ORAL ARGUMENT SCHEDULED MAY 16, 2013

No. 12-5365

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WENDY E. WAGNER, *et al.*,
Plaintiffs-Appellants,

v.

FEDERAL ELECTION COMMISSION,
Defendant-Appellee.

On Appeal from the United States District Court for the District of Columbia, Case No. 1:11-cv-01841-JEB

BRIEF *AMICI CURIAE* OF CAMPAIGN LEGAL CENTER, DEMOCRACY 21 AND PUBLIC CITIZEN IN SUPPORT OF APPELLEE AND URGING AFFIRMANCE

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

(A) ***Parties and Amici***. Wendy E. Wagner, Lawrence M. E. Brown, and Jan W. Miller were the plaintiffs in the district court and are the appellants in this Court. The Federal Election Commission (FEC) was the defendant in the district court and is the appellee in this Court. The Campaign Legal Center and Democracy 21 filed a brief *amici curiae* in the district court; the Campaign Legal Center and Democracy 21, joined by Public Citizen, are filing a brief *amici curiae* with this Court.

(B) ***Rulings Under Review***. Plaintiffs appeal the final order of the United States District Court for the District of Columbia (Boasberg, J.) (Nov. 2, 2012) granting the Commission's motion for summary judgment. That order incorporates by reference the district court's earlier order denying plaintiffs' motion for a preliminary injunction (Boasberg, J.) (Apr. 16, 2012). The district court's opinions are available at *Wagner v. FEC*, 854 F. Supp. 2d 83 (D.D.C. 2012), and *Wagner v. FEC*, 2012 WL 5378224 (D.D.C. Nov. 2, 2012).

(C) ***Related Cases***. The *amici* are aware of no "related cases" as defined in D.C. Cir. R. 28(a)(1)(C).

CORPORATE DISCLOSURE STATEMENT OF *AMICI CURIAE* CAMPAIGN LEGAL CENTER, DEMOCRACY 21 AND PUBLIC CITIZEN

Pursuant to Federal Rule of Appellate Procedure 26.1, *amici curiae* Campaign Legal Center, Democracy 21 and Public Citizen make the following disclosure regarding their corporate status:

The Campaign Legal Center (CLC) is a nonprofit, nonpartisan corporation working in the areas of campaign finance reform, voting rights and media law. The CLC has no parent corporation and no publicly held corporation has any form of ownership interest in the CLC.

Democracy 21 is a nonprofit, nonpartisan corporation dedicated to making democracy work for all Americans, including promoting campaign finance reform and other political reforms to accomplish these goals. Democracy 21 has no parent corporation and no publicly held corporation has any form of ownership interest in Democracy 21.

Public Citizen, Inc. is a nonprofit corporation dedicated to openness in government and the protection of individuals against overreaching by government and corporate entities alike. Public Citizen has no parent corporation and no publicly held corporation has any form of ownership interest in it.

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STATEMENT OF INTEREST[1]

Amici curiae Campaign Legal Center, Democracy 21 and Public Citizen are non-partisan, non-profit organizations that work to strengthen the laws governing campaign finance and political disclosure. *Amici* have participated in several of the Supreme Court cases underlying the claims herein, including *McConnell v. FEC*, 540 U.S. 93 (2003), and *Citizens United v. FEC*, 558 U.S. 310, 130 S. Ct. 876 (2010). *Amici* thus have a demonstrated interest in the issues raised here.

All parties have consented to *amici*'s participation in this case.

INTRODUCTION & SUMMARY OF ARGUMENT

The district court below upheld the 70-year old federal restriction on campaign contributions from government contractors, 2 U.S.C. § 441c, recognizing that Congress passed the restriction "to prevent corruption and the appearance thereof and, in so doing, to protect the integrity of the electoral system by ensuring that federal contracts were awarded based on merit." *Wagner v. FEC*, 854 F. Supp. 2d 84, 89 (D.D.C. 2012); *see also Wagner v. FEC*, --- F. Supp. 2d ----, 2012 WL 5378224, at *10 (D.D.C. 2012). Plaintiffs-appellants Wagner, *et al.* (the "Wagner contractors") make no arguments that would justify a reversal of this decision.

[1] No party or party's counsel authored this brief in whole or in part, and no person, other than the *amici curiae*, contributed money intended to fund the preparation or submission of this brief.

The Wagner contractors object that Section 441c is unsupported by current evidence of corruption in federal contracting, that it is both overbroad and underinclusive, and that it violates principles of equal protection. In this Brief, *amici curiae* will focus on the Wagner contractors' arguments about the evidence of corruption and the statute's tailoring. *Amici* will not separately analyze the equal protection argument because the Wagner contractors have conceded that "there is considerable overlap" between their First Amendment and equal protection claims, *see* Pls.' Stmt. of Pts. and Authorities in Support of Mot. for Prelim. Inj., at 18 (Jan. 31, 2012) ("Pls.' PI Br."), and that they "kn[o]w of no case in which an equal-protection challenge to contribution limits succeeded where a First Amendment one did not." *Wagner*, 2012 WL 5378224, at *10.[2]

The Wagner contractors assert that there is no current evidence that federal officeholders award contracts or seek to influence the award of contracts to reward contributors, indicating that the record of corruption in this case is inferior to the evidence that led to the enactment of recent state contractor contribution restrictions. *Wagner*, 854 F. Supp. 2d at 81; Plaintiffs'-Appellants' Principal Brief ("Wagner Br.") 45. *See also* Pls.' PI Br. 30, 35. But the Wagner contractors' complaint about this lack of evidence is proof of the statute's success, not its infirmity. Given that the federal ban has been in place for over 70 years, it has

[2] *Amici* agree with the FEC's analysis of this claim. *See* Brief of the Federal Election Commission 48-60 (Feb. 20, 2013).

surely prevented the very corruption that the Wagner contractors claim is lacking—a point they concede. Wagner Br. 45. But insofar as instances of recent corruption would aid the consideration of this challenge, this Court can look to the experience of a number of states and municipalities that have enacted pay-to-play laws. *See Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 391 (2000) (sustaining state contribution limits in part because of the record of apparent corruption in federal elections that led to enactment of federal limits). A survey of state law illustrates the ubiquity of contracting scandals at all levels of government and "substantiate[s] the corruption worries that attend contributions by government contractors." *Wagner*, 2012 WL 5378224, at *6.

Second, the Wagner contractors devote much of their argument to challenging the tailoring of section 441c, listing a range of defects that supposedly renders the law both overbroad and underinclusive, and attacking policy details from the law's coverage of "sole source" contracts to its exclusion of military academy students and federal loan recipients. Wagner Br. 49 n.7, 52-54. But few of these objections directly relate to the class of contractors at issue here—individuals with personal service contracts. Indeed, the Wagner contractors' brief reads more like a policy paper than a constitutional argument: in essence, they ask this Court to assume a legislative role and tinker with section 441c in ways that would not even bring relief to the Wagner contractors. Their attempt to "throw out

. . . First Amendment objections to see what sticks" in no way casts doubt on the tailoring of section 441c. *Wagner*, 2012 WL 5378224, at *9. Such objections to the minutiae of the statute are better directed to Congress than to this Court.

ARGUMENT

I. A Review of State and Local Laws Demonstrates That Legislatures Across the Country Have Recognized the Potential for Corruption Posed by Campaign Contributions by Governmental Contractors.

The prevalence of state and municipal pay-to-play laws, many passed in direct response to scandals involving quid pro quo exchanges, demonstrates that campaign activity by contractors and prospective contractors is widely and reasonably perceived to pose a threat of political corruption.

A. State and Local Laws Limiting Government Contractor Contributions Reflect a Shared Interest in Safeguarding the Integrity of Government Contracting.

In recent years, a growing number of states and localities have taken steps to limit the role of political contributions in government contracting. At least seventeen states have enacted limits or prohibitions on campaign contributions from prospective and/or current governmental contractors or licensees.[3] A number

[3] Cal. Gov't Code § 84308(d); Conn. Gen. Stat. §§ 9-612(g)(1), (2); Haw. Rev. Stat. § 11-355; 30 Ill. Comp. Stat. 500/50-37; Ind. Code §§ 4-30-3-19.5, -19.7; Ky. Rev. Stat. Ann. §121.330; La. Rev. Stat. Ann. § 18:1505.2(L), *id.* § 27:261(D); Mich. Comp. Laws § 432.207b; Neb. Rev. Stat. §§ 9-803, 49-1476.01; N.J. Stat. Ann. §§ 19:44A-20.13, -.14; N.M. Stat. Ann. § 13-1-191.1(E); Ohio Rev. Code § 3517.13(I)-(Z); 53 Pa. Cons. Stat. § 895.704-A(a); S.C. Code Ann. § 8-13-

of municipalities, including New York City and Los Angeles, have followed suit.[4] Two more states, Maryland and Rhode Island, have political disclosure requirements specific to contractors.[5]

Pay-to-play laws vary greatly from one jurisdiction to the next. Some statutes apply to a broad range of contracts and cover grants, licenses and other individualized state benefits,[6] while others are targeted to particular types of contracts. States variously define the subject class of contracts as, *inter alia*, industry-specific contracts,[7] contracts not subject to competitive bidding,[8] or both competitive and no-bid contracts.[9]

1342; Vt. Stat. Ann. tit. 32, § 109(B); Va. Code Ann. § 2.2-3104.01; W. Va. Code § 3-8-12(d).

[4] N.Y.C. Admin. Code §§ 3-702(18), 3-703(1-a), (1-b); L.A., Cal., City Charter § 470(c)(12).

[5] *See* Md. Code, Elec. Law § 14-101, *et seq*.; R.I. Gen. Laws § 17-27-2, -3. Several of the states that restrict contractor campaign contributions also require contractors to file disclosure reports. *See, e.g.*, 25 Pa. Cons. Stat. § 3260a(a).

[6] *See, e.g.*, N.Y.C. Admin. Code § 3-702(18) (defining "business dealings with the city" to include contracts, real property transactions with the City, franchises, concessions, grants, pension fund investment contracts, economic development agreements, and land use actions); Cal. Gov't Code § 84308(a)(5) (defining covered entitlements as "business, professional, trade and land use licenses and permits and all other entitlements for use, . . . and all franchises").

[7] *See, e.g.*, Ind. Code §§ 4-30-3-19.5, 19.7 (state lottery contracts); La. Rev. Stat. Ann. § 27:261 (casino licensees); Neb. Rev. Stat. §§ 9-835, 49-1476.01(1) (state lottery contracts).

Many states' laws cover contracts for personal services, such as the consulting contracts of appellants Brown and Miller, although there is some variation. While a few statutes regulate specific subgroups of contracts or licenses that do not include contracts for personal services,[10] most state statutes either define "contracts" broadly enough to include service contracts,[11] or explicitly cover contracts for "services" or "personal services."[12]

B. Enactment of State Contractor Contribution Regulations Is Often Prompted by Instances of Quid Pro Quo Corruption in Contracting.

As was the case for section 441c, state and municipal pay-to-play laws were frequently enacted in response to scandals involving attempts by contractors to

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[8] *See, e.g.*, Cal. Gov't Code § 84308(a)(5); Ky. Rev. Stat. Ann. § 121.330; S.C. Code Ann. § 8-13-1342; Va. Code Ann. § 2.2-3104.01. *See also* Mun. Sec. Rulemaking Bd. rule G-37.

[9] *See, e.g.*, Conn. Gen. Stat. § 9-612(g)(1)(C); Haw. Rev. Stat. § 11-355(a); 30 Ill. Comp. Stat. 500/50-37(a) (excluding highway projects eligible for federal funds); N.J. Stat. Ann. § 19:44A-20.13 *et seq*. (excluding federal highway projects and those involving eminent domain); N.M. Stat. Ann. § 13-1-191.1; Ohio Rev. Code Ann. § 3517.13(A)(4); W. Va. Code Ann. § 3-8-12.

[10] *See, e.g.*, Cal. Gov't Code § 84308(a)(5).

[11] *See, e.g.*, Ky. Rev. Stat. Ann. § 121.330(2); S.C. Code Ann. § 8-13-1342

[12] *See* Conn. Gen. Stat. §§ 9-612(g)(1)(C)-(E), (g)(2); Haw. Rev. Stat. § 11-355(a); Ind. Code §§ 4-30-3-19.7(e), (f), (j); N.J. Stat. Ann. § 19:44A-20.14; *see also* N.J. Admin. Code §§ 19:25-24.1, -24.2; W.Va. Code Ann. § 3-8-12(d). *See also* N.Y.C. Admin. Code §§ 3-702(18), 3-703(1-a).

purchase influence over procurement processes by making or soliciting campaign contributions.

For instance, Illinois' government-contractor contribution ban was enacted in the wake of repeated pay-to-play scandals. *See* 2008 Ill. Legis. Serv. Pub. Act 95-971. While serving as Illinois's Secretary of State in the 1990s, Governor George Ryan steered leases and contracts to businesses controlled by an associate in exchange for kickbacks, including financial support for Ryan's successful 1998 gubernatorial campaign. *United States v. Warner*, 498 F.3d 666, 675 (7th Cir. 2007). He was ultimately convicted of 18 felony charges including racketeering and fraud. *Id.* In the wake of Ryan's conviction and other pay-to-play abuses, Illinois legislators enacted a state-contractor contribution ban—over the fervent opposition of Ryan's notorious successor, then-Governor Rod Blagojevich. According to testimony at Blagojevich's first trial, after his veto failed, Blagojevich sought to raise as much money from state contractors as possible before the law's January 1, 2009, effective date. Mike McIntire & Jeff Zeleny, *Obama's Effort on Ethics Bill Had Role in Governor's Fall*, N.Y. Times, Dec. 9, 2008, http://www.nytimes.com/2008/12/10/us/politics/10chicago.html?pagewanted=all. Federal agents were tipped off to the Governor's redoubled efforts, and their

ensuing wiretap recorded his most spectacular feat of "pay-to-play"—his attempt to sell the U.S. Senate seat being vacated by President-elect Obama. *Id.*

Passage of New Jersey's contractor contribution ban in 2005 also followed contractor corruption scandals. N. J. Pub. L. 2005, c. 51. One of the largest involved the award of an almost $400 million contract to Parsons Infrastructure & Technology Group to privatize automobile inspections. Although the contract was required to be awarded through a competitive bidding process, Parsons was the sole bidder. N.J. Comm'n of Investigation, N.J. Enhanced Motor Vehicle Inspection Contract, at 1-2 (2002), *available at* http://www.state.nj.us/sci/pdf/mvinspect.pdf. The system broke down weeks after its launch—with cost overruns exceeding $200 million—prompting an investigation that revealed how Parsons had used a "political strategy," including lobbying and campaign support, to obtain the contract. *Id.* This "political strategy" enabled Parsons to receive exclusive information from senior officials prior to the publication of the state's Request for Proposals, giving it "a head start on the deployment of corporate resources for a bid submission." *Id.* at 3-4. The investigation concluded that the bidding process had been "tainted at key intervals by political considerations and by the granting of favored treatment." *Id.* at 3.

These examples represent only a fraction of the pay-to-play scandals that have arisen in government contracting. *See also* FEC Br. 12-15. And arguments

that the contracting systems in Illinois, New Jersey and other states are different from the federal system, *see, e.g.*, Wagner Br. 45, miss the point. Although state and federal procurement processes undoubtedly differ, the prevalence of quid pro quo schemes at the state and local levels demonstrates that concerns about the corruptive potential of campaign activity by government contractors are legitimate and grounded in experience. In light of abundant examples of pay-to-play behavior, the district court rightly concluded that "[i]t in no way stretches the imagination to envision that individuals might make campaign contributions to curry political favor." *Wagner*, 2012 WL 1255145, at *7.

C. Courts Have Widely Held That Restricting Government Contractor Contributions Is an Appropriate Defense Against Actual and Apparent Corruption.

In light of the ubiquity of pay-to-play practices, it is unsurprising that the courts have generally approved state restrictions on contractor contributions.

In *Green Party of Conn. v. Garfield*, 616 F.3d 189 (2d Cir. 2010), the Second Circuit upheld a Connecticut law banning contributions from state contractors. Unlike section 441c, the law applied not just to the contracting individual or entity, but also to certain "principals" and immediate family members of contractors. *Id.* at 202. Observing that the federal law is more limited in scope, the court nevertheless found that Connecticut had a valid anti-corruption interest in its expansive ban: "[T]he dangers of corruption associated with contractor

contributions are so significant . . . that the General Assembly should be afforded leeway in its efforts to curb contractors' influence on state lawmakers." *Id.* at 203.

A subsequent Second Circuit decision also recognized that special restrictions on state contractors were justified by the governmental interest in preventing the actuality and appearance of corruption. In *Ognibene v. Parkes*, 671 F.3d 174 (2nd Cir. 2011), the Court upheld a New York City provision imposing additional limitations on campaign contributions by entities "doing business" with the City. Noting the series of pay-to-play scandals in New York City preceding enactment of the law, the Court found that there was "no doubt that [contractor] contributions have a negative impact on the public because they promote the perception that one must 'pay to play.'" *Id.* at 179.

Similarly, a district court in Hawaii recently upheld that state's broad ban on contractor contributions. *Yamada v. Weaver*, 872 F. Supp. 2d 1023 (D. Haw. 2012), *appeal docketed*, No. 12-15913 (9th Cir. Apr. 20, 2012). The Hawaii law prohibits all contractors, regardless of the amount of their contracts, from making contributions to candidate and non-candidate committees. Haw. Rev. Stat. § 11-355. The court upheld the ban based on the government's interest in preventing actual and apparent corruption, finding that "[t]he legislative history of [the law] confirms that Hawaii's Legislature passed the government contractor contribution ban in large part precisely because of these concerns—prevention of both actual

corruption and its appearance." 872 F. Supp. at 1049; *see also id.* at n.27 (recounting corruption scandals that preceded law).

State courts have likewise sustained strict contractor contribution limits. *See, e.g.*, *In Re Earle Asphalt Co.*, 950 A.2d 918, 325 (N.J. Super. App. Div. 2008) ("In sum, the State's interest in insulating the negotiation and award of State contracts from political contributions that pose the risk of improper influence, . . . or the appearance thereof, is a sufficiently important interest to justify a [$300] limitation upon political contributions.") (internal citations and quotations omitted), *aff'd*, 966 A.2d 460 (N.J. 2009) (per curiam). Relatedly, state courts have also upheld a range of contribution restrictions applicable to certain highly regulated industries deemed to pose a heightened threat of political corruption. *See, e.g.*, *Casino Ass'n of La. v. State ex rel. Foster*, 820 So.2d 494 (La. 2002) (upholding state law prohibiting any political contributions from officers, directors, and certain employees in the casino industry, and their spouses); *Soto v. New Jersey*, 565 A.2d 1088 (N.J. 1989) (upholding similar prohibition on casino-industry contributions); *Schiller Park Colonial Inn, Inc. v. Berz*, 349 N.E.2d 61 (Ill. 1976) (upholding law prohibiting political contributions from any officer, associate, agent, representative, or employee of a liquor licensee).

The Wagner contractors' reliance on *Dallman v. Ritter*, 225 P.3d 610 (Colo. 2010), is misplaced. That decision, which invalidated a Colorado law banning

contractor contributions, is readily distinguishable from this case. Indeed, the Colorado Supreme Court specifically distinguished the federal ban as far less burdensome than the state restriction, because the state law applied to the contracting entity as well as to a broadly defined class of family members and associates;[13] remained in effect from the beginning of negotiations until two years *after* the contract's completion; and imposed harsh penalties for violations. *Id.* at 617 (noting that violators were ineligible to hold state office or state contracts for three years, and government officials who knowingly violated the restriction were punishable by removal from office and disqualification from future office). While the Wagner contractors correctly point out that the Colorado law only applied to sole-source contracts valued above a $100,000 threshold, *see* Wagner Br. 49, that fact hardly renders it less restrictive than section 441c. Given the expansive scope of the Colorado law, *Dallman* provides scant support for the Wagner contractors' constitutional arguments.[14]

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[13] The Colorado law defined "immediate family member" as "any spouse, child, spouse's child, son-in-law, daughter-in-law, parent, sibling, grandparent, grandchild, stepbrother, stepsister, stepparent, parent-in-law, brother-in-law, sister-in-law, aunt, niece, nephew, guardian, or domestic partner." *Dallman*, 225 P.3d at 618.

[14] Only a handful of other cases have invalidated local pay-to-play laws, and they were decided on grounds not relevant to this case. *See, e.g.*, *DePaul v. Commonwealth*, 969 A.2d 536 (Pa. 2009) (invalidating restriction on gaming licensee contributions under Pennsylvania Constitution, but finding that state Constitution "provides broader protections of expression than the related First Amendment guarantee"); *United Auto Workers, Local Union 1112 v. Brunner*, 911

II. The Federal Contractor Contribution Ban Is Constitutional.

A. Strict Scrutiny Does Not Apply.

The district court was correct to apply "closely drawn" scrutiny rather than strict scrutiny to the Wagner contractors' First Amendment claims. *Wagner*, 854 F. Supp. 2d at 88. The Supreme Court held in *FEC v. Beaumont*, 539 U.S. 146, 162 (2003), that laws regulating contributions are subject to "closely drawn" scrutiny, regardless whether the law takes the form of a limit or a ban. And all lower courts to have considered this issue following *Citizens United* have rejected the Wagner contractors' contention that *Citizens United* cast doubt on *Beaumont*'s analysis of the scrutiny applicable to contribution limits. *See*, *e.g.*, *United States v. Danielczyk*, 683 F.3d 611, 618-19 (4th Cir. 2012), *cert. denied*, No. 12-579 (Feb. 25, 2012).

In the court below, the Wagner contractors incorrectly asserted that *amici* are effectively advocating use of a rational basis standard. Pls' Response to Mem. of *Amici*, at 1-2 (Aug. 30, 2012). They argue that that judicial deference to Congress's judgment in matters of campaign finance, as urged by *amici*, is

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N.E. 2d 327 (Ohio Ct. App. 2009) (invalidating amendments to Ohio contractor contribution limits on the basis of a procedural deficiency with the law's enactment, and not under the First Amendment); *Lavin v. Husted*, 684 F.3d 543, 547-48 (6th Cir. 2012) (6th Cir. Aug. 3, 2012) (striking down law criminalizing contributions from state Medicaid providers to Attorney General and county prosecutor candidates, after state conceded a lack of evidence from Ohio or elsewhere linking campaign contributions to abuse of prosecutorial discretion). None of these decisions casts any doubt on the constitutionality of the federal ban.

incompatible with "closely drawn" scrutiny. *Id.*; *see also* Wagner Br. 21 (complaining that district court "gave substantial deference to Congress, almost as if section 441c were subject to rational basis review"). But the Wagner contractors are simply wrong. In applying "closely drawn" scrutiny, the Supreme Court has consistently given deference to Congress's expertise in regulating political contributions. *Randall v. Sorrell*, 548 U.S. 230, 248 (2006) (noting the Court has "ordinarily" "deferred to the legislature's determination of [contribution limits]"); *McConnell*, 540 U.S. at 137 ("The less rigorous standard of review we have applied to contribution limits (*Buckley*'s 'closely drawn' scrutiny) shows proper deference to Congress' ability to weigh competing constitutional interests in an area in which it enjoys particular expertise."); *Beaumont*, 539 U.S. at 155 ("[W]e have understood that such deference to legislative choice is warranted particularly when Congress regulates campaign contributions . . ."); *Buckley v. Valeo*, 424 U.S. 1, 30 (1976) (noting that "a court has no scalpel to probe" details of contribution limits formulated by Congress).

Indeed, the nature of the Wagner contractors' attack on section 441c underscores the appropriateness of according deference to the legislature. To support their overbreadth claim, the Wagner contractors in the district court suggested a laundry list of revisions to section 441c that they believed would narrow the law without undermining its pay-to-play rationale. *See* Pls.' Stmt. of

Pts. and Authorities in Support of Mot. Summ. J., at 10-13 (Jan. 31, 2012). They suggest, *inter alia*, that Congress should exempt both "sole source" and competitively bid contracts, establish a minimum amount for regulated contracts, and substitute a contribution restriction with a disqualification protocol. *Id.*; *see also* Wagner Br. 49 n.7, 48-51. But their list of proposed reforms simply underscores that the details of formulating contribution restrictions are best left to Congress. "[Q]uestions such as whether to apply the ban only to non-bid contractors or only large contractors, whether to allow small contributions or allow no contributions, or whether principals of contractors may contribute, are all legislative choices." *Yamada*, 872 F. Supp. 2d. at 1062. A court need not apply "rational basis review" to recognize that politicians might have a particular expertise in matters of political fundraising. "Closely drawn scrutiny" is consistent with deference to Congress's judgment regarding campaign contributions.

B. Section 441c Constitutionally Advances the Important Government Interest in Preventing Actual and Apparent Corruption in Federal Contracting.

The FEC documented that the ban now found at 2 U.S.C. § 441c was enacted more than 70 years ago to respond to corruption in the federal contracting process, specifically the Democratic "campaign book scandal." *See Wagner*, 2012 WL 1255145, at *6; FEC Br. 6-8. As the court below recognized, the prohibition on contributions from federal contractors thus serves the important state interest in

"protect[ing] the integrity of the electoral system by ensuring that federal contracts [are] awarded based on merit." *Wagner*, 2012 WL 1255145, at *5; *see also FEC v. Weinstein*, 462 F. Supp. 243, 248 (D.C.N.Y. 1978) (approving section 441c and noting that "the importance of the governmental interest" in preventing electoral corruption "through the creation of political debts" had "never been doubted").

The Wagner contractors do not deny that the government's interest in preventing actual and apparent corruption is compelling, but assert that there is insufficient evidence of *recent* scandals in federal contracting to sustain section 441c. Wagner Br. 45. But as the state and municipal experience demonstrates, evidence of modern-day corruption in contracting is plentiful and concerns about pay-to-play politics have not diminished since the enactment of the federal ban. The limited record of recent corruption involving federal contractors thus does not suggest that the contribution ban is unnecessary; it suggests that the ban is working. *Wagner*, 2012 WL 1255145, at *7.

Even if political quid pro quos were to occur only occasionally in contracting, the Supreme Court has allowed legislatures to take a prophylactic approach when political corruption is "neither easily detected nor practical to criminalize." *McConnell*, 540 U.S. at 153. Here, in light of contractor scandals across the country and the enactment of pay-to-play statutes in at least 20 states and municipalities, "the suggestion that those seeking federal contracts might 'pay

to play' is hardly novel or implausible." *Wagner*, 2012 WL 1255145, at *7. Therefore, even if the evidence of potential corruption were less abundant than it is here, a prophylactic approach would still be permissible. *See also Blount v. SEC*, 61 F.3d 938, 945 (D.C. Cir. 1995) ("[N]o smoking gun is needed where, as here, the conflict of interest is apparent, the likelihood of stealth great, and the legislative purpose prophylactic.").

Furthermore, at least as important as the need to prevent actual corruption connected to federal contracting is the need to avoid the appearance of corruption. *See Buckley*, 424 U.S. at 27. Recognizing the importance of this interest, the Second Circuit observed in *Ognibene* that recurrent pay-to-play scandals had "created a climate of distrust that feeds the already-established public perception of corruption." 671 F.3d at 191 n.15. It was therefore "not necessary to produce evidence of actual corruption to demonstrate the sufficiently important interest in preventing the appearance of corruption." *Id.* at 183 (emphasis added). Similarly, as the Second Circuit emphasized in *Garfield*, "widespread media coverage of Connecticut's recent corruption scandals" created a "manifest need to curtail the appearance of corruption created by contractor contributions." 616 F.3d at 200 (emphasis added). Thus, multiple courts have reiterated that limiting contractor contributions is a key measure to combat the public perception that public business is for sale to private interests.

C. Section 441c Is Closely Drawn to Advance the Government's Anti-Corruption Interest.

The prohibition on contractor contributions is designed to prevent corruption and its appearance and to ensure a merit-based system of federal contracts; and its scope is limited in accordance with those goals. Far from being fatally overbroad, section 441c is a "channeling device, cutting off the avenue of association and expression that is most likely to lead to corruption but allowing numerous other avenues of association and expression." *Preston v. Leake,* 660 F.3d 726, 734 (4th Cir. 2011). By confining its limitations to a particular group of individuals and entities with a heightened financial interest in government contracting, while leaving open other forms of political expression, the federal ban is tailored to restrict the campaign contributions that Congress deemed likeliest to engender actual or apparent corruption.

1. *Section 441c Applies to Contributions to Federal Candidates, Party Committees and Political Action Committees.*

The Wagner contractors argue that section 441c is overbroad because "the connection between the would-be recipients of plaintiffs' contributions and the awarding of federal contracts is far too remote." *See* Wagner Br. 23. They claim "federal contracts are awarded at the agency level," adding, without support, that political appointees "have nothing to do with most federal contracts." *Id*. at 42. But there is no impermeable boundary between agencies, on the one hand, and

elected officeholders and presidential appointees, on the other. Agency officials are enormously dependent on legislators and presidential appointees, whether for appropriations, favorable appointments, employment benefits or other less tangible rewards.

Elected officeholders and executive branch officials operate in a political culture with significant professional and social overlap, so identifying all persons who have the political capital to influence a contract's award or oversight is not as simple as identifying agency officials with explicit contracting authority. *See, e.g.*, FEC Br. 31, 35-38 (describing how political appointees could "reward political loyalty" by steering contracts to "those who make contributions to a favored candidate or party"). The *Yamada* court explained some of the many ways elected officials may affect the contracting process:

> The Legislature routinely holds informational and oversight hearings. Legislators . . . represent constituents and the public in an appropriate role overseeing administration of State contracts and utilization of appropriated funds—they might criticize, scrutinize, or support contractor performance. . . . Legislators make decisions and hold power over large infrastructure projects, sometimes involving hundreds of millions of dollars, where government contractors stand to benefit. And Legislators may have power over, or close friendships with, the government employees or others who *do* award or manage [state] contracts.

872 F. Supp. 2d at 1061. *Yamada* went on to note that it would not make sense for the court to narrow Hawaii's broad ban on contractor contributions because the

court lacked knowledge as to "which Legislators have 'control' over all types of contractual matters (whether large or small, be they for general electrical work or for a non-bid research study of a particular issue)." *Id.* at 1062. The *Yamada* court rightly recognized that determining which officials have influence over the contracting process lies in the expertise of the legislature, and that attempting to answer this question is fundamentally unsuited to the judicial role.

The Wagner contractors claim that "in most of the litigated [state law] cases," the contractor contribution ban "applied only to contributions to officials in the contracting process," pointing to the Connecticut ban upheld in *Garfield*. Wagner Br. 45. But most of the laws upheld in recent case law were *not* so limited. *See, e.g.*, *Ognibene*, 671 F.3d at 179-80 (noting that pay-to-play restrictions applied to candidates for all City offices); *Yamada*, 872 F. Supp. 2d at 1035 (Hawaii contractor restriction applied to contributions to any "candidate committee or noncandidate committee"). Further, although the Connecticut ban is "branch-specific"—i.e., it bans only contributions to officials in the government branch with oversight authority over a particular contract—it is substantially broader than the federal law in other key respects: (1) it applies not only to the contractor himself, but also to "principals" and immediate family members of the contracting entity (board members, officers, managers and individuals holding at least a 5% interest in the business), *see* Conn. Gen. Stat. § 9-612(g)(1)(F); (2) it

prohibits all state contractors from making contributions to state and town party committees, *see id.* § 9-601(1)-(2); and (3) its temporal coverage can extend for nearly a year after a contract's termination, *see id.* § 9-612(g)(1)(D). As a whole, Connecticut's statute is more expansive than section 441c.

The Wagner contractors also argue that section 441c is overbroad because it covers contributions to party committees and "challenger" candidates "who have no current power." Wagner Br. 47. But in claiming these recipients have no influence over contracting, the Wagner contractors fail to take into account the possibility of transfers between candidates, and between parties and candidates. Federal law allows for unrestricted transfers of funds between, *inter alia*, national and state party committees of the same party; affiliated committees; and from candidate committees to national party committees. *See* 2 U.S.C. § 441a(a)(4); 11 C.F.R. § 110.3(c). Consequently, contributions from a contractor to party committees can easily be aggregated and spent to the benefit of officeholders with influence over the relevant contracting process, such as congressional committee chairmen. Indeed, the Supreme Court has already recognized the unique capacity of parties to serve as "effective conduits for donors desiring to corrupt federal candidates and officeholders." *McConnell*, 540 U.S. at 156 n.51. Because of the "close affiliation" between parties and elected officials, parties are placed "in a unique position, 'whether they like it or not,' to serve 'as agents for spending on

behalf of those who seek to produce obligated officeholders.'" *Id.* at 145 (quoting *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 452 (2001)). Given the "special relationship and unity of interest" between parties and federal officeholders, as well as the transferability of contributions, contractor contributions to party committees and "challenger" candidates pose a clear threat of corruption. *See id.*[15]

2. Section 441c Applies to the Contracting Entity Only.

The federal contractor ban encompasses only the contracting entity itself. It is thus narrower than many of the pay-to-play laws in place at the state level, as it does not reach political committees controlled by the contractor, nor individuals associated with or employed by the contractor.

The Wagner contractors contend that, by regulating only the contracting entity, section 441c impermissibly favors corporations over individuals because it allows a corporation to contribute through a PAC or through the individual donations of its officers, directors and employees, whereas individual contractors do not have a comparable option. But as the district court recognized, and the Wagner contractors concede, section 441c applies equally to corporate and

[15] Contractor contributions to unconnected political committees could also be routed to the campaign coffers of officials with oversight over contracting. The Supreme Court has already recognized that political committees are vehicles for "circumvention of the other contribution limitations embodied in the Act." *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 199 n.20 (1981).

individual contractors, and a corporation is legally distinct from its officers, directors, and shareholders, as well as from its PAC. *See* Wagner Br. 29.

The Wagner contractors therefore must resort to arguing that a direct contribution from a corporate contractor would be the "functional equivalent" of a contribution from its PAC because both would be perceived as equally corrupt. Wagner Br. 29; Pls.' SJ Br. 19. But this claim is at odds with settled principles of Supreme Court jurisprudence. As the Supreme Court has held, because a PAC is a "separate association from the corporation," with separate legal rights and obligations, a corporate PAC "*does not* allow corporations to speak." *Citizens United*, 130 S. Ct. at 897 (emphasis added). *Citizens United* thus directly refutes the Wagner contractors' theory that corporate contributions and corporate PAC contributions are functionally equivalent. The Wagner contractors attempt to dismiss the legal independence of corporations and corporate PACs having "no relevance," but they ignore the many regulations that insulate corporate PACs from their corporate sponsors. Wagner Br. 29. The corporation cannot fund the corporate PAC's political activity with its treasury funds,[16] but may solicit only *voluntary* contributions from the corporation's administrative and executive personnel and shareholders for this purpose. 2 U.S.C. § 441b(b)(4); 11 C.F.R. §

[16] *Citizens United* struck down restrictions on corporate independent expenditures, but did not alter the ban on corporate contributions, including the restriction on the sources of funds used for candidate and party contributions by corporate PACs. 130 S. Ct. at 909.

114.5. Federal law further forbids the sponsoring corporation from coercing contributions in any manner—whether by job discrimination or financial reprisal. 11 C.F.R. § 114.5. Thus, the sponsoring corporation can neither fund the PAC's political activities nor control its receipt of political contributions. This regulatory system means that the direct beneficiary of a government contract—i.e., the corporation—is prevented from funding the contributions that could influence the grant of federal contracts, thereby reducing in a very practical sense the potential for corruption. Given these barriers between a corporation and its PAC's funding, the Wagner contractors have no grounds for speculating that outside observers would perceive corporate PAC contributions as equivalent to direct corporate contributions.

Similarly, there is no reason to think that there is an identity of interest with respect to contracting between a corporation and its officers, employees and shareholders. Few in this class have any involvement in, or knowledge of, the procurement of the corporation's federal contracts. It is implausible that the majority of a large corporation's shareholders, for instance, are even aware of the corporation's government contracts, much less so invested in the procurement process than they are willing to make quid pro quo contributions. Furthermore, any resultant benefit from a government contract to the class of officers, employees and shareholders is likely to be diffuse. Shareholders of the government contractor

are unlikely to experience more than a negligible rise in the value of their investment due to a single contract, and it seems equally unlikely that a contract would result in a material change in the terms of employment for most of the contractor's employees. The Wagner contractors offer no reason why the contributions of a corporation's officers, employees and shareholders should be equated with those of a contractor for the purpose of the contractor contribution ban.

3. Section 441c Is a Prohibition.

The Wagner contractors also complain that 441c is a ban, not a limit, on contributions. But multiple courts have upheld state "bans" on contributions from contractors, lobbyists and other groups that raise a particular risk of corruption. *See* Section I.C. *supra.* And as the district court in *Yamada* explained, the choice of a ban instead of a limit suggests proper tailoring, not overbreadth:

> A choice to completely ban direct government contractor contributions indicates, at some level, the strength of the Legislature's intended message combating a perception that government contracts are awarded to friends based on corruption (i.e., indicative of the tailoring of the restriction to the government interest). That a ban is total, that it has no dollar exceptions, might "eliminate[ ] *any* notion that contractors can influence state officials by donating to their campaigns," and in that sense indicates *closer* tailoring to the important government interest than if contributions to certain types of Legislators were excepted.

872 F. Supp. 2d at 1062 (internal citations and footnotes omitted) (quoting *Garfield*, 616 F.3d at 205).

The Wagner contractors also attempt to analogize section 441c to the ban on contributions from minors that was invalidated in *McConnell*. *See* Wagner Br. 44. But the under-18 restriction barred a vast portion of the population from making political contributions not because the regulated class itself posed a heightened risk of corruption, but because parents might circumvent individual contribution limits by contributing in the names of their children. 540 U.S. at 231-32. The *McConnell* Court struck down the ban not because it was a ban, as the Wagner contractors allege, but because there was "scant evidence" of such circumvention, and the anti-circumvention interest was fully addressed by a provision barring contributions made "in the name of another." *Id.* at 232; *see also* 2 U.S.C. § 441f; 11 C.F.R. § 110.4(b). Section 441c, by contrast, does not rely on an *anti-circumvention* interest, but rather targets federal contractors as a class that, because of its heightened incentive to purchase influence over candidates and officeholders, poses a greater risk of *direct corruption* than do ordinary donors. As the evidence of corruption in the states demonstrates, concerns about pay-to-play are not merely conjectural. And in contrast to the under-18 contribution restriction, the government's anti-corruption interest here cannot be adequately addressed by other measures: generally applicable contribution limits alone have not prevented contracting scandals at the state and local levels.

Finally, although section 441c bans federal contractors from making political contributions, contractors are free to pursue other forms of political expression. Individual contractors may express their political views in a variety of ways, many of which are "more expressive than the act of making a political contribution." *Wagner*, 2012 WL 1255145, at *9 (citing *Buckley*, 424 U.S. at 21). Contractors are permitted to volunteer their time on a behalf of a candidate or party committee, solicit contributions and hold fundraisers. As a practical matter, it is difficult to see how the maximum individual contribution of $2,600 is more expressive than, for instance, canvassing for a candidate. The mere fact that the Wagner contractors have elected not to exercise these other forms of political expression in no way demonstrates that section 441c is improperly tailored.

D. Section 441c Is Not Underinclusive.

The Wagner contractors also contend that the federal contractor contribution ban is unconstitutionally underinclusive because it fails to capture all situations that they claim might lead to corruption or its appearance. Wagner Br. 51-55. But a statute is not "invalid under the Constitution because it might have gone farther than it did . . . ." *Buckley*, 424 U.S. at 105. In *Blount*, this Court confirmed that "a regulation is not fatally underinclusive simply because an alternative regulation, which would restrict more speech or the speech of more people, could be more effective." 61 F.3d at 946.

Only when a regulation cannot "fairly be said to advance any genuinely substantial governmental interest" because it provides only "ineffective or remote" support for the asserted goals will it be deemed underinclusive. *FCC v. League of Women Voters*, 468 U.S. 364, 396 (1984). The Wagner contractors point to groups that do not fall within the strictures of section 441c, such as federal grant and loan recipients and military academy students, whom they allege are similarly situated to federal contractors. *See* Wagner Br. 52-54. But the Wagner contractors fail to explain why Congress' decision not to include these disparate groups—for instance, military academy students who generally are obligated to serve in the armed forces in exchange for their free education—renders the federal contractor ban so ineffective as to advance no "substantial governmental interest." Most states and municipalities with pay-to-play statutes have made similar determinations, as very few state laws cover grants or loans, and several state laws cover only limited varieties of contracts. *See* Section I.A *supra*. Congress was thus hardly alone in its judgment that campaign activity by governmental *contractors* was "the phase of the problem which seems most acute." *Buckley*, 424 U.S. at 105.[17]

[17] In addition, many federal grantees and loan recipients are subject to different limitations on their political activities. *See generally* Jack Maskell, Cong. Research Serv., RL 34725, *Political Activities of Private Recipients of Federal Grants or Contracts* (Oct. 21, 2008).

The Wagner contractors complain in particular that federal employees are not subject to restrictions on political giving comparable to section 441c. Wagner Br. 33-36. But political activity of federal employees—like that of federal contractors—is subject to significant restrictions and prohibitions. Some of those limitations are more severe than section 441c: for instance, federal employees are prohibited from holding political fundraisers, or engaging in many volunteer activities for a campaign, such as distributing campaign materials or performing campaign related chores. *See* 5 C.F.R. §§ 734.303, 734.408-12; *see also Less Restricted Employees—Political Restrictions and Prohibited Activities*, U.S. Office of Special Counsel, http://www.osc.gov/haFederalLessRestrisctionandActivities.htm. It is thus far from clear that treating contractors like employees would have the speech-enhancing effect the Wagner contractors seek. If the Wagner contractors were regulated as if they were employees, they would be subject to more campaign restrictions, not fewer.

Given Congress' stated goal of preventing corruption and its appearance, the decision to ban contributions from federal contractors but not contributions from other federally subsidized groups reflects a permissible legislative judgment that the risk of improper influence is greatest for contractors. *See also Ognibene*, 671 F.3d at 191 ("The fact that the City has chosen to focus on one aspect of quid pro

quo corruption, rather than every conceivable instance, does not render its rationale a 'challenge to the credulous.'"). As the Supreme Court has long maintained, "[r]eform may take one step at a time." *Buckley*, 424 U.S. at 105.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's decision.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,927 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in Times New Roman 14 point font.

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of February 2013, I caused the foregoing BRIEF *AMICI CURIAE* to be filed electronically using this Court's CM/ECF System and sent via the ECF electronic notification system to all CM/ECF registered counsel of record:

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Courtesy copies of the BRIEF *AMICI CURIAE* were sent to the counsel of record via email (where email addresses are available and known).

I further certify that I also cause the requisite number of paper copies of the brief to be filed with the Clerk on February 27, 2013.

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