No. 15-

IN THE

Supreme Court of the United States

JAN MILLER,

PETITIONER,

v.

FEDERAL ELECTION COMMISSION,

RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

52 U.S.C. § 30119 forbids any person seeking or holding any contract with the federal government from making a contribution in any amount to any candidate, political party, or political committee in connection with a federal election. The principal justification for the contribution ban is that it prevents quid pro quo corruption or its appearance. However, section 30119 expressly allows corporate contractors to create captive political committees to make contributions within the limits prescribed by law that the corporation cannot make. The law also permits a corporate contractor's officers and shareholders to make such contributions. In addition, individuals seeking or holding government grants are not subject to this ban, nor are federal employees or individuals who raise vast sums of money in the hope of obtaining high-level federal jobs. The question presented is:

Is the ban on contributions in 52 U.S.C. § 30119, as applied to individuals such as petitioner and the other plaintiffs, sufficiently tailored to meet the requirements of the Equal Protection component of the Fifth Amendment and the First Amendment to the Constitution?

PARTIES BELOW

In addition to the petitioner Jan Miller, Wendy Wagner and Lawrence Brown were plaintiffs in the courts below. Both Wagner and Brown held federal contracts when the case was filed, but they had completed their contracts before the court of appeals rendered its decision. The respondent Federal Election Commission was the defendant below and is the only other party in the case.

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The en banc opinion of the court of appeals in *Wagner v. Federal Election Commission*, was issued on July 7, 2015 (App.1-75) and is reported at 793 F.3d 1. The decisions of the district court denying plaintiffs' motion for a preliminary injunction and granting defendant's motion for summary judgment are reported at 854 F. Supp.2d 83 (D. D.C. 2012) and 901 F. Supp.2d 101 (D. D.C. 2012). On appeal, a panel of the court of appeals vacated both decisions, finding that the district court lacked jurisdiction. 717 F.3d 1007 (D. C. Cir. 2013). On remand from the order vacating the prior decisions, the district court certified finding of facts and proposed constitutional questions for the en banc court of appeals to decide. That order is not reported, but is set forth at App.76-93.

JURISDICTION

The original complaint in this action based jurisdiction on 2 U.S.C. § 437(h), now 52 U.S.C. § 30110, and 28 U.S.C. § 1331. The panel of the court of appeals that initially heard this case concluded that section 437(h) provided the exclusive basis for subject matter jurisdiction over the constitutional claims in this case. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

52 U.S.C. § 30119, formerly codified at 2 U.S.C. § 441c, is set forth in full in the Appendix to

this petition. App.94-95. The relevant portion is as follows:

> (a) It shall be unlawful for any person--
>
> **(1)** who enters into any contract with the United States or any department or agency thereof . . . if payment for the performance of such contract . . . is to be made in whole or in part from funds appropriated by the Congress, . . . directly or indirectly to make any contribution of money or other things of value . . . to any political party, committee, or candidate for public office or to any person for any political purpose or use; or
>
> **(2)** knowingly to solicit any such contribution from any such person for any such purpose during any such period.
>
> (b) Separate segregated funds
>
> This section does not prohibit or make unlawful the establishment or administration of, or the solicitation of contributions to, any separate segregated fund by any corporation. . . for the purpose of influencing the nomination for election, or election, of any person to Federal office. . .

INTRODUCTION

Petitioner is a retired federal employee who now works part-time as an individual contractor for his former federal agency. It is a crime for him to contribute even $1 to any federal candidate, party, or committee. The same ban applies to any

individual who has a contract with any branch of the federal government.

The bulk of the opinion below was devoted to establishing that Congress was rightly concerned that, if federal contractors were permitted to make political contributions, that might give the appearance of an improper quid pro quo, and they might be coerced into making such contributions. Plaintiffs have never asserted that those interests are not legitimate nor that the asserted concerns are not realistic. Rather, they have argued that the fit between ends and means was constitutionally inadequate under the "closely drawn" standard that the court of appeals applied to this total ban. The lack of fit is most dramatic with respect to the political committees of major corporate contractors, as well as their officers and shareholders, each of whom is free to contribute up to $3.6 million each to federal candidates and parties in every election cycle. *See McCutcheon v. FEC,* 134 S. Ct. 1434, 1473 (2014) (Breyer, J., dissenting). Similar disparities exist with respect to federal employees who often do the same kind of work as federal contractors in the same office, but are free to make whatever contributions they can afford, as can individuals holding federal grants and those who bundle contributions in the hope of being rewarded with a high federal position. Even if the "closely drawn" standard is applicable to this case, these egregious disparities, as applied to petitioner's right to make federal political contributions, are invalid under Equal Protection and the First Amendment.

STATEMENT OF THE CASE

1. The Applicable Law

In 1940, Congress heard evidence that federal contractors were making political contributions to secure federal contracts, in some cases prompted by forceful requests from those in charge of awarding the contract. In response, it enacted the predecessor of 52 U.S.C. § 30119 (section 30119), under which any person who holds, or is negotiating to obtain, a federal contract is barred from making any contribution in connection with a federal election. As applied to corporate contractors, the ban was redundant since corporations had been forbidden since 1906 from making contributions in federal elections by what is now 52 U.S.C. § 30118. The bill also placed a general limit of $5000 on all federal campaign contributions, but there was no accompanying enforcement mechanism. As authority for the ban, a leading supporter of the bill quoted the famous, but no longer valid, observation of Justice Oliver Wendell Holmes that "[t]here is nothing in the Constitution or the statute to prevent the city from attaching obedience to [a] rule as a condition to the office of policeman. . ." 86 Cong. Rec. 2563 (1940) (quoting *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220 (1892)).

With one important exception discussed below, the contribution ban has remained unchanged. In terms of federal contracts, the numbers, dollar amounts, and uses of federal contractors have exploded, App.40**,** and after World War II the entire process was revamped and made

much more regular and generally based on competitive bidding.[1] To be sure, undue influence and outright criminality can never be eliminated entirely from federal contracting, but the record and the laws establish that the federal system is now merit-based. App.90-91, ¶¶23-24 and sources cited. And most significantly for section 30119, decisions on most contracts are made by agency personnel (as they were for plaintiffs), not by elected officials who might receive campaign contributions, or even by agency heads appointed by the President, let alone by political parties and independent committees that are also covered by the ban. *See* 48 C.F.R. § 1.601(a).

The first comprehensive federal campaign finance law was enacted in the early 1970s. Once the main challenges to the law were resolved in *Buckley v. Valeo,* 424 U.S. 1 (1976), its major components included contribution limits applicable to everyone, public reporting of contributions and expenditures, no limits on candidate spending or on independent expenditures by individuals, and an agency – respondent Federal Election Commission – to enforce the law. However, a very significant change was made to section 30119 in 1976, by adding subsection (b), which permits corporate contractors to create "separate segregated funds" (PACs), that are entitled to make contributions like the PACs of non-contractors. Thus, the PACs of large federal

[1] *See, e.g.,* Armed Services Procurement Act, 10 U.S.C. § 2302 *et seq*; Federal Property and Administrative Services Act, Pub. L. 103-355, Title X; Office of Federal Procurement Policy Act of 1974, Pub. L. 93-400.

contractors like Boeing and IBM, which are controlled by officials of the contracting corporation, may make contributions to members of the relevant congressional committees and candidates for President within the limits of the law, as can their shareholders and officers, including those who negotiate and implement federal contracts. *See* 11 C.F.R. § 115.6. This change, which is at the heart of plaintiffs' case, was disregarded by the court of appeals (App.23, "essential features" of law unchanged since 1940 & App.27, ban left in place, "without change") until it first recognized those exceptions in Part V of its opinion. App.62-63.

Other individuals in comparable situations to individual federal contractors regarding their desire to obtain financial and other benefits from the federal government, have never been subject to the ban. For example, since 1939, the Hatch Act has limited the political activities of many federal officers and employees, mainly to assure that their conduct appears to be apolitical. However, Congress has never prohibited them from making contributions, although there are some restrictions that are mainly of the time, place and manner variety or that are designed to assure that contributions are freely made.[2] In addition, although today the federal government spends

[2] *See* 18 U.S.C. 603; 5 C.F.R. § 734.208(b)(4)(ii); 5 C.F.R. § 734.303(d); 5 C.F.R. § 734.302(b)(3) & 5 C.F.R. § 734.306. There are special rules in 5 C.F.R. § 734.401 for employees of seventeen sensitive agencies, such as the FEC, the FBI, and the CIA, but 5 C.F.R. § 734.404(a)(4) specifically allows even those employees to make contributions.

more money on federal grants than on federal contracts (App.85, ¶21), there is no contribution ban that applies to federal grantees. Nor does a ban or any other special rule apply to "bundlers" who raise large sums of money for candidates and in the hope of being suitably rewarded with an Ambassadorship or other high position for their efforts.

The FEC takes the position that section 30119 also forbids contractors from making independent expenditures, even after *Citizens United, v. FEC,* 558 U.S. 310 (2010). *See* FEC News Release October 5, 2011, note 1, http://www.fec.gov/press/press2011/20111006postcarey.shtml. Because none of the plaintiffs wished to make such expenditures, the legality of the FEC's position on that issue was not addressed below.

2. The Plaintiffs

The three plaintiffs who filed this case are all eligible to vote in Presidential elections and are examples of the thousands of individuals who are subject to the contribution ban. They seek to make contributions in connections with federal elections, subject to the same limits as any other individual, including the requirement that all contributions exceeding $200 be publicly disclosed. 11 C.F.R. § 104.8(a).

Lawrence Brown worked for many years at USAID, and when he retired, he returned to the agency as a contractor. In most respects, his work life was unchanged, except that he could no longer

make contributions for federal elections as he had in the past. He wrote to the FEC, asking for a ruling that, since he was essentially still an employee, he should be allowed to continue to make contributions, subject to the same restrictions as everyone else. The FEC rejected his request, and also informed him that he could not use funds obtained from sources other than his contract to make a contribution. *See* 11 C.F.R. § 115.5. Brown's contract has expired, and he is now a temporary USAID employee, free to make contributions—although he may become a contractor again, if that is what the agency wishes.

Petitioner Jan Miller is also a retired USAID employee, who has a current part-time contract through June 2017, under which he performs somewhat different duties than he did when he was an employee. He also works part-time for the Peace Corps, but there he is an employee. If his only federal position were with the Peace Corps, he would not be subject to section 30119. Both Brown and Miller were hired as contractors under the agency's standard contracting procedures, and no elected official or presidential appointee had any role in the decision to hire them or in supervising their work once hired. Other retirees who return in significant numbers as individual contractors include former FBI agents who continue to perform background investigations. App.85, ¶11.

Plaintiff Wendy Wagner is a professor of law at the University of Texas Law School. She specializes in the relation between science and administrative agency decisions. Because of her

expertise, she was approached by the staff of the Administrative Conference of the United States to prepare a report and assist with a recommendation on that subject. For her 144-page report she was paid $12,000, plus expenses, which made her subject to the contribution ban for the two plus years of her project. ACUS uses both outside consultants like Professor Wagner and its own staff to prepare reports. Paul Verkuil, ACUS's chair, was not involved in her hiring, although she did interact with him in carrying out her project. Professor Wagner also held a federal grant for $475,721 while she had her ACUS contract, App.89, ¶21, but that did not preclude her from making federal contributions. Professor Wagner has no current federal contract, but there are thousands of other individuals who are similarly situated and cannot make even a $10 contribution to a federal candidate, party, or committee. These include expert witnesses in court and agency cases; translators and interpreters; academics with special expertise in all areas in which the federal government operates; and the reporters for all the Rules Advisory Committees under the Judicial Conference.

Individual federal contractors can support federal candidates or political parties by volunteering for them or by speaking out on their behalf. *But see McCutcheon* 134 S. Ct. at 1449 (rejecting such as options as not meaningful for most individuals). More significantly, although the main purpose of the ban is to remove the appearance that a contractor obtained a contract by contributing to a candidate or a party, the law

expressly excludes from the definition of a contribution the holding of a fundraiser for a federal candidate or party, at which large contributions (within the limits of the law) can be collected by the host for the candidate or party. 52 U.S.C. § 30101(8)(B)(ii). That provision also allows the host to spend up to $1000 for food, invitations, etc., while section 30119 forbids him or her from writing a check for even $10.

3. Proceedings Below

The complaint was filed in October 2011, with subject matter jurisdiction based on 28 U.S.C. § 1331 and 2 U.S.C. § 437(h), now 52 U.S.C. § 30110. The complaint alleged that section 30119 violated both the Equal Protection component of the Fifth Amendment and the First Amendment as applied to individual contractors. The parties subsequently agreed that the case could be decided as a federal question case by the district court, with review by a panel of the court of appeals. Plaintiffs unsuccessfully sought a preliminary injunction, after which there was limited discovery. The parties cross-moved for summary judgment, largely based on an agreed set of facts, and the district court upheld the statute.

Plaintiffs appealed, but the court of appeals held that 52 U.S.C. § 30110 provided the exclusive method by which a challenge such as this could be brought and dismissed the appeal, remanding the matter to the district court to make the appropriate findings. The case was set for en banc argument in September 2013, but the court postponed

argument pending this Court's decision in *McCutcheon supra.*

After *McCutcheon* was decided, the parties filed supplemental briefs, and the case was re-set for en banc argument. However, in the interim, plaintiffs Wagner and Brown completed their contracts.

On July 7, 2015, the court of appeals unanimously upheld section 30119 in an opinion by Chief Judge Garland. Much of the opinion was devoted to showing that avoiding corruption and its appearance was the principal purpose of the ban and that the anti-corruption concern is still valid. Very little attention was given to the lack of connection between recipients of federal contributions and the contracting process, in which elected officials have no formal involvement, or to the protections now afforded under federal contracting law that were not available in 1940. Nor did the court discuss the relevance of the advent of a major new system of campaign finance regulation in the 1970s to the ban that had been enacted more than 30 years before. The opinion also supported the law by pointing to the need to prevent contractors from being coerced into contributing (App. 16, 42, 44,) even though coercion of political contributions generally, and solicitation of federal contractors specifically, are already prohibited by law. *See infra,* at 24-25. Moreover, this Court's decision in *McCutcheon*, 134 S. Ct. at 1450, which the opinion below cited more than a dozen times, specifically stated that it "has identified only one legitimate governmental

interest for restricting campaign finances: preventing corruption or the appearance of corruption." [3]

Because they were challenging a ban, not a contribution limit, plaintiffs asked the court to apply strict scrutiny, but the court of appeals rejected that request, relying on *FEC v. Beaumont*, 539 U.S. 146 (2003). The *Beaumont* Court applied the closely drawn standard in holding that a non-profit corporation, which had a PAC and could make independent expenditures, could be precluded from making contributions. The court also disagreed with plaintiffs' reliance on the portion of this Court's opinion in *McConnell v. FEC,* 540 U.S. 93, 231-32 (2003), in which it struck down a ban on contributions by individuals under the age of 18, even though, unlike plaintiffs here, those plaintiffs (and the corporation in *Beaumont)* were not eligible to vote.

The court of appeals did note that *Beaumont* stated that "[i]t is not that the difference between a ban and a limit is to be ignored; it is just that the time to consider it is when applying scrutiny at the level selected, not in selecting the standard of review itself." *Id.* at 162. There is, however, no evidence that the court carried out that mandate,

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[3] As justification for the ban, the court also cited "merit-based public administration," which it described as including assuring efficiency in government. App.15. Efficiency seems directed at an individual's job performance, but the ban mainly applies off the job. To the extent that efficiency assures that contracts are not affected by contributions, that interest merges with the corruption justification and will not be discussed further.

nor is it clear how that kind of adjustment would fit within the existing "closely drawn" standard that the court did apply. And when the court did apply that standard, it cited *McCutcheon,* even though this Court had rejected aggregate limits on contributions because of a lack of a close fit, thereby permitting the plaintiff in *McCutcheon* to make over $3 million in annual contributions, while plaintiffs here can make none.

On the question of whether the ban was closely drawn, plaintiffs offered many examples of more closely drawn limits on contributions by federal contractors, some taken from the very SEC rule and state laws that the court of appeals relied on to sustain the ban. These included excluding small dollar contracts, allowing smaller contributions only, limiting bans to contributions to officials with power to enter into contracts, excluding contractors who function like employees, and allowing contributions to independent political committees and/or minor parties and candidates who have no possible connection to the contracting process. All of these exceptions have one feature in common: they leave in place the law as applied to situations for which its rationale is strongest, while at the same time excluding from the ban contributions that cannot reasonably be thought to raise even the specter of corruption.

To the extent that the court below dealt with them, it did so mainly by finding fault with each as an alternative, without examining whether their use could significantly lessen the impact of the ban with little loss of its goals. In particular, the

plaintiffs had pointed to the SEC's nuanced regulation, sustained in *Blount v. SEC,* 61 F.3d 938 (D.C. Cir. 1995), dealing with the same problem as applied to contracts to sell municipal securities, as an example of a much more finely tuned approach (and also one that did not contain the PAC/shareholder loophole). Plaintiffs recognize that the First Amendment's closely drawn standard does not require that a law be perfectly tailored, but the court of appeals found the fit to be sufficient, relying in part on the SEC rule upheld in *Blount*.

Plaintiffs had focused much of their case on the ability of corporate contractors to create the same reality or appearance of corruption that the contractor ban is supposed to avoid, through the use of corporate PACs, which by law must bear the corporation's name. 52 U.S.C. § 30102(e) That loophole is magnified by the right of the corporation's shareholders and officers – including individuals who will be negotiating for the contract and carrying it out – to make contributions that plaintiffs are barred from making. In plaintiffs' view, these exclusions demonstrated that the ban violated their right to Equal Protection and was significantly underinclusive in violation of the First Amendment. As to the PAC exclusion, the court of appeals observed that the PAC and the contractor were legally separate entities, but failed to explain why that formality was dispositive given the close connection between the corporate contractor and its PAC. Moreover, it never sought to justify treating contractors and their PACs as unrelated in light of the asserted purpose of section

30119, which is to avoid even the appearance of undue favoritism to contractors. The court employed a similarly formalistic approach in rejecting plaintiffs' efforts to show why officers and shareholders of corporate contractors are similarly situated to individual contractors. And it also rejected plaintiffs' claims regarding federal grantees, bundlers, and employees, in each case by pointing to factual distinctions that have no apparent connection to the rationale for the ban and by stating that Congress need not address all evils at once, even though Congress has made no changes in section 30119 since it was enacted in 1940, except to create the PAC exclusion.[4]

Overall, although the opinion purported to use the "closely drawn" standard as most recently applied in *McCutcheon*, it reads much more like a decision reviewing an agency rule under the arbitrary and capricious standard of the Administrative Procedure Act or a constitutional review under the rational basis test.

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[4] The court also relied on the pre-*Buckley* decision in *United States Civil Service Comm'n v. Nat'l Ass'n of Letter Carriers,* 413 U.S. 548 (1973), upholding various restrictions on the political activities of federal employees. Because Congress has never banned federal employees from making political contributions, and because the on-the-job rules applicable to employees do not apply to plaintiffs, that decision does not undermine plaintiffs' Equal Protection claim.

REASONS FOR GRANTING THE WRIT

> There is no right more basic in our democracy than the right to participate in electing our political leaders. Citizens can exercise that right in a variety of ways: They can run for office themselves, vote, urge others to vote for a particular candidate, volunteer to work on a campaign, and contribute to a candidate's campaign. This case is about the last of those options. *McCutcheon*, 134 S. Ct. at 1440-41.

From the filing of the complaint, through their briefing to the en banc court of appeals, plaintiffs' principal objection to section 30119 was based on Equal Protection: similarly situated PACs, officers, and shareholders of corporate contractors, as well as federal employees with whom plaintiffs worked, were not subject to the ban on the "no more basic right" to contribute to federal political campaigns, that is applicable to them. The court of appeals, however, re-cast that claim as primarily one of under-inclusion – plaintiffs wanted to curtail more speech (App.57-58) – when the remedy that plaintiffs sought was to increase speech by allowing them to make like contributions within the limits allowed by law.

Instead of focusing on what was Point I of plaintiffs' brief, the court treated their Equal Protection claim as an after-thought to their First

Amendment under-inclusiveness argument. App.71. But simply because other campaign finance cases have not been decided based on discrimination among similarly situated individuals did not justify the court of appeals in devoting most of its opinion to plaintiff's secondary claim and then rejecting it as a re-dressed version of their First Amendment argument.

Although this petition is brought by only one individual, its resolution is of great importance to the thousands of former federal employees now working as federal contractors and the countless other individuals who have service contracts with the federal government who are barred from making any federal campaign contributions. App. 40 & n. 22. No other law forbids citizens who can vote in federal elections from making *any* contributions to support the candidate, party, or political cause of their choice, let alone doing so while allowing others who are similarly situated to contribute. In addition, while the holding below is not inconsistent with the holding in *McCutcheon* because McCutcheon was not a federal contractor, the outcomes – the individual plaintiff there can contribute millions of dollars in federal elections, but these plaintiffs cannot contribute a dollar – are very difficult to reconcile under most basic notions of fairness.

There are three important subsidiary questions within the question presented by the petition that have not been, but should be, decided by this Court.

- When a campaign finance law is alleged to deny Equal Protection, and the primary defense is that other persons not subject to the law are not similarly situated to the challengers, must the question of comparability be determined by focusing on the asserted purpose of the law and the connection between each group and the law?

- When Congress forbids individual citizen-voters from making any contributions in federal elections, should "strict scrutiny" rather than the "closely drawn" standard apply?

- Even if the closely drawn standard applies, what is the proper means of assessing the fit of the ban, where contractor restrictions in other laws are much less sweeping and are limited to contracts that raise concerns that form the core of the reason for the law?

1. Claims of Denial of Equal Protection Must Be Judged in Light of the Purposes of the Law Being Challenged.

Section 30119 was primarily challenged on the ground that it fails to cover others who are similarly situated, in this case, principally the PACs of corporate contractors and the contractor's officers and shareholders. The court of appeals

considered this claim as one of under-inclusion in its First Amendment analysis, not as one of discriminatory treatment in violation of Equal Protection. It then rejected that claim because it concluded that individual contractors are similarly situated only to corporations that have federal contracts. App.62-64. That conclusion requires this Court's review because it may seriously reduce the protections against unequal treatment for similarly situated individuals.

The precise question on which there is disagreement is, on what basis should courts decide whether parties are similarly situated? Plaintiffs argued below that the answer must be determined in this case by examining the asserted rationale for the ban as applied to individual contractors and asking whether that rationale also applies to the other groups that are free to make contributions within otherwise-applicable dollar limits. *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432, 454 (1985) (Stevens, J. concurring) (comparisons must be made in light of "the purpose that the challenged laws purportedly intended to serve"). In this case, the principal rationale is avoiding the reality or appearance of corruption, and that rationale applies not just to corporate contractors (who are doubly barred by the ban on all contributions by any corporation), but also to their PACs and their officers and shareholders. The court of appeals rejected these comparisons on the ground that PACs and corporate officers and shareholders are different legal entities from the corporation that holds a contract. App.63.

No one disputes that a corporation is a separate legal entity from its PAC and its officers and shareholders, but that cannot be a sufficient justification for this discrimination. Just this past Term, in *Reed v. Town of Gilbert,* 135 S. Ct. 2218 (2015), the Town had different rules for the sizes of different public signs and for the time periods they could remain displayed. Those differences were based on the messages that the signs conveyed, and this Court unanimously held that the differences violated the First Amendment. As Justice Thomas put it for the majority, focusing on the justifications of "aesthetic appeal and traffic safety," the "distinctions fall as hopelessly underinclusive." *Id.* at 2231. The Court treated the law in *Reed* as one that made content-based distinctions, because the Town preferred some categories of messages over others, a claim that plaintiffs do not make. However, the key point from *Reed* for this case, which the court below did not appreciate, is that any distinctions in treatment can be justified only based on the rationale for the rule being challenged, not on other unrelated facts. The content-based nature of the distinction may affect how closely the differences in treatment must be scrutinized, but the comparison must be based on what the challenged law seeks to achieve and how each of the groups fits into that goal.

Because the court below failed to understand how to analyze the question of whether different groups are similarly situated for Equal Protection purposes, this Court should grant review to address the issue. It is directly raised in this case because the PACs, officers and shareholders of

corporate contractors may make contributions that individual contractors may not. Indeed, the result upheld below turns upside down this Court's refusal in *Citizens United* to treat a corporate PAC as the equivalent of the corporation – there as a reason to *deny* the corporation the ability to make independent expenditures (558 U.S. at 337) – whereas here plaintiffs sought only to have the court of appeals recognize that a corporate contractor's PAC is similarly situated to individual contractors in determining whether they must be given equal rights to make campaign contributions.

The corporate PAC comparison with individual contractors is most clear because the distinction on the right to make political contributions is found in the same section that imposes the contribution ban on plaintiffs. But the officer/shareholder comparison is not far behind because it rests on the FEC's interpretation of that statute. 11 C.F.R. §115.6. Other appropriate comparisons, also rejected by the court of appeals, do not involve persons who are involved in federal contracting, but they still raise the same issue of whether excluding them is consistent with the appearance of corruption justification for the ban applicable to plaintiffs. These include individuals who receive federal grants and stand to reap at least as much financial benefit from making federal contributions as do contractors, but the ban does not cover them. The same federal law that treats contracts and grants alike also includes the recipients of federal guarantees, loans, and loan guarantees, 2 C.F.R. § 180.970, all of whom are as

likely as contractors to benefit from making contributions in federal elections.

Then there are the bundlers who have the most to gain personally from collecting large amounts of money for Presidential candidates, often with the specific goal (stated or not) of being rewarded with a high federal position. Indeed, the FEC contends that plaintiffs could lawfully become bundlers and raise tens of thousands – even millions – of dollars for candidates or political parties by hosting fundraising events because such activities, which would also allow the plaintiffs to spend up to $1000 on food and invitations, etc., are excluded by the statute from the definition of a contribution. 52 U.S.C. § 30101(8)(B)(ii). As in *Reed*, and judged by its asserted justifications, the law is "hopelessly underinclusive" in criminalizing plaintiffs for writing a check for $10, while allowing them to host a fundraiser where they can deliver checks worth $10,000 or more.

Then there are individuals like plaintiffs Miller and Brown who were formerly employees of the agency with which they have a federal contract. As employees, they were allowed to make contributions, but even if virtually every other aspect of their jobs is unchanged, they can no longer do so. The court of appeals rejected this comparison because there are different personnel rules applicable to employees and contractors, with employees having some restrictions and benefits not applicable to individual contractors and because contracts have finite terms whereas federal employees have more-or-less permanent

jobs. App.67-68. Under the court's theory, plaintiffs might make a contribution to obtain a renewal of their employment contract, whereas federal employees would have no need to do that. To be sure, federal employees do not generally have to worry about contract renewals, but they may, on the same rationale, decide to contribute in order to curry favor for other reasons, such as to obtain promotions, pay increases, or better job opportunities.

There is one other aspect of the employee vs contractor comparison that makes the differing treatment for campaign contributions indefensible. There are no rules that instruct agencies when a job will be handled by an employee or a contractor. Plaintiff Brown was an employee until he retired, then became a contractor, is now an employee, and may become a contractor again – if that is what USAID wants. Petitioner Miller is now a part-time contractor with USAID and a part-time employee with the Peace Corps, with no apparent reason for the difference that might bear on campaign contributions. At ACUS, where plaintiff Wagner was a contractor, the choice between contractors and staff employees is based on factors such as budget and expertise, which have nothing to do with the rationale for section 30119. Again, the court below rejected the comparison, without asking whether allowing employees to make contributions, while banning individuals like Miller and Brown from doing so, can be justified under Equal Protection or the closely drawn First Amendment standard. That comparative justification is particularly important given the

remote connection between a contribution to, for example, a presidential candidate and an increase in the chances of renewing a contract or gaining a promotion at ACUS or USAID. The court's rejection of the comparison confirms that the court did not understand on what basis courts should decide whether a given comparison is relevant, which is by looking to the rationale for the law being challenged and not by focusing on unrelated factual distinctions.

The court of appeals also defended section 30119 on an anti-coercion rationale. App.16. Ironically, that rationale is equally applicable to all PACs, officers and shareholders of corporate contractors who are not banned from making contributions. In many of the examples of potential or actual corruption cited by the FEC and the court below, the contributor was not the contractor but an officer or shareholder. App.30-31. It makes no sense to assert that individual contractors like plaintiff Wagner, who have full time jobs, are subject to coercion to make a federal contribution, but the head of procurement or the largest shareholder of a major defense contractor is immune. The same potential for coercion applies to potential grantees and bundlers, as well as others seeking federal benefits, often in amounts far larger than individual contractors' contracts, yet section 30119 does not apply to them.

Moreover, even if this Court in *McCutcheon* had not repeated its frequent admonition – that there is "only one legitimate governmental interest for restricting campaign finances: preventing

corruption or the appearance of corruption," 134 S. Ct. at 1450 – the proper response to coercion is to prohibit federal officials from soliciting money from persons in potentially vulnerable positions. That is exactly what the prohibitions currently in 18 U.S.C. §§ 601, 603, 606 & 610 already do. Those rules, which date back more than 130 years to the law upheld in *Ex Parte Curtis*, 106 U.S. 371 (1882), recognize that when First Amendment rights are at stake, the proper remedy is to ban the coercive conduct and not to silence the speaker. In addition, 52 U.S.C. § 30119(a)(2) already prohibits any person from soliciting federal contractors (but not their PACs, officers, and shareholders), which is a broader restriction than a prohibition on coercion. Finally, no theory of coercion can support the ban as applied to contributions to independent political committees that have no power to reward or punish any would-be contributor.

2. Strict Scrutiny Should Apply to the Ban Imposed by Section 30119.

The court of appeals applied this Court's ruling in *Beaumont* that the closely drawn standard, not strict scrutiny, applied to bans on contributions as well as contribution limits. *Beaumont* involved a corporation which had its own PAC that could make contributions and that had officers and employees who could contribute, neither of which apply to individual contractors such as plaintiffs. The closer decision to this is the ruling in *McConnell v. FEC, supra,* 540 U.S. at 231-32, striking down, under the closely drawn standard, the ban on individuals under 18 from

making any contributions, where the ban was found to be vastly over-inclusive. Although the plaintiffs in neither *McConnell* nor *Beaumont* could vote, the fact that plaintiffs (and most individual contractors) can vote makes section 30119 a greater affront to the democratic process.

This Court in *McCutcheon* expressed a particular concern over a law that was technically a limitation, not a ban. That law allowed all individuals to contribute $123,200 in an election cycle, but after plaintiff had "maxed out" by giving to 47 candidates, he could give nothing to other candidates he wished to support. The Court treated that limitation as "an outright ban on further contributions to any other candidate" (*id.* at 1448), not simply a contribution limit, and for that reason, among others, it applied greater scrutiny and struck down the aggregate limit.

Related to this aspect of the question presented is the application of this Court's statement in *Beaumont* that, although a ban did not change the standard of review, it must be taken into account at the merits, or balancing, stage. 539 U.S. at 162. This Court has never explained how that is supposed to work: does that make the standard "closely drawn plus," or is it a thumb on the scale that may alter the balance in some undetermined way? The court of appeals did not appear to factor it in at all, and it may be that, upon further consideration, the Court will conclude that there is no appropriate way to apply that part of the *Beaumont* opinion. Unlike contribution limits, which *Buckley* teaches are permissible because

they still allow speech through contributions, a ban forecloses such speech, which makes the *Beaumont* admonition confusing or difficult to apply. It also supports the conclusion that the better approach is to apply strict scrutiny to bans on contributions applicable to individual citizen-voters.

There are two other related issues that suggest the advisability of this Court considering the appropriate First Amendment standard of review for contribution bans. First, in *Citizens United*, 558 U.S. at 359, the Court expressly declined to consider whether the ban on corporate contributions must be considered under the strict scrutiny standard that the Court applied to corporate independent expenditures. That precise question, which the Court has declined to hear since *Citizens United*,[5] is an important one, although it need not be definitively answered in this case because plaintiffs are entitled to vote and corporations are not. But the fact that the Court expressly left the question open in *Citizens United* signals that the status of bans generally needs further consideration by this Court.

Second, several members of this Court have advocated the elimination of the distinction created in *Buckley* between contributions and expenditures, so that strict scrutiny would apply to restrictions on both. *See McCutcheon v. FEC, supra,* at 1462 *et seq* and cases cited therein (Thomas, J., concurring in judgment); *id.* at 1445-46, declining to revisit distinction. Again, the

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[5] *See United States v. Danielczyk,* 682 F.3d 611 (4th Cir. 2012), *cert denied,* 131 S. Ct. 1459 (2013).

Court need not resolve that question in this case to conclude that at least total contribution bans on individual voters must be treated like expenditure limits and subjected to strict scrutiny.

Throughout the case, plaintiffs have asserted Equal Protection and First Amendment claims, but the court below rejected plaintiffs' argument that strict scrutiny applied to their Equal Protection claim on the ground that it had already rejected that argument as applied to their First Amendment claim. App.70-71. However, when this Court has been asked to declare a campaign finance law unconstitutional on both First Amendment and Equal Protection grounds, it has dealt with each on its merits. Thus, in *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652, 666 (1990), the Court rejected the First Amendment defense later accepted in *Citizens United,* and then went on to reject related Equal Protection claims.

The case for applying strict scrutiny to plaintiffs' Equal Protection claim is particularly strong because, under *Buckley*, the right to make contributions is a fundamental right protected by the First Amendment. Thus, pursuant to *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973), strict scrutiny is required when a law "impinges upon a fundamental right explicitly or implicitly protected by the Constitution." *See also Kramer v. Union Free School District,* 395 U.S. 621, 626 (1969), where this Court gave a ban on voting for the school board for those who did not meet the statutory requirements "a close and

exacting examination" because the law allegedly created an "unjustified discrimination in determining who may participate in political affairs," precisely what section 30119 does to plaintiffs. Accordingly, the proper standard of scrutiny for Equal Protection claims involving bans on campaign contributions is another basis for review by this Court.

3. The Closely Drawn Standard Requires Careful Examination of Less Sweeping Alternatives.

If the closely drawn standard is appropriate, the question is, how should it be applied in cases such as this, in which there is a claim that the ban is substantially overbroad and that there are many ways in which it could be narrowed while protecting its core goal? The answer is found in *McCutcheon,* to which the court of appeals paid lip service, but disregarded its basic message that "[i]n the First Amendment context, fit matters." 134 S. Ct. at 1456. The aggregate limit statute there was overturned because it was "poorly tailored to the Government's interest in preventing circumvention of the base limits [and] impermissibly restricts participation in the political process." *Id.* at 1457. As the Second Circuit observed in striking down a ban on contributions by lobbyists, "if a contribution limit would suffice where a ban has been enacted, the ban is not closely drawn to the state's interests." *Green Party of Connecticut v. Garfield,* 616 F.3d, 189, 206, n. 14 (2010).

The principal basis for the ban in section 30119 is that it avoids the appearance that those with federal contracts have obtained them by making contributions in connection with federal elections. Two related points about the connection between contributions in federal elections and federal contracting are significant. The only elections for federal officials are for President, Vice-President, and Members of Congress, and none of those officials has any formal role in federal contracting today. Under current federal contracting law, there is an elaborate system, designed to protect against improper influence and to assure that the government receives high quality goods and services at fair prices, with specific contracting decisions made at the agency level. *See infra* at 4-5. Thus, unlike many state and local contracting systems, federal elected officials have no direct decision-making role in the award of even major contracts, let alone modest contracts of the kind that the plaintiffs and many other individual contractors have.

Plaintiffs cited a number of examples of other laws relating to contributions by contractors with narrower bans that still fully achieved their goals, precisely the process that this Court utilized in rejecting the aggregate limits in *McCutcheon*. 134 S. Ct. at 1458-59. However, the court below took them on one by one, found each to be insufficient to do the whole job, and then rejected the over-inclusiveness claim. App.51-53. But even under the closely drawn standard, when a limit rather than an absolute ban was at issue, this Court has found the fit to be wanting. *See Randall*

v. Sorrell, 548 U.S. 230 (2006). If some contribution limits, which inevitably involve line drawing, can be found to be not closely drawn, then an absolute ban on contributions should rarely, if ever, satisfy that test.

In their en banc brief, plaintiffs cited the regulation upheld in *Blount v. SEC* as an example of a carefully drawn set of rules dealing with contributions to elected state and local officials by those interested in selling the government's bonds. Among its features were (a) only contributions for the election of a person with actual responsibility for selecting the bond-seller were covered, not contributions to the official's political party; (b) contributions up to $250 were allowed to candidates for whom the individual could vote; (c) the rule applied prospectively so that the donor was not forbidden from making contributions, but was barred from obtaining future business from the recipient's agency for two years after the contribution was made; and (d) contracts subject to open competitive bidding were excluded. 61 F.3d at 940 & n.1, 944. Unlike Congress, which has left the ban applicable to plaintiffs untouched since 1940, the SEC took into account current laws and practices regarding pay-to-play at the state and local levels and carefully examined when its rule needed to apply and where there was room for a restriction less absolute than a ban. Although plaintiffs had relied on *Blount* as an example of a much more carefully drawn law, the court of appeals saw it simply as proof that there was a need for limits on the political contributions of government contractors. Plaintiffs never denied

that general proposition, but contended that the fit in section 30119 was not even reasonably close, unlike that in *Blount*.

Perhaps the clearest example of the over-inclusiveness of section 30119 is that it applies to contributions to independent political committees, which by definition are unconnected to any candidate or party. These include such entities as EMILY's List, the NRA Political Victory Fund, the Sierra Club Political Committee, the Planned Parenthood Action Fund, and the various Right to Life Committees. None of them has any role or influence over the award of federal contracts, yet plaintiffs are barred from contributing to any of them, as well as any other independent committee.[6]

Other examples were cited, but found insufficient. North Carolina banned lobbyist contributions to candidates for the legislature, but allowed contributions and recommendations to political committees, *Preston v. Leake*, 660 F.3d 726, 729-31, 740 (4th Cir. 2011), whereas section 30119 bans all PAC contributions as well. New York City's rules did not apply to small contracts, allowed modest contributions, and if they were

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[6] To the extent that the ban might be defended on the ground that Congress was concerned that money from government contracts could be seen as being used for political purposes, the FEC's letter to plaintiff Brown told him that he could not even use money from other sources to make a contribution. *See also Agency for Intern. Development v. Alliance for Open Society Intern., Inc.,* 133 S. Ct. 2321 (2013), setting aside a law that limited the use of non-government funds by a federal grantee.

exceeded, penalized the candidate rather than the donor. *Ognibene v. Parkes,* 671 F.3d 174, 179-80 (2d Cir. 2012). Those rules also do not appear to apply to former employees like Brown and Miller who became contractors. Connecticut has similar exceptions and also applied its ban only to candidates for the branch of government that approved the contract, *Green Party, supra,* 616 F.3d at 194, in contrast to the federal ban that applies regardless of whether the recipient of the contribution has any connection to the donor's contract.

Plaintiffs also cited various aspects of federal contracting regulations that suggested other ways of reducing the adverse impact of the ban, but the court found them all wanting. For example, most federal contracts are subject to competitive bidding, both to protect the federal fisc and to make the process transparent and fair. Where those rationales do not apply, or where they apply with less force, Congress and the agencies have created exceptions, such as for small contracts, with certain protections included. App.90-91, ¶24. Including such exceptions in section 30119 would help satisfy the closely drawn standard, but the court was unpersuaded that any of them was necessary.

Plaintiffs also noted that in many cases, like plaintiff Wagner's, the agency approached her with a proposed contract that she would perform, rather than her seeking out the work. No person with even the most minimal knowledge of those facts would think that any contribution she made while

carrying out the contract was either a thank you or a down payment on a future contract. Similarly, an exception is surely warranted for former employees who retire and then are asked to become contractors – like plaintiffs Miller and Brown and the FBI agents who do background checks – because their agencies knew the quality of their work and their knowledge of the agency, and not because of any contributions that they had made or might make in the future. A closely drawn statute would have included some if not most of these exceptions, but the court below sustained section 30119 even though it imposes a total prohibition on all contributions by individual contractors in federal elections.

A recent example of the Court approving a speech restriction after finding that there was a proper fit between the goal of the law and the means to achieve it is *Williams-Yulee v. The Florida Bar,* 135 S. Ct. 1656 (2015). There a candidate for judicial office was censured for personally sending a mass mailing seeking funds for her election race. This Court, applying strict scrutiny, rejected her First Amendment defense and upheld the prohibition against judicial candidates personally soliciting contributions. Although her chosen method of soliciting funds was precluded, she had a campaign committee that could lawfully raise money for her campaign, and no one suggested that it could not do the job for her. The court below cited *Williams-Yulee* more than a dozen times without recognizing that the ruling had no practical impact on the ability of future judicial candidates to raise money through their

official committees. By contrast, under section 30119 individual contractors will not be able to make contributions for candidates, political parties, or political committees by any means, not just by a means that is at most marginally inferior.[7]

The cause of the lack of fit between the stated goal of section 30119 and the expansive manner in which it operates is that Congress never focused, in 1940 or at any time thereafter, on why a total ban was necessary. Similarly, the court below focused on the appearance of corruption for contractor contributions, but never asked why the limits applicable to every other individual (or some lower limit) did not suffice. Instead, it approached the case as if the plaintiffs had the burden of establishing their right to make contributions, instead of the other way around. Having picked off each of the alternatives found in other similar laws, one at a time, the court of appeals never asked whether section 30119 was far more expansive than needed to achieve its stated objectives, let

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[7] The court also cited the ethical rule against federal judges making political contributions as support for section 30119. App.46. The provision, which is part of a broader set of rules applicable to judges' political activities, http://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges#f, is intended to assure the judge's continued neutrality, with the contribution ban as only one part. Moreover, Canon 5(A)(3) of the Code of Conduct expressly precludes judges from holding fundraising events, whereas the FEC defends the ban in section 30119 by arguing that plaintiffs are nonetheless permitted to holding fundraisers and solicit contribution from others, thereby confirming the substantial differences between the two sets of rules.

alone did it follow this Court's conclusion concluded in *McCutcheon* that the Government is required to use other available alternatives, even if their efficacy and validity are uncertain. 134 S. Ct. at 1458-59. For example, allowing individual contractors like plaintiffs to make contributions to a national party or candidate for President in a modest amount – such as $200, which never has to be publicly disclosed – would surely not create an appearance of corruption in the mind of any reasonable person, while at the same time eliminating the sting of an absolute ban.

The blanket prohibition in section 30119 is like the ban on contributions by those younger than 18 that was struck down in *McConnell v. FEC*, *supra*. The problem that Congress sought to remedy there was that parents were giving their minor children money to "make their own" contributions, when the parents had maxed out. Like section 30119, that law was inartfully drawn, and it covered contributions beyond the law-avoiding examples that prompted its enactment. So here, the goal of preventing would-be contractors from using campaign contributions to influence those who award those contracts is a proper one, but sweeps far too broadly by banning small contributions and those given to persons with no connection to the contracting process.

The cause here, of what this Court referred to in *McCutcheon* as a "substantial mismatch" (134 S. Ct. at 1446), is that Congress has never reviewed the scope of the ban since its enactment, despite massive changes in the laws governing both

campaign contributions and government contracting. *See Shelby County, Ala. v. Holder*, 133 S. Ct. 2612, 2625-28 (2013) (striking down portion of Voting Rights Act because of significant changes in minority voter registration, turnout, and elected officials since its enactment); *McCutcheon*, 134 S. Ct. at 1446, justifying re-visiting the ban on aggregate limits upheld in 1976 because "BCRA is a different statutory regime, and the aggregate limits it imposes operate against a distinct legal backdrop"; *id.* at 1447 focusing on regulations "currently in place." Accordingly, this Court should grant review so that the lower courts can be re-informed on how to conduct the over-inclusiveness inquiry when the law at issue extends far beyond the areas needed to achieve its stated goals. In contrast to the decision below, such an inquiry would support, rather than undermine, First Amendment rights.

* * *

Because section 30119 imposes a ban on the ability of eligible voters to make any contributions in federal elections, strict scrutiny should apply to this ban. Moreover, even examined under the "closely drawn" standard applicable to First Amendment challenges to limitations imposed by campaign finance laws, section 30119 cannot stand. The failure of the court of appeals to follow the teachings of this Court with respect to the three subsidiary questions outlined above was compounded by its failure to ask the overall question of why a total ban was needed and why a similar ban was not applied to others in similar

situations. Section 30119 extends to many contributions and contributors that no reasonable person could think would affect the awarding of federal contracts, while at the same time allowing the political committees of major corporate contractors, along with their officers and shareholders, as well as federal grantees and campaign bundlers, to make (or bundle) contributions that in the aggregate could exceed $3 million per contributor per election. Because the court below did not appreciate these important aspects of the operation of these laws, this Court should grant review and apply the proper standards under the Equal Protection and First Amendment to section 50119.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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October 2, 2015

App. 1

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued En Banc September 30, 2014
Decided July 7, 2015

No. 13-5162

WENDY E. WAGNER, ET AL.,
PLAINTIFFS

v.

FEDERAL ELECTION COMMISSION,
DEFENDANT

On Certification of Constitutional Questions
from the United States District Court
for the District of Columbia
(No. 1:11-cv-01841)

Alan B. Morrison argued the cause for plaintiffs. With him on the briefs was *Arthur B. Spitzer*.

Ilya Shapiro and *Allen J. Dickerson* were on the brief for *amici curiae* Center for Competitive Politics, et al. in support of plaintiffs.

Kevin Deeley, Acting Associate General Counsel, Federal Election Commission, argued the cause for defendant. With him on the briefs were *Harry J. Summers*, Assistant General Counsel, and *Holly J. Baker* and *Seth E. Nesin*, Attorneys.

J. Gerald Hebert, *Scott L. Nelson*, *Fred Wertheimer*, and *Donald J. Simon* were on the brief for *amici curiae* Campaign Legal Center, et al. in support of defendant.

Before: GARLAND, *Chief Judge*, and HENDERSON, ROGERS, TATEL, BROWN, GRIFFITH, KAVANAUGH, SRINIVASAN, MILLETT, PILLARD, and WILKINS, *Circuit Judges*.

Opinion for the Court filed by *Chief Judge* GARLAND.

GARLAND, *Chief Judge*: Seventy-five years ago, Congress barred individuals and firms from making federal campaign contributions while they negotiate or perform federal contracts. The plaintiffs, who are individual government contractors, contend that this statute violates their First Amendment and equal protection rights. Because the concerns that spurred the original bar remain as important today as when the statute was enacted, and because the statute is closely drawn to avoid unnecessary abridgment of associational freedoms, we reject the plaintiffs' challenge.

I

The statute at issue, 52 U.S.C. § 30119(a)(1), makes it unlawful for any person "who enters into any contract with the United States . . . directly or indirectly to make any contribution . . . to any political party, committee, or candidate for public office or to any person for any political purpose." This

prohibition applies "between the commencement of negotiations . . . and . . . the completion of performance" of the contract. *Id.* The Federal Election Commission (FEC) has construed the section not to apply "in connection with State or local elections." 11 C.F.R. § 115.2(a).

The plaintiffs are three individuals who hold or have held federal contracts. The first two, Lawrence Brown and Jan Miller, spent much of their careers as full-time employees of the U.S. Agency for International Development (USAID). Each went back to work at USAID under a personal services contract after retirement. The third plaintiff, Wendy Wagner, is a law professor. In 2011, the Administrative Conference of the United States (ACUS) hired Wagner under a consulting contract to prepare a report about science and regulation.

All three plaintiffs wanted to make campaign contributions during the 2012 federal elections, but each was barred from doing so by § 30119. On October 19, 2011, they filed suit against the FEC in the United States District Court for the District of Columbia, challenging the statute's constitutionality. The plaintiffs contend that § 30119 violates their rights under both the First Amendment and the equal protection component of the Fifth Amendment's Due Process Clause.

The plaintiffs have been careful to frame their challenge narrowly. First, they challenge the constitutionality of § 30119 "only as it applies to plaintiffs

and other individual contractors," not as it applies to contractors that are corporations or other kinds of entities. Pls. Br. 1. Second, they do not challenge the statute as the FEC might seek to apply it to a contractor's independent expenditures on electoral advocacy, as opposed to his or her contributions to candidates, parties, or political action committees (PACs). *Id.* at 40 n.5 (stating that the "[p]laintiffs have no interest in making independent expenditures"); Oral Arg. Recording 26:59-27:06 (same). Nor do they challenge the law as the Commission might seek to apply it to donations to PACs that themselves make only independent expenditures, commonly known as "Super PACs." Oral Arg. Recording 25:59-26:33 ("Super PACs . . . . are not at issue here; none of my clients wants to make a contribution to them or anything like them."); *id.* 26:59-27:06 (same). In short, the plaintiffs challenge § 30119 only insofar as it bans campaign contributions *by* individual contractors *to* candidates, parties, or traditional PACs that make contributions to candidates and parties.

After considering the merits of this challenge, the district court granted summary judgment in favor of the FEC. *Wagner v. FEC*, 901 F. Supp. 2d 101, 113 (D.D.C. 2012). On appeal, a panel of this court held, sua sponte, that the district court lacked jurisdiction to reach the merits of the constitutional claims because the special judicial review provision of the Federal Election Campaign Act (FECA) "grants exclusive merits jurisdiction to the *en banc* court of appeals." *Wagner v. FEC*, 717 F.3d 1007, 1011 (D.C.

Cir. 2013) (citing 2 U.S.C. § 437h, now codified at 52 U.S.C. § 30110). The panel therefore remanded the case to the district court to make appropriate findings of fact, and then to certify those facts and the relevant constitutional questions to this court sitting en banc. *Id.* at 1017.

The case has now returned to us. But time does not stand still, and some important facts have shifted in the years since this litigation began. The plaintiffs advise us that both Wagner and Brown have now completed their federal contracts and hence are once again free to make campaign contributions. *See* Brown Supp. Mootness Decl. ¶ 3; Second Wagner Supp. Decl. ¶ 2. Brown, at least, has already done so. *See* Brown Supp. Mootness Decl. ¶ 3. Accordingly, Wagner's and Brown's claims are moot. *See, e.g.*, *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67-72 (1997) (holding that the plaintiff's departure from her position as a state employee mooted her First Amendment challenge to a law regulating the speech of state employees).[1]

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[1] Although Wagner's ACUS contract is her first, she says that she "expect[s]" to "be offered other similar opportunities in the future" because her area of expertise "is a very important topic for federal regulatory agencies." Wagner Decl. ¶ 4. Brown also plans to seek future work with the federal government, "either as an employee or as a contractor," and therefore "may or may not be subject to" § 30119 at some future point. Brown Supp. Mootness Decl. ¶ 4. These possibilities are too speculative to sustain a concrete interest in this litigation. *See Munsell v. Dep't of Agric.*, 509 F.3d 572, 582-83 (D.C. Cir. 2007) (holding

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Miller's contract is ongoing, however, and his constitutional claims therefore remain alive. But the mootness of the other plaintiffs' claims matters because Miller's injury is notably narrower than theirs. Whereas Wagner and Brown alleged that they wanted to support a variety of political "causes," and that they had given to "PACs" or "political committees" in the past, Miller tells us only that he wants to contribute to "candidates running for federal offices and/or their political parties." *Compare* Wagner Decl. ¶ 6, *and* Brown Decl. ¶¶ 6, 8, *with* Miller Decl. ¶ 7. Miller thus has standing to challenge the statute only as it applies to contributions to candidates and parties. *See Davis v. FEC*, 554 U.S. 724, 734 (2008) ("[S]tanding is not dispensed in gross. Rather, a plaintiff must demonstrate standing for each claim he seeks to press. . . ." (citation and internal quotation marks omitted)).

Our limited jurisdiction therefore narrows the plaintiffs' already-narrow challenge even further: the only issue properly before us is the application of § 30119 to contributions by an individual contractor to a federal candidate or political party. In Parts II

"that a live controversy is not maintained by speculation that claimant *might* reenter a business that it has left" (citing *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 283-84 (2001))). Neither Brown nor Wagner has argued that his or her injury, though capable of repetition, will evade review unless we make an exception to the ordinary rule of mootness. *Cf. Spencer v. Kemna*, 523 U.S. 1, 17 (1998) (explaining the situations in which that exception applies).

through V, we address the plaintiffs' First Amendment arguments. In Part VI, we consider their equal protection arguments.[2]

II

Since *Buckley v. Valeo*, the Supreme Court has instructed us to review different kinds of campaign finance regulations with different degrees of scrutiny. 424 U.S. 1, 19-25, 44-45 (1976); *see McCutcheon v. FEC*, 134 S. Ct. 1434, 1444 (2014) (plurality opinion); *McConnell v. FEC*, 540 U.S. 93, 134-38 (2003), *overruled in part on other grounds by Citizens United v. FEC*, 558 U.S. 310 (2010). Laws that limit a person's independent expenditures on electoral advocacy are subject to strict scrutiny. *McCutcheon*, 134 S. Ct. at 1444 (citing *Buckley*, 424 U.S. at 44-45). Under that standard, "the Government may regulate protected speech only if such regulation promotes a compelling interest and is the least restrictive means to further the articulated interest." *Id.*; *see, e.g.*, *Citizens United*, 558 U.S. at 339-41.

Laws that regulate campaign contributions, however, are subject to "a lesser but still 'rigorous standard of review,'" *McCutcheon*, 134 S. Ct. at 1444

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[2] We continue to describe the arguments as those of the "plaintiffs," notwithstanding that only a single plaintiff's arguments remain alive, because the plaintiffs presented their arguments collectively in a single set of briefs and oral arguments.

(quoting *Buckley*, 424 U.S. at 29), because "contributions lie closer to the edges than to the core of political expression," *FEC v. Beaumont*, 539 U.S. 146, 161 (2003). "Under that standard, '[e]ven a significant interference with protected rights of political association may be sustained if the State demonstrates a sufficiently important interest and employs means *closely drawn* to avoid unnecessary abridgment of associational freedoms.'" *McCutcheon*, 134 S. Ct. at 1444 (emphasis added) (quoting *Buckley*, 424 U.S. at 25); *see Beaumont*, 539 U.S. at 161-62; *SpeechNow.org v. FEC*, 599 F.3d 686, 692 (D.C. Cir. 2010) (en banc).

The Supreme Court has repeatedly applied this "closely drawn" standard to challenges to campaign contribution restrictions.[3] And it has repeatedly (and recently) declined invitations "to revisit *Buckley*'s distinction between contributions and expenditures and the corollary distinction in the applicable standards of review," *McCutcheon*, 134 S. Ct. at 1445.[4]

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[3] *See, e.g.*, *McCutcheon*, 134 S. Ct. at 1446-62 (aggregate contribution limits); *Randall v. Sorrell*, 548 U.S. 230, 246-63 (2006) (plurality opinion) (state contribution limits); *McConnell*, 540 U.S. at 231-32 (2003) (ban on contributions by minors); *Beaumont*, 539 U.S. at 161-63 (2003) (ban on corporate contributions); *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 456-65 (2001) (limits on party expenditures that are coordinated with candidates); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 386-95 (2000) (state contribution limits); *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 196-99 (1981) (plurality opinion) (limits on contributions to multicandidate committees).

[4] *See, e.g.*, *Shrink Mo. Gov't PAC*, 528 U.S. at 406-10 (Kennedy, J., dissenting); *Colo. Republican Fed. Campaign Comm. v. FEC*,

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So, too, have we. *See, e.g.*, *SpeechNow.org*, 599 F.3d at 696.

The plaintiffs argue that we should nonetheless apply strict scrutiny here because § 30119 does not merely limit contributions, but bans them entirely. As the plaintiffs recognize, however, the Supreme Court expressly rejected this argument in *FEC v. Beaumont*, concluding that both limits and bans on contributions are subject to the same "closely drawn" standard. 539 U.S. at 161-63. "This argument," the Court said, "overlooks the basic premise we have followed in setting First Amendment standards for reviewing political financial restrictions: the level of scrutiny is based on the importance of the 'political activity at issue' to effective speech or political association." *Id.* at 161 (quoting *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 259 (1986)). "It is not that the difference between a ban and a limit is to be ignored; it is just that the time to consider it is when applying scrutiny at the level selected, not in selecting the standard of review itself." *Id.* at 162. Indeed, although the plaintiffs insist that "[t]he closest case" to this one is *McConnell v. FEC*, which struck down a ban on contributions by persons under the age of

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518 U.S. 604, 635-640 (1996) (Thomas, J., concurring in the judgment and dissenting in part); *see also SpeechNow.org*, 599 F.3d at 696 (noting that the "*Citizens United* Court avoided 'reconsider[ing] whether contribution limits should be subjected to rigorous First Amendment scrutiny'" (quoting *Citizens United*, 558 U.S. at 359)).

eighteen, Pls. Br. 39, *McConnell* itself applied the "closely drawn" test, citing *Beaumont. See McConnell*, 540 U.S. at 231-32.

The plaintiffs further maintain that *Citizens United v. FEC* "casts doubt" on *Beaumont.* Pls. Br. 40. We do not see the basis for that claim. The plaintiffs correctly note that *Citizens United* "applied strict scrutiny to the ban on for-profit corporate independent expenditures." *Id.* But the reason for applying strict scrutiny was not that the case involved a ban, but that it involved independent expenditures rather than contributions. *See* 558 U.S. at 359. Accordingly, the "closely drawn" standard remains the appropriate one for review of a ban on campaign contributions. *See Republican Nat'l Comm. v. FEC*, 698 F. Supp. 2d 150, 156 (D.D.C.), *summ. aff'd*, 561 U.S. 1040 (2010); *Yamada v. Snipes*, No. 12-17845, 2015 WL 2384944, at *19 & n.17 (9th Cir. May 20, 2015); *Preston v. Leake*, 660 F.3d 726, 734-35 (4th Cir. 2011); *Green Party of Conn. v. Garfield*, 616 F.3d 189, 199 (2d Cir. 2010).

There is one respect, however, in which the "closely drawn" standard may not be a perfect fit for this case. But that consideration would cut in favor of a more, rather than less, deferential standard of review. Section 30119 is a restriction on First Amendment activity aimed only at those who choose to work for the federal government. To be sure, citizens do not check their First Amendment rights at

the agency door.[5] Nonetheless, the Court has "consistently given greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large." *Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 676 (1996) (internal quotation marks omitted); *see, e.g.*, *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 566-67 (1973); *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 99 (1947). In so doing, the Court has held that the government may "maintain a statutory restriction on employee speech" if it is "able to satisfy a balancing test of the *Pickering* form." *United States v. Nat'l Treasury Emps. Union (NTEU)*, 513 U.S. 454, 467 (1995) (referring to *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968)).[6]

Although the plaintiffs are contractors rather than employees, they acknowledge that their positions are often indistinguishable from those of employees.

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[5] *See Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996) (noting that the Court's "precedents have long since rejected Justice Holmes' famous dictum, that a policeman 'may have a constitutional right to talk politics, but he has no constitutional right to be a policeman' " (quoting *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892))).

[6] Under the *Pickering* test, a court must " 'arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.' " *NTEU*, 513 U.S. at 465-66 (quoting *Pickering*, 391 U.S. at 568).

Pls. Br. 17, 19; *see* Miller Decl. ¶¶ 6-7 (stating that "the nature of the work performed by an individual rarely varied depending on whether the person was an employee or a contractor," and that "in almost every respect" his relationship to his agency and supervisor is "identical" to that of an employee); *see also* District Court Findings of Fact ¶ 13 [hereinafter D. Ct. Findings]. In fact, two of the plaintiffs "are retired employees from the same agency where they [were hired as] contractual consultants [to] do much the same work they previously did." Pls. Br. 35-36. The plaintiffs further acknowledge, in light of the case law described above, that Congress has greater latitude to restrict the expression of both employees and government contractors than it does with respect to the general public. *See* Oral Arg. Recording 6:00-08, 14:21-33. Indeed, the Court has expressly extended the *Pickering* balancing test to cases involving government contractors. *See Umbehr*, 518 U.S. at 684-85 (holding that there is no "difference of constitutional magnitude between independent contractors and employees" in the context of a speech-retaliation claim, and "that the same form of [*Pickering*] balancing analysis should apply to each" (internal quotation marks and citation omitted)); *see also O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 719-20 (1996).

To resolve this case, we need not precisely parse the way in which the "closely drawn" standard intersects with or differs from the *Pickering* balancing test. It will suffice for us to proceed under the rubric

of the former, since it is – if anything – the less deferential standard. In doing so, however, we will take into account the considerations that the Supreme Court has indicated are particularly relevant in evaluating restrictions the government imposes in its role as employer. We therefore now proceed to examine whether, with respect to § 30119, the government has "'demonstrate[d] a sufficiently important interest and employ[ed] means closely drawn to avoid unnecessary abridgment of associational freedoms.'" *McCutcheon*, 134 S. Ct. at 1444 (quoting *Buckley*, 424 U.S. at 25).

III

Our initial responsibility under the "closely drawn" standard is to determine whether the government has advanced a "sufficiently important interest" in support of § 30119. The FEC argues that there are two such interests, each of which has been accepted by the Supreme Court as sufficient to warrant appropriate restrictions on First Amendment rights. We briefly address the sufficiency of each of those interests in the abstract, before turning to whether they are properly invoked in light of the particular problems that § 30119 addresses.

A

The two interests asserted by the government are: (1) protection against quid pro quo corruption

and its appearance, and (2) protection against interference with merit-based public administration.

The first interest is the most significant, as the Supreme Court has repeatedly held that "the Government's interest in preventing *quid pro quo* corruption or its appearance [is] 'sufficiently important'" to justify the regulation of campaign contributions. *McCutcheon*, 134 S. Ct. at 1445 (quoting *Buckley*, 424 U.S. at 26-27). In fact, the Court has "stated that the same interest may properly be labeled 'compelling,' so that the interest would satisfy even strict scrutiny." *Id.* at 1445 (citing *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985)). As the Court has explained, "[t]hat Latin phrase captures the notion of a direct exchange of an official act for money," *id.* at 1441, and such exchanges undermine "the integrity of our system of representative democracy," *Buckley*, 424 U.S. at 26-27. "Of almost equal concern [is] . . . the appearance of corruption," which threatens "'confidence in the system of representative Government.'" *Id.* at 27 (quoting *Letter Carriers*, 413 U.S. at 565). Therefore, if the FEC shows that § 30119 furthers the interest in combating quid pro quo corruption or its appearance, that will suffice to clear the "closely drawn" standard's first hurdle.[7]

The second interest is also significant, and in combination with the first makes this case even

[7] Throughout this opinion, when we use the terms "corruption" or its "appearance," we refer to the quid pro quo variety.

stronger for the FEC. Although the Supreme Court has identified no congressional objective beyond protection against quid pro quo corruption and its appearance that warrants imposing campaign finance restrictions on the citizenry at large, *see McCutcheon*, 134 S. Ct. at 1450; *Citizens United*, 558 U.S. at 359, it has "upheld a narrow class of speech restrictions that operate to the disadvantage of certain persons,. . . . based on an interest in allowing governmental entities to perform their functions," *Citizens United*, 558 U.S. at 341 (citing, inter alia, *Letter Carriers*, 413 U.S. at 557). That narrow class of approved speech restrictions includes the Hatch Act's limits on political activities by federal employees, which, as the Court put it in *Citizens United*, rest on the principle that "'[f]ederal service should depend upon meritorious performance rather than political service.'" 558 U.S. at 341 (quoting *Letter Carriers*, 413 U.S. at 557).

The Court's cases indicate that this interest in protecting merit-based public administration has two distinct but mutually reinforcing components. The first is that the Government "operate effectively and fairly," *Letter Carriers*, 413 U.S. at 564, which in turn comprises a series of interrelated concerns. The "'interest of the [government], as an employer, in promoting the *efficiency* of the public services it performs through its employees,'" *id.* (emphasis added) (quoting *Pickering*, 391 U.S. at 568), is perhaps best captured by the Court's rationale for upholding the original 1876 employee contribution ban: "If . . . a refusal [to make political contributions] may

lead to putting good men out of the service, liberal payments may be made the ground for keeping poor ones in." *Ex parte Curtis*, 106 U.S. 371, 375 (1882). The related interest in operating *fairly* is the "great end of Government – the impartial execution of the laws." *Letter Carriers*, 413 U.S. at 565. "It seems fundamental," the Court has said, that "those working for [Government] agencies, should administer the law in accordance with the will of Congress, rather than in accordance with their own or the will of a political party." *Id.* at 564-65. In this regard, "it is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent." *Id.* at 565.

The flip side of the interest in governmental efficiency and fairness is the employees' interest in being "sufficiently free from improper influence" or coercion, which the government may also vindicate on their behalf. *Id.* As the Court has explained, it upheld the Hatch Act's restrictions on "political campaigning" by federal employees in part because, in the Court's "judgment[,] . . . congressional subordination of those activities was permissible to safeguard the core interests of individual belief and association." *Elrod v. Burns*, 427 U.S. 347, 371 (1976). *See NTEU*, 513 U.S. at 471 (explaining that "the Hatch Act aimed to *protect* employees' rights, notably their right to free expression, rather than to restrict those rights");

Letter Carriers, 413 U.S. at 566 (identifying an interest, "as important as any other," in "mak[ing] sure that Government employees would be free from pressure and from express or tacit invitation to . . . perform political chores in order to curry favor with their superiors"); *Ex parte Curtis*, 106 U.S. at 374 (identifying "the protection of those in the public service against unjust exactions" as an independently sufficient basis for upholding the 1876 statute restricting contributions by federal employees).

The Supreme Court has repeatedly credited these "obviously important interests sought to be served by . . . limitations on partisan political activities," *Letter Carriers*, 413 U.S. at 564, for over a century.[8] And there is no reason why they should not be heard in support of restrictions on contractors as well as regular employees. *Cf. NASA v. Nelson*, 562 U.S. 134, 150 (2011) (rejecting the respondents' argument that, "because they are contract employees and not civil servants, the Government's broad authority in managing its affairs should apply with diminished force"); *Umbehr*, 518 U.S. at 676-79 (noting that, under the *Pickering* balancing test, "'[t]he government's interest in achieving its goals as effectively and efficiently as possible is elevated . . . to a significant one when it acts as employer,'" and holding that *Pickering* applies

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[8] *See, e.g.*, *Citizens United*, 558 U.S. at 341; *NTEU*, 513 U.S. at 471; *Elrod*, 427 U.S. at 370; *Buckley*, 424 U.S. at 27; *Letter Carriers*, 413 U.S. at 557; *Mitchell*, 330 U.S. at 98; *Ex parte Curtis*, 106 U.S. at 374-75.

to claims by independent contractors that they were terminated for their speech (quoting *Waters v. Churchill*, 511 U.S. 661, 675 (1994) (plurality opinion))).

We now proceed to examine whether these two Court-approved justifications for limitations on campaign activities – to protect against quid pro quo corruption and its appearance, and to protect merit-based administration – are furthered by the contractor contribution statute.

B

We begin with the historical pedigree of § 30119, which stretches back to the 1870s. That history demonstrates that Congress did indeed aim to protect the two interests articulated by the FEC, and that its concerns on both fronts were well warranted.

1. Congress began to tackle problems related to the political activity of those who work for the government in the late 19th century. *See generally Letter Carriers*, 413 U.S. at 555-60. It started by prohibiting most federal employees "from requesting, giving to, or receiving from, any other . . . employee of the Government, any money or property . . . for political purposes." Act of Aug. 15, 1876, ch. 287, § 6, 19 Stat. 143, 169. In upholding that early statute as "within the just scope of legislative power," the Supreme Court declared that its "evident purpose" was "to promote efficiency and integrity in the discharge of official duties" and "to protect the classes of . . .

employees provided for from being compelled to make contributions for [political] purposes through fear of dismissal if they refused." *Ex parte Curtis*, 106 U.S. at 373-74.

The 1876 statute was limited to employees of the Executive Branch. In the 1883 Pendleton Act, Congress took the next step, making it a crime for its own members, among others, to "solicit or receive" political contributions from federal workers, ch. 27, § 11, 22 Stat. 403, 406, and for those workers to "give or hand over" such contributions, *id.* § 14, 22 Stat. at 407.[9] The Pendleton Act further declared that "no person in the public service is for that reason under any obligations to contribute to any political fund." *Id.* § 2, 22 Stat. at 404. And it "authorized the President to promulgate rules to carry the Act into effect and created the Civil Service Commission as the agency or administrator of the Act." *Letter Carriers*, 413 U.S. at 558.

In 1925, Congress broadened the ban to include solicitation and receipt by congressional challengers

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[9] Because the Pendleton Act prohibited accepting contributions from "any person receiving any salary or compensation from moneys derived from the Treasury of the United States," *id.* § 11, 22 Stat. at 406, it textually encompassed contributions from the various government contractors of the era – ranging from experts hired to survey Indian lands, *see* Contract for Surveying Public Lands, 10 Op. Att'y Gen. 261, 261 (1862), to a contractor hired to make copies of patent drawings for the Commissioner of Patents, *see* Letting Contracts – Advertisement, 15 Op. Att'y Gen. 538 (1876).

as well as incumbents, while continuing to tweak the range of forbidden donors. *See* Federal Corrupt Practices Act, 1925, ch. 368, sec. 312, § 118, 43 Stat. 1070, 1073. When Congressman Harry Wurzbach was subsequently indicted for receiving contributions from federal employees, the Supreme Court again upheld the statute as a proper exercise of Congress' powers. *United States v. Wurzbach*, 280 U.S. 396 (1930); *see Mitchell*, 330 U.S. at 98.

Alongside these early bans on campaign contributions, Congress and the Executive Branch incrementally expanded the scope of the nascent civil service system, imposing limitations on political activity by employees and implementing merit-based hiring rules. *See Letter Carriers*, 413 U.S. at 557-60. Those efforts culminated in the Hatch Act of 1939, which aimed to consolidate civil service reforms and "to combat demonstrated ill effects of Government employees' partisan political activities." *NTEU*, 513 U.S. at 471. As the Court has explained, Congress' purpose was to protect merit-based administration, including ensuring governmental efficiency and fairness and shielding government personnel from political coercion. *See Letter Carriers*, 413 U.S. at 564-66.

The Hatch Act was particularly aimed at certain notorious abuses that occurred during the 1936 and 1938 election campaigns. *See id.* at 559-60. Responding to reports that workers paid by the Works Progress Administration (WPA) had been coerced to

contribute to the Democratic Party, for example,[10] the Hatch Act criminalized accepting political contributions from anyone known to be receiving "compensation, employment, or other benefit" from work relief funds. Hatch Act, ch. 410, §§ 5, 8, 53 Stat. 1147, 1148.

The Act imposed other restrictions on political activity by government employees as well, including barring them from "tak[ing] any active part in political management or in political campaigns." *Id.* § 9(a), 53 Stat. at 1148. In subsequently upholding those restrictions against a First Amendment challenge, the Supreme Court noted that they were "not dissimilar in purpose from the statutes against political contributions of money." *Mitchell*, 330 U.S. at 98. Congress, the Court said, "recognizes danger to the [civil] service in that political rather than official effort may earn advancement and to the public in that governmental favor may be channeled through political connections." *Id.* Twenty-six years later, the Court again rejected a First Amendment challenge to the same restrictions. *See Letter Carriers*, 413 U.S. at 551.

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[10] *See, e.g.*, 84 CONG. REC. 9598 (1939) (statement of Rep. Taylor) (reporting that WPA workers had been required to place $3 to $5 out of their $30 monthly pay under a Democratic donkey paperweight on their supervisor's desk); *see also* REPORT OF THE SPECIAL COMM. TO INVESTIGATE SENATORIAL CAMPAIGN EXPENDITURES AND USE OF GOVERNMENTAL FUNDS IN 1938, S. REP. NO. 76-1, pt. 1, at 8-33, 39 (1939) (recounting WPA abuses and recommending reforms).

Although the 1939 Hatch Act focused on public employees and recipients of work relief, exploitation of government contractors drew congressional interest as well. Arguing that the original bill "does not go far enough," Congressman J. Will Taylor pointed to the coercion of contractors in the "'celebrated' Democratic campaign book" scandal as a prime example of "political immorality and skullduggery that should not be tolerated." 84 CONG. REC. 9598-99 (1939). Representative Taylor recounted that, at the behest of the Democratic National Committee, party representatives paid visits to government contractors, reminding each one "of the business he had received from the Government" and explaining that the contractor was expected to buy a number of the party's souvenir convention books – at $250 each – "in proportion to the amount of Government business he had enjoyed." *Id.* In addition, "large concerns, which directly or indirectly, benefitted from Government business, were . . . by sinister methods, convinced of the importance of taking advertising space in the book." *Id.*; *see also* 81 CONG. REC. 6429-30 (1937) (statement of Rep. Taylor) (citing newspaper report regarding solicitation of contractors in Tennessee). Taylor urged that the bill "should be amended to include rackets of this character." 84 CONG. REC. 9599 (1939).

The next year, as the scandal surrounding the campaign books persisted,[11] Congress took up that task in a package of amendments to the Hatch Act. Denouncing contracting abuses as "[t]he greatest source of corruption in American politics today," Senator Harry Byrd argued for a broad amendment that would "prevent those who are making money out of governmental contracts from making contributions to any political party," and thereby "prevent them from making contributions which may be considered in some instances as bribery in order to secure governmental contracts for themselves." 86 CONG. REC. 2982 (1940). Thus, in addition to specifically banning the purchase of goods (such as the campaign books) from political parties, *see* Act of July 19, 1940, ch. 640, sec. 4, § 13(c), 54 Stat. 767, 770-71, Congress enacted the general contractor contribution ban that is now before us, *id.* § 5(a), 54 Stat. at 772.

The statute that Congress passed in 1940 has retained its essential features since that time. Then, as now, it barred any person or firm negotiating or performing a federal contract from contributing "to any political party, committee, or candidate for public office or to any person for any political purpose or

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[11] *See, e.g.*, 86 CONG. REC. 9362 (1940) (statement of Rep. Knutson) (recounting advertising rates for the 1940 Democratic campaign book and speculating that "all of this space will be taken by Government contractors," who would be "solicit[ed] . . . at the point of a gun"); *see also* Editorial, *That Convention Book*, N.Y. TIMES, Mar. 13, 1940, at 22.

use." *Id.* (codified as amended at 52 U.S.C. § 30119(a)(1)).

2. Just as the Hatch Act was spurred by outrage over misconduct in the 1936 and 1938 elections, "deeply disturbing examples" of corruption "surfacing after the 1972 election" led to the Federal Election Campaign Act (FECA) Amendments of 1974. *Buckley*, 424 U.S. at 27 & n.28 (citing *Buckley v. Valeo*, 519 F.2d 821, 839-840 & nn. 36-38 (D.C. Cir. 1975) (en banc)). Particularly important for our purposes, those "disturbing examples" included a variety of efforts to channel government contracts to President Nixon's political supporters and to exact contributions from existing contractors, both of which figured prominently in the Senate Watergate Committee's report. *See, e.g.*, FINAL REPORT OF THE SELECT COMM. ON PRESIDENTIAL CAMPAIGN ACTIVITIES, S. REP. NO. 93-981, at 368 (1974) [hereinafter WATERGATE REPORT] (describing the so-called "Responsiveness Program," pursuant to which agencies were to ensure that "[t]he letting of Government grants, contracts, and loans" was directed at "meet[ing] reelection needs"); *id.* at 412 (recounting evidence that "campaign officials were participating in the selection process for the awards of GSA architectural and engineering design contracts"); *id.* at 1210 & n.85 (separate views of Sen. Weicker) (recounting "evidence of *quid pro quos* for

the contracts from" four cabinet departments and six agencies).[12]

As the Watergate Committee recognized, much of the conduct that it exposed squarely implicated the contractor contribution statute (then 18 U.S.C. § 611). *See* WATERGATE REPORT at 440. The Committee reported that the 1972 election gave rise to the first indictments of contributors under that statute, resulting in guilty pleas and then-maximum fines. *Id.* at 486-89. "In view of the abuses discovered," it recommended that Congress take care not to "lessen the penalties" or otherwise "weaken[ ] . . . the law in this area." *Id.* at 444. The Committee further concluded that the statutory scheme was "deficient in failing to provide a civil penalty," which made it difficult to address "nonflagrant cases," and recommended that the new Federal Election Commission be given primary civil enforcement jurisdiction with respect to, inter alia, the contractor contribution statute. *Id.* at 566-67.

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[12] *See also* WATERGATE REPORT at 440 ("There is evidence that plans were laid for Government officials and others to solicit campaign contributions from minority recipients of Federal grants, loans, and contracts. Moreover, the committee has obtained evidence that these plans were in part consummated."); *id.* at 384-85 (recounting testimony that a contract was awarded to a Nixon fundraiser "based solely on political motivations" and " 'rammed down the throats' of Department officials"). In the passage of our *Buckley* opinion later relied upon by the Supreme Court, this court leaned heavily on the Watergate Report. *See* 519 F.2d at 839 nn.35-36, 38.

A few months after the Watergate Committee made its recommendations, Congress increased the maximum fine for violations of the contractor contribution statute from $5,000 to $25,000, *see* FECA Amendments of 1974, Pub. L. No. 93-443, § 101(e)(2), 88 Stat. 1263, 1267, and authorized the Commission to initiate civil enforcement actions for violations of that provision, *see id.* sec. 208(a), § 314(a)(7), 88 Stat. at 1285.[13] It also strengthened enforcement of the longstanding bans on campaign contributions by corporations and labor unions. *See id.* § 101(e)(1), 88 Stat. at 1267; *see also Beaumont*, 539 U.S. at 152-53 (recounting the history of those bans). And, as is well known, the 1974 amendments also imposed generally applicable ceilings on campaign contributions. *See McCutcheon*, 134 S. Ct. at 1445; *Buckley*, 424 U.S. at 7. FECA's "primary purpose," the Court has said, "was to limit *quid pro quo* corruption and its appearance." *McCutcheon*, 134 S. Ct. at 1444 (citing *Buckley*, 424 U.S. at 26-27).

Finally, in 1976, Congress incorporated the contractor contribution ban into FECA itself. *See* FECA Amendments of 1976, Pub. L. No. 94-283, sec. 112(2), § 322, 90 Stat. 475, 492-93. Over the subsequent decades, both FECA and the civil service laws have been further amended. Those amendments lifted most restrictions on campaign contributions by

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[13] That monetary penalty has since been superseded by FECA's own penalty scheme. *See* 52 U.S.C. § 30109(a)(5)-(6) (civil penalties); *id.* § 30109(d) (criminal penalties).

federal employees.[14] At the same time, however, they retained some of the more direct limits on government employees' political activities, including barring most federal employees from soliciting or accepting political contributions, running for office in partisan elections, and hosting political fundraisers. *See* 5 U.S.C. §§ 7323(a), 7324(a). The Civil Service Reform Act of 1978 also afforded federal employees protection against "prohibited personnel practices," 5 U.S.C. § 2302, including discrimination on the basis of political affiliation and coercion to make political contributions, *id.* § 2302(b)(1)(E), (b)(3), and allowed them to seek redress through the Office of Special Counsel and the Merit Systems Protection Board, 5 U.S.C. §§ 1214-15, 1221. Congress has left the contractor contribution ban in place, however, without change. *See* 52 U.S.C. § 30119.

3. As we have recounted, Congress enacted § 30119 in the aftermath of a national scandal involving a pay-to-play scheme for federal contracts. The statute was itself the outgrowth of a decades-long congressional effort to prevent corruption and ensure the merit-based administration of the national government. And it was followed by subsequent scandals that led to further legislative refinements, again

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[14] *See, e.g.*, Hatch Act Reform Amendments of 1993, Pub. L. No. 103-94, sec. 2(a), § 7323, 107 Stat. 1001, 1002 (1993) (codified at 5 U.S.C. § 7323); *id.* § 4(b), 107 Stat. at 1005 (codified at 18 U.S.C. § 603(c)).

motivated by concerns over corruption and merit protection.

This historical pedigree is significant. As the Court said in *Beaumont*, "[j]udicial deference is particularly warranted where, as here, we deal with a congressional judgment that has remained essentially unchanged throughout a century of 'careful legislative adjustment.'" 539 U.S. at 162 n.9 (quoting *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 209 (1982)). Moreover, as we discuss in Part V below, the lineage of the statute makes clear that its objects are the legitimate and important purposes that the Commission claims they are.

C

More recent evidence confirms that human nature has not changed since corrupt quid pro quos and other attacks on merit-based administration first spurred the development of the present legislative scheme. Of course, we would not expect to find – and we cannot demand – continuing evidence of large-scale quid pro quo corruption or coercion involving federal contractor contributions because such contributions have been banned since 1940. As the Supreme Court has recognized, "no data can be marshaled to capture perfectly the counterfactual world in which" an existing campaign finance restriction "do[es] not exist." *McCutcheon*, 134 S. Ct. at

1457.[15] Instead, "'the question is whether experience under the present law confirms a serious threat of abuse.'" *Id.* (quoting *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 457 (2001)). The experience of states with and without similar laws is also relevant. *See id.* at 1451 n.7; *Citizens United*, 558 U.S. at 357.

Unfortunately, as was the case with the coordinated expenditure limits at issue in *Colorado Republican*, "[d]espite years of enforcement of the challenged" contractor contribution ban, "substantial evidence demonstrates" that individuals and firms continue to "test the limits of the current law[s]," 533 U.S. at 457 – at both the federal and state levels. This experience readily confirms that the government's fear of the consequences of removing the current ban is not unwarranted.

1. We begin with Congress itself, where a number of corruption scandals point to the danger that contributions from government contractors would pose. Indeed, although the plaintiffs contend that Members of Congress are insulated from the

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[15] *See Burson v. Freeman*, 504 U.S. 191, 208 (1992) (plurality opinion) ("The fact that these laws have been in effect for a long period of time also makes it difficult for the States to put on witnesses who can testify as to what would happen without them."); *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 457 (2001) (noting the "difficulty of mustering evidence to support long-enforced statutes" because "there is no recent experience" without them).

contracting process, *see infra* Part III.D.1, many significant congressional corruption cases involve quid pro quo agreements regarding contracts. In 2005, for example, Representative Randy "Duke" Cunningham pled guilty to accepting millions of dollars in bribes in exchange for influencing Defense Department contract awards. *See* Plea Agreement at 4-6, ECF No. 40 ex. 2, *United States v. Cunningham*, No. 3:05-cr-2137 (S.D. Cal. Nov. 28, 2005). Mitchell Wade, the defense contractor who pled guilty to bribing Cunningham, admitted to making illegal "straw" contributions to two other Members of Congress as well, both of whom he targeted for their perceived "ability to request appropriations funding that would benefit" his company. Statement of Offenses at 12, *United States v. Wade*, No. 1:06-cr-49 (D.D.C. Feb. 24, 2006).[16]

In 2006, Representative Bob Ney similarly pled guilty to a series of quid pro quos with the lobbyist Jack Abramoff, including steering a "multi-million dollar" contract for a House of Representatives infrastructure project to one of Abramoff's clients. *See* Factual Basis for Plea at 6, *United States v. Ney*, No. 1:06-cr-272 (D.D.C. Sept. 15, 2006). And in 1981, Senator Harrison Williams was convicted on bribery

[16] Wade and the contracting corporation later agreed to pay a $1 million civil penalty for violating, inter alia, § 30119 (then 2 U.S.C. § 441c). Conciliation Agreement at 6-7, *In re MZM, Inc. and Mitchell Wade*, Matter Under Review 5666 (FEC, Oct. 30, 2007).

and corruption charges for crimes exposed in the FBI's Abscam investigation. Williams "agreed to use his position as a United States Senator to obtain government contracts" for titanium to be produced by a mine financed by fictional Arab businessmen. *United States v. Williams*, 529 F. Supp. 1085, 1091 (E.D.N.Y. 1981), *aff'd*, 705 F.2d 603 (2d Cir. 1983).

One might argue from this record that the general ban on contractor contributions is unnecessary prophylaxis: after all, congressmen who enter into quid pro quo agreements go to jail anyway. But as the Supreme Court has explained, "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." *Buckley*, 424 U.S. at 27-28. Although the criminal cases certainly confirm the appetite for corruption in contracting – and the availability of channels for carrying it out – corruption and its appearance are no doubt more widespread in the contracting process than our criminal dockets reflect.

The Executive Branch is also an obvious site of potential corruption in the contracting process, since its agencies are the ones that ultimately award contracts. This was a key focus of congressional concern during the Watergate hearings. *See supra* Part III.B.2; *see also*, *e.g.*, WATERGATE REPORT at 409 (describing a consultant who "was made to feel that his continued success in obtaining Government

contracts would, in significant degree, be dependent on his contributing to the President's reelection").[17] Many more recent instances of corruption or its appearance in the agency contracting process are collected in the Defense Department's aptly named *Encyclopedia of Ethical Failure*. *See generally* DEP'T OF DEFENSE, OFFICE OF GEN. COUNSEL, ENCYCLOPEDIA OF ETHICAL FAILURE 4-58, 77-78, 82, 84-88, 132-46 (updated 2014).

2. Further evidence comes from the states, many of which have enacted pay-to-play laws in response to their own recent experiences. At least seventeen states now limit or prohibit campaign contributions from some or all state contractors or

[17] Another notorious pay-to-play contracting scheme of the Watergate era involved Vice President Spiro Agnew. In 1973, a federal investigation uncovered evidence that Agnew had accepted bribes (including campaign contributions) in exchange for infrastructure contracts while serving as Baltimore County Executive and Governor of Maryland – and that he had continued to request payments from contractors as Vice President, "stat[ing] expressly that he hoped to be able to be helpful . . . with respect to the awarding of Federal engineering contracts." Exposition of the Evidence at 3-4, *United States v. Agnew*, No. 73-0535 (D. Md. Oct. 10, 1973), *reprinted in* FBI Records: Spiro Agnew, Part 16, at 130, http://vault.fbi.gov/Spiro%20Agnew. The Attorney General agreed that Agnew could plead *nolo contendere* to a single count of tax evasion if he resigned his office, which he did. *See* Transcript of Plea Hearing at 7-8, *United States v. Agnew*, No. 73-0535 (D. Md. Oct. 10, 1973), *available at* http://research.archives.gov/description/279170.

licensees.[18] The fact that many states have such laws shows that the federal statute is no outlier. Moreover, the corruption scandals that prompted the adoption of those laws further demonstrate the dangers that § 30119 helps stave off at the federal level.[19]

New Jersey's law, for example, was enacted in the aftermath of a state investigation finding that a $392 million contract for a failed project went to a firm that had made extensive campaign contributions to state candidates and political committees. *See*

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[18] The laws of Hawaii and West Virginia most closely track the text and design of § 30119. *See* HAW. REV. STAT. § 11-355; W. VA. CODE § 3-8-12(d). Other states have tailored their restrictions differently – often more broadly than the federal model in some respects, such as by sweeping in the individual principals of contracting firms, and more narrowly in others, such as by targeting particular industries or imposing ceilings on contract or contribution size. *See* CAL. GOV'T CODE § 84308(d); CONN. GEN. STAT. § 9-612(f)(1)-(2); 30 ILL. COMP. STAT. 500/50-37; IND. CODE §§ 4-30-3-19.5 to -19.7; KY. REV. STAT. ANN. § 121.330; LA. REV. STAT. ANN. §§ 18:1505.2(L), 27:261(D); MICH. COMP. LAWS § 432.207b; NEB. REV. STAT. §§ 9-803, 49-1476.01; N.J. STAT. ANN. § 19:44A-20.13 to -20.14; N.M. STAT. ANN. § 13-1-191.1(E)-(F); OHIO REV. CODE ANN. § 3517.13(I)-(Z), *invalidated in part on other grounds, United Auto Workers, Local Union 1112 v. Brunner*, 911 N.E.2d 327 (Ohio Ct. App. 2009); 53 PA. CON. STAT. § 895.704-A(a); S.C. CODE ANN. § 8-13-1342; VT. STAT. ANN. tit. 32, § 109(b); VA. CODE ANN. § 2.2-3104.01.

[19] Further evidence also comes from the Securities and Exchange Commission, which in 1994 approved a pay-to-play rule for municipal financing in response to concern that brokers and dealers were making political contributions to state and local officials to influence the choice of underwriters. This court upheld that rule against First Amendment challenge in *Blount v. SEC*, 61 F.3d 938 (D.C. Cir. 1995).

STATE OF N.J. COMM'N OF INVESTIGATION, N.J. ENHANCED MOTOR VEHICLE INSPECTION CONTRACT 1-2, 62-65 (2002). Similarly, Illinois' law was passed after former Governor George Ryan was convicted of racketeering charges based on his efforts, as Secretary of State, to steer state contracts to friendly firms in exchange for financial support for his gubernatorial campaign. *United States v. Warner*, 498 F.3d 666, 675 (7th Cir. 2007); *see* Ray Long, *Illinois Senate Overrides Blagojevich's Veto, Enacts 'Pay-to-Play' Ethics Law*, CHI. TRIB., Sept. 23, 2008, at 1. The law's passage prompted Ryan's successor, Governor Rod Blagojevich, to redouble his efforts to solicit contributions from state contractors before the new rules took effect. *See* Mike McIntire & Jeff Zeleny, *Obama's Intervention for Ethics Bill Indirectly Led to Case Against Governor*, N.Y. TIMES, Dec. 10, 2008, at A32. Those efforts in turn drew the interest of federal prosecutors, and Blagojevich was ultimately convicted of various forms of pay-to-play corruption, including attempting to extort campaign contributions from the chief executive of a hospital in exchange for raising Medicaid reimbursement rates, as well as offenses in connection with his effort to sell a U.S. Senate seat. *See* Jury Verdict, *United States v. Blagojevich*, No. 1:08-cr-888 (N.D. Ill. June 27, 2011).

In 2005, Connecticut passed a Campaign Finance Reform Act that prohibited "campaign contributions by state contractors, lobbyists, and their families." *Green Party*, 616 F.3d at 192. In upholding the contractor contribution ban, the Second Circuit noted

that it was passed "in response to several corruption scandals in Connecticut," which together had "helped earn the state the nickname 'Corrupticut.'" *Id.* at 193 (quoting *Green Party of Conn. v. Garfield*, 616 F.3d 213, 218-19 (2d Cir. 2010)) (internal quotation marks omitted). As the court detailed:

> The most widely publicized of the scandals involved Connecticut's former governor, John Rowland. In 2004, Rowland was accused of accepting over $100,000 worth of gifts and services from state contractors. . . . Rowland accepted the gifts, it was alleged, in exchange for assisting the contractors in securing lucrative state contracts. Rowland resigned amidst the allegations, and in 2005 pleaded guilty – along with two aides and several contractors – to federal charges in connection with the scandal.

Id. (quoting *Green Party*, 616 F.3d at 218-19). In light of that experience, the court found "sufficient evidence" of "actual corruption stemming from contractor contributions," as well as "a manifest need to curtail the appearance of corruption created by contractor contributions." *Id.* at 200.

Later, the Second Circuit also upheld New York City's law limiting contributions by entities "doing business with" the City. *Ognibene v. Parkes*, 671 F.3d 174 (2d Cir. 2011). In so doing, the court noted that there were "actual pay-to-play scandals in New York City in the 1980s," *id.* at 188-89, and that there were "several recent scandals . . . specifically involv[ing]

pay-to-play campaign donations" in New York State, *id.* at 190 n.15.[20]

We could go on. The FEC has assembled an impressive, if dismaying, account of pay-to-play contracting scandals, not only in the above states, but also in New Mexico, Hawaii, Ohio, California, and elsewhere. *See* FEC's Proposed Findings of Fact, J.A. 298-313.[21] But we think that the evidence canvassed

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[20] The plaintiffs point out that, in *Lavin v. Husted*, the Sixth Circuit overturned an Ohio statute that made it a crime for candidates for attorney general or county prosecutor to accept contributions from Medicaid providers. 689 F.3d 543 (6th Cir. 2012). The court did so because, inter alia, the defendant Secretary of State "concede[d] that he ha[d] *no evidence at all* in support of his theory that [the statute] prevent[ed] actual or perceived corruption among prosecutors in Ohio." *Id.* at 547 (emphasis added). As we discuss in the text, that is emphatically not the situation here. *See also id.* (distinguishing *Green Party* on the ground that there the state did have evidence "to demonstrate how its ban on contributions from contractors would help bring such scandals to an end").

[21] *See also*, *e.g.*, *Yamada*, 2015 WL 2384944, at *20 (upholding Hawaii contractor contribution ban "in light of past 'pay to play' scandals and the widespread appearance of corruption that existed at the time" the ban was passed in 2005); *United States v. Dimora*, 750 F.3d 619, 623 (6th Cir. 2014) (affirming conviction of Ohio county official who "influenced Cleveland decision-makers and steered public contracts in return for approximately 100 bribes worth more than $250,000"); Plea Agreement at 3, *United States v. Montoya*, No. 1:05-cr-2050 (D.N.M. Nov. 8, 2005) (guilty plea of New Mexico State Treasurer, who explained that "it was quite easy to get bribes from people who wanted to keep or obtain business," including individual investment and financial advisors); James Drew & Steve Eder, *Petro: Noe Stole Millions*, TOLEDO BLADE, July 22, 2005 (reporting on an Ohio

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thus far suffices to show that, in government contracting, the risk of quid pro quo corruption and its appearance, and of interference with merit-based administration, has not dissipated. Taken together, the record offers every reason to believe that, if the dam barring contributions were broken, more money in exchange for contracts would flow through the same channels already on display.

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scandal in which state workers' compensation funds were invested with a major political contributor who was ultimately convicted of both corruption and theft from the funds, *see State v. Noe*, 2009 WL 5174163 (Ohio Ct. App. 2009)); Carl Ingram, *Former Davis Aide Faces Charges in Oracle Probe*, L.A. TIMES, Mar. 3, 2004 (recounting incident in which a corporate lobbyist delivered a $25,000 contribution to the Governor of California's reelection campaign, via his policy director, days after the state signed a $95 million contract with the company; the contribution was ultimately returned and the contract rescinded); Bruce Dunford, *Jail Time, Fines Are Levied in Hawaii Election Probe*, BOSTON GLOBE, Jan. 12, 2004, at A3 (detailing "a scandal in which respected architects and engineers illegally made political donations in the names of their employees, wives, and children, allegedly to win government contracts" in Honolulu); *United States v. Troutman*, 814 F.2d 1428, 1433-36 (10th Cir. 1987) (affirming the extortion conviction of New Mexico's State Investment Officer for demanding that a bank make political contributions in order to obtain a state contract); *cf.* Patrick Madden, *The Cost of D.C. Council's Power Over Contracts*, WAMU (Oct. 14, 2014), http://wamu.org/projects/paytoplay/#/story (reporting on an investigation that "identified more than $5 million in political contributions from more than 300 firms with [D.C.] Council-approved contracts from 2005 to 2014," and that revealed that "[r]oughly half of the contractors' campaign cash was donated to lawmakers within a year of their contracts getting approved," often "months and weeks ahead of when the contracts were voted on" or even the same day as the vote).

D

Notwithstanding the above, the plaintiffs argue that the interests asserted by the Commission are not furthered by § 30119 for two reasons.

1. The plaintiffs contend that changes in government contracting practices since the 1940s – especially the advent of formalized competitive bidding – render the current system "immune from political interference" in the majority of cases. Pls. Br. 11. Thus, they maintain, "even if a pay-to-play rationale might have made [the statute] defensible in 1940, the vast changes in federal procurement since then have made it indefensible on that basis today." *Id.* at 13. We are unpersuaded.

First, the facts that we have recounted above speak for themselves. *See supra* Part III.C.1. If contracting were truly immune from political interference, for example, Rep. Cunningham could not have "pressure[d] and influence[d] United States Department of Defense personnel to award and execute government contracts." Plea Agreement at 6, *United States v. Cunningham*, No. 3:05-cr-2137 (S.D. Cal. Nov. 28, 2005). Nor would the myriad of other instances of corruption and self-dealing in the contract bidding process have occurred. *See generally* DEP'T OF DEFENSE, ENCYCLOPEDIA OF ETHICAL FAILURE 4-58, 77-78, 82, 84-88, 132-46. Moreover, those facts are hardly surprising. Although agencies do rely on specialized contracting officers to help ensure independence, contracting officers in turn rely on information about

needs and objectives provided by the "customer" agency, which may include input from political appointees. *See* D. Ct. Findings ¶ 23 (citing Schooner Dep. 110-16). And Members of Congress have many opportunities of their own to intercede on behalf of their constituents. *See, e.g.*, MORTON ROSENBERG & JACK H. MASKELL, CONG. RESEARCH SERV., CONGRESSIONAL INTERVENTION IN THE ADMINISTRATIVE PROCESS: LEGAL AND ETHICAL CONSIDERATIONS 80 (2003); H.R. REP. NO. 113-666, at 4 (2014).

Second, most contracts held by individuals to provide personal services on a regular basis, such as those held by plaintiffs Brown and Miller, "'are not. . . . subject to full and open competition and the full range of rights and responsibilities that follow.'" D. Ct. Findings ¶ 24 (quoting Schooner Dep. 89); *see* 48 C.F.R. § 13.003(d). Nor is full-blown competitive bidding required for contracts with values below the "simplified acquisition threshold" – set at $150,000 in most cases, 48 C.F.R. § 2.101. *See* 41 U.S.C. § 1901; 48 C.F.R. § 13.003(a). Instead, "'the government can call two or three people on the phone and operate in a very informal manner.'" D. Ct. Findings ¶ 24 (quoting Schooner Dep. 107-08). Wagner's contract, for example, was arranged under the simplified acquisition procedures. *Id.* She was proactively approached by a staff member at ACUS, and then discussed the arrangement with ACUS's Chairman, who is appointed by the President and confirmed by the Senate. Wagner Decl. ¶ 3. In short, because the plaintiffs challenge § 30119 as it applies to individual contractors,

the competitive bidding regime does little to help their case.

Finally, perhaps the most relevant change in government contracting over the past several decades has been the enormous increase in the government's reliance on contractors to do work previously performed by employees. *See* Schooner Dep. 35-36, *cited in* D. Ct. Findings ¶ 22.[22] If anything, that shift has only strengthened the original rationales for the contractor contribution ban by increasing the number of potential targets of corruption and coercion – targets who do not have the merit system protections available to government employees. *See* 5 U.S.C. §§ 1214-15, 2301(b)(1)-(2); *infra* Part V.B.[23]

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[22] *See also* Test. of John K. Needham, Director, Acquisition & Sourcing Management, Gov't Accountability Office, S. Hrg. 111-626, at 3 (2010) ("[I]t is now commonplace for agencies to use contractors to perform activities historically performed by government employees."); Presidential Memorandum for the Heads of Executive Departments and Agencies on Government Contracting, Mar. 4, 2009 (noting that spending on government contracts had more than doubled since 2001 and that the line between traditional public functions and contracting functions "has been blurred and inadequately defined"); PAUL C. LIGHT, RESEARCH BRIEF: THE NEW TRUE SIZE OF GOVERNMENT 1 (2006) (noting that the Bush Administration "has overseen the most significant increase in recent history in the largely hidden workforce of contractors and grantees who work for the federal government").

[23] Increased reliance on individual contractors – particularly retirees such as Brown and Miller – also raises a concern that some former federal employees may unwittingly violate § 30119 because they are unaware that they have become subject to a

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2. The plaintiffs also question whether there is sufficient evidence of corruption or coercion specifically with respect to individual contractors, as compared to those organized as corporations or other kinds of firms. It is true that most of the examples set forth in Parts III.B and III.C above involve firms.[24] We see no reason, however, to believe that the motivations for corruption and coercion exhibited in those examples are inapplicable in the case of individual contractors. Consider Sam Harris, a consultant who told the Watergate Committee that "he was made to feel that his continued success in obtaining Government contracts would, in significant degree, be dependent on his contributing to the President's reelection." WATERGATE REPORT at 409. There is no basis for

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different set of restrictions as contractors. However, as FEC counsel advised the court, there is no criminal violation unless the individual knows his or her conduct violates the law. Oral Arg. Recording 1:01:19-1:02:19; *see* 52 U.S.C. § 30109(d)(1)(A) (imposing criminal penalties on those who "knowingly and willfully" violate FECA); *Bryan v. United States*, 524 U.S. 184, 191-92 (1998) ("[I]n order to establish a 'willful' violation of a statute, the Government must prove that the defendant acted with knowledge that his conduct was unlawful." (internal quotation marks omitted)).

[24] *But see, e.g.*, 84 CONG. REC. 9598, 9610 (1939) (statements of Reps. Taylor and Michener) (detailing the coercion of WPA-paid workers to contribute to the Democratic Party that led to passage of the Hatch Act); WATERGATE REPORT at 413 (describing how federal employees were pressured to help meet a "management objective" by contributing to a Republican Party fundraiser); *id.* 429 (describing evidence that contributions were solicited from Veterans' Administration employees).

thinking that Harris would have been less vulnerable to such coercion if, instead of doing business as Sam Harris & Associates, *id.*, he had contracted with the government in his personal capacity. We are also mindful that less direct evidence is required when, as here, the government acts to prevent offenses that "are successful precisely because they are difficult to detect." *Burson*, 504 U.S. at 208 (upholding restriction of campaign speech near voting places as warranted to prevent "[v]oter intimidation and election fraud," notwithstanding limited record evidence). "[N]o smoking gun is needed where . . . the conflict of interest is apparent, the likelihood of stealth great, and the legislative purpose prophylactic." *Blount v. SEC*, 61 F.3d 938, 945 (D.C. Cir. 1995).

Moreover, the trend we identified above, toward a larger federal workforce outside the protection of the civil service system, necessarily poses an increased threat of both corruption and coercion. If anything, past experience suggests that such workers are particularly vulnerable to tacit (or not so tacit) demands for political tributes. *See, e.g.*, *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 66 (1990) (describing state government promotion decisions predicated on "whether the applicant has provided financial or other support to the Republican Party and its candidates"); *Elrod*, 427 U.S. at 355 (describing Cook County patronage system in which, "[i]n order to maintain their jobs, respondents were required to . . . contribute a portion of their wages to the [Democratic] Party"); *see also Umbehr*, 518 U.S. at 671 (describing an individual

whose contract for hauling trash allegedly was terminated in retaliation for political criticism). A coercive patronage system can thrive on even small contributions from a large group of workers beholden to those in power – which is what the growing ranks of individual contractors staffing federal agencies offer. As the Court explained in *Elrod v. Burns*, "[a]s government employment . . . becomes more pervasive, the greater the dependence on it becomes, and therefore the greater becomes the power to starve political opposition by commanding partisan support, financial and otherwise." 427 U.S. at 356; *see Letter Carriers*, 413 U.S. at 565-66 (explaining that "perhaps the immediate occasion for enactment of the Hatch Act in 1939 . . . was the conviction that the rapidly expanding Government work force should not be employed to build a powerful, invincible, and perhaps corrupt political machine").

E

Our historical review makes clear that the two Court-approved justifications for limitations on campaign activities – to protect against quid pro quo corruption and its appearance, and to protect merit-based public administration – were the justifications that lay behind the contractor contribution statute. Likewise, our national experience supports Congress' fear that political contributions by government contractors can corrupt and interfere with merit-based administration.

The Supreme Court has instructed that the "quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 (2000). There is nothing novel or implausible about the notion that contractors may make political contributions as a quid pro quo for government contracts, that officials may steer government contracts in return for such contributions, and that the making of contributions and the awarding of contracts to contributors fosters the appearance of such quid pro quo corruption. Nor is there anything novel or implausible about the idea that contractors may be coerced to make contributions to play in that game, or that more qualified contractors may decline to play at all if the game is rigged. To the contrary, the empirical record is more than sufficient to satisfy the heightened judicial scrutiny appropriate for review of the legislative judgments that support § 30119.

In sum, the interests supporting the contractor contribution statute are legally sufficient, and the dangers it seeks to combat are real and supported by the historical and factual record. Accordingly, we now turn to the remainder of the "closely drawn" test.

IV

Even if a contribution ban serves sufficiently important interests, to satisfy the First Amendment

it still must employ "'means closely drawn to avoid unnecessary abridgment of associational freedoms.'" *McCutcheon*, 134 S. Ct. at 1444 (quoting *Buckley*, 424 U.S. at 25). Clearing this hurdle "require[s] 'a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served[;] . . . that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective.'" *Id.* at 1456-57 (quoting *Bd. of Trs. v. Fox*, 492 U.S. 469, 480 (1989)). The plaintiffs contend that § 30119 fails this test because it is overinclusive in several respects, which we consider in turn.

A

The plaintiffs first maintain that the statute is overinclusive because Congress banned their contributions entirely, rather than simply resting on the contribution limits generally applicable to all citizens, *see* 52 U.S.C. § 30116(a), or on some more modest limits. Such a contribution ban, applicable to a particular category of persons, is not unique. Federal law has long prohibited all federal campaign contributions by corporations and labor unions. *See* 52 U.S.C. § 30118(a); *Beaumont*, 539 U.S. at 161-63. Several states have their own bans on certain contributions by classes of individuals or firms that do business

with the government.[25] And every judge on this court – indeed, on every lower federal court – is likewise banned from making political contributions. *See* CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 5(A)(3). So, too, are judicial employees. *See* CODE OF CONDUCT FOR JUDICIAL EMPLOYEES § 310.10(a); *id.* § 320, Canon 5(A). *See also Bluman v. FEC*, 800 F. Supp. 2d 281 (D.D.C. 2011) (three-judge court) (upholding ban on contributions by foreign nationals, 52 U.S.C. § 30121(a)), *summ. aff'd*, 132 S. Ct. 1087 (2012).

We do not dispute that the total ban on federal contributions by contractors is a significant restriction. But the point of the "closely drawn" test is that "'[e]ven a significant interference with protected rights of political association may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms.'" *McCutcheon*, 134 S. Ct. at 1444 (quoting *Buckley*, 424 U.S. at 25). And we conclude that the ban at issue here is permissible in the circumstances that we address in this opinion: a regulation that bars only campaign contributions and that is imposed only on government contractors. As we have discussed, the Court has held that campaign contributions constitute a form of

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[25] *See, e.g.*, CONN. GEN. STAT. § 9-612(f)(1)-(2); HAW. REV. STAT. § 11-355; 30 ILL. COMP. STAT. 500/50-37; IND. CODE §§ 4-30-3-19.7; LA. REV. STAT. ANN. § 18:1505.2(L); MICH. COMP. LAWS § 432.207b; W. VA. CODE § 3-8-12(d).

expressive activity less central to the First Amendment than other kinds of political activity and expenditures. *See, e.g.*, *id.* at 1444; *Beaumont*, 539 U.S. at 161; *Buckley*, 424 U.S. at 25. And as we have also discussed, we owe "'greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large.'" *Umbehr*, 518 U.S. at 676 (quoting *Waters*, 511 U.S. at 673); *see Letter Carriers*, 413 U.S. at 566-67; *Pickering*, 391 U.S. at 568. Under these circumstances, we conclude that Congress' decision to impose a contribution *ban* during the period of contract negotiation and performance is closely drawn for two reasons.

First, the contracting context greatly sharpens the risk of corruption and its appearance. Unlike the corruption risk when a contribution is made by a member of the general public, in the case of contracting there is a very specific quo for which the contribution may serve as the quid: the grant or retention of the contract. Indeed, if there is an area that can be described as the "heartland" of such concerns, the contracting process is it. *Cf. Green Party*, 616 F.3d at 202 (explaining that Connecticut's ban on contractor contributions "is, without question, 'closely drawn' to meet the state's interest in combating corruption and the appearance of corruption" because such contributions "lie at the heart of the corruption problem in Connecticut"); *see also Yamada*, 2015 WL 2384944, at *20. The long historical experience described in Parts

III.B and III.C makes clear that this is not just a question of risk, but of reality.

Moreover, because of that sharpened focus, the appearance problem is also greater: a contribution made while negotiating or performing a contract looks like a quid pro quo, whether or not it truly is. As the sponsor of the 1940 contractor contribution ban explained to his Senate colleagues, the ban was needed because contractor contributions "may be considered in some instances as bribery in order to secure governmental contracts," 86 CONG. REC. 2982 (1940) (statement of Sen. Byrd). *See Green Party*, 616 F.3d at 205 (upholding Connecticut's ban because, inter alia, "[e]ven if small contractor contributions would have been unlikely to influence state officials, those contributions could have still given rise to the appearance that contractors are able to exert improper influence on state officials"); *cf. Preston*, 660 F.3d at 736 (upholding North Carolina's ban on lobbyists' contributions because it rested on "a legitimate legislative judgment" that "a complete ban was necessary as a prophylactic to prevent not only actual corruption but also the appearance of corruption in future state political campaigns").

Second, the contracting context also greatly sharpens the risk of interference with merit-based public administration. Because a contractor's need for government contracts is generally more focused than a member of the general public's need for other official acts, his or her susceptibility to coercion is concomitantly greater. And coercing a contractor to

contribute, even if limited by a contribution ceiling, is still coercion.

In sum, we conclude that a flat prohibition is closely drawn to the important goals that § 30119 serves. *Cf. Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1672 (2015) ("Although the Court has held that contribution limits advance the interest in preventing *quid pro quo* corruption and its appearance in political elections, we have never held that adopting contribution limits precludes a State from pursuing its compelling interests through additional means.").

B

The plaintiffs also argue that § 30119 is overinclusive because it bans contributions not only to candidates for President and Congress, but also to political parties, which, "[u]nlike elected officials who might have the theoretical power to influence a contract, . . . plainly have no ability to affect the award of any contract." Pls. Br. 51. But the Democratic campaign book scandal of the 1930s gave Congress sufficient reason to target contributions to parties: it was the Democratic National Committee whose agents reportedly told government contractors that the continuation of their contracts hinged on their financial support of the party. *See* 84 CONG. REC. 9598-99 (1939). Indeed, the 1876 law concerning federal employees was also "aimed at the suppression of the practice which has prevailed among *party organizations* of soliciting contributions for *party*

purposes from their office-holding members, or exacting them by a moral coercion." *United States v. Curtis*, 12 F. 824, 838 (C.C.S.D.N.Y. 1882) (emphasis added). Likewise the Watergate Committee's report on the 1972 election included evidence that federal employees were pressured to contribute to the Republican Party. WATERGATE REPORT at 413. Nor did the role of contributions to political parties in influencing government employment wane as the 20th century progressed. *See, e.g.*, *Elrod*, 427 U.S. at 351-52 (1976); *Branti v. Finkel*, 445 U.S. 507, 510-11 (1980); *Rutan*, 497 U.S. at 66 (1990).

More recently, in upholding FECA's restrictions on soft-money contributions to political parties, the Supreme Court noted that "'[t]here is no meaningful separation between the national party committees and the public officials who control them.'" *McConnell*, 540 U.S. at 155 (quoting expert report cited in *McConnell v. FEC*, 251 F. Supp. 2d 176, 468-69 (D.D.C. 2003)). As a three-judge court in this district noted, "the [*McConnell*] Court suggested that federal officeholders and candidates may value contributions to *their national parties* – regardless of how those contributions ultimately may be used – in much the same way they value contributions to *their own campaigns*." *Republican Nat'l Comm.*, 698 F. Supp. 2d at 159, *summ. aff'd*, 561 U.S. 1040

(2010).[26] Congress did not sweep too broadly by designing § 30119 to address that fact.

C

In addition to those we have just considered, the plaintiffs propose a miscellany of further ways in which Congress could make § 30119 less restrictive. We address only the more substantial of these.

First, the plaintiffs propose that the ban should at least exclude sole-source contracts for experts like plaintiff Wagner, particularly when it is the government that initiates the contact, "because the requirements to enter them are sufficiently rigorous" to address the risk of corruption. Pls. Br. 53 n.9. But the plaintiffs do not explain what those requirements are, or why they provide the requisite assurances. *Cf.* KATE M. MANUEL, CONG. RESEARCH SERV., COMPETITION IN FEDERAL CONTRACTING: AN OVERVIEW OF THE LEGAL REQUIREMENTS 1 (2011) (noting "high-profile incidents of alleged misconduct by contractors or agency officials involving noncompetitive contracts"). Moreover, this argument appears contrary to the plaintiffs' principal contention, that it is the rise of competitive bidding – not the private placement of

[26] *See McConnell*, 540 U.S. at 155 (explaining that the "close connection and alignment of interests" between parties and federal officeholders are likely to create the risk of "actual or apparent" corruption); *Emily's List v. FEC*, 581 F.3d 1, 6 (D.C. Cir. 2009).

sole-source contracts – that has eliminated the risk of pay-to-play. *See supra* Part III.D.1. In any event, because Wagner's claims are moot, this argument need not detain us.

Second, the plaintiffs argue that § 30119 unnecessarily bars contractors from contributing to ideological PACs that, in turn, contribute to candidates. Whether or not this argument has merit,[27] it suffers from a similar problem: the one plaintiff whose claim is not moot lacks standing to challenge limitations on contributions to PACs. *See supra* Part I.

Third, the plaintiffs suggest that the statute would be more closely drawn if it applied only to large contracts, pointing out that Colorado and New York City enacted pay-to-play laws limited to contracts worth more than $100,000. *See* Pls. Br. 52-53. Although such a dollar limit would of course reduce the number of covered contractors, the plaintiffs do not explain why § 30119 is not closely drawn to the interests it serves in the absence of such a limit, or why a dollar limit would draw it more closely to those interests. Perhaps quid pro quos and coercion are more likely when larger contracts are involved because, since more money is at stake, the parties are

[27] The Supreme Court has upheld restrictions on contributions to multicandidate committees as a necessary means to avoid circumvention of other limits. *Cal. Med. Ass'n*, 453 U.S. at 197-99 (plurality opinion); *see id.* at 203 (Blackmun, J., concurring in part and concurring in the judgment); *Emily's List*, 581 F.3d at 11-12.

more willing to risk detection and prosecution. Or perhaps such abuses are just as likely when smaller contracts are involved because the relative value to the small contractor is high and the risk of detection is comparatively low. Because the plaintiffs have advanced no argument on this point, there is no need for us to speculate further. We do note, however, that the historical record provides support for legislative concern that corrupt and coercive patronage regimes can take root even when relatively small amounts of money are at stake. *See supra* Parts III.B.1-2, III.D.2., IV.A. And we also note again that a contribution ban need not be a perfect fit to be constitutional, *see McCutcheon*, 134 S. Ct. at 1456-57, and that courts give substantial deference to the government's predictions of harm concerning its own employees and contractors, *see Umbehr*, 518 U.S. at 676.

Finally, the plaintiffs maintain that Congress should have rested on the criminal statutes that directly ban quid pro quos and coercion,[28] rather than also banning political contributions. But the Supreme Court has repeatedly dispatched this argument. As *McConnell* explained, "[i]n *Buckley*, we expressly rejected the argument that antibribery laws provided a less restrictive alternative to FECA's contribution limits, noting that such laws 'deal[t] with only the

[28] *See, e.g.*, 18 U.S.C. § 201 (proscribing bribes and gratuities); *id.* § 601 (proscribing causing or attempting to cause persons to make political contributions by denying or threatening to deny them work in or for the federal government).

most blatant and specific attempts of those with money to influence governmental action.'" 540 U.S. at 143 (quoting *Buckley*, 424 U.S. at 28); *see Citizens United*, 558 U.S. at 356-57 (noting that, although quid pro quo arrangements "would be covered by bribery laws" if proven, the Court has viewed "restrictions on direct contributions a[s] preventative" and has sustained them "in order to ensure against the reality or appearance of corruption"). And what is true of the antibribery laws is equally true of the anticoercion provisions. *See Letter Carriers*, 413 U.S. at 566 ("It may be urged that prohibitions against coercion are sufficient protection; but for many years the joint judgment of the Executive and Congress has been that to protect the rights of federal employees with respect to their jobs and their political acts and beliefs it is not enough merely to forbid one employee to attempt to influence or coerce another.").

D

Because the operative question in the plaintiffs' overinclusiveness challenge is whether § 30119 avoids "unnecessary abridgment" of First Amendment rights, it is also important to consider how much the statute leaves untouched. Campaign contributions are banned, but other forms of political engagement are left entirely unrestricted. The plaintiffs are free to volunteer for candidates, parties, or political committees; to speak in their favor; and to host fundraisers and solicit contributions from others. *See* 52 U.S.C. § 30101(8)(B) (enumerating activities to which the

term "contribution" does not extend). And even the contribution ban itself is limited to the period between commencement of negotiations and completion of contract performance. *Id.* § 30119(a)(1).

The plaintiffs insist that the fact that the statute preserves other avenues of political communication is irrelevant to First Amendment analysis. Pls. Br. 61. But that argument is incorrect. As the Court recognized in *McCutcheon v. FEC*, "in the context of [upholding the] base contribution limits, *Buckley* observed that a supporter could vindicate his associational interests by personally volunteering his time and energy on behalf of a candidate." *McCutcheon*, 134 S. Ct. at 1449 (citing *Buckley*, 424 U.S. at 22, 28).[29] The availability of other avenues of political communication can thus be relevant, although it is of course not dispositive.

In *Blount v. SEC*, for example, this court upheld a rule restricting political contributions by municipal finance professionals to state and local officials from whom they hoped to secure underwriting contracts.

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[29] *See Buckley*, 424 U.S. at 22 (noting that FECA's contribution ceilings "limit one important means of associating with a candidate or committee, but leave the contributor free to become a member of any political association and to assist personally in the association's efforts on behalf of candidates"); *see also Williams-Yulee*, 135 S. Ct. at 1670 (upholding Florida's ban on solicitation of campaign funds by judicial candidates, emphasizing that the ban restricts only "a narrow slice of speech" because it "leaves judicial candidates free to discuss any issue with any person at any time").

61 F.3d 938. We found the rule to be "closely drawn," in part because it "restrict[ed] a narrow range of their activities for a relatively short period of time," and those subject to the rule were "not in any way restricted from engaging in the vast majority of political activities." *Id.* at 947-48. Similarly, the Fourth Circuit upheld a lobbyist contribution ban in part because it "serve[d] only as a channeling device, cutting off the avenue of association and expression that is most likely to lead to corruption but allowing numerous other avenues of association and expression." *Preston*, 660 F.3d at 734. So, too, here.

E

We conclude that the ban on contractor contributions is closely drawn to the government's interests in preventing corruption and its appearance, and in protecting against interference with merit-based administration. It strikes at the dangers Congress most feared while preserving contractors' freedom to engage in many other forms of political expression. We do not discount the possibility that Congress could have narrowed its aim even further, targeting only certain specific kinds of government contracting or doing so only during specific periods. But as the Court has made clear, "most problems arise in greater and lesser gradations, and the First Amendment does not confine a State to addressing evils in their most acute form." *Williams-Yulee*, 135 S. Ct. at 1671.

V

What we have said thus far establishes that § 30119's ban on contractor contributions serves sufficiently important interests and employs means closely drawn to avoid unnecessary abridgment of protected expression. The plaintiffs make one further First Amendment argument: not only is § 30119 *over* inclusive because it *restricts* too much speech, but it is also *under* inclusive because it *permits* too much speech. That is, it fails to ban contributions by three categories of individuals or entities that might implicate the same interests.

The first category proffered for comparison by the plaintiffs consists of entities and individuals associated with firms that have government contracts: PACs established by contracting corporations; officers, employees, and shareholders of contracting corporations; and individuals who control limited liability companies (LLCs) that contract with the federal government. The second category is composed of federal employees. The final category comprises individuals who seek other government benefits or positions, particularly grants and loans, admission to the military academies, and ambassadorships.[30]

[30] The plaintiffs' opening brief proffers only the third category as an example of First Amendment underinclusiveness, discussing the first two as part of their equal protection challenge. Pls. Br. 23, 55-59. In their reply brief, the plaintiffs identify all three categories as supporting their First Amendment

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We begin with some general principles relevant to evaluating a claim that a statute violates the First Amendment because it is "underinclusive." To put it most bluntly: "The First Amendment does not require the government to curtail as much speech as may conceivably serve its goals." *Blount*, 61 F.3d at 946. Or, as the Supreme Court recently said in *Williams-Yulee v. Florida Bar*, in which it upheld, under strict scrutiny, Florida's ban on solicitation of campaign funds by judicial candidates:

> [T]he First Amendment imposes no free-standing "underinclusiveness limitation." A State need not address all aspects of a problem in one fell swoop; policymakers may focus on their most pressing concerns. We have accordingly upheld laws – even under strict scrutiny – that conceivably could have restricted even greater amounts of speech in service of their stated interests.

135 S. Ct. at 1668 (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 387 (1992)). Of course, in the instant case we do not apply strict scrutiny, but rather the more forgiving "closely drawn" standard. And a statute that does not go as far as it might to cut off campaign contributions can hardly be said to constitute an "unnecessary abridgment" of the freedom to make such contributions, *McCutcheon*, 134 S. Ct. at 1444.

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argument. Reply Br. 26-28. Because the issues are intertwined, *see infra* Part VI, we consider all three categories here.

This is not to say that underinclusiveness plays no role in First Amendment analysis. As the Court explained in *Williams-Yulee*, a law's underinclusiveness raises "a red flag" that may indicate a different kind of problem. 135 S. Ct. at 1668. For example, it may raise "'doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.'" *Id.* (quoting *Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2740 (2011)). The "textbook illustration of that principle," the Court explained, is the *Lukumi Babalu Aye* case, in which it struck down a city's ban on ritual animal sacrifices because the city's failure to ban secular killings indicated that the ban's object was not (as it asserted) animal welfare but rather the suppression of particular religious beliefs. *Williams-Yulee*, 135 S. Ct. at 1668 (citing *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 543-47 (1993)).[31] Indeed, underinclusiveness may call into question whether "the proffered state interest

[31] *See also City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994) (noting that "a regulation of speech may be impermissibly *underinclusive*" if it represents an attempt "to give one side of a debatable public question an advantage in expressing its views to the people," or "to select the permissible subjects for public debate and thereby to control . . . the search for political truth" (internal quotation marks omitted)); *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 793 (1978) (finding an underinclusiveness problem where "[t]he fact that a particular kind of ballot question [was] singled out for special treatment . . . suggest[ed] . . . that the legislature may have been concerned with silencing corporations on a particular subject").

actually underlies the law," *Blount*, 61 F.3d at 938 (internal quotation marks omitted), even when the true interest is not invidious. *See Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002) (finding a restriction on speech by judicial candidates "so woefully underinclusive as to render belief in [its asserted] purpose a challenge to the credulous").[32]

But the plaintiffs do not challenge § 30119 on these grounds. They do not contend, for example, that Congress' true interest was to favor corporate affiliates, federal employees, or government grantees over individual contractors, *see* Oral Arg. Recording 18:20-19:03, which would require us to undertake closer analysis of the basis for such disparate treatment. To the contrary, they agree that the interests that motivated and have sustained § 30119 are the anti-corruption goals the government invokes today. *See id.* 22:05-45. Moreover, it is plain that the statute "applies evenhandedly to all [government contractors], regardless of their viewpoint," *Williams-Yulee*, 135 S. Ct. at 1668, and regardless of their form of

[32] *See also Citizens United*, 558 U.S. at 362 (concluding that, "if Congress had been seeking to protect dissenting shareholders" as the government claimed, it would not have banned corporate speech "in only certain media" for only a specific period before an election); *Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989) (invalidating statute barring publication of victims' identities in part because its "facial underinclusiveness . . . raises serious doubts about whether Florida is, in fact, serving, with this statute, the significant interests which [it] invokes in support of affirmance").

organization, *see* 52 U.S.C. § 30119(a)(1) (barring the "person" who enters into the contract from making the contribution); *id.* § 30101(11) (defining "person" to "include[ ] an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons"). And nothing in the statute's history even hints at any purpose to disfavor individual contractors as against the categories proffered by the plaintiffs.

In *Williams-Yulee*, the Court noted that "[u]nderinclusiveness can also reveal that a law does not actually advance a compelling interest." 135 S. Ct. at 1668. *See also Blount*, 61 F.3d at 946 (noting that a rule may be "struck for *under* inclusiveness . . . if it cannot 'fairly be said to advance any genuinely substantial governmental interest'" (quoting *FCC v. League of Women Voters*, 468 U.S. 364, 396 (1984))). As an example of that kind of case, the Court cited the facts of *Smith v. Daily Mail*, where the Court struck down a state statute banning newspapers from disclosing the names of juvenile defendants because, inter alia, the statutory purpose – protecting the anonymity of juvenile offenders – was entirely vitiated by the statute's failure to bar electronic media from making the same disclosures. *Williams-Yulee*, 135 S. Ct. at 1668 (citing *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 104-105 (1979)).[33] But here, the

[33] *Cf. Reed v. Town of Gilbert*, No. 13-502, 2015 WL 2473374, at *11 (U.S. June 18, 2015) (holding that a town's content-based sign regulation failed strict scrutiny because

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record reflects that § 30119 does advance, albeit imperfectly, the government's important interests in protecting against quid pro quo corruption and its appearance, and in protecting merit-based public administration.

With these general principles in mind, we now briefly examine each of the categories of underinclusiveness to which the plaintiffs draw our attention.

A

The plaintiffs' first category includes entities and individuals associated with corporations that have government contracts. Like the plaintiffs, corporations that contract with federal agencies cannot make contributions in federal elections. *See* 52 U.S.C. §§ 30119(a), 30101(11).[34] At the same time, it is true

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"[t]he Town cannot claim that placing strict limits on temporary directional signs is necessary to beautify the Town while at the same time allowing unlimited numbers of other types of signs that create the same problem"); *Sanjour v. EPA*, 56 F.3d 85, 95 (D.C. Cir. 1995) (en banc) ("Because the government has . . . not even attempted to regulate a broad category of behavior . . . giving rise to precisely the harm that supposedly motivated it to adopt the [challenged] regulations, we have trouble taking the government's avowed interest to heart.").

[34] The ban on corporate contractor contributions is a consequence not only of § 30119, but also of 52 U.S.C. § 30118, which bans contributions by any corporation in a federal election. *See Beaumont*, 539 U.S. 146 (upholding the ban on corporate contributions).

that corporate contractors (like other corporations) are permitted to form PACs – separate segregated funds that can make campaign contributions with non-treasury funds solicited from shareholders, certain personnel, and their families. *See* 52 U.S.C. § 30119(b); *id.* § 30118(b). Officers, employees, and shareholders of corporate contractors are also free to make direct contributions "from their personal assets." 11 C.F.R. § 115.6. And it may be that individuals who control LLCs that contract with the federal government can make contributions as well. But none of these allowances fatally undermines the statutory regime.

1. A corporation is a separate legal entity from a PAC. *See Citizens United*, 558 U.S. at 337; *Mass. Citizens for Life*, 479 U.S. at 252-56. As a consequence, the Supreme Court has said that the political expression of a PAC is not equivalent to that of its associated corporation. *See Citizens United*, 558 U.S. at 337 ("A PAC is a separate association from the corporation. So the PAC exemption from [FECA's] expenditure ban does not allow corporations to speak." (citation omitted)). Congress' decision to permit contributions by PACs associated with contracting corporations is therefore not inconsistent with its decision to prohibit contributions by contractors themselves.

In *Williams-Yulee*, the Court considered a similar underinclusiveness challenge to Florida's ban on personal solicitation of campaign funds by judicial candidates. That ban "allow[ed] a judge's campaign

committee to solicit money," which the petitioner argued "reduces public confidence in the integrity of the judiciary just as much as a judge's personal solicitation." 135 S. Ct. at 1668. The Court was not moved. "However similar the two solicitations may be in substance," the Court said, "a State may conclude that they present markedly different appearances to the public. Florida's choice to allow solicitation by campaign committees does not undermine its decision to ban solicitation by judges." *Id.* at 1669. The same can be said of Congress' choice to permit contributions by political committees associated with corporate contractors, while banning contributions by contractors themselves.

2. Respecting the corporate form, and therefore according separate treatment to shareholders and other individuals associated with corporations, is also constitutional. In *Blount*, we considered and rejected a similar underinclusiveness challenge to the SEC's pay-to-play rule, which, while restricting contributions by municipal securities professionals, did not extend the restriction to the chief executives of banks with municipal securities departments. "[A] regulation is not fatally underinclusive," we said, "simply because an alternative regulation, which would restrict *more* speech or the speech of *more* people, could be more effective." *Blount*, 61 F.3d at 946.

In upholding the SEC's rule, *Blount* also noted the SEC's explanation that this "loophole," like others in the rule, reflected the Commission's sensitivity to First Amendment concerns about overinclusiveness.

Id. at 947. Here, too, Congress could reasonably have concluded that banning contributions by all those associated with corporate contractors would go too far at too great a First Amendment cost.

3. The plaintiffs further argue that, while they contract directly with the federal government for their services and so are barred from making contributions, they or other individuals could instead establish an LLC to formally contract with the government and receive payment for their work. Then, because the FEC has ruled that the contractor contribution ban does not apply to an entity's "employees, officers, or members," 11 C.F.R. § 115.6, the plaintiffs maintain that such individuals would remain free to make contributions. The availability of this LLC loophole, they say, vitiates the statutory purpose.

Although the FEC's briefs accepted the plaintiffs' description of the regulatory treatment of individuals who establish LLCs, the agency submitted a post-argument letter clarifying that the Commission itself "has not addressed the application of FECA's contractor contribution prohibition to contributions made by an individual who is the sole member of an LLC that is a federal contractor." FEC Post-Argument Letter at 6 (Nov. 24, 2014) (emphasis omitted).[35] Perhaps for

[35] The statute, of course, does not mention LLCs, which first emerged in the late 1970s. *See* Treatment of Limited Liability Companies Under the Federal Election Campaign Act, 64 Fed. Reg. 37397, 37398 (July 12, 1999).

that reason, there is no evidence in the record that anyone has ever used an LLC as a loophole to permit him or her to make an individual campaign contribution.[36]

The plaintiffs' own evidence highlights the not insignificant costs involved in both establishing and operating as an LLC. *See* Tiemann Decl. ¶ 3, *cited in* D. Ct. Findings ¶ 19. Moreover, at oral argument, plaintiffs' counsel acknowledged that "persons like Mr. Miller and Mr. Brown almost certainly could not have [contracted] through [an] LLC" – both because the agency may not have allowed it, and because of the "substantial sacrifice" they would have incurred by forgoing various benefits that come with employment-like contracts. Oral Arg. Recording 23:13-58. In short, in the absence of any evidence of circumvention-by-LLC, the failure to plug this speculative loophole is hardly a basis for invalidating the statute. *Cf. Williams-Yulee*, 135 S. Ct. at 1670 ("Even under strict scrutiny, '[t]he First Amendment does not require States to regulate for problems that do not exist.'" (quoting *Burson*, 504 U.S. at 207)).

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[36] One witness opined that, at least with respect to consulting-type contracts, client agencies are indifferent between contracting with an LLC and contracting with an individual. *See* Schooner Decl. ¶ 8, *cited in* D. Ct. Findings ¶ 20. The witness did not say how many such arrangements there are, or that any individuals using LLCs had actually made campaign contributions. *Id.*; *see also* Lubbers Decl. ¶ 8, *cited in* D. Ct. Findings ¶ 20.

B

The second category proffered by the plaintiffs as evidence of § 30119's underinclusiveness is composed of federal employees who, unlike federal contractors, are generally not barred from making campaign contributions. *See* 5 C.F.R. § 734.208(a). As with the other categories, there is no ground for concluding that Congress chose to invidiously discriminate against contractors in favor of employees. And while federal employees are permitted to make contributions, they are subject to other restrictions (pursuant to the Hatch Act) and enjoy other protections (pursuant to the Civil Service Reform Act) that do not apply to contractors.[37]

Congress could reasonably have thought that the difference in status of the two kinds of workers

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[37] The Hatch Act bars most federal employees from, inter alia, soliciting or accepting political contributions, running for office in a partisan election, hosting a political fundraiser, or engaging in political activity while on duty or in a federal building. *See* 5 U.S.C. §§ 7323(a), 7324(a); 5 C.F.R. §§ 734.302-.306. Employees of more than a dozen specific agencies, as well as others who hold certain senior or adjudicative positions, are more broadly prohibited from "tak[ing] an active part in . . . political campaigns." 5 U.S.C. § 7323(b)(2)(A). Under the Civil Service Reform Act, covered employees are protected against "prohibited personnel practices," including discrimination on the basis of political affiliation and coercion to make political contributions. 5 U.S.C. § 2302(a)(1), (b)(1)(E), (b)(3). Aggrieved employees who have been subjected to such practices can seek redress through the Office of Special Counsel and the Merit Systems Protection Board. 5 U.S.C. §§ 1214-15, 1221.

warrants this difference in treatment. Because regular employees do not generally need new contracts or renewals with the frequency required by outside contractors, permitting them to make contributions carries less risk of corruption or its appearance: employees have less to gain from making contributions and less to lose from not making them.[38] It is true, as the plaintiffs note, that employees have other concerns that could make them susceptible to coercion, including the desire for promotion or the fear of termination. But Congress has provided them with merit system protections that guard against that risk. *See supra* note 37. We see no basis for overturning Congress' decision about how to calibrate these different restrictions.[39]

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[38] *Cf.* 86 CONG. REC. 2580 (1940) (statement of Sen. Brown) ("[T]he Government clerk, *if he is not under civil service*, is interested in keeping in power the party that is in power and that gave him a job. . . . I can apply the same principle. . . . to contractors who are doing business with the Government of the United States." (emphasis added)).

[39] *Cf. Broadrick v. Oklahoma*, 413 U.S. 601, 607 n.5 (1973) (rejecting equal protection challenge to Oklahoma statute "singling out classified service employees for restrictions on partisan political expression while leaving unclassified personnel free from such restrictions" because "the legislature must have some leeway in determining which of its employment positions require restrictions on partisan political activities and which may be left unregulated").

C

Finally, the plaintiffs' comparison of contractors to a miscellany of other individuals who seek government benefits or positions – particularly grants and loans, admission to the military academies, and ambassadorships – is equally unavailing. Once again, there is no basis for a claim that Congress invidiously discriminated against contractors and in favor of others. Nor is there any reason to believe that permitting contributions by these other individuals defeats § 30119's purpose of protecting against corruption and interference with merit-based administration. Congress is surely not prohibited from fighting such problems in one sector unless it fights them in all. As the Supreme Court has said, "'a legislature need not strike at all evils at the same time.'" *Buckley*, 424 U.S. at 105 (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 657 (1966)). Rather, "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Id.* (internal quotation marks and citations omitted); *see Williams-Yulee*, 135 S. Ct. at 1668.

D

We conclude that the contractor contribution ban is not fatally underinclusive. There is no doubt that "the proffered state interest actually underlies the law," and that it can "fairly be said" that the statute "advance[s] a[ ] genuinely substantial governmental

interest." *Blount*, 61 F.3d at 946 (citations and internal quotation marks omitted). The plaintiffs may well be right that the ban would be even more effective if it swept in more potential contributors. But § 30119 "aims squarely at the conduct most likely to undermine" the important interests that underlie it, and "[w]e will not punish [Congress] for leaving open more, rather than fewer, avenues of expression, especially when there is no indication that the selective restriction of speech reflects a pretextual motive." *Williams-Yulee*, 135 S. Ct. at 1668-70.

Accordingly, and in light of the analysis of the preceding Parts, we reject the plaintiffs' First Amendment challenge.

VI

In addition to their First Amendment claim, the plaintiffs challenge § 30119 under the equal protection component of the Fifth Amendment. Equal protection is violated, they maintain, because the statute subjects individual contractors like themselves to a ban that it does not apply to two categories of similarly situated persons: (1) entities and individuals associated with firms that have government contracts (i.e., PACs of contracting corporations; officers, employees, and shareholders of contracting corporations; and individuals who control contracting LLCs); and (2) individuals who are regular employees rather than contractors.

If this argument sounds familiar, it should. It is the same argument that we have just considered, and rejected, when clothed in the garb of a First Amendment claim that § 30119 is too underinclusive to satisfy the "closely drawn" standard.[40] Now dressing their argument as an equal protection claim, the plaintiffs insist that we must evaluate it under strict scrutiny. That is so, they say, because "the right to make a political contribution is a fundamental right protected by the First Amendment," and because "strict scrutiny is required when a law . . . 'impinges upon a fundamental right explicitly or implicitly protected by the Constitution.'" Pls. Br. 25 (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973)).

We reject this doctrinal gambit, which would require strict scrutiny notwithstanding the Supreme Court's determination that the "closely drawn" standard is the appropriate one under the First Amendment. Although the Court has on occasion applied strict scrutiny in examining equal protection challenges in cases involving First Amendment rights, it has done so only when a First Amendment analysis would itself have required such scrutiny.[41] There is

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[40] As noted above, the plaintiffs' underinclusiveness argument included a third category as well: individuals seeking a miscellany of other government benefits or positions. *See supra* note 30.

[41] *See Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 655, 666 (1990) (applying strict scrutiny in determining whether restrictions on *independent expenditures* by corporations but not

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consequently no case in which the Supreme Court has employed strict scrutiny to analyze a contribution restriction under equal protection principles. Indeed, the plaintiffs acknowledge that they know of no case in *any* court "in which an equal-protection challenge to contribution limits succeeded where a First Amendment one did not." *Wagner*, 901 F. Supp. 2d at 112. This will not be the first.

As we explained in *Ruggiero v. FCC*, "[a]lthough equal protection analysis focuses upon the validity of the classification rather than the speech restriction, 'the critical questions asked are the same.' We believe that the same level of scrutiny . . . is therefore appropriate in both contexts." 317 F.3d 239, 247 (D.C. Cir. 2003) (en banc) (quoting *Cmty.-Serv. Broad. of Mid-Am., Inc. v. FCC*, 593 F.2d 1102 (D.C. Cir. 1978) (en banc)).[42] That has been this court's consistent view. *See, e.g.*, *Int'l Ass'n of Machinists v. FEC*, 678 F.2d 1092, 1106 (D.C. Cir. 1982) (en banc) (observing that "the nature and quality of the legislative action at issue determine the intensity of judicial review of intertwined equal protection, First Amendment claims"); *see also Reform Party of Allegheny Cnty. v. Allegheny Cnty. Dep't of Elections*, 174 F.3d 305, 314 (3d Cir. 1999) (en banc).

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unincorporated associations passed muster under the Equal Protection Clause), *overruled on other grounds by Citizens United*, 558 U.S. at 365.

[42] In *Ruggiero*, that level of scrutiny was "heightened rational basis." 317 F.3d at 247.

It is certainly true that the Court "has occasionally fused the First Amendment into the Equal Protection Clause" in concluding that "content-based discrimination" is not a legitimate government interest because it "violates the First Amendment." *R.A.V.*, 505 U.S. at 384 n.4.[43] And it is likewise true that the Court has sometimes examined campaign finance classifications to determine whether they are invidious in the context of a First Amendment analysis, *see Williams-Yulee*, 135 S. Ct. at 1668-70, and sometimes in the context of an equal protection analysis, *see Buckley*, 424 U.S. at 31-33, 105 & n.143. But in a case like this one, in which there is no doubt that the interests invoked in support of the challenged legislative classification are legitimate, and no doubt that the classification was designed to vindicate those interests rather than disfavor a particular speaker or viewpoint, the challengers "can fare no better under the Equal Protection Clause than under the First Amendment itself." *City of Renton v. Playtime*

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[43] *See City of Ladue*, 512 U.S. at 51 n.9 (observing that regulatory distinctions based on the content of speech "may fall afoul of the Equal Protection Clause"); *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972) (observing that "the equal protection claim . . . is closely intertwined with First Amendment interests" when a classification discriminates on the basis of the content of speech); *see also Carey v. Brown*, 447 U.S. 455, 463 n.7 (1980) (describing *Mosley* as a "pronouncement that the First and Fourteenth Amendments forbid *discrimination* in the regulation of expression on the basis of the content of that expression" (emphasis added)).

Theatres, Inc., 475 U.S. 41, 55 n.4 (1986).[44] For the reasons discussed in the preceding Parts, when we apply the same degree of scrutiny to the plaintiffs' equal protection challenge, we find it wanting.

VII

As should by now be clear, this is a somewhat unusual campaign finance case in at least two respects. First, there is no dispute regarding the legitimacy or importance of the interests that support the contractor contribution ban. In § 30119, Congress was plainly not attempting "to reduce the amount of money in politics, or to restrict the political participation of some in order to enhance the relative influence of others." *McCutcheon*, 134 S. Ct. at 1441 (citing, e.g., *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2825-26 (2011)). Nor did it create a mechanism "to level the playing field, or to level electoral opportunities, or to equaliz[e] the financial resources of candidates." *Id.* at 1450 (internal quotation marks omitted). Nor did it "'disfavor[ ] a particular speaker or viewpoint,'" *Williams-Yulee*, 135 S. Ct. at 1668 (quoting *Brown*, 131 S. Ct. at 2740), or favor incumbents over challengers, *cf. Randall v. Sorrell*, 548 U.S. 230, 249, 253 (2006)

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[44] *Cf. Blount*, 61 F.3d at 946 & n.4 (concluding that the invalidity of an equal protection challenge to the SEC's pay-to-play rule followed a fortiori from the court's rejection of the claim that the rule violated the First Amendment as impermissibly underinclusive).

(plurality opinion). To the contrary, the interests supporting the statute are ones that the Supreme Court has long approved – indeed, endorsed – as legitimate and important grounds for restricting campaign contributions and certain related associational freedoms.

Second, the contractor contribution ban rests on not one but two such interests. The ban is not only supported by the "compelling" interest in protecting against quid pro quo corruption and its appearance, *McCutcheon*, 134 S. Ct. at 1444-45, commonly at issue in campaign finance cases. It is also supported by the "obviously important interest[ ]" in protecting merit-based public administration, *Letter Carriers*, 413 U.S. at 564, commonly at issue in cases involving limits on partisan activities by government employees.

The long historical experience recounted in Part III further makes clear that these important concerns supporting § 30119 are neither theoretical nor antiquated, but rather are grounded in unhappy experience stretching to the present day. And for the reasons set forth in Parts IV through VI, we also conclude that the statute employs means closely drawn to avoid unnecessary abridgement of associational freedoms, and does not deprive the plaintiffs of equal protection of the laws. Accordingly, we uphold the statute against all of the plaintiffs' constitutional challenges.

So ordered.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

CERTIFICATION ORDER

Three federal contractors brought this action seeking a declaration that the Federal Election Campaign Act's prohibition on individual contractors' political contributions, *see* 2 U.S.C. § 441c(a)(1), is unconstitutional. After this Court granted summary judgment to the Federal Election Commission, *see Wagner v. FEC*, 901 F. Supp. 2d 101 (D.D.C. 2012), Plaintiffs appealed. The Court of Appeals determined that, under 2 U.S.C. § 437h, only the *en banc* D.C. Circuit has jurisdiction to decide Plaintiffs' constitutional claims. *See Wagner v. FEC*, ___ F.3d ___, 2013 WL 2361005, at *8 (D.C. Cir. May 31, 2013). The district court's role is simply to find facts and certify the constitutional questions to the *en banc* Court of Appeals. *Id*.

On Friday, May 31, accordingly, the Court of Appeals issued an Opinion remanding this case to this Court "to make appropriate findings of fact, as

necessary, and to certify those facts and the constitutional questions to the *en banc* court of appeals within five days." *Id*. Bearing this accelerated timetable in mind, this Court that same day held a conference call with the parties, in which it required them to submit by Monday, June 3, any facts to which they could stipulate or, if they were unable to do so, separate proposed findings of fact. The parties apparently could not agree and ultimately submitted four pleadings on June 3-4: Plaintiffs' Proposed Certification as to Constitutional Questions Presented and Facts (ECF No. 46), FEC Filing Regarding Constitutional Questions Presented and Proposed Findings of Facts (ECF No. 47), Plaintiffs' Response to Defendant's Proposed Facts Dated June 3, 2013 (ECF No. 48), and Defendant FEC's Reply to Plaintiffs' Filing Regarding Proposed Findings of Fact (ECF No. 50). Adhering to the deadline of June 5, the Court now complies with the mandate of the Court of Appeals.

As the Court of Appeals panel explained, § 437h assigns three tasks to this Court:

> First, it must develop a record for appellate review by making findings of fact. *See Bread Political Action Comm. v. FEC*, 455 U.S. 577, 580 (1982) (*Bread PAC*); *Buckley v. Valeo*, 519 F.2d 817, 818-19 (D.C. Cir. 1975) (en banc) (per curiam). Second, the district court must determine whether the constitutional challenges are frivolous or involve settled legal questions. *See Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 192 n.14 (1981) (*CalMed*); *Khachaturian v. FEC*, 980 F.2d 330, 331 (5th

> Cir. 1992) (en banc) (per curiam); *Goland v. United States*, 903 F.2d 1247, 1257 (9th Cir. 1990). Finally, the district court must immediately certify the record and all nonfrivolous constitutional questions to the *en banc* court of appeals. *See CalMed*, 453 U.S. at 192 n.14; *see also Mariani v. United States*, 212 F.3d 761, 769 (3d Cir. 2000) (en banc).

2013 WL 2361005, at *1. Before the final certification, the first two tasks (reversed below for ease of consideration) each demand brief discussion.

This Court must first "determine whether the constitutional challenges are frivolous or involve settled legal questions." Certainly the legal questions remain unsettled – indeed, the Supreme Court and D.C. Circuit have yet to face these constitutional issues. Nor, despite the FEC's protests, are the challenges frivolous. Even under a heightened standard for frivolousness, the *en banc* Third Circuit has said that "a genuinely new variation on an issue raised under a particular section of the FECA that already has been challenged and upheld may give rise to a nonfrivolous challenge to that section." *Mariani*, 212 F.3d at 769. Far beyond variations, this case presents two constitutional challenges to a section of FECA that so far has evaded all appellate review, even though it imposes "one of the harshest contribution restrictions in the U.S. Code." *Wagner*, 901 F. Supp. 2d at 103.

Second, the parties disagree about the scope of the "findings of facts" that the Court should be making. Plaintiffs wish the Court to limit its findings to facts about the parties and contracting generally, *see* Plaintiff's Proposed Certification at 2-11, while the FEC submits over 100 additional proposed paragraphs of facts, including "facts" about corruption contained in legislative history, reported cases, legal treatises, congressional testimony, and media reports. *See* FEC Filing at 11-55. In a recent § 437h case, Judge James Robertson explained the difficulty with the FEC's approach:

> Most of the [parties'] proposed findings, and nearly all of the supporting material, centered on the question of whether or not the challenged provisions are necessary to ward off corruption – or the appearance of corruption – in federal elections. To my mind, the facts needed to answer that question are the kind of "facts" that legislatures find. They are not the kind of facts that can be determined in a judicial forum on the basis of a cold paper record full of hearsay and opinion.

Speechnow.org v. FEC, No. 08-cv-248, 2009 WL 3101036, at *1 (D.D.C. Sept. 28, 2008). Similarly, the "facts" needed for appellate review here are the adjudicative facts particular to this case, not the legislative facts relevant to the parties' legal positions. *See* Advisory Committee Notes to Fed. R. Evid. 201(a) ("Adjudicative facts are simply the facts of the particular case. Legislative facts, on the other hand, are those which have relevance to legal reasoning and

the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body."); Kenneth Culp Davis, *Judicial Notice*, 55 Colum. L. Rev. 945, 952-59 (1955) (explaining distinction).

The Court, therefore, will limit its findings to facts about Plaintiffs, their particular circumstances, and some background about the federal contracting process. Such a determination does not prejudice the FEC inasmuch as it may still cite public documents discussing corruption – *e.g.*, legislative history, legal treatises, or media reports – in its appellate briefing. The Court's findings of fact appear in Section II, *infra*, following the certified constitutional questions in Section I.

I. Constitutional Questions for Appeal

The Court certifies the following two constitutional questions to the *en banc* Court of Appeals for the D.C. Circuit:

1. Does 2 U.S.C. § 441c(a)(1), which prohibits any person holding a federal contract from making a contribution in connection with a federal election, violate the First Amendment?

2. Does 2 U.S.C. § 441c(a)(1) violate the Fifth Amendment's equal-protection guarantee as applied to individual contractors?

II. Findings of Fact

The Court makes the following findings of fact:[1]

1. Plaintiffs Wendy Wagner, Lawrence Brown, and Jan Miller are individuals who currently have contracts with federal agencies under which they are providing personal services to an agency and for which payments are made from funds appropriated by Congress. Decl. of Wendy E. Wagner, ¶ 3, J.A. 50-51; Decl. of Lawrence M.E. Brown, ¶¶ 4-5, J.A. 55; Decl. of Jan W. Miller, ¶¶ 4-5, J.A. 64-66.

2. Each Plaintiff has, prior to becoming a government contractor, made contributions to candidates for federal office, political parties, or political committees in connection with elections for federal offices, either individually or jointly with his or her spouse. Wagner Decl., ¶ 6, J.A. 52-53; Brown Decl., ¶ 6, J.A. 55; Miller Decl., ¶ 7, J.A. 66-67. Each Plaintiff desires to make contributions in connection with future federal elections, but is barred from doing so by section 441c and will not do so unless it is lawful. Wagner Decl., ¶ 6, J.A. 52-53; Brown Decl., ¶¶ 6-8, J.A. 55-56; Miller Decl., ¶ 7, J.A. 66-67.

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[1] Other than references to Plaintiffs' lengthy contracts, all citations refer to the Joint Appendix (J.A.) that was filed in the appeal in No. 12-5365. Citations to the contracts refer to Plaintiffs' Appendix ("Appx.") to their Motion for Summary Judgment filed in this Court (ECF 30), giving page numbers from the ECF document.

3. Each Plaintiff is a registered voter and was eligible to vote in federal elections in 2012. Wagner Decl., ¶ 6, J.A. 52-53; Supp. Decl. of Wendy E. Wagner, ¶ 2, J.A. 80; Brown Decl., ¶ 1, J.A. 54; Supp. Decl. of Lawrence M.E. Brown, ¶ 1, J.A. 83; Miller Decl., ¶ 1, J.A. 64.

4. The contracts under which Plaintiffs are performing personal services for their agencies were negotiated and signed by officials of those agencies. None of those officials were elected to their positions. There is no evidence in the record that the President, the Vice President, any Member of Congress, or any official of any political party or political committee had any role in the negotiation, approval, or implementation of the contracts under which Plaintiffs are performing personal services for their federal agencies. Wagner Decl., ¶ 3, J.A. 50-51; Brown Decl., ¶ 5, J.A. 55; Miller Decl., ¶ 6, J.A. 66.

5. Plaintiff Wagner is a law professor who entered a contract with the Administrative Conference of the United States, which began in March 2011 and was scheduled to end in April 2012. Wagner Decl., ¶¶ 2-3, J.A. 50-51. She was required to write a report on the intersection of science and regulation, but the contract term is not considered complete until ACUS discusses and accepts her report. *Id*., ¶ 3, J.A. 51. Her contract has been continued so that the agency may discuss her study. Second Supp. Decl. of Wendy E. Wagner, ¶ 2, J.A. 81-82. ACUS is scheduled to discuss and take action on the recommendation that was based on her study on June 13-14, 2013.

58th Plenary Session, Admin. Conf. of the U.S., http://acus.gov/meetings-and-events/plenary-meeting/58th-plenary-session (last visited June 4, 2013). Although Wagner currently has no other federal contracts, she anticipates having future contracts because of her area of expertise. Wagner Decl., ¶ 4, J.A. 51.

6. Wagner was approached about conducting her study by Jonathan Siegel, then Research Director of ACUS. Before signing her contract, she discussed it with ACUS Chairman Paul Verkuil, who was appointed to his position by President Obama and was confirmed by the United States Senate. Initially, ACUS had no budget for this study, and Wagner agreed to work for $1. After ACUS obtained its budget from funds appropriated by Congress, her contract was amended to increase her pay to $12,000, plus up to $4,000 for travel and research assistance expenses. *Id*., ¶ 3, J.A. 50-51.

7. Plaintiff 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 optional extensions, as a human resources adviser with the United States Agency for International Development, by which he had been previously employed. That contract began in October 2011 and has a total estimated contract cost (for five years) of $865,698. Brown has held personal services contracts with USAID since October 2006. Brown Decl., ¶¶ 2-5, J.A. 54-55; Brown Contract, Appx. 113-14; Brown Resp. to FEC Requests for Admission ("RFA"), ¶¶ 12-14, J.A. 91.

8. Plaintiff Miller is an attorney who, after retiring from USAID in 2003 and while collecting a government pension, negotiated and signed a two-year contract as an annuitant-consultant. After that, Miller negotiated and executed a 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, not a contractor for, the Peace Corps. Miller Decl., ¶¶ 2-5, J.A. 64-66; Miller Contract, Appx. 212; Miller Resp. to FEC RFA, ¶¶ 12-14, J.A. 97.

9. Along with Plaintiffs, evidence in this case comes from three other declarants. Steven Schooner is a professor of government procurement law and the Co-Director of the Government Procurement Law Program at George Washington University Law School and has previously entered federal contracts. Decl. of Steven L. Schooner, ¶¶ 1, 3, J.A. 72-73. Jeffrey Lubbers was the Research Director of ACUS for 13 years and now serves as a special consultant there. Decl. of Jeffrey S. Lubbers, ¶ 2, J.A. 68-69. Jonathan Tiemann is the president of an LLC that holds a contract with the Department of Labor. Decl. of Jonathan Tiemann, ¶¶ 1, 4-5, J.A. 76-78.

10. Government personal services contracts are of three main types: (i) contracts held by corporations that provide individuals who perform services for an agency, (ii) contracts held by individuals to perform services on a regular basis for an agency, and

(iii) contracts held by individuals or limited liability companies set up by individuals to perform specific tasks for an agency. Schooner Decl., ¶¶ 5-7, J.A. 73-74. The first and third categories are basically distinguished by the "size and complexity" of the services being provided. Dep. of Steven L. Schooner at 105, J.A. 210.

11. Plaintiffs Brown and Miller appear to have the second type of contract described by Schooner. Schooner Decl., ¶ 6, J.A. 74. This category includes retired annuitants whose federal agencies have authority to hire them back. Schooner Dep. at 85-86, J.A. 205. 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, J.A. 206; Schooner Decl., ¶ 6, J.A. 74. Retired FBI agents, who are regularly hired to do background checks for persons needing security clearances, are in the same category of contractors. Schooner Dep. at 65-66, 88, J.A. 200, 205.

12. The contract forms for Brown and Miller 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 individual to withholding for both FICA and federal income tax. The individual is not an employee for purposes of laws administered by the Office of Personnel Management, such as Title 5 of

the U.S. Code. Brown Contracts, Appx. 64, 107; Miller Contracts, Appx. 152, 205. Title 5 includes the statutory protections afforded to federal employees by the Merit Systems Protection Board, 5 U.S.C. §§ 1201-1209.

13. Plaintiffs Brown and Miller work directly with employees of their agencies and perform the same kinds of services that employees perform. Brown Decl., ¶ 4, J.A. 55; Miller Decl., ¶ 6, J.A. 66.

14. Wagner's contract with ACUS appears to be the third type of contract described by Professor Schooner, under which 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. Federal agencies regularly enter into contracts with both individuals and corporations, including LLCs that are essentially one-person entities that have been incorporated. Schooner Decl., ¶¶ 3, 7-8, J.A. 73-75.

15. Plaintiffs Wagner, Brown, and Miller negotiated the terms of their current contracts with their federal agencies. Wagner Resp. to FEC RFA, ¶ 11, J.A. 86; Brown Resp. to FEC RFA, ¶ 11, J.A. 91; Miller Resp. to FEC RFA, ¶ 11, J.A. 97.

16. 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, as required by her contract. Wagner Resp. to FEC RFA,

¶¶ 14-15, J.A. 87; Wagner Contract, Appx. 51. Plaintiffs Brown and Miller have also both had interactions with at least one political appointee in the course of performing their current contracts. Brown Resp. to FEC RFA, ¶ 18, J.A. 92; Miller Resp. to FEC RFA, ¶ 18, J.A. 98.

17. Wagner's contract provides that ACUS has property rights over all materials produced under the performance of her contract and that the ACUS chairman or contracting officer has the authority to control and deny the publication of the final report. Wagner Contract, Appx. 53. When Lubbers was Research Director, ACUS rarely if ever denied permission to publish. Lubbers Decl., ¶ 4, J.A. 69.

18. The ACUS Council, which serves as an unpaid governing board, is comprised of a chairman and ten other members all appointed by the President. No more than five of them may be officials within the executive branch of government. The Research Director, a staff attorney, and, in some cases, the Chairman review the draft reports of contractors. *Id*., ¶¶ 3, 5, J.A. 69-70.

19. If a Plaintiff established an LLC or other similar corporate entity, and if the Plaintiff's agency were willing to have its contract be with the Plaintiffs LLC and not with the Plaintiff individually, only the LLC would remain subject to section 441c. There are costs involved in establishing and maintaining an LLC, which include the fee charged by the state for incorporation, fees charged by lawyers or others (if

any) to do the incorporation, annual fees paid to the state for retaining the corporate license, fees charged by accountants or others (if any) to prepare the tax returns for the LLC, and any taxes that the LLC might owe in addition to the taxes owed by the owner of the LLC. The one-time fee for establishing an LLC in Maryland is $141, and it can be accomplished using a one-page form. Md. Dep't of Assessments & Taxation, *Articles of Organization for Limited Liability Company Form and Instructions*, *available at* http://www.dat.state.md.us/sdatweb/artorgan.pdf. When Tiemann established an LLC in California, he paid a filing fee of $70 to the state. Tiemann Decl., ¶ 3, J.A. 76-77.

20. In Professor Schooner's experience, federal agencies are generally indifferent to whether a contract to provide services to the agency is with the individual who will perform such services or with his or her LLC, provided it is clear that the individual will provide the services requested. Schooner Decl., ¶ 8, J.A. 75; Schooner Dep. at 118-19, J.A. 213. It is "very common" to have a large corporation, a small business, and an individual compete against each other for a contract, he says, and "[a]s a general rule the government as consumer doesn't care" which one it hires. Schooner Dep. at 106, J.A. 210. An attorney from the Department of Labor once told Tiemann that it made no difference to the Department whether he entered his contract personally or as president of his LLC. Tiemann Decl., ¶ 5, J.A. 78. 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., ¶ 8, J.A. 71.

21. Professor Schooner believes that, in most years, the Government awards more money in grants than in contracts. Schooner Dep. at 38-39, J.A. 193. Federal loans and loan guarantees include loans and guarantees for homes given by the VA and FHA, as well as "small business" and "economic injury disaster loans" that can be as large as $2 million. *Housing Loans*, GovLoans.gov. http://www.govloans.gov/loans/type/6 (last visited June 4, 2013); *Loan Details: 7(a) Small Business Loan*, GovLoans.gov. http://www.govloans.gov/loans/loandetails/1497 (last visited June 4, 2013); *Loan Details: Economic Injury Disaster Loans*, GovLoans.gov. http://www.govloans.gov/loans/loan-details/1504 (last visited June 4, 2013). Plaintiff Wagner has a grant of $45,721 from the National Science Foundation, Wagner Decl., ¶ 4, J.A. 51-52, but that does not bar her from making political contributions.

22. According to Professor Schooner, the trend over the last two decades "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 36, J.A. 192. He says that "there 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, J.A. 192.

23. The federal employees tasked with awarding contracts are known as "contracting officers." *Id*. at 24, J.A. 189. These contracting officers are specially trained for their positions, and their decisions are supposed to be made independently, insulated from political pressure. *Id*. at 24, 51-60, 92-98, 109-17, 134-37, J.A. 189, 196-98, 206-08, 211-13, 217-18. In carrying out their contracting responsibilities, contracting officers utilize the expertise and information supplied by the agency officials for whom the services will be performed, who are not elected officials, to determine the needs of the agency. *Id*. at 110-16, J.A. 211-12. Although not the "common scenario," this input into contracting decisions may sometimes be provided by political appointees. *Id*. at 115, J.A. 212.

24. Normal competitive bidding procedures for contracts may be bypassed in some cases. Professor Schooner describes "a fundamental group of core exemptions," which includes "the classic public interest and national security exemptions." *Id*. at 27-28, J.A. 190. Other exemptions apply when "there is an industry where prices are set by law or regulation" and when an agency awards a contract to an expert witness or an ADR mediator. *Id*. at 24-30, J.A. 188-91. The agencies contracting with Wagner, Tiemann, and Schooner initiated the contact, and at least Schooner had no prior knowledge that he was being considered for a contract. Wagner Decl., ¶ 13, J.A. 50-51; Tiemann, ¶ 4, J.A. 77; Schooner Dep. at 130-32, J.A.

216. Professor Schooner's understanding is that most contracts in the second category he described – contracts held by individuals to perform services on a regular basis for an agency – "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, J.A. 206. The award and performance of these contracts is not evaluated by a contracting officer. *Id*. at 104, J.A. 209. Furthermore, "there are many types of smaller contracts that have very flexible award authorities." *Id*. at 108, J.A. 210. Contracts up to $150,000 (or higher in some instances) fall under the Simplified Acquisition Threshold, which allows "streamlined competitions, where the government can call two or three people on the phone and operate in a very informal manner." *Id*. at 107-08, J.A. 210. Plaintiff Wagner 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, Appx. 50.

25. Despite the precautions in the procurement process to insulate contracting decisions from political pressure, Professor Schooner says it is not uncommon for dissatisfied contractors or potential contractors to allege that they were mistreated due to political influence, although such mistreatment is rarely proven. Schooner Dep. at 59, J.A. 198. Officials of political parties have been "sanctioned, punished,

prosecuted and sent to jail for attempting to [influence the award of a contract]." *Id*. at 138, J.A. 218.

26. The normal benefits that accompany federal employment are not typically given to contractors: "[A]s 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. . . ." *Id*. at 75, J.A. 202.

27. According to Schooner, "government 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 others. *Id*. at 40, J.A. 193.

28. Contractors working for the federal government are often required to have e-mail addresses and badges that distinguish them from employees, and they can even be required to answer the telephone in a different manner. *Id*. at 73-74, J.A. 202.

III. Conclusion

The Court, therefore, ORDERS that the above constitutional questions and findings of fact are hereby CERTIFIED to the *en banc* Court of Appeals for the District of Columbia Circuit.

IT IS SO ORDERED.

/s/ James E. Boasberg
JAMES E. BOASBERG
United States District Judge

Date: June 5, 2013

STATUTE INVOLVED

52 U.S.C. § 30119. Contributions by government contractors

(a) Prohibition

It shall be unlawful for any person –

(1) who enters into any contract with the United States or any department or agency thereof either for the rendition of personal services or furnishing any material, supplies, or equipment to the United States or any department or agency thereof or for selling any land or building 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, land, or building is to be made in whole or in part from funds appropriated by the Congress, at any time between the commencement of negotiations for and the later of (A) the completion of performance under; or (B) the termination of negotiations for, such contract or furnishing of material, supplies, equipment, land, or buildings, 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; or

(2) knowingly to solicit any such contribution from any such person for any such purpose during any such period.

(b) Separate segregated funds

This section does not prohibit or make unlawful the establishment or administration of, or the solicitation of contributions to, any separate segregated fund by any corporation, labor organization, membership organization, cooperative, or corporation without capital stock for the purpose of influencing the nomination for election, or election, of any person to Federal office, unless the provisions of *section 30118* of this title prohibit or make unlawful the establishment or administration of, or the solicitation of contributions to, such fund. Each specific prohibition, allowance, and duty applicable to a corporation, labor organization, or separate segregated fund under *section 30118* of this title applies to a corporation, labor organization, or separate segregated fund to which this subsection applies.

(c) "Labor organization" defined

For purposes of this section, the term "labor organization" has the meaning given it by *section 30118(b)(1)* of this title.