ORAL ARGUMENT SCHEDULED OCTOBER 31, 2016

No. 16-5194

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LINDA HOLMES AND PAUL JOST,
Plaintiffs-Appellants,

v.

FEDERAL ELECTION COMMISSION,
Defendant-Appellee.

On Certification by the United States District Court for the District of Columbia, Case No. 1:14-cv-01243-RMC

BRIEF *AMICI CURIAE* OF CAMPAIGN LEGAL CENTER AND DEMOCRACY 21 IN SUPPORT OF DEFENDANT

Fred Wertheimer
DEMOCRACY 21
2000 Massachusetts Avenue, NW
Washington, DC 20036
(202) 429-2008

Donald J. Simon
SONOSKY, CHAMBERS, SACHSE
ENDRESON & PERRY, LLP
1425 K Street, NW, Suite 600
Washington, DC 20005
(202) 682-0240

J. Gerald Hebert,
ghebert@campaignlegalcenter.org
(D.C. Bar No. 447676)
Tara Malloy
Megan McAllen
THE CAMPAIGN LEGAL CENTER
1411 K Street NW, Suite 1400
Washington, DC 20005
(202) 736-2200

Counsel for *Amici Curiae*

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

(A) Parties and *Amici*. Plaintiffs Laura Holmes and Paul Jost were the plaintiffs in the district court, and the Federal Election Commission ("FEC") was the defendant in the district court. No person filed as *amicus curiae* before the district court.

(B) Rulings Under Review. Pursuant to an order of a panel of this Court, the United States District Court for the District of Columbia (Collyer, J.) (June 29, 2016) certified the constitutional question at issue to this Court sitting en banc under 52 U.S.C. § 30110. *See* Amended Order, JA 197, *Holmes v. FEC*, No. 14-cv-1243-RMC (D.D.C. June 29, 2016), ECF No. 42. The District Court previously made findings of fact that it incorporated into its Amended Order. *See id.* (citing *Holmes v. FEC*, 99 F. Supp. 3d 123, 126-36 (D.D.C. 2015)).

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

/s/ J. Gerald Hebert
J. Gerald Hebert
THE CAMPAIGN LEGAL CENTER
1411 K Street NW, Suite 1400
Washington, DC 20005
(202) 736-2200

CORPORATE DISCLOSURE STATEMENT OF AMICI CURIAE CAMPAIGN LEGAL CENTER AND DEMOCRACY 21

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

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

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

/s/ J. Gerald Hebert
J. Gerald Hebert
THE CAMPAIGN LEGAL CENTER
1411 K Street NW, Suite 1400
Washington, DC 20005
(202) 736-2200

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FEC	Federal Election Commission
FECA	Federal Election Campaign Act
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STATEMENT OF INTEREST[1]

Amici curiae Campaign Legal Center and Democracy 21 are nonprofit organizations that work to strengthen the laws governing campaign finance. *Amici* have participated in several of the Supreme Court cases underlying the claims herein, including *McConnell v. FEC*, 540 U.S. 93 (2003), and *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014). *Amici* have a demonstrated interest in the issues raised here.

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

INTRODUCTION & SUMMARY OF ARGUMENT

Plaintiffs Holmes and Jost characterize this case as a narrow, as-applied challenge to the so-called "bifurcation" of federal campaign contribution limits. Pls.' Opening Br. ("Holmes Br.") 9, 26. According to plaintiffs, they are concerned about only *when* individuals can donate to their preferred candidates, not *how much* they can give. *Id.* at 12-13.

But make no mistake: this suit is designed to chip away at the Federal Election Campaign Act's ("FECA's") contribution limits themselves. FECA limits individuals to $2,700 in donations to a federal

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

candidate during a general election.[2] Plaintiffs, however, seek to give $5,400. As the district court recognized, "Plaintiffs are seeking simply to contribute more than Congress has authorized." JA 174. And the argument that plaintiffs assert to achieve this goal is as damaging as the actual relief they request: they seek to eliminate the deference traditionally accorded Congress in the enactment of contribution limits, so that even the minutest regulatory details would be subject to probing judicial review. Holmes Br. 16. In other words, they ask this Court to replace Congress's policy choices with their own.

Plaintiffs' claim, however, runs headlong into established precedent. Deference to legislative decisions is a well-established part of campaign finance doctrine. *See, e.g.*, *McConnell*, 540 U.S. at 136-37; *see also infra* Section I.A.1 (collecting cases). Contribution limits protect the government's vital interest in combatting corruption but impose only limited burdens on First Amendment rights, and any system of contribution limits demands empirical judgments that are best left to the legislative branch. Therefore, unless they are unreasonable or

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[2] When this case was filed, the relevant base limit was $2,600 per election. It has since been adjusted for inflation, and is now $2,700 per election. JA 145.

extreme, the details of a contribution scheme are the legislature's prerogative. *See Randall v. Sorrell*, 548 U.S. 230, 248 (2006) (plurality opinion).

This is even truer with regard to the structuring of a contribution limit than it is to its dollar amount. Congress chose FECA's per-election structure out of respect for the states' differing election processes, and the desire to balance effective contribution limits with candidates' need for adequate resources to run competitive campaigns. These interests are more than sufficient to justify deferring to Congress's considered choice.

Moreover, a survey of state laws confirms both the ubiquity of this per-election contribution structure in the states and the rarity of the election-cycle structure that plaintiffs demand here. Adopting the plaintiffs' preferred regulatory approach to the structure of contribution limits would have nationwide impact, and could cause widespread upheaval in state campaign finance laws.

Finally, plaintiffs devote much of their brief to the idea that the per-election structure serves no anti-corruption purpose. Even if the per-election structure of FECA's contribution restrictions did not receive deference, however, FECA's structure is closely drawn to prevent *quid pro quo* corruption and its appearance. Plaintiffs assume that one can simply add up FECA's per-election limits to reach larger, election-cycle limits without giving rise to any new concerns about corruption or the appearance of corruption. By that logic, donors could just as easily add up contribution limits across different elections in the same cycle—primary, runoff, and general elections—or even across different election cycles in order to give even larger lump-sum amounts. This creates a real risk of corruption—and certainly the appearance of corruption—which FECA's per-election structure is closely drawn to prevent. *Buckley v. Valeo*, 424 U.S. 1, 30 (1976) (per curiam).

For these reasons, *amici* urge this court to find in favor of the FEC on the certified question raised in this *en banc* proceeding.

ARGUMENT

I. Courts Should Defer to Legislative Judgments About the Structure and Timing of Otherwise Constitutional Campaign Contribution Limits.

Since *Buckley*, the Supreme Court has recognized that the legislature should determine the details of contribution regulation. "[I]f it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe" the legislature's choice of dollar amount. *Buckley*, 424 U.S. at 30. The same principle applies to judgments about the *structuring* of contribution limits. Indeed, this Court has already upheld FECA's contribution limits while paying explicit attention to its per-election structure. *Buckley v. Valeo*, 519 F.2d 821, 851-52 (D.C. Cir. 1975) (per curiam) ("[T]he statutory contribution limit of $1,000 per candidate *per election (with primary and general elections counted as two separate elections)* serves a compelling governmental interest." (footnotes omitted) (emphasis added)), *aff'd in part, rev'd in part*, 424 U.S. 1. These precedents—and the deference typically paid the legislature in this area—foreclose the plaintiffs' arguments here.

A. The determination of a per-election, rather than a per-election-cycle, limit on campaign contributions is a question of electoral mechanics best left to the legislature.

1. Deference to the legislature is integral to contribution limit analysis.

While expenditure limits are subject to strict scrutiny, contribution limits are subjected to a lesser burden. A contribution limit will be "sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms." *Buckley*, 424 U.S. at 25. Under "closely drawn" scrutiny, a legislature is granted discretion to determine the best solution to the problem it has identified. A law must be not "perfect, but reasonable"; the legislature must adopt, not "the single best disposition[,] but one whose scope is 'in proportion to the interest served.'" *McCutcheon*, 134 S. Ct. at 1456 (citation omitted).

Plaintiffs acknowledge that contribution limits are subject to closely drawn, rather than strict, scrutiny. Holmes Br. 11. Plaintiffs argue, however, that this Court should not defer to Congress's judgment regarding the proper structure of FECA's contribution limits. *Id.* at 12 n.8, 18. They are wrong. For four decades, the Supreme Court has consistently counseled deference to legislative judgments when regulating political contributions. *See Davis v. FEC*, 554 U.S. 724, 737 (2008); *Randall*, 548 U.S. at 248; *McConnell*, 540 U.S. at 136-37; *FEC v. Beaumont*, 539 U.S. 146, 155 (2003); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 391, 397 (2000); *id.* at 402-03 (Breyer, J., concurring); *FEC v. Nat'l Conservative Pol. Action Comm.*, 470 U.S. 480, 500 (1985); *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 209-10 (1982); *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 201 (1981); *Buckley*, 424 U.S. at 30.

This is so for at least three reasons. First, deference is appropriate because of "the limited burdens [contribution restrictions] impose on First Amendment freedoms." *McConnell*, 540 U.S. at 136. Contributions act only as "a general expression of support for the candidate and his views," and "[t]he quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing." *Buckley*, 424 U.S. at 21. This is why, "[g]oing back to *Buckley*," "restrictions on political contributions have been . . . subject to relatively complaisant review under the First Amendment." *Beaumont*, 539 U.S. at 161.

Second, deference is necessary because of "the importance of the interests that underlie contribution limits." *McConnell*, 540 U.S. at 136. Corruption and the appearance of corruption are toxic to our system of self-government. Regulations on political contributions help deter these threats, and are thereby "designed to protect the integrity of the political process." *Id.* at 137. As the Supreme Court has continually affirmed, this is a governmental interest of the highest order. *See, e.g.*, *McCutcheon*, 134 S. Ct. at 1450 (acknowledging "the compelling nature of the 'collective' interest in preventing corruption in the electoral process").[3]

Third, deference recognizes that the legislature "is far better equipped than the judiciary" to make decisions "concerning regulatory schemes of inherent complexity." *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195-96 (1997). This is doubly true in regard to campaign finance law. "[L]egislators have 'particular expertise' in matters related to the costs and nature of running for office." *Randall*, 548 U.S. at 248. The judiciary, by contrast, "has no scalpel to probe" whether a $5,400 contribution limit is better than a $2,700 one, or whether an election-cycle contribution structure is superior to a per-election structure. *Buckley*, 424 U.S. at 30. Therefore, when it comes to the details of

[3] The Supreme Court has also frequently recognized that the legislature has a particularly compelling constitutional role in the context of elections. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) ("Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections . . . ."). Congress's "important regulatory interests" here give it the discretion to choose between "reasonable, nondiscriminatory restrictions" on contributions. *Anderson v. Celebrezze*, 460 U.S. 780, 788 & n.9 (1983); *see also Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989) ("A State indisputably has a compelling interest in preserving the integrity of its election process."); *Buckley*, 424 U.S. at 58 (contribution limits "serve the basic governmental interest in safeguarding the integrity of the electoral process").

designing contribution limits—like dollar amount or timing—deference is the general rule.

2. *Deference is particularly appropriate when reviewing the structure of a contribution limit.*

Deference is even more appropriate here because plaintiffs do not challenge FECA's contribution ceilings, Holmes Br. 6, but instead attack only *how* the ceilings apply in an election cycle. *Id.* Such structural regulations constitute "an even more 'marginal restriction upon the contributor's ability to engage in free communication' than a dollar cap." *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1122 (9th Cir. 2011).

Plaintiffs' constitutional injury is similarly minor. FECA allowed plaintiffs to donate $5,400 to their preferred candidates, so long as they chose to associate with those candidates in two separate elections: the primary and the general. 52 U.S.C. § 30116(a)(1)(A), -(a)(6). By giving the maximum $2,700 donation, they were able "to fully associate with [their] party's ultimate nominee[s]" in the general election. Holmes Br. 7. It was only the *plaintiffs' choice* not to associate with these candidates in the primary that prevented them from giving more in the same cycle.

Plaintiffs' only argument, therefore, is that "FECA prevents [them] from association with candidates in their *preferred manner* and for their *intended purpose*." *Id.* at 25 (emphases added). But *Buckley* already considered and rejected this line of reasoning. 424 U.S. at 22, 28-29. And the Constitution gives "little weight to the interest [a] candidate and his supporters may have in making a late rather than an early decision to" associate. *Burdick v. Takushi*, 504 U.S. 428, 437 (1992) (internal quotation marks omitted). Thus, any burden imposed by a per-election structure, as opposed to an election-cycle structure, is marginal. *Id.* When two enforcement options have such similar First Amendment implications, "Congress is entitled to its choice." *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 465 (2001).

Indeed, the technical, detail-oriented nature of plaintiffs' attack underscores the appropriateness of deferring to Congress. For instance, plaintiffs have asserted, throughout this litigation, that their challenge applies only to situations in which "a candidate who faces a primary challenge competes in the general election against a candidate who ran unopposed or *virtually unopposed* during the primary." JA 186-87 (emphasis added); *see also* JA 160.[4] Deciding which candidates are "virtually unopposed" in the primary is a difficult line-drawing exercise. Would the definition include those opposed only by write-in candidates? Those who spent below a certain threshold, or whose opponents raised less than a certain threshold? Those whose opponents received less than five percent of the vote? Fifteen percent? Plaintiffs claimed that Scott Peters, a California Democratic incumbent, was virtually unopposed in the 2014 primary, and Plaintiff Holmes donated to Peters's Republican opponent in the general election. JA 71-72, 157, 160 n.4. But, in fact, Peters won only 42 percent of the vote in a four-way blanket primary. Cal. Sec'y of State, *Statement of Vote: June 3, 2014, Statewide Direct Primary Election* 76 (July 11, 2014), http://elections.cdn.sos.ca.gov/ sov/2014-primary/pdf/2014-complete-sov.pdf. As difficult as Congress and the FEC may find it would be to draw this line, courts would find it almost impossible without overstepping their judicial role.

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4 Plaintiffs have recharacterized the scope of their challenge before this Court. They now challenge FECA's application to all "donors who wish to give . . . $5,200 contribution[s] to party nominees once they have won their primary elections." Holmes Br. 28. This broad attack would require relief beyond plaintiffs' particular circumstances. Plaintiffs "must therefore satisfy [the] standards for a facial challenge to the extent of that reach." *John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010).

Plaintiffs advocate for "the drawing of fine distinctions that, in the end, would themselves be questionable." *Citizens United v. FEC*, 558 U.S. 310, 327 (2010). This simply underscores that the details of formulating contribution restrictions are best left to Congress. As the Supreme Court has recognized, the judiciary "cannot determine with any degree of exactitude the precise restriction necessary to carry out [a] statute's legitimate objectives." *Randall*, 548 U.S. at 248. A court need not apply rational basis review to recognize that politicians might have a particular expertise in matters of political fundraising. Determining the timing of contribution limits is a quintessential detail of regulatory policy, and remains the prerogative of the legislative branch.

B. The per-election structure of FECA's contribution limits respects state election processes and ensures that all candidates receive sufficient funds to run their campaigns.

Plaintiffs make the sweeping claim that FECA's per-election structure does not serve any "valid, let alone substantial, governmental interest." Holmes Br. 17 n.10. This is not so. Congress deliberately chose per-election contribution limits over multiple alternative structures, and for good reasons: to tailor the law to accommodate the different election processes prescribed by the states, and to ensure that candidates have sufficient resources to run competitive campaigns in all variety of elections.

States vary in the procedures they impose for federal elections. Some require runoffs for candidates who do not receive a sufficient share of the vote, *see, e.g.*, Tex. Elec. Code Ann. § 172.004; some require special elections in addition to the normal primary and general elections when there is a vacancy, *see, e.g.*, Mass. Gen. Laws ch. 54, § 140. Congress structured FECA to respect these differences, by creating separate contribution limits for primary, general, runoff, and special elections, as well as for caucuses and nominating conventions. 52 U.S.C. § 30101(1). This per-election structure also ensures that candidates running in extra elections have the money to compete, without having to raise the contribution limits for other candidates.

As FECA's legislative history confirms, Congress made a proper "empirical judgment" in choosing per-election contribution limits. *Randall*, 548 U.S. at 248. In the early decades of federal campaign finance regulation, Congress imposed annual limits of $5,000 on individual contributions to general-election campaigns (the law did not cover primaries). *See* Act of July 19, 1940, Pub. L. No. 76-753, § 13(a), 54 Stat. 767, 770; 117 Cong. Rec. 43,410 (1971) (statement of Rep. Abzug). Contributions to political committees, which are not legally tied to individual candidates or election cycles, still follow this annual structure. 52 U.S.C. § 30116(a)(1)-(2).

But, when drafting the 1974 FECA amendments, Congress decided to move away from this structure for individual contributions to candidates. *See* FECA Amendments of 1974, Pub. L. No. 93-443, § 101(a), 88 Stat. 1263, 1263 (codified as amended at 52 U.S.C. § 30116(a)(1)(A), -(a)(6)).[5] Because the states have the primary "duty . . . to prescribe the time, place, and manner of electing Representatives and Senators," *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247, 2253 (2013), candidates from different states have to compete in varying numbers of elections per cycle. Congress chose per-election

[5] Initially, the Senate structured the limits as plaintiffs would prefer. Individuals would have been limited to $3,000 in contributions to a candidate over the course of an entire campaign, with "campaign" defined "to include all primary, primary runoff, and general election campaigns related to a specific general election." S. Conf. Rep. No. 93-1237, at 50 (1974). However, the House chose a per-election structure, setting up $1,000 limits that would apply "separately to each election." *Id.* at 50-51. At conference, the conferees considered these election-cycle and per-election options, and adopted the House's approach. *Id.* at 52.

limits in order to incorporate runoffs and special elections, and to close the linguistic loophole that had left primaries out of the prior law.[6] This was a considered choice about one aspect of a larger regulatory scheme—a choice which "the legislature is better equipped to make" than is the judiciary. *Randall*, 548 U.S. at 248.

Moreover, in choosing to adopt per-election limits, Congress ensured that contributors can associate with candidates—and that candidates can receive enough money to mount their campaigns—in *each* election. As one House conferee put it when describing the bill's similarly structured expenditure limitations: "Without allowance for

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[6] One of the House conferees explained the reasons behind the per-election structure soon before the House voted to approve the final bill. *See* 120 Cong. Rec. 35,137 (1974) (statement of Rep. Fraser) ("Under the 1971 law, considerable confusion was created by the use of the phrase 'nomination for election, or election.' The courts, candidates and administrators and enforcers of the law frequently made different interpretations of its meaning. Under the new law, such confusion should be avoided. . . . In the case of contribution limitations, an individual can contribute $1,000 for the primary campaign and $1,000 for the general election. If there is a primary runoff, an individual can contribute an additional $1,000. If, as may be the case in the State of Georgia, there is a runoff in the general election, an individual can contribute another $1,000."); *see also* 120 Cong. Rec. 35,130 (1974) (statement of Rep. Hays) ("Before somebody asks me what this 'per election' means, that means a primary and a general, and if there are States that have a law and one is engaged in a runoff, it means a runoff.").

these additional amounts, a candidate might find himself unable to spend anything in a primary or general election runoff. This would make a mockery of the election process." 120 Cong. Rec. 35,137 (1974) (statement of Rep. Fraser). FECA's per-election structure thus balances "the importance of the interests that underlie contribution limits" with "the limited burdens they impose on First Amendment freedoms." *McConnell*, 540 U.S. at 136.

In sum, Congress's decision to use a per-election structure was not an attempt to restrict speech or association, but, on the contrary, "reflect[s] [Congress's] effort to respect the First Amendment interests of candidates and their contributors." *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1669 (2015). By choosing a per-election structure, Congress ensured that it did not "prevent candidates from 'amassing the resources necessary for effective [campaign] advocacy.'" *Randall*, 548 U.S. at 248. This Court should defer to "Congress'[s] ability to weigh competing constitutional interests in an area in which it enjoys particular expertise." *McConnell*, 540 U.S. at 137.[7]

[7] FECA's per-election structure can also be upheld as a time, place, and manner restriction on speech and association. *Buckley*, 424 U.S. at 18 (noting that "the government may adopt reasonable time, place, and

II. Invalidating FECA's Structure Would Stifle a Diversity of State Approaches to Campaign Finance Regulation.

Plaintiffs' attack on FECA threatens not only the administration of the federal contribution limits. It also has the potential to upend state campaign finance regimes. As this Court has recognized, when passing on federal contribution restrictions, "[t]he experience of states with and without similar laws is also relevant." *Wagner v. FEC*, 793 F.3d 1, 14 (D.C. Cir. 2015) (en banc). *See also McCutcheon*, 134 S. Ct. at

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manner regulations, which do not discriminate among speakers or ideas, in order to further an important governmental interest unrelated to the restriction of communication"). *Buckley* found that FECA's contribution and expenditure limits were not themselves time, place, and manner regulations, because they "impose direct quantity restrictions on political communication and association . . . *in addition to any reasonable time, place, and manner regulations otherwise imposed*." *Id.* (emphasis added). But plaintiffs concede that they "do not challenge the specific dollar amount Congress has chosen," but "only the *manner* in which" the limits are "split." Holmes Br. 12-13 (emphasis added). Stripped of the specific dollar limitations that plaintiffs accept as constitutional, the decision whether to use a per-election or a per-election-cycle structure is "just . . . a matter of timing." *Gable v. Patton*, 142 F.3d 940, 953 (6th Cir. 1998). And a reasonable time, place, or manner regulation is "perfectly valid" unless it "results in removing a subject or viewpoint from effective discourse (or otherwise fails to advance a significant public interest in a way narrowly fitted to that objective)." *Hill v. Colorado*, 530 U.S. 703, 736 (2000) (Souter, J., concurring) (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

1451 n.7; *Citizens United*, 558 U.S. at 357. And only a handful of states employ the contribution structure that plaintiffs seek here.

States use a variety of timing mechanisms in their campaign finance laws, in keeping with their legitimate power to regulate the electoral process itself. Thirty-eight states impose contribution limits for state elections.[8] Of these, the vast majority—twenty-seven—have per-election limits, like those that FECA imposes at the federal level.[9]

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8 Alaska Stat. § 15.13.070; Ariz. Rev. Stat. § 16-905(A)-(B); Ark. Code Ann. §§ 7-6-201(7), -203; Cal. Gov't Code §§ 82022, 85301; Colo. Const. art. XXVIII, § 3(1); Conn. Gen. Stat. § 9-611; Del. Code Ann. tit. 15, §§ 8002(11)(a), 8010(a); Fla. Stat. § 106.08(1); Ga. Code Ann. § 21-5-41(a)-(b); Haw. Rev. Stat. §§ 11-302 (defining "election"), -357; Idaho Code Ann. § 67-6610A(1); 10 Ill. Comp. Stat. 5/9-1.9(1)-(2), 5/9-8.5(b); Kan. Stat. Ann. § 25-4153(a); Ky. Rev. Stat. Ann. §§ 121.015(2), -.150(6); La. Stat. Ann. § 18:1505.2(H)(1)(a), (3)(a); Me. Rev. Stat. tit. 21-A, §§ 1001(2), 1015(1); Md. Code Ann., Elec. Law §§ 1-101(w), 13-226(b); Mass. Gen. Laws ch. 55, § 7A(a)(1); Mich. Comp. Laws §§ 169.205(3), -.252(1); Minn. Stat. §§ 10A.01 subd. 16, 10A.27 subd. 1(a); Mont. Code Ann. § 13-37-216(1), (5); Nev. Rev. Stat. § 294A.100; N.H. Rev. Stat. Ann. § 664:4; N.J. Stat. Ann. §§ 19:44A-3(e), -4, -11.3(a); N.M. Stat. Ann. § 1-19-34.7(A)(1); N.Y. Elec. Law § 14-114(1); N.C. Gen. Stat. § 163-278.13(a), (d); Ohio Rev. Code § 3517.102(B)(1); Okla. Stat. tit. 74, ch. 62, app. 1, Rule 2.37; 17 R.I. Gen. Laws § 17-25-10.1(a); S.C. Code Ann. §§ 8-13-1300(10), -1314(A)(1); S.D. Codified Laws §§ 12-27-7 to -8; Tenn. Code Ann. §§ 2-10-102(5), -302(a); Vt. Stat. Ann. tit. 17, § 2941(a)(1)-(3), (c); Wash. Rev. Code Ann. § 42.17A.405(2); W. Va. Code Ann. § 3-8-12(f)-(g); Wis. Stat. §§ 11.1101(1), -.1103; Wyo. Stat. Ann. § 22-25-102(c), (j).

9 These states are Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Kansas, Kentucky,

Five use annual or biennial limits.[10] Only six states have the per-election-cycle limits for which plaintiffs advocate.[11] Notably, even some of the states that do not use per-election limits provide for additional contribution periods to accommodate special elections. *See, e.g.*, Mass. Gen. Laws ch. 55, § 7A(a)(1); Mich. Comp. Laws § 169.205(3); Minn. Stat. § 10A.01 subd. 16.

Municipalities likewise employ different methods of structuring contribution limits. Los Angeles and Austin, for example, use per-election limits that parallel FECA's. *See* Austin, Tex., Charter, art. III, §

Louisiana, Maine, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, South Carolina, Tennessee, Washington, West Virginia, and Wyoming. *See supra* note 8. Montana's per-election limits have been the subject of ongoing litigation, although their "per-election" structure is not at issue. *See Lair v. Motl*, No. CV 12-12-H-CCL, 2016 WL 2894861 (D. Mont. May 17, 2016), *appeal docketed*, No. 16-35424 (9th Cir. May 20, 2016). Montana has temporarily reinstated its previous limits pending appeal. Mont. Comm'r of Pol. Practices, *Amended Office Management Policy 2.4* (May 26, 2016), http://leg.mt.gov/content/Committees/Interim/2015-2016/State-Administration-and-Veterans-Affairs/Meetings/June-2016/Motl-contribution%20limit%20policy%202.pdf.

[10] Alaska, Massachusetts, Rhode Island, and South Dakota use annual limits. *See supra* note 8. Minnesota divides its campaign finance administration into two-year election "segments," with higher contribution limits for segments that include an election and lower limits for segments without one. *Id.*

[11] These states are Arizona, Hawaii, Maryland, Michigan, Vermont, and Wisconsin. *See supra* note 8.

8(A); L.A., Cal., Charter vol. I, art., IV, § 470(b)(3), (c)(3)-(4). Denver and San Francisco, meanwhile, employ campaign cycle-based limits. *See* Denver, Colo., Code of Ordinances, ch. 15, art. III, § 15-37(a); S.F., Cal., Campaign and Governmental Conduct Code, art. I, ch. 1, §§ 1.104, 1.114(a). New York City employs a hybrid system in which limits are set per election cycle but candidates can accept an additional amount, equal to one-half the election-cycle limit, if they face a runoff or special election. New York, N.Y. Admin. Code tit. III, ch. 7, §§ 3-703(f), 3-719(2)(b). Houston sets its contribution limits using biennial periods. Houston, Tex., Code of Ordinances, ch. 18, art. IV, §§ 18-31(c)(1), 18-38(a).

As this variety makes clear, state legislatures and city councils have chosen those methods of campaign finance administration that they determine best fit their local situations. For instance, nearly all of the states that provide for primary runoffs use per-election limits (when they have limits at all).[12] "These considered judgments deserve our

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[12] For a list of states with primary runoff provisions, see Nat'l Conf. of State Legislatures, *Primary Runoffs*, http://www.ncsl.org/research/elections-and-campaigns/primary-runoffs.aspx (last updated May 12, 2014). Arkansas, Georgia, Louisiana, North Carolina, Oklahoma, and South Carolina employ per-election limits, while Alabama, Texas, and

respect, especially because they reflect sensitive choices by States in an area central to their own governance . . . ." *Williams-Yulee*, 135 S. Ct. at 1671. But the logic of plaintiffs' argument would allow contributors in state elections to calculate an artificial "election cycle" limit and donate up to that amount at any time during the cycle. This would essentially invalidate the contribution limits of every state—except for those of the six states currently employing a single contribution limit for the entire election cycle.

III. FECA's Per-Election Structure Helps Combat Corruption and Its Appearance.

Plaintiffs contend that FECA's per-election structure is unconstitutional because it does not serve an anti-corruption purpose distinct from that of the limits themselves. Holmes Br. 24. As explained above, Congress need not have a separate anti-corruption rationale for each and every structural detail of a campaign finance law, and other substantial interests justify the per-election structure. But plaintiffs lose even when playing their own game. In fact, FECA's per-election

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Mississippi have no limits. *See supra* notes 8-9. The exceptions are South Dakota and Vermont, both of which have annual limits, *see supra* note 10, and utilize runoffs for state elections only in quite limited circumstances, *see Primary Runoffs*, *supra*.

structure serves an important anti-corruption function. It ensures that individuals cannot contribute large sums in a single election, thereby preventing *quid pro quo* corruption and its appearance.

Plaintiffs claim that Congress determined that a $5,400 donation cannot corrupt. Holmes Br. 20. As the district court explained, however, Congress made no such determination. JA 173. Rather, Congress concluded that the inflation-adjusted base limit of *$2,700* in each election would both deter corruption and its appearance and ensure that candidates had sufficient resources to compete. *Id.*

If plaintiffs were correct in their reasoning, however, then individuals would be able to donate far more than Congress has authorized. Even by plaintiffs' own logic, $5,400 is not the actual maximum for an election cycle, because it fails to factor in those with runoffs or special elections. As an example, take the 2014 U.S. Senate race in Mississippi. In that race, Senator Thad Cochran did not reach the requisite majority vote to win the primary outright. He therefore faced a primary runoff against opponent Chris McDaniel. *See* JA 154. What if an individual had wished to avoid taking sides in the primary and donate only to the eventual Republican nominee? According to plaintiffs, she could simply have waited until the general election and donated $8,100 at once: $2,700 each for the primary, the runoff, and the general.[13]

Such large, lump-sum donations are much likelier to give rise to corruption, or certainly an appearance of corruption, than do the current per-election limits. After all, "the dangers of large, corrupt contributions and the suspicion that large contributions are corrupt are neither novel nor implausible." *Shrink Mo.*, 528 U.S. at 391. Plaintiffs' argument suggests that three $2,700 donations are functionally equivalent to one $8,100 donation. Yet these do not equally serve the legislature's anti-corruption interest. The "sticker shock" of such large lump-sum payments could damage confidence in the electoral process in a way that a series of smaller donations would not. "However similar

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[13] Indeed, taking plaintiffs' reasoning to its absurd logical conclusion, one could simply multiply contribution limits across election cycles. If Congress has determined that $5,400 for one election cycle could not corrupt, then, by simple arithmetic, Congress has also determined that $27,000 for five election cycles could not corrupt. Therefore, a donor could simply hand over a $27,000 lump-sum check to a candidate designated to that candidate's next five election cycles, or to pay off debt remaining from the past five cycles. *See* 11 C.F.R. §§ 110.1(b)(2)(i), -(3)(i), -(4)-(5), 110.3(c)(3)-(4). By front- or back-loading donations in this manner, donors could give far larger amounts at one time.

the two [contributions] may be in substance, a State may conclude that they present markedly different appearances to the public." *Williams-Yulee*, 135 S. Ct. at 1669.

FECA's per-election structure is closely drawn to serve Congress's important interests. *Buckley*, 424 U.S. at 25. Just as no dollar cap can perfectly balance anti-corruption concerns and associational rights, no timing mechanism will equally satisfy all potential donors. But closely drawn scrutiny does not require perfection. *McCutcheon*, 134 S. Ct. at 1456-57. FECA's solution is more than "reasonable" and its regulations are "in proportion to the interest served." *Id.*

CONCLUSION

For the foregoing reasons, this Court should find in favor of the FEC on the certified question raised in this proceeding.

Respectfully submitted,

/s/ J. Gerald Hebert
J. GERALD HEBERT
ghebert@campaignlegalcenter.org
(D.C. Bar No. 447676)
Tara Malloy
Megan McAllen
THE CAMPAIGN LEGAL CENTER
1411 K Street NW, Suite 1400
Washington, DC 20005
(202) 736-2200

Fred Wertheimer
DEMOCRACY 21
2000 Massachusetts Avenue, NW
Washington, DC 20036
(202) 429-2008

Donald J. Simon
SONOSKY, CHAMBERS, SACHSE
ENDRESON & PERRY, LLP
1425 K Street, NW, Suite 600
Washington, DC 20005
(202) 682-0240
Counsel for *Amici Curiae*

Dated: September 15, 2016

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

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5093 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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/s/ J. Gerald Hebert

J. Gerald Hebert
THE CAMPAIGN LEGAL CENTER
1411 K Street NW, Suite 1400
Washington, DC 20005
(202) 736-2200

Dated: September 15, 2016

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of September 2016, I caused the foregoing BRIEF *AMICI CURIAE* to be filed electronically using this Court's CM/ECF System and sent via the ECF electronic notification system to the following CM/ECF registered counsel of record:

Attorneys Representing Plaintiffs Holmes, *et al.*:

Allen Joseph Dickerson,
adickerson@campaignfreedom.org
Center for Competitive Politics
124 West Street, South
Alexandria, VA 22314
(703) 894-6800

Attorneys Representing Defendant Federal Election Commission:

Erin Rebecca Chlopak,
echlopak@fec.gov
Charles P. Kitcher,
ckitcher@fec.gov
Kevin Andrew Deeley,
kdeeley@fec.gov
Steve Nicholas Hajjar,
shajjar@fec.gov

Federal Election Commission
999 E Street, NW
Washington, DC 20463
(202) 694-1528

I further certify that I also caused the requisite number of paper copies of the brief to be filed with the Clerk on September 15, 2016.

/s/ J. Gerald Hebert
J. Gerald Hebert
THE CAMPAIGN LEGAL CENTER
1411 K Street NW, Suite 1400
Washington, DC 20005
(202) 736-2200