UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WENDY WAGNER, *et al,*

Plaintiffs,

vs. **No. 11-cv-1841(JEB)**

FEDERAL ELECTION COMMISSION,

Defendant.

REPLY STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

In its opposition to plaintiffs' motion for a preliminary injunction, the Federal Election Commission has four themes that it frequently repeats and that form the basis for its conclusion that plaintiffs will not prevail on the merits. Because they are so pervasive, plaintiffs will respond to them before turning to their First Amendment and Equal Protection claims and to the reasons why both preliminary and permanent relief are appropriate at this time.

OVERALL RESPONSE TO FEC OPPOSITION

First, the FEC persists in referring to the prohibition on making contributions in section 441c as a "restriction" or a "limit,"[1] and then relying on cases in which the courts were faced with a ceiling on what the plaintiff could contribute. While it may be linguistically correct to say that the absolute ban on contributions in section 441c is a kind of "restriction" or "limitation," there is a world of difference in plaintiffs' being limited in how much they can contribute and in being denied the right to contribute at all.

[1] *E.g.,* Opposition ("Opp") at 12, all describing section 441c as "like other limits on campaign contributions"; "like other restrictions"; and "merely restricts campaign contributions." Opp. at 18: "section 441c's modest restriction"; Opp. at 21: "contribution restrictions like section 441c."

As the Court observed in *Buckley v. Valeo,* 424 U.S. 1, 21 (1976), making contributions is in part a form of symbolic speech, and for that reason the amount of that speech is less significant than the fact that it is made at all. But section 441c denies plaintiffs the right to make even a symbolic statement by contributing as little as $1 to the federal candidate or party of their choice, something that no case involving the Federal Election Campaign Act has upheld for individuals eligible to vote for federal offices, as well as some citizens who were not eligible because they were too young. *McConnell v. Federal Election Commission,* 540 U.S. 93, 231-32 (2003).

The impact of this mischaracterization of section 441c is most evident in the FEC's citation of cases in which the issue was whether the contribution limit was too low, such as *Randall v. Sorrell,* 548 U.S. 230 (2006). Yet even there, where there was no absolute ban and hence everyone could make at least a symbolic contribution, the Court struck down the limits as too low, belying the FEC's contention that a relatively relaxed standard of review applies in this case. Moreover, in *FEC v. Beaumont,* 539 U.S. 146, 161-62 (2003), the one case in which the Court upheld a total ban on contributions – by corporations, not individuals eligible to vote – the Court declined to apply strict scrutiny to the ban, but ruled that the fact that a ban was being challenged *was* relevant in determining whether the justifications offered were sufficient. Thus, the fact that this challenge is to a flat prohibition on making contributions, rather than on the amount that can be contributed, is highly relevant to both of plaintiffs' constitutional arguments.

Second, the opposition seeks to characterize the reason why plaintiffs are subject to section 441c as their own fault, by their oft-repeated use of the terms "voluntarily"[2] and "chosen"[3], as well as similar phrases (Opp. at 11 – "by virtue of their decisions to become federal contractors") to describe how they came to be government contractors and hence subject to section 441c**.** It is true that plaintiffs were not conscripted into serving as government contractors, and in that sense their decision to sign their contracts and be subject to section 441c was "voluntary." But the notion that individuals who become federal contractors thereby surrender their constitutional rights cannot be sustained because the Supreme Court's "precedents have long since rejected Justice Holmes' famous dictum, that a policeman 'may have a constitutional right to talk politics, but he has no constitutional right to be a policeman,' *McAuliffe v. Mayor of New Bedford,* 155 Mass. 216, 220, 29 N.E. 517 (1892)." *Board of County Commissioners v. Umbehr,* 518 U.S. 668, 674 (1996).

Moreover, a moment's reflection would have demonstrated that the terms "voluntary" and "chosen" could equally describe how federal employees become civil servants, so that plaintiffs' Equal Protection claim cannot be defeated on that ground. The same can also be said for individuals who choose to form a corporation, as in *Beaumont*, or for non-profit corporations that "voluntarily" accept money from for-profit corporations, as in *Citizens United v. Federal Election Commission,* 130 S. Ct. 876, 887 (2010). But if voluntariness were the key, the *Beaumont* opinion would have been much

[2] *E.g.,* Opp. at 8 "*voluntarily*" (italics in original); *id.* at 37 plaintiffs "voluntarily chose to receive the benefits of doing business with the federal government."
[3] *E.g.,* Opp. at 2, 14 italicized in Opp.; *id*. at 21:"bars contributions by those who choose to enter federal contracts;" *id*. at 25 "**Voluntarily Chosen**" (bold in heading); *id.* at 37 "harm arises from their own choice to become federal contractors."

shorter, as would *Civil Service Commission v. National Ass'n of Letter Carriers, AFL-CIO,* 413 U.S. 548 (1973). Moreover, on that basis, *Citizens United* would have come out the other way, as would *Davis v. FEC,* 554 U.S. 724 (2008), where the plaintiff "voluntarily" chose to spend more of his own money than the law permitted without triggering matching funds from the government.

Third, the FEC contends that Congress enacted section 441c, which applies to multi-billion dollar contractors such as Boeing and IBM, as well as individuals such as plaintiffs, to prevent them from being "coerced" into making contributions.[4] We leave aside the issue of whether that kind of paternalism could be sustained in the face of the First Amendment right of individual voters to make contributions. We also put aside the fact that the ban applies to contributions to persons and entities that have no power to coerce anyone: candidates who are not incumbents, political parties, and all political committees, even those like the Right to Life organizations and EMILY's List, that are ideological and have nothing to do with federal contracts. Congress has already addressed this very problem in 18 U.S.C. § 603, with respect to federal employees, who are identically situated as far as the potential for coercion is concerned. The FEC never mentions section 603 although plaintiffs relied on it in support of their motion. That provision goes back to the 19th Century, *see Ex Parte Curtis*, 106 U.S. 371 (1882), and only forbids the making or receiving of contributions where "the person receiving such contribution is the employer or employing authority of the person making the

[4] Opp. at 6 "protecting employees and contractors from coercion;" *id.* at 7 "protect individual government contractors from coercion"; *id.* at 16 contractors should be "insulated from political patronage or coercion."

contribution." If coercion of contractors is a problem, there is a ready-made solution in section 603.

On page 18 of the Opposition, the FEC suggests that, although elected officials do not control plaintiffs' contracts, high ranking appointees, who may be cognizant of the making or failure to make political contributions, do have such control, and thus section 441c is a means of protecting individual contractors. That contention overlooks the fact that 18 U.S.C. § 601 makes it a crime for anyone who "causes or attempts to cause any person to make a contribution of a thing of value . . . for the benefit of any candidate or any political party, by means of the denial or deprivation, or the threat of the denial or deprivation, of . . . employment, position, work, compensation, payment, or benefit" from the federal government That provision is also directly responsive to the "campaign-book-racket" which is the one example from the legislative history cited by the FEC (Opp. 7-8). *See also* 18 U.S.C. § 610 (criminalizing attempts to coerce federal employees, but not others, to engage in political activities). In addition, the regulations set forth on pages 20-21 of Plaintiffs' Statement of Points & Authorities (Pls Memo), while limiting some activities of some government employees (especially those who work for sensitive agencies), generally allow all of them to make political contributions, which is all plaintiffs seek to do. If preventing coercion were the justification for this broad ban, the approach of section 603 is an obvious and far less restrictive way of achieving that goal, and hence section 441c cannot be upheld on the ground that it is needed to prevent individual contractors from being coerced into making federal contributions.

Fourth, the final recurring theme in the FEC's opposition is that even though plaintiffs cannot make contributions, they have many other ways to make their views

known. Opp. at 23-25, 38. The conclusive answer to that contention is that the government does not have the right to determine in what manner and by what means individuals will exercise their First Amendment rights, which includes the right to make contributions. That is the dispositive lesson of *Texas v. Johnson,* 491 U.S. 397 (1989), where the defendant had an almost infinite number of ways to express his displeasure with the government besides burning an American flag, yet the Court struck down the law forbidding him from choosing that method of making his views known. Moreover, if alternatives to making contributions were a defense to a claim that the First Amendment was violated by a limit on contributions, many Supreme Court cases would have been much shorter and some, such as *Randall v. Sorrell, supra,* would have come out the opposite way. Indeed, under the FEC's theory, no limit on contributions would ever be struck down.

THE PRELIMINARY INJUNCTION HEARING SHOULD BE CONSOLIDATED WITH THE MERITS.

Despite the FEC's insistence that the case is not in a proper position to be decided on the merits (note 31, p. 45), it fails to offer a *reason* to support its conclusion beyond the statement that it is "generally inappropriate" to exercise the specific authority granted by Rule 65(a)(2) to effect such a consolidation. This case has been on file for over four months, the FEC has not served any discovery on plaintiffs, and it has submitted no exhibits with its opposition, other than plaintiff's contracts and a single House Report. Plaintiffs filed a Statement of Material Facts Not in Dispute in their earlier effort to have those facts certified and as part of their current motion, and nowhere in their 45 page Opposition has the FEC challenged any of those facts or suggested that there are any other facts that might be relevant to the legal issues presented. If this were a motion for

summary judgment, which we recognize it is not, Rules 56(e)(2) and 56(f) would require the FEC to put forth evidence supporting material facts that it wishes to contest or offer in support of its position, or at least explain why it cannot do so at this time. Surely, the FEC, which is the agency that enforces the law being challenged and routinely defends against constitutional challenges to its statutes, ought to be able to explain why it needs more time and what additional record it thinks needs to be developed in order for this Court to be able to decide the case on the merits. Absent some good reason for delay, the FEC's resistance to having the Court reach the merits will unnecessarily burden plaintiffs and the Court with another round of briefing and argument on the same record as is now presented.

Furthermore, the FEC's position on the equitable issues on the preliminary injunction motion provides another basis for hearing the merits now. One of the FEC's reasons for opposing the motion is, in effect, that a preliminary injunction may be a meaningless remedy for plaintiffs because if this or a higher Court ultimately ruled for the FEC on the merits, the preliminary injunction would not protect plaintiffs from being subject to enforcement action – presumably including criminal penalties – for having done what the preliminary injunction expressly permitted them to do. To the extent that the FEC is observing a possible defect in the form of the order that plaintiffs have submitted, we are submitting a revised proposed preliminary injunction with this Reply, making clear that if plaintiffs make otherwise lawful contributions while the preliminary injunction is in effect, the FEC would be barred from taking enforcement actions against them, even if the order were eventually overturned, by this Court or on appeal. But if the FEC is making a different point – that preliminary injunctions can never provide

protection except against actions taken during the time that they are in effect – that is a further reason why the Court should reach the merits. We explain in Point III why the FEC's argument should not be accepted as applied to any orders of this Court, but to the extent that the FEC believes its understanding of the effect of a preliminary injunction is even arguable, that is another very significant reason why its opposition to consolidation with the merits should be rejected.

ARGUMENT

I. SECTION 441C VIOLATES THE FIRST AMENDMENT AS APPLIED TO PLAINTIFFS.

Plaintiffs have two claims on the merits, and in their motion they argued the more narrow Equal Protection claim first, and at greater length, followed by the First Amendment claim. The FEC's opposition reversed that order, although for what reason is unstated. In this Reply, plaintiffs will respond in the order of the FEC's opposition, even though prevailing on that claim would call into serious question the applicability of section 441c to corporations as well as to individuals, which is not true of the Equal Protection claim.

The FEC relies on the decision in *Blount v. SEC*, 61 F.3d 938 (D.C. Cir. 1995), which involved an SEC regulation addressing contributions by municipal securities brokers and dealers to the state officials from whom they obtain business. However, on close inspection, the regulation at issue there contains all the features of careful tailoring that section 441c excludes. First, the rule applies to contributions by "municipal finance professionals" – the officials of the dealers – and to any PAC established by the dealer. *Id.* at 946. Thus, the rule assures that it actually reduces the appearance that contracts are based on "pay-to-play," unlike section 441c, which allows contributions by officers and

PACs, but not individuals like plaintiffs. Second, the rule does not forbid anyone from making a political contribution, but operates more like a recusal law, by forbidding those who make contributions from bidding on municipal securities offerings for a period of two years. *Id.* Third, it does not apply once a contract has been obtained, except as a possible bar to future bids, a feature that is especially important for individuals like plaintiffs Miller and Brown who have long-term contracts.

Fourth, it is expressly inapplicable to business in which there is open competitive bidding. *Id.* at 940, n1. Fifth, it is limited to contributions to specific officials of the issuer (*i.e.,* the persons who decide who gets the business) and thus is even more narrowly tailored than the branch specific law in *Green Party of Connecticut v. Garfield,* 616 F. 3d 189, 194 (2d Cir. 2010). Sixth, the SEC rule expressly forbids covered persons from engaging in solicitation, recognizing that fundraisers can be at least as beneficial to the candidate as contributors, yet the FEC argues that plaintiffs should engage in solicitation of contributions, even if they cannot make them on their own. Opp. at 23, suggesting "raising funds for candidates or parties." And last, and perhaps most significant, there is a $250 "safe harbor" that allows covered persons to contribute up to that amount to those officials for whom larger contributions would trigger the ban. *Id.* at 948. Far from supporting section 441c, the SEC rule in *Blount* has all the attributes of a carefully crafted law that section 441c lacks and that the First Amendment requires.

The other non-FECA cases relied on by the FEC provide no more help. In *Green Party of Connecticut* the court upheld the branch-specific ban on contractor contributions: a contract involving the executive branch only triggered a ban on contributions for officials in that branch, with similar rules for legislative branch

contributions. If section 441c were branch-specific, plaintiffs could contribute to campaigns for Congress, as well as give to political parties and political committees, none of which they can now do. Moreover, the law in *Green Party* sensibly extended to "a political committee established or controlled by an individual described in this subparagraph or the business entity or nonprofit organization that is the state contractor or prospective state contractor." C.G.S.A. § 9-612(g)(1)(F)(vi). By contrast, section 441c permits further undermining of the supposed purpose of preventing the appearance of corruption by allowing corporate PACs of a contractor to make contributions, in the face of a FECA requirement in 2 U.S.C. § 432(e)(5) that demands that all corporate PACs include the name of the sponsor so that there is no doubt as to the contribution's origins. The Connecticut law also applies to individuals who have positions of responsibility or have substantial ownership in corporate contractors, C.G.S.A. § 9-612(g)(1)(F), because, as the court observed, "many state contractors are likely artificial entities, so the provisions making the law applicable to 'principals' of contractors are particularly important." 616 F.3d at 202 n.10. But unlike the Connecticut law, which reaches corporate officers and thereby prevents evasion of the purposes of the law, section 441c allows all corporate officers, even those at one-person LLCs, to make contributions.[5]

Perhaps the most relevant part of *Green Party* is the court's conclusion that a similar ban on lobbyists, which was not branch-specific, was unconstitutional, in large part because there was no evidence that the corruption scandals extended to lobbyists. *Id.*

[5] The Connecticut law also contains an exception for contracts under $50,000, or a series of contracts under $100,000 in a given year, which would exclude contractors like plaintiff Wagner. C.G.S.A. § 9-612(g)(1)(C). There is no indication that the Connecticut government has employee-contractors like plaintiffs Brown and Miller, or if it does, that they are covered by the law.

at 206. Similarly, there is no evidence that contributions from would-be contractors have ever influenced federal contracting decisions, any more than they have influenced employment decisions regarding federal employees for whom the ban of section 441c is inapplicable. These comparisons not only strongly support plaintiffs' Equal Protection claim, but also demonstrate that section 441c is not narrowly tailored to meet its supposed purposes, and therefore cannot be sustained under the First Amendment because laws abridging First Amendment rights cannot be based on speculation alone: "[I]t has long been established that the government cannot limit speech protected by the First Amendment without bearing the burden of showing that its restriction is justified," *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986). Even regarding the more permissive regulation of commercial speech, the Court has held that "t]his burden is not satisfied by mere speculation or conjecture; rather a governmental body seeking to sustain a restriction on . . . speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfeld v. Fane*, 507 U.S. 761, 770-71 (1993).

The FEC's attempt to find support in *Ognibene v. Parkes,* 2012 WL 89358 (2d Cir. Jan 12, 2012), is unavailing because it fails to respond to the many differences pointed out at pages 33-35 in Pls Memo Similarly, assuming *Preston v. Leake,* 660 F.3d 726 (4th Cir. 2011), was correctly decided, the FEC conveniently omits the fact that even the lobbyist-plaintiff there, whose challenge was only on as-applied basis, could still contribute up to $4000 to a political committee of her choosing and designate her preference on where the money should go. Pls Memo at 35. In sum, there is no court has

ever upheld a law remotely like section 441c in the face of a First Amendment challenge, and this Court should not be the first to do so.

The FEC suggests (Opp. at 17 n.12) that section 441c can be justified because, according to a Congressional Research Service Report, elected representatives sometimes suggest a company or individual for a contract. Leaving aside whether there is any evidence of that practice for these kinds of contracts, or whether such a suggestion might come before the time that the ban in section 441c comes into play, there is a much simpler remedy that does not infringe the First Amendment rights of plaintiffs and other would-be contributors: forbid recipients of contributions from recommending the contributor for a federal contract for a period of time after receipt of the money. That is the method used by the SEC and approved in *Blount,* and it would be much more closely drawn than section 441c. The same approach could be used vis-à-vis political appointees, a concern noted by the FEC on page 18, but which overlooks the criminal prohibition on coercing contributions that already exists in 18 U.S.C. § 601. Given the size of the Plum Book (note 13), the well-known practice of awarding high level positions to high level donors or fund-raisers, *see* Washington Post, March 8, 2012 (A-15),"Obama Gives Administration Jobs to Some Big Fundraisers," is a much more serious problem than is forbidding all contributions by individuals like plaintiffs, and yet Congress has done nothing to address that problem.

Although section 441c is a total ban and not a limitation, plaintiffs do not dispute in this Court that the appropriate standard of review is that provided in *Beaumont*: the law must be "closely drawn to match a sufficiently important interest." 539 U.S. at 162. As the Court stated, "It is not that the difference between a ban and a limit is to be ignored; it

is just that the time to consider it is when applying scrutiny at the level selected, not in selecting the standard of review itself." *Id.* The Court went on to uphold the prohibition on using treasury funds of the corporation in *Beaumont,* in part because it declined to treat the prohibition as a ban where the corporation could use its PAC to make contributions. *Id.* That avenue is not available to plaintiffs, and for this reason as well, the Court should find that the ban as applied to plaintiffs is not "closely drawn" and thus section 441c violates the First Amendment.

II. SECTION 441C VIOLATES EQUAL PROTECTION AS APPLIED TO PLAINTIFFS.

The most noteworthy aspect of the FEC's opposition on the Equal Protection claim is that its defense is premised on the proposition that the distinctions raised by plaintiffs need only be defended under the "Highly Deferential Review Under the Rational Basis Standard" (Opp. at 28, heading 1). There is no effort to defend the discriminations in favor of federal employees, corporate contractors, or individuals who are officers, directors, stockholders, and employees of federal contractors on anything but the lowest level of judicial review. Accordingly, if, as we now show, some form of heightened review is required, plaintiffs must prevail on their Equal Protection claim.

As the FEC recognizes, heightened scrutiny applies when dealing with discrimination that involves "a fundamental right or a suspect class." (Opp. at 28). Plaintiffs do not claim that they are members of a suspect class, but they do claim that the right to make political contributions, which is the right abridged by section 441c, is a fundamental right protected by the First Amendment to the Constitution. There can be no doubt after *Buckley* that the right to make contributions is protected by the First

Amendment, and that the right can be restricted only if the restriction survives some form of heightened scrutiny, even if not strict scrutiny. See *supra,* at 1-2. Because the basic right to contribute is subject to heightened scrutiny when applied equally to all would-be contributors, plaintiffs are *a fortiori* entitled to at least that much protection when others who are similarly situated can exercise the right and plaintiffs cannot. Indeed, the Equal Protection argument is effectively an argument in addition to the First Amendment, and so it defies logic that it should be subject to a reduced form of judicial scrutiny.

The FEC cites no case, post-*Buckley*, supporting rational basis review in the First Amendment context, let alone as applied to campaign contributions. Almost all of the rational basis cases cited by the FEC involve economic regulation, including cases in which the government has declined to subsidize certain activities which were arguably protected by the First Amendment. As we pointed out previously (Pls Memo at 17), the closest case in the campaign finance area in terms of factual similarity is the portion of *McConnell v. Federal Election Commission,* 540 U.S. 93, 231-32 (2003), striking down the prohibition on all contributions by persons under the age of 18. To be sure, that claim was decided under the First Amendment, but it could just as properly be viewed through an Equal Protection lens. Thus, the hypothetical justifications put forth by the FEC there – just like those put forth here – do not support the discriminatory treatment of those under age 18 as compared with the laws applicable to adults, even though only the latter can vote in federal elections.

Similarly in *FEC v. Beaumont,* 539 U.S. 146 (2003), the Court considered the differing treatment of corporations and individuals in making contributions in federal elections under a heightened standard of First Amendment review. But it could also have

viewed the case as one involving Equal Protection, in which the standard of review would surely be no less, since the right at issue was a fundamental one entitled to heightened scrutiny. The fact that a corporation cannot vote and that plaintiffs can, should affect the outcome of the review, but it does not alter the applicable standard. Finally, *Kramer v. Union Free School District,* 395 U.S. 621 (1969), applied strict scrutiny to an Equal Protection claim involving the right to vote, to which the right to make a political contribution in connection with an election in which plaintiffs will vote is closely related. *Kramer* supports application of strict scrutiny (a point that we reserve for appeal), but at the very least it argues against any notion that rational basis review is applicable to plaintiffs' Equal Protection claim here. *See also FEC v. Weinsten*, 462 F. Supp. 243, 249 (S.D. N. Y. 1978) ("In this court's view, the making of a political contribution by an individual is a means of self-expression which is directly linked to that individual's right to vote").

Plaintiffs recognize that a few of the cases cited by the FEC suggest a lower standard of review, but in our view those statements are distinguishable because they deal with situations other than restrictions (let alone bans) on making contributions, are dicta (generally quite brief), and/or fail to consider *Buckley* and other relevant authority. *Broadrick v. Oklahoma,* 413 U.S. 601 (1973), is a pre-*Buckley* state Hatch Act case upholding limits on conduct (not on making contributions) by state civil service employees. At page 607 n.5, the Court rejected an Equal Protection claim that the law should also have covered non-civil service employees, after it had already rejected the same claims under the First Amendment, and concluded only that the state should have "some leeway" in this area, a proposition with which we do not disagree,

In *Buckley*, after upholding contribution limits under heightened scrutiny, the Court rejected an Equal Protection challenge by minor political parties to the system of matching funds for Presidential elections. 424 U.S. at 93-94. Their claim did not involve a ban of any kind, but rather an objection that the amount of money that they had to raise to be eligible for a taxpayer subsidy was too high. In finding against those plaintiffs, the Court observed that their problem was caused not by the Government, but by the plaintiffs' inability to raise the money needed to obtain a match. The Court concluded that the minor and major parties were not actually similarly situated, because public financing "does not enhance the major parties' ability to campaign; it substitutes public funding for what the parties would raise privately," whereas with a minor party that "cannot raise funds privately, there are legitimate reasons not to provide public funding, which would effectively facilitate hopeless candidacies." 424 U.S. at 95 & n.129. That fact-bound reasoning has no relevance here.

Also cited by the FEC is *McGuire v. Reilly,* 260 F.3d 36 (1st Cir. 2001), in which the court denied a First Amendment claim challenging a buffer zone around abortion clinics, and then responded very briefly and with minimum attention to an Equal Protection claim. Applying intermediate scrutiny to a First Amendment challenge, it sustained the statute which affected "only areas immediately adjacent to [abortion providers]; prohibit[ed] only nonconsensual approaches within six feet; and applie[d] only within a clearly marked eighteen-foot radius from clinic entrances and exits." *Id.* at 48, 49. It then summarily rejected the Equal Protection argument on the ground that "where the state shows a satisfactory rationale for a content-neutral time, place, and manner regulation, that regulation necessarily passes the rational basis test employed

under the Equal Protection Clause." *Id.* at 49-50. That an Equal Protection challenge to a content-neutral time, place, and manner regulation is subject only to rational basis review has nothing to do with the discrimination at issue in this case.

Finally, the FEC is correct that the D.C. Circuit in *Blount* rejected an Equal Protection challenge to one aspect of the SEC's rule at issue there. That rule (unlike section 441c) reached officers of the securities dealer, but the challengers contended that it violated Equal Protection because it also did not extend to officers of the parent corporation of the dealer and the parent's political committees. The court in note 4 on page 946 rejected the claim of under-inclusion, recognizing that the SEC could sensibly stop somewhere and, with little analysis, applied rational basis to that line-drawing. Given the overall thrust of the rule, that outcome is hardly problematic since the principal impact of the law was on the economics of the municipal securities industry, a matter well within the special competence of the SEC.

To the extent that the FEC engages on the reasons for these discriminations, it does no more than chip away at the edges. It states the obvious: that employees and contractors are not the same (although judged by what these plaintiffs actually do, it is hard to tell the difference). Even that assertion simply states the question and does not answer it. The FEC suggests, without actually arguing the point, that employees and contractors are not similarly situated, which is inconsistent with its quotation on page 14 of its Opposition from *Board of County Commissioners v. Umbehr,* 518 U.S. 668, 684-685 (1996), where the Court stated that "[i]ndependent government contractors are similar in most relevant respects to government employees." Moreover, the statement from Senator Brown from the legislative history of the predecessor of section 441c,

quoted on page 8 of the Opposition, asserted that Congress was purporting to "apply the same principle . . . to contractors" as applied to federal employees, but that is not the law since only contractors, and not employees, are barred from making contributions. Plaintiffs agree that the civil service rules cited on page 33 of the Opposition, which distinguish among federal employees in terms of what employees of different agencies should be allowed to do, are "nuanced" (Opp. at 32) However, that surely cannot be said for the rule that allows all federal employees to make contributions just like everyone else – *e.g.,* up to $2,500 per candidate, per election – but denies individual federal contractors like plaintiffs the ability to contribute even $100 to their favorite candidate, party, or political committee.

The FEC's main responses to the employee vs contractor discrimination are that plaintiffs cannot object because they are volunteers and because contractors are more likely to be coerced, points to which we responded in the opening section of this Reply. The Opposition also makes the point that the LLC option is only available for the plaintiff Wagner (and for all other true consultants and experts), but that is because of the way that USAID hires its contractors, and not because of anything in section 441c. It further observes that at least in Maryland some kinds of LLCs can be easily established, but does not respond to the Tiemann declaration as to the continuing costs of keeping them in good standing and paying for the additional expenses of preparing a corporate tax return. And since the right to speak by corporations, such as those in *Citizens United* and *FEC v. Wisconsin Right to Life Committee,* 551 U.S. 449 (2007), is not lost even where they have a PAC, let alone where they might create one, there is simply no basis on

which any individual contractor should be forced to establish and pay for an LLC simply to be able to make a contribution in a federal election.

The FEC further argues that individual and corporate contractors are both forbidden from making contributions, and thus the two groups are "treated almost identically" (Opp. at 34). But that is incorrect because all corporations, not just government contractors, are forbidden from making contributions, and even government contractor corporations can establish separated segregated funds, but individual contractors like plaintiffs cannot. The FEC then points out that the money for corporate PACs cannot come from the corporation itself, but from other sources (forgetting for the moment that the corporation can pay for the costs in establishing an administering them, which includes solicitation of funds). That is true, but the more accurate analogy would be if plaintiffs could use funds not obtained from their government contracts (which may have been what Congress originally intended, *see* Opp. at 8-9). However, the FEC was explicit in its Opinion Letter to plaintiff Brown and in its regulations that, for individuals, it does not matter what the source of the money is: no contributions can be made while the person is negotiating for or holds a government contract.

The notion that corporations should have greater rights than individual voters is impossible to square with the decision in *Beaumont*, where the Court held that the ban on corporation contributions, there by a non-profit, was constitutional. In reaching that conclusion, the Court observed at 161 n.8: "Within the realm of contributions generally, corporate contributions are furthest from the core of political expression, since corporations' First Amendment speech and association interests are derived largely from those of their members, *see, e.g., NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449,

458-459 (1958), and of the public in receiving information, *see, e.g., First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978). A ban on direct corporate contributions leaves individual members of corporations free to make their own contributions, and deprives the public of little or no material information." Yet under section 441c, it is these individual contractors who are not free to make their own contributions – even with money not derived from their federal contracts - but corporate PACs, officers, directors, and shareholders – even a sole shareholder and officer of an LLC – are at liberty to do exactly that and more, since they can even contribute from funds derived from their federal contracts.

III. THE BALANCE OF EQUITIES DECIDEDLY FAVORS PLAINTIFFS.

The Opposition correctly observes that plaintiffs did not extensively argue the factors other than the merits in seeking a preliminary injunction. There were two reasons: the equities in favor of three individuals seeking very modest relief under the First Amendment and Equal Protection provisions of the Constitution seemed quite strong when viewed in the context of entire 2012 federal election, and they had no idea what the FEC would argue in opposition. Now that the opposition has surfaced, plaintiffs will respond and demonstrate that, as on the merits, the FEC's position cannot be sustained.

The FEC argues that, in effect, granting preliminary relief is pointless because, if a preliminary injunction were later overturned, either by this Court or on appeal, plaintiffs could still be subject to enforcement proceedings – including being charged with felonies – for making a contribution that was specifically permitted by the preliminary injunction (Opp. 38-42). If the FEC only means that the order that plaintiffs

have submitted did not provide protection in the event that it was later overruled, plaintiffs are submitting with this Reply a Revised Proposed Order, whose third ordering paragraph makes it clear that if plaintiffs make contributions while the preliminary injunction is in effect, the FEC is precluded from going back later, if the order should be reversed, and bringing any kind of enforcement proceeding against plaintiffs for conduct during that "safe harbor" time frame.[6] We are unaware of any case in which the federal government has sought to prosecute a person for acts taken under the protection of a federal court injunction (either preliminary or permanent) that was in effect at the time of those acts but was later vacated. We also do not believe that the FEC would seek any such enforcement action, nor that a judge or jury would convict on such facts. And to the extent that the FEC persists in this position, that provides another reason for the Court to decide the merits of this case at this time.

The FEC also attempts to downplay the significance of even the temporary relief sought, by suggesting that plaintiff Wagner will be able to contribute starting in early April. In fact, as she points out in her Second Supplemental Declaration, which is limited to this issue, her contract requires her to work on the project for ACUS until it is concluded, which will not be before mid-June 2012. Given the extraordinary depth of her report, extending to over 120 pages, and the far-reaching nature of its recommendations, it is far from certain that the project will end in June. But even if her work is concluded then, that is at least three more months before she can express views by making political contributions in this year's elections for federal office. The FEC is simply wrong to

[6] ORDERED that the injunction granted in the preceding paragraph shall continue to apply, even if this Court or a higher Court overturns the injunction, with respect to any contribution that plaintiffs may make while this order is in effect.

discount the importance of that denial of her First Amendment rights for that period of time. As for plaintiffs Miller and Brown, their contracts extend well beyond this election cycle, during which they will be silenced if preliminary relief is not accorded them.

The FEC also suggests that plaintiffs sat on their rights before seeking what it calls "emergency relief" (Opp. at 37), a phrase typically invoked when a temporary restraining order is sought. There is no suggestion that plaintiffs purposefully delayed filing to place the FEC at a disadvantage, and they initially filed this case, seeking immediate review in the D.C. Circuit under 2 U.S.C. §437h. They only sought a preliminary injunction when it became apparent that the FEC would not agree to have this case decided on even a moderately expedited basis. Furthermore, the contract of plaintiff Brown, who had sought an opinion from the FEC allowing to make contributions despite section 441c, was to expire on September 30, 2011, and he could not be a plaintiff unless his contract were renewed. This case was filed less than three weeks after that occurred. The FEC has not claimed any prejudice from any delay, nor could it, given its posture on moving the case ahead.

The FEC also argues (Opp. at 42) that there is a government interest in continuing its programs and laws and that courts should not lightly enter injunctions (either preliminary or permanent) against federal agencies. Plaintiffs do not disagree. But that does not mean that no preliminary injunction should ever issue enjoining enforcement of a federal statute. *See, e.g., Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006) (affirming preliminary injunction against enforcement of federal controlled substances statute as applied to plaintiffs). In other words, caution does not equal never or even almost never. It all depends.

The FEC observes that a decision favoring plaintiffs, even on a preliminary injunction, "could set a precedent" (Opp. at 43), but this Court knows that its decisions need not be followed by any other judge, even in this district. Of course, an opinion by this Court may be persuasive, but that is hardly a reason not to decide the pending motion in accordance with law and equity. It is possible that others will decide to sue, but that is always the case. If suits are brought, the FEC can be expected to resist as it has resisted here. These cases involve complicated legal issues, and most lawyers will be unwilling to sue when they can free ride on this case. Moreover, because there is no basis for statutory attorneys' fees against the FEC, any case would probably have to be brought by pro bono counsel, further decreasing the likelihood that there will any, let alone a significant number of, cases filed based on the granting of a preliminary injunction. Therefore, to the extent that there might be actual, as opposed to theoretical, harm from the granting of a preliminary injunction, it will be limited to that resulting from the contributions of these three individuals, all of whom must continue to abide by the laws limiting everyone's contributions.

Finally, plaintiffs do not contend, as the FEC suggests on page 44, that, because their contributions will be small and cannot effect the election, for that reason section 441c should not apply to them, as the plaintiff was arguing in *Preston, supra.* Their claim is more fundamental, and they recognize that, if they ultimately prevail, all individual contractors like them will be freed of section 441c's ban. Their point now is that a *preliminary injunction* will only free these three individuals, and that fact is relevant in balancing the equities on that motion. Of course, if a permanent injunction is granted and sustained on appeal, the relief will not be so limited, but the court will not have to

balance the equities as it does on a motion for a preliminary injunction. As for the FEC's contention that campaign finance will become the "wild west" if preliminary relief is awarded here (Opp. 43), we note that in the decision from which that quote was taken - *Real Truth About Obama, Inc. v. FEC,* 2008 WL 4416282 (E.D.Va. 2008), *vacated based on Citizens United*, 130 S.Ct. 2371 (2010) – there were four claims of unconstitutionality and the court found it "unlikely" plaintiffs would succeed on any of them. *Id.* at * 15. In addition, plaintiffs were seeking to enjoin the FEC from enforcing its regulations not just against plaintiff, "but also to all other entities similarly situated." *Id.* at * 3 (internal quotation marks and citation to record omitted). Like many of the cases cited in the FEC's Opposition, *Real Truth* has almost nothing to do with the issues and facts in this case.

CONCLUSION

For the foregoing reasons, the Court should (A) grant plaintiffs' request to consolidate their motion for a preliminary injunction with a hearing on the merits, grant their motion for a permanent injunction, and sign the permanent injunction order submitted with this Reply, or (B) in the alternative grant plaintiffs' motion for a preliminary injunction and enter the revised proposed order submitted with this Reply.

Respectfully submitted,

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