UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WENDY WAGNER, *et al.,*

Plaintiffs,

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

FEDERAL ELECTION COMMISSION,

Defendant.

PLAINTIFFS' STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

Introduction

This memorandum is submitted in support of plaintiffs' motion for summary judgment. It is agreed by the parties that this memorandum and that to be submitted by the defendant Federal Election Commission ("FEC") supplement the prior memoranda of the parties submitted in connection with plaintiffs' motion for a preliminary injunction. It is further agreed that the failure of either party to raise an argument in these summary judgment memoranda shall not constitute a waiver of any argument previously raised. In addition to the Statement of Material Facts submitted herewith (and the FEC's response to it and any additional properly supported statement by the FEC), either party may rely on the declarations previously filed by plaintiffs; the responses of the plaintiffs to the Requests for Admission made by the FEC (including their current contracts); the Supplement to Responses of Plaintiffs to Requests for Admission; the response of the FEC to the Requests for Admission made by the plaintiffs; and the deposition of Steven L. Schooner taken on June 12, 2012 ("Schooner Dep."), all of which are being filed with this motion or will be filed by the FEC.

On June 29, 2012, just days before the close of discovery, the FEC filed a Supplemental Disclosure to its January 17, 2012 initial disclosures, in which it stated that it may rely on "Declarations, Reports, Studies, and other exhibits" filed in three cases that it cited there. Plaintiffs have the most serious doubts that the FEC has adequately described these documents, as required by Rule 26(a)(1)(A)(ii), because in theory they could comprise the entire record in three fully litigated cases. From discussions with FEC counsel, plaintiffs' counsel believes that these documents are likely to be used to establish legislative facts because they contain information of a kind that courts may judicially notice and/or are found in appellate briefs, including those of amici. As so limited, we agree that the Court may give them such weight as seems appropriate, and we would not interpose an objection to that limited use. However, plaintiffs do object if those documents are to be used to establish material facts, or to oppose those facts that plaintiffs have designed as material facts not in dispute, because those documents are unlikely to be admissible evidence in the record as required by Rule 56(c).

Before turning to the specific reasons why section 441c is unconstitutional, plaintiffs believe that the Court may not be fully aware of the breadth of application of section 441c, beyond plaintiffs themselves. Today there are millions of individuals providing a wide range of services for the federal government. As of 2003 – and the number has grown since then (Schooner Dep. 34-36) – there were in excess of five million individuals providing services under contract to the federal government. http://www.brookings.edu/~/media/research/files/articles/2003/9/05politics%20light/light20030905.pdf . That number includes manufacturing contracts that create jobs, as well as the very large number of corporate contractors that employ individuals who, in turn,

provide services to the government. According to Professor Schooner (Dep. 45-48), individuals working for corporations constitute by far the largest group of individuals (FTE equivalents) that provide their services under a federal contract. They comprise the first category of service providers described in paragraph 5 of his declaration, but because they are employed by the contractor, they are unaffected by section 441c.

By contrast, plaintiffs Brown and Miller are retired federal employees who have returned to their agency as contractors to work alongside of regular federal employees under contracts of several years duration. They are paid by their agency on a regular basis, just like regular employees, and their taxes are withheld from their paychecks. They fall into the second category in Professor Schooner's declaration (¶ 6) and are, for all practical purposes, federal employees except that they have contracts that take them out of employee status and civil service protection. Among the many others who fall into that category are retired FBI agents who are regularly hired in place of active duty agents, to do background checks on those applying for federal employment or who need a federal security clearance. Schooner Dep. at 65-66, 88.

The third Schooner category (described in paragraphs 7 & 8 of his declaration) is the more diverse, and as the FEC has admitted in its response to Request for Admission # 4, it includes individuals who contract in all of the following circumstances and hence are subject to section 441c: (a) the individual is hired by an agency, including but not limited to the Department of Justice, or by a federal court, to be an expert witness in either administrative or court litigation; (b) the individual is an attorney hired to represent the United States, a federal agency, officer, or employee, where the Department of Justice may have a conflict of interest or in other circumstances authorized by law; (c) the

individual is hired by the Judicial Conference or another entity within the Judicial Branch to be a reporter for one of the Rules Committees or to provide training to judges; (d) the individual is hired to provide expert advice to the federal government in law, medicine, the hard or social sciences, or in any other area where the government lacks the necessary expertise among its officers or employees; and (e) the individual is hired to provide translation or interpretation services in federal court or at a federal agency proceeding.

There is one other important aspect of the hiring of plaintiffs and many (although not all) of the individual contractors who are subject to the ban in section 441c. For most large government contracts, there is an open process by which interested persons can apply and their applications are assessed according to the terms of the proposal. However, contractors like plaintiff Wagner, who is doing a special study for ACUS, and Professor Schooner, who has served as an expert witness, a mediator, and a special investigator (Dep. 29-30), typically do not apply for a contract or even know that there is a contract that will be let (Dep. 27, 130-132). Instead, they are initially approached by an agency because the agency has concluded that they are able to fill a particular need of the government.

The situation for plaintiffs Brown and Miller is different but far closer to that of plaintiff Wagner and Professor Schooner than to large scale corporate suppliers of employers who provide support and other services to federal agencies. Brown and Miller are former employees of their agency, whose work was well known before they retired. They (and the retired FBI agents who now regularly conduct background investigations) may have "applied" for their contracts, in the sense that they made their desires known to their agency, but the notion that they or anyone else would conceivably think that their

chances of obtaining a contract would be enhanced at all by making a contribution to anyone – let alone to the wide range of entities covered by section 441c – is not believable. Indeed, the FEC has offered no evidence of any federal contracts held by individuals for which there is anything like a bidding process for major corporate contracts, let alone a process that is susceptible to influence because a bidder might have made a political contribution.

I. SECTION 441C IS NOT "CLOSELY DRAWN" TO MEET ITS ASSERTED PURPOSES.

The Court concluded in connection with the preliminary injunction motion that section 441c must be "closely drawn" to satisfy the First Amendment. Plaintiffs agree that section 441c must at least meet that standard, but disagree with the Court's conclusion that it does so.

Initially, plaintiffs note that the Court did not discuss the most recent Supreme Court decision on the issue of banning all contributions by a category of individuals, which is the portion of *McConnell v. Federal Election Commission,* 540 U.S. 93, 231-32 (2003), in which the Court, applying "heightened scrutiny," held that the federal law that banned all contributions by individuals under the age of 18 violated the First Amendment. There the FEC posited that parents would make contributions in the names of their minor children, using them as "conduits" in an effort to avoid the contribution limits applicable to the parents. However, the Court found that concern to be insufficient to justify any limits on contributions by persons under the age of 18 beyond the $2300 limit then applicable to all contributors. It did so with almost no need for discussion because the law was not close to being "closely drawn" to meet its asserted purposes. *Id.* Like the under-18 ban struck down in *McConnell*, this case involves a ban, not simply a

limit, on all contributions by a specific group of individuals. Therefore, under *Federal Election Commission v. Beaumont,* 539 U.S. 146, 161-63 (2003), that fact must be taken into account when assessing whether section 441c is "closely drawn" to meet its asserted goals. *Compare Ognibene v. Parkes,* 671 F. 3d 174, 178-79 (2d Cir), *cert. denied,* ___ S. Ct. ___, 2012 WL 950086 (June 25, 2012), where individuals "doing business" with New York City were only subject to lower limits on campaign contributions (but not a ban like section 441c), and their contributions were not eligible for the 6 to 1 match that is available to participating candidates for other contributions of up to $175.[1]

In this case, the FEC asserts two justifications for section 441c, which precludes individuals such as plaintiffs from making any contributions to any person or entity in connection with federal elections. The first – avoidance of coercion of actual or would-be contractors – can be disposed of quite quickly. Initially, there is no reason to believe that individuals like plaintiffs need or want any such "protection" from coercion. Second, and more significant, coercing another to make a political contribution is already a criminal offense as applied to federal employees. *See* 18 U.S.C. §§ 601, 602, 603, 606, 607 & 610. There is no indication that those laws are ineffective as applied to employees or any reason to believe that extending them to individuals who have or are negotiating for federal contracts (which section 601 already reaches) would not take care of any problem of coercion. At the very least, section 441c is not "closely drawn" to prevent coercion and thus cannot be sustained on that basis.

[1] The fact that children are not allowed to vote is irrelevant because they nonetheless have First Amendment rights. The same is true for convicted felons who cannot vote in many states, but who are allowed to contribute to candidates for federal office.

The FEC's second (and principal) justification for the ban is that it allegedly prevents the appearance of corruption that would arise if individuals who had federal contracts also made political contributions in connection with federal elections. Plaintiffs do not argue that avoiding the appearance of "pay-to-play" is not an important government interest, which is the applicable standard. *See McConnell* at 231. Nor do they dispute that it is *possible* that a Member of Congress, the President, or a political appointee *might* attempt to influence the award of a federal contract, although the likelihood of that happening for contracts for individuals, as contrasted with major corporations, is, in plaintiffs' view, extremely small. As the response of plaintiff Brown to the FEC's Interrogatory No. 2 makes clear, the process by which contracts are awarded to individuals at USAID is designed to preclude improper outside influence, and generally succeeds in doing so. Similarly, Professor Schooner in his deposition (24-28, 52-53, 54, 56-60, 110-115, & 133-37) confirms that the special qualifications and the independence of the contracting officers at all agencies are vital parts of the contracting process. *See* Plaintiffs' Statement of Undisputed Material Facts ¶¶ 4 & 14 and record citations therein. The FEC has offered no evidence that the contrary is true, but only speculation that Members of Congress and the President (acting through his political appointees) might at some time try to influence some federal contracts based on making, or failing to make, a political contribution. And even then, it has offered no actual examples of that occurring for contracts such as those held by plaintiffs. In short, there is no basis on which to conclude that a reasonable person, who understands how federal contracts are let, would conclude that allowing plaintiffs to make the same kinds and

amounts of contributions that every other individual is permitted to make would create an appearance of corruption.

Moreover, section 441c is not "closely drawn" enough to satisfy the First Amendment for three additional sets of reasons: (1) it applies to many contributions to various categories of recipients that could not reasonably, or even possibly, give rise to the appearances sought to be avoided; (2) the ban could readily be modified to substantially reduce the harm to plaintiffs without increasing in any meaningful respect the prospect of creating an appearance of corruption; and (3) the ban is significantly under-inclusive by omitting from its coverage very similar kinds of transactions by individuals who are not federal contractors, where there are similar if not greater prospects of creating an appearance of corruption (beyond those discussed in plaintiffs' Equal Protection claim below). We deal with each in turn and urge the Court to evaluate the likelihood of an appearance of "pay to play" from each of them.[2]

(1) As we have established (Plaintiffs' Statement of Undisputed Material Facts ¶¶ 4, 14), federal contracts are negotiated, approved and implemented at the agency level, with no role for the President or any Member of Congress. As a result, the possibility that either the President, a person appointed by the President, or a Member of Congress might attempt to influence the award of a contract to an individual is so remote that it cannot satisfy the First Amendment. By contrast, the "pay-to-play" rule upheld in *Blount*

[2] The Court in *McConnell* found the ban on contributions by minors to be overinclusive, which is another way of saying that it is not closely drawn: "The States have adopted a variety of more tailored approaches— *e.g.,* counting contributions by minors against the total permitted for a parent or family unit, imposing a lower cap on contributions by minors, and prohibiting contributions by very young children. Without deciding whether any of these alternatives is sufficiently tailored, we hold that the provision here sweeps too broadly." 541 U.S. at 232.

v. SEC, 61 F.3d 938, 939-40 (D.C. Cir. 1995), applied only to the state officials from whom the contributors obtained business. *See also* the branch-specific law at issue in *Green Party of Connecticut v. Garfield,* 616 F. 3d 189, 194 (2d Cir. 2010). Even if all of the elected officials covered by section 441c had comparable contracting authority to those covered by the rules in *Blount* and *Green Party,* the ban in section 441c extends far beyond actual officeholders and includes the following categories of contribution recipients, none of whom is in a position to influence the award of a federal contract:

(A) Political parties, especially the party whose leader does not currently occupy the Office of the President. The Court in *Dallman v. Ritter,* 225 P.3d 610, 627 (Col. 2010), set aside the law in part because it applied to contributions to political parties and to all candidates for office, regardless of their connection to the contributor's actual or potential contract.

(B) A "minor party" or a "new party, as defined by 26 U.S.C. § 9002 (7) & (8), candidates of a minor or new party, and political committees supporting candidates of a minor or new party.

(C) Political committees that are independent of any party or candidate, such as Emily's List, the various Right to Life Committees, political committees of trade associations and labor unions, and ideological organizations such as the Sierra Club and the National Rifle Association. North Carolina's ban on contribution by lobbyists allows them to make contributions of up to $4000 (N.C. Stat. 163-278.13(a)) to political committees and even allows them to suggest to whom the contribution should be made. *Preston v. Leake,* 660 F.3d 726, 739 (4th Cir. 2011).

(D) Candidates for Congress or for President who are not incumbents, including those who had already been defeated at the time that the contribution was made.

(E) Members of Congress who are not in a leadership position or on a committee with either substantive or appropriations jurisdiction over the subject of the federal contract that the individual is seeking or already has.

(2) The second way in which section 441c is not "closely drawn" is that the ban could be relaxed in at least *some* of the various ways set forth below that would still provide meaningful protection against the appearance of improper "pay-to-play."

(A) Exclude individuals such as plaintiffs Brown and Miller who are the functional equivalent of federal employees (to whom section 441c does not apply). As far as plaintiffs have been able to determine, laws banning or limiting contributions by contractors applicable to state and local contracts do not include individuals who are in a status similar to plaintiffs Brown and Miller.

(B) Exclude smaller contracts, such as plaintiff Wagner's $12,000 contract, from the ban. For example, the Connecticut law at issue in *Green Party* contains an exception for contracts under $50,000, or a series of contracts under $100,000 in a given year. C.G.S.A. § 9-612(g)(1)(C). Similarly, the New York City law at issue in *Ognibene* applied only to contracts of at least $100,000, 671 F.3d at 180, as did the law at issue in *Dallman*, 225 P.3d at 618. No reasonable person would believe that anyone would make a contribution of any amount in order to obtain a contract of the size of Wagner's. Under federal law, small contract are excluded from competitive bidding

(Schooner Dep. 107-108, 142-143), with no evidence that those contracts are any more subject to improper influence than any other contract.

(C) Allow individual contractors to make modest size contributions as the SEC did with its exclusion of up to $250. *Blount, supra,* at 948. The concept of small contribution exclusions is already a feature of federal election law under which only contributions totaling more than $200 in an election cycle have to be reported to the FEC and the name of the contributor publicly disclosed. No reasonable person would believe that anyone would make a contribution of $200 or less in order to obtain a federal contract, even assuming that the identity of the contributor were made known to the recipient.

(D) Attack the problem of "pay-to-play" from the contract side and not ban contributions. This is what the SEC does: its "pay-to-play" rule only forbids entering into contracts within a period of time (two years) *after* making of a disqualifying contribution. *Blount, supra,* at 939-40. Under such a rule, once an individual signed a contract with a federal agency, he or she could make contributions, unless the individual wanted to obtain other contracts within the time period covered by the ban.

(E) Exclude contracts that are entered into by a process of open competitive bids, as the SEC did in *Blount, supra,* at 940 n.1, because that process is designed to eliminate the possibility of the kind of favoritism that "pay-to-play" might undermine.

(F) Exclude sole source contracts because the requirements to enter them are sufficiently rigorous that they provide reasonable assurances of eliminating the possibility of the kind of favoritism that "pay-to-play" might undermine. As Professor

Schooner testified (Dep. 27, 130-132, 139-140), in many such cases the government initiates the contact with an individual to be an expert (like plaintiff Wagner), a mediator (where a private party must also consent and pay, Dep.127, 132), or an investigator for the agency, and the individual does not even know that there is a possible contract under consideration. In such cases the notion that a political contribution even to a candidate for President, let alone to independent political committees, would influence the selection of a contractor is beyond fanciful.

Plaintiffs recognize that the FEC's responses to their Requests for Admission took the position that each of the situations discussed in parts (1) & (2) above could give rise to the appearance of corruption, as could a ban on contributions by all registered lobbyists (Response to Request 35), and that, accordingly, Congress's failure to create exceptions for them does not make section 441c over-inclusive. The FEC's unwillingness to recognize section 441c's over-inclusiveness further demonstrates how extreme the FEC's position is and how far its understanding falls short of recognizing what satisfies the "closely drawn" test applicable to section 441c.

(3) Section 441c is also under-inclusive in a number of ways, which suggests that the actual purpose of the law is not to prevent the kind of "pay-to-play" rationale that the FEC suggests. Indeed, the legislative history of section 441c shows that in 1940, when it was passed, its supporters relied on the now-discredited approach of Justice Holmes, under which someone seeking government employment was treated as seeking a privilege to which Congress could attach any conditions.[3] As plaintiffs observed in their

[3] Remarks of Senator Hatch (sponsor of the Bill) quoting Holmes, 86 Cong. Rec. 2563 (March 8, 1940): "There is nothing in the Constitution or the statute to prevent the city from attaching obedience to this rule as a condition to the office of

reply memorandum on the motion for a preliminary injunction, the notion that individuals who "choose" to become federal contractors thereby surrender their constitutional rights cannot be sustained because the Supreme Court's "precedents have long since rejected Justice Holmes' famous dictum" quoted in note 3, *supra.* *Board of County Commissioners v. Umbehr,* 518 U.S. 668, 674 (1996).

On the under-inclusion side, there are a number of potential "pay-to-play" situations that are not covered by section 441c, but in all material respects are subject to the same arguable potential for the appearance of corruption from making a contribution, as the FEC admits in its response to Plaintiffs' Requests 24-27:

(A) Federal grants, such as the one that plaintiff Wagner has in an amount nearly four times the amount of her federal contract. Wagner Dec. ¶ 4. By contrast, the New York City law at issue in *Ognibene* applied only to grants in excess of $100,000, 671 F. 3d at 180, and while the Connecticut law in *Green Party* included grants, loans, and loan guarantees, it applied the same small-size exemption as applied to contracts. C.G.S.A. § 9-612(g)(1)(C)(vi). According to one study completed in 2003, there were nearly 3 million individuals providing services pursuant to federal grants. http://www.brookings.edu/~/media/research/files/articles/2003/9/05politics%20light/light20030905.pdf. Professor Schooner testified that the government gives away more money in grants in most years than it expends for contracts (Dep. 38-39), yet only contracts are

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policeman and making it part of the good conduct required. The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *See also id.* at 2623 (March 11, 1940) colloquy between Senators Hatch and Pepper relying on Holmes, pointing out that employees "have the right to express their opinions on all political subjects," and observing that if there is a curtailment of freedom of speech by the Hatch Act, it is a "constitutional curtailment" because there is a "waiver of his rights when he accepts the conditions attached to his employment" and, plaintiffs would add, his contract.

covered by section 441c. He also explained that the protections against improper influence under federal contracting law (Dep. 72-73, 136, 141-142) are inapplicable to federal grants (Dep. 40-42).

(B) Federal loans and federal guarantees, which can be in very large amounts. Those include loans and guarantees for homes given by the VA or FHA, as well as "small business" and "economic injury disaster loans," both of which can be as much as $2 million.[4] Moreover, "business and industrial loans" can be as large as $40 million.[5]

(C) Admission, tuition free, to one of the four United States Military Academies. Applicants need a recommendation from a Member of Congress or the President, and their parents may lawfully contribute to them or their party while a request for a recommendation is pending. *See, e.g.,* 10 U.S.C. §§ 6954(a); *United States Naval Academy, http://www.usna.edu/Admissions/steps4.htm.*[6]

(D) Individuals who make contributions to a presidential candidate and to the candidate's party up to the limits allowed by law, who assist the campaign by collecting contributions from others, and who hope to be are rewarded with government

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[4] http://www.govloans.gov/loans/loan-details/1497; http://www.govloans.gov/loans/loan-details/1504.

[5] http://www.govloans.gov/loans/loan-details/4735.

[6] A similar opportunity for contributions to influence discretionary decisions involves Presidential pardons, for which letters from Members of Congress can be persuasive. *See* http://www.propublica.org/article/pardon-attorney-torpedoes-plea-for-presidential-mercy (citing support of Senator Dick Durbin to obtain only Obama commutation). Thus, there are real incentives for individuals with pardon matters to make generous contributions, as the case of Marc Rich and President Clinton illustrates, yet no ban like 441c applies in that situation. http://www.propublica.org/article/the-shadow-of-marc-rich.

positions, including coveted ambassadorships. *See, e.g.,* Washington Post, March 8, 2012 (A-15) "Obama Gives Administration Jobs to Some Big Fundraisers."

The FEC responds by pointing out that plaintiffs and other individual contractors can still hold fundraisers and solicit contributions for candidates and political parties because such voluntary activity is excluded from the definition of contribution by 2 U.S.C. § 431(8)(B)(i). That argument is flawed for several reasons. First, it is the right of the individual, not the government, to choose how she or he wishes to exercise his or her First Amendment rights, which means, in this context, deciding how to express his or her political preferences. Some individuals may prefer to give money, while others may prefer to donate their time, but absent some exceptional justification, it is not the role of government to decide how individuals exercise their First Amendment rights.[7]

Second, the purported reason for the ban in section 441c is that allowing contractors to contribute might give the appearance that they obtain their contracts because of those contributions. But if making a contribution of $100 to a political committee that has no connection to a candidate or political party can be banned by section 441c on the "pay-to-play" theory, it makes no sense to allow individual contractors to raise tens of thousands of dollars (if not more) by bundling contributions from others for a candidate for President or Congress, as section 441c permits.

[7] The FEC makes a similar argument in the Equal Protection context, which this Court embraced. Preliminary Injunction Opinion ("P.I. Opinion") at 24. Federal employees may not engage in soliciting contributions for federal elections, and so, according to the FEC, plaintiffs are better off in this respect than are federal employees, even though they are worse off because of section 441c. Plaintiffs are unaware of any authority that allows the government to require individuals to trade one First Amendment right for another in order to avoid Equal Protection flaws in a statutory scheme. Each restriction must be independently justified, and permission to speak in one manner cannot be used to offset a ban of another when the First Amendment is involved.

Although the ban on contributions by individuals who are federal contractors has been in effect since 1940, and although Congress began imposing contribution limitations on individuals in 1971, Congress has never once debated any amendment that would be in any way responsive to the vastly over- and under- inclusiveness of section 441c. To be sure, the Court first applied the First Amendment to campaign contributions in *Buckley v. Valeo,* 424 U.S. 1 (1976), but since then it has been clear that the ability to contribute money to political campaigns is not a privilege and requires careful attention to assure compliance with the Constitution. Congress has also amended the Hatch Act, of which section 441c was a part when it was enacted, to remove or modify certain restrictions applicable to federal employees but, so far as we can determine, it has never considered whether the ban in section 441c applicable to individuals such as plaintiffs could be loosened, or whether these closely analogous areas ought not to be brought within the same "pay-to-play" prohibition. The rough justice approach to the ban on contributions urged by the FEC here might be sustained if this were purely economic legislation, *see Armour v. City of Indianapolis,* 132 S. Ct. 2073 (2012), but it is not. The ban on contributions by individual federal contractors in section 441c is a direct assault on First Amendment rights, and like the ban on contributions by individuals under the age of 18 in *McConnell, supra,* it fails to satisfy the requirement that such bans be "closely drawn" to meet the purposes behind the law. Accordingly, plaintiffs cannot be limited in making contributions in connection with federal elections except by laws that apply to all other individual American citizens.[8]

[8] In its Discovery Requests to plaintiffs, the FEC used two terms in ways that might cause confusion to the Court regarding the scope of the legitimate concerns at which section 441c might be directed. First, although the only federal officials who are elected are the

II. SECTION 441C ALSO VIOLATES EQUAL PROTECTION.

In analyzing plaintiffs' Equal Protection claim, the Court properly rejected the FEC's contention that the Court should apply rational basis, but instead applied an intermediate form of scrutiny. P.I. Opinion at 20-22**.** Because the FEC defended the discriminatory treatment of individual contractors vis-à-vis federal employees and corporate contractors (and in particular their PACs, officers, directors, and shareholders) only under rational basis, it has, in effect, conceded that it could not justify the discrimination under any higher standard. The Court nonetheless reviewed the differences and rejected plaintiffs' Equal Protection claim. In doing so, the Court apparently overlooked or misapprehended certain of plaintiffs' contentions, and it is on those aspects of Equal Protection that this memorandum will focus.

Equal Protection claims are not analyzed in a vacuum. Rather, they arise in the context of specific laws that have specific goals. For example, in *Kramer v. Union Free School District No. 15,* 395 U.S. 621 (1969), the Equal Protection issue was the validity of the law that denied the plaintiff the right to vote in a school board election, and in *Bush v. Gore,* 531 U.S. 98 (2000), the issue was whether the method chosen for a recount was proper in light of the goal of producing an accurate vote for President. In this case, the

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President, Vice-President, and Members of Congress, the FEC asked about the role of political appointees in the contracting process. Its definition included not only persons appointed by the President, but also persons whom those appointees in turn appointed. Second, its inquiries used the term "influence" in connection with the awarding of contracts, without defining the term, and without indicating whether such influence was proper (because, for example, a person made a recommendation based on actual knowledge of the potential contractor's qualifications) or improper (because the potential contractor was the member of a political party). These problems are more fully discussed in the April 30, 2012, Supplement to Responses of Plaintiffs to Requests for Admission that is filed with the Court.

issue is not whether individuals like plaintiffs are similar in all respects to federal employees or to federal corporate contractors and their PACS, their officers, and their shareholders, but whether they are similarly situated and treated comparably with respect to the asserted goals of section 441c: to prevent coercion of contributions and to limit the appearance of corruption by avoiding situations that might give rise to an inference that contracts were given as rewards for contributions to federal elections by persons in positions to influence the awards of federal contracts or, in the case of federal employees, employment decisions such as raises, promotions, job locations, and other conditions of federal employment. We do not understand the FEC to argue (or the Court to have found) that the avoidance of coercion rationale is different for plaintiffs than for the others, and so we will focus on the avoidance of the appearance of "pay-to-play" to determine whether that rationale can support the very unequal treatment of plaintiffs.

Because both corporate contractors and individual contractors are subject to section 441c, we begin our Equal Protection analysis by acknowledging that section 441c does not facially discriminate between corporate and individual contractors: both are subject to the ban. However, whereas individuals have no means by which to accomplish their goal of making political contributions, there is a direct and easy path for corporations to do that. Subsection (b) of section 441c specifically authorizes a corporation to set up a separate segregated fund (PAC), for which the corporation may pay administrative and fundraising expenses despite the general ban in subsection (a). That fund can make any contribution that any other PAC can make, using funds that are solicited from the corporation's officers, directors, and shareholders – *i.e.,* the individuals with the greatest stake in the corporation. Section 432(e)(5) requires that the separate

fund bear the name of the sponsoring corporation, and there is no requirement that anyone outside the corporation manage the sponsored PAC. However, the separate fund route is not available to individuals, as subsection (b) does not mention them. In addition, the FEC has made clear in Advisory Opinion 2008-11 (Exhibit B to the Brown declaration) and in 11 CFR § 115.5 that the ban on individual contractor contributions applies not only to money earned under a federal contract, but includes any funds owned by the individual, regardless of when or how acquired, for as long as that individual holds a federal contract or is negotiating for one.

Plaintiffs recognize, as this Court observed (P.I. Opinion at 25), that a corporation that has the federal contract and the PAC that it has established are separate legal entities. However, the question in this context is whether an appearance of corruption based on "pay-to-play" would be any different if the contribution came from the PAC (as is allowed) or from the contractor-sponsor, which is forbidden. In our view, no person with knowledge of the facts would perceive a contribution to a federal candidate from The Boeing Company PAC to be any different from a "pay-to-play" perspective than if it came from The Boeing Company itself. In effect, allowing a corporate contractor to accomplish through its PAC what it cannot do directly, while denying plaintiffs a comparable opportunity, is inconsistent with the majority's rationale in *Citizens United v. FEC,* 130 S. Ct. 876 (2010), which held that corporations and individuals have equal rights to make independent expenditures. And it is even more inconsistent with the positions of the FEC and the dissent in *Citizens United,* under which corporations could be treated less favorably than individuals. Treating corporations the same as individuals

under the First Amendment and Equal Protection Clause is one thing, but giving them better treatment, as section 441c does, is quite another.

The same Equal Protection problem exists, although perhaps to a slightly lesser degree, if the contribution came, for example, from the Chairman of The Boeing Company, the Director of Government Relations, or the Director of the Division that sells airplanes to the Pentagon, rather than The Boeing PAC. The FEC recognizes (correctly in our view) that section 441c does not apply to an individual officer, director, shareholder, or employee of any corporate contractor, even though it applies to individuals such as plaintiffs. Indeed, the FEC concedes that if plaintiff Wagner had chosen to spend the time and money to establish an LLC (or whatever the form of a personal service corporation exists in her home state), and her same contract were between ACUS and that corporation, she could make any contribution permitted by any individual – even if she were the sole officer, shareholder, director, and employee of her LLC. To be sure, as the Court observed (P.I. Opinion at 25), those contributions are not made as officials of the corporate contractor, but the plaintiffs would likewise be contributing as individuals, not as government contractors, if section 441c allowed them to do so. Accordingly, from the only perspective that is relevant to this Equal Protection challenge – are plaintiffs being treated equally as compared to corporate contractors and their officers, directors, shareholders, and employees in terms of avoiding the appearance of "pay-to-play" from the making of political contributions – the answer must be "No."

The comparison for Equal Protection purposes regarding federal employees is different, but the outcome should be the same. Plaintiffs and federal employees all regularly work for the federal government, often alongside of one another, doing identical

or nearly identical work, for which the government regularly pays them and withholds taxes. Unlike section 441c which is applicable to plaintiffs, there is no law forbidding federal employees from making political contributions to any proper recipient, although 18 U.S.C. § 603 does preclude federal employees from delivering their contribution to their superiors, which is designed to prevent coercion and has nothing to do with "pay-to-play" in any of its incarnations. In fact, applicable federal regulations are clear that, despite other restrictions on political activities by employees, making contributions is perfectly legal: "An employee may make a political contribution to a political party, political group, campaign committee of a candidate for public office in a partisan election and multicandidate political committee of a Federal labor or Federal employee organization." 5 C.F.R. § 734.208(a). Indeed, even employees of the FEC, including the lawyers who are defending it in this case, can freely make contributions in amounts as great as any other citizen, although they (but not the FEC commissioners) may not "receive from or give" a contribution to "an employee, a Member of Congress, or an officer of a uniformed service." 5 C.F.R. § 734.413. Although not entirely clear, the use of the term "give," as well as the phrase "receive from," appear to be solely a limit on physical and other forms of delivery, and do not preclude federal employees from financially supporting a Member of Congress so long as the contribution is made through a means such as the Internet or the mail, so that the Member would never see or touch it. But even if section 734.413 banned contributions to Members of Congress, FEC employees could still give to challengers, candidates for President, political parties, and political committees, all of which are out of bounds for plaintiffs.

The problem of coercion by superiors was very much on the mind of Senator Carl Hatch, the sponsor of the 1940 bill that included the predecessor of section 441c, as well as his colleagues, yet that concern cannot support the differing treatment of federal employees and individual federal contractors like plaintiffs. The main purpose of the bill was to extend the prohibitions against political activities contained in the 1939 Hatch Act that covered only federal employees to include state employees funded with federal dollars. The debates are replete with examples of state employees being required to contribute to political campaigns as a condition of retaining their jobs. *See e.g.,* 86 Cong. Rec. 2433, 2567-69, 2574, 2579, 2625 & 2626 (1940). The Senators also recognized that existing law at the time (now 18 U.S.C. § 603) prohibited solicitation and receipt of contributions by a superior federal official (and some others), *id.* at 2559-61, 2575, but neither the 1939 law applicable to federal employees, nor the 1940 state employee extension, banned employees from making contributions entirely, so long as they were voluntary. *Id.* at 2576, 2623. Yet when it came to federal contractors, who were far less at the mercy of those who sought their political contributions than were the state employees protected by the 1940 extension, Congress enacted a total contribution ban, almost certainly because, as shown on pages 12-13, *supra,* it believed that a person accepting federal dollars as an employee or a federal contractor had no right to object to any conditions imposed, including a waiver of First Amendment rights. For these reasons, the anti-coercion measures enacted to protect vulnerable government employees were surely sufficient to protect federal contractors like plaintiffs, and yet Congress went much further in limiting their First Amendment rights.

The remaining question is whether there is some other justification applicable to plaintiffs that is not also applicable to federal employees generally. Plaintiffs recognize that most, but not all, federal employees have civil service protections that are significant safeguards against arbitrary action by their agencies. But federal contractors are not simply subject to the whims of agency officials; they have contractual and statutory rights that provide protections and guard against arbitrary agency action (Schooner Dep. 72-73, 136, 141-42), as well as the Due Process Clause. Given those protections, section 441c can not reasonably be justified on the ground that it is needed to prevent early and perhaps unlawful termination of federal contracts, any more than a ban on federal employee contributions could be justified on that rationale.

As we understand the FEC's argument, it is that the ban is intended to prevent the appearance of corruption that would arise if individual contractors were to make contributions in order enhance their chances of being awarded future contracts (or renewals of existing contracts). Because federal employees do not need new contracts or renewals, the FEC argues, they would have nothing to gain from making contributions or lose from not making them, which makes the situations not comparable. This argument overlooks the fact that federal employees are not in a static situation. Almost all of them would like to have pay raises, obtain promotions, or at least receive good annual evaluations by their superiors. There are also some locations that are more desirable than others, and within a given office, there are better and worse jobs, in terms of quality of work, the hours during the day when the employee must be present, the availability of flextime, the identity of the supervisor, and the ability to enhance one's experience as a means of advancing in the future. And in contrast to contractors like plaintiff Wagner,

for whom the ACUS work is only part time and for a limited duration, or like plaintiffs Miller and Brown, who are retired employees for whom their contract work supplements their retirement, full time federal employees have a great deal to gain or lose even if their "contracts" cannot readily be terminated. Thus, to the extent that they too have incentives to please (or not displease) their supervisors by making "appropriate" political contributions, they are just like individual contractors, especially those like plaintiffs Brown and Miller who literally work along side of, supervise, or are supervised by federal employees. We do not argue that the situations are identical, but under the heightened standard of review that this Court has concluded applies to this Equal Protection challenge, they are sufficiently close that the FEC must supply a far greater justification than it has to date to explain why the Constitution permits Congress to forbid plaintiffs from making contributions in federal elections, but does not apply a similar ban to federal employees.

Finally, this Court suggested (P.I. Opinion at 23) that Congress had made a "reasonable legislative judgment" that the contribution limits applicable to all individuals, including federal employees, were not adequate to protect the federal interest allegedly advanced by the ban in section 441c applicable to individual federal contractors. The difficulty with that assertion is that it assumes that Congress actually considered the issue in that way, but there is nothing to support that hypothesis. Congress imposed the ban on individual contributions in section 441c in 1940, and the only changes to that provision since then made it easier for corporations to make contributions, through their PACs. Even when Congress implemented the current contribution system in 1971, and imposed contributions limits on all individuals, it never

considered making those limits applicable to individual contractors. And when it loosened restrictions in the Hatch Act after 1940, there is no indication that it ever considered loosening or eliminating the ban in section 441c applicable to plaintiffs and others. In short, even if a considered legislative judgment could overcome the kind of First Amendment and Equal Protection problems that exist here, the relation of section 441c to the lack of restrictions on the making of contributions by federal employees and by PACs, officers, directors and shareholders of corporate contractors is entirely one of happenstance that has never been considered, let alone reconsidered in light of other directly relative changes in campaign finance law since the ban applicable to plaintiffs was enacted in 1940. *See Miller v. Alabama*, ___ S. Ct. ___, 2012 WL 2368659 at *14 - *15 (June 25, 2012) (when mandatory sentences of life without the possibility of parole for juveniles resulted from the interaction of separate statutes enacted at different times, "it [is] impossible to say whether a legislature had endorsed a given penalty for children (or would do so if presented with the choice)." *Id.* at *15).

CONCLUSION

For the foregoing reasons, and those set forth in plaintiffs' prior submissions, the plaintiffs' motion for summary judgment should be granted. Therefore, the Court should enter an order declaring that 2 U.S.C. § 441c as applied to plaintiffs violates the First Amendment and the Equal Protection component of the Fifth Amendment and enjoining defendant from enforcing section 441c against plaintiffs.

Respectfully submitted,

/s/ *Alan B. Morrison*
Alan B. Morrison
D. C. Bar No. 073114
George Washington Law School
2000 H Street NW
Washington D.C. 20052
(202) 994 7120
(202) 994 5157 (fax)
abmorrison@law.gwu.edu

/s/ *Arthur B. Spitzer*
Arthur B. Spitzer
D.C. Bar No. 235960
American Civil Liberties Union of
the Nation's Capital
4301 Connecticut Ave, N.W., Suite 434
Washington, D.C. 20008
(202) 457-0800
(202) 457-0805
artspitzer@gmail.com

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