one case the Political Committees cite involving PAC plaintiffs, the court found that the PACs would "again be impacted" by the

state laws they challenged. *Catholic Leadership Coal. of Tex. v. Reisman*, 764 F.3d 409, 423 (5th Cir. 2014).[3]

In contrast here, Stop PAC and American Future PAC concede that they will not again be affected by the six-month period. (PACs' Br. at 15.) Counts I and II are therefore moot and not capable of repetition yet evading review.

D. Count III Is Moot Since the Tea Party Fund Can Now Contribute the Amounts It Alleged It Wanted to or It Is Too Late to Do So

The Tea Party Fund alleged that it wanted to "immediately contribute an additional $5,000" to the Alexandria Committee, "which would bring its total contributions to the [Alexandria Committee] *for the year 2014* to $10,000." (JA 59-60 (emphasis added).) Because 2014 has passed, however, no court can grant the Tea Party Fund or Alexandria Committee that relief. The Tea Party Fund claims it will supplement the record to show it contributed to the Alexandria Committee in 2015 (PACs' Br. at 10 n.8), but that would not change the allegations of the complaint.

The complaint also alleges that the Tea Party Fund wants to "immediately contribute" $32,400 to the National Republican Senatorial Committee ("NRSC").

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[3] Appellants stress that some of these courts stated (in *dicta*) that the same-complaining-party requirement need not be met in an election-law case (*see* PACs' Br. at 37-38 (citing *Catholic Leadership*, 764 F.3d at 423-24; *Majors*, 317 F.3d at 732; *Lawrence*, 430 F.3d at 372)), but that out-of-Circuit *dicta* is inconsistent with the Supreme Court's and this Court's recent application of that requirement in election-law cases.

(JA 59.) Because of Congress's December 2014 party-limit increases, the Tea Party Fund can now immediately give that amount plus $72,600 more to the NRSC, so long as the NRSC used amounts in excess of $15,000 for its building-headquarters or election-related legal expenses. *See* 52 U.S.C. § 30116(a)(2)(B); *see also supra* pp. 9-10. The Tea Party Fund has not said it would object if the NRSC used part of its proposed $32,400 contribution for these purposes. In fact, the Tea Party Fund states in its brief that it is not challenging the new, increased limits in this suit because Congress enacted them after it moved for summary judgment. (PACs' Br. at 6 n.5.) That timing, however, does not prevent the limit increases from mooting the Tea Party Fund's claim as it exists today.[4]

E. The Political Committees Have Alleged No Potential Future Harm to Justify the Forward-Looking Relief They Seek

Finally, even assuming the Political Committees were harmed by FECA in 2014, their complaint does not allege that in the future "there is a 'real or immediate threat that [they] will be wronged again . . . in a similar way.'" *Raub v. Campbell*, 785 F.3d 876, 885-86 (4th Cir. 2015) (quoting *City of L.A. v. Lyons*, 461

[4] At the same time, the Political Committees insinuate that they do indirectly challenge the December 2014 party-limit increases. (PACs' Br. at 6 n.5 ("[T]his lawsuit does not *directly* challenge such limits." (emphasis added)); *see also id.* at 4 n.2.) The Political Committees raised no arguments attacking the December 2014 party-limit increases before the district court, however, and so they cannot now challenge those increases — directly, indirectly, or otherwise. *See Helton v. AT&T Inc.*, 709 F.3d 343, 360 (4th Cir. 2013) ("[B]ecause AT&T failed to raise this argument before the district court, it is waived on appeal.").

U.S. 95, 111 (1983)). As a result, they have alleged no injury that could be redressed by the permanent injunction and declaration they request. JA 63-64; *see Lyons*, 461 U.S. at 101-13.

III. THE SUPREME COURT HAS ALREADY REJECTED THE CLAIMS THE POLITICAL COMMITTEES ASSERT AGAINST THE SIX-MONTH PERIOD AND THE $2,700 CONTRIBUTION LIMIT (COUNTS I & II)

Even if justiciable, the Political Committees' claims fail on their merits. In fact, two of those claims (counts I and II) were already denied by the Supreme Court in *Buckley*. This Court must therefore decline the Political Committees' invitation to in effect reverse Supreme Court precedent. *See Danielczyk*, 683 F.3d at 615 ("[W]hen Supreme Court precedent has direct application in a case," lower courts must "leav[e] to [the Supreme] Court the prerogative of overturning its own decisions." (internal quotation marks omitted)).

The *Buckley* Court upheld the constitutionality of the six-month period (and the other two multicandidate PAC qualifying criteria) against both First and Fifth Amendment challenges. 424 U.S. at 35-36, 59 n.67. It rejected the argument — identical to that asserted by the Political Committees here — that the criteria "unconstitutionally discriminate against ad hoc organizations in favor of established interest groups and impermissibly burden free association." *Id.* at 35; *cf., e.g.*, JA 49 (claiming in the complaint that FECA discriminates against "newly formed grassroots organizations" in favor of "entrenched institutions"). The Court

explained that the application of the $2,700 limit (which was then $1,000) to a new PAC's contributions to candidates for six months did not "undermin[e] freedom of association"; instead, the $5,000 limit for multicandidate PACs "enhances the opportunity of bona fide groups to participate in the election process." 424 U.S. at 35. And the multicandidate PAC qualifying criteria, including the six-month period, "serve the permissible purpose of preventing individuals from evading the applicable [now $2,700] contribution limitations by labeling themselves committees." *Id.* at 35-36. The *Buckley* Court's ruling affirmed the *en banc* D.C. Circuit, which described the six-month period as a "protective shield," designed to "prevent proliferation of dummy committees." 519 F.2d at 857-58.

The Political Committees cannot distinguish *Buckley*. They argue that their claims are narrower because (1) they attack only the six-month period (as opposed to all three multicandidate PAC requirements); and (2) they attack it only as applied to new PACs that have satisfied the other two criteria (as opposed to groups that are "a front for a single contributor"). (PACs' Br. at 42-43.) But those are exactly the claims *Buckley* disposed of. The *Buckley* plaintiffs argued that the six-month period discriminates against not single-contributor fronts, but legitimate "philosophically motivated groups with widely dispersed members who want to respond to an issue as it arises, or who coalesce only near election time[.]" Reply Br. of the Appellants, *Buckley v. Valeo*, Nos. 75-436, 75-437, 1975 WL 171458, at

*22 (U.S. Nov. 3, 1975). And despite the Supreme Court's broader analysis, the plaintiffs' claim was aimed directly at the six-month period. That is clear from the D.C. Circuit's opinion. *See* 519 F.2d at 857-58 ("[Plaintiffs] ask[] whether there is a constitutional violation in the statute's requirement . . . that a political committee be registered for 'not less than 6 months' before being entitled to the higher ($5,000) contribution limit."). It is also clear from the constitutional question the plaintiffs presented:

> Does [52 U.S.C. § 30116(a)(4)] violate [First and Fifth Amendment] rights, in that it excludes from the definition of "[multicandidate] political committee" committees *registered for less than the period of time prescribed in the statute*?

424 U.S. at 59 n.67 (paragraph 3(h)) (emphasis added). The Supreme Court answered that question, "NO." *Id.* And therefore so must this Court.

IV. THE SIX-MONTH PERIOD DOES NOT VIOLATE THE FIRST AMENDMENT (COUNT II)

Even if *Buckley* had not already decided counts I and II, its reasoning and that of later decisions "dictate the result here," as the district court held. (JA 511.)

A. The District Court Correctly Held That the Differences in Contribution-Limit Amounts Caused the Political Committees No Cognizable First Amendment Injury

The Political Committees' suit does not challenge Congress's ability to place some limits on contributions from new PACs to candidates and from multicandidate PACs to political parties. Indeed, the Supreme Court has upheld

these types of contribution limits. *See supra* pp. 3-4. The claims here are much narrower: They seek to fine-tune the *amounts* of these otherwise constitutional limits. *See supra* pp. 10-11.

The incremental differences at issue, however, did not place a burden of constitutional dimension on the Political Committees' ability to speak or associate, as the district court held. (JA 512-13.) As that court recognized, and as the Supreme Court has repeatedly explained, the "'quantity of communication by [a] contributor does not increase perceptibly with the size of his contribution.'" JA 513 (quoting *Buckley*, 424 U.S. at 21); *see also McConnell*, 540 U.S. at 135 (same); *Shrink Mo.*, 528 U.S. at 386 (same); *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 628 (1996) ("*Colorado I*") (same); *Cal. Med.*, 453 U.S. at 196 n.16 (same). In contrast to money spent directly on speech, a contribution is a "symbolic act" — it affiliates the contributor with the candidate, and it serves as the contributor's "general expression of support for the candidate and his views, but it does not communicate the underlying basis for the support." *Buckley*, 424 U.S. at 21-22. Therefore, a contribution limit "permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues," *id.* at 21 — and that remains true whether the limit is set, for example, at $2,700 or $5,000.

The *Buckley* Court denied an attempt to fine-tune the amount of the same limit the Political Committees attempt to fine-tune here. The *Buckley* plaintiffs claimed its then-amount of $1,000 was "unrealistically low." 424 U.S. at 30. The Court explained, however, that once 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.* at 30; *see also Randall v. Sorrell*, 548 U.S. 230, 248 (2006) ("[W]e recognize, as *Buckley* stated, that we have 'no scalpel to probe' each possible contribution level."). The $1,000 range that *Buckley* cited amounts to $4,194 in today's dollars.[5] And yet Stop PAC and American Future PAC assert that their temporary inability to give an extra $2,400 placed a burden of constitutional dimension on their First Amendment rights. It did not.

With the contributions they made, "Stop PAC and American Future were able to associate with, express approval of . . . their chosen candidates," as the district court found. (JA 512.) The same is true for the Tea Party Fund, with its contribution to the Alexandria Committee. (JA 58.) Had the Political Committees been able to contribute a few thousand dollars more, it would not have increased

[5] *See* Bureau of Labor Statistics, CPI Inflation Calculator, http://www.bls.gov/data/inflation_calculator.htm (last visited Aug. 10, 2015).

the amount of their speech or the extent of their association to a significant degree. *See Buckley*, 424 U.S. at 21, 30.

The Political Committees could have increased their speech for, and association with, their favored candidates and parties by spending funds to speak independently in favor of those candidates and parties. *See Buckley*, 424 U.S. at 28. They could have also organized volunteer efforts to support them. *Id.* FECA's contribution limits left plaintiffs free to engage in these and other acts of association and speech. *Id.*; *see also Wagner*, 2015 WL 4079575, at *20. Yet Stop PAC, American Future PAC, and the Tea Party Fund each chose to forego these alternative avenues to increase their speech and association. (JA 111-12, 145, 151, 194, 214-15, 392-93, 430-32, 450-51, 454.)

The minimal burdens the Political Committees face in being subject to lower contribution limits than other entities pale in comparison to those imposed by the "prior restraint" laws the Political Committees claim are comparable. (PACs' Br. at 46-49.) Unlike contribution limits, those laws were subject to strict scrutiny because they gave government officials open-ended discretion to prospectively ban speech based on its content. (*See id.*)

Because Stop PAC and American Future PAC suffered no injury cognizable under the First Amendment, count II should be dismissed. *See also infra* pp. 53-54

(discussing the effect of the lack any burden of constitutional dimension on the Political Committees' equal protection claims).

B. The Six-Month Period Is Closely Drawn to Further Important Government Interests

Even if the application of the $2,700 contribution limit for six months had meaningfully burdened the Political Committees' rights, that application would still easily survive constitutional scrutiny. Applying closely drawn scrutiny's "relatively complaisant review," *Beaumont*, 539 U.S. at 161, courts have routinely upheld FECA's base contribution limits because they limit the risk and appearance of corruption, *see supra* pp. 3-4. As the Political Committees recognize, these anti-corruption interests also justify laws that prevent circumvention of the limits on contributions to candidates. (PACs' Br. at 28-29 (citing *Colorado II*, 533 U.S. at 456).) And the anti-corruption interests also support laws that promote the disclosure of campaign finance information, since disclosure helps "deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity." *Buckley*, 424 U.S. at 67.

The six-month period serves these interests. It has also been the law for nearly four decades, and so to show that it continues to serve these interests, 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; *see also Wagner*, 2015 WL 4079575, at *10 ("Of course, we would not expect to find — and we

cannot demand — continuing evidence of large-scale quid pro quo corruption . . . because such contributions have been banned since 1940."). That experience, as evidenced by the record in this case, confirms that the six-month period is closely drawn to prevent circumvention and promote campaign finance disclosure.

1. The Six-Month Period Helps Prevent Individuals from Using Dummy PACs to Circumvent the $2,700 Limit

a. *The Six-Month Period Acts as a "Protective Shield" for the $5,000 Limit*

As the district court held, "there is sufficient government interest in preventing the risk of corruption" and the "circumvention of the legislative and regulatory systems to justify the limit[] on contributions from new PACs . . . to candidates." (JA 517.) Among the "deeply disturbing" reports of corruption from Congress's Watergate investigation were revelations that the dairy industry used hundreds of "dummy" PACs just before the 1972 general election to funnel a $2 million contribution to President Nixon's re-election campaign. *Buckley*, 519 F.2d at 839 & nn.35-36; Final Report of the Select Comm. on Presidential Campaign Activities, S. Rep. No. 93-981, 93d Cong., 2d Sess. at 579-81, 612-15, 736-43 (1974) ("Watergate Report"). The dairy industry gave $2,500 to each dummy PAC, each of which then passed the money on to the Nixon campaign. Watergate Report at 615, 738. In return, the White House increased the government's milk price supports. *Id.* at 612, 1209.

In light of this and other scandals, in 1974 Congress created the generally applicable $1,000 limit on contributions from individuals and organizations to candidates. *See supra* pp. 2-3. To avoid equating individuals with "an organization of hundreds or thousands," however, Congress also created a special $5,000 limit for contributions to candidates from "broad-based citizen interest groups" — which FECA reasonably correlated to the criteria for multicandidate political committees. 120 Cong. Rec. S4461 (daily ed. Mar. 26, 1974) (statement of Sen. Hathaway); *see also* 120 Cong. Rec. H7810 (daily ed. Aug. 7, 1974) (statement of Rep. Brademas).

With this increased limit, Congress sought to enhance the important role that "bona fide groups" play in federal elections. *Buckley*, 424 U.S. at 35; 120 Cong. Rec. S4461; 120 Cong. Rec. H7810. As Congress recognized, citizens do not always have the expertise or resources to identify qualified candidates who share their views. 120 Cong. Rec. S4461. Instead, they can contribute to like-minded multicandidate PACs that identify and "help elect persons who support the group's views or ideology." *Id.* In this way, multicandidate PACs help citizens "participate in the most intelligent way in the election process." *Id.* Today, multicandidate PACs are run by many of the nation's most well-known advocacy groups, including the Natural Resources Defense Council and the National Rifle Association, as the Political Committees acknowledge. (PACs' Br. at 3.) Political

party committees are also a type of multicandidate political committee. 120 Cong. Rec. H7810.

Congress enacted the three multicandidate PAC qualifying criteria to reserve the $5,000 limit for legitimate groups, and to weed out dummy PACs and those "supporting only a single candidate." *FECA Amendments, 1979, Hearing Before the Comm. on Rules and Admin. U.S. Senate*, 96th Cong. 145 (1979). The six-month period in particular is a "protective shield" that works to prevent "two or three persons" from "organizing themselves" as a "dummy" multicandidate PAC. *Buckley*, 519 F.2d at 857-58. Starting a PAC is simple — 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. And satisfying the first two multicandidate PAC qualifying requirements — obtaining 51 contributors and contributing to five candidates — is not significantly more difficult. As Stop PAC and American Future PAC have demonstrated, it can be done in just days. *See infra* pp. 41-42. While those two requirements ensure that a multicandidate PAC will have a bare minimum of financial support and diverse candidate interest, Congress feared that they would not be enough to reserve the $5,000 limit for legitimate groups given how easily they can be satisfied. For example, Senator Edward Kennedy predicted that "individuals and narrow-based political committees — now limited to [$2,700] contributions per candidate — are likely to take on new sources of contributions to

their own warchests and new candidate beneficiaries in order to qualify for the $5,000 gifts allowed to be made by broad-based committees." 120 Cong. Rec. S18527 (daily ed. Oct. 8, 1974); *see also* S. Rep. No. 96-319 at 5 (1979) ("Under present law, it is possible for a committee to make de minimis contributions to four candidates and $1,000 to a fifth to qualify it for the $5,000 limit available to multicandidate committees, although the committee may, in reality, be contributing to only one candidate.").

The six-month period helps prevent this scenario by deterring individuals from circumventing the limit, especially right before an election when the risk is highest. "It is well known that the public begins to concentrate on elections only in the weeks immediately before they are held," *Citizens United*, 558 U.S. at 334, and it is thus during this time "when the incentives to infuse funds to a candidate are at their highest," as the district court explained (JA 516). As the FEC data relied upon by the district court shows, the number of PACs that register increases significantly in the months prior to an election. (*Id.* (citing JA 352-55).) These PACs often have fleeting existences — in many cases, they spend large sums of money just prior to the election and then cease operating afterwards. (JA 355-56.) The six-month period ensures that these fly-by-night, pre-election PACs can make only the $2,700 contributions that individuals are permitted to make.

In contrast, a PAC that has existed for at least six months is more likely to be a *bona fide* group. After six months, a PAC is more likely to be a known commodity to donors and donees. *See* 120 Cong. Rec. S4461 (statement of Sen. Hathaway) (observing that "large citizens' groups," deserving of an increased limit, "are known by their name and reputation"). As even the plaintiffs in *Buckley* noted, a PAC that makes it to six months old is more likely to be "well organized and have the finances to remain in continuous operation and contact." 1975 WL 171458, at *22. A six-month old PAC is also likely to have more members, more contributors, more contributions to candidates, and as discussed below, will have publicly disclosed information to the FEC about itself. *See infra* pp. 44-45.

The six-month period has continued to serve this anti-circumvention purpose in tandem with other anti-circumvention measures that have been enacted since *Buckley* upheld the six-month period. The Political Committees claim that the six-month period has become "heavy-handed" in light of those legal developments (PACs' Br. at 43 (internal quotation marks omitted)), but none of the provisions they cite prevent the type of circumvention at issue here. An individual could label herself a committee to give $5,000 instead of $2,700 to a candidate regardless of (1) the $5,000 limit on contributions from individuals to PACs; (2) the limits on what individuals can contribute to parties; and (3) the $5,000 limit on what PACs can contribute to each other. (*See id.* at 44 (citing 52 U.S.C. § 30116(a)(1)(B)-(D),

(2)(C).) Additionally, the type of circumvention limited by the six-month period involves just one PAC, and so it is not affected by FECA's "anti-proliferation restrictions," which ensure that a person cannot create a "series of committees that will, in turn, contribute to a particular candidate." (*Id.* (citing 52 U.S.C. § 30116(a)(5)).)

Finally, the six-month period complements and bolsters FECA's earmarking provision, which considers a person's contributions through an intermediary to a candidate to be a contribution from the original source in certain cases. *See* 52 U.S.C. § 30116(a)(8). As the Political Committees acknowledge, this provision existed at the time *Buckley* upheld the six-month period. (PACs' Br. at 45.) More recently, the Supreme Court found that the FEC's earmarking regulation would help prevent "a scheme in which a donor routes *millions of dollars* in excess of the base limits to a particular candidate," but the Court specifically distinguished smaller-scale circumventions of the base limit. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1456 (2014) (contrasting past FEC enforcement matters with a hypothetical scenario involving "200 newly created PACs"). The six-month period effectively limits smaller-scale schemes.

b. *Stop PAC and American Future PAC Illustrate That a Serious Threat of Circumvention Exists Today*

This Court need look no further than Stop PAC and American Future PAC to see that a serious threat of circumvention still exists today. As the district court

determined, Stop PAC is "precisely the type of instrumentality that lends itself to a circumvention of the contribution limits applicable to individuals." (JA 515-16.) Indeed, both PACs have demonstrated how a candidate's campaign workers could set up a dummy-like PAC just before an election to support their candidate with the $5,000 limit in just days were it not for the six-month period.

Stop PAC was created and operated by two paid employees for the Niger Innis campaign. Stop PAC's chairman, Gregory Campbell, worked for the Innis campaign by writing campaign speeches, op-eds, and policy positions. (JA 33, 216-21, 270-71, 277.) Stop PAC's attorney and treasurer, Dan Backer, was the Innis campaign's treasurer, attorney, and "compliance czar." (JA 134-36, 205-07, 332.) Campbell was a friend of Innis's, and both Campbell and Backer had worked with Innis prior to his campaign. (JA 259, 261, 277-78, 290-94, 301-03, 307-09.) They created Stop PAC three months before Innis's election and then announced that their PAC wanted to give the Innis campaign $5,000. *See supra* p. 20.

American Future PAC's chairman, Matt Lenell, performed work for Tom Cotton's Senate campaign, including editing Cotton fundraising communications. (JA 106, 469-70, 476-77.) Lenell registered American Future PAC about three months prior to Cotton's election and then announced that his PAC wanted to give the Cotton campaign $5,000. *See supra* p. 13.

Both PACs were able to quickly satisfy the first two multicandidate PAC requirements with little effort. Stop PAC received contributions from more than 50 persons and made five contributions within about three weeks of registering. (JA 55, 144; *see also* DE 29-1 at 2.) To do so, Stop PAC hired a vendor that sent fundraising emails to potential donors. (JA 146, 165-67.) Campbell had no involvement in that process and knew little about how it worked. (JA 165-67.) Then, Stop PAC contributed $2,600 to Innis and a much smaller $250 each to four other candidates. (JA 55; *see also* DE 29-1 at 2.) Stop PAC has not reported contributing to any candidate since October 2014.[6]

American Future PAC satisfied the first two multicandidate PAC requirements approximately two weeks after registering on August 11, 2014. (DE 50-4 at 3.) Within only nine days, Lenell and his attorney successfully solicited contributions from more than 50 persons using e-mails, text messages, and Facebook messages. (*Id.* at 16-17; *see also* JA 104, 471, 478, 496-500.) They asked friends, family, and acquaintances to give contributions of five dollars or less specifically for the purpose of satisfying that particular multicandidate PAC

[6] Campaign finance information that PACs report to the Commission can be found on the FEC's website by searching for the PAC's name at http://www.fec.gov/finance/disclosure/candcmte_info.shtml (last visited Aug. 10, 2015).

requirement.[7] (JA 471, 478, 496-500.) Later, American Future PAC received a $5,000 donation from a Cotton supporter and contributor. (DE 50-4 at 17.) The next day, the PAC contributed $2,600 to Cotton and, a few days later, a relatively *de minimis* $100 to four other candidates. *Id.* at 10-14. American Future PAC has not reported contributing to any candidate since. *See supra* p. 41 n.6.

When Stop PAC and American Future PAC had each obtained more than 50 contributors and contributed to five candidates, both appeared to be prototypical examples of the fly-by-night, single-candidate-focused groups that Congress feared would circumvent the $2,700 limit. The only thing that prevented these PACs from obtaining the $5,000 limit on an election eve was the six-month period.

The Political Committees put forth no evidence of their own to attempt to rebut the FEC's evidence. Instead, they claim that the district court was required to ignore any evidence regarding their particular characteristics. (PACs' Br. at 25-28.) But the Political Committees bring as-applied claims (*id.* at 2, 27, 43, 46), and so evidence regarding how the challenged statutes apply to them is not only

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[7] For instance, Lenell sent a solicitation on Facebook to a potential contributor that stated: "Hey. I need a favor. . . . I'm starting a Political Action Committee and I need to get to 51 donors to get standing and join a lawsuit. [W]ill you donate to help?" (JA 496.) While this message and other record evidence shows that appellants were attempting to construct a constitutional test case, their efforts evidence how easy it would be for individuals who were concerned only with circumventing the $2,700 limit to start a PAC, obtain more than 50 contributors, and make five contributions.

relevant, it is central to their case, *see*, *e.g.*, *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 468 (1978) (rejecting as-applied challenge to ban on lawyers soliciting clients at hospitals based on the "facts in this case" about the plaintiff, which "present a striking example of the potential for overreaching" and "demonstrate the need for prophylactic regulation in furtherance of the State's interest").

Furthermore, the Political Committees are members of the statutorily defined classes that they claim FECA discriminates against, and so evidence regarding them exemplifies the relevant characteristics of those groups.[8] Courts frequently reject as-applied claims against FECA citing FEC-submitted evidence regarding the plaintiffs. *See*, *e.g.*, *Wagner*, 2015 WL 4079575, at *14, *24 (detailing the FEC's record, including evidence about the plaintiffs, and rejecting an as-applied equal protection claim against a FECA contribution limit); *Libertarian Nat'l Comm. v. FEC*, 930 F. Supp. 2d 154, 166 (D.D.C. 2013) (relying in part upon FEC's deposition of plaintiff to deny as-applied claim against a FECA contribution limit), *aff'd mem. in relevant part*, No. 13-5094, 2014 WL 590973 (D.C. Cir. Feb. 7, 2014). The district court properly did the same here.

[8] More precisely, Stop PAC and American Future PAC *were* members of the statutorily defined class that they claim FECA discriminates against (*i.e.*, new PACs), but since they no longer are, their claims are moot. *See supra* pp. 22-25.

2. The Six-Month Period Helps Promote Campaign Finance Disclosure

The six-month period also furthers the government's important interest in promoting the disclosure of the sources of campaign funds. *See Buckley*, 424 U.S. at 67. In particular, it ensures that groups seeking multicandidate PAC status cannot evade filing at least one disclosure report before becoming eligible to contribute $5,000 to candidates. *Cf. Stop This Insanity, Inc. Emp. Leadership Fund v. FEC*, 761 F.3d 10, 15 (D.C. Cir. 2014) (upholding certain solicitation and expenditure limits because they preserve the effectiveness of "disclosure requirements [that] Appellants are endeavoring to avoid"), *cert. denied*, 135 S. Ct. 949 (2015).

In *Buckley*, 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 FECA. 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 what it receives and spends, and the identities of those who gave it more than $200 in a calendar year. *Id.* § 30104(b). PACs must file disclosure reports more frequently in election years, *see, e.g.*, *id.* § 30104(a)(4)(A)(ii) (requiring a "pre-election report" disclosing financial activity up to 20 days before an election), but even those reports allow a nearly three-week pre-election window in which a fly-by-night PAC could form and obtain the

$5,000 limit without having first provided any disclosure about who it is or where it gets its funds. *Cf.* Watergate Report at 743 (detailing how the dairy industry's dummy PACs made their contributions "with a minimum of public detection before the election [as] all of them took place . . . after the last preelection reporting date"). Given the large number of PACs that already register at the eleventh hour before an election (JA 352-55), the absence of the six-month period would further encourage the last minute proliferation of new PACs with undisclosed donors.

3. The Six-Month Period Is Closely Drawn to the Government's Important Interests

Even if the six-month period were a "significant interference" with political association, it would be constitutional because Congress has "employ[ed] means closely drawn to avoid unnecessary abridgement of associational freedoms." *Buckley*, 424 U.S. at 25 (internal quotation marks omitted). This intermediate level of scrutiny "'provides Congress with sufficient room to anticipate and respond to concerns about circumvention of regulations designed to protect the integrity of the political process.'" *Preston*, 660 F.3d at 741 (quoting *McConnell*, 540 U.S. at 137). Unlike strict scrutiny, "perfect tailoring is not required," *N.C. Right to Life Comm.*, 524 F.3d at 441, and so Congress need not use "the least restrictive means" to achieve its goals, *McCutcheon*, 134 S. Ct. at 1456-57 (internal quotation marks omitted). A provision is not closely drawn only where there is a "substantial

mismatch" between Congress's "stated objective and the means selected to achieve it." *Id.* at 1446.

Applying closely drawn scrutiny, courts including this Court have repeatedly held that FECA may use bright-line, prophylactic rules to limit the risk of corruption and circumvention before they occur. For example, courts have routinely upheld contribution limits, *see supra* pp. 3-4, even though, as *Buckley* acknowledged, "most large contributors do not seek improper influence," 424 U.S. at 29. *Buckley* explained that "[n]ot only is it difficult to isolate suspect contributions, but more importantly, Congress was justified in" removing "the opportunity for abuse inherent in the process of raising large monetary contributions." *Id.* at 30; *see also, e.g.*, *Preston*, 660 F.3d at 736 (upholding statute banning contributions by lobbyists as a prophylactic measure to prevent corruption and its appearance). For similar reasons, courts have approved the scope of FECA's limits designed to prevent circumvention. *See, e.g.*, *N.C. Right to Life, Inc.*, 525 F.3d at 310 ("The Court has further recognized that the unrelenting and imaginative efforts of some political participants to circumvent almost every new campaign finance regulation [justifies] prophylactic laws that extend beyond the regulation of direct political contributions."). And the same is true for FECA's disclosure requirements. *See, e.g.*, *First Nat'l Bank of Bost. v. Bellotti*, 435 U.S.

765, 792 n.32 (1978) ("[W]e emphasized in *Buckley* the prophylactic effect of requiring that the source of communication be disclosed.").

The six-month period at issue here is also a bright-line, preventive rule shaped to eliminate the inherent risk of circumvention and non-disclosure presented by new PACs. That length of time is appropriate because six months is the longest a PAC may go without filing a disclosure report. *See supra* p. 44. It also approximates the period of time before an election during which candidate supporters are most likely to be focused on the upcoming election and motivated to form fly-by-night PACs. *Id.* at 37. As a result, there is no "substantial mismatch" between the six-month period and Congress's legitimate goals. *McCutcheon*, 134 S. Ct. at 1446. In fact, the Political Committees' current ability to contribute $5,000 to any federal candidate illustrates just how limited the six-month period is.

The Political Committees admit that closely drawn scrutiny applies. (PACs' Br. at 23, 30.) Yet they inappropriately demand that the rule at issue here be perfectly tailored, while relying on inapposite cases applying strict scrutiny to laws regulating direct spending on speech (called "independent expenditures"), not contributions. (*Id.* at 30-31 (citing *Colorado I*, *Citizens United*, and *National Conservative Political Action Committee*).) The Political Committees propose that instead of using the six-month period to catch "bad apples," the FEC should "identify and target just those committees that have engaged in suspicious

behavior." (*Id.* at 32.) Closely drawn scrutiny, however, does not require such a least restrictive alternative. More fundamentally, the Political Committees' proposal is highly subjective and unworkable. Hundreds of PACs register with the FEC during the six months before an election. (JA 352-55.) It took weeks of discovery for the FEC to learn that Stop PAC and American Future PAC were potentially "bad apples" — and those are powers the FEC normally does not have outside of an already-open investigation. Even if they were, there is no guarantee that the high-risk nature of any particular PAC would be revealed in time for something to be done about it before an imminent election.[9]

In contrast, the six-month period works in a clear, administrable way to lessen the risks of circumvention and non-disclosure. *Cf. Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1671 (2015) ("[M]ost problems arise in greater and lesser gradations, and the First Amendment does not confine a State to addressing evils in their most acute form."). The rule is therefore closely drawn.

[9] In contrast to many other agencies, the FEC does not have the authority to conduct roving investigations based on its own perception that conduct is "suspicious." *FEC v. Machinists Non-Partisan Pol. League*, 655 F.2d 380, 387-88 (D.C. Cir. 1981). The vast majority of alleged lawbreaking that it investigates is brought to its attention through administrative complaints that any person can file with the agency. *See* 52 U.S.C. § 30109(a).

V. THE CONTRIBUTION-LIMIT AMOUNTS THAT THE POLITICAL COMMITTEES CHALLENGE DO NOT VIOLATE THE FIFTH AMENDMENT (COUNTS I & III)

To trigger any level of constitutional scrutiny for their equal protection claims, the Political Committees were required to show that they were "treated differently from others who were similarly situated." *Equity in Athletics, Inc. v. Dep't of Educ.*, 639 F.3d 91, 108 (4th Cir. 2011). As the district court found, they could not make that showing. (JA 515-16.) But even if they had, their claims would still have qualified for nothing more than rational basis scrutiny, since they also could not show that the differences in the contribution-limit amounts they attack "proceed[] along suspect lines" or "infringe[] fundamental constitutional rights." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993). Those limit amounts are not only rationally related to important government interests but are closely drawn to those interests, as the district court concluded. (JA 516-17.)

A. FECA Does Not Discriminate Against the Political Committees

The Political Committees cannot show that FECA discriminates against either new PACs or multicandidate PACs, because FECA favors all PACs. The Political Committees' claims of discrimination each hinge on their comparison of just two of FECA's numerous contribution limits and other provisions. But as the district court recognized, the Supreme Court has explained that an equal protection claim against FECA must be examined in the context of how the "statute as a

whole" treats the plaintiff. (JA 515.) In *California Medical Association v. FEC*, an association argued that FECA violated equal protection because corporations were allowed to contribute more to certain PACs than it could. 453 U.S. at 200. The Court denied that claim solely because the association's "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.*

Counts I and III here fail for the same reason. FECA favors PACs in several ways, as the Political Committees' own claims illustrate. PACs, along with political parties, are the only entities that may qualify to directly contribute $5,000 per election to federal candidates. *See supra* pp. 5-6. That reward for a limited number of multicandidate committees does not transform the broadly applicable $2,700 limit into discrimination, as *Buckley* held. 424 U.S. at 35. PACs may contribute thousands of dollars per election to candidates, and hundreds of thousands of dollars annually to political parties, while other groups like corporations, unions, federal contractors, and foreign nationals may not contribute at all. *See supra* pp. 5-6. And PACs may receive contributions of unlimited size to fund their independent speech, while other groups like political parties and

connected political committees may not. *See McConnell*, 540 U.S. at 133-85; *Stop This Insanity*, 761 F.3d at 13-14.[10]

B. New PACs Are Not Situated Similarly to Multicandidate PACs

The Political Committees' equal protection claims also fail because, as the district court held (JA 515-16), the Political Committees did not prove that new PACs and multicandidate PACs are similarly situated, as they must. *See Veney v. Wyche*, 293 F.3d 726, 730-31 (4th Cir. 2002). In fact, as the district court noted, the Political Committees' own complaint stresses how different they are, describing new PACs as "grassroots organizations that have spontaneously mobilized" and multicandidate PACs as "entrenched" institutions. (JA 515 (citing JA 49).)

"Spontaneously mobilized" new PACs like Stop PAC and American Future PAC are more likely than "entrenched" groups to be dummy PACs focused on a single candidate. *See supra* pp. 34-43. Illustrating the point, Stop PAC and American Future PAC (when they were new PACs) differed radically from the Tea Party Fund. (JA 515-16.) The Tea Party Fund is a model of the broad-based citizen interest groups that Congress intended to have the $5,000 limit. It has

[10] The Alexandria Committee is a local party committee, not a PAC. But as it candidly admitted in discovery, the contribution limit it challenges does not treat it differently from any other local party committee. (JA 435.) The district court was therefore correct to dismiss its equal protection claim as well.

contributed to dozens of candidates with funds collected from more than 100,000 contributors. (JA 40, 516.) It is also a well-known group that has been publicly scrutinized in part because it has disclosed the millions of dollars it has received and spent. *See, e.g.*, Matea Gold, *Tea Party PACs Reap Money for Midterms, but Spend Little on Candidates*, Wash. Post (Apr. 26, 2014) ("The Tea Party Leadership Fund has doled out a quarter of a million dollars to eight consulting firms.").[11]

The Political Committees do not dispute that the district court accurately detailed the material ways in which Stop PAC and the Tea Party Fund differ. (PACs' Br. at 26.) And they do not provide any evidence showing that new PACs are situated similarly to multicandidate PACs. Instead, they incorrectly claim that the FEC's evidence about their particular characteristics is irrelevant. *Id.* at 25-28; *but see supra* pp. 42-43. Even if that were right, the Political Committees' equal protection claims would still fail — it is their burden to show that new PACs and multicandidate PACs "are in all relevant respects alike." *Veney*, 293 F.3d at 730-31 (internal quotation marks omitted).

The Political Committees offer only their unsupported assertion that new PACs and multicandidate PACs must be similarly situated in the "manner

[11] *See* http://www.washingtonpost.com/politics/tea-party-pacs-reap-money-for-midterms-but-spend-little-on-candidates/2014/04/26/0e52919a-cbd6-11e3-a75e-463587891b57_story.html.

Congress deemed relevant" because they both have more than 50 contributors and have made five contributions. (PACs' Br. at 28.) But Congress also deemed a PAC's age to be relevant, as shown by its choice to enact the six-month period. *See supra* pp. 36-39. The FEC's evidence supports Congress's judgment, and the Political Committees have put forth no evidence of their own to even try to prove otherwise.

C. Because the Political Committees Did Not Suffer a Cognizable First Amendment Injury, Rational Basis Scrutiny Applies to Their Fifth Amendment Claims

Even had the Political Committees proved that FECA discriminated against them compared to similarly situated PACs, their equal protection claims would have been subject only to rational basis scrutiny. No appellant contends that it is a member of a suspect class. And as explained above, the differences in contribution-limit amounts that the Political Committees challenge did not significantly burden their First Amendment rights. *See supra* pp. 29-33.

While some courts have applied closely drawn scrutiny to equal protection claims against contribution limits, many of those cases involved plaintiffs who also argued that it was unconstitutional to have any limit at all, which the Political Committees do not argue here. *See Wagner*, 2015 WL 4079575, at *25; *Ognibene v. Parkes*, 671 F.3d 174, 177-78 (2d Cir. 2011); *Ill. Liberty PAC v. Madigan*, 902

F. Supp. 2d 1113, 1115-16 (N.D. Ill.), *aff'd*, No. 12-3305, 2012 WL 5259036 (7th Cir. 2012).[12]

In any event, the Political Committees' equal protection claims fail regardless of whether rational basis or closely drawn scrutiny applies.

D. The Contribution-Limit Amounts the Political Committees Challenge Are Closely Drawn to Important Government Interests

The district court correctly concluded that the FEC proved that "there is sufficient government interest" to support FECA's "limits on contributions from new PACs . . . to candidates and from multicandidate PACs to parties." (JA 517.)

1. The $2,700 Contribution Limit Applied to New PACs Is Closely Drawn to the Important Government Interests of Preventing Circumvention and Promoting Disclosure (Count I)

The Political Committees' equal protection claim against the $2,700 limit (count I) is identical in substance to its First Amendment claim against the six-month period (count II). *See supra* p. 10. Both claims incorrectly assert that the government has no legitimate interest in keeping new PACs from utilizing the $5,000 contribution limit reserved for multicandidate PACs. (JA 59-62.) The equal protection claim, therefore, fails for the same reasons the First Amendment

[12] In other out-of-Circuit cases, the state-defendants apparently did not contend, as the FEC does here, that rational basis scrutiny applies. *See Riddle v. Hickenlooper*, 742 F.3d 922, 927-28 (10th Cir. 2014); *Woodhouse v. Me. Comm'n on Gov't al Ethics and Election Practices*, 40 F. Supp. 3d 186, 194 (D. Me. 2014).

claim does. *See Wagner*, 2015 WL 4079575, at *25 (plaintiff cannot succeed on a failed First Amendment claim against contribution limits by repackaging it as an equal protection claim); *Ognibene*, 671 F.3d at 193 n.19 (same); *Ill. Liberty PAC*, 902 F. Supp. 2d at 1126 (same).

2. The Limits on PAC Contributions to Political Parties Are Closely Drawn to Anti-Corruption Interests and Allow the Parties to Amass the Resources Necessary for Effective Advocacy (Count III)

In count III, the Political Committees contend that the amounts of FECA's limits on multicandidate PAC contributions to political parties violate equal protection because new PACs may contribute more to parties. (JA 62-63.) These limits and their amounts, however, are constitutionally justified. The existence of some limit on PAC contributions to parties lessens the risk and appearance of corruption, as the Political Committees do not dispute. *See McConnell*, 540 U.S. at 145. As for "the amount or level" of those limits, Congress was required by the First Amendment to ensure that they were high enough to allow recipients to "'amass[] the resources necessary for effective advocacy.'" *Randall*, 548 U.S. at 247 (quoting *Buckley*, 424 U.S. at 21). The increased limit for persons, including new PACs, furthers that important interest, and by doing so, it helps the parties to perform their important role in federal elections.

Congress historically has had a "general desire to enhance" the "important and legitimate role" of parties in federal elections. *Colorado I*, 518 U.S. at 618.

Unlike PACs, parties "select slates of candidates for elections," choose "who will serve on legislative committees, elect congressional leadership," and "organize legislative caucuses." *McConnell*, 540 U.S. at 188. And so the Supreme Court has said that "Congress is fully entitled to consider the real-world differences between political parties and interest groups when crafting a system of national campaign finance regulation." *Id*.

Congress has therefore repeatedly enacted contribution limits that favor political parties. National parties may receive far larger contributions from individuals ($33,400 annually) than PACs can ($5,000 annually). *See supra* pp. 5-6. The Supreme Court has said that such differences do not violate equal protection. *McConnell*, 540 U.S. at 187-88. Parties may also contribute millions of dollars more to candidates through coordinated spending (up to $21.6 million per general election) than multicandidate PACs can ($5,000 annually), *see supra* pp. 5-6, and the Court has upheld those limits as well, *see Colorado II*, 533 U.S. at 465.

The differences at issue in this case were also created by Congress to enhance the functioning of the parties. Congress first limited contributions to parties in 1976. *See* FECA Amendments of 1976, Pub. L. 94-283, § 112, 90 Stat. 475 (May 11, 1976). While persons could then give just $1,000 per election to candidates, they could contribute $20,000 annually to national parties and $5,000

annually to state or local parties. *Id.* While multicandidate PACs could contribute $5,000 per election to candidates, they could give $15,000 annually to national parties and $5,000 annually to state or local parties. *Id.* Congress designed those higher limits "to allow the political parties to fulfill their unique role in the political process." H.R. Rep. No. 94-1057, at 58 (1976), *reprinted in* 1976 U.S.C.C.A.N. 946.

In 2002, Congress further increased the amount persons could contribute annually to national parties to $25,000 (indexed for inflation), and to state and local parties to $10,000. *See* Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, §§ 102, 307(a)(1)-(2), (d), 116 Stat. 81 (Mar. 27, 2002). Congress increased these limits because in that same legislation it strictly limited the parties' receipt of "soft money," funds raised outside of FECA's limits. *Id.* § 101. At that time, soft money accounted for nearly half of all funding for major national parties.[13] So Congress needed to ensure that the parties could continue to raise sufficient funds from other sources. *See* 148 Cong. Rec. S2153 (daily ed. Mar. 20, 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

[13] 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.

money contribution limits by modest amounts, and indexing those limits for inflation.").

Congress's increase of the limits on what a person could give to party committees was the most effective way to ensure the parties could continue to amass necessary funds. Individuals make up the vast majority of the persons covered by section 30116(a)(1). (*See* JA 356.) Historically, individuals have contributed far more to political parties than have other contributors, including multicandidate PACs. (JA 356-57.)[14] Allowing persons to contribute more was not only effective, but also sufficient to make up for the loss of soft money while still limiting the risks of corruption, and so the limits on multicandidate PAC contributions to parties remained at their already generous levels. In fact, in the 2011-12 election cycle, political parties raised more than $1.6 billion.[15]

The Political Committees incorrectly contend that Congress could consider only the anti-corruption interests when setting these contribution limits amounts.

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[14] *See also supra* p. 57 n.13 (first four appended Tables show that multicandidate PACs contributed very little of political parties' funding before 2002 when there was no limit on the amount of soft money they could give to parties).

[15] 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. At the end of 2014, Congress enacted legislation giving the parties even more enhanced abilities to raise funds, as individuals and PACs may now contribute hundreds of thousands of dollars per year to the parties for certain specific uses. *See supra* pp. 9-10.

(PACs' Br. at 20, 28-29, 33.) To be sure, the Supreme Court has made general statements that those interests are the only "'constitutionally sufficient justification[s]'" for *creating* broadly applicable contribution limits, as the Political Committees point out. (PACs' Br. at 28 (alternation in original; internal quotation marks omitted).)[16] But when setting their amounts, Congress was able — and in fact required — to consider also whether the limits were high enough to allow the parties to raise sufficient funds. *See Randall*, 548 U.S. at 247.

The balance of interests involved in setting the levels of FECA's different contribution limits, which number more than a dozen, varies from limit to limit. As a result, the symmetry that the Political Committees demand between FECA's PAC-to-candidate limits and PAC-to-party limits is neither realistic nor constitutionally required. *Cf. McConnell*, 540 U.S. at 188 ("Taken seriously, plaintiffs' equal protection arguments would call into question . . . much of the pre-existing structure of FECA."). Although new PACs may give increased amounts to parties, they are not permitted to give elevated amounts to candidates because when setting that latter limit in 1974, Congress had a different chief concern: The

[16] More particularized contribution limits are also constitutional on the basis of other important government interests, where applicable. *See Bluman v. FEC*, 800 F. Supp. 2d 281, 283 (D.D.C. 2011) (three-judge court) (ban on contributions by foreign nationals), *summ. aff'd*, 132 S. Ct. 1087 (2012); *Wagner*, 2015 WL 4079575, at *5-7 (government contractor contribution ban); *see also Citizens United*, 558 U.S. at 341 (limits related to enabling governmental functions).

risk of corruption is at its peak when a contribution is made directly to a candidate. *McCutcheon*, 134 S. Ct. at 1452. The Political Committees point out that Congress's selection of the amount of that limit (now $2,700) "indicate[d] its belief that contributions of that amount or less do not create a cognizable risk of corruption." (PACs' Br. at 49 (quoting *McCutcheon*, 134 S. Ct. at 1452).) But the same logic does not apply to Congress's selection of the PAC-to-party limit amounts in 2002, a decision primarily motivated by different concerns. *See supra* pp. 56-58. It is therefore not "incoherent" or "fundamentally backwards" for FECA to allow new PACs to give more to parties than multicandidate PACs can. (PACs' Br. at 20, 33.) Those limits reflect a multi-factored balancing of interests.

What is fundamentally backwards is the Political Committees' view that the courts can standardize FECA's many contribution-limit amounts (which range from $21.6 million to zero) based on just one consideration — the apparent corruption risk presented by the donor. (PACs' Br. at 28-30.) This approach ignores the contribution recipient's particular corruption risk and advocacy needs. It further ignores that democracy benefits from PACs that have grown into broad-based interest groups that can represent the views of citizens during elections. And most importantly, it ignores the fact that the Supreme Court has expressly rejected the Political Committees' approach. Under closely drawn scrutiny, Congress's "decision to enact contribution limits" is entitled to deference because Congress

"enjoys particular expertise" in weighing the "competing constitutional interests" involved. *McConnell*, 540 U.S. at 137. This Court therefore should reject the Political Committees' invitation — contrary to the Supreme Court's direction — to wield a "scalpel to probe" the specific amounts of FECA's contribution limits.

CONCLUSION

For the foregoing reasons, the district court's ruling should be affirmed.

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 15-1455 **Caption:** Stop R.E.I.D., et al. v. Federal Election Commission

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