UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WAGNER, *et al.*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, Defendants.	Case No. 11-CV-01841-JEB

MEMORANDUM OF CAMPAIGN LEGAL CENTER AND DEMOCRACY 21 AS *AMICUS CURIAE* IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION & SUMMARY OF ARGUMENT

In 1940, Congress enacted a restriction on campaign contributions from persons and entities contracting with the federal government to address corruption in federal contracting, most notably the "Democratic campaign book" scandal. *See* 2 U.S.C. § 441c. As this Court correctly found in denying plaintiffs' motion for preliminary injunction: "It is thus clear that, in passing the ban, Congress wished 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*, No. 11-cv-01841, 2012 WL 1255145, at *5 (D.D.C. Apr. 16, 2012).

Plaintiffs offer no evidence or argument in support of its motion for summary judgment that would justify a reversal of this Court's decision to deny preliminary relief.

Plaintiffs put forward several arguments against section 441c, including that it 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 the memorandum that follows, *amici curiae* will focus on plaintiffs' arguments pertaining to the evidence of corruption and the tailoring of the statute. *Amici* will not separately analyze the equal protection arguments at length as even plaintiffs concede that "there is considerable overlap" between its First Amendment and equal protection claims. Pls.' Stmt. of Pts. and Authorities in Support of Mot. for Prelim. Inj., at 18 (Jan. 31, 2012) ("Pls.' PI Br."). *Amici* agree, however, with the position of the Federal Election Commission (FEC) on this claim, *see* FEC Mot. for Summ. J. 13-21 (Aug. 15, 2012).

First, plaintiffs argue that there is no current evidence that federal officeholders seek to award contracts or influence the award of contracts to reward contributors, indicating that the

record of corruption in this case is inferior to the evidence of corruption that led to the enactment of recent state contractor contribution restrictions. *Wagner*, 2012 WL 1255145, at *7; Pls.' Stmt. of Pts. and Authorities in Support of Mot. for Summ. J., at 7 (July 12, 2012) ("Pls.' SJ Br."); Pls.' PI Br. at 30, 35. This position ignores that the federal contractor contribution ban has been on the books for over 70 years, and thus has prevented the types of corruption that plaintiffs now suggest are necessary to sustain the ban. 2012 WL 1255145, at *4. But insofar as instances of recent corruption would aid the consideration of plaintiffs' 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*, 528 U.S. 377, 391 (2000) (discussing federal contribution limits and finding that state can look to other jurisdictions for evidence of potential corruption). A survey of state law illustrates both the ubiquity of contracting scandals at the state and local levels and the need to pay deference to legislative expertise in matters of procurement and campaign financing.

Second, plaintiffs devote much of their papers to challenging the tailoring of section 441c, setting forth a laundry list of reasons why the law is both overbroad and underinclusive, and criticizing every policy detail from the law's coverage of "sole source" contracts to its exclusion of "military academy students" and federal loan recipients. *See* Pls.' SJ Br. at 5–16. But few of these objections directly relate to the class of contractors at issue here—i.e., individuals with personal service contracts—and rarely in their argument do plaintiffs even attempt to explain why a personal service contract is somehow less susceptible to political manipulation than any other type of contract. Indeed, plaintiffs' brief supporting summary judgment reads more like a policy paper than a constitutional argument: in essence, they ask this Court to overstep its judicial role and tinker with section 441c as if it were a legislature, not a

court. But as the Second Circuit recognized in upholding Connecticut's ban on contractor contributions, "we, as judges, cannot consider each possible permutation of a law limiting contributions, and thus we 'cannot determine with any degree of exactitude the precise restriction necessary to carry out the statute's legitimate objectives.'" *Green Party of Conn. v. Garfield*, 616 F.3d 189, 203 (2d Cir. 2010) (quoting *Randall v. Sorrell*, 548 U.S. 230, 248 (2006)).

For all these reasons, the plaintiffs' motion for summary judgment should be denied, and this Court should instead grant summary judgment in favor of the FEC.

ARGUMENT

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

A survey of state and municipal law illustrates both the pervasiveness of corruption in the contracting process and the need to grant legislators wide discretion to tailor play-to-play measures to address the particular concerns and needs of their jurisdiction.

First, the popularity of pay-to-play laws at the state and municipal levels demonstrates that campaign activity by contractors and potential contractors is widely perceived to pose a threat of political corruption. Such fears are well-founded. Many state and municipal laws were passed in direct response to scandals involving quid pro quo exchanges of campaign contributions for state contracts, or broader schemes by contractors to bribe or otherwise influence officeholders to secure contracts and other individualized state benefits.

Second, there is a wide diversity of pay-to-play laws at the federal, state and local levels, highlighting the importance in paying deference to legislative expertise in matters related to procurement and the financing of elections. As noted in *Randall*, "[i]n practice, the legislature is better equipped to make such empirical judgments, as legislators have particular expertise in

matters related to the costs and nature of running for office." 548 U.S. at 248 (quoting *McConnell v. FEC*, 540 U.S. 93, 137 (2003)).

Finally, the lower courts have reached a near-consensus that so-called pay-to-play restrictions are constitutional. The weight of the case law has both recognized the pervasiveness of corruption in the contracting process and accorded discretion to legislatures to tailor measures appropriate for the unique circumstances of each jurisdiction.

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.[1] A number of municipalities, including New York City and Los

[1] Cal. Gov't Code § 84308(d) (prohibiting parties to proceeding relating to licenses, permits, contracts or other entitlements for use from making contributions of over $250 to any officer of the presiding agency); Conn. Gen. Stat. §§ 9-612(g)(1), (2) (prohibiting contributions from state contractor, prospective state contractor, or their principals to candidates for any state office or to party committees); Haw. Rev. Stat. § 11-355 (prohibiting contributions from state contractors to any candidate committee or non-candidate committee, or to any person for any political purpose or use); 30 Ill. Comp. Stat. 500/50-37 (prohibiting contributions from any business entity who contracts with State and any affiliated persons to any political committees for candidates for the office that has responsibility for awarding the contracts); Ind. Code §§ 4-30-3-19.5, -19.7 (prohibiting any contributions from individual or organization with a contract with State Lottery Commission to any candidate committees, party committees or legislative caucus committees); Ky. Rev. Stat. Ann. §121.330 (prohibiting award of any non-bid contract to an entity if the entity or its officers, employees or officers' and employees' spouses made contributions exceeding $5,000 or conducted fundraising exceeding $30,000 on behalf of official with responsibility for contract); La. Rev. Stat. Ann. § 18:1505.2(L) (prohibiting contributions from any person or entity holding gaming licenses to any candidate, or to any other political committee which supports or opposes any candidate), *id.* § 27:261(D) (prohibiting contributions from entity holding a casino operating contract); Mich. Comp. Laws § 432.207b (prohibiting contributions from holder of a casino license or a supplier's license to candidates for state or local elective office, political party committees, independent committees and legislative caucus committees); Neb. Rev. Stat. §§ 9-803, 49-1476.01 (prohibiting contributions from any person awarded major procurement by Lottery Division to candidates for state elective office); N.J. Stat. Ann. §§ 19:44A-20.13, -.14 (prohibiting award of contract of over $17,500 if person or entity or its principals, subsidiaries or political organizations made a contribution to any candidate for Governor or Lieutenant Governor, or to any state or county political party committee); N.M. Stat. Ann. § 13-1-

Angeles, have followed suit.[2] An additional two states, Maryland and Rhode Island, require contractors to disclose their campaign contributions.[3]

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,[4] while others are targeted to particular types of contracts. States variously define the subject class of

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191.1(E) (prohibiting contributions from prospective contractor, family member, or representative to a public official during the negotiation period for a sole source or small purchase contract); Ohio Rev. Code § 3517.13(I)-(Z) (prohibiting contributions from recipients of non-competitively bid government contractors to state and local officials responsible for awarding the contract or appointing administrators who award the contract); 53 Pa. Cons. Stat. § 895.704-A(a) (prohibiting award of professional services contracts with municipal pension system if applicant or its agent, officers or employee has made a contribution to any municipal official or candidate for municipal office or to their political party); S.C. Code Ann. § 8-13-1342 (prohibiting contributions from recipients of contracts that were not competitively bid to public officials who were in a position to act on the contract's award); Vt. Stat. Ann. tit. 32, § 109(B) (prohibiting firm that provides investment services that has a contract with the state treasurer from making or soliciting contributions on behalf of a candidate for the office of treasurer); Va. Code Ann. § 2.2-3104.01 (prohibiting Governor and Governor's Secretaries from accepting a contribution of over $50 from an applicant for certain state contracts); W. Va. Code § 3-8-12(d) (prohibiting any contractor or prospective contractor from making contributions to any political party, committee, or candidate for public office or to any person for political purposes).

[2] N.Y.C. Admin. Code §§ 3-702(18), 3-703(1-a), (1-b) (imposing lower limits on contributions from individuals and organizations having business dealings with the city to any candidate for municipal office); L.A., Cal., City Charter § 470(c)(12).

[3] *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) (requiring businesses awarded non-bid contracts to report all contributions made by their officers, directors, associates, partners, limited partners, owners, or employees, or their immediate family members, aggregating more than $1,000 annually).

[4] *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, including all entitlements for land use, all contracts (other than competitively bid, labor, or personal employment contracts), and all franchises").

contracts as, *inter alia*, industry-specific contracts,[5] contracts not subject to competitive bidding,[6] or both competitive and no-bid contracts.[7]

There is no support for plaintiffs' suggestion, however, that state laws do not cover contracts for personal services, such as the consulting contracts for plaintiffs Brown and Miller. Pls.' SJ. Br. at 10. A few statutes regulate specific subgroups of contracts or licenses that do not include contracts for personal services.[8] But most state statutes are simply silent as to whether personal service contracts are covered,[9] or alternatively, explicitly cover contracts for "services" or "personal services."[10]

The state laws also vary in terms of temporal scope. Pay-to-play laws impose contribution restrictions before, during and after a contract's term, or some combination of these time periods. Indiana and Nebraska, for instance, prohibit the award of state lottery contracts to

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[5] *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).

[6] *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.

[7] *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.

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

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

[10] *See* Conn. Gen. Stat. § 9-612(g)(1)(C)–(E), (g)(2) (prohibiting contributions from any "person, business entity or non-profit organization" that has entered into or applied for a state contract for, *inter alia,* "the rendition of services"); Haw. Rev. Stat. § 11-355(a) (prohibiting contributions from any person who "enters into any contract with the State" for, *inter alia*, "the rendition of personal services"); Ind. Code § 4-30-3-19.7(e), (f), (j) (prohibiting certain contributions from "persons" with contracts with the lottery commission for, *inter alia*, "consultation services"); N.J. Stat. Ann. § 19:44A-20.14 (prohibiting state from entering into a contract for, *inter alia*, "services," with persons who made certain campaign contributions); *see also* N.J. Admin. Code §§ 19:25-24.1, -24.2; W.Va. Code Ann. § 3-8-12(d) (prohibiting certain campaign contributions from persons entering into a state contract for, *inter alia*, the "rendition of personal services"). *See also* N.Y.C. Admin. Code §§ 3-702(18), 3-703(1-a) (prohibiting contributions from, *inter alia*, "natural persons" with any contract for the procurement of "services" with the City).

anyone who has contributed to a candidate for elective office within three years preceding the contract's award. *See* Ind. Code § 4-30-3-19.7(i); Neb. Rev. Stat. § 9-835(2). Illinois limits contributions from contractors either two years beyond the contract's termination or upon completion of the elected official's term of office, whichever is later. 30 Ill. Comp. Stat. 500/50-37(b).

Additionally, the extent to which state contribution restrictions apply to persons associated with the contracting entities varies significantly, and often sweep more broadly than the federal law. Among states that limit contractor contributions from businesses, many cover various "principals" of the contracting entity and their family members as well. For example, Connecticut's ban covers the contracting entity's board members, officers, managers, and those with a 5% ownership stake, as well as their immediate family members (spouses and dependent adult children). Conn. Gen. Stat. § 9-612(g)(1)(F). *See also, e.g.*, 30 Ill. Comp. Stat. 500/50-37(a) (covering those with 7.5% controlling interest; officers, subsidiaries and associated nonprofits; and their spouses and minor children); Ky. Rev. Stat. Ann. § 121.330(a) (covering entity's officers and employees and their spouses); N.J. Stat. Ann. § 19:44A-20.17 (covering those with 10% ownership interest, subsidiaries and any "section 527" organizations controlled by the business entity, and the immediate family of individual contractors). By contrast, the federal law prohibits contributions only from the contracting entity itself.

In short, state pay-to-play laws are wide-ranging and widely used; while their prevalence indicates a shared appreciation for their value as anti-corruption measures, their diversity underscores the importance of granting legislatures the discretion to tailor pay-to-play laws according to the needs, experience and goals of the relevant jurisdictions.

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

Pay-to-play laws are frequently enacted at the state and municipal level in response to a scandal involving attempts by contractors to purchase influence over the procurement process by making or soliciting campaign contributions or by directly bribing candidates and officeholders.[11] A review of the state experiences in Connecticut, Illinois and New Jersey illustrates the pervasiveness of pay-to-play practices in contracting and validates concerns that campaign activities by contractors and prospective contractors pose a heightened threat for political corruption.

1. Connecticut

The impetus to enact far-reaching pay-to-play legislation in Connecticut came from a series of high-profile scandals involving state officials and state contracting.

On June 21, 2004, then-Governor John Rowland announced his resignation after being accused of accepting $107,000 worth of free vacations, construction work on his cottage and other favors from state contractors in return for facilitating the award of several contracts. *Green Party of Conn. v. Garfield*, 590 F. Supp. 2d 288, 305 (D. Conn. 2008), *rev'd in part*, 616 F.3d 189 (2d Cir. 2010). *See also* John O'Neil and Avi Salzman, *Ex-Governor of Connecticut Pleads Guilty to Corruption*, N.Y. Times, Dec. 23, 2004, *available at* http://www.nytimes.com/2004/12/23/nyregion/23cnd-rowl.html?oref=login. After pleading guilty, he was sentenced to a term of imprisonment of one year and a day.

The Rowland prosecution was preceded by a corruption scandal involving State Treasurer Paul Silvester. In 1999, Silvester pled guilty to charges arising from his participation

[11] *See, e.g.*, Eliza Newlin Carney, *Rules of the Game: Congress Should Heed Scandals In The States*, Nat'l J. (last updated Feb. 16, 2011), http://www.nationaljournal.com/columns/rules-of-the-game/congress-should-heed-scandals-in-the-states-20090803.

in a kickback scheme wherein he invested over $500 million of the state's pension funds with certain financial institutions in exchange for millions of dollars in "finder's fees," some of which were ultimately laundered through his campaign fund. *Green Party*, 590 F. Supp. 2d at 305.

Additional pay-to-play scandals at both the state and municipal level in Connecticut led to the press coining the moniker "Corrupticut" for the state. *Id*. at 306, *citing*, *e.g*., Paul von Zielbauer, *The Nutmeg State Battles the Stigma of Corrupticut*, N.Y. Times, Mar. 28, 2003 ("Nowadays, from Storrs to Stamford, there are jokes about living in Corrupticut, Connection-icut or, the new favorite, Criminalicut"). And the repeated instances of corruption in state elections and contracting predictably resulted in the loss of public trust, with one poll showing that 78% of likely Connecticut voters agreed that the way political campaigns are financed in Connecticut encourages candidates to grant special favors and preferential treatment to their contributors. *Green Party*, 590 F. Supp. 2d at 307.

2. Illinois

Illinois' government contractor contribution ban was also enacted in the wake of a series of pay-to-play scandals. *See* 2008 Ill. Legis. Serv. Pub. Act 95-971. Governor George Ryan, in office from 1998 to 2002, was convicted of trading government contracts for gifts and campaign contributions. While serving as Illinois's Secretary of State in the 1990s, Ryan was alleged to have steered leases and contracts to businesses controlled by an associate, Lawrence E. Warner, in exchange for kickbacks, including financial support for Ryan's successful 1998 campaign for Governor. *United States v. Warner*, 498 F.3d 666, 675 (7th Cir. 2007). Ryan was convicted of 18 felony charges, including racketeering and fraud, and sentenced to six and a half years in federal prison. Monica Davey, *Ex-Governor of Illinois Gets 6½ Years in Prison*, N.Y. Times,

Sept. 7, 2006, *available at* http://www.nytimes.com/2006/09/07/us/07ryan.html?_r=1&ref=georgeryan.

Ryan's successor, former Governor Rod Blagojevich, was impeached and convicted for play-to-play offenses, namely numerous charges relating to the exchange of state contracts and appointments for millions of dollars in contributions to his campaign committee, Friends of Blagojevich, as well as for gifts given directly to Blagojevich and his family members. Superseding Indictment, *United States v. Blagojevich, et al*. (N.D. Ill. Apr. 2, 2009) (No. 08 CR 888), *available at* http://www.usdoj.gov/usao/iln/pr/chicago/2009/pr0402_01a.pdf. Blagojevich was ultimately sentenced to 14 years imprisonment. *See* Monica Davey, *Blagojevich Sentenced to 14 Years in Prison*, N.Y. Times, Dec. 7, 2011, *available at* http://www.nytimes.com/2011/12/08/us/blagojevich-expresses-remorse-in-courtroom-speech.html. Several schemes involved directing state business relating to state pensions in exchange for substantial campaign contributions to Friends of Blagojevich and kickbacks to the Governor and his associates. Superseding Indictment, *Blagojevich*, at 11–13; *see also* Mark Guarino, *Blagojevich indictment outlines more pay-to-play schemes*, Christian Science Monitor, Apr. 2, 2009, *available at* http://www.csmonitor.com/USA/Politics/2009/0402/blagojevich-indictment-outlines-more-pay-to-play-schemes/.

Ironically, even though his administration had been under federal investigation since 2003, Blagojevich attempted to block passage of the state contractor ban that had been motivated by the string of pay-to-play scandals. *Timeline of the Blagojevich investigation*, Chi. Trib., http://www.chicagotribune.com/news/chi-investigation-timeline-1208,0,2680294.story. The Illinois legislature ultimately voted in September 2008 to override Blagojevich's veto and pass the ban. Mike McIntire and Jeff Zeleny, *Obama's Effort on Ethics Bill Had Role in Governor's*

Fall, N.Y. Times, Dec. 9, 2008, *available at* http://www.nytimes.com/2008/12/10/us/politics/10chicago.html?pagewanted=all. According to testimony at his 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 Robinson and Michael Tarm, *Alonzo Monk: Obama Stopped Blagojevich Senate Deal with Emil Jones*, Huffington Post (June 10, 2010, 9:15 PM), http://www.huffingtonpost.com/2010/06/10/alonzo-monk-obama-phone-c_n_608220.html. Federal agents were tipped off to Blagojevich's redoubled efforts, and obtained a wire tap for the Governor's phone. *See* McIntire and Zeleny, *supra.* In a fitting twist of fate, the wiretap in turn recorded his most spectacular feat of "pay-to-play," namely his attempt to sell the U.S. Senate seat being vacated by then President-elect Obama. *Id.*

3. New Jersey

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 emerged as the sole bidder. The project ultimately had cost overruns exceeding $200 million and the system broke down weeks after its launch. 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.

These irregularities prompted an investigation of the incident, which discovered that Parsons had developed a "political strategy" including lobbying and campaign support to obtain the contract. *Id.* This "political strategy" paid off for Parsons, as it was able to meet privately with senior state officials to discuss the state's Request for Proposals (RFP) and received

exclusive information prior to the RFP becoming public that gave it "a head start on the deployment of corporate resources for a bid submission." *Id.* at 3–4. The investigation further found that during the four years bracketing the contract award, entities associated with Parsons made over $500,000 in contributions to candidates and political committees affiliated with the Republican Party, which raised "serious concerns about the integrity of the state contract procurement process that go well beyond the events and circumstances surrounding the specific [Parsons contract]." *Id.* at 4; *see also id*. at 62. 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.

The foregoing examples from Connecticut, Illinois and New Jersey represent only a small sample of the pay to play scandals that arise in government contracting. To be sure, plaintiffs may attempt to distinguish these cases by arguing that that the state contracting process is different than the federal system, or that some scandals involved bribes and kickbacks as well as campaign contributions. *See, e.g.*, Pls.' PI Br. at 29. But this argument misses the point. Although there may be differences between state and federal contracting, the prevalence of quid pro quo schemes at the state and local levels demonstrates that concerns about the corruptive potential of campaign activity by contractors are legitimate and grounded in fact. As this Court already noted, in light of abundant examples of pay-to-play behavior, "[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 and need for legislative flexibility in crafting solutions, it is unsurprising that the courts have generally viewed state restrictions on contractor contributions with approval.[12] In sustaining the constitutionality of pay-to-play restrictions, courts have emphasized both the importance of the anti-corruption interests served by such limits and the legislature's discretion to define the contours of such limits.

In *Green Party*, the Second Circuit Court of Appeals upheld a Connecticut provision banning contributions from state contractors. Unlike section 441c, the law considered in *Green Party* applied not just to the contracting individual or entity, but also to certain "principals" and immediate family members of contractors. 616 F.3d 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 banning contributions from principals and immediate family members. *Id.* at 203 (reasoning that "the 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").

A subsequent decision in the Second Circuit also recognized that heightened 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

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[12] The D.C. Circuit Court of Appeals has twice upheld federal laws restricting campaign contributions from contractors. In *FEC v. Weinstein*, 462 F. Supp. 243 (D.C. Cir. 1978), the Court approved section 441c, noting that "the importance of the governmental interest" in preventing electoral corruption "through the creation of political debts" had "never been doubted." *Id.* at 248. *See also Blount v. SEC*, 61 F.3d 938, 944–45 (D.C. Cir. 1995) (upholding MSRB Rule G-37, which restricted campaign contributions by participants in municipal bond industry, on ground that government interest was "self-evident," "obvious and substantial").

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*, No. 10-cv-00497, 2012 WL 983559 (D. Haw., Mar. 21 2012), *appeal docketed*, No. 12-15913 (9th Cir. Apr. 20, 2012). The Hawaii law prohibited all contractors, regardless of the amount of the contract, from making contributions to any candidate committees or 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." *Id.* at *30; *see also id.* at n.27 (recounting chain of corruption scandals that preceded law).

State courts have likewise sustained 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 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 contributions limits applicable to certain highly-regulated industries that are deemed to pose a greater threat of political corruption. *See, e.g.*, *Casino Ass'n of La. v. State ex rel. Foster*, 820

So.2d 494 (La. 2002) (rejecting arguments that a state law prohibiting any political contributions from any officer, director, or certain employees in the casino industry, or the spouse of any of the foregoing was unconstitutionally broad); *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) (rejecting arguments that a state law prohibiting any political contributions from any officer, associate, agent, representative, or employee of a liquor licensee was unconstitutionally broad).[13]

Plaintiff cite *Dallman v. Ritter*, 225 P.3d 610 (Colo. 2010) as a case reaching a contrary result, but their reliance 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 provision, which applied to the contracting entity as well as a broadly defined class of family members[14] and associates; remained in effect from the beginning of negotiations until two years *after* the

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[13] A somewhat different, though related, line of decisions has approved campaign finance restrictions targeting another group that poses a particular risk of corruption, namely, lobbyists. Most recently, the Fourth Circuit Court of Appeal upheld a North Carolina statute that imposed a complete ban on campaign contributions from lobbyists. *See Preston v. Leake,* 660 F.3d 726, 737 (4th Cir. 2011) (upholding contribution ban on lobbyists because role of a lobbyist "by its very nature . . . is prone to corruption and therefore especially susceptible to public suspicion of corruption"). This decision followed a number of rulings that had upheld somewhat narrower restrictions on contributions from lobbyists. *Institute of Governmental Advocates v. Fair Political Practices Comm'n*, 164 F. Supp. 2d 1183 (E.D. Cal. 2001) (upholding California lobbyist contribution restriction); *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 718 (4th Cir. 1999) (upholding ban on lobbyist contributions during legislative sessions); *State v. Alaska Civil Liberties Union*, 978 P.2d 597, 619-20 (Alaska 1999) (upholding prohibition on contributions from lobbyist to legislative candidates in districts outside the district in which the lobbyist can vote); *Kimbell v. Hooper*, 665 A.2d 41, 51 (Vt. 1995) (upholding ban on lobbyist contributions during legislative sessions).

[14] The Colorado law broadly defined immediate family member to include "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." *Ritter*, 225 P.3d at 618.

contract's completion; and imposed harsh penalties for violations.[15] *Id.* at 617. Finally, the Act expansively defined its reach to include all political subdivisions of the state, including not only local governing bodies but also school districts, special districts, and quasi-public bodies receiving state funding. *Id.* at 618. While Plaintiffs correctly point out that the Colorado law only applied to sole source contracts valued above a $100,000 threshold, that fact hardly renders it less restrictive than section 441c. *See* Pls.' PI Br. at 31–32. Given the expansive scope of the Colorado law, the *Ritter* decision provides scant support for plaintiffs' constitutional arguments.[16]

II. The Federal Contractor Contribution Ban is Constitutional.

A. Section 441c Constitutionally Advances The Important Government Interest in Preventing Actual And Apparent Corruption In Federal Contracting.

The ban now found at 2 U.S.C. § 441c was originally enacted more than 70 years ago to prevent both actual and apparent corruption in the award of federal contracts. As the FEC has exhaustively documented in its brief, and this Court has already found, the ban was originally enacted based on concerns regarding corruption in federal contracting process, specifically the "Democratic campaign book scandal." *See Wagner*, 2012 WL 1255145, at *6; FEC Opp. to Pls' Mot. for a Prelim. Inj. 4-10 (Mar. 1, 2012). There can be no doubt that the prohibition on

[15] Contractors who violated the Act's provisions were ineligible to hold state office or any state contracts for three years. Additionally, government officials who knowingly violated the Act were punishable by removal from office and disqualification from future office. *Ritter*, 225 P.3d at 617.

[16] Only a handful of other cases have invalidated local pay-to-play laws, and were generally decided on alternative grounds. *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 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*, No. 11-3908, 2012 WL 3140909, at *3 (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.

contributions from federal contractors serves the important state interest in "protect[ing] the integrity of the electoral system by ensuring that federal contracts were awarded based on merit." *Wagner*, 2012 WL 1255145, at *5.

As the review of the state and municipal experience demonstrates, evidence of corruption in contracting is still plentiful and concerns about pay-to-play politics have not diminished in the period since the enactment of the federal ban. Plaintiffs suggest that the FEC has offered no evidence of recent scandals in federal contracting. *Id.* at *7; Pls.' SJ Br. at 7 (asserting that FEC failed to provide evidence that federal officeholders had "tr[ied] to influence some federal contracts based on making, or failing to make, a political contribution"). The seeming absence of recent corruption involving federal contractors, however, hardly suggests that the contribution ban is unnecessary; instead, as this Court already noted, it suggests that the ban is working. *Wagner*, 2012 WL 1255145, at *7.

But 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 (noting that "[t]he best means of prevention is to identify and remove the temptation"). As the Supreme Court stated in *Shrink Missouri*, "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." 528 U.S. at 391. 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 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) ("Although the record contains only allegations, no 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 instances of actual corruption in federal contracting is the need to avoid the appearance of corruption. *See Buckley v. Valeo*, 424 U.S. 1, 27 (1976) ("Congress could legitimately conclude that the avoidance of the appearance of improper influence 'is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.'") (citation omitted). Recognizing the importance of this interest, the Second Circuit observed in upholding New York City's "doing business" law that recurrent pay-to-play scandals had "created a climate of distrust that feeds the already-established public perception of corruption." *Ognibene*, 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 *Green Party*, "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, as multiple courts have found, limiting contractor contributions is a key measure to combat the public perception that public business is for sale to private interests.

Concerns about federal government corruption are widespread. According to a recent USA Today/Gallup poll, reducing corruption in the federal government was the second-highest priority for respondents of both political parties, trailing only job creation.[17] Furthermore, the recurrent corruption scandals at the state and local level create an appearance of impropriety that

[17] Jeffrey M. Jones, *Americans Want Next President to Prioritize Jobs, Corruption*, Gallup Politics (July 30, 2012), http://www.gallup.com/poll/156347/Americans-Next-President-Prioritize-Jobs-Corruption.aspx.

affects public confidence in the integrity of federal contracting processes. Clearly, high-profile state corruption scandals have repercussions beyond state borders, as the national outrage stirred by the Blagojevich scandal attests. By preventing the appearance of corruption in federal contracting, section 441c preserves the trust in electoral and government integrity that is critical to democratic self-government.

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

The prohibition on contractor contributions is designed to prevent corruption and the appearance of corruption and to ensure a merit-based system of federal contracts; its scope is limited in accordance with those goals. Far from being fatally overbroad, section 441c is what the Fourth Circuit would label a mere "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 cabin the campaign activity 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 FEC has interpreted section 441c to apply only to federal elections, i.e., elections for the Presidency, Vice Presidency, U.S. House of Representatives, U.S. Senate, and Delegate or Resident Commissioner. *See* 11 C.F.R. § 115.2(a). However, because most contracts are awarded at the agency level, plaintiffs argue that the possibility that the President, a presidential appointee, or a Member of Congress might attempt to influence the contracting process is "so

remote that it cannot satisfy the First Amendment." *See* Pls.' SJ Br. at 8. But there is no impermeable boundary between agencies and elected officials. Indeed, agency officials often depend on the solicitude of legislators and presidential appointees, whether for appropriations, favorable appointments, or other and less tangible rewards.

Plaintiffs identify the Connecticut ban upheld in *Green Party*, as less restrictive than section 441c because it is "branch-specific"—i.e., it only bans contributions to officials in the government branch with oversight authority over a particular contract. *See* Pls.' SJ Br. at 8–9. However, the Connecticut pay-to-play law is substantially broader than the federal law in other key respects: 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); it prohibits all state contractors from making contributions to state and town party committees, *see id.* § 9-601(1)–(2); and its temporal coverage extends for as much as one year after a contract's termination, *see id.* § 9-612(g)(1)(D) (entities deemed "state contractors" until December 31 of the year in which contract terminates). Plaintiffs' assertion that *Green Party* involved a less stringent law than section 441c is thus undercut by the comparative expansiveness of the Connecticut statute.

Plaintiffs also suggest that the ban could carve out contributions to members of Congress who are not "in a leadership position" or on a committee with appropriations authority. This suggestion ignores the dynamics of political fundraising. Federal officeholders operate in a political culture with significant professional and social overlap, so identifying the particular officials who have sufficient political capital to influence a contract's award or oversight is not as simple as identifying officeholders with explicit statutory authority. *See, e.g.*, FEC Mem.

Supp. Summ. J. 8 (describing how political appointees can "steer contracts to those who make contributions to a favored candidate or party"). Indeed, given the dynamic nature of legislative committee membership—and the complexity of federal procurement processes—knowing the source of authority for the award of any given contract is not necessarily straightforward. Even in the comparatively small jurisdiction of Hawaii, a federal district court recognized as much in upholding the state's contractor contribution ban:

> 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.

Yamada, 2012 WL 983559, at *31. The Hawaii court went on to note that, under the plaintiff's logic, analyzing the constitutionality of a contractor contribution limit would require courts "to know 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 *32. The *Yamada* court rightly recognized that the kind of line-drawing urged by plaintiffs here would be unpredictable, burdensome and fundamentally unsuited to the judicial role.

Furthermore, in arguing that the law is overbroad because it covers contributions to party committees[18] and candidates running for offices without direct authority over contracting, plaintiffs fail to take into account the possibility of transfers between candidates, and between parties and candidates. Federal law allows for unrestricted transfers between, *inter alia*, national

[18] 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).

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. 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)). Thus 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 pose a clear threat of corruption. *See id*.

2. Section 441c Applies to 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 section 441c does not reach individuals associated with or employed by federal contractors, nor political committees controlled by the contractor. Instead, section 441c targets the specific class of persons and entities Congress deemed uniquely positioned to exert improper influence through campaign contributions—or to fall victim to coercion to give such contributions.

Plaintiffs contend that, by regulating only the contracting entity, section 441c impermissibly favors corporations over individuals because the ban allows a corporation to contribute through a PAC or through the individual donations of its officers, directors and

employees, whereas individual contractors have no option to make campaign contributions. But, this Court has recognized, and plaintiffs concede, that section 441c applies equally to corporate and individual contractors, and a corporation is legally distinct from its officers, directors, and shareholders, as well as from its PAC. *See* Pls.' SJ Br. at 19; *Wagner*, 2012 WL 1255145, at *14. Plaintiff must therefore resort to arguing that (1) direct contributions from corporations are the "functional equivalent" of contributions from corporate PACs or (2) corporations and their PACs would be perceived as equivalent by any person "with knowledge of the facts." *See* Pls.' SJ Br. at 19. Both claims are at odds with settled principles of corporate jurisprudence and cannot succeed.

First, as the Supreme Court has confirmed, a PAC is a "separate association from the corporation," *see Citizens United v. FEC*, 130 S. Ct. 876, 897 (2010), with separate legal rights and obligations, and Congress may regulate them as separate entities. Indeed, the *Citizens United* Court specifically found that a corporate PAC "does not allow corporations to speak," *id.* (emphasis added), directly refuting plaintiffs' theory that corporate contributions and corporate PAC contributions are functionally equivalent. Second, plaintiffs have no grounds for their assertion that someone "with knowledge of the facts" would perceive corporate PAC contributions as equivalent to direct corporate contributions. This is sheer speculation.

Similarly, there is no reason to think that there is always an identity of interest between a corporation and its officers, employees and shareholders. Few in this class have any input into whether a corporation becomes a federal contractor—indeed, in the case of a large corporation, one can safely assume that many are likely ignorant of the corporation's specific contracts. Furthermore, any resultant benefit to the class is likely to be diffuse. Plaintiffs offer no reason why the contributions of a corporation's officers, employees and shareholders should be

necessarily equated with those of the corporation for the purpose of the contractor contribution ban.

3. Section 441c Applies Through Completion of Contract.

The federal law is also temporally tailored, applying only to individuals and businesses actively bidding for, or performing under, contracts with the federal government. Because section 441c targets corruption and favoritism until a federal contract is completed, plaintiffs argue that it is overbroad. Pls.' SJ Br. at 11. But the potential for corruption and the appearance of corruption does not vanish once a contract is awarded. For example, unforeseen costs late in performance of a contract might require an additional appropriation of funds; permitting contractors to make campaign contributions before securing such additional funds could easily give rise to impropriety, or at least the appearance of impropriety. Furthermore, a contractor is just as likely—if not more likely—to give post hoc contributions to thank helpful officeholders once a contract is secured as it is to give contributions in the negotiation stage when the outcome of the contracting process is still uncertain.

In recognition of this, most state contribution restrictions apply throughout the performance of a contract, *see supra* Section I.A., and indeed some laws prohibit contributions even following completion of the contract. *See, e.g.*, Conn. Gen. Stat. § 9-612(g)(1)(D) (ban applies through Dec. 31 in year contract terminates); 30 Ill. Comp. Stat. 500/50-37(b) (2 years or duration of awarding officeholder's term, whichever is longer); Ind. Code § 4-30-3-19.5(j) (three years after termination); Neb. Rev. Stat. § 49-1476.01 (three years from award of contract). Thus, if anything, the temporal scope of the federal restriction is narrower than that of many of its state counterparts, making it more, not less, tailored to its anti-corruption objectives. *See, e.g.*, *McConnell*, 540 U.S. at 167 (upholding certain soft money regulations on grounds that they

are "reasonably tailored, with various temporal . . . limitations designed to focus the regulations on the important anticorruption interests to be served").

4. Section 441c Is a Prohibition on Certain Contributions.

Although section 441c bans federal contractors from making political contributions, contractors are free to pursue other forms of political expression. As this Court has already noted, individual federal contractors may still 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). While contractors are barred from making political contributions, they are permitted to volunteer their time on a behalf of a candidate or party committee, and most importantly, to engage in independent spending without restriction. *Buckley*, 424 U.S. at 28 (noting that contribution limit "leav[es] persons free to engage in independent political expression" and "to associate actively through volunteering their services"). The mere fact that plaintiffs have elected not to exercise these other forms of political expression in no way demonstrates that section 441c is unconstitutional.

Despite the ample avenues for political expression left open by section 441c, plaintiffs argue that the law is overbroad because it does not allow for small contributions. *See* Pls.' SJ Br. at 10–12. As a practical matter, it is difficult to fathom how a contractor's nominal contribution of $200 would be more expressive than, for instance, offering to host a fundraiser at her home. But plaintiffs also ignore that a limit, as opposed to a ban, would allow a single contractor to give "nominal" contributions to potentially hundreds of candidates, party committees and PACs, and would thereby allow large aggregate sums to be donated. Indeed, if a contractor gave just $100 to the candidates of one party in each of the 468 federal congressional elections in a cycle, its

giving would exceed the $46,200 aggregate limit on contributions to federal candidates.[19] Because of liberal transfer rules, this money could be quickly routed back to a single party committee, which could disburse these funds in such a way as to maximize the contributor's influence over those officeholders with direct or indirect authority over the relevant contracts. Finally, as the Second Circuit acknowledged in *Green Party*, even small contributions can create an appearance of corruption. 616 F.3d at 205 ("Even if small contractor contributions would have been unlikely to influence state officials, those contributions could have still given rise to the appearance that contractors are able to exert improper influence on state officials.").

At base, plaintiffs' fundamental objection to the law appears to be simply that section 441c operates as a ban, not a limit. On this basis, plaintiffs attempt to analogize section 441c to the ban on contribution from minors that was struck down in *McConnell*. *See* Pls.' SJ Br. at 5–6. 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 rather because parents could circumvent individual contribution limits by contributing in the names of their minor children. 540 U.S. at 231–32. The *McConnell* Court struck down the minor contribution ban not because it was a ban, as plaintiffs allege, but because there was "scant evidence" of such circumvention, and in any event the asserted anti-circumvention interest was already 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 because this class, by virtue of its heightened incentive to purchase influence over candidates and officeholders, has been

[19] Plaintiffs would presumably still be subject to the generally-applicable federal biennial limits. All contributions by an individual to federal candidates are capped at an aggregate of $46,200 on a biennial basis ("$46,200 aggregate limit"), 2 U.S.C. § 441a(a)(3)(A), and all contributions by an individual to non-candidate political committees (including party committees) are capped at $70,800 biennially ("$70,800 aggregate limit"), *id.* § 441a(a)(3)(B).

deemed to pose a greater risk of direct corruption than an ordinary donor. Further, as the evidence of corruption at the state level 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: clearly, generally-applicable contribution limits have not prevented contracting scandals at the state and local levels.

Finally, 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 does not necessarily suggest a law is overbroad, but in fact can indicate that a law is properly tailored:

> 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. The wisdom of these particular choices (the scope of the ban or any exceptions) is not for courts to decide; courts decide whether the choices are closely tailored to sufficiently important government interests. And this court upholds Hawaii's choice.

2012 WL 983559 at *32 (internal citations and footnotes omitted) (quoting *Green Party*, 616 F.3d at 205).

C. The Court Should Defer to Congress on Questions of Policy.

To support their assertion of overbreadth, plaintiffs also propose a variety of ways that section 441c could be narrowed without losing "meaningful protection against the appearance of improper 'pay-to-play.'" Pls.' SJ Br. at 10–13. But their three-page list of proposed reforms that would "relax" the ban does not demonstrate that the law is overbroad; to the contrary, it

underscores that the minutiae of policy is best left to Congress. Indeed, plaintiffs in this section are not so much making constitutional arguments, as expressing their opinions on issues that are essentially legislative, suggesting, *inter alia*, that Congress should exempt "sole source" contracts, establish a minimum amount for regulated contracts, and substitute a contribution restriction with a disqualification protocol. In short, plaintiffs are effectively requesting that this Court replace the judgment of a democratically-elected legislature with plaintiffs' own legislative preferences. But the courts "have no scalpel to probe" complex legislative enactments, *see Randall*, 548 U.S. at 248, and this Court should reject plaintiffs' invitation to do so.

First, plaintiffs highlight that the federal ban does not specify a threshold contract amount, and argue that the inclusion of a minimum amount in, for instance, the Connecticut contribution ban, demonstrates that the federal ban is overbroad. But the presence or absence of such a threshold must be considered in the context of the law's overall tailoring. While the Connecticut law indeed established a threshold contract amount of $50,000, its coverage sweeps substantially more broadly than the federal ban overall.[20] Moreover, plaintiffs are selectively blind in this comparison, and conveniently ignore that several states laws also do not include minimum contract amounts as a threshold for regulation.[21] Furthermore, it is not necessarily true that "[n]o reasonable person would believe that anyone would make a contribution of any amount in order to obtain a contract" of the size of plaintiffs' contracts, as plaintiffs maintain. Pls.' SJ Br. at 10. This is pure speculation on plaintiffs' part. Indeed, Congress may have determined that the award of lower-value individual personal service contracts is more likely to

[20] *See supra* Section II.B.1, discussing the scope of Connecticut's law.

[21] *See supra* Section I.A.

be influenced by political contributions than is the award of high-profile million- or billion-dollar procurement contracts subject to greater public scrutiny.

Plaintiffs also urge this Court to exclude competitive and sole source contracts from the requirements of section 441c. While open and competitive bidding processes might be less susceptible to improper influence, they do not obviate the risk of corruption. Even when contracts are competitively bid, government officials still exercise discretion in myriad ways. For example, officials usually have discretionary authority in determining whether bids conform to contract specifications; whether to reject bids for exceeding the estimated cost; and whether to approve change orders once a contract is granted. *See In Re Earle Asphalt*, 950 A.2d at 323–24. As the Parsons scandal in New Jersey illustrates, oftentimes contractors contribute precisely so that an officeholder will manipulate contract specifications or shape the RFP to favor the contractor in a "competitive" bidding situation. *See* Section I.B. *supra*. The fact that so many states that have enacted some form of pay-to-play restrictions apply them to both no-bid and competitive-bid contracts makes clear that many legislatures have determined that both processes give rise to corruption and the appearance of corruption.[22]

Plaintiffs also suggest a number of changes to section 441c that would not clearly make it less restrictive than the current ban. For example, plaintiffs urge the creation of a carve-out for individual contractors who are the "functional equivalent of federal employees." Pls.' SJ Br. at 10. As an initial matter, distinguishing between contractors who are and are not "functionally equivalent to federal employees" is far more complex than plaintiffs acknowledge. Certainly plaintiffs offer no particular criteria for making this determination, and it is unclear why certain attributes of plaintiffs' work experience highlighted in the brief, i.e., that a federal agency issues their paychecks and handles their tax withdrawals, have any bearing on the corruptive potential

[22] *See supra* notes 2–8.

of their campaign activity. *See* Pls.' SJ Br. at 3. Even beyond the inherent definitional problems associated with such a test, however, the 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 even have speech-enhancing effect plaintiffs seek. If indeed plaintiffs were regulated as if they were the functional equivalent of employees, they would be subject to a greater number of campaign restrictions, not fewer.

Plaintiffs also propose addressing pay-to-play "from the contract side," as does the MSRB rule upheld in *Blount*, 61 F.3d at 944–45, instead of restricting contributions during a contract's negotiation and performance. *See* Pls.' SJ Br. at 11. Under this regime, a campaign contributor would be disqualified from bidding on a federal contract for two years after making a contribution. However, substituting a two-year disqualification period is not necessarily less restrictive than a contribution ban covering only the duration of a contract. The MSRB rule applies to a narrow and relatively sophisticated class of investors in a single, highly-regulated market. Other federal agencies seeking personal service contractors, on the other hand, draw from a wide-ranging pool of professions. Accordingly, if section 441c were to be replaced with an ex ante rule, it would be difficult to provide adequate notice to all potential contractors that certain political donations could disqualify them from future contracts. Addressing pay-to-play

"from the contract side," in light of the attendant notice and enforcement problems, is simply not a feasible alternative to the current ban—nor is it even a more "relaxed" alternative.

In short, this Court should reject plaintiffs' attempts to invalidate a duly-enacted federal law as overbroad based purely upon policy disagreements. As noted in *Yamada*, "[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." 2012 WL 983559, at *32.

D. Section 441c Is Not Underinclusive.

Plaintiffs also contend that the federal contractor contribution ban is unconstitutionally underinclusive because it fails to capture all situations that plaintiffs claim might lead to corruption or its appearance. Pls.' SJ Br. 12–16. But it is well established that a statute is not "invalid under the Constitution because it might have gone farther than it did . . . ." *Buckley*, 424 U.S. at 105. "Reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Id*. (internal citations and quotations omitted). In *Blount*, the D.C. Circuit reiterated 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. As the Court there recognized, Congress need not address all aspects of a problem at once, particularly in the context of First Amendment speech. *See id*.

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). In support of their underinclusiveness claim, plaintiffs point to certain groups that do not

fall within the strictures of section 441c, such as federal grant recipients, federal loan recipients and prospective military academy students, whom they allege are similarly situated to federal contractors. *See* Pls.' SJ Br. at 13–15. But plaintiffs fail to explain why Congress' decision not to include—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." Furthermore, most of the states and municipalities with pay-to-play statutes made similar determinations as to the regulated class, as very few state laws cover grants or loans, and indeed, 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."[23] Given Congress' stated goal of preventing corruption and its appearance, the decision to ban contributions from federal contractors and not 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 (stating that "[t]he 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'").

CONCLUSION

For the foregoing reasons, the challenged law, *see* 2 U.S.C. § 441c, does not violate the First Amendment. Accordingly, this Court should deny plaintiffs' motion for summary judgment, and grant summary judgment in favor of the FEC.

[23] 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).

Respectfully submitted,

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