UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WENDY E. WAGNER, *et al.*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, Defendant.	Civil Action No. 11-cv-1841-JEB OPPOSITION

DEFENDANT FEDERAL ELECTION COMMISSION'S OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Anthony Herman (D.C. Bar No. 424643)
General Counsel

David Kolker (D.C. Bar No. 394558)
Associate General Counsel

Harry J. Summers
Assistant General Counsel

Holly J. Baker
Attorney

Seth Nesin
Attorney

COUNSEL FOR DEFENDANT
FEDERAL ELECTION COMMISSION
999 E Street, NW
Washington, DC 20463
Telephone: (202) 694-1650
Fax: (202) 219-0260

March 1, 2012

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

Legislative Materials

Miscellaneous

Plaintiffs cannot justify the extraordinary remedy of a preliminary injunction to halt enforcement of a vital measure that Congress put in place more than 70 years ago to protect the integrity of the federal government and of federal elections. *First*, plaintiffs are unlikely to succeed on the merits of their constitutional challenge to the longstanding ban on contractors' contributions in 2 U.S.C. § 441c, because that provision is closely drawn to serve important government interests in deterring corruption and ensuring an effective and unbiased federal workforce. And since section 441c narrowly targets only campaign contributions — not contractors' other political activity or their fundamental rights, or the rights of any suspect class — it satisfies both the First Amendment and equal protection review.

Second, plaintiffs fail to demonstrate irreparable harm — which, by itself, defeats their effort to obtain preliminary injunctive relief. Plaintiffs freely chose their status as federal contractors in order to receive federal funds, and that status is not only voluntary but also temporary. Indeed, in less than *two weeks* after the hearing on this motion, the lead plaintiff's consulting contract will end — and section 441c will no longer restrict her contributions. The other two plaintiffs, who elected to enter into multi-year service contracts valued at more than $800,000 each, have been federal contractors subject to section 441c for years, belying any claim of an urgent need for relief.

Third, the relief plaintiffs seek would harm the public interest. Plaintiffs' effort to upset the status quo in the months leading up to a presidential election — because plaintiffs wish to set aside a condition of their status as federal contractors that they voluntarily assumed — should be rejected. Plaintiffs' motion should be denied.

BACKGROUND

A. The Parties

The Federal Election Commission ("Commission" or "FEC") is the independent agency

of the United States government with exclusive jurisdiction to administer, interpret, and civilly enforce the Federal Election Campaign Act of 1971, as amended ("FECA" or "Act"), 2 U.S.C. §§ 431-57. The Commission is specifically empowered to "formulate policy" with respect to the Act, 2 U.S.C. § 437c(b)(1); "to make, amend, and repeal such rules . . . as are necessary to carry out the provisions of [the] Act," 2 U.S.C. § 437d(a)(8); to issue advisory opinions construing the Act, 2 U.S.C. §§ 437d(a)(7), 437f; and to civilly enforce the Act, 2 U.S.C. § 437g.

Plaintiffs are three individuals who have *chosen* to enter into contracts with the federal government. Wendy E. Wagner is a law professor who agreed to a contract with the Administrative Conference of the United States ("ACUS"), beginning in March 2011 and ending on April 2, 2012, under which she will earn $12,000 to prepare a report and recommendations on the use of science by administrative agencies. (Plaintiffs' Amended Complaint ("Am. Compl.") ¶ 5 (Doc. No. 17); FEC Exhibit ("Exh.") 1; Plaintiffs' Statement of Points and Authorities in Support of Their Motion for Preliminary Injunction ("Pls' PI Br.") at 10-11 (Doc. No. 18-4).) Lawrence M.E. Brown entered into a two-year personal services contract, with three one-year option periods, as a human resources adviser with the United States Agency for International Development ("USAID"). That contract began in October 2011 and has a total estimated contract cost of $865,698. Brown has held personal services contracts with USAID since October 2006. (Am. Compl. ¶ 6; FEC Exh. 2 at 1, 6; Pls' PI Br. at 11-12.) Jan W. Miller is an attorney who executed a five-year personal services consulting contract with USAID that began in June 2010 and will end in June 2015; the total budgeted value of his contract is $884,151, although he works only part-time for USAID and also works part-time as an employee of the Peace Corps. (Am. Compl. ¶ 8; FEC Exh. 3; Pls' PI Br. at 12-13.)

B. Relevant Statutory and Regulatory Provisions

FECA restricts how much individuals can contribute to federal candidates, political

parties, and other political committees. *See* 2 U.S.C. § 441a(a).[1] FECA also prohibits corporations and labor organizations from making contributions, except through their separate segregated funds (also known as political action committees or PACs). *Id.* §§ 441b(a), (b)(2)(C). FECA defines "contribution" as "any gift, subscription, loan, advance, or deposit of money or anything of value made . . . for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i). In 1976, the Supreme Court generally upheld FECA's contribution limits against a facial challenge. *See Buckley v. Valeo*, 424 U.S. 1, 23-38 (1976) (per curiam).

FECA prohibits any person who is negotiating or performing a contract with the United States government or any of its agencies from making a contribution to any political party, political committee, or federal candidate. *See* 2 U.S.C. § 441c(a).[2] Section 441c(a)(2) prohibits any person from soliciting a contribution from a federal contractor during the period of the contract. *See also* 11 C.F.R. §115.2. The Commission has interpreted section 441c to apply only to contributions made in connection with federal elections, not state or local elections, 11 C.F.R. § 115.2, and to allow spouses of federal contractors to make contributions in their own names, 11 C.F.R. § 115.5. *See* Explanation and Justification ("E&J") Part 115 Federal Contractors,

---

[1] Currently, individuals may contribute $2,500 per election to each federal candidate, $30,800 annually to a national party committee, and an aggregate of $117,000 to all federal political committees in each two-year election cycle. *See id*.; Federal Election Commission, Contribution Limits for 2011-2012, http://www.fec.gov/info/contriblimits1112.pdf.

[2] 2 U.S.C. § 441c(a)(1) provides:

"(a) *Prohibition.* It shall be unlawful for any person —

(1) Who enters into any contract with the United States or any department or agency thereof either for the rendition of personal services or furnishing any material, supplies, or equipment to the United States or any department or agency thereof . . . , if payment for the performance of such contract or payment for such material, supplies, equipment . . . to be made in whole or in part from funds appropriated by the Congress, at any time between the commencement of negotiations for the later of (A) the completion of performance under; or (B) the termination of negotiations for, such contract or furnishing of material, supplies, equipment . . . , directly or indirectly to make any contribution of money or other things of value, or to promise expressly or impliedly to make any such contribution to any political party, committee, or candidate for public office or to any person for any political purpose or use[.]"

1977; 41 Fed. Reg. 35,963 (Aug. 25, 1976).

C. History of the Ban on Political Contributions by Federal Contractors

The prohibition on contributions by federal contractors has deep roots in our nation's history. Congress enacted the particular ban at issue here as part of the 1940 amendments to the Hatch Act of 1939, and it was codified originally at 18 U.S.C. § 61m-1 and later at 18 U.S.C. § 611 ("Contributions by Government Contractors").[3] The Hatch Act sought to ensure a merit-based federal workforce free of coercion or other improper political influence, following many decades of pernicious patronage and inadequate reform efforts. In 1972, the language of former 18 U.S.C. § 611 was incorporated, with minor modifications, into the Federal Election Campaign Act of 1971. The FECA provision was in turn amended in 1976 to include subsections (b) and (c), and the provision in its entirety was redesignated section 441c. *See* Section 322, Pub. L. 94-283 (1976), 90 Stat. 475. The language of the current 2 U.S.C. § 441c(a) is based closely on former 18 U.S.C. § 611.

The origins of the Hatch Act can be traced back to the beginning of the 19th century, and to efforts to establish a merit-based government workforce insulated from political influence. In 1801, President Jefferson issued an executive order stating that while it was the right of a federal officer to vote at elections, "it is expected that he will not attempt to influence the votes of others nor take part in the business of electioneering, that being deemed inconsistent with the spirit of the Constitution and his duties to it." *See* 86 Cong. Rec. 2434 (March 6, 1940) (statement of Sen. Hatch). *See also generally U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers* ("*Letter Carriers*"), 413 U.S. 548, 557-563 (1973).

In the aftermath of the Civil War, a civil service reform movement emerged and made

[3] Amendments to Hatch Act of 1939, 1940 Ed., § 61m-1 (July 19, 1940, c. 640, § 5, 54 Stat. 772), codified at 18 U.S.C. § 611 (originally 18 U.S.C. § 61m-1).

further efforts to substitute merit for party allegiance in government hiring. *See* S. Rep. 101-165, 1989 WL 222486, at *2 (1990); *Letter Carriers*, 413 U.S. at 557-58. In 1882, the Supreme Court upheld an 1876 statute making it illegal "to request [from], give to, or receive from, any other officer or employe[e] of the government any money, or property, or other thing of value, for political purposes." *Ex parte Curtis*, 106 U.S. 371, 372 (1882) (Bradley, J., dissenting). The majority opinion explained that this provision was similar to one "that passed in 1868, prohibiting members of [C]ongress *from being interested in contracts* with the United States." *Id*. at 373 (emphasis added). "The evident purpose of [C]ongress in all this class of enactments has been to promote efficiency and integrity in the discharge of official duties, and to maintain proper discipline in the public service." *Id*.

These post-Civil War efforts culminated in the Civil Service Act of 1883. *See Letter Carriers*, 413 U.S. at 558. Civil Service Rule I, one part of that Act, provided that "no person in the public service is for that reason under any obligations to contribute to any political funds, or to render any right to use his official authority or influence to coerce the political action of any person or body." 22 Stat. 404; S. Rep. 101-165 at *17. In 1907, President Roosevelt expanded the Civil Service Act's prohibition in an executive order, stating that "persons who by the provisions of these rules are in the competitive classified service, while retaining the right to vote as they please and to express privately their opinions on all political subjects, shall take no active part in political management or in political campaigns." S. Rep. 101-165 at *2; *Letter Carriers*, 413 U.S. at 558-59. And in 1925, the Corrupt Practices Act barred federal candidates from making any promise of employment in return for political support. 84 Cong. Rec. 9616.

Despite these early reform efforts, the goal of a nonpartisan merit-based federal workforce proved elusive. By 1934, for example, although the number of federal agencies had

increased to 60, only five of those agencies had been placed under the Civil Service Commission. S. Rep. 101-165 at *2. Instead, most agencies continued to be staffed through political patronage and the spoils system. *Id.*[4]

In 1939 Senator Carl Hatch introduced S. 1871, officially titled "An Act to Prevent Pernicious Political Activities," commonly referred to as the Hatch Act. S. Rep. 101-165 at *18; *Letter Carriers* at 560; 84 Cong. Rec. 9597-9600. The Hatch Act of 1939 adopted the language of both Civil Service Rule I and the Corrupt Practices Act, and expanded coverage to the entire federal service. *See* 86 Cong. Rec. at 2338, 2342 (statement of Sen. Hatch); 84 Cong. Rec., 9595, 9607, 9616. In particular, Congress sought to eliminate the aggressive political use of participants in federal work relief programs, including to promote the election of Democratic candidates in recent elections. *See Letter Carriers*, 413 U.S. at 565; 84 Cong. Rec. 9598, 9603-04, 9606, 9610; 86 Cong. Rec. 2625, 2582. These abuses included requiring "destitute women on sewing projects . . . to disgorge" part of their wages as political tribute or be fired (84 Cong. Rec. 9598), and requiring WPA workers to make contributions by depositing $3-$5 of their $30 monthly pay under the Democratic donkey paperweight on the supervisor's desk (*id.* at 9598).

The Hatch Act of 1939 and its 1940 amendments had two main purposes: to protect the federal workforce from being coerced into political activity and to establish a merit-based system rather than one based on political fealty. Thus, the amended Act barred government employees and contractors from making political contributions and also barred the solicitation of such contributions, protecting the employees and contractors from coercion. 84 Cong. Rec. 4191-92;

---

[4] *See* S. Hrg. 110-275 at 41, The Perils of Politics in Government: A Review of the Scope and Enforcement of the Hatch Act, Hearing Before the Oversight of Government Management, the Federal Workforce, and the District of Columbia Subcommittee of the Committee on Homeland Security and Governmental Affairs, United States Senate, October 18, 2007, http://www.access.gpo.gov/congress/senate.

86 Cong. Rec. 9496-97. The Hatch Act also prohibited offering any job or contract as a reward for political activity. 18 U.S.C. § 600 (Hatch Act of 1939) (53 Stat. 1147 § 3) (Pub. L. 76-252).

Concerns about federal *contractors* played a salient role in the Hatch Act's passage. Although the Senate passed the Hatch Act of 1939 unanimously, 84 Cong. Rec. 9610, 9613, the bill was hotly debated in the House, *id.* at 9594-9639, where bill supporter Congressman Ramspeck warned that what "is going to destroy this Nation, if it is destroyed, is political corruption, based upon traffic in jobs *and in contracts*, by political parties and factions in power." 84 Cong. Rec. 9616 (July 20, 1939) (statement of Rep. Ramspeck) (emphasis added). *See* Samuel Issacharoff, On Political Corruption, 124 Harv. L. Rev. 118, 138 (Nov. 2010) (just as public employees have a dual hold on public policy as both voters and government employees, "contractors engage the decision-making processes of elected officials in dual fashion, both as voters in the political arena and as entities having special relationships to the same government officials outside the electoral process").

The House debates were animated by the notorious "Democratic campaign book" scandal involving federal contractors, powerfully illustrating the need to protect individual government contractors from coercion. 84 Cong. Rec. 9598 (statement of Rep. Taylor). Representative Taylor explained (*id.* at 9599) that the "campaign-book racket" required contractors to buy books at inflated prices to assure that they would continue to receive government business:

> Thousands of books were printed and were supposed to have been autographed by . . . our present Chief Executive. Agents skilled in the art of high-pressure salesmanship were . . . . supplied with data as to the amount of business each material and equipment dealer and contractor had received, and the number of books each was expected to purchase was based on the amount of business he had enjoyed. Of course, this information was supplied by the heads of Government agencies.… [Each contractor was] reminded of the business he had received from the Government and the prospect of future favors was dangled before him. He was then shown the Democratic campaign book . . . and told that he was expected to purchase. The victim immediately expressed

> a willingness to buy a book, thinking, of course, that the price would certainly be nominal; but when he was told that he was expected to buy several books, the number varying in proportion to the amount of Government business he had enjoyed, and that the price of the book was only a measly $250 per copy, the victim's enthusiasm was greatly dampened. . . . It was just a subterfuge to levy cold-blooded blackmail, and the victims knew it, but there was no alternative if they expected to continue to get Government business.

Likewise, during debate on the 1940 amendments, federal contractors were viewed as similar to federal employees, and so both, some members of Congress argued, should be prohibited from making contributions and from active participation in politics. 86 Cong. Rec. 2575. Senator Brown, for example, went so far as to propose that stockholders and officers of corporations with contracts with any government entity should also be prohibited from making contributions. *Id.* Senator Brown summarized the partisan political concerns that would naturally motivate patronage workers and business entities seeking tax advantages, adding that he could "apply the same principle . . . to *contractors* who are doing business with the government of the United States." 86 Cong. Rec. 2580 (statement of Sen. Brown) (emphasis added). Senator Brown noted that government contractors *voluntarily* choose that status and that his amendment

> does not prohibit anyone from political activity, or from making political contributions, or from engaging in political management. Every man has the right so to conduct himself that he may be excepted from the provisions of the amendment by divesting himself of interest in a governmental financial benefit, just as every Government employee, if he desires to resign, may except himself from the provisions of the Hatch Act. The requirement of the amendment is that if a man's profits depend upon Government tariffs, *if he desires to continue a contract he has with the Government* or to borrow from it, he may not, by pernicious political activity, attempt to influence the Government.

86 Cong. Rec. 2616 (March 11, 1940) (statement of Sen. Brown) (emphasis added). Senator Brown's amendment was rejected after much debate, 86 Cong. Rec. 2627, but a similar version was reported out of the Judiciary Committee prohibiting "any person or firm entering into a contract with the United States . . . or performing any work or services for the Unites States . . . if

payment is to be made in whole or part from funds appropriated by Congress . . . to make such contribution to a political party, committee or candidate for public office or to any person for any political purpose or use." *See* H.R. Rep., No. 76-3, vol. 3, p. 12 (June 4, 1940), FEC Exh. 4. That provision became the predecessor of section 441c (*see supra* p. 4) and was upheld in *Letter Carriers*, 413 U.S. at 564.[5]

Concerns about the influence of contractors in the federal workforce and the potential for "pay-to-play" arrangements remain, especially as the use of contractors and the privatization of the federal workforce has expanded in the last two decades. In March 2009, President Obama issued an Executive Order directing the Office of Management and Budget ("OMB") to develop government-wide guidance on the use of government contracts: The Executive Order noted that the line between inherently governmental functions performed by government employees and private sector contractor functions had been "blurred," the amount spent on government contracts had grown to $500 billion per year by 2008, and agencies had placed "excessive reliance" on contracts.[6] Similarly, Congress has held hearings on concerns about the balance between government employees and contractors.[7] One Senator expressed frustration that the

---

[5] In 1978, a court upheld section 441c against a First Amendment challenge by a corporate contractor. *See FEC v. Weinsten and Winfield Mfg. Co.*, 462 F. Supp. 243, 249 (S.D.N.Y. 1978). The court relied primarily on its analysis of a challenge to the broader corporate contribution ban in section 441b, but also noted that "there is a *greater likelihood that the public will perceive corrupt relationships* between elected officials and corporations when those corporations have previously received Government contracts." *Id*. at 249 n.8 (emphasis added).

[6] *See* Memorandum [from President Obama] for the Heads of Executive Departments and Agencies — Subject: Government Contracting, Mar. 4, 2009, http://www.whitehouse.gov/the-press-office/memorandum-heads-executive-departments-and-agencies-subject-government-contracting.

[7] *See* S. Hrg. 111-626, Balancing Act: Efforts to Right-Size the Federal Employe[e]-to-Contractor Mix, , Hearing Before the Oversight of Government Management, the Federal Workforce, and the District of Columbia Subcommittee of the Committee on Homeland Security and Governmental Affairs, United States Senate, May 20, 2010, http://www.gpoaccess.gov/congress/index.html.

Committee could not even determine how large the federal contractor workforce had become, *id.* at 11-12, and witnesses testified that at some agencies more persons worked as or for government contractors than as federal employees, citing the Department of Homeland Security with approximately 188,000 civilian employees and 200,000 contractors, *id.* at 28,[8] and the United States Marshals Services with approximately 5,000 federal employees and 8,000 contractors, *id.* at 89.[9] As part of the 2010 Senate hearing, the Government Accountability Office commented:

> Inherently governmental functions require discretion in applying government authority or value judgments in making decisions for the government, and as such they should be performed by government employees, not private contractors. The closer contractor services come to supporting inherently governmental functions, the greater this risk of influencing the government's control over and accountability for decisions that may be based, in part, on contractor work.

S. Hrg. 111-626 at 60 (footnote omitted).

In sum, Congress and the Executive Branch have long considered regulation of both federal employees and contractors necessary to establishing a merit-based workforce free from political favoritism and coercion. A ban on contractors making federal campaign contributions is at the very core of the Congressional concern with integrity implemented in the provision challenged here in section 441c.

ARGUMENT

I. PLAINTIFFS CANNOT CARRY THEIR HEAVY BURDEN OF SHOWING THAT THEY ARE ENTITLED TO A PRELIMINARY INJUNCTION

A. The Requirements for a Preliminary Injunction

A preliminary injunction is "an extraordinary remedy that may only be awarded upon a

---

[8] In another estimate, DHS had approximately 230,000 federal employees and 210,000 contractors. S. Rep. 111-626 at 122.

[9] These figures appear not to distinguish between individuals who have direct contracts with the government and individuals who work for corporations or other entities that are government contractors.

clear showing that the plaintiff is entitled to such relief. . . . [It is] never awarded as of right." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22, 24 (2008) (citations omitted). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 20 (citations omitted). *See also Mills v. District of Columbia*, 571 F.3d 1304, 1308 (D.C. Cir. 2009). Not only must a plaintiff make a "clear showing" that the extraordinary remedy is necessary, but it is not enough to show "only a possibility of irreparable harm." *Winter*, 555 U.S. at 22 (citation omitted). Moreover, the D.C. Circuit has read the Supreme Court's decision in *Winter* "to suggest if not to hold 'that a likelihood of success is an independent, free-standing requirement for a preliminary injunction,'" regardless of whether a "sliding-scale analysis" is used to weigh the four factors. *See Sherley v. Sebelius*, 644 F.3d 388, 393 (D.C. Cir. 2011) (citation omitted).

Plaintiffs here shoulder a particularly heavy burden because their request is at odds with the purpose of a preliminary injunction, which "is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). Rather than seeking to preserve the status quo, plaintiffs seek to "upend" it by asking this Court to prevent the Commission from enforcing a statutory provision that has been in place for more than 70 years. *See Sherley*, 644 F.3d at 398. In fact, plaintiffs themselves, by virtue of their decisions to become federal contractors, appear to have been subject to the contribution ban for one or more years. As demonstrated below, plaintiffs have not met their heavy burden on any of the factors necessary for the Court to issue a preliminary injunction to stop the enforcement of 2 U.S.C. § 441c.

B. Plaintiffs Are Unlikely to Succeed on the Merits of Their First Amendment Claim

The contractor contribution ban in 2 U.S.C. § 441c survives First Amendment scrutiny because it is closely drawn to serve important government interests. First, like other limits on campaign contributions, it helps prevent "corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office," *Buckley*, 424 U.S. at 25. Second, like other restrictions on people who work for the government, it helps ensure that federal contracts are awarded on merit and that federal contractors are not coerced into political participation. These important government interests justify the relatively modest and temporary burden on the political expression of federal contractors, who have voluntarily chosen to seek federal funds and can engage in many other forms of political expression.

1. Courts Review Contribution Restrictions Under a "Relatively Complaisant" Standard That Requires Only That They Be Closely Drawn to Serve Important Government Interests

Statutory provisions like section 441c that merely restrict campaign contributions are reviewed under a more deferential standard of review than laws that restrict campaign-related expenditures for speech. *See, e.g.*, *Citizens United v. FEC*, 130 S. Ct. 876, 908-09 (2010) (discussing the two different standards of review for campaign finance restrictions); *Buckley*, 424 U.S. at 23 (same). The Supreme Court has flatly rejected the suggestion that plaintiffs make here (Pls' PI Br. at 16-18): that "strict scrutiny" applies to a provision like section 441c because it prohibits all contributions by contractors.

To the contrary, laws limiting campaign contributions receive a "relatively complaisant review under the First Amendment." *FEC v. Beaumont*, 539 U.S. 146, 161 (2003). The Court applies this more lenient standard because giving money to a candidate or a candidate's political

committee "lie[s] closer to the edges than to the core of political expression" in contrast to laws limiting campaign expenditures, which "impose significantly more severe restrictions on protected freedoms of political expression and association than do" laws limiting campaign contributions. *Id*.; *Buckley*, 424 U.S. at 23. Thus, a contribution limit or ban need not satisfy the "narrowly tailored" requirement of strict scrutiny, but instead "passes muster if it satisfies the lesser demand of being closely drawn to match a sufficiently important interest." *Beaumont*, 539 U.S. at 162 (quoting *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 387-88 (2000)) (internal quotation marks omitted); *see also Randall v. Sorrell*, 548 U.S. 230, 253 (2006) (plurality opinion) (applying "closely drawn" standard to contribution limit); *McConnell v. FEC*, 540 U.S. 93, 138 n.40 (2003) (same).

The Supreme Court has expressly held that this lower standard applies not only to contribution limits, but also to complete bans on contributions:

> [The would-be contributor] argues that application of the ban on its contributions should be subject to a strict level of scrutiny, on the ground that § 441b does not merely limit contributions, but bans them on the basis of their source. . . . [I]nstead of requiring contribution regulations to be narrowly tailored to serve a compelling governmental interest, a contribution limit involving significant interference with associational rights passes muster if it satisfies the lesser demand of being closely drawn to match a sufficiently important interest. . . . 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*.

Beaumont, 539 U.S. 161-62 (internal quotation marks and citations omitted; emphasis added) (reviewing 2 U.S.C. § 441b, which bans contributions by corporations).

Courts of appeals have recently applied this same relatively relaxed standard in reviewing state and local bans on contributions by contractors and lobbyists. *See Preston v. Leake*, 660 F.3d 726, 734-35 (4th Cir. 2011) (reviewing ban on contributions by lobbyists); *Green Party of*

Conn. v. Garfield, 616 F.3d 189, 199 (2d Cir. 2010) (reviewing bans on contributions by contractors and lobbyists).

Section 441c is entitled to particular deference because it applies to individuals (and entities) who have freely *chosen* to work for the federal government as contractors. *See Connick v. Myers*, 461 U.S. 138, 151 (1983) (quoting *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974) ("'[T]he Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs.'") (Powell, J., concurring)); *Waters v. Churchill*, 511 U.S. 661, 668 (1994) (quoting *Connick*, 461 U.S. at 142, and *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205,Will Cty., Ill.*, 391 U.S. 563, 568 (1968) ("a[] [government] employee's interest in expressing herself … must not be outweighed by any injury the speech could cause to 'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'")). In conducting this careful balancing of interests, the Supreme Court has "consistently given greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large." *Waters*, 511 U.S. at 673.

As plaintiffs stress, many government contractors are similar to government employees in important respects (Pls' PI Br. at 11, 12, 13-14, 21-22, 35 ("plaintiffs are, in essence, little more than government employees")). In recognition of this fact, the Court has extended this deference to review of speech restrictions on government contractors. *See Bd. of Cnty. Comm'rs, Wabaunsee Cnty., Kan. v. Umbehr*, 518 U.S. 668, 684-85 (1996) (applying deferential review of municipal action against trash hauling contractor because "[i]ndependent government contractors are similar in most relevant respects to government employees. . . . [T]he same form of balancing analysis should apply to each.").

2. The Government's Interest in Protecting the Integrity and Effectiveness of Its Workforce and Contractors Justifies Section 441c's Ban on Contributions by Those Who Choose Contractor Status

Section 441c plainly serves "sufficiently important" government interests. *Beaumont*, 539 U.S. at 162. As discussed *supra* pp. 4-9, section 441c was originally part of the 1940 amendments to the Hatch Act, which was enacted to regulate political activity by federal employees after rampant patronage and corruption had undermined trust in the government's workforce and led to the coercive use of that workforce in electoral politics. In *Letter Carriers*, the Supreme Court rejected a challenge to the Hatch Act's prohibition on "active participation in political management or political campaigns" by federal employees in the executive branch, 413 U.S. at 551, and that statute had greater restrictions on political activity than the "marginal" burden on speech caused by a contribution limit, *McConnell*, 540 U.S. at 138.[10]

In upholding these Hatch Act restrictions, *Letter Carriers* identified several "obviously important interests" that section 441c also advances. 413 U.S. at 564. The Court found that the Act's restrictions combat corruption and bias, noting that employees should act "without bias or favoritism for or against any political party or group or the members thereof" and that "the rapidly expanding Government work force should not be employed to build a powerful, invincible, and perhaps corrupt political machine." *Id.* at 565. The Court found that the statute also served the distinct interest in avoiding even the *appearance* of corruption and bias, since federal employees must "appear to the public to be avoiding [practicing political justice], if

[10] Under the Hatch Act, federal employees in the executive branch were prohibited from, among other things: "[o]rganizing or reorganizing a political party organization or political club"; "soliciting … contributions, or other funds for a partisan political purpose"; "[e]ndorsing or opposing a partisan candidate for public office or political party office in a political advertisement"; "[a]ddressing a convention, caucus, rally, or similar gathering of a political party in support of or in opposition to a partisan candidate for public office or political party office"; and "[i]nitiating or circulating a partisan nominating petition." *Letter Carriers*, 413 U.S. at 576 n. 21 (quoting 5 C.F.R. § 733.122).

confidence in the system of representative Government is not to be eroded to a disastrous extent." *Id.* And a third interest "as important as any other" was ensuring that civil service jobs were obtained and kept based on merit, not politics. *Id.* at 566. The Court explained that the restrictions were necessary to "make sure that Government employees would be free from pressure and from express or tacit invitation to vote in a certain way or perform political chores in order to curry favor with their superiors rather than to act out their own beliefs," adding that "federal service should depend upon meritorious performance rather than political service, and that the political influence of federal employees on others and on the electoral process should be limited." *Id.* at 566, 557. The Court found it significant that, although certain activities were restricted, the employee "retains the right to vote as he chooses and to express his opinion on political subjects and candidates." *Id.* at 575-76.

Section 441c serves all of the important interests identified in *Letter Carriers*, and similarly preserves alternative means of political expression for contractors (*see infra* pp. 23-25). Just as federal employees should not be hired for reasons other than merit or subjected to political pressure from elected or politically appointed officials, so too should individuals with government contracts be insulated from political patronage or coercion. The risks are clear. In recent decades, contractors have played an increasingly important role in our federal system. *See supra* pp. 9-10. As plaintiffs emphasize (Pls' PI Br. at 11, 12, 13-14, 21-22, 35), individual contractors may work side-by-side with federal employees and, to a casual observer, may seem indistinguishable. Many personal service contracts with the government are quite lucrative — the contracts of two of the three plaintiffs in this case, for example, are multi-year contracts whose total potential value appears to exceed $800,000 each. *See supra* p. 2. And such contracts should be awarded based on merit.

The government also has an interest in assuring that federal contractors do not feel pressure, either explicit or implicit, to contribute to a particular candidate or political party to obtain or renew a contract. A deserving federal contractor should not be passed over for lack of a contribution or for contributing to the "wrong" party or candidate. By prohibiting all contractor contributions, section 441c advances this interest and prevents even the appearance that such political coercion or decision-making is taking place.[11]

Contrary to plaintiffs' claims (Pls' PI Br. 29-30), the concern that politics can infect the federal contracting process is well-founded, even when elected officeholders do not formally approve government contracts. Elected officials are not prohibited by law from suggesting or recommending contractors to an agency, and some do.[12] Even plaintiffs concede (*id*. at 30) that for "some large or important contracts" the "President or Members of Congress may have a role

---

[11] In recent years, analogous concerns have arisen with respect to whether some federal employees may have been hired based on political beliefs rather than merit. *See, e.g.*, Department of Justice Inspector General/Office of Professional Responsibility Report on An Investigation of Allegations of Politicized Hiring by Monica Goodling and Other Staff in the Office of the Attorney General, http://www.justice.gov/oig/special/s0807/final.pdf (investigating pervasive politicization of hiring in the Department of Justice). The danger of such politicization may be more serious for potential federal contractors than federal employees because of additional civil service protections available to federal employees.

[12] *See* Morton Rosenberg and Jack Maskell, Congressional Intervention in the Administrative Process: Legal and Ethical Considerations, Congressional Research Service, Sept. 25, 2003, http://www.fas.org/sgp/crs/misc/RL32113.pdf, at 80 ("Depending on the nature of communications ... the intervention of a congressional office in a procurement procedure to attempt to 'influence' the letting of a contract by a federal agency based on terms or factors other than those which the agency may properly consider may involve conduct contrary to proper federal contracting principles and administration, as well as general ethical precepts. If a Member of Congress does wish to communicate with an agency on behalf of a business or individual in his or her district or State, it is sometimes the practice to provide a letter of introduction for the constituent business entity or individual, to ask for fair and prompt consideration in the award of the contract or contracts, to request to be kept informed of the process and, if the Member or the Member's staff knows or has experience with the individuals involved in the business personally, the office may also choose to vouch for the character and reputation of the business in the community. In some cases it may be appropriate to arrange for interviews or appointments with officials of a federal agency.") (citations omitted).

in the procurement process," yet they offer no principled alternative to the line Congress has drawn to eliminate political considerations in government contracting decisions.

Moreover, even when elected officeholders have no direct involvement in federal contracting, the danger of bias and coercion exists because political appointees are ubiquitous in government. The majority of agency officials who award and oversee contracts pursuant to 48 C.F.R. § 1.601(a) are political appointees who owe their own jobs to the Administration; many were previously employed as campaign operatives.[13] A political appointee seeking to reward political loyalty could be tempted to award or renew contracts only for those who make contributions to a favored candidate or party. *Cf., e.g., McConnell,* 540 U.S. at 146-47 & n.46 (describing how indirect influence on a variety of government decision-makers was gained by making "soft money" donations to political parties); *id.* at 148 n.47 (describing how political opponents used FEC reports to pressure donors to give to both major parties).[14]

In sum, several important government interests are well-served by section 441c's modest restriction on federal contractors' political activity.

3. Recent Experience at the State and Local Level Has Reinforced the Government Interest in Combating Corruption and Its Appearance in Connection with Government Contracts

Recent federal appellate decisions have relied on the government's interest in combating

---

[13] The 2008 edition of the Government Printing Office's "Plum Book" listing political positions contained about 8,000 such positions in the executive and legislative branches. U.S. Senate, Committee on Homeland Security and Government Affairs, S. Prt. 110-36, Policy and Supporting Positions (2008); *see* Lois Romano, The Plum Book: Washington's Hottest Read, Washington Post, Nov. 7, 2008.

[14] Contrary to the plaintiffs' suggestion that only concerns about corruption or its appearance can justify FECA restrictions (Pls' PI Br. at 28-29), protecting the integrity of the federal government from improper outside influence has been deemed an adequate basis, by itself, to justify a complete ban on contributions by certain individuals. *See Bluman v. FEC,* 800 F. Supp. 2d 281, 292 (D.D.C. 2011) (upholding ban on foreign national contributions in 2 U.S.C. § 441e), *aff'd,* 132 S. Ct. 1087 (2012).

corruption and bias in upholding state laws that, like section 441c, limit contributions from contractors and lobbyists. In *Green Party*, 616 F.3d at 189, the Second Circuit upheld a recently enacted ban on campaign contributions by Connecticut government contractors. The court found that the law was "designed to combat both actual corruption and the appearance of corruption caused by contractor contributions" in response to a series of scandals in which "contractors illegally offered bribes, 'kick-backs,' and campaign contributions to state officials in exchange for contracts with the state." *Id.* at 200. Noting that the Supreme Court had repeatedly recognized that "laws limiting campaign contributions can be justified by the government's interest in addressing both the 'actuality' and the 'appearance' of corruption," *id.* (citing *Buckley*, 424 U.S. at 26, and *McConnell*, 540 U.S. at 143), the Second Circuit concluded that the state's ban on contractor contributions "furthers 'sufficiently important' government interests," *id.* (quoting *Beaumont*, 539 U.S. at 162).

Similarly, in *Preston*, 660 F.3d at 726, the Fourth Circuit upheld a law prohibiting contributions from registered lobbyists in North Carolina. The court pointed to the "rational judgment" that the law was needed "as a prophylactic to prevent not only actual corruption but also the appearance of corruption in future state political campaigns." *Id.* at 736. The court explained that "'[c]ourts simply are not in the position to second-guess' [legislative judgments] especially 'where corruption is the evil feared.'" *Id.* (quoting *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 716 (4th Cir. 1999), and *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 210 (1982)). The Fourth Circuit recognized that "[o]ne can hardly imagine another interest more important to protecting the legitimacy of democratic government." *Id.*

And in *Ognibene v. Parkes*, Nos. 09-994; 09-1432, 2012 WL 89358 (2d. Cir. Jan. 12, 2012), the Second Circuit addressed a law, passed in the wake of a series of scandals, that

imposed more restrictive limits on political contributions from individuals who were "doing business" with New York City. *Id.* at *3. The court reiterated that "eliminating corruption or the appearance thereof is a sufficiently important governmental interest to justify the use of closely drawn restrictions on campaign contributions." *Id.* at *8.

The important governmental interest in addressing the *appearance* of corruption is distinct and exists even where the risk of actual corruption is low, because that perception threatens the public's faith in democracy. *See Shrink Missouri*, 528 U.S. at 390 ("Leave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance."); *Buckley*, 424 U.S. at 26-27. Similarly, the decision in *Green Party* explained that a statute banning contractor contributions — even small ones — could be upheld as an effort to combat the appearance of corruption even if the law could not be justified as an anti-corruption measure:

> 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. … [The statute's] *ban* on contractor contributions … unequivocally addresses the perception of corruption brought about by Connecticut's recent scandals. By totally shutting off the flow of money from contractors to state officials, it eliminates any notion that contractors can influence state officials by donating to their campaigns.

Green Party, 616 F.3d at 205.[15]

Ognibene also noted that it is "not necessary to produce evidence of actual corruption to

[15] Plaintiffs wrongly argue (Pls' PI Br. at 32-33) that section 441c is more akin to the ban on contributions by minors struck down in *McConnell* than the statute at issue in *Green Party*. The Court in *McConnell* explained, however, that there was "scant evidence" that parents had used their minor children as conduits to circumvent the Act's contribution limits (540 U.S. at 231-32), and the government did not argue that contributions from children had created a serious risk of the appearance of corruption. The government interest in protecting the integrity of its workforce and contracting expenditures is strongly supported by the history of the Hatch Act and wholly different in kind from the danger of corruption presented by minors' contributions.

demonstrate the sufficiently important interest in preventing the appearance of corruption." 2012 WL 89358, at *6 (citing *McConnell*, 540 U.S. at 150). "[I]f every case of apparent corruption required a showing of actual corruption, then the former would simply be a subset of the latter, and the prevention of actual corruption would be the only legitimate state interest for contribution limits." *Id.* at *10; *see also McConnell*, 540 U.S. at 153.[16]

4. Section 441c Is Closely Drawn

Section 441c is closely drawn to serve important government interests. It is a viewpoint-neutral financing restriction that simply bars contributions by those who choose to enter into federal contracts, while leaving them many alternative means of political expression. Plaintiffs concede that a ban on contractor contributions might be appropriate in some situations (Pls' PI Br. at 29-30), but they contend that section 441c is not closely drawn because the government's interests are not served by a ban applied to plaintiffs or other individuals. The standard of judicial review for contribution restrictions like section 441c, however, affords substantial deference to legislative judgment and does not require Congress to use the least restrictive means available.

To demonstrate that section 441c is closely drawn, the government need not show that the provision has actually prevented actual corruption or that every individual affected by the provision would likely cause corruption. *See Buckley*, 424 U.S. at 29. Such a standard would be nearly impossible to meet. Federal contractors have been prohibited from making contributions for more than 70 years, so recent proof of its effectiveness may be difficult to find. *See FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 457 (2001) ("Since there is no recent

[16] Plaintiffs argue (Pls' PI Br. at 30-31) that the law reviewed in *Green Party* was upheld only because of the history of corruption in Connecticut, but that view of the case was specifically rejected by the same appellate court just two years later. *Ognibene*, 2012 WL 89358, at *10 ("to require evidence of actual scandals for contribution limits would conflate the interest in preventing actual corruption with the separate interest in preventing apparent corruption"). In any event, section 441c originated in Hatch Act restrictions designed to combat a long history of federal corruption. *See supra* pp. 4-9.

experience with [certain unlawful campaign] spending, the question is whether experience under the present law confirms a serious threat of abuse [if the activity were made lawful.] It clearly does. Despite years of enforcement of the challenged limits, substantial evidence demonstrates how candidates, donors, and parties test the limits of the current law. . .") (citing *Burson v. Freeman*, 504 U.S. 191, 208 (1992) (opinion of Blackmun, J.) (noting difficulty of mustering evidence to support long-enforced statues); *Citizens United*, 130 S. Ct. at 908 (contribution limits are preventative because the scope of quid pro quo corruption "'can never be reliably ascertained'" (quoting *Buckley*, 424 U.S. at 27)).

Congress is not required to wait until corruption occurs and becomes detectable before taking appropriate prophylactic measures to prevent it. *Ognibene*, 2012 WL 89358, at *10 ("Appellants essentially propose giving every corruptor at least one chance to corrupt before anything can be done, but this dog is not entitled to a bite."). And this Court may look to Connecticut and elsewhere in evaluating whether section 441c promotes government interests. *See Shrink Missouri*, 528 U.S. at 395 (state can look to other jurisdictions for evidence of potential corruption).

The comparable set of restrictions placed on federal employees is again instructive. In *United Public Workers of Am. v. Mitchell*, 330 U.S. 75, 101 (1947), the Supreme Court considered a challenge to the Hatch Act restrictions on political activity from a plaintiff who worked as a "roller in the Mint," a job that "does not involve contact with the public." The plaintiff argued that he should not be restricted because his particular job seemed unlikely to corrupt, but the Court rejected the argument (*id.*) (emphasis added):

> *For regulation of employees it is not necessary that the act regulated be anything more than an act reasonably deemed by Congress to interfere with the efficiency of the public service.* There are hundreds of thousands of United States employees with positions no more influential upon policy

> determination than that of [the plaintiff]. Evidently what Congress feared was the cumulative effect on employee morale of political activity by all employees who could be induced to participate actively. It does not seem to us an unconstitutional basis for legislation.

Plaintiffs also suggest (Pls' PI Br. at 38) that the contribution limits that generally apply to individuals would be sufficient to serve section 441c's purposes, but the situation of government contractors is plainly unlike that of the public at large, and the precise restriction needed is for Congress to determine, not the judiciary. *See Randall*, 548 U.S. at 248 ("[W]e have no scalpel to probe each possible contribution level. We cannot determine with any degree of exactitude the precise restriction necessary to carry out the statute's legitimate objectives. … Thus ordinarily we have deferred to the legislature's determination of such matters." (internal citations and quotation marks omitted)); *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 500 (1985); *Nat'l Right to Work Comm.*, 459 U.S. at 210; *Buckley*, 424 U.S. at 30.

a. Section 441c Allows Federal Contractors to Engage in Numerous Other Forms of Political Expression

Section 441c allows ample alternative forms of political expression for persons who elect to become federal contractors. Federal contractors are not prohibited from speaking about candidates, volunteering for campaigns, raising funds for candidates or parties, or engaging in numerous other activities in which they can express their views of candidates or public issues. *See* 2 U.S.C. § 431(8)(B); 11 C.F.R. §§ 100.74-100.77. Plaintiffs acknowledge that the purpose of this lawsuit is to enable them to "use their contributions to make public statements of support in this crucial election year" (Pls' PI Br. at 38), but plaintiffs retain the right to make "public statements of support" in many other ways, a fact that courts have considered critical in upholding contribution bans. *See, e.g.*, *Blount v. SEC*, 61 F.3d 938, 944-48 (D.C. Cir. 1995) (regulation barring contributions by finance professionals to state officials with whom they do

business is "closely drawn" because "the rule restricts a narrow range of their activities for a relatively short period of time. … [M]unicipal finance professionals are not in any way restricted from engaging in the vast majority of political activities."); *Preston*, 660 F.3d at 740 (ban on lobbyist contributions is closely drawn because lobbyists can still "volunteer with campaigns, … display[] signs or literature … engage in door-to-door canvassing and contribute other time to get the vote out … attend a fund raiser on behalf of a candidate, … host a fund raiser … make speeches, telephone calls, and arrange meetings between the candidate and third parties for purposes of fundraising"); *Casino Ass'n of La. v. State*, 820 So. 2d 494, 509 (La. 2002) (state statute barring campaign contributions by those in casino industry was "closely drawn" because it "focus[ed] precisely on the problem of campaign contributions by the gaming industry").[17]

When the Supreme Court has reviewed various restrictions on those seeking government funds, it has found it critical whether they have other ways to achieve their goals. *See Rust v. Sullivan*, 500 U.S. 173, 196 (1991) (upholding law barring use of public funds for abortions because grantee "can continue to perform abortions, provide abortion-related services, and engage in abortion advocacy; it simply is required to conduct those activities through programs that are separate and independent from the project that receives Title X funds."); *Regan v. Taxation Without Representation of Wash.*, 461 U.S. 540, 545-46 (1983) (upholding law excluding lobbying organizations from certain tax-exempt status because they remained free "to receive deductible contributions to support ... nonlobbying activit[ies]. … Congress has not

[17] Plaintiffs rely (Pls' PI Br. at 31-32) on *Dallman v. Ritter*, 225 P.3d 610 (Colo. 2010), to argue that section 441c is not closely drawn, but the Colorado statute at issue there involved a prohibition on contributions to state and local officials of "over three thousand special districts within the state" and thus applied to thousands of elected officials such as school board members and county commissioners. *Id*. at 627. The Supreme Court of Colorado itself distinguished 2 U.S.C. § 441c as applying "only to members of Congress, the President, and the Vice President, thus tailoring its restrictions to individuals with oversight responsibility." *Id.* at 628.

infringed any First Amendment rights or regulated any First Amendment activity[; it] has simply chosen not to pay for [appellee's] lobbying.").

By regulating only contributions, Congress has carefully drawn section 441c to address the financial activity it deemed most likely to influence officeholders, leaving contractors a very broad range of alternative means of political expression. *See McConnell*, 540 U.S. at 138 (holding that contribution limits "have only a marginal impact on the ability of contributors . . . to engage in effective political speech" but limit contributors' ability "to influence federal elections, federal candidates, and federal officeholders"). Indeed, the alternatives available to plaintiffs are far more expressive than the largely symbolic act of making a contribution.[18]

b. Federal Contractors Have Voluntarily Chosen the Benefits of Their Contracts, and They Can Easily Avoid Section 441c by Not Accepting Federal Funds

Section 441c is also closely drawn because it does not compel any individual to become a federal contractor or to forego making contributions. When persons who wish to receive government funds have an alternative to complying with a regulation, then the decision to comply is not an act compelled by the government, even if their constitutional rights might have been infringed if compliance had been mandatory. In *Buckley*, the Supreme Court ruled that the campaign expenditure limitations for presidential candidates receiving public funding did not

[18] Section 441c is also consistent with the First Amendment because it is viewpoint neutral. "The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995). Section 441c applies no differently to any viewpoint; rather, it simply prohibits all contributions by contractors. *See Hill v. Colorado*, 530 U.S. 703. 723-25 (2000) (holding that statute limiting protests at abortion facilities drew no distinctions between types of speech and so was viewpoint neutral); *Ruggiero v. FCC*, 317 F.3d 239, 244 (D.C. Cir. 2003) (en banc) (rejecting argument that regulation applying only to unlicensed broadcasters was viewpoint discrimination: "[T]he [regulation] applies equally to all unlicensed broadcasters regardless of the motivation for, or the message disseminated by, their illegal broadcasting.").

violate the First Amendment because the candidates could choose to decline public funding altogether and thereby avoid the otherwise unconstitutional expenditure restrictions. 424 U.S. at 57 n.65; *cf. Preston*, 660 F.3d at 740 (upholding lobbyist ban in part because "[plaintiff] freely chose to become a registered lobbyist, and in doing so agreed to abide by a high level of regulatory and ethical requirements focusing on the relationship of lobbyist and public official"). Similarly, the Supreme Court has held that the Fifth Amendment rights of college students who had not registered for the draft were not infringed by financial aid form questions asking their draft status because students could simply choose not to apply for financial aid at all. *Selective Serv. Sys. v. Minn. Pub. Interest Research Group*, 468 U.S. 841, 856-57 (1984); *see also Lyng v. Int'l Union*, 485 U.S. 360 (1988) (First Amendment rights of striking workers were not infringed by law exempting strikers from obtaining food stamps, because they were not compelled to apply for food stamps); *Wyman v. James*, 400 U.S. 309, 317-18, 324 (1971) (Fourth Amendment rights of welfare recipients were not infringed by required home visits by social workers, because recipients were not required to continue receiving aid).

Plaintiffs and other individuals can easily avoid the restriction in section 441c. They need only choose not to seek federal funds through federal contracts.

c. Section 441c Is Not Underinclusive

Plaintiffs argue that the prohibition in 441c is underinclusive and therefore not "closely drawn" because it prohibits contributions from federal contractors but does not similarly restrict contributions from recipients of grants, loans, or admission to military academies. (Pls' PI Br. at 36-37.) But Congress is not required to address every conceivable issue. Rather, it is permitted to address the problems it perceives as the most egregious.

The D.C. Circuit rejected a similar argument in *Blount*. In a challenge to a statute barring municipal securities professionals from contributing to the campaigns of state officials with whom they did business, the plaintiff argued that the provision did not prevent "*all* possible methods by which underwriters may curry favor" nor apply to "chief executive officers of banks with municipal securities departments or subsidiaries." 61 F.3d at 946. The court rejected this argument and explained:

> [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. The First Amendment does not require the government to curtail as much speech as may conceivably serve its goals. . . . [W]ith regard to First Amendment underinclusiveness analysis, neither a perfect nor even the best available fit between means and ends is required.

Id. (citations and internal quotation marks omitted); *see also Ruggiero*, 317 F.3d at 246 (rejecting argument that FCC regulation was underinclusive because it only prohibited "broadcast pirates," but not other criminals, from receiving FCC licenses).[19]

C. Plaintiffs Are Unlikely to Succeed on the Merits of Their Equal Protection Claim

Contrary to plaintiffs' contention, section 441c satisfies the Equal Protection guarantee of the Fifth Amendment. The Court reviews plaintiffs' equal protection challenge under the "rational basis" standard because section 441c concerns no fundamental rights. Section 441c satisfies that review because it involves complex legislative judgments about how to regulate government contractors and treats them rationally in light of their role in carrying out government functions.

---

[19] Plaintiffs also suggest that the additional restriction on spouses of contractors making contributions in the law reviewed in *Green Party* was "a help, not a hindrance, to upholding the law because it supported the stated purpose of the statute, rather than undermining it." (Pls' PI Br. at 31.) The *Green Party* opinion says no such thing. *See* 616 F.3d at 203-04 (upholding ban on spousal contributions without any suggestion that the statute would not be upheld without it).

1. Plaintiffs' Equal Protection Claim Is Subject to Highly Deferential Review Under the Rational Basis Standard

In the absence of a fundamental right or a suspect class, courts use the deferential "rational basis" standard in reviewing claims that legislation violates the Constitution's guarantee of equal protection, whether made under the Equal Protection Clause of the Fourteenth Amendment or the Due Process Clause of the Fifth Amendment. *See, e.g.*, *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313-15 (1993); *Heller v. Doe*, 509 U.S. 312, 320 (1993); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461 (1981).

Under this highly deferential standard, a court is not to judge the "wisdom, fairness, or logic of legislative choices." *Beach Commc'ns*, 508 U.S. at 313. Instead, "those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Clover Leaf Creamery*, 449 U.S. at 464 (quoting *Vance v. Bradley*, 440 U.S. 93, 111 (1979)). Plaintiffs attacking a legislative classification on rational-basis review have the burden "to negative every conceivable basis which might support it." *Beach Commc'ns*, 508 U.S. at 315 (citation and quotation marks omitted); *see also Heller*, 509 U.S. at 321 ("[C]ourts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it 'is not made with mathematical nicety or because in practice it results in some inequality.'" (quoting *Dandridge v. Williams*, 397 U.S. 471, 485 (1970))).

A statute challenged for violating equal protection is analyzed under strict scrutiny only if the law "operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973). Plaintiffs do not argue here, nor could they, that federal

contractors make up a "suspect class" akin to a racial minority. Their argument for strict scrutiny therefore hinges on whether making campaign contributions constitutes a "fundamental right." It does not. Giving money to a candidate or political committee is plainly not such a right, and no court has ever held otherwise. Plaintiffs themselves repeatedly acknowledge that the cases upon which they rely did not even contemplate equal protection arguments.[20]

In two cases that are on point, courts not only declined to apply strict scrutiny, but rejected equal protection arguments — disposing of them in footnotes. In *Blount*, the D.C. Circuit considered a law prohibiting contributions from municipal securities professionals to political campaigns of certain state officials. The petitioner argued, among other claims, that the law "violates … the due process clause of the Fifth Amendment" with its "disparate treatment" because it applied to municipal securities professionals but not to "bank officers and bank-controlled political action committees." 61 F.3d at 946 n.4. The court found it "unnecessary to evaluate this contention" because the "Fifth Amendment requires only that the government have a *rational basis* for its distinction … and rational-basis review requires, if anything, less 'mathematical nicety' … than the First Amendment requires." *Id.* (quoting *Vance*, 440 U.S. at 109) (emphasis added). And in *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), claimants argued that a state law restricting political activity by state employees violated the Equal Protection Clause "by singling out classified service employees for restrictions on partisan political

---

[20] *See, e.g.*, Pls' PI Br. at 18 ("Although the Supreme Court has had several cases challenging limits on campaign contributions, it has not analyzed them under the Equal Protection Clause."); *id*. at 19 ("But in none of these cases [*Buckley*, *Randall*, *Beaumont*, *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986), and *McConnell*] did the Court discuss the issue in terms of the appropriate Equal Protection standard of review."); *id*. at 26 n.6 (re *Green Party*); *id*. at 34 (re *Ognibene*); *id*. at 35 (re *Preston*). *Buckley* addressed one equal protection argument — that the presidential public financing scheme discriminated against "minor parties" by providing them with less funding than major parties — but the Court rejected the argument, applying less than "exacting scrutiny." 424 U.S. at 93-94.

expression while leaving unclassified personnel free from such restrictions." *Id.* at 607 n.5. The Supreme Court rejected the argument and explained that "the legislature must have some leeway in determining which of its employment positions require restrictions on partisan political activities and which may be left unregulated." *Id.* The Court's cursory treatment of the claim forecloses any credible suggestion that it applied strict scrutiny.[21]

Moreover, the Supreme Court has identified only a small group of "fundamental rights" whose regulation requires strict scrutiny in equal protection analysis. For example, the Court has applied strict scrutiny to statutes that discriminate in voting, because the right to vote "is preservative of other basic civil and political rights." *See Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 626 (1969); *see also Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (applying higher level of scrutiny in striking down Alabama apportionment scheme that gave voters in rural areas more representatives per capita than urban voters).

Plaintiffs argue that contributing to candidates and their political committees should be treated similarly to voting (Pls' PI Br. at 27), but such contributions "lie closer to the edges than to the core of political expression," *Beaumont*, 539 U.S. at 161, and thus cannot amount to a fundamental right protected by the Constitution. Moreover, the Supreme Court has refused to extend the narrow category of "fundamental rights," even to important interests that are related to specific rights enumerated in the Constitution. For example, in *San Antonio Independent School District*, 411 U.S. at 17, the Court upheld under rational basis review a Texas law that provided unequal resources to different school districts, rejecting the claim that education constituted a fundamental right because of its importance and relationship with other rights, such

[21] Plaintiffs argue that the "closest factual case" to theirs (Pls' PI Br. at 19) is the portion of *McConnell* that struck down a prohibition on contributions by minors, 540 U.S. at 232, but as plaintiffs themselves acknowledge (*id.*), that ruling was based on the First Amendment. *See supra* p. 20 n.15.

as the right to vote.[22]

In short, plaintiffs' contention that Congress's decision to ban federal campaign contributions by persons who elect to accept federal funds as contractors offends the Equal Protection Clause is subject to rational basis review. It can only be struck down if plaintiffs can demonstrate to the Court that Congress's judgment was not reasonable.[23]

2. The Line Congress Drew Is Rational – the Court Should Defer to Congress Regarding the Precise Restrictions Appropriate for Those Who Perform Government Work

The Supreme Court has noted that it has "no scalpel to probe" specific limits on contributions. *Buckley*, 424 U.S. at 30; *see also Randall*, 548 U.S. at 248 ("We cannot determine with any degree of exactitude the precise restriction necessary to carry out the statute's legitimate objectives."). The Court has recognized that "the legislature is better equipped to make such empirical judgments … ." *Randall*, 548 U.S. at 248. Such deference is particularly appropriate here, where, under equal protection analysis, Congress's complex judgment about the varying restrictions appropriate for those who perform federal government work is subject to only

---

[22] The mere fact that campaign contributions include a symbolic speech component does not mean making them is a "fundamental right" for purposes of equal protection analysis. Speech restrictions that are viewpoint neutral, like section 441c, receive rational basis review when challenged on equal protection grounds. *See McGuire v. Reilly*, 260 F.3d 36, 49-50 (1st Cir. 2001) (upholding restriction on speech outside abortion clinics against equal protection challenge under rational basis review); *cf. Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 102 (1972) (applying higher level of scrutiny to statute that prohibited all protests except labor picketing near a school because "the discrimination among pickets is based on the content of their expression").

[23] Plaintiffs suggest that the Court can rule on a "more narrow ground" by relying on the Equal Protection Clause rather than the First Amendment. (*See* Pls' PI Br. at 18.) But plaintiffs do not explain how such reliance would be narrower. *See DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 411 n.7 (6th Cir. 1997) ("In cases such as this [law regulating adult establishments], the Equal Protection Clause adds nothing to the First Amendment analysis; if a sufficient rationale exists for the ordinance under the First Amendment, then the City has demonstrated a rational basis for the alleged disparate treatment under the Equal Protection Clause.") (citations omitted).

rational basis review.

As explained *supra* pp. 4-9, the precise restrictions on the political activities of government employees and contractors have evolved over more than a century, as Congress has reacted to recurring incidents of corruption and changes in the roles of government employees and contractors.

Plaintiffs argue that their work is similar to that of federal employees, who themselves perform a wide range of jobs and abide by different sets of Hatch Act restrictions, depending upon the agency they work for and how they were appointed. For example, currently 17 federal agencies are designated as "further restricted" under the Hatch Act.[24] An FEC lawyer who civilly enforces the FECA is subject to greater political restrictions (including contribution restrictions) than a Department of Justice lawyer who criminally enforces the statute, who in turn has greater restrictions than a lawyer in the Office of the Solicitor General, which defends FECA before the Supreme Court. 5 C.F.R. §§ 734.401, 734.413. These nuanced lines entail exactly the kind of legislative judgments that the courts have no "scalpel" to probe. *Buckley*, 424 U.S. at 30.

3. The Government Has a Rational Basis for Treating Federal Contractors Differently from Federal Employees

Plaintiffs argue that federal employees "are more favorably treated than are the plaintiffs regarding the making of contributions in federal elections" (Pls' PI Br. at 19), but making contributions is only one, largely symbolic form of political activity regulated by federal law. And plaintiffs do not demonstrate that, overall, federal employees are "more favorably treated." In fact, in some cases, federal employees are subject to more severe restrictions than federal

[24] Those agencies or agency divisions include, for example, the Federal Election Commission, Federal Bureau of Investigation, Central Intelligence Agency, Merit Systems Protection Board, Office of Special Counsel, and the Criminal Division of the Department of Justice. 5 U.S.C. § 7323(b)(2)(B).

contractors.

Unlike federal contractors, for example, federal employees are *not* permitted to solicit campaign donations or invite people to political fundraisers. *See* 5 C.F.R. § 734.303. And federal employees who work at "further restricted" agencies, other than those appointed by the President and confirmed by the Senate, are prohibited from other political speech, including addressing political party conventions or campaign rallies, endorsing candidates in political advertisements, or circulating partisan nominating petitions. 5 C.F.R. §§ 734.408-12. In addition to the above restrictions, FEC employees are prohibited from making certain campaign contributions. 5 C.F.R. § 734.413.

But even if campaign contributions are viewed in isolation, plaintiffs have not met their burden "to negative every conceivable basis which might support" treating federal contractors differently from federal employees. *See Beach Commc'ns*, 508 U.S. at 315 (citation omitted). Congress could have rationally concluded that the important government interests section 441c promotes (*see supra* pp. 15-18), including protecting workers from coercion, were already being served adequately with respect to federal employees, but that a ban on contributions was needed for contractors. Unlike federal contractors, federal employees are protected by the Merit Systems Protection Board ("MSPB"), an independent, quasi-judicial agency in the executive branch. *See* 5 U.S.C. §§ 1201-1209.[25] No similar agency is tasked with enforcing merit-based federal contracting.

[25] The MSPB has the power to hear and decide complaints when an agency is alleged to have violated the Merit System Principles articulated in the U.S. Code. 5 U.S.C. §§ 1214, 1215, 2301(b)(1)-(2). The law specifies that "[a]ll employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation" and that "[e]mployees should be … protected against … coercion for partisan political purposes … ." 5 U.S.C. §§ 2301(b)(2), (b)(8)(A).

4. The Government Has a Rational Basis for Treating Corporate Contractors Differently From Individual Contractors

Plaintiffs also argue that section 441c is unconstitutional because corporations, individuals associated with those corporations, and individuals who control LLCs with federal contracts all "are more favorably treated than are the plaintiffs regarding the making of contributions in federal elections." (Pls' PI Br. at 19.) Plaintiffs' argument is doubly flawed.

The Supreme Court has long acknowledged that "the 'differing structures and purposes' of different entities 'may require different forms of regulation in order to protect the integrity of the electoral process.'" *Nat'l Right to Work Comm.*, 459 U.S. at 210 (quoting *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 201 (1982))). "The governmental interest in preventing both actual corruption and the appearance of corruption" may be "accomplished by treating unions, corporations, and similar organizations differently from individuals." *Id.* at 210-11 (citations omitted). As *Buckley* noted in discussing FECA's disparate treatment of major and minor parties, "[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike … ." 424 U.S. at 97-98 (citation omitted).

But in this case, corporate contractors and individual contractors are treated almost identically. Both are prohibited from making campaign contributions. *See* 2 U.S.C. §§ 441b(a), 441c. If a corporation wishes to help support a candidate, it may establish a separate segregated fund and solicit money from its "stockholders and their families and its executive or administrative personnel and their families" for the purpose of making contributions. 2 U.S.C. §§ 441b(b)(4)(A)(i); 441c(b). Similarly, if an individual contractor wishes to help a candidate, she can solicit eligible persons to make direct contributions to that candidate. And, in any event, plaintiffs have not alleged that they would have an interest in creating a separate segregated fund to pool resources with other individuals. Rather, plaintiffs' stated desire is to contribute their

own money, which corporations — like government contractors — are also barred from doing.

Plaintiffs also argue that section 441c is unconstitutional because the "officers, directors, employees, and stockholders" of corporations with federal contracts are permitted to make campaign contributions. (Pls' PI Br. at 22.) Plaintiffs' argument runs counter to settled principles of corporate jurisprudence. It is beyond dispute that, as a matter of law, a corporation is a separate legal entity from the individuals who operate and own it. Corporate officers, directors, employees, and shareholders, for example, cannot in ordinary circumstances be held accountable for the debts or misconduct of the corporation. 1 William Meade Fletcher, Cyclopedia of the Law of Corporations § 25 (rev. ed. 2012).

Congress could have come to the reasonable conclusion that, for example, there is a lesser appearance of corruption when the entity receiving the government contract is different from the individual making the contribution. Congress easily could have concluded that there is a lesser risk of corruption, or appearance of corruption, when an employee or shareholder of a major federal contractor such as Boeing makes a contribution to a federal candidate compared to an individual who freely enters into a federal contract. Congress might have reached the conclusion that individual personal service contracts are small enough that their award might be influenced by an individual's contribution, but that it is unlikely that a corporate contract totaling millions of dollars would be steered in a particular direction merely because an employee or stockholder of that company made an individual contribution.

Finally, plaintiffs argue (Pls' PI Br. at 25-26) that section 441c violates the Equal Protection Clause because individuals can create a limited liability corporation ("LLC"), have the LLC contract with the government, and thereby avoid the prohibition on making individual

contributions.[26] Given this alternative way to structure one's contracting business, it is difficult to see how section 441c creates an unconstitutional burden. Establishing an LLC is not particularly onerous. For example, Maryland requires only a one-page form and payment of $141. *See* Md. State Dep't of Assessments and Taxation, Articles of Organization for LLC form and instructions, http://www.dat.state.md.us/sdatweb/artorgan.pdf.[27]

D. Plaintiffs Fail to Demonstrate Irreparable Harm

Plaintiffs utterly fail to meet their burden of demonstrating that they will likely suffer irreparable harm without the requested injunctive relief. *See Winter*, 555 U.S. at 22. Plaintiffs devote only *one paragraph* of their brief to allegations of irreparable harm, arguing that they wish to make contributions "in this crucial election year." (Pls' PI Br. at 38.) But a mere allegation of harm is insufficient for entry of a preliminary injunction, even in the First Amendment context. *See Elrod v. Burns*, 427 U.S. 347 (1976) (plurality opinion); *Christian Knights of the Ku Klux Klan Invisible Empire, Inc. v. District of Columbia*, 919 F.2d 148, 149-50 (D.C. Cir. 1990) (explaining that irreparable injury was caused when "First Amendment rights were totally denied by the disputed Government action"). Moreover, the presumption that irreparable harm occurs when a challenged regulation "directly limits speech," *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 301 (D.C. Cir. 2006), does not apply here, because the

---

[26] The facts underlying this claim are confusing. Plaintiffs argue that they are similarly situated to the LLC owners because it "makes no difference to the agency whether an individual has formed an LLC or enters a contract with the agency directly." (Pls' PI Br. at 25.) But plaintiffs also acknowledge that "[i]n all likelihood," USAID would not approve a contract with LLCs created by plaintiffs Miller or Brown, if they had them. (*Id.* at 26 n.7.)

[27] Plaintiffs argue that *Citizens United* foreclosed the argument that plaintiffs' rights are not infringed by having to establish an LLC to make contributions, because that decision stated that permitting corporations to use separate segregated funds was inadequate to protect their right to make expenditures. (*See* Pls' PI Br. at 26-27.) But *Citizens United* did not concern contributions, and FECA had prohibited corporations from using any money from their general treasuries for expenditures. Corporations that wish to make contributions must still establish PACs for that purpose. *See Beaumont*, 539 U.S. at 147-48.

challenged restrictions merely limit how much money plaintiffs can give, not their ability to speak.

1. Plaintiffs Voluntarily Became Federal Contractors, Control the Timing of That Status, and Delayed Seeking Emergency Relief

Plaintiffs' purported irreparable harm arises from their own choice to become federal contractors, not from coercive governmental action. Plaintiffs are experienced professionals who voluntarily chose to receive the benefits of doing business with the federal government and entered into contracts of limited duration. They are not irreparably harmed by accepting the consequences of their own financial choices. *See supra* pp. 25-26.

The ban on making contributions persists only as long as plaintiffs' contracts, so the restriction is temporary and completely within plaintiffs' control. The claim of irreparable harm falls particularly short for plaintiff Wagner, whose contract will shortly end on April 2, 2012. Wagner alleges that she "expect[s]" to be "offered other similar opportunities in the future" (Wagner Decl. ¶ 4 (Doc. No. 10-2)), but admits having "no short-term plans to seek another one from ACUS" (Pls' PI Br. at 39). The other two plaintiffs have chosen to work as federal contractors for years, but delayed filing suit until November 2011.[28]

When "an application for [a] preliminary injunction is based upon an urgent need for the protection of [a] Plaintiff's rights, a long delay in seeking relief indicates that speedy action is not required," *Quince Orchard Valley Citizens Ass'n, Inc. v. Hodel*, 872 F.2d 75, 80 (4th Cir.

[28] Plaintiffs provided evidence that the instant lawsuit has been in development since at least 2010. Declaration of Jonathan Tiemann ¶ 6 (Doc. No. 10-6). Plaintiff Brown has been aware of the federal contractor ban in section 441c since at least 2008, when he received an advisory opinion from the Commission explaining that the prohibition applied to his conduct. *See* FEC Advisory Opinion 2008-11, http://saos.nictusa.com/saos/searchao?SUBMIT=ao&AO=2787. Brown nonetheless signed another contract with USAID on September 30, 2011, shortly before filing this suit. *See* FEC Exh. 2.

1989) (internal quotation marks omitted), even when First Amendment rights allegedly are at issue. *See, e.g.*, *Anderson v. FEC*, 634 F.2d 3, 5 (1st Cir. 1980) (denying preliminary injunction when "[p]laintiffs did not commence this action until late in the campaign"); *Charlesbank Equity Fund II v. Blinds To Go, Inc.*, 370 F.3d 151, 163 (1st Cir. 2004) (plaintiff's "cries of urgency are sharply undercut by its own rather leisurely approach to the question of preliminary injunctive relief"); *Tenacre Foundation v. INS*, 78 F.3d 693, 695 n.2 (D.C. Cir. 1996) (finding preliminary injunction unwarranted when seven months elapsed in seeking the injunction).

2. Plaintiffs Have Alternative Avenues to Express Their Electoral Views

As explained *supra* pp. 23-25, section 441c leaves plaintiffs ample alternative ways to express their political views even while they are federal contractors. Besides being able to vote for the candidates of their choice, federal contractors may volunteer in a variety of ways to help candidates' campaigns, political parties, and other political committees. For example, they can directly participate in volunteer campaign activity for candidates of their choice, send emails and make phone calls expressing their views of candidates and political parties, discuss their political views with anyone they wish, put bumper stickers on their vehicles, wear campaign logo T-shirts, and erect yard signs. *See* 2 U.S.C. § 431(8)(B); 11 C.F.R. §§ 100.74-100.77.

3. The Preliminary Injunction Plaintiffs Seek Would Not Prevent Any Irreparable Harm and Would Provide at Most an Illusory Remedy

Although the gist of plaintiffs' *complaint* is that they seek a court order permanently declaring it lawful for them to make contributions, the *preliminary* relief they seek in the pending motion would not provide declaratory relief, even temporarily. Plaintiffs seek only an injunction against the Commission. Moreover, as explained below, even if they were to seek temporary declaratory relief, the Court cannot provide a preliminary ruling that would forever legalize contributions that plaintiffs might make before a final judgment in this case.

In their proposed order, plaintiffs merely seek to enjoin the Commission "pending a final judgment in this case . . . from enforcing 2 U.S.C. § 441c against the plaintiffs in this action, including referring any matter involving 2 U.S.C. § 441c and plaintiffs to the Department of Justice or any other agency of the United States for enforcement." ([Proposed] Order Granting Plaintiffs' Motion for a Preliminary Injunction) (Doc. No. 18-5 at 2)). But plaintiffs do not present any evidence that would support such relief. They do not allege, for example, that anyone has filed a complaint against them with the Commission, or that the Commission has taken any enforcement action against them or sent a referral to another agency. Nor do plaintiffs allege that any such action is imminent.

Even if the Commission were to begin an investigation or other enforcement action, such steps would not cause plaintiffs *irreparable* harm, and they have made no allegations to the contrary. Any potential expense associated with a prospective FEC enforcement proceeding would not constitute irreparable harm. The courts have long held that "the expense and annoyance" of agency proceedings do "not constitute irreparable injury," but are merely "part of the social burden of living under government." *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980) (internal citations and quotation marks omitted).[29] Thus, there is no factual or legal basis for granting the specific relief plaintiffs now seek.

The relief requested in plaintiffs' complaint, unlike the proposed order accompanying their pending motion, goes much further. Each plaintiff states that he or she would like to make federal campaign contributions but is "unwilling to make any such contribution absent a court order authorizing [him or her] to do so" (Am. Compl. ¶¶ 5, 7, 8), and the prayer for relief asks

[29] Moreover, if enforcement litigation were someday commenced against plaintiffs, they would then have a full opportunity to present their constitutional argument *de novo* to a federal court before they could be subject to any penalties. *See* 2 U.S.C. §§ 437g(a)(4)-(6).

that the Court "[d]eclare that 2 U.S.C. § 441c as applied to plaintiffs violates the Fifth and First Amendments to the Constitution" (*Id.* at 9 ¶ B). To the extent that plaintiffs are implicitly requesting such relief as the predicate for the injunction they now seek, the Court cannot provide it. At this stage, even if the Court were to decide that plaintiffs are likely to succeed on the merits, it could not *permanently* "authorize" the legality of any contributions plaintiffs might make during the pendency of a preliminary injunction. Any "preliminary declaratory relief" (if such relief even exists) concerning section 441c(a)'s constitutionality as applied to plaintiffs would thus be illusory. *See Alpha Capital Anstalt v. Ness Energy Int'l, Inc.*, No. 10-1218-D, 2011 WL 232393, at *12 (W.D. Okla. Jan. 24, 2011) (citing cases noting skepticism about whether "preliminary declaratory relief" is ever available); *Crowley Cutlery Co. v. U.S.*, 849 F.2d 273, 279 (7th Cir. 1988) ("The plaintiff in a declaratory-judgment action is not seeking immediate relief, and judges ought to be alert to the possibility that he may be trying to enlist them in a tactical maneuver undeserving of the expenditure of federal judicial resources.")

If the Commission eventually prevails on the merits before this Court or a higher court — or if a preliminary injunction were simply reversed on appeal — under the retroactivity doctrine the courts must treat any action taken by plaintiffs during the pendency of the preliminary injunction as governed by the law as determined in the final decision of the case. *See James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 532 (1991); *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97-98 (1993). Under that doctrine, if upon further review a court determines that a legislative enactment was in fact constitutional, it is applied as if it had always been in effect. "[A]n opinion announcing a rule of federal law ... 'appl[ies] retroactively to the litigants then before the Court.'" *Harper*, 509 U.S. at 97-98 (quoting *Beam*, 501 U.S. at 539 (opinion of Souter, J.)). Moreover, "when th[e] Court applies a rule of federal law to the parties before it,

that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." *Harper*, 509 U.S. at 97.

Because a preliminary injunction is by its very nature a temporary remedy meant to preserve the status quo, it does not create a permanent or appeal-proof blanket of immunity for actions taken during the period in which it is in effect. "Neither the terms of the preliminary injunction nor prior equity practice provides any support for an interpretation of the District Court's order as a grant of total immunity from future prosecution. More fundamentally, federal judges have no power to grant such blanket dispensation from the requirements of valid legislative enactments." *Edgar v. MITE Corp.*, 457 U.S. 624, 648-49 (1982) (Stevens, J. concurring).[30] *See also In re UAL Corp.*, 412 F.3d 775, 779-80 (7th Cir. 2005) (discussing various fact patterns that required the courts, upon reversing an incorrect injunction, to restore the correct state of affairs "which had been valid all along"); *Suster v. Marshall*, 149 F.3d 523, 527 (6th Cir. 1998) (citing Justice Stevens' concurrence in *MITE*); *Donaldson v. U.S. Dep't of Labor*, 930 F.2d 339, 346 (4th Cir. 1991) (parties' action during the period of the preliminary injunction "was taken under the manifest legal and practical risk that their underlying claim might ultimately fail on the merits, thereby exposing them to whatever remedy, other than the preventive one they had forestalled, might then be available") (footnote omitted).

In sum, plaintiffs have neither alleged nor demonstrated any irreparable harm from any hypothetical Commission enforcement action against them, and because "declaratory judgments

[30] Although Justice Stevens' concurrence was not joined by any other Justice, only Justices Marshall and Brennan, in dissent, expressed the view that the "injunction would have barred the Secretary from seeking either civil or criminal penalties for violations of the Act that occurred during [the] period" the preliminary injunction was in effect. *MITE Corp.*, 457 U.S. at 656 (Marshall, J. dissenting).

should . . . be denied when they would serve no useful and proper purpose," *Virginians Against a Corrupt Congress v. Moran*, 805 F. Supp. 75, 78 (D.D.C. 1992) (citation omitted), the Court should deny plaintiffs' implicit request to declare preliminarily that section 441c(a) is unconstitutional as applied to contributions they might make before a final judgment.

E. The Balance of Harms Weighs in Favor of the Commission and the Public

Enjoining the Commission from enforcing the federal contractor restriction in 2 U.S.C. § 441c would substantially injure the Commission and the public. Plaintiffs concede that the interests of the Commission and the public coincide, but they claim that an injunction would harm neither interest. (*See* Pls' PI Br. at 38.) However, "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers . . . injury." *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)*; see also Mylan Pharm., Inc. v. Shalala*, 81 F. Supp. 2d 30, 45 (D.D.C. 2000) ("It is in the public interest for courts to carry out the will of Congress and for an agency to implement properly the statute it administers.").

Moreover, the "presumption of constitutionality [that] attaches to every Act of Congress" is "an equity to be considered in favor of [the government] in balancing hardships." *Walters v. Nat'l Ass'n of Radiation Survivors*, 468 U.S. 1323, 1324 (1984) (Rehnquist, J., in chambers). That presumption "'is not merely a factor to be considered in evaluating success on the merits, but an equity to be considered in favor of [the government] in balancing hardships.'" *Bowen v. Kendrick*, 483 U.S. 1304 (1987) (Rehnquist, C.J., in chambers) (quoting *Walters*, 468 U.S. at 1324; bracketed words added). "[A] court sitting in equity cannot 'ignore the judgment of Congress, deliberately expressed in legislation.'" *U.S. v. Oakland Cannabis Buyer's Co-op.*, 532 U.S. 483, 497 (2001) (quoting *Virginia R. Co. v. Railway Emps.*, 300 U.S. 515, 551 (1937)).

The imminent harm to the public if the Commission cannot enforce the statutory ban against federal contractor contributions far outweighs plaintiffs' self-selected and temporary inability to make contributions. In these key months leading up to the presidential election, a lifting of the challenged statutory provision could undermine the public's confidence in the integrity of both the federal campaign finance system and the federal contracting process. The statutory provision at issue has been in effect for more than 70 years, reflecting Congress's judgment that it continues to serve vital government interests. The settled nature of regulatory activity involving section 441c counsels against halting enforcement of the provision without the benefit of plenary review. "Should this Court enter the injunction, the next [few] months of election law and enforcement would likely become a 'wild west' of . . . contributions without the challenged regulations in place." *Real Truth About Obama v. FEC*, No. 3:08-CV-483, 2008 WL 4416282, at *16 (E.D. Va. 2008) (denying motion for preliminary injunction) *aff'd*, 575 F.3d 342 (4th Cir. 2009), *vacated and remanded on other grounds*, 130 S. Ct. 2371 (2010).

Plaintiffs suggest (Pls' PI Br. at 38-39) that the only thing at stake here is the impact of contributions from three individuals in 2012, but that argument ignores both the power of precedent and the nature of the provision at issue. It is also at odds with their own complaint, which alleges that section 441c is unconstitutional not only as applied to plaintiffs, but also as applied to "other individuals who have contracts with the federal government." (Am. Compl. ¶ 19; *see also* Pls' PI Br. at 15, 22, 28.) A preliminary injunction here could set a precedent equally applicable to the hundreds of other personal service contractors plaintiffs allege work at USAID (*see* PI Br. at 13), not to mention thousands of contractors at other agencies. Plaintiffs offer no principled way to distinguish their own situations from those of other individual contractors. Even an injunction purportedly limited to the three plaintiffs could create significant

confusion and uncertainty as to the state of the law.

Moreover, plaintiffs' myopic view that isolated violations of federal statutes would cause no real harm would undermine FECA — and most other laws. Like other important prophylactic rules, section 441c would unravel if individuals could obtain as-applied exemptions by professing good intentions or noting that their exemptions, in isolation, might not appear to do much harm. The Supreme Court has rejected just such arguments. In *Buckley*, for example, the Court "assumed" that "most large contributors do not seek improper influence over a candidate's position or an officeholder's action." 424 U.S. at 29. The Court held, however, that the difficulty of isolating suspect contributions and Congress's interest in guarding against the inherent appearance of abuse justified universal application of the then-$1,000 individual contribution limit. *Id*. at 29-30.

More generally, the operation of prophylactic statutory rules cannot depend upon an in-depth analysis of the extent to which the interests underlying them are served in each particular situation. In *Hill v. Colorado*, 530 U.S. at 729, for example, the statute banned "unwelcome demonstrators" from coming closer than eight feet to people entering health care facilities. The Court recognized that the statute's "prophylactic approach . . . will sometimes inhibit a demonstrator whose approach in fact would have proved harmless." *Id*. The Court nonetheless upheld the statute, explaining that the very exercise of engaging in a case-by-case factual analysis would thwart the rule's effectiveness and limit free expression. *Id*.

Thus, the Commission need not show that plaintiffs' particular political contributions would lead to corruption or its appearance. Congress has adopted a bright-line rule, prohibiting contributions by all federal contractors because they undermine a government system based on merit and value, not political loyalty and coercion. Preventing enforcement of that rule is not in

the public interest.[31]

II. CONCLUSION

Plaintiffs cannot meet their heavy burden to justify a preliminary injunction. They have not shown that they are likely to prevail on the merits. Nor have they shown that the contribution ban — which applies to them because they freely elected to become federal contractors — will result in irreparable harm in the absence of a preliminary injunction. Finally, halting the Congressional ban on contributions by federal contractors offends the interests of the public and the Federal Election Commission. The Court should deny the motion.

Respectfully submitted,

Anthony Herman (D.C. Bar No. 424643)
General Counsel

David Kolker (D.C. Bar No. 394558)
Associate General Counsel

Harry J. Summers
Assistant General Counsel

Holly J. Baker
Attorney

/s/ Seth Nesin
Seth Nesin
Attorney

COUNSEL FOR DEFENDANT
FEDERAL ELECTION COMMISSION
999 E Street, NW
Washington, DC 20463
Telephone: (202) 694-1650
Fax: (202) 219-0260

March 1, 2012

[31] Plaintiffs have indicated that they may ask this Court to exercise its authority under Fed. R. Civ. P. 65(a)(2) to consolidate the hearing on the preliminary injunction with the trial on the merits. (*See* Pls' PI Br. at 15.) The Commission would oppose that approach because it would deprive the FEC of a chance to develop a factual record to support its theory of the case. Because a party is "not required to prove his case in full at a preliminary-injunction hearing …[,] … it is generally inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits." *Camenisch*, 451 U.S. at 395 (citations omitted).