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 MOTION FOR SUMMARY JUDGMENT

DEFENDANT FEDERAL ELECTION COMMISSION'S
MOTION FOR SUMMARY JUDGMENT

The Federal Election Commission ("the Commission") respectfully moves the Court for an order granting summary judgment to the Commission pursuant to Rule 56 of the Federal Rules of Civil Procedure because 2 U.S.C. § 441c is consistent with the First Amendment and the equal protection guarantee of the Fifth Amendment as applied to individuals with federal contracts. Attached are a Memorandum of points and authorities in support of the Commission's Motion, a Statement of Material Facts, and a Proposed Order, as required by LCvR 7.

Respectfully submitted,

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August 15, 2012

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 MEMORANDUM

DEFENDANT FEDERAL ELECTION COMMISSION'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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In denying plaintiffs' request for a preliminary injunction, this Court previously held that it is unlikely that 2 U.S.C. § 441c violates either the First Amendment or the equal protection guarantee of the Fifth Amendment as applied to individuals with federal contracts. *Wagner v. FEC*, __F. Supp.2d __, 2012 WL 1255145 (D.D.C. Apr. 16, 2012) ("Mem. Op.") (Doc. No. 28). As the Court recognized, the prohibition on federal contractors making campaign contributions is a longstanding and important measure in combating corruption and the appearance of corruption, and ensuring an effective and unbiased federal workforce free from political coercion. Neither plaintiffs' memorandum in support of their motion for summary judgment (Plaintiffs' Statement of Points and Authorities in Support of Their Motion for Summary Judgment ("Pls.' Mem.") (July 12, 2012) (Doc. No. 30-1)) nor their statement of undisputed facts offers anything new that could support a different conclusion on the merits. The Court should therefore uphold the statute and grant summary judgment for the Federal Election Commission ("FEC" or "Commission").[1]

BACKGROUND

The Federal Election Campaign Act of 1971, as amended ("FECA" or "Act"), 2 U.S.C. §§ 431-57, prohibits any person who is negotiating or performing a contract with the United States government or any of its agencies or departments from making a contribution to any political party, political committee, or federal candidate. *See* 2 U.S.C. § 441c(a).[2] Congress

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[1] To diminish duplication of earlier briefs, the parties agreed that they would each file only a single brief on their cross motions for summary judgment and that arguments made in the earlier briefs would not be waived by failure to raise them here. A more complete recitation of the background is set forth in the FEC's prior brief filed in opposition to plaintiffs' motion for a preliminary injunction. (Defendant FEC's Opposition To Plaintiffs' Motion for a Preliminary Injunction (Mar. 1, 2012) (Doc. No. 25).)

[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

originally enacted this prohibition on contributions by federal contractors as part of the 1940 amendments to the Hatch Act of 1939.[3] The law was intended, *inter alia*, to ensure a merit-based federal workforce free of coercion or other improper political influence, following many decades of inadequate reform efforts to deal with the problems of political influence. (FEC's Statement of Material Facts ¶¶ 15-31 ("FEC Facts").)

Plaintiffs are three individuals who chose to enter into contracts with the federal government and are thereby currently prohibited from making contributions. (FEC Facts ¶¶ 2-5.) They have brought this action to strike down the contribution prohibition in section 441c, claiming that it violates both the First Amendment and the equal protection guarantee of the Fifth Amendment. The action was brought against the FEC, the independent agency of the United States government with exclusive jurisdiction to administer, interpret, and civilly enforce FECA. (*Id.* ¶ 1)

Plaintiffs sought a preliminary injunction barring the FEC from enforcing section 441c while the case was pending, allegedly so that they could make contributions during the 2012 election cycle. (Plaintiffs' Motion for a Preliminary Injunction) (Jan. 31, 2012) (Doc. No. 18).) After full briefing and argument, the Court denied the motion for a preliminary injunction, finding that plaintiffs were unlikely to succeed on the merits of their claims. (Mem. Op. at 26.)

> 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[.]"

[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).

ARGUMENT

I. SECTION 441c IS CONSTITUTIONAL UNDER THE FIRST AMENDMENT

A. The Federal Contractor Ban Is Closely Drawn to Match the Government's Important Interests in Preventing Corruption, the Appearance of Corruption, and Political Coercion of Federal Contractors

A law limiting campaign contributions challenged under the First Amendment need not satisfy the "narrowly tailored" requirement of strict scrutiny. Rather — as this Court previously determined, and plaintiffs acknowledged — such a law "passes muster if it satisfies the lesser demand of being closely drawn to match a sufficiently important interest." *FEC v. Beaumont*, 539 U.S. 146, 162 (2003) (quoting *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 387-88 (2000)) (internal quotation marks omitted); Mem. Op. 5-7; Plaintiffs' Reply Statement of Points and Authorities in Support of Plaintiffs' Motion for Preliminary Injunction at 12-13 (Mar. 12, 2012) (Doc. No. 26).

The Supreme Court has described the "closely drawn" standard as a "relatively complaisant review," *Beaumont*, 539 U.S. 161-62, and section 441c easily meets it. The ban on contractor contributions closely matches the important government interests of preventing 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 v. Valeo*, 424 U.S. 1, 25 (1976). It also matches the interests of ensuring that federal contracts are awarded on merit, that federal contractors carry out their duties in a nonpartisan manner, and that contractors not be coerced into political participation. The Supreme Court has identified these interests as sufficiently important to support some infringement on political expression. *See U.S. Civil Service Comm'n v. Nat'l Ass'n of Letter Carriers, AFL-CIO*, 413 U.S. 548, 557, 565-66 (1973) (identifying the same substantial government interests supporting

the Hatch Act, which restricts political activity by federal employees). Both this Court and plaintiffs have also noted that these interests are substantial. (Mem. Op. at 8-9 ("It is well established that preventing corruption or its appearance is a sufficiently important government interest to justify certain restrictions on political giving."); Pls.' Mem. at 7 (avoiding the appearance of pay-to-play is "an important government interest.").)

Plaintiffs rely on three general arguments in their failed attempt to show that section 441c is not "closely drawn." First, plaintiffs argue that the problems of corruption and coercion could be managed effectively through less-restrictive criminal statutes, such as the existing provisions that criminalize the coercion of federal employees (*see* Pls.' Mem. at 6). But plaintiffs fail to acknowledge that the Hatch Act protects federal employees above and beyond the criminal provisions they cite, and *Letter Carriers* clearly upheld Congress's decision to enact these additional protections. And regarding FECA, the Supreme Court in *Buckley* dismissed virtually the same argument that plaintiffs make here. The Court rejected the suggestion that FECA's contribution limits were unconstitutional because the government's interest in preventing corruption was adequately addressed by bribery and disclosure laws. *Buckley*, 424 U.S. at 27. The Court recognized that "laws making criminal the giving and taking of bribes deal with only the most blatant and specific attempts of those with money to influence governmental action." *Id.* at 27-28. The Court thus held that it was well within Congress's power to determine that the federal contractor contribution ban is necessary to prevent less blatant forms of corruption and coercion.[4]

[4] Plaintiffs note (Pls.' Mem. at 2) that the Court "may not be fully aware of the breadth of application of section 441c, beyond plaintiffs themselves." Neither plaintiffs nor the Commission has been able to ascertain the precise number of individuals with federal government contracts. But the fact that this case has far-reaching implications is a reason for the Court to proceed with extreme caution, not to overturn the law. And the fact that some

Second, plaintiffs invent a series of other statutory provisions that they believe would be less restrictive but in their view would "still provide meaningful protection against the appearance of improper 'pay-to-play.'" (Pls.' Mem. at 9-11.) As this Court has already noted, however, this sort of Congressional determination is entitled to deference, in part because Congress "is better equipped to make . . . empirical judgments" than the Court. (Mem. Op. at 14 (quoting *Randall v. Sorrell*, 548 U.S. 230, 248 (2006).) Plaintiffs' belief that a different provision might still "provide meaningful protection" cannot be substituted for Congress's judgment, and their wish that the law be perfectly tailored in every respect is directly at odds with the applicable "closely drawn" standard. In any event, plaintiffs' suggested statutory amendments would likely eviscerate section 441c, given that their proposed exclusions would include virtually the entire universe of federal contracts. (Pls.' Mem. at 10-11 (suggesting law might be amended to "[e]xclude individuals . . . who are the functional equivalent of federal employees" or "[e]xclude smaller contracts" or "[e]xclude contracts that are entered into by a process of open competitive bids" or "[e]xclude sole source contracts.")[5] Moreover, some of plaintiffs' other proposed amendments would do little or nothing to serve the important interests

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"individuals like plaintiffs" may not "need or want any such 'protection' from coercion" (Pls.' Mem. at 6) is beside the point. While some contractors and potential contractors may be unconcerned about political influence — or may even welcome the opportunity to exert such influence — section 441c is designed to protect the greater interests of the public in a depoliticized contracting process and a federal election system without corruption. Just as *Buckley* upheld FECA's contribution limits across the board even though the Court assumed that "most large contributors do not seek improper influence," 424 U.S. at 29, so too is section 441c valid as applied to plaintiffs, even if they personally would prefer not to be protected from coercion.

[5] Several of the contracts plaintiffs identify as possible exclusions from the prohibition, such as small contracts and sole source contracts, have a streamlined process and therefore could potentially present a *greater* likelihood of politicization, rather than a diminished one. (FEC Facts ¶ 50.) Even relatively small contributions or contracts can result in corruption or the appearance of corruption. (FEC Facts ¶¶ 53, 93, 107, 111, 112.)

at stake. For example, the suggestion that contractors be permitted to make contributions, but only *after* the contract has been entered into (Pls.' Mem. at 11), would do little to prevent corruption or the appearance of corruption — a contractor could simply indicate an intention to give a contribution later on — and would do *nothing* to protect a contractor from being coerced to make a contribution once the work on the contract had begun.[6]

Third, plaintiffs' renew their underinclusive argument (Pls.' Mem. at 12-15), relying again on their earlier suggestion that section 441c is unconstitutional because people who receive federal grants or loans, or admission to the service academies, are not barred from making contributions.[7] As this Court has explained, however, "[t]he D.C. Circuit has squarely rejected arguments of this kind, stating that 'a regulation is not fatally underinclusive simply because an alternative regulation, which would restrict *more* speech or the speech of *more* people, could be more effective. The First Amendment does not require the government to curtail as much speech as may conceivably serve its goals.'" (Mem. Op. at 16 (quoting *Blount v. SEC*, 61 F.3d 938, 946 (D.C. Cir. 1995).) Plaintiffs present no new facts or law that call into question the Court's prior ruling on this point.

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[6] Plaintiffs suggest that their approach of identifying different ways in which the statute might be made more closely drawn is supported by the section of the *McConnell* decision that struck down a prohibition on contributions by minors. (Pls.' Mem. at 8 n.2.) But that prohibition was an *anti-circumvention* measure — minors were prohibited from making contributions so that parents could not use their children as conduits to make contributions that the parents would not be able to make themselves. *McConnell v. FEC*, 540 U.S. 93, 232 (2003). In that particular situation, the Supreme Court was able to assess less restrictive anti-circumvention measures that would be equally effective. *Id.*

[7] Plaintiffs also note that big contributors and fundraisers are sometimes rewarded with government positions. (Pls.' Mem. at 14-15.) If individuals are able to obtain ambassadorships in part by contributing generously, it is "neither novel nor implausible" to assume that similar contributions could help lead to federal contracts, or at the very least, give that appearance. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 (2000); *see also* FEC Facts ¶¶ 104-14.

In sum, the bulk of plaintiffs' recycled argument is that Congress could have drawn the lines it chose in regulating contributions by federal contractors and others differently. Those arguments, however, should be directed to Congress itself, not to this Court.

B. Section 441c Serves an Important Purpose in Combating Corruption

Corruption, the appearance of corruption, and the coercion of contractors have been genuine dangers, from the time the federal government first banned campaign contributions from federal contractors until today. The "pay-to-play" scandals in various states discussed in cases such as *Green Party of Conn. v. Garfield*, 616 F.3d 189 (2d Cir. 2010), *cert denied*, 131 S. Ct. 3090 (2011) and *Yamada v. Weaver*, No. 10-cv-00497, 2012 WL 983559 (D. Hawaii March 21, 2012) show that pay-to-play problems are not merely a relic from the past that has been eradicated, but a real threat that requires continuing government vigilance to combat.[8] If there is little recent evidence of federal contributions being used to influence contracting decisions, that is a credit to the efficacy of section 441c, not a reason to strike it down after 70 years on the books.[9] (*See* Mem. Op. at 11-12 (citing *Burson v. Freeman*, 504 U.S. 191, 207 (1992).)

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[8] The Statement of Material Facts that accompanies this motion contains numerous additional examples of pay-to-play scandals in various jurisdictions that rely upon news accounts and other secondary sources. (*See, e.g*, FEC Facts ¶¶ 51-124.) Plaintiffs have expressed concern that these facts might "be used to establish material facts, or to oppose those facts that plaintiffs have designed [sic] as material facts not in dispute." (Pls.' Mem. at 2.) These facts, while material to the issues in this case, are legislative facts presented for the benefit of the Court and are not intended to contradict any of the adjudicative facts alleged by plaintiffs concerning their particular situations. (*See* Defendant FEC's Opposition to Plaintiffs' Motion to Certify Facts at 6-7 (Dec. 5, 2011) (Doc. No. 11) (explaining the distinction between legislative and adjudicative facts).)

[9] The long and widespread history of pay-to-play practices is what distinguishes this case and others like it from *Lavin v. Husted*, No. 11-3908, 2012 WL 3140909 (6th Cir. Aug. 3, 2012), which plaintiffs have cited to the Court as a supplemental authority. (Plaintiffs' Notice of Additional Authority (Aug. 7, 2012) (Doc. No. 31).) The law challenged in *Lavin* was struck down because there was "no evidence that prosecutors in Ohio, or any other state for that matter" have made decisions to prosecute based on campaign contributions. *Lavin*, 2012 WL 3140909, at *3. In contrast, there is a wealth of evidence from numerous jurisdictions that contractors

Even contributions made to candidates or political committees without a direct role in the contracting process can breed corruption and its appearance. As this Court found, the "wall between elected federal officials and agency heads is hardly as impassable as Plaintiffs make out." (Mem. Op. at 16.) "Plaintiffs do not dispute . . . that elected officials can and sometimes do recommend contractors to agencies." (*Id*.) And there are thousands of persons appointed by the President serving at various agencies, many of whom may play a role in the contracting process. (FEC Facts at ¶¶ 43-44 (quoting Deposition of Steven L. Schooner ("Schooner Dep.") at 27-28, 110-12, 114-15); U.S. Senate, Committee on Homeland Security and Government Affairs, S. Prt. 110-36, Policy and Supporting Positions (2008) (listing about 8,000 positions for political appointees in the executive and legislative branches).) These appointees can attempt to steer contracts to 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 national political parties). In sum, as this Court correctly concluded, "there is a connection between federal elected officeholders and the awarding of contracts, albeit indirect, that supports a finding that the ban is closely drawn." (Mem. Op. at 16.)

Even plaintiffs concede 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 they regard the likelihood of that happening for an individual contract as "extremely small." (Pls.' Mem. at 7.) But plaintiffs' subjective assessment of the likelihood of such undue influence does not matter; this quintessentially legislative judgment belongs to Congress. While plaintiffs may believe, for example, that the procurement process at USAID "generally" succeeds at precluding

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attempt and succeed in obtaining contracts by making campaign contributions. (FEC Facts ¶¶ 51-90 (discussing pay-to-play scandals in various jurisdictions).)

outside influence (*id*. at 7), it is for Congress to decide how best to prevent potential corruption and the appearance of corruption, even when the risk is relatively small. *See Buckley*, 424 U.S. at 53 n.59 (upholding limit on contributions to candidates from family members because "[a]lthough the risk of improper influence is somewhat diminished in the case of large contributions from immediate family members, we cannot say that the danger is sufficiently reduced to bar Congress from subjecting family members to the same limitations as nonfamily contributors.")

Furthermore, many federal contracts, including those awarded to plaintiffs, are awarded through streamlined processes that dispense with the open formal bidding procedures. (See FEC Facts ¶¶ 3, 44-46, 49-50.) Plaintiffs assert that it is "not believable" and "beyond fanciful" to think that the award of such contracts might be influenced by making a campaign contribution. (Pls.' Mem at 5, 12.) But plaintiffs' own declarant testified as to the efficacy and usefulness of the competitive bidding process and the requirement for contracting officers who are "attuned to the need to be independent, above-board and [who are] able to explain their actions in an objective and impartial way" to help keep politics out of contracting. (FEC Facts ¶ 43 (quoting Schooner Dep. at 136).) It is neither unbelievable nor fanciful to believe that even small contributions might make a difference in a process "where the government can call two or three people on the phone" and make a determination on that basis. (See FEC Facts ¶ 50 (quoting Schooner Dep. at 107).)

Lastly, even when *actual* corruption may be unlikely or difficult to prove, the government maintains an interest in fighting even the *appearance* of corruption. Plaintiffs argue that there would be no appearance of corruption to "a reasonable person, who understands how federal contracts are let." (Pls.' Mem. at 7.) But plaintiffs' attempt to impose some sort of

enhanced "reasonable person" standard — one that assumes knowledge of the federal contracting system — is way off the mark and without any basis in law. The Supreme Court has never hinted that only a specially educated subset of the public should be imagined as the focus group for determining whether certain campaign finance activity may create an appearance of corruption. To the contrary, the Court has spoken about the public at large, the voters who choose our elected officials. *See, e.g., 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.") Most Americans lack familiarity with the complexities of federal contracting, and they could easily view contributions by contractors with suspicion. Even plaintiffs' own declarant, Professor Schooner, who teaches and studies federal contracting for a living, acknowledged that "I don't know anything about how the retired annuitants [like plaintiffs Miller and Brown] and those types of contracts work" and "for all I know every agency that uses retired annuitants does it a different way." (*See* FEC Facts ¶ 49 (quoting Schooner Dep. at 67, 81).) The government has an interest in preventing the appearance of corruption by prohibiting contractors' campaign contributions, regardless of how they might be viewed by a small fraction of the public familiar with federal contracting law.

C. Section 441c Is Closely Drawn Because It Creates Only a Modest Burden on Expression

Section 441c allows ample alternative forms of political expression, even though it temporarily prevents persons who *choose* to become federal contractors from making contributions. Federal contractors are *not* prohibited from speaking about candidates, volunteering for campaigns, raising funds for candidates or parties, blogging, 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, 100.94; FEC Facts ¶¶ 137-41.

This Court has already noted that one reason the law is closely drawn is because "persons affected by the ban have other meaningful avenues for political association and expression." (Mem. Op. at 15 (citing *Blount*, 61 F.3d at 948, and *Preston v. Leake*, 660 F.3d 726, 740 (4th Cir. 2011)).) Plaintiffs argue, however, that these alternative means of expression are of no consequence because "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 . . . ." (Pls.' Mem. at 15.) But plaintiffs' argument is beside the point because the government is not *choosing* how plaintiffs express themselves. As this Court noted, this kind of restriction is a "mere 'channeling device[]'" that "'cut[s] off the avenue of association and expression that is most likely to lead to corruption but allow[s] numerous other avenues of association and expression.'" (Mem. Op. at 14 (quoting *Preston*, 660 F.3d at 734).) Plaintiffs cite no supporting authority for their argument, which is also directly contradicted by cases such as *Letter Carriers* and *Buckley*, each of which held that it was constitutional to limit certain types of expression while permitting other types.

Furthermore, section 441c's prohibition is modest because it applies only while a contract is being negotiated or performed. If an individual wishes to make a contribution, that person can do so simply by completing the contract with the government, or by not entering into one in the first place. As this Court has noted, "Plaintiffs voluntarily chose to become federal contractors and are only subject to the ban for as long as they continue to make that choice." (Mem. Op. at 15 (citing *Preston*, 660 F.3d at 740).)

D. Section 441c's Constitutionality Is Not Called into Question by Either Its Legislative History or Congress's Decision Not to Amend the Provision

Plaintiffs also attack the constitutionality of section 441c by arguing that Senator Hatch, one of the bill's original sponsors, may have used a flawed constitutional analysis when he expressed support for the law prior to its passage. (Pls.' Mem. at 12-13 n.3 (quoting Remarks of Senator Hatch, 86 Cong. Rec. 2563 (March 8, 1940).) But legislative history is relevant in certain circumstances to help understand the purpose and meaning of a statute — it makes no difference whether Congress was wrong about why a particular law is constitutional. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566, 2598 (2012) (upholding the Affordable Care Act on a constitutional basis other than the one relied upon by Congress because "[t]he 'question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise'" (quoting *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948))).

Plaintiffs also argue that Congress's failure to amend the law during the past 72 years somehow suggests that it may not be closely drawn. (Pls.' Mem. at 16.) Plaintiffs provide absolutely no authority for this novel approach to judging the constitutionality of a statute, and its flaws are readily apparent. Nothing in the Constitution remotely suggests that Congress is required to explicitly reaffirm every law on the books every few years, nor is it the courts' role to examine whether Congress has done so. Such a means of constitutional review would be completely unworkable and raise serious separation of power concerns; plaintiffs can offer no explanation of how a court might judge whether Congress has sufficiently reconsidered previously enacted legislation and justified keeping it in the United States Code.

In any event, plaintiffs are wrong to assume that Congress has failed to consider the ban on contractor contributions since its passage. Both the Hatch Act and FECA have been amended

multiple times since 1940. (FEC Facts ¶¶ 32, 34-35.) Congress's decision to amend other provisions — while leaving the contractor ban intact — strongly suggests that Congress believes that the provision continues to serve important interests. *Cf. United States v. Fausto*, 484 U.S. 439, 453 (1988) ("[I]t can be strongly presumed that Congress will specifically address language on the statute books that it wishes to change.")

Finally, to the extent that scandals involving federal contractors are relatively infrequent, that suggests that Congress's efforts to depoliticize the government contracting process have been highly effective in changing both the practice and perception of political patronage in the federal system. This improvement in the realm of federal contracting presents a contrast to the attitude in certain states and municipalities that still regard pay-to-play as "how business is done" and where participants "don't even know it's wrong anymore." (FEC Facts ¶¶ 55, 58 (quoting reports about scandals in New Mexico and Ohio).) Any time a statute modifies behavior and helps make compliance the norm — whether it is a reduction in race or gender discrimination, increase in seatbelt use, or decrease in corruption in federal contracting — a cultural shift in social expectations is likely to work in tandem with the law to create a virtuous cycle of increasing compliance. But that cycle could turn vicious if the law that started the improvements in the first place were suddenly overturned. Plaintiffs' attempt to strike down a provision that has served the nation well for more than 70 years amounts to little more than a claim that it has worked so well it is no longer needed, but that argument has no colorable basis in fact or law.

II. SECTION 441c SATISFIES THE EQUAL PROTECTION GUARANTEE OF THE FIFTH AMENDMENT

A. Because the Contribution Ban Does Not Infringe a Fundamental Right, It Receives a More Lenient Standard of Review

This Court previously determined that plaintiffs' equal protection claim should receive the same intermediate level of scrutiny as the First Amendment claim — "closely drawn to

match a sufficiently important interest." (Mem. Op. at 21 (quoting *Beaumont*, 539 U.S. at 161).) The FEC maintains that section 441c should not be subject to intermediate scrutiny — rather, the appropriate standard is rational basis review. This case involves neither a suspect class nor a fundamental right identified by the Supreme Court. (Mem. Op. at 17-19). Although the Supreme Court has sometimes applied intermediate scrutiny in equal protection cases, those cases all involve instances of "quasi-suspect" classes. (*See id.* at 20 (discussing the application of intermediate scrutiny in equal protection cases, citing *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 219 (2000) (noting the existence of intermediate scrutiny for "cases involving classifications on a basis other than race"); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (gender); *Mills v. Habluetzel*, 456 U.S. 91, 98 (1982) (illegitimate children)).) We are aware of no Supreme Court case that has ever applied intermediate scrutiny to protect something akin to a quasi-fundamental right, and plaintiffs do not assert — and they cannot — that individual federal contractors are a "suspect" or "quasi-suspect" class. In the absence of such a right or class, the Supreme Court has applied rational basis review.

But even under the intermediate scrutiny that this Court previously applied, section 441c does not violate the equal protection guarantee of the Fifth Amendment.[10] As the Court determined at the preliminary injunction stage, even under this higher standard of review, "the various comparison groups suggested by Plaintiffs are not similarly situated to individual contractors subject to § 441c ." (Mem. Op. at 26.)

[10] Contrary to plaintiffs' baseless assertion (Pls.' Mem. at 17), the Commission has not "conceded" that section 441c is unconstitutional under this higher standard of review. The FEC previously argued that the law withstood rational basis review because that was the standard it believed was applicable, not because it was the only standard the law could meet. By the same token, plaintiffs argued previously that strict scrutiny was the appropriate standard, but do not appear to have now conceded that the law is constitutional.

B. Equal Protection Analysis Must Consider the Statute as a Whole to Determine Whether Differential Treatment Is Constitutional

As this Court has stated, under any standard of review, a court reviewing a law challenged for violating equal protection must determine "whether 'an appropriate government interest [is] suitably furthered by the differential treatment.'" (Mem. Op. at 22 (quoting *Police Dept. of City of Chi. v. Mosley*, 408 U.S. 92, 95 (1972)).) The Court must "'consider the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification.'" (*Id.* (quoting *Williams v. Rhodes*, 393 U.S. 23, 30 (1968)).) The statute and context must be considered in its entirety.

In *California Med. Ass'n v. FEC*, 453 U.S. 182 (1981), the Supreme Court took this kind of holistic approach in reviewing an equal protection claim against a (different) provision of FECA. An unincorporated association challenged the limits on the contributions it could make to political committees. As in this case, the plaintiff association claimed both a violation of the First Amendment and the equal protection guarantee of the Fifth Amendment. The plaintiffs argued that corporations were treated more favorably due to the corporations' ability to spend unlimited sums for the administrative and solicitation expenses of their separate segregated funds ("SSFs" — often referred to as "PACs"). *Id.* at 200; *see also* 2 U.S.C. § 441b(b). After concluding that there was no First Amendment violation, the Court also rejected the equal protection claim: "Appellants' claim of unfair treatment ignores the plain fact that *the statute as a whole* imposes far *fewer* restrictions on individuals and unincorporated associations than it does on corporations and unions." *Cal Med. Ass'n*, 453 U.S. at 200 (first emphasis added). The Court went on to describe *other* parts of the statute, which were not part of the constitutional challenge, and which favored the plaintiffs' interests over corporations. It noted that "differing restrictions placed on individuals and unincorporated associations, on the one hand, and on

unions and corporations, on the other, reflect a judgment by Congress that these entities have differing structures and purposes, and that they therefore may require different forms of regulation in order to protect the integrity of the electoral process." *Id.* at 201.

The same equal protection analysis is properly invoked here. But instead, plaintiffs' equal protection argument rests on a cramped and disaggregated analysis in which a single provision is viewed in isolation against a single governmental objective to determine whether the provision passes muster. Plaintiffs also limit their inquiry to only the government interest in thwarting pay-to-play and ignore the interest in preventing coercion of federal contractors.[11] For example, plaintiffs state that the "only perspective that is relevant" is whether "plaintiffs [are] 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 . . . ." (Pls.' Mem. at 20.) Plaintiffs then repeatedly fail to consider other provisions that are part of the overall regulatory scheme: for example, the Hatch Act's different restrictions on government employees and the ability of individuals to enter into contracts with the government through an LLC. Plaintiffs' approach is out of step with the Court's holistic approach adopted in *California Medical Association.*

[11] Plaintiffs restrict their analysis to the government interest in preventing pay-to-play corruption because they mistakenly "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." (Pls.' Mem. at 18.) To the contrary, both the Commission and the Court noted at the preliminary injunction stage that, for example, federal employees have greater civil service protection than do federal contractors and are thereby potentially less prone to being coerced and not similarly situated in that regard. (Defendant FEC's Opposition To Plaintiffs' Motion for a Preliminary Injunction at 33 & n.25 (Mar. 1, 2012) (Doc. No. 25); Mem. Op. at 23.)

C. The Differential Treatment Between Federal Contractors and Federal Employees Is Constitutional

As this Court previously found, the "restrictions on federal contractors' freedoms of expression and association are different from those on federal employees, but not necessarily more severe." (Mem. Op. at 24; *see also* FEC Facts ¶ 142.) Plaintiffs' arguments in support of their motion for summary judgment add nothing new to those already rejected by the Court at the preliminary injunction stage.

Federal employees and federal contractors are not the same and therefore are justifiably treated differently in numerous ways. (FEC Facts ¶¶ 147-51.) Even the plaintiffs "do not argue that the situations [of federal contractors and federal employees] are identical," but merely that the two groups are "sufficiently close" that the law is unjustifiable for prohibiting contributions from only contractors. (Pls.' Mem. at 24.) But this amounts, again, to plaintiffs asking the Court to substitute its judgment for that of the legislature. Especially in light of the many different occupations and functions of workers *within* the two categories (federal employees versus federal contractors), it is particularly difficult to assess whether these groups are "sufficiently close" to each other. Federal employees perform innumerable different duties for different agencies, as do federal contractors. The Hatch Act establishes different restrictions for employees of different agencies for this very reason. (FEC Facts ¶ 142.)[12] It is Congress's role to draw these fine and complex lines; the courts have "no scalpel to probe" with such specificity. *Buckley*, 424 U.S. at

[12] Plaintiffs make the novel argument that the regulation preventing FEC employees from making certain contributions is not actually a prohibition on contributions, but a restriction merely on the specific manner by which contributions can be *delivered*. (Pls.' Mem. at 21 (citing 5 C.F.R. § 734.413).) Plaintiffs cite no authority for this bizarre reading of the regulation in which FEC employees would be permitted to "financially support[ ] a Member of Congress so long as the contribution is made through a means such as the Internet or mail, so that the Member would never see or touch it." (*Id.*)

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.").

As the Court noted (Mem. Op. at 23), one critical distinction between federal employees and contractors is that only the former are protected by the Merit Systems Protection Board ("MSPB"), which has the power to hear and decide complaints when an agency is alleged to have violated Merit System Principles governing federal employment. *See* 5 U.S.C. §§ 1201-1209, 1214-15, 2301(b)(1)-(2). Two such Merit System Principles are 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). Plaintiffs suggest that this difference is insubstantial because contractors still have "contractual and statutory rights that provide protections and guard against arbitrary agency action . . . as well as the Due Process Clause." (Pls.' Mem. at 23.) But plaintiffs make no effort to explain what sort of contractual and statutory rights they are describing, nor do they offer any legal support or even argue for the proposition that the Merit System's protections are coextensive with the guarantees of the Due Process Clause. The MSPB exists for the purpose of ensuring that federal employment is based on merit. There is no comparable institution for federal contracting, and it therefore is sensible that Congress might take additional precautions to assure the meritorious awarding of contracts, such as by prohibiting contractors' campaign contributions.[13]

[13] Contractors working for the federal government do not typically receive the same benefits as employees, can be required to have email addresses and badges that distinguish them from employees, and can even be required to answer the telephone in a different manner. (FEC Facts ¶¶ 148, 151 (citing Schooner Dep. at 73-75).) These seemingly minor details, in the

D. The Differential Treatment Between Individual Contractors and Corporate Contractors Is Constitutional

Both corporate contractors and individual contractors are prohibited from making campaign contributions — *see* 2 U.S.C. §§ 441b(a), 441c — so if those two groups are compared, *there is no differential treatment.* Employees and officers of corporate contractors can make contributions in their capacity as individuals because they do not personally have federal contracts. Plaintiffs will likewise be able to make contributions when they no longer have their own direct contracts with the federal government.

Plaintiffs argue that they are unconstitutionally treated less favorably than corporate contractors because only a corporation may establish an SSF 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). In contrast to this "direct and easy path" by which corporations can make contributions, plaintiffs argue, "individuals have no means by which to accomplish their goal of making political contributions . . . ." (Pls.' Mem. at 18.) This argument lacks merit for several reasons.

First, the very existence of SSFs was intended by Congress to make evident that the corporation is *not* the entity making the contribution, and therefore plaintiffs' notion that using an SSF is a "direct and easy path" for a corporation to make a contribution is wide of the mark. While plaintiffs believe that "no person with knowledge of the facts would perceive [a PAC contribution as different from a corporate contribution]" (Pls.' Mem. at 19), that is not a view

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aggregate, also rebut the plaintiffs' suggestion that federal employees and contractors are similarly situated overall.

Finally, plaintiffs devote a page of their brief rebutting the argument that "[b]ecause 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 [federal employees and federal contractors] not comparable." (Pls.' Mem. at 23.) Plaintiffs have rebutted a straw man, however, because the FEC has never made this argument.

shared by Congress, which codified the regime of separate segregated funds in FECA. Nor is it the view of the Supreme Court, which has held that there exists a sufficient justification for FECA's requirement that corporations establish an SSF for making contributions rather than making them directly from their corporate treasuries. *See Beaumont*, 539 U.S. at 147-48.

Indeed, the holding in *Citizens United* rested in part on the Court's determination that "[a] PAC is a separate association from the corporation." *Citizens United v. FEC*, 130 S. Ct. 876, 897 (2010). The Court held that a PAC's ability to make independent expenditures was insufficient to alleviate the First Amendment burdens on corporations because the PAC option still "does not allow corporations to speak." *Id.* Thus, plaintiffs' argument that the treatment of PACs and corporations in § 441c is inconsistent with *Citizens United* (Pls.' Mem. at 19-20) is exactly backward: corporations with federal contracts cannot make contributions, but PACs can, precisely because they are separate and distinct entities. As this Court explained (Mem. Op. at 25), "[i]ndividual federal contractors, accordingly, are not similarly situated to PACs or officers of contracting corporations; as a result, their disparate treatment does not present an equal-protection problem."

In addition, the notion that individual contractors lack a "direct and easy path" to make contributions is belied by the plaintiffs' acknowledgment that they could establish a corporate form, such as an LLC, enter into contracts with the government through their LLC, and remain free to make contributions as individuals. (Plaintiffs' Statement of Undisputed Material Facts ¶¶ 5, 10-11 (Doc. 30-2).) This path is not meaningfully different from that of a corporation establishing an SSF. Plaintiffs claim that there are "significant costs" associated with establishing an LLC, but only reach that conclusion by hypothetically including the costs of lawyers and accountants (as well as LLC taxes that might otherwise be paid as individual taxes

in the absence of a corporate form). (*Id.* at ¶ 10.) But hiring these professionals would also drive up the costs of creating an SSF for a corporation. And in any event, it is unnecessary to take such elaborate measures to create an LLC. 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. If corporate contractors have a "direct and easy" path to make contributions, then so do plaintiffs.

III. CONCLUSION

For the reasons stated above — and for the reasons set forth in the Court's opinion denying plaintiffs' motion for a preliminary injunction — the Court should uphold 2 U.S.C. § 441c and grant summary judgment to the Commission.

Respectfully submitted,

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August 15, 2012

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 STATEMENT OF FACTS

DEFENDANT FEDERAL ELECTION COMMISSION'S
STATEMENT OF MATERIAL FACTS

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I. BACKGROUND

1. 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.

2. 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 or about April 2, 2012, to write a report on the intersection of science and regulation, but the contract term is not considered completed until ACUS discusses and accepts her report. (Plaintiffs' Amended Complaint ("Am. Compl.") ¶ 5 (Doc. No. 17); Declaration of Wendy E. Wagner, dated Nov. 15, 2011 ("1st Wagner Decl.") ¶ 3, Plaintiffs' Appendix ("Pls.' Appx.") at 3; Wagner contracts, Pls.' Appx. at 42-57.) That contract has been continued so that the agency may discuss the study. (Second Supplemental Decl. of Wendy E. Wagner, dated March 11, 2012, Pls.' Appx. at 34-35.)

3. Wagner was approached about conducting her study by Jonathan Siegel, then Research Director of ACUS, and before signing, she discussed the contract with ACUS Chairman Paul Verkuil, who was appointed to his position by President Obama and was confirmed by the United States Senate. (1st Wagner Decl. ¶ 3; Wagner Response to FEC's Requests for Admission ("Resp. to FEC RFA") at ¶¶ 14, 15, Pls.' Appx. at 40.) Initially, ACUS had "no budget" so Wagner agreed to work for $1, but after ACUS obtained its budget from funds appropriated by Congress, her contract was amended to increase her pay to $12,000 plus

$4,000 for travel and research assistance expenses. (1st Wagner Decl. ¶ 3, Pls' Appx. at 3; Wagner contracts, Pls.' Appx. at 42-57.)

4. Lawrence M.E. Brown, after retiring from federal employment and while collecting a federal government pension, 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; Decl. of Lawrence M.E. Brown, Pls.' Appx. at 7- 8; Brown Resp. to FEC RFA ¶¶ 12-14, Pls.'Appx. at 60.)

5. Jan W. Miller is an attorney who, after retiring from USAID in 2003 and collecting a government pension, negotiated and signed a two-year contract as an annuitant-consultant. After that, Miller negotiated and executed a five-year personal services consulting contract with a different office of USAID that began in June 2010 and will end in June 2016; 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; Plaintiffs' Statement of Points and Authorities in Support of Their Motion for Preliminary Injunction at 12-13 (Doc. No. 18-4); Decl. of Jan W. Miller, Pls.' Appx. at 17-20; Miller Resp. to FEC RFA ¶¶ 12-14, Pls.' Appx. at 148).)

6. Government contracts are of three main types: contracts held by corporations, those held by individuals to perform services on a regular basis to an agency, and contracts held by individuals to perform specific tasks for an agency. (Decl. of Steven L. Schooner ("Schooner Decl."), Pls.' Appx. at 26-28.)

7. Brown and Miller have a type of personal services contract (Deposition of Steven

L. Schooner ("Schooner Dep.") at 103, FEC Exhibit ("Exh.") 6; they are retired annuitants whose federal agencies have authority to hire them back. (*Id.* at 85-86.) A personal services contract is akin to a "services arrangement" whereby an agency hires an individual to perform specific services on a regular basis for the agency. (*Id.* at 90; Schooner Decl. ¶ 6, Pls.' Appx. at 27.) "[S]ome recognized form of employer-employee relationship is thereby created." (Schooner Decl. ¶ 6, Pls.' Appx. at 27.)

8. Brown's and Miller's contract forms include a "Special Note" indicating that the contractor, if a U.S. citizen, is considered to be an employee of the United States for purposes of the Foreign Assistance Act of 1961, as amended, 22 U.S.C. § 2396(a)(3), and Title 26 of the United States Code, which subjects the contractor to withholding for both FICA and federal income tax, but the contractor is not an employee for purposes of laws administered by the Office of Personnel Management, *e.g.*, Title 5 of the U.S. Code. (Brown contracts, Pls.' Appx. at 64, 107; Miller contracts, Pls.' Appx. at 152, 205.) Title 5 includes the statutory protections afforded federal employees by the Merit Systems Protection Board, 5 U.S.C. §§ 1201-1209.

9. Wagner's contract with ACUS is the third type of government contract. (*See supra* ¶ 6.) In this type, the government enters into an agreement with an individual to perform specific tasks for a limited duration, such as serving as an expert witness or as an alternative dispute resolution mediator. (Schooner Decl., Pls.' Appx. at 26-27). This type of contract can also be made with an LLC when one of the principals carries out the specific task, such as being an expert witness for the Department of Labor. (Decl. of Jonathan Tiemann, Pls.' Appx. at 30-31.)

10. During the process of negotiating for, executing, and performing under her contract with ACUS, Wagner has interacted with at least one political appointee, Chairman Paul

Verkuil. (Wagner Resp. to FEC RFA ¶¶ 14, 15, Pls.' Appx. at 40.) The contract itself provides as an "obligation" the requirement that:

> The Contractor shall make himself or herself available to participate in such meetings of the Conference, its Council, and the Chairman's staff as may be required by the Office of the Chairman, for consideration of the study and report that are the subject of this contract and resulting proposals, including plenary sessions and other meetings taking place after submission of and payment for the final report as provided herein. The Contractor shall cooperate with the staff of the Office of the Chairman as necessary and appropriate for the completion of this contract.

(Wagner contract, Pls.' Appx. at 51).

11. Wagner's contract also provides that ACUS has property rights over all materials produced under the performance of the contract and that the *ACUS chairman or contracting officer* has the authority to control and deny the publication of the final report. (Wagner contract, Pls.' Appx. at 53 (emphasis added).) The contracting officer is "any person designated by the Chairman of the Conference and duly authorized as such . . . ." (*Id.* at 56.)

12. The council of ACUS, which serves as an unpaid governing board, is comprised of a chairman and ten other members all appointed by the President and no more than five of whom can be officials within the executive branch of government. The Research Director and a staff attorney, and in some cases, the Chairman, review draft reports of the contractor. (Decl. of Jeffrey S. Lubbers, Pls.' Appx. at 22-23.)

13. Brown and Miller have each had interactions with at least one political appointee in the course of performing their current contracts. (Brown Resp. to FEC RFA ¶ 18, Pls.' Appx. at 61; Miller Resp. to FEC RFA 18, Pls.' Appx. at 149.)

II. CONGRESS EARLY RECOGNIZED THE POTENTIAL CORRUPTIVE DANGER TO AND FROM GOVERNMENT CONTRACTORS

A. Efforts to Create a Merit-Based Federal Workforce, Including Through the Use of Contractors, Date Back to the Founding of the Nation

14. The prohibitions on the making of contributions by federal contractors and on soliciting contributions from them — currently codified at 2 U.S.C. § 441c — are longstanding. These prohibitions were first enacted as part of the 1940 amendments to the Hatch Act of 1939 and incorporated in 1972, with minor modifications, into the Federal Election Campaign Act of 1971. The predecessor of current section 441c was subsequently amended in 1976 to include subsections (b) and (c), and the whole was re-designated section 441c. *See* FECA Amendments of 1976, Pub. L. No. 94-283, § 322, 90 Stat. 475 (1976). The statutory language of section 441c(a) is based on former 18 U.S.C. § 611, including both the prohibition against government contractor contributions and the solicitation of contributions from them. Amendments to Hatch Act of 1939, 1940 ed., § 61m-l (July 19, 1940, c. 640, § 5, 54 Stat. 772) (codified at 18 U.S.C. § 611), amended by 86 Stat. 9 § 206, 1263 § 103. In addition, the Hatch Act of 1939 contained a prohibition against offering any job or contract as a reward for political activity. Hatch Act of 1939, Pub. L. No. 76-252, § 3m 53 /stat, 1147 (1939) (codified at 18 U.S.C. § 600).

15. Efforts to establish a merit-based government workforce, insulated from political activity, date nearly as far back as the founding of the nation. For example, in 1801, President Thomas Jefferson issued an executive order to the heads of federal departments stating that while it was the right of an 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* Statement of Sen. Hatch, 86 Cong. Rec. 2434 (March 6, 1940). *See also* generally for the early history of the Hatch Act, *U.S. Civil Service Comm'n v. Nat'l Assoc. of Letter Carriers*, 413 U.S. 548, 557-563 (1973).

16. Following the Civil War, a civil service reform movement further sought 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 558. In 1882, for example, the Supreme Court upheld a federal statute enacted in 1876, 19 Stat. 169, 5 U.S.C. § 1180, making it illegal "to request [from], give to, or receive from, any other officer or employe [sic] of the government any money, or property, or other thing of value, for political purposes." *Ex parte Curtis*, 106 U.S. 371, 376 (1882).

17. The Supreme Court explained that the 1876 law was similar to other laws such as the one passed in "1789 at the first session of the first congress, which makes it unlawful for certain officers of the treasury department to engage in the business of trade or commerce, or to own a sea vessel, or to purchase public lands or other public property, or to be concerned in the purchase or disposal of the public securities of a state, or of the United States, (Rev. St. § 243)." *Ex parte Curtis*, 106 U.S. at 372-73. The 1876 statute was also like one "passed in 1868, prohibiting members of congress from being interested in *contracts* with the United States." *Id.* at 373 (emphasis added). "The evident purpose of congress 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*.

18. These efforts at reform culminated a few years later in the Civil Service Act of 1883 (also known as the Pendleton Act). *See Letter Carriers*, 413 U.S. at 558. Civil Service Rule I provided that "no person in the public service is for that reason under any obligations to contribute to any political fund, or to render any . . . right to use his official authority or influence to coerce the political action of any person or body." 47 Cong. Ch. 27, 22 Stat. 403, 404 (Mar. 6, 1882); S. Rep. 101-165 at *28.

19. An executive order of President Theodore Roosevelt in 1907 expanded the prohibition and specified 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 *3; *Letter Carriers*, 413 U.S. at 558-59.

20. In 1907, the Tillman Act first prohibited corporate contributions to candidates for federal office. Pub. L. No. 59-36, 34 Stat. 864 (1907).

21. In 1925, Congress passed the Federal Corrupt Practices Act, c. 368, § 312, 43 Stat. 1053, 1073 (formerly codified at 18 U.S.C. § 208; now 18 U.S.C. § 602), prohibiting any promise of employment in return for political support or opposition. 84 Cong. Rec. 9616. Congress, federal employees, and officers whose salaries came from the United States Treasury were prohibited from soliciting or receiving contributions from each other:

> It is unlawful for any Senator or Representative in, or Delegate or Resident Commissioner, to, Congress, or any candidate for, or individual elected as, Senator, Representative, Delegate, or Resident Commissioner, or any officer or employee of the United States, or any person receiving any salary or compensation for services from money derived from the Treasury of the United States, to directly or indirectly solicit, receive, or be in any manner concerned in soliciting or receiving, any assessment, subscription, or contribution for any political purpose whatever, from any other such officer, employee, or person.

This provision was upheld in *United States v. Wurzbach*, 280 U.S. 396, 398 (1930) (citing Federal Corrupt Practices Act), in which Wurzbach, a member of the United States House of Representatives, was convicted for having received contributions from federal government employees and officers to support his candidacy in the 1926 Republican primary.

22. Despite such early reform efforts, a nonpartisan federal workforce came slowly. Although the number of federal agencies had increased to 60 by 1934, only five of them had been placed under the Civil Service Commission. S. Rep. 101-165 at *2. Instead, most of those agencies continued to be staffed through political patronage and the spoils system rather than through merit. *Id.* That meant that only a fraction of approximately 300,000 employees were

covered by Civil Service Rule I. *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 Subcomm. of the Committee on Homeland Security and Governmental Affairs, United States Senate, October 18, 2007, http://www.access.gpo.gov/congress/senate.

23. In an effort to further curb the political spoils system, 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*, 413 U.S. at 560; 84 Cong. Rec. 9597-9600 (discussing work relief scandals). The Hatch Act of 1939 adopted the language of both Civil Service Rule I and the Federal Corrupt Practices Act and expanded coverage to the entire federal service. *See* Statement of Sen. Hatch, 86 Cong. Rec. 2338, 2342; 84 Cong. Rec. 9595, 9607, 9616.

24. In particular, Congress sought to eliminate the political use of participants in federal work relief programs, including promoting the election of Democratic candidates in the 1936 and 1938 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); a Works Projects Administrator (WPA) standing outside the polling site, telling workers "'to vote the straight ticket or the voter need not come to work the next morning'" (*id.* at 9604); requiring WPA workers to make political contributions by depositing $3-$5 from their $30 monthly pay under the Democratic donkey paperweight on the supervisor's desk (*id.* at 9598); hiring people shortly before an election purportedly to work on roads but actually to do political work and to use their salaries for political contributions, and then firing them immediately after

the election (86 Cong. Rec. 2343, 2433); and making employees give 2% of their salaries, received from the federal government, for state political activities (*id.* at 2567-70).

25. The Hatch Act of 1939 and its 1940 amendments had a two-fold purpose: to protect the federal workforce from being coerced into political activity and to establish a merit-based workforce rather than one based on political activity and loyalty. Thus, the legislation in 1939 included contribution restrictions applicable to federal employees and, in 1940, to federal contractors. 84 Cong. Rec. 4191-92; 86 Cong. Rec. 9496-97. In addition, the 1940 Hatch Act amendments extended coverage to state and local government employees whose principal employment was in connection with any activity financed in whole or in part by loans or grants made by the United States. *See* 86 Cong. Rec. 2338, 2342 (statement of Sen. Hatch). *See also Letter Carriers*, 413 U.S. at 561.

26. An integral part of the Hatch Act's efforts to remedy "pernicious political activities" in 1939 and 1940 was its regulation of federal contractors. The concern with federal contractors was predicated not on the form of organization — corporation, partnership, or individual — but on the "idea that contractors engage the decisionmaking 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," in the same way that public employees have a double hold on public policy. *See* Samuel Issacharoff, *On Political Corruption*, 124 Harv. L. Rev. 118, 139 (Nov. 2010).

27. Although the Senate passed the Hatch Act of 1939 unanimously and essentially without discussion, 84 Cong. Rec. 9610, 9613, the bill was hotly debated in the House, *id.* at 9594-9639, and Congress's concern with federal contracts appears in the House debates. For example, Congressman Ramspeck emphasized the perils that awaited the nation if the Hatch Act

was not passed: " . . . we have to remove the rank and file employees from being pawns in the political game. . . . [T]he thing that 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) (emphasis added).

28. Also animating the House debates was the "'celebrated' Democratic campaign book" incident: "This performance, which was carried on throughout the Nation, presented the most audacious and disgraceful species of highjacking and racketeering that had thitherto been known in this country." 84 Cong. Rec. 9598 (Statement of Rep. Taylor). Rep. Taylor of Tennessee colorfully explained how the "campaign-book racket" worked, requiring government contractors to buy a certain number of books at inflated prices in order to assure that they would have future opportunities for government business:

> Thousands of books were printed and were supposed to have been autographed by no less a personage than our present Chief Executive. Agents skilled in the art of high-pressure salesmanship were engaged to travel throughout the Nation and sell these books to those equipment dealers and contractors who had been given P.W.A, W.P.A. [Works Projects Administration], and other Government contracts. The agents were supplied with data as to the amount of business each material and equipment dealer and contactor 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. . . . [T]hese solicitors were . . . furnished a list of lambs to be shorn, and given a letter signed by the head of the Democratic National Committee authorizing them to make the necessary contacts. The agent who worked Tennessee . . .summoned to his suite those whose names were furnished him in Washington as beneficiaries of Government business. They came singly, and when Mr. A., for instance, was ushered into the presence of the shearer, he was adroitly 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. . . [T]housands of people bought them. . . 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. . . .

Id. at 9599.

29. Another aspect of the Democratic book scheme required big businesses to purchase advertising space in the book to avoid being blacklisted for future government contracts:

> In advance of the publication of the book, large concerns, which directly or indirectly, benefited from Government business, were also visited, and by sinister methods, convinced of the importance of taking advertising space in the book, paying from $10,000 to $15,000 per page. . . Of course, it was simply a hold-up . . .but it was either take the space or be blacklisted.

84 Cong. Rec. 9599.

30. During debate on the 1940 amendments, which added contractor contribution prohibitions, federal contractors were viewed as similar to federal employees in that they both benefited from government employment, and so both, some argued, should be prohibited from active participation in politics and should be prohibited from making contributions. 86 Cong. Rec. 2575. Indeed, Senator Brown proposed that lobbyists, as well as stockholders and officers of corporations that have contracts with the federal, state, municipal or other governmental subdivisions — when those contracts are funded in whole or in part with loans or grants made by the federal government — should also be prohibited from making contributions. *Id.* Senator Brown summarized the reasons: "the Government clerk, if he is not under the civil service, is interested in keeping in power the party that is in power and that gave him a job, and the Sun Oil Co. is interested in kicking out of power the political party that will not give it the high-excise taxes it wants to prevent the importation of foreign oil and to raise the price of domestic oil. I can apply the same principle to the tariff . . . to quotas . . . to loans . . . *to contractors who are*

doing business with the government of the United States." 86 Cong. Rec. 2580 (Mar. 11, 1940) (Statement of Sen. Brown) (emphasis added). Responding to detractors, Sen. Brown commented on his own amendment:

> In the first place, it 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). Sen. Brown's amendment was rejected after much debate, 86 Cong. Rec. 2627, but a similar version was reported out of the Committee on the Judiciary, prohibiting "any person or firm entering into a contract with the United States . . . or performing any work or services for the United 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. Repts., 76-3, vol. 3, p. 12 (June 4, 1940), FEC's Opposition to Plaintiffs' Motion for a Preliminary Injunction, (Mar. 1, 2012), FEC Exh. 4 (Doc. No. 25-D). That provision became the predecessor of 2 U.S.C. § 441c.

31. The Hatch Act of 1940 incorporated some 3000 Civil Service Commission rulings found in Civil Service Commission Form 1236 (1939). Part of Form 1236 that Sen. Hatch later added to the Congressional Record (86 Cong. Rec. 2938-2940) is set out in an Appendix in *Letter Carriers*: "Contributions: An employee may make political contributions to any committee, organization, or person not employed by the United States, but may not solicit, collect, receive, or otherwise handle or disburse the contributions. (See provisions of the

Criminal Code, discussed in secs. 36 to 50.)" *Letter Carriers*, 413 U.S. at 584. In short, federal employees apparently could not make contributions to incumbent Members of Congress, but could make contributions to candidates if they were not Members of Congress. That prohibition was extended and codified in the 1966 version of former 5 U.S.C. § 7323, Pub. L. No. 89-544 80 Stat 525 (1966): "Section 7323. Political contributions; prohibition. An employee in an Executive agency (except one appointed by the President, by and with the consent of the Senate) may not request or receive from, or give to, an employee, a Member of Congress, or an officer of a uniformed service a thing of value for political purposes. An employee who violates this section shall be removed from the service."

32. The 1966 version of 5 U.S.C. § 7323 was extensively revised by the Hatch Act Reform Amendments of 1993, Pub. L. No. 103-94 (1993), 107 Stat. 1001, 5 U.S.C. § 7323(b)(1). Under the 1993 amendments, federal employees, except for employees of 17 federal agencies or agency divisions designated as "further restricted," gained the right to make contributions to incumbent Members of Congress. These further restricted agencies or agency divisions include 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)-3.

33. Employees of the Federal Election Commission (except those appointed by the President) are subject to additional restrictions in that they are prohibited from making certain campaign contributions, *e.g.*, to Members of Congress. 5 C.F.R. § 734.413.

B. Congress Did Not Amend the Contractor Contribution Ban When It Made Other Changes to the Hatch Act and FECA

34. In 1993, when Congress made sweeping changes to the Hatch Act and related provisions concerning federal employee political activities, Congress did not disturb the

prohibition on government contractor contributions codified at 2 U.S.C. § 441c. The legislative history is silent on the issue. Hatch Act Reform Amendments of 1993, Pub. L. No. 103-94, 107 Stat. 1001 (1993).

35. In 2002, Congress enacted the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81 (2002), which comprehensively reformed and amended FECA. Although Congress considered potential changes to many of the provisions of FECA then in effect, Congress did not consider any changes to the FECA provision prohibiting contractor contributions codified at 2 U.S.C. § 441c.

C. Government Reliance on Contracting Has Increased in the Last Two Decades

36. Over the past two decades, the federal government has become increasingly reliant upon contractors to perform its functions. During that time, "the trend has very heavily tilted to what we call an out-sourced government or blended work force so the ratio of contractor personnel to full-time government personnel has increased … ." (Schooner Dep. at 35:11-36.) "[T]here are some studies that would suggest we are getting closer to 50-50 or there may be more contractors [than federal employees]." (*Id.* at 35:14-16.)

37. The federal government reportedly awards more than $500 billion in contracts annually. Nick Taborek, *Contractors Bemoan Delays as Rookie U.S. Acquisition Officers Learn Ropes*, Wash. Post, July 30, 2012, at A14, http://www.washingtonpost.com/business/economy/contractors-bemoan-delays-as-rookie-us-buyers-learn-the-ropes/2012/07/29/gJQAyjAuIX_story.html.

38. Despite the ban on federal contractors' contributions, 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 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. *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.

39. Similarly, Congress has held hearings on concerns about the balance between government employees and contractors. *See Balancing Act: Efforts to Right-Size the Federal Employe[e]-to-Contractor Mix*, S. Hrg. 111-626, Hearing Before the Oversight of Gov't Mgmt., the Fed. Workforce, and the District of Columbia SubComm. of the Comm. on Homeland Sec. and Governmental Affairs, 111th Cong. (2010), May 20, 2010, http://www.gpo.gov/fdsys/pkg/CHRG-111shrg57942/pdf/CHRG-111shrg57942.pdf.

40. One Senator expressed frustration that the Oversight Committee (*supra* ¶ 39) could not even determine how large the federal contractor workforce had become. S. Hrg. 111-626 at 11-12 (Statement of Sen. Akaka). 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 (Statement of Maureen Gilman, Legislative Dir., Nat'l Treasury Employees Union) (in another estimate, DHS had approximately 230,000 federal employees and 210,000

contractors, *see id.* at 122), and the United States Marshals Services with approximately 5,000 federal employees and 8,000 contractors, *id.* at 89. 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.

41. As part of the 2010 Senate hearing (*supra* ¶ 39), 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.

42. Any work to be performed through a government contract with a corporation could also be performed through a contract with an individual: what distinguishes the two is the "size and complexity of the goods, services or construction." (Schooner Dep. at 105:21-22.) For example, if a federal agency wanted to acquire training services, the agency could hire a large corporation, a small corporation, or an individual speaker. "In fact, it is very common to have a competition where those three different types of contractors are competing against each other. As a general rule the government as consumer doesn't care." (*Id.* at 106:6-10.)

43. The federal employee who is specifically tasked with awarding and monitoring contracts is known as the "contracting officer." To help keep politics out of contracting, contracting officers are trained to be "attuned to the need to be independent, above-board and … able to explain their actions in an objective and impartial way." (Schooner Dep. at 136:2-5). But the federal contracting officer does not operate in a vacuum. Because there are a wide variety of

relevant factors in the award of a contract other than just price, the contracting officer generally "must rely on the expertise and information" of other employees in the award of a contract. (Schooner Dep. at 110-112.) Although not the "common scenario," this input into contracting decisions may sometimes be provided by political appointees. (*Id.* at 114-15.)

44. The federal contracting process is not uniform across all agencies and types of contracts, and as a result not every contracting decision is equally insulated from the possibility of political pressure. There are numerous exceptions to the typical procedures. (Schooner Dep. at 27-28.)

45. For example, normal competitive bidding procedures applicable to federal contracts may be bypassed for one of "a fundamental group of core exemptions" such as "the classic public interest and national security exemptions." (Schooner Dep. at 27-28.) Furthermore, "if there is an industry where prices are set by law or regulation, there is no need to compete those," so the normal procedures are not necessary. (*Id.* at 28.)

46. There are also statutory carve-outs for certain types of federal contracts; for example, an agency awarding a contract to an expert witness or an alternative dispute resolution mediator need not go through the ordinary procedures. (Schooner Dep. at 24-26, 29-30.) Plaintiff Wagner, for example, obtained her contract under the provisions "for simplified acquisition procedures in the Federal Acquisition Streamlining Act of 1994, 41 U.S.C. § 427." (Wagner contract, Pls.' Appx. at 50.)

47. Personal services contracts are generally prohibited unless there is specific statutory authority for an agency to enter into them. It is therefore unlawful for most agencies to award personal services contracts, but "many of the personal services prohibitions today are dead letter. There is no effort to enforce the personal services prohibition and most agency officials

acknowledge that agencies frequently play fast and loose with the distinction." (Schooner Dep. at 71:19-72:1.) The idea behind the personal services contract prohibition is that "Congress wanted civil servants and members of the military treated differently from contractor personnel." (*Id.* at 72:4-6.)

48. "[T]he blurring of the lines [between personal services contracts and other contracts] is pervasive across the government today." (Schooner Dep. at 64:7-8.) Thus, it would be "naïve" to believe there is "a clear bright line distinction between personal services contractors and others because there are certain statutory rules that apply to them." (*Id.* at 64:9-12.) And "in the last 20 years the growth of personal services contracts explicitly and implicitly has been one of the most dramatic changes in how the government operates today." (*Id.* at 61:18-22.)

49. Awards of personal service contracts generally "are not covered by the Federal Acquisition Regulation. In other words, they would not be subject to full and open competition and the full range of rights and responsibilities that follow that." (Schooner Dep. at 89:4-8; *see also id.* at 87.) As a result, "the award and performance of those types of contracts is not being evaluated by a contracting officer." (*Id.* at 104:8-10; *see also id.* at 67:16-18 ("I don't know anything about how the retired annuitants and those types of contracts work."); *id.* at 81:1-2 ("for all I know every agency that uses retired annuitants does it a different way.").)

50. There are also "wide amounts of variety" in the manner by which contracts like those of plaintiff Wagner are awarded. (Schooner Dep. at 104.) For example, for contracts of less than $150,000 (or even higher-value contracts in some instances) "there are streamlined competitions, where the government can call two or three people on the phone and operate in a very informal manner." (*Id.* at 107:20-22.) "[T]here are many types of smaller contracts that

have very flexible award authorities." (*Id.* at 108:14-15.)

III. A DANGER EXISTS THAT CONTRACTORS WOULD TRY TO INFLUENCE FEDERAL CONTRACTING THROUGH POLITICAL CONTRIBUTIONS IN THE ABSENCE OF LAWS PROHIBITING SUCH CONTRIBUTIONS

51. Although the prohibition on federal contractor contributions has existed for more than 70 years, more recent experience from the states demonstrates the risk of political influence from contractor contributions.

52. Many states and municipalities have laws banning or strictly limiting contributions from government contractors. These jurisdictions include: Hawaii (Hawaii Revenue Statute § 11-355 (2005) (upheld by *Yamada v. Weaver*, No. 10-cv-497, 2012 WL 983559 (D. Hawaii Mar. 21, 2012), *appeal docketed*, No. 12-15913 (9th Cir. Apr. 20, 2012)); Connecticut (Conn. Gen. Stat. § 9-612(g)-(i)) (upheld by *Green Party of Conn. v. Garfield*, 616 F.3d 189, 199 (2d Cir. 2010)); Illinois; Nebraska; New Mexico; South Carolina; Vermont; West Virginia. *See* Fred Nathan and Kristina Gray Fisher, *Restoring Trust: Banning Political Contributions from Contractors and Lobbyists* ("*Restoring Trust*"), Think New Mexico, Fall 2009, at 11, http://www.thinknewmexico.org/policypubs.html; Perkins Coie, *Overview of State Pay-to-Play Statutes*, May 5, 2010, http://www.perkinscoie.com/files/upload/WP_10-05_Pay-to-Play.pdf.

53. Even relatively small contributions can have the potential to corrupt or give the appearance of corruption. In 2004, the Executive Director of the Ohio School Facilities Commission was charged with state ethics violations for awarding millions of dollars in contracts after accepting only $1,289 from six companies seeking those contracts. Sandhya Bathija, *Ex-Schools Agency Director Fined: Guilty of Violating Conflict-of-Interest Ethics Laws*, Dayton Daily News, July 10, 2003, 2003 WLNR 2151363; Mark Niquette, *Construction*

Company Faces Ethics Charge: Gifts Influenced Unbid Contracts, Panel Says, Columbus Dispatch, June 11, 2004, 2004 WLNR 21205133.

54. Although numerous states and municipalities have passed legislation to curb the pay-to-play aspects of contracting, the practice and particularly the appearance of corruption can remain pervasive. *Dallman v. Ritter*, 225 P.3d 610, 635 (Col. 2010). "'You wonder what in the heck would happen if I didn't give,' said one government contractor for Wayne County, Michigan. Another local contractor said, 'I'd rather contribute than not… [there's] a feeling of better safe than sorry [among contractors].'" *Id.* at 365.

55. Ohio State Senator Marc Dann, commenting on a scheme to use campaign contributions to gain the right to invest government funds, reportedly said: "It is one thing to have pay-to-play. I think they are at the point that they don't even know it's wrong anymore." James Drew and Mike Wilkinson, *Fund Managers Ratcheted Up Political Giving*, Toledo Blade, Apr. 19, 2005, http://www.toledoblade.com/frontpage/2005/04/19/Fund-managers-ratcheted-up-political-giving.html.

56. A number of state and local jurisdictions have adopted restrictions on contractor contributions in response to recent "pay-to-play" scandals.

A. New Mexico

57. In 2006, in response to a series of scandals, New Mexico adopted laws to combat pay-to-play corruption. They require prospective contractors to disclose all campaign contributions that they, their family members, and their representatives have made during the two years prior to making a bid or signing a sole-source contract; the provisions also prohibit contractors, their family members, and their representatives from making any campaign

contributions during the negotiation period for sole source or small purchase contracts. *See* N. M. Stat. § 13-1-191 (2007).

58. In 1984, New Mexico State Investment Officer Phillip Troutman and Deputy State Treasurer Ken Johnson were convicted of conspiracy to commit extortion. At trial, Troutman testified that he had solicited a campaign contribution from a bank executive, reminding him that he controlled the bank's ability to obtain state business. Johnson told the executive: "You have to pay to play because this is how business is done." *Restoring Trust* at 7 (internal quotation marks omitted).

59. In 1995, a witness in the trial resulting in the conviction of New Mexico state Treasurers Michael Montoya and Robert Vigil for extortion testified: "My understanding is that's how business is done in New Mexico." *Restoring Trust* at 7. Montoya stated in his plea agreement that he had started taking bribes as soon as he took office in 1995: "I discovered that it was quite easy to get bribes from people who wanted to keep or obtain business with the State's Treasurer's Office." *Id.* at 7; *see also United States v. Vigil*, 506 F. Supp. 2d 544, 547-49, 566 (D.N.M. 2008) (describing the facts).

60. In the fall of 2008, former Senate President Pro Tem and Majority Leader Manny Aragon pled guilty to involvement in a scheme to skim $4.2 million from a contract to build a new federal courthouse in Bernalillo County, New Mexico. Aragon sponsored legislation to pay for the new courthouse, then conspired with the court administrator to hire a specific architectural firm that in turn kicked back the dollars from the contract. *Restoring Trust* at 8.

61. Former New Mexico Governor Bill Richardson faced multiple pay-to-play allegations, and while all of the charges were eventually dropped, they reportedly contributed to his withdrawal as the nominee for Secretary of Commerce in President Obama's cabinet in

January 2009. Sheryl Gay Stolberg, *Richardson Won't Pursue Cabinet Post*, N.Y. Times, Jan. 4, 2009, http://www.nytimes.com/2009/01/05/us/politics/05richardson.html.

62. One allegation against Governor Richardson involved CDR Financial Products, Inc., based in California. The president of the company, David Rubin, donated $100,000 to Richardson-controlled PACs, and an additional $10,000 to Richardson's 2005 re-election campaign. In return, Rubin's company allegedly had received two contracts from the state of New Mexico valued at $1.4 million. The allegations centered on whether someone in the governor's office had pushed the New Mexico Finance Authority to give business to Rubin's company. Dan Frosch and James C. McKinley, *Political Donors' Contracts Under Inquiry in New Mexico*, N.Y. Times, Dec. 18, 2008, http://www.nytimes.com/2008/12/19/us/politics/19richardson.html.

63. In 2009, Gary Bland, New Mexico's Investment Chief, resigned as allegations arose that Governor Richardson's former chief of staff had "instruct[ed] Bland to make investments in exchange for political contributions." New Mexico reportedly lost $90 million while investing with firms whose employees contributed at least $15,100 to Richardson's presidential campaign. Bland was eventually cleared, but $16 million — representing nearly "half of fees paid to middlemen for New Mexico investments" — went to Marc Correra, the son of a Richardson political supporter and a financial securities placement agent. William Selway and Martin Z. Braun, *New Mexico's Investment Chief Resigns Amid Probe*, Bloomberg.com, Oct. 22, 2009, http://www.bloomberg.com/apps/news?pid =newsarchive&sid=a1TqX6Jm4Ntg.

64. In another reported example, Governor Richardson's Transportation Commission Chairman Johnny Cope was implicated in a procurement scandal involving a bid for a federal stimulus project. In 2009, multiple companies submitted bids on a contract to expand Interstate

10 near Las Cruces, New Mexico, with the lowest bid coming from Fisher Sand & Gravel – New Mexico, Inc. But after agreeing to award the contract to Fisher, "DOT officials held off and began an inquiry after FNF [Construction New Mexico] attorneys and officials privately contacted them to discredit Fisher." Colleen Heild, *Low Bidder Sues Over Lost Contract*, Albuquerque J. Online, Jan. 15, 2012, http://www.abqjournal.com/main/2012/01/15/news/low-bidder-sues-over-lost-contract.html. FNF Construction reportedly had obtained confidential state legal documents through Cope's contacts with the vice president of FNF, Paul Wood. Both Wood and Cope contributed extensively to Richardson's presidential campaign and raised funds for Richardson's PAC. Eventually, the Federal Highway Administration required the New Mexico Department of Transportation to seek new bids, and the contract was given to a different party. Colleen Heild, *NMDOT Documents Leaked to Bidder*, Albuquerque J. Online, July 10, 2011, http://www.abqjournal.com/main/2011/07/10/news/nmdot-documents-leaked-to-bidder.html.

B. Hawaii

65. Hawaii enacted a 2005 contractor contribution ban to prevent pay-to-play schemes and corruption. *See* Hawaii Revenue Statute ("HRS") § 11-355. One Representative arguing for a ban instead of lowered contribution limits stated: "It's such a complete disappointment for me, Session after Session, year after year, not to see us go after the heart of the problem, which is the 'pay-to-play' game. We should simply outlaw, ban contributions from people who do work with government. We ought to do it. It should have been done long ago. It's done in thirty states. It's done by the federal government." *Yamada*, 2012 WL 983559, at *30 n.26 (quoting 2005 House Journal at 477 (statement of Rep. Fox)).

66. In a 2003 scandal, Honolulu lawyer Edward Chun was charged with two misdemeanors for advising Food Grocery, a grocery store chain, to make a contribution of $9,000 ($5,000 in excess of the then-applicable limit) to Honolulu Mayor Harris's campaign, funneled illegally through reimbursements to employees. The Harris campaign had allegedly solicited Mr. Chun. Johnny Brannon, *Lawyer Charged in Donations Made to Harris*, Honolulu Advertiser, May 21, 2003, http://the.honoluluadvertiser.com/article/2003/May/21/ln/ln21a.html.

67. In another reported scandal, a Honolulu engineering firm's contributions to Mayor Harris illustrated the existing pay-to-play culture. Between 1998 and 2002, family members and employees of SSFM International, Inc. contributed in excess of $400,000 to Harris's campaigns. The corporation received $7 million in city contracts during the same period. AP, *Jail Time, Fines Are Levied in Hawaii Election Probe*, Jan. 12, 2004, http://articles.boston.com/2004-01-12/news/29209119_1_mayoral-candidates-government-contracts-honolulu**.**

68. Even after passage of the ban on contractor contributions, Hawaii has still experienced pay-to-play behavior. In a recent case rejecting a challenge to Hawaii's contractor contribution ban, the district court found that although individual legislators might not themselves award or manage contracts, the Hawaii Legislature itself appropriates funds for state contracts; routinely holds informational and oversight hearings; and asks questions, requests audits, and otherwise oversees the administration of state contracts and use of appropriated funds. *Yamada*, 2012 WL 983559, at *31 & n.30 (citing, *e.g.*, samples of legislative committee meetings or briefings on state contracts). The court upheld the statute even though it found that government contractors cannot know in advance whether any particular candidate will or will not be in a position to oversee specific contracts if the candidate is later elected because some

committees have stronger oversight roles than others and all committee assignments are made after the election. The court noted that all Hawaii legislators vote on many bills concerning procurement and budgetary issues. *See Yamada*, 2012 WL 983559, at *31 n.30**.**

69. The court also found that contributions by contractors can create the appearance of corruption. *See Yamada*, 2012 WL 983559, at *32. For example, in the 2011 Hawaii legislative session, an officer of A-1 A-lectrician, Inc. ("A-1") — a for-profit corporation that at various times had held contracts for electrical services with the State of Hawaii or government entities — testified before the Senate Education Committee in favor of a construction project and procurement-related bill involving the University of Hawaii. A-1 had made 30 contributions to candidates during the last few weeks before the 2010 general election. At least three legislators that served on committees that considered the bill — and voted in favor of it — had received campaign contributions from A-1. *See Yamada*, 2012 WL 983559, at *31 n.30.

70. Moreover, the court found that even if individual legislators do not have direct control over contract matters, they may have power over or close friendships with government employees or others who do award or manage a specific government contract and hence play an indirect role. *See Yamada*, 2012 WL 983559, at *32.

C. Washington, DC

71. In an unfolding federal campaign corruption investigation, one of Washington, DC's major government contractors, Jeffrey E. Thompson, reportedly ran a "shadow campaign" on behalf of Vincent Gray in his successful 2010 bid to unseat Mayor Adrian Fenty. Mike DeBonis and Nikita Stewart, *Gray's Victory Called Tainted*, Wash. Post, July 11, 2012, at A1; Mike DeBonis and Nikita Stewart, *Gray's Ties to Scandal at Issue*, Wash. Post, July 12, 2012, at A1. The shadow campaign reportedly directed more than $650,000 to the Gray mayoral

campaign and included reimbursements to a series of straw donors to avoid contribution limits and to prevent then-Mayor Fenty from knowing that Thompson —whose companies reportedly had hundreds of millions of dollars in city contracts — was supporting Fenty's opponent. *Id.* at July 11, 2012. Early in his administration, Mayor Gray reportedly provided $32 million to increase reimbursement rates for one of Thompson's $355 million-a-year health care firm, D.C. Chartered Health Plan, that runs the District's health care programs for the needy, and for another company. Editorial, Wash. Post, July 11, 2012, at A16. Thompson reportedly has been secretly contributing through straw donors to various DC campaigns since 2001. Mike DeBonis, *D.C. Fundraiser's Presence Shrinks Under Spotlight*, Wash. Post, July 13, 2012, at A14. Jeanne Clarke Harris, one of the main players in the scheme along with Thompson, has pleaded guilty. DeBonis, *id.* at July 11, 2012. Op-Ed articles have decried the "corruption" and called for an end to the "'pay to play' system in which money gets to decide our policies.'" Colbert I. King, Op-Ed., *Rooting Out the Rot in D.C. Politics*, Wash. Post, July 21, 2012 at A-17.

72. Washington, DC, does not restrict or ban contributions from government contractors. *See* D.C. Code § 1-1163.33 (2012).

D. New York

73. In 2007, New York City voters passed a referendum approving reforms further regulating campaign contributions by those doing business with the City. Although laws had been in place since 1988, the Campaign Finance Board concluded that there were still problems with lobbyist and contractor contributions and set out to study the need for further reforms in 2006. The Board reported that more than 20% of the contributions in 2001 and 2005 were from individuals and entities doing business with the City, that these contributors comprised less than 6% of all donors, and that large contributions were more likely than small contributions to come

from such donors. *See* N.Y.C. Campaign Fin. Bd., *Interim Report on "Doing Business" Contributions*, at 12, 13 (June 19, 2006), http://www.nyccfb.info/PDF/issue_reports/Doing-Business-White-Paper.pdf- N.Y. City Campaign Finance Board; *Ognibene v. Parkes*, 671 F.3d 174, 189 (2nd Cir. 2012), *cert. denied*, 2012 WL 950086 (Jun. 25, 2012).

74. In 2007, the New York City Council passed a law further restricting and lowering the limits on contributions from donors doing business with the City. The City Council Committee Report noted the purpose of the law was to "eradicate this perception" that contributors doing business with the City "have a higher level of access to the City's elected officials" and to "reduce the appearance of undue influence associated with the contributions from individuals doing business with the City." *See Ognibene*, 671 F.3d at 180 (quoting N.Y.C. Council, Comm. on Gov'tl Affairs, Report of the Govt'l Affairs Div., for Int. No. 586-2007, at 24-25 (June 12, 2007)).

75. In upholding the New York City law in 2012, the Second Circuit Court of Appeals found that "there is direct evidence of a public perception of corruption," and referenced numerous newspaper articles recounting pay-to-play scandals, declarations, and deposition testimony (*e.g.*, Thomas V. Ognibene, former Republican New York City Councilman from Queens, acknowledging the public perception of officeholders and candidates: "'You're all a bunch of crooks.'").) *Ognibene*, 671 F.3d at 189-190 & n.15.

76. Thomas Ognibene himself had been the subject of an investigation into pay-to-play corruption in the late 1990s and early 2000s. Newspaper articles recount that Ognibene and his chief of staff had allegedly been caught on wiretaps with a New York City Department of Buildings official, Ronald Lattanzio, Ognibene's friend and major campaign fundraiser. Eric Lipton, *Councilman Denies Improperly Helping Building Consultant*, N.Y. Times, June 20,

2001, http://www.nytimes.com/2001/06/20/nyregion/councilman-denies-improperly-helping-building-consultant.html?pagewanted=2&src=pm. The Village Voice reported that Lattanzio had admitted "to plying Ognibene with campaign contributions and offers of travel. Lattanzio said Ognibene helped squelch a troublesome state investigation, pushed City Hall to hire the consultant's pals, and regularly used his political clout on behalf of Lattanzio's building projects." Tom Robbins, *Danger Below*, Village Voice, June 19, 2001, http://www.villagevoice.com/2001-06-19/news/danger-below/. Although Ognibene was never officially charged, the investigation reportedly caused him to withdraw from an appointment as a judge on the New York Court of Claims. Eric Lipton, *Councilman Denies Improperly Helping Building Consultant*, N.Y. Times, June 20, 2001, http://www.nytimes.com/20001/06/20/nyregion/councilman-denies-imporperly-helping-building-consultant/.

77. Even after the 2007 reforms, New York has continued to experience pay-to-play schemes leading to corruption or the appearance of corruption. New York Comptroller General Alan Hevesi, an elected official, invested $250 million in state funds in a private equity fund run by a Los Angeles venture capitalist, Elliot Broidy, who had lavished him with gifts and made $500,000 in campaign contributions. Then-New York Attorney General Andrew Cuomo (now Governor) led the investigation of Broidy and Hevesi. "Alan Hevesi presided over a culture of corruption and violated his oath as a public servant," Cuomo said. "He was solely charged with protecting our pension fund, but he exploited it for personal benefit instead." Marc Lifsher, *Ex-N.Y. Pension Fund Trustee Pleads Guilty*, L.A. Times, Oct. 8, 2010, http://articles.latimes.com/2010/oct/07/business/la-fi-hevesi-20101007.

E. Illinois

78. In Illinois, then-Governor Rod Blagojevich reportedly received 235 checks for $25,000 each between 2000 and 2008, and about three out of every four such donors "came from . . . companies or interest groups who got something — from lucrative state contracts to coveted appointments to favorable policy and regulatory actions." Jeffrey Meitrodt, Ray Long, and John Chase, *The Governor's $25,000 Club: Big Campaign Donors to Blagojevich Benefit From State*, Chicago Tribune, Apr. 27, 2008, http://articles.chicagotribune.com/2008-04-27/news/0804260452_1_campaign-contributions-top-campaign-adviser-rod-blagojevich. As Blagojevich himself reportedly said, "it was easier for governors to solicit campaign contributions because of their ability to award contracts and give legal work, consulting work, and investment banking work to campaign contributors." Second Superseding Indictment at 10-11, *United States v. Blagovich*, No. 08 CR 888 (N.D. Ill. 2008), www.justice.gov /usao/iln/pr/chicago/2010/pr0204_02a.pdf.

79. In the wake of the Blagojevich scandal, Illinois enacted laws in 2009 to curb pay to play. *See* 30 Ill. Comp. Stat. § 500/50-37(a)-(b)(2011).

F. New Jersey

80. After the Clean Air Act amendments in 1990, New Jersey began a procurement process to develop and operate an Enhanced Motor Vehicle Inspection and Maintenance Program ("I/M"). The state awarded a $392 million contract to Parsons Infrastructure to develop the program which, in the end, did not work properly. Between 1997 and 2000, when Parsons submitted its non-competitive bid for the I/M program, Parsons-related entities gave $507,950 to political candidates and state committees, and extensively lobbied state leaders. After State Senate President DiFrancesco came out against awarding the contract, a Parsons-sponsored

lobbyist called DiFrancesco's office and "pointed out" that Tony Sorter, a large contributor to DiFrancesco's campaigns, was one of the main subcontractors for the project. One day after Parsons had submitted its bid to the state, the program manager was instructed by Parsons's President DeMartino to deliver a $1,000 check from its California headquarters to Senate President DiFrancesco. *See* State of New Jersey Commission of Investigation, N.J. Enhanced Motor Vehicle Inspection Contract, at 62-63 (March 2002), http://www.state.nj.us/sci/pdf/mvinspect.pdf.

81. In 2002, the I/M program with Parsons and the individual subcontractors eventually cost the state of New Jersey $590 million for an ineffective program, nearly $200 million more than originally expected. A lobbyist "defended the fundraising efforts as a valid component of the political process." N.J. Enhanced Motor Vehicle Inspection Contract at 65.

82. In response to New Jersey's procurement scandals, New Jersey Governor McGreevey issued an Executive Order in 2004, later codified, whose main purpose was to "prevent even the appearance of campaign contributions influencing the granting of business contracts." *See* Political Activity, Lobbying Laws & Gift Rules Guide, 3d § 19:14; N.J. Stat. Ann. 19:44 A-20.3 *et seq*.

G. Connecticut

83. Connecticut passed its ban on contributions from contractors in 2005 in the wake of a pay-to-play scandal involving Governor John Rowland's accepting favors in return for influencing the awarding of more than $100 million in state contracts. *Restoring Trust* at 20-21; *Green Party of Conn. v. Garfield*, 648 F. Supp. 2d 298, 307-308 & n.9 (D. Conn. 2009) (setting out history of scandals and newspaper articles), *aff'd in part and rev'd in part*, 616 F.3d 213 (2nd Cir. 2010), *cert. denied sub nom. Green Party of Conn. v. Lenge*, 131 S. Ct. 3090 (2011).

84. According to press accounts, William Tomasso, a construction contractor with close ties to Governor Rowland, had donated $76,000 to Rowland's re-election campaigns from 1998-2002. The Tomasso Group, the contracting business, received $131 million in state contracts for three projects. Two of the projects — worth a combined total of $94 million — were awarded in a "no-bid" contest by the Public Works Commissioner, who cited his legal power to bypass procurement procedure in an emergency. While the Commissioner "defended his choices for those projects as fair and free of political influence," a 2003 New York Times article attributed "pressure from the governor's office" for the Commissioner to complete the facilities quickly, using the emergency power clause. Paul Von Zeilbauer, *Federal Inquiry into Influence Peddling Under Rowland Administration Is Expanding*, N.Y. Times, March 17, 2003, http://www.nytimes.com/2003/03/17/nyregion/federal-inquiry-into-influence-peddling-under-rowland-administration-expanding.html?pagewanted=all&src=pm.

85. A Connecticut public opinion poll in showed that 76% of Connecticut voters believed that "campaign contributions Governor Rowland received influenced him in awarding government contracts." *Green Party of Conn. v. Garfield*, 616 F. 3d.189, 200 (2nd Cir. 2010) (quoting opinion poll).

H. Ohio

86. In 2005, Ohio Governor Bob Taft was convicted and fined $4,000 for accepting gifts of more than $75 without disclosing them. These gifts included more than $6,000 worth of golf outings, meals, and tickets to see the Columbus Blue Jackets, including some gifts from Thomas Noe, who invested Bureau of Workers' Compensation ("BWC") money in rare coins and was appointed as a regent of Ohio State University. Reuters, *Ohio Gov. Charged with*

Criminal Misdemeanors, Aug. 17, 2005, http://www.bloomberg.com /apps/news?pid=newsarchive&sid=a6vF0sz8qNNg&refer=top_world_news**.**

87. That scandal was part of a larger scandal known as *Coingate*. Beginning in 1996, BWC reportedly invested $500 million with politically-connected investment firms, more than half of which had contributed to the Republican party and statewide candidates, including $61,875 for Governor Taft. *See* Drew Wilkinson, *Fund Managers Ratcheted Up Political Giving*, Toledo Blade, Apr. 19, 2005, http://www.toledoblade.com/State/2005/04/19/Fund-managers-ratcheted-up-political-giving.html. Noe and his associates had contributed $6,780 to GOP candidates before receiving $50 million to invest from BWC, and in the years after receiving the contract, Noe contributed $65,250 to statewide candidates. However, $13 million was reported missing from Noe's investment in rare coins largely because it proved to be a Ponzi scheme. James Drew and Steve Eder, *Petro: Noe Stole Millions*, Toledo Blade, July 22, 2005, http://www.toledoblade.com/State/2005/07/22/Petro-Noe-stole-millions.html.

88. In 2009, a school board member in the Parma School District outside of Cleveland resigned after reportedly approving $25 million in contracts to companies that contributed to the board member's campaign war chest. Joseph Wagner, *Kelley Quits Parma School Board*, Cleveland Plain Dealer, Mar. 21, 2009, http://www.cleveland. com/news/plaindealer/index.ssf?/base/cuyahoga/1237624340252470.xml&coll=2. The board member, J. Kevin Kelley, admitted he had accepted a $10,000 bribe from State Sen. Tom Patton, who was a consultant for a company that received a $489,000 contract from the school board; Patton has denied the claim. John Caniglia, *Former Parma School Board Member J. Kevin Kelley Testifies He Received Bribe from State Senator, Who Denies the Claim*, Cleveland Plain

Dealer, Feb. 3, 2012, http://www.cleveland.com/ countyincrisis/ index.ssf/ 2012/02 dimora_trial_j_kevin_kelley_te.html.

89. In late July 2012, Cuyahoga County Commissioner Jimmy Dimora was sentenced to 28 years in prison for accepting bribes and overseeing a pay-to-play culture pervading county government. The sentencing capped a four-year investigation that resulted in more than 50 convictions of contractors and public officials, including a county assessor and two judges. Douglas Belkin, *Ohio Official Sentenced to 28 Years*, Wall St. J., Aug. 1, 2012, at A3, http://online.wsj.com/article/SB10000872396390444130304577561370235744432.html.

I. California

90. In 2004, California Attorney General Bill Lockyer conducted an investigation into Governor Gray Davis's no-bid software contract with Oracle Corp. According to state senate investigations and press accounts, an Oracle lobbyist handed a $25,000 campaign check to one of Davis' policy directors days after the state signed a $95 million contract with Oracle to upgrade state government computer systems. Davis eventually returned the check to Oracle and rescinded the contract with the company. His chief policy director was fired and charged with falsifying evidence. However, Senate President Pro-Tem John Burton (D-San Francisco) called this "a high-profile deal" because someone had to take the fall and said that others involved in the scandal had escaped being charged. Carl Ingram, *Former Davis Aide Faces Charges in Oracle Probe*, L.A. Times, March 3, 2004, http://articles.latimes.com/2004/mar/03/local/me-oracle3.

V. SOME STATES AND MUNICIPALITIES RESTRICT CONTRIBUTIONS FROM LOBBYISTS, WHOSE CONTRIBUTIONS, LIKE THOSE OF GOVERNMENT CONTRACTORS, CAN LEAD TO CORRUPTION AND ITS APPEARANCE

91. States and municipalities have passed bans on lobbyist contributions, generally limited to periods when the legislature is in session. They include: Alabama, Alaska, Arizona, California (though a lobbyist may hold a fundraiser in the lobbyist's own home if the event costs under $500), Colorado, Iowa, Kansas, Kentucky (legislative branch), Louisiana (barring contributions gathered during a fundraiser unless permission is obtained from the governing board 30 days in advance), Maryland, Minnesota, Nevada, New Mexico, North Carolina, Oklahoma, Tennessee, Utah, and Vermont. *See* COGEL Conference, 2011 Lobbying Update, FEC Exh. 6.

92. In 2006, North Carolina enacted the Campaign Contributions Prohibition, which bars registered lobbyists from making contributions to candidates for the North Carolina General Assembly and the Council of State, *see* 2006 N.C. Sess. Laws 201; N.C. Gen. Stat. § 163-278.13C(a). The law was enacted in response to a scandal based on corruption over the previous decade involving elected officials, lobbyists, and the campaign committees of former governors. *See Preston v. Leake*, 660 F.3d 726, 729-30 (4th Cir. 2011).

93. The Fourth Circuit Court of Appeals, in upholding North Carolina's ban on lobbyists' contributions, explained: "The role of a lobbyist is both legitimate and important to legislation and government decisionmaking, but by its very nature, it is prone to corruption and therefore especially susceptible to public suspicion of corruption. *Any payment* made by a lobbyist to a public official, whether a campaign contribution or simply a gift, calls into question the propriety of the relationship." *Preston*, 660 F.3d at 735-37 (emphasis in original). The court further explained: "The nature of the lobbyists' role in its finest tradition exists in tension with

any idea that a lobbyist can make payments of any kind or in any amount to a public official. The small campaign contribution, just as the small gift, suffers from a legitimate suspicion of corruption." *Id.* at 740.

94. In 1999, the Alaska Supreme Court upheld the state's out-of-district ban on lobbyists' contributions based on affidavits and results from a survey commissioned by the state senate of perceptions of the role lobbyists play in campaign fundraising. According to the survey, 87% of lobbyists said that their refusal to make campaign contributions sometimes adversely affects lobbying; 37% said such refusals frequently adversely affect lobbying and that they give contributions "'defensive[ly] to ward off negative reactions and the loss of access.'" *State of Alaska v. Alaska Civil Liberties Union*, 978 P.2d 597, 618 (Alaska 1999) (alteration in original).

95. In his 2011 book, *Capitol Punishment*, Jack Abramoff, former lobbyist and convicted felon, presents an insider's view of how he and fellow lobbyists, starting in the 1990s, arranged to give campaign contributions and lavish gifts to Members of Congress and their staffs for having steered legislation in their clients' favor and to make sure they did so in the future. Jack Abramoff, *Capitol Punishment: The Hard Truth About Washington Corruption From America's Most Notorious Lobbyist* (WND Books 2011).

96. Reflecting on his experiences as a lobbyist, Abramoff concluded that everyone who makes money doing business with the government, *including lobbyists and contractors*, should be prohibited from making political contributions and gifts:

> Instead of limiting the size of every American's political contribution, we need to entirely eliminate any contribution by those lobbying the government, *participating in a federal contract*, or otherwise financially benefiting from public funds. If you get money or perks from elected officials — be "you" a company, a union, an association, a law firm, *or an individual* — you shouldn't be permitted to give them so much as one dollar. . . . *[I]f you choose*

> *to perform federal contracts*, or if you draw your compensation from any entity which does, *you need to abstain from giving campaign contributions. It's your choice either way. But you have to choose one, not both.* . . . If you are going to lobby the federal government, take from the treasury, or *work as a contractor, you shouldn't be permitted to give one penny to any elected official or staff*, including the executive branch. Remove all temptations. Eradicate even the scent of impropriety.

Abramoff at 305 (emphases added).

97. Following the Abramoff lobbying scandal, Congress enacted, and President Bush signed in 2008, the Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81, 121 Stat. 735 (2007), prohibiting lawmakers from, *inter alia*, accepting gifts or trips from organizations that hire lobbyists.

VI. DESPITE LAWS AND RULES DESIGNED TO PROTECT THE INTEGRITY OF THE FEDERAL CONTRACTING PROCESS, THE POTENTIAL FOR CORRUPTION AND THE APPEARANCE OF CORRUPTION PERSISTS

98. Despite the precautions in the procurement process to insulate contracting decisions from political pressure, it is not uncommon for dissatisfied contractors or potential contractors to allege that they were mistreated due to political influence, although it is rarely proven. (Schooner Dep. at 59, 92-93.) It is also not unheard of for officials of political parties to be "sanctioned, punished, prosecuted and sent to jail for attempting to [influence the award of a contract]." (Schooner Dep. at 138.)

99. Political appointees pervade the government, as demonstrated by the 2008 edition of the Government Printing Office's "Plum Book" listing about 8,000 political 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); Lois Romano, *The Plum Book: Washington's Hottest Read*, Wash. Post, Nov. 7, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/11/06/AR2008110602519.htm.

100. Plaintiffs admit that federal officeholders and political appointees have influenced the selection of federal contractors. (Wagner Resp. to FEC RFA ¶ 1, Pls.' Appx. at 37; Brown Resp. to FEC RFA ¶ 1, Pls.' Appx. at 58; Miller Resp. to FEC RFA ¶ 1, Pls.' Appx. at 146.)

101. Plaintiffs admit that federal officeholders and political appointees have influenced the selection of federal contractors who are individuals. (Wagner Resp. to FEC RFA ¶ 2, Pls.' Appx. at 38; Brown Resp. to FEC RFA ¶ 2, Pls.' Appx. at 58; Miller Resp. to FEC RFA ¶ 2, Pls.' Appx. at 147.)

102. Plaintiffs admit that federal officeholders and political appointees have attempted to influence the selection of corporate federal contractors. (Wagner Resp. to FEC RFA ¶ 3, Pls.' Appx. at 38; Brown Resp. to FEC RFA ¶ 3, Pls.' Appx. at 59; Miller Resp. to FEC RFA ¶ 3, Pls.' Appx. at 147.)

103. Plaintiffs admit that federal officeholders and political appointees have attempted to influence the selection of federal contractors who are individuals. (Wagner Resp. to FEC RFA ¶ 4, Pls.' Appx. at 38; Brown Resp. to FEC RFA ¶ 4 at 59; Miller Resp. to FEC RFA ¶ 4, Pls.' Appx. at 147.)

104. Steve Spinner, a fundraising "bundler" for President Obama and liaison in the Energy Department, allegedly pressed staff members to finalize a government loan for Solyndra, LLC, the now-shuttered solar panel company in which another campaign bundler, Oklahoma billionaire George Kaiser, was a major investor. T.W. Farnam, *More Than Half of Obama's Big Fundraisers Got Jobs in His Administration*, Wash. Post, March 8, 2012, at A15; Joe Stephens and Carol D. Leonnig, *OMB staffer Warned about Solyandra*, Wash. Post, Aug. 2, 2012, at A2.

105. Many examples of ethical improprieties and criminal violations, large and small, involving federal contracting are found in *The Encyclopedia of Ethical Failure*, a handbook

developed by the Department of Defense ("DOD") for training DOD and other federal government employees in ethical responsibilities and the laws governing conduct as federal employees. Encyclopedia of Ethical Failure, Dep't. of Defense, Office of General Counsel, Standards of Conduct Office, updated July 2012, www.dod.mil/dodgc/ defense_ethics/ resource_library/guidance.htm.

106. For example, a major in the U.S. Army Reserve, Theresa Jeanne Baker, pled guilty to bribery for accepting money and goods, including a Harley Davidson motorcycle, from defense contractor Raman Corporation and a former employee of another defense contractor, Elie Samir Chidiac. In return, she fraudulently awarded contracts to Raman Corporation and cancelled other contracts held by third-party contractors and re-awarded them to Chidiac. Encycl. of Ethical Failure at 13.

107. In 1992, the Sergeant-at-Arms of the United States Senate, the chief purchasing agent for the Senate, pled guilty to recommending that the Senate purchase and install an AT&T telephone system for the U.S. Capitol Police in exchange for a round-trip ticket to Hawaii. Encycl. of Ethical Failure at 36.

108. An employee of NASA pled guilty to violating the conflict of interest statute (18 U.S.C. § 208) in connection with an electrical services contract. The employee was a communications specialist and was responsible for reviewing and approving work done installing "telecommunications closets" at Langley Research Center. The employee recommended that the main contractor hire a certain sub-contractor which was wholly owned and operated by the employee's friend. After the sub-contractor finished that work, he bid on another contract which he was awarded. The friend, in turn, subcontracted the work to another

company that was wholly owned and operated by the NASA employee himself. The scam netted about $40,000. Encycl. of Ethical Failure at 39-40.

109. An employee of the Department of the Treasury was sentenced for a scheme to funnel contracts to companies that she and her husband controlled. The employee was responsible for determining the training needs of Treasury employees and for procuring private training services. Over the course of two years, the employee awarded 105 training contracts valued at more than $139,000 to companies owned by her husband. Encycl. of Ethical Failure at 40.

110. A contracting officer at the General Services Administration ("GSA") funneled contracts to her husband's employer who in turn rewarded the husband with raises and a Jaguar. Over a span of 15 months, the employee directed over $11.5 million to her husband's employer for GSA food preparation and serving equipment. Encycl. of Ethical Failure at 40.

111. An electrical foreman at the Naval Air Warfare Center with authority over Navy contracts relating to base maintenance was convicted and sentenced for accepting $9,300 from a government contractor in exchange for assisting in the award of a contract to that contractor. Encycl. of Ethical Failure at 18.

112. A U.S. Postal Service employee responsible for awarding contracts for printing services was charged with funneling contracts to a printing company in exchange for a payment of $11,575 to the employee's divorce lawyer; he may also have accepted bribes from at least four other printing companies. Encycl. of Ethical Failure at 30.

113. A major investigation dubbed Operation Ill Wind in the late 1980s and early 1990s uncovered massive defense contract and procurement fraud. One of the major players in the corruption scandal that netted 52 convictions was Melvyn Paisley, then Assistant Secretary of

the Navy. Outside consultants and contractors paid bribes and gave lavish gifts to government officials in exchange for secret information on bids and clandestine aid in obtaining multimillion-dollar contracts in the 100-billion-dollar-a-year procurement program. Douglas Franz, *Paisley Gets 4-Year Term in Ill Wind Case: Pentagon: He Is The Highest-Ranking Target And His Sentence Is The Stiffest Yet In The Defense Procurement Scandal*, L.A. Times, Oct. 19, 1991, http://articles.latimes.com/1991-10-19/news/mn-526_1_ill-wind.

114. In 2008, Alphonso Jackson, Secretary of HUD, resigned when the FBI and HUD's Inspector General began investigating his dealings with government contracts. Shortly after taking office in 2004, Jackson said in a speech that he had canceled a contract for a company after its president told him that he did not like President Bush, although Jackson later claimed that he had made up the story. HUD's Inspector General, however, found that Jackson had in fact urged his staff to consider contractors' political leanings when awarding contracts, though there was no proof that staff members had complied. The investigation focused on whether Jackson improperly steered hundreds of thousands of dollars in government contracts to friends in New Orleans and the Virgin Islands. Jackson also reportedly threatened to withdraw federal aid from the director of the Philadelphia Housing Authority after he refused to turn over a $2 million property to a politically connected developer. N.Y. Times, *Alphonso R. Jackson*, May 4, 2010, http://topics.nytimes.com/top/reference/timestopics/ people/j/ alphonso_r_jackson/index.html; Rachel L. Swarns, *HUD Secretary Draws Strong Criticism at Hearing*, N.Y. Times, March 13, 2008, http://www.nytimes.com/2008/03/13/washington/ 13jackson.html?ref=alphonsorjackson.

VII. MEMBERS OF CONGRESS HAVE ATTEMPTED TO INFLUENCE GOVERNMENT CONTRACTING DECISIONS AND SIMILAR AGENCY DECISION-MAKING

115. In 2006, Representative Robert Ney of Ohio signed a plea agreement pleading guilty to various charges related to the Jack Abramoff lobbying scandal. *See United States v. Ney*, Case No. 06 CR 91506 (D.D.C. 2006), Plea Agreement and Factual Basis For the Plea of Robert W. Ney, http://www.justice.gov/criminal/pr/2006/09/ 2006_4760_2_ CRM_091506 _pin_agree.pdf; http://www.justice.gov/criminal/pr/2006/09/2006_4760_3_CRM_091506 _pin_fact.pdf. The charges against Ney included allegations regarding his support for the award of a multimillion dollar contract in 2002 to one of Abramoff's clients, Foxcom Wireless, an Israeli company, to install antennas as part of a wireless infrastructure system in the House of Representatives even though another process was already underway to select a wireless provider. One of the wireless bidders reportedly wrote to Ney to complain about the "'highly politicized selection process.'" James V. Grimaldi and Susan Schmidt, *Lawmaker's Abramoff Ties Investigated*, Wash. Post, Oct. 18, 2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/10/17/ AR2005101701918.html. Foxcom reportedly donated $50,000 to the Capitol Athletic Foundation, one of Abramoff's Charities, before Ney used his influence to ensure Foxcom was selected for the contract. *Id.*

116. Abscam, one of the most famous congressional corruption scandals, was the code-name for an FBI undercover sting operation designed to expose political corruption among Members of Congress in the late 1970s and 1980s. *See United States v. Myers*, 527 F. Supp. 1206, 1209-11 (E.D.N.Y. 1981), *aff'd*, 692 F.2d 823 (2d Cir. 1982); Katherine Goldwasser, After Abscam, 36 Emory L. J. 75 (1987). "Abscam" is an acronym combining the first two letters of Abdul Enterprises, Ltd., a fictitious Middle Eastern corporation, and the word "scam." The scam

story was that two Arab sheiks, who had been investing in the United States, were afraid that they would eventually have to flee their country because of internal problems, as the Shah of Iran had had to do. To insure against any problems they might encounter with immigrating, the sheiks wanted to "sign up" as many Congressmen and other public officials as possible to commit to helping them. The Congressmen's commitment would be secured with promises of investment in their districts and payments of cash to them: Representatives would receive $25,000 and Senators $50,000 for their help and more money once the sheiks arrived in the United States. *See United States v. Kelly*, 539 F. Supp. 363, 366 (D.D.C. 1982), *reversed*, 707 F.2d 1460 (D.C. Cir. 1983).

117. Abscam resulted in the indictment of 25 individuals, including one United States Senator who promised to help secure government contracts, six United States Representatives, and other public officials and lawyers, for corrupt acts, by federal grand juries in New York, Philadelphia and the District of Columbia. *See United States v. Myers*, 527 F. Supp. at 1209-11. All convictions were upheld on appeal. *See* 36 Emory L. J. at n.6 (listing cases).

118. Senator Harrison Williams of New Jersey was convicted of bribery and other offenses for offering to use his influence to obtain government contracts in return for financing a titanium mine by the Abscam operative. The Senator met seven times with the undercover agents before they convinced him to accept $100 million of financing assistance in exchange for his promise to use his influence to obtain government contracts for the purchase of titanium from a mining venture in which Williams and others held an interest. Two transactions were involved. In the first, the stock-and-loan transaction, Williams and his associates would organize corporations for the purchase and operation of a titanium mine and processing plant and receive an 18% stock interest. Abdul Enterprises offered to provide the financing for the venture.

Before that transaction could be finalized, however, another group of Arab businessmen offered to buy the entire operation, offering Williams a continuing small interest in the venture, but also requiring him to use his influence as a United States Senator to obtain government contracts to purchase titanium from the mine. *See United States v. Williams*, 529 F. Supp. 1085, 1091-93 (E.D.N.Y. 1981), *aff'd*, 705 F.2d 603 (2nd Cir. 1983).

119. In 2004, Representative Tom Delay was reprimanded by the House Committee on Ethics for taking official action on the basis of partisan affiliation when he intervened on behalf of Republican members of the Texas House by using the Federal Aviation Administration to obtain the location of an airplane that was shuttling Democratic members of the Texas House to avoid a quorum:

> Your intervention in a partisan conflict in the Texas House of Representatives using the resources of a Federal agency, the Federal Aviation Administration, raises serious concerns under these standards of conduct. Your contacts with the FAA were in connection with the dispute over congressional redistricting in the Texas House of Representatives that occurred in May 2003. The purpose of these contacts was to obtain information on the whereabouts of Democratic Members of the Texas House who had absented themselves from Austin for the purpose of denying the House a quorum.

Letter to Rep. Tom Delay from House Comm. on Ethics (Oct. 6, 2004), http://ethics.house.gov/committee-report/2nd-session-report-105-797/letter-representative-tom-delay.

120. Another major scandal involved the "Keating Five," a group of United States Senators that intervened in 1987 during the savings and loan crisis to help the troubled Lincoln Savings and Loan Association, whose chairman was Charles H. Keating, Jr. Keating was a major donor, contributing millions of dollars to the five Senators: Alan Cranston, Dennis DeConcini, John Glenn, John McCain, and Donald W. Reigle, Jr. Lincoln was a target of an investigation by the Federal Home Loan Bank Board, but after the Senators intervened, the

agency backed off taking any action against Lincoln, which collapsed in 1989 at a cost of over $3 billion to the government and a loss of life savings for some investors. The Senate Ethics Committee investigated and in 1991 cleared Senators Glenn and McCain but criticized them for their "poor judgment" in actions that appeared improper. Senators Cranston, DeConcini. and Riegle received formal reprimands. Richard L. Berke, *Aftermath of the Keating Verdicts: Damage Control, Political Glee*, N.Y. Times, Mar. 1, 1991, http://www.nytimes.com/1991/03/01/us/ aftermath-of-the-keating-verdicts-damage-control-political-glee.html**.** *See also* Senate Ethics Manual excerpting 1991 Senate Ethics Committee Keating Report 102-223, at 179-185, on interventions with administrative agencies, http://www.ethics.senate.gov/public/index.cfm/files/serve?File_id=f2eb14e3-1123-48eb-9334-8c4717102a6e).

121. Senator Cranston, for example, reportedly received over $1 million from Keating: $39,000 from Keating and his associates for his 1986 re-election campaign, $850,000 to groups founded or controlled by Cranston, and another $85,000 to the California Democratic Party. N.Y. Times, *The Lincoln Savings and Loan Investigation: Who Is Involved*, Nov. 22, 1989, http://www.nytimes.com/1989/11/22/business/the-lincoln-savings-and-loan-investigation-who-is-involved.html?src=pm.

122. In 1977, Representative Bertram L. Podell pleaded guilty to having violated the federal conflict of interest statute, 18 U.S.C. § 208, when he accepted among other items a contribution to his campaign committee in return for appearing before the Civil Aeronautics Board and the Federal Aviation Administration on behalf of Florida Atlantic Airlines, Inc. ("FAAI"), which was seeking to operate a route between Florida and the Bahamas and opposing a revocation of its operating certificate. Podell spoke to U.S. and Bahamian officials, wrote

letters, made telephone calls, and attended meetings to further the interests of FAAI in exchange for payments totaling about $40,000. *See United States v. Podell*, 436 F. Supp. 1039, 1040-41 (S.D.N.Y. 1977), *aff'd* 572 F.2d 31 (2nd Cir. 1978).

123. In 2005, Representative Randy Cunningham of California pled guilty to bribery involving contracts. Cunningham had taken bribes from contractors, which enabled him to buy a mansion, a suburban Washington condominium, a yacht and a Rolls Royce. In total, Cunningham reportedly received at least $2.4 million in bribes. The investigation was sparked when Cunningham sold his San Diego-area house in 2003 for $1.6 million to defense contractor Mitchell Wade, who then sold it for $700,000 less. The contractor had bought the house at the higher price as payback for Cunningham's pressing the Pentagon to award contracts to the defense contractor. CNN Politics, *Congressman Resigns After Bribery Plea*, Nov. 28, 2005, http://articles.cnn.com/2005-11-28/politics/cunningham_1_mzm-mitchell-wade-tax-evasion?_s=PM:POLITICS.

124. Congressman William J. Jefferson was convicted for a variety of crimes including bribery, 18 U.S.C. § 201, for soliciting bribes starting in about 2001 from individuals and companies in return for promoting their business interests in Africa. Some $90,000 in cash was found in his freezer. In exchange for payments to various Jefferson-controlled companies, Jefferson promised to help businesses by corresponding and meeting with various African and American government officials, including an unnamed member of the House Subcommittee on Telecommunications, Trade, and Consumer Protection. *See United States v. Jefferson*, 534 F. Supp. 2d 645 (E.D. Va.), *aff'd*, 546 F.3d 300 (4th Cir. 2008). The court rejected Jefferson's argument that he had no actual authority to directly advance the businesses' interests, noting instead that it is "'the corruption of official decisions through the misuse of influence in

governmental decision-making which the bribery statute makes criminal.'" *United States v. Jefferson*, 562 F. Supp. 2d 687, 694 n.15 (E.D. Va. 2008) (quoting *United States v. Muntain*, 610 F.2d 964, 968 (D.C. Cir. 1979), *aff'd*, 674 F.3d 332 (4th Cir. 2012). He was convicted of 10 counts of bribery and sentenced to 13 years in prison. Bruce Alpert, *William Jefferson Ordered to Report to Prison by May 4*, Times-Picayune, Apr. 20, 2012, http://www.nola.com/politics/index.ssf/2012/04/william_jefferson_ordered_to_b.html

VIII. THE "SOFT MONEY" ERA SHOWS THAT DONORS CAN GAIN UNDUE INFLUENCE OVER FEDERAL CANDIDATES AND OFFICE HOLDERS THROUGH LARGE DONATIONS TO POLITICAL PARTIES

125. The era of soft money taught that large donations to national party committees pose a danger of corruption and its appearance because national political parties are "inextricably intertwined" with their federal officeholders and candidates, with whom they "enjoy a special relationship and unity of interest." *McConnell v. FEC*, 540 U.S. 93, 145, 155 (2003) (internal quotation marks omitted), *overruled in part on other grounds by Citizens United v. FEC*, 130 S.Ct. 876 (2010). In fact, "'"[t]here is no meaningful separation between the national party committees and the public officials who control them."'" *Id.* at 155 (quoting *McConnell v. FEC*, 251 F. Supp. 2d 176, 468-69 (D.D.C. 2003) (Kollar-Kotelly, J.) (quoting Expert Report of Thomas E. Mann ("Mann Expert Report") at 29.

126. Prior to November 6, 2002, FECA limited donations to national party committees only if they were made for the purpose of influencing a federal election. *McConnell*, 540 U.S. at 122-23. Such contributions are known as "federal" or "hard money" contributions. *Id.* at 122. In contrast, FECA did not limit "[d]onations made [to national party committees] solely for the purpose of influencing state or local elections," which are known as "nonfederal" or "soft money" donations. *Id.* at 122-23.

127. In 2002, Congress passed the Bipartisan Campaign Reform Act of 2002, which "plug[ged] the soft-money loophole" by adding 2 U.S.C. § 441i(a) to FECA. *McConnell*, 540 U.S. at 133. The "soft-money ban," as that provision is known, "prohibits national party committees and their agents from soliciting, receiving, directing, or spending any soft money." *Id.* at 133, 187. As a result, national party committees today may generally accept only hard money contributions, which are subject to FECA's contribution limit found at 2 U.S.C. § 441a(a)(1)(B). However, BCRA also increased the hard-money contribution limits. Currently, an individual may give contributions totaling $117,000 per two-year election cycle, including $30,000 per year to the national committees of a political party. *See* 2 U.S.C. § 441a(a)(1); FEC, *Price Index Adjustments for Contribution and Expenditure Limits and Lobbyist Bundling Disclosure Threshold*, 76 Fed. Reg. 8368, 8370 (Feb. 14, 2011).

128. Before BCRA outlawed them, "*soft-money* contributions to national party committees ha[d] a corrupting influence [and] g[a]ve rise to the appearance of corruption." *McConnell*, 540 U.S. at 145.

129. The trading of soft money to national party committees in exchange for access to and influence over federal candidates and officeholders was rampant. *McConnell*, 540 U.S. at 150-52; *McConnell*, 251 F. Supp. 2d at 492-506 (Kollar-Kotelly, J.), 860-61 (Leon, J.). Therefore, when unlimited soft-money donations to national party committees were legal, "[i]t [was] not only plausible, but likely, that candidates would feel grateful for such donations and that donors would seek to exploit that gratitude." *McConnell*, 540 U.S. at 145 (footnote omitted).

130. Once donors had contributed the maximum amount of hard money allowed by FECA, candidates would ask them to make an additional donation of unlimited soft money to the candidate's national party committee. *McConnell*, 540 U.S. at 125 & n.15.

131. Even when federal candidates and officeholders were not directly soliciting soft money, they nevertheless "were well aware of the identities of the [soft-money] donors." *McConnell*, 540 U.S. at 147-48; *see also McConnell*, 251 F. Supp. 2d at 487-88 (Kollar-Kotelly, J.), 784, 853-55 (Leon, J.).

132. Donors gave large amounts of soft money to the national party committees out of fear that if they did not, the parties' officeholders would ignore their views or give an advantage to competing business interests that did give soft money. *McConnell*, 251 F. Supp. 2d at 490 (Kollar-Kotelly, J.) (citing Declaration of Senator Warren Rudman ("Rudman Decl.") ¶ 5).

133. The access obtained by soft money donors did in fact give them influence over officeholders and legislation. *McConnell*, 540 U.S. at 149-50 ("The evidence connects soft money to manipulations of the legislative calendar, leading to Congress' failure to enact, among other things, generic drug legislation, tort reform, and tobacco legislation."). As a former Senator explained: "'Who, after all, can seriously contend that a $100,000 donation does not alter the way one thinks about — and quite possibly votes on — an issue?'" *Id.* at 149 (quoting *McConnell*, 251 F. Supp. 2d at 481 (Kollar-Kotelly, J.) (quoting Declaration of Alan K. Simpson ("Simpson Decl.") at ¶ 10)).

134. When a donor gave unlimited soft money to a national party committee, there was "'sometimes at least an implicit understanding that the money w[ould] be used to benefit a certain candidate,'" and the candidates knew that if they raised unlimited soft-money, it would benefit their campaign later. *McConnell*, 251 F. Supp. 2d at 822 (Leon, J.) (quoting Simpson

Decl. ¶ 6). Even though a donor could not give soft money directly to a federal candidate, "'everyone kn[e]w[] that it [was] fairly easy to push the money through our tortured system to benefit specific candidates.'" *Id.* (quoting Simpson Decl. ¶ 7).

135. "'[M]ost federal elected officials recognize that continued financial support from the donor often may be contingent upon the donor feeling that he or she has received a fair hearing and some degree of consideration or support.'" *McConnell*, 251 F. Supp. 2d, at 489-90 (Kollar-Kotelly, J.) (quoting Declaration of Wright H. Andrews ¶ 8). And as Senator John McCain has noted, "'legislators have been in situations where they would rather fit in an appointment with a soft money contributor than risk losing his or her donation to the party.'" *Id.* at 496-97 (quoting Declaration of Senator John McCain ¶ 6).

136. The fact that federal candidates and officeholders were willing to give their valuable time to soft money donors even where the party would use the donation for its own purposes indicated "that officeholders place[d] substantial value on the soft-money contribution themselves, without regard to their end use[.]" *McConnell*, 540 U.S. at 155-56 (citing Expert Report of Donald P. Green, Yale Univ.). Indeed, Members of Congress have "an interest in a strong party that can assist its federal officeholders" in "'perform[ing] its function of keeping tabs on statements, policies, and votes of opposition party members and groups.'" *McConnell*, 251 F. Supp. 2d at 474-75 (Kollar-Kotelly, J) (quoting Declaration of Senator Dale Bumpers ¶ 10).

IX. THE CONTRIBUTION BAN DOES NOT PREVENT CONTRACTORS FROM POLITICAL EXPRESSION OR EVEN FROM ACTIVELY PARTICIPATING IN FEDERAL ELECTIONS

A. Federal Contractors Are Permitted to Engage in Advocacy and Even to Support Federal Candidates in Numerous Ways

137. FECA defines "contribution" to include only transactions made "for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A). The prohibition of contributions in section 441c therefore does not prevent contractors from giving money to issue advocacy groups. Nor does it prevent federal contractors from engaging in their own issue advocacy organization or working for issue advocacy organizations.

138. Federal contractors are not prohibited from volunteering on behalf of candidates or political committees. 2 U.S.C. § 431(8)(B)(i); 11 C.F.R. § 100.74.

139. Federal contractors who volunteer for campaigns or political parties can provide the use of their homes for candidate or party-related activities. 2 U.S.C. § 431(8)(B)(ii); 11 C.F.R. § 100.75. A federal contractor can also arrange for the campaign or party to use a church or community room that he has obtained. 2 U.S.C. § 431(8)(B)(ii); 11 C.F.R. § 100.76. And he or she can even provide invitations, food and beverages to the party or campaign for the occasion, subject to some amount limitations. 2 U.S.C. § 431(8)(B)(ii); 11 C.F.R. § 100.77.

140. Federal contractors with expertise in law or accounting can provide those services to a campaign or political party for the purposes of complying with FECA or other campaign laws. 2 U.S.C. § 431(8)(B)(viii)(II); 11 C.F.R. § 100.86.

141. Federal contractors can also engage in voluntary internet activity coordinated with a campaign, political committee, or political party, for the purpose of influencing a federal election. Such internet activity includes, but is not limited to, sending emails, blogging, creating and maintaining or hosting websites, or any other form of internet communications. 11 C.F.R.

§ 100.94.

142. Unlike federal contractors, 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.

B. Federal Contractors Who Are Individuals Could Form an LLC

143. Federal contractors like Wagner could establish an LLC. Forming 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.

144. Plaintiffs' declarant Jonathan Tiemann established an LLC in California for a "modest" amount and paid a filing fee of $70 to the Secretary of State. (Decl. of Jonathan Tiemann, Pls.' Appx. at 29-30.)

145. A former Research Director of ACUS indicated that if a request for a contract came from an LLC rather than an individual, he knew of "no reason why ACUS would not have made the contract with it, as long as it was clear that the work would be done by the individual consultant who had been chosen for his or her expertise." (Lubbers Decl., Pls.' Appx. at 24.)

146. In a similar vein, Prof. Schooner stated that in his experience, "agencies are indifferent to whether the contract is with an individual or with that individual's LLC, so long as

it is clear that the individual (the key personnel) will be providing the services required. I am unaware of any law or regulation that would preclude a person providing contractual services of this kind from doing so under his or her LLC, if that were the person's preference." (Schooner Decl., Pls.' Appx. at 28.)

X. FEDERAL CONTRACTORS AND GOVERNMENT EMPLOYEES ARE NOT SIMILARLY SITUATED

147. 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. 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). No similar agency is tasked with enforcing merit-based federal contracting.

148. The normal benefits that accompany federal employment are not typically given to contractors: "As a general rule, a contractor, even if they worked for the government before, would not accrue years of services, would not be part of the retirement package, would not be able to participate in the thrift savings program, all those types of things." (Schooner Dep. at 75.)

149. "[G]overnment contractors have extensive compliance regimes with regard to drug-free workplace, child labor, human trafficking, obviously issues related to occupational safety and health, the union and wage, minimum wage requirements, and the list literally goes on and on." (Schooner Dep. at 40-41.)

150. Federal contractors who are individuals can negotiate the amount of their

compensation and other terms of their contracts with the United States government, its agencies, or departments. (Wagner Resp. to FEC RFA ¶ 10, Pls.' Appx. at 39; Brown Resp. to FEC RFA ¶ 11, Pls.' Appx. at 60; Miller Resp. to FEC RFA ¶ 11, Pls.' Appx. at 148.)

151. Contractors working for the federal government are often required to have email addresses and badges that distinguish them from employees, and can even be required to answer the telephone in a different manner. (Schooner Dep. at 73-74.)

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