ORAL ARGUMENT SCHEDULED SEPTEMBER 30, 2013

No. 13-5162

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WENDY E. WAGNER, *et al.*,
Plaintiffs,

v.

FEDERAL ELECTION COMMISSION,
Defendant.

On Certification from the United States District Court for the District of Columbia, Case No. 1:11-cv08841 JEB

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

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

(A) ***Parties and Amici***. Wendy E. Wagner, Lawrence M. E. Brown, and Jan W. Miller are the plaintiffs in this Court. The Federal Election Commission (FEC) is the defendant in this Court.

The Campaign Legal Center and Democracy 21 filed a brief as *amici curiae* in the district court; the Campaign Legal Center and Democracy 21, joined by Public Citizen, are now filing a brief as *amici curiae* in this Court supporting the defendant. In addition, the Cato Institute and the Center for Competitive Politics have filed a brief as *amici curiae* in support of the plaintiffs in this Court.

(B) ***Rulings Under Review***. This case is before this Court for *en banc* hearing pursuant to 2 U.S.C. § 437h, based on the unreported certification order of United States District Judge James E. Boasberg that was entered on June 5, 2013. It is included in the Joint Appendix (J.A.) at 345-357.

(C) ***Related Cases***. This case was before this Court in No. 12-5365. On May 31, 2013, the Court vacated the rulings below and remanded the case to be certified pursuant to 2 U.S.C. § 437h. J.A. 243-262, 2013 WL 2361005. The *amici* are aware of no "related cases" as defined in D.C. Cir. R. 28(a)(1)(C).

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CORPORATE DISCLOSURE STATEMENT OF *AMICI CURIAE* CAMPAIGN LEGAL CENTER, DEMOCRACY 21 AND PUBLIC CITIZEN

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

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

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STATEMENT OF INTEREST[1]

Amici curiae Campaign Legal Center, Democracy 21 and Public Citizen are nonprofit organizations that work to strengthen the laws governing campaign finance. *Amici* have participated in several of the Supreme Court cases underlying the claims herein, including *McConnell v. FEC*, 540 U.S. 93 (2003), and *Citizens United v. FEC*, 558 U.S. 310 (2010). *Amici* have a demonstrated interest in the issues raised here.

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

INTRODUCTION & SUMMARY OF ARGUMENT

In 1940, Congress enacted a restriction on campaign contributions from persons and entities contracting with the federal government in response to corruption in federal contracting, most notably the "Democratic campaign book" scandal. *See, e.g.*, J.A. 232. Plaintiffs Wagner, *et al.* (the "Wagner contractors") make no arguments that would justify the invalidation of this 70-year old statute.

The Wagner contractors object that Section 441c is unsupported by any current evidence of corruption in federal contracting, that it is both overbroad and underinclusive, and that it violates principles of equal protection. In this Brief,

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

amici curiae will focus on the Wagner contractors' arguments about the evidence of corruption and the statute's tailoring.

Amici will not separately analyze the equal protection argument because it duplicates plaintiffs' First Amendment argument, and as plaintiffs admitted below, they "kn[o]w of no case in which an equal-protection challenge to contribution limits succeeded where a First Amendment one did not." J.A. 240. *See also Ill. Liberty PAC v. Madigan*, 902 F. Supp. 2d 1113, 1126 (N.D. Ill. 2012) (noting that "it makes no difference whether a challenge to the disparate treatment of speakers or speech is framed under the First Amendment or the Equal Protection Clause") (collecting cases). Indeed, the only apparent reason for the inclusion of an equal protection claim is the Wagner contractors' desire for the application of a higher level of scrutiny than the "closely drawn" review that has been consistently applied in challenges to contribution limits. But "[i]f that goal could be accomplished simply by switching [their] analysis from the First Amendment to the Equal Protection Clause," surely this "course" would have been accepted in past campaign finance challenges. *Id.* at 1125.

In support of their First Amendment challenge, plaintiffs assert that there is no current evidence of federal officeholders steering government contracts to their contributors, suggesting that the record of corruption here is inferior to the evidence that led to the enactment of recent state contractor contribution

restrictions. Brief for Plaintiffs ("Wagner Br.") 47-48. But their complaint rings hollow, because this allegedly "[in]defensible" absence of evidence is proof of the statute's success, not its infirmity. Given that the federal ban has been in place for over 70 years, it has effectively prevented the very corruption that the Wagner contractors claim is lacking—a point they concede. *Id*. at 47. Moreover, insofar as instances of recent corruption would aid the consideration of this challenge, this Court can look to the experience of numerous states and municipalities that have enacted pay-to-play laws. *See Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 391 (2000) (sustaining state contribution limits in part based on the record of apparent corruption in federal elections that led to enactment of federal limits). A survey of state law illustrates the ubiquity of contracting scandals at all levels of government and confirms that the corruption concerns that attend contributions by government contractors are well-founded.

Second, the Wagner contractors devote much of their argument to challenging the tailoring of section 441c, listing various defects that supposedly render the law both overbroad and underinclusive, and attacking details from the law's coverage of "sole source" contracts to its exclusion of military academy students. Wagner Br. 50-60. Indeed, the Wagner contractors' brief reads more like a policy paper than a constitutional argument. Their objections to the minutiae

of the statute, however, are more appropriately directed to Congress than to a court.

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

ARGUMENT

I. A Review of State and Local Laws Demonstrates That Legislatures Nationwide Have Recognized the Potential for Corruption Posed by Campaign Contributions by Government Contractors.

The prevalence of state and municipal pay-to-play laws, many passed in direct response to scandals involving quid pro quo exchanges, demonstrates that campaign activity by contractors and prospective contractors is widely and reasonably perceived to pose a threat of political corruption.

A. State and Local Laws Limiting Government Contractor Contributions Reflect a Shared Interest in Safeguarding the Integrity of Government Contracting.

In recent years, a growing number of states and localities have taken steps to limit the role of political contributions in government contracting. At least seventeen states have enacted limits or prohibitions on campaign contributions from prospective and/or current government contractors or licensees.[2] A number

[2] Cal. Gov't Code § 84308(d); Conn. Gen. Stat. § 9-612(f)(1)-(2); Haw. Rev. Stat. § 11-355; 30 Ill. Comp. Stat. 500/50-37; Ind. Code §§ 4-30-3-19.5 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.

of municipalities, including New York City and Los Angeles, have followed suit.[3] Two more states, Maryland and Rhode Island, have political disclosure requirements specific to contractors.[4]

Pay-to-play laws vary greatly from one jurisdiction to the next. Some statutes apply to a broad range of contracts and cover grants, licenses and other individualized state benefits,[5] while others are targeted to particular types of contracts. States variously define the subject class of contracts as, *inter alia*,

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Code § 3517.13(I) to (Z); 53 Pa. Cons. 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 (amended by Va. Acts 2013, Ch. 583 (eff. July 1, 2014)); W. Va. Code § 3-8-12(d).

[3] N.Y.C. Admin. Code §§ 3-702(18), 3-703(1-a) to (1-b); L.A., Cal., City Charter § 470(c)(12).

[4] *See* Md. Code, Elec. Law §§ 14-101 to 14-108 (amended by 2013 Md. Laws, Ch. 419 (eff. Jan. 1, 2015)); R.I. Gen. Laws §§ 17-27-2 to -3. Several of the states that restrict contractor campaign contributions also require contractors to file disclosure reports. *See, e.g.*, 25 Pa. Cons. Stat. § 3260a(a).

[5] *See, e.g.*, N.Y.C. Admin. Code § 3-702(18) (defining "business dealings with the city" to include contracts, real property transactions with the City, franchises, concessions, grants, pension fund investment contracts, economic development agreements, and land use actions); Cal. Gov't Code § 84308(a)(5) (defining covered entitlements as "business, professional, trade and land use licenses and permits and all other entitlements for use, . . . and all franchises").

industry-specific contracts,[6] contracts not subject to competitive bidding,[7] or both competitive and no-bid contracts.[8]

Many states' laws cover contracts for personal services, such as the consulting contracts of appellants Brown and Miller, although there is some variation: a few state statutes regulate specific subgroups of contracts or licenses that do not include contracts for personal services,[9] but most either define "contracts" broadly enough to include service contracts,[10] or explicitly cover contracts for "services" or "personal services."[11]

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6 *See, e.g.*, Ind. Code §§ 4-30-3-19.5 to -19.7 (state lottery contracts); La. Rev. Stat. Ann. § 27:261 (casino licensees); Neb. Rev. Stat. §§ 9-835, 49-1476.01(1) (state lottery contracts).

7 *See, e.g.*, Cal. Gov't Code § 84308(a)(5); Ky. Rev. Stat. Ann. § 121.330; S.C. Code Ann. § 8-13-1342; Va. Code Ann. § 2.2-3104.01. *See also* Mun. Sec. Rulemaking Bd. rule G-37.

8 *See, e.g.*, Conn. Gen. Stat. § 9-612(f)(1)(C); Haw. Rev. Stat. § 11-355(a); 30 Ill. Comp. Stat. 500/50-37(a) (excluding highway projects eligible for federal funds); N.J. Stat. Ann. § 19:44A-20.13, *et seq.* (excluding federal highway projects and those involving eminent domain); N.M. Stat. Ann. § 13-1-191.1; Ohio Rev. Code Ann. § 3517.093(A)(4); W. Va. Code Ann. § 3-8-12.

9 *See, e.g.*, Cal. Gov't Code § 84308(a)(5).

10 *See, e.g.*, Ky. Rev. Stat. Ann. § 121.330(2); S.C. Code Ann. § 8-13-1342.

11 *See* Conn. Gen. Stat. § 9-612(f)(1)(C)-(E), (f)(2); Haw. Rev. Stat. § 11-355(a); Ind. Code § 4-30-3-19.7(e), (f), (j); N.J. Stat. Ann. § 19:44A-20.14; *see also* N.J. Admin. Code §§ 19:25-24.1 to -24.2; W.Va. Code Ann. § 3-8-12(d). *See also* N.Y.C. Admin. Code §§ 3-702(18), 3-703(1-a).

B. Enactment of State Contractor Contribution Regulations Is Often Prompted by Instances of Quid Pro Quo Corruption in Contracting.

As was true of section 441c when it was enacted in 1940, state and municipal pay-to-play laws have frequently been enacted in response to scandals involving attempts by contractors to purchase influence over procurement processes by making or soliciting campaign contributions.

For instance, Illinois' government-contractor contribution ban was enacted in the wake of repeated pay-to-play scandals. While serving as Illinois' Secretary of State in the 1990s, Governor George Ryan steered leases and contracts to businesses controlled by an associate in exchange for kickbacks, including financial support for Ryan's successful 1998 gubernatorial campaign. *United States v. Warner*, 498 F.3d 666, 675 (7th Cir. 2007). He was ultimately convicted of 18 felony charges including racketeering and fraud. *Id.* In the wake of Ryan's conviction and other pay-to-play abuses, Illinois legislators enacted a state-contractor contribution ban, *see* 2008 Ill. Pub. Act No. 95-971 (Sept. 28, 2008), over the fervent opposition of Ryan's successor, then-Governor Rod Blagojevich. According to testimony at Blagojevich's first trial, after his veto failed, Blagojevich sought to raise as much money from state contractors as possible before the law's January 1, 2009 effective date. Mike McIntire & Jeff Zeleny, *Obama's Effort on Ethics Bill Had Role in Governor's Fall*, N.Y. Times, Dec. 9,

2008,

http://www.nytimes.com/2008/12/10/us/politics/10chicago.html?pagewanted=all. Federal agents were tipped off to the Governor's redoubled fundraising efforts, and their ensuing wiretap recorded his most spectacular feat of "pay-to-play"—his attempt to sell the U.S. Senate seat being vacated by President-elect Obama. *Id.*

Passage of New Jersey's contractor contribution ban in 2005 also followed contractor corruption scandals. *See* N.J. Pub. L. 2005, c. 51. One of the largest involved the award of an almost $400 million contract to Parsons Infrastructure & Technology Group to privatize automobile inspections. Although the contract was required to be awarded through a competitive bidding process, Parsons was the sole bidder. *See* N.J. Comm'n of Investigation, N.J. Enhanced Motor Vehicle Inspection Contract, at 1-2 (2002), http://www.state.nj.us/sci/pdf/mvinspect.pdf. The system broke down weeks after its launch—with cost overruns exceeding $200 million—prompting an investigation that revealed how Parsons had used a "political strategy," including lobbying and campaign support, to obtain the contract. *Id.* This "political strategy" enabled Parsons to receive exclusive information from senior officials prior to the publication of the state's Request for Proposals, giving it "a head start on the deployment of corporate resources for a bid submission." *Id.* at 3-4. The investigation concluded that the bidding process

had been "tainted at key intervals by political considerations and by the granting of favored treatment." *Id.* at 3.

These examples represent only a fraction of the pay-to-play scandals that have arisen in government contracting, as also documented by the FEC. *See* J.A. 149-163. And arguments that the contracting systems in Illinois, New Jersey and other states are different from the federal system, *see, e.g.*, Wagner Br. 47, miss the point. Although state and federal procurement processes undoubtedly differ, the prevalence of quid pro quo schemes at the state and local levels demonstrates that concerns about the corruptive potential of campaign activity by government contractors are legitimate and grounded in experience. In light of abundant examples of pay-to-play behavior, "[i]t in no way stretches the imagination to envision that individuals might make campaign contributions to curry political favor," as the district court concluded when the parties initially presented the merits of this case to it for decision. J.A. 35.

C. Courts Have Widely Held That Restricting Government Contractor Contributions Is an Appropriate Defense Against Actual and Apparent Corruption.

Given the ubiquity of pay-to-play practices, it is unsurprising that the courts have generally approved state restrictions on contractor contributions.

In *Green Party of Connecticut v. Garfield*, 616 F.3d 189 (2d Cir. 2010), the Second Circuit upheld a Connecticut law banning contributions from state

contractors. Unlike section 441c, the law applied not just to the contracting individual or entity, but also to certain "principals" and immediate family members of contractors. *Id.* at 202. Observing that the federal law is more limited in scope, the court nevertheless found that Connecticut had a valid anti-corruption interest in its expansive ban: "[T]he dangers of corruption associated with contractor contributions are so significant . . . that the General Assembly should be afforded leeway in its efforts to curb contractors' influence on state lawmakers." *Id.* at 203.

A subsequent Second Circuit decision also recognized that special restrictions on state contractors were justified by the government interest in preventing the actuality and appearance of corruption. In *Ognibene v. Parkes*, 671 F.3d 174 (2nd Cir. 2011), the Court upheld a New York City provision imposing additional limitations on campaign contributions by entities "doing business" with the City. Noting the series of pay-to-play scandals in New York City preceding enactment of the law, the Court found that there was "no doubt that [contractor] contributions have a negative impact on the public because they promote the perception that one must 'pay to play.'" *Id.* at 179.

Similarly, a district court in Hawaii recently upheld that state's broad ban on contractor contributions. *Yamada v. Weaver*, 872 F. Supp. 2d 1023 (D. Haw. 2012), *appeal docketed*, No. 12-15913 (9th Cir. Apr. 20, 2012). The Hawaii law prohibits all contractors, regardless of the amount of their contracts, from making

contributions to candidate and non-candidate committees. Haw. Rev. Stat. § 11-355. The court upheld the ban based on the government's interest in preventing corruption, finding that "[t]he legislative history of [the law] confirms that Hawaii's Legislature passed the government contractor contribution ban in large part precisely because of these concerns—prevention of both actual corruption and its appearance." 872 F. Supp. at 1049; *see also id.* at n.27 (recounting corruption scandals that preceded law).

State courts have likewise sustained strict contractor contribution limits. *See In Re Earle Asphalt Co.*, 950 A.2d 918, 325 (N.J. Super. App. Div. 2008) ("In sum, the State's interest in insulating the negotiation and award of State contracts from political contributions that pose the risk of improper influence, . . . or the appearance thereof, is a sufficiently important interest to justify a [$300] limitation upon political contributions.") (internal citations and quotations omitted), *aff'd*, 966 A.2d 460 (N.J. 2009) (per curiam). Relatedly, state courts have also upheld a range of contribution restrictions applicable to certain highly regulated industries deemed to pose a heightened threat of political corruption. *See, e.g., Casino Ass'n of La. v. State ex rel. Foster*, 820 So.2d 494 (La. 2002) (upholding state law prohibiting any political contributions from officers, directors, and certain employees in the casino industry, and their spouses); *Soto v. New Jersey*, 565 A.2d 1088 (N.J. 1989) (upholding prohibition on casino-industry contributions); *Schiller*

Park Colonial Inn, Inc. v. Berz, 349 N.E.2d 61 (Ill. 1976) (upholding law prohibiting political contributions from any officer, associate, agent, representative, or employee of a liquor licensee).

The Wagner contractors' reliance on *Dallman v. Ritter*, 225 P.3d 610 (Colo. 2010), is misplaced. *See* Wagner Br. 52-53. That decision, which invalidated a Colorado law banning contractor contributions, is readily distinguishable from this case. Indeed, the Colorado Supreme Court specifically distinguished the federal ban as far less burdensome than the state restriction, because the state law applied to the contracting entity as well as to a broadly defined class of family members;[12] remained in effect from the beginning of negotiations until two years *after* the contract's completion; and imposed harsh penalties for violations. 225 P.3d at 617 (noting that violators were ineligible to hold state office or state contracts for three years). While the Wagner contractors correctly point out that the Colorado law only applied to sole-source contracts valued above a $100,000 threshold, *see* Wagner Br. 53, that fact hardly renders it less restrictive than section 441c. Given

[12] The Colorado law defined "immediate family member" as "any spouse, child, spouse's child, son-in-law, daughter-in-law, parent, sibling, grandparent, grandchild, stepbrother, stepsister, stepparent, parent-in-law, brother-in-law, sister-in-law, aunt, niece, nephew, guardian, or domestic partner." *Dallman*, 225 P.3d at 618.

the expansive scope of the Colorado law, *Dallman* provides scant support for the Wagner contractors' constitutional arguments.[13]

II. The Federal Contractor Contribution Ban Is Constitutional.

A. Strict Scrutiny Does Not Apply.

"Closely drawn" scrutiny, rather than strict scrutiny, applies to the Wagner contractors' First Amendment claims. J.A. 29-30, 228. The Supreme Court held in *FEC v. Beaumont*, 539 U.S. 146, 162 (2003), that a law regulating contributions is subject to "closely drawn" scrutiny, regardless of whether it takes the form of a limit or a ban. And all lower courts to have considered this issue following *Citizens United* have rejected the Wagner contractors' contention that *Citizens United* cast doubt on *Beaumont*'s analysis of the scrutiny applicable to a contribution ban. *See, e.g., United States v. Danielczyk*, 683 F.3d 611, 618-19 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 1459 (Feb. 25, 2013).

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[13] Only a handful of other cases have invalidated pay-to-play laws, and they were decided on grounds not relevant to this case. *See, e.g.*, *Lavin v. Husted*, 684 F.3d 543, 547-48 (6th Cir. 2012) (striking down law criminalizing contributions from state Medicaid providers to Attorney General and county prosecutor candidates, after state conceded a lack of evidence from Ohio or elsewhere linking campaign contributions to abuse of prosecutorial discretion); *DePaul v. Commonwealth*, 969 A.2d 536 (Pa. 2009) (invalidating restriction on gaming licensee contributions under Pennsylvania Constitution, but finding that state Constitution "provides broader protections of expression than the related First Amendment guarantee"); *United Auto Workers, Local Union 1112 v. Brunner*, 911 N.E. 2d 327 (Ohio Ct. App. 2009) (invalidating amendments to Ohio contractor contribution limits on the basis of a procedural deficiency with the law's enactment, and not under the First Amendment).

In addition to their demand for strict scrutiny, plaintiffs argue that judicial deference to Congress' judgment in matters of campaign finance is incompatible with even a more relaxed standard of scrutiny. *See* Wagner Br. 10-11. But they are wrong. In applying "closely drawn" scrutiny, the Supreme Court has consistently given deference to Congress' expertise in regulating political contributions. *McConnell*, 540 U.S. at 137 ("The less rigorous standard of review we have applied to contribution limits (*Buckley*'s 'closely drawn' scrutiny) shows proper deference to Congress' ability to weigh competing constitutional interests in an area in which it enjoys particular expertise."); *Beaumont*, 539 U.S. at 155 ("[W]e have understood that such deference to legislative choice is warranted particularly when Congress regulates campaign contributions . . ."); *Buckley v. Valeo*, 424 U.S. 1, 30 (1976) (noting that "a court has no scalpel to probe" details of contribution limits formulated by Congress).

Indeed, the nature of the Wagner contractors' attack on section 441c underscores the appropriateness of according deference to the legislature. To support their overbreadth claim, the Wagner contractors suggest a laundry list of revisions to section 441c that they believe will narrow the law without undermining its pay-to-play rationale. *See* Wagner Br. 51-55; *see also* J.A. 236-38. They recommend, *inter alia*, that Congress should exempt both "sole source" and competitively bid contracts, Wagner Br. 53 n.9, establish a minimum amount

for regulated contracts, *id.* at 52, and substitute a contribution restriction with a disqualification protocol, *id.* at 46 n.7. But their list of proposed reforms simply underscores that the details of formulating contribution restrictions are best left to Congress. "[Q]uestions such as whether to apply the ban only to non-bid contractors or only large contractors, whether to allow small contributions or allow no contributions, or whether principals of contractors may contribute, are all legislative choices." *Yamada*, 872 F. Supp. 2d. at 1062. A court need not apply "rational basis review" to recognize that politicians might have a particular expertise in matters of political fundraising. "Closely drawn scrutiny" is consistent with deference to Congress' judgment regarding campaign contributions.

B. Section 441c Advances the Important Government Interest in Preventing Actual and Apparent Corruption in Federal Contracting.

In its submissions to the district court, *see, e.g.*, J.A. 139-143, the FEC documented that the ban now found at 2 U.S.C. § 441c was enacted more than 70 years ago to respond to corruption in the federal contracting process, specifically the Democratic "campaign book scandal." As the district court aptly stated in its now-vacated summary judgment ruling, the prohibition on contributions from federal contractors serves the important state interest in "protect[ing] the integrity of the electoral system by ensuring that federal contracts [are] awarded based on merit." J.A. 31; *see also FEC v. Weinstein*, 462 F. Supp. 243, 248 (D.C.N.Y.

1978) (approving section 441c and noting that "the importance of the governmental interest" in preventing electoral corruption "through the creation of political debts" had "never been doubted").

The Wagner contractors do not deny that the government's interest in preventing actual and apparent corruption in contracting is compelling, nor do they deny that current evidence of such corruption at the federal level "is unlikely to exist" given that contractors have been barred from making contributions for more than 70 years. Wagner Br. 47. Still, appellants maintain that the lack of recent scandals involving "otherwise lawful contributions" made in exchange for federal contracts proves that section 441c is unnecessary today. *Id*. But the state and municipal experience demonstrates that evidence of modern-day corruption in contracting is plentiful and concerns about pay-to-play politics have not diminished the federal ban was enacted. And as the Supreme Court recognized in *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431, 457 (2001), the "difficulty of mustering evidence to support long-enforced statutes" does not render those statutes obsolete or invalid.[14] The limited record of recent

[14] To support their claim that section 441c has been rendered obsolete by "sea-changes" in federal contracting, plaintiffs' attempt to draw a parallel between this case and the Supreme Court's recent decision in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013). Wagner Br. 48-50. Their efforts to import federal voting rights law into the unrelated realm of campaign finance, however, are unavailing. In *Shelby County*, the Court found that the Voting Rights Act's preclearance formula imposed "federalism costs" that outweighed the scope of congressional power

corruption involving federal contractors thus does not suggest that the contribution ban is unnecessary, but rather that the ban is working.

Even if political quid pro quos were to occur only occasionally in contracting, however, the Supreme Court has allowed legislatures to take a prophylactic approach when political corruption is "neither easily detected nor practical to criminalize." *McConnell*, 540 U.S. at 153. In light of contractor scandals across the country and the enactment of pay-to-play statutes in at least 20 states and municipalities, "the suggestion that those seeking federal contracts might 'pay to play' is hardly novel or implausible," J.A. 35 (citing *Shrink Missouri*, 528 U.S. at 391), and a prophylactic approach is thus permissible here. *See also Blount v. SEC*, 61 F.3d 938, 945 (D.C. Cir. 1995) ("[N]o smoking gun is needed where, as here, the conflict of interest is apparent, the likelihood of stealth great, and the legislative purpose prophylactic.").

Furthermore, at least as important as preventing actual corruption connected to federal contracting is avoiding the appearance of corruption. *See Buckley*, 424 U.S. at 27. Recognizing the importance of this interest, the Second Circuit observed in *Ognibene* that recurrent pay-to-play scandals had "created a climate of distrust that feeds the already-established public perception of corruption." 671

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under the Fifteenth Amendment. 133 S. Ct. at 2621, 2629. Appellants do not explain how the equal sovereignty and Fifteenth Amendment considerations at issue in *Shelby County* are at all applicable to the validity of section 441c, a federal law targeting federal-level corruption.

F.3d at 191 n.15. It was therefore "not necessary to produce evidence of actual corruption to demonstrate the sufficiently important interest in preventing the appearance of corruption." *Id.* at 183 (emphasis added). Similarly, as the Second Circuit emphasized in *Garfield*, "widespread media coverage of Connecticut's recent corruption scandals" created a "manifest need to curtail the appearance of corruption created by contractor contributions." 616 F.3d at 200 (emphasis added). Thus, multiple courts have reiterated that limiting contractor contributions also combats the public perception that public business is for sale to private interests.

C. Section 441c Is Closely Drawn to Advance the Government's Anti-Corruption Interest.

By confining its limitations to a particular group of individuals and entities with a heightened financial interest in government contracting, while leaving open other forms of political expression, the federal ban is tailored to restrict the campaign contributions that Congress deemed likeliest to engender actual or apparent corruption. Far from being fatally overbroad, section 441c is merely 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 v. Leake,* 660 F.3d 726, 734 (4th Cir. 2011).

1. *Section 441c's Application to Contributions to Federal Candidates, Party Committees and Political Action Committees Serves Important Anti-Corruption Interests.*

Despite acknowledging that "agencies are headed by persons appointed by the President with the advice and consent of the Senate," the Wagner contractors assert that "there is no role [in awarding federal contracts] for any elected official to whom contributions might be made." Wagner Br. 44. Consequently, they conclude that "the connection between any contributions that plaintiffs might make and the awarding of federal contracts is too remote to pass First Amendment scrutiny." Wagner Br. 3.

But there is no impermeable boundary between agencies, on the one hand, and elected officeholders and presidential appointees, on the other. Agency officials are enormously dependent on legislators and presidential appointees, whether for appropriations, favorable appointments, employment benefits or other less tangible rewards. *See, e.g.*, J.A. 356-57 ¶ 25 (describing how contracting decisions can be susceptible to political pressure despite the formal precautions meant to insulate the process from such influence).

Elected officeholders and executive branch officials operate in a political culture with significant professional and social overlap, so even identifying all persons who have the political capital to influence a contract's award or oversight

is beyond a court's expertise. The *Yamada* court explained some of the many ways that elected officials may affect the contracting process:

> The Legislature routinely holds informational and oversight hearings. Legislators . . . represent constituents and the public in an appropriate role overseeing administration of State contracts and utilization of appropriated funds—they might criticize, scrutinize, or support contractor performance. . . . Legislators make decisions and hold power over large infrastructure projects, sometimes involving hundreds of millions of dollars, where government contractors stand to benefit. And Legislators may have power over, or close friendships with, the government employees or others who *do* award or manage [state] contracts.

872 F. Supp. 2d at 1061. *Yamada* went on to note that it would not make sense for the court to narrow Hawaii's broad ban on contractor contributions because the court lacked knowledge as to "which Legislators have 'control' over all types of contractual matters (whether large or small, be they for general electrical work or for a non-bid research study of a particular issue)." *Id.* at 1062. The *Yamada* court rightly recognized that determining which officials have influence over the contracting process lies in the expertise of the legislature, and that attempting to answer this question is fundamentally unsuited to the judicial role.

The Wagner contractors claim that "in most of the litigated [state law] cases," the contractor contribution ban applied only "to persons actually involved in the contracting process," pointing to the Connecticut law upheld in *Garfield.* Wagner Br. 47. But most of the statutes upheld in recent case law were *not* so

limited. *See, e.g.*, *Ognibene*, 671 F.3d at 179-80 (noting that pay-to-play restrictions applied to candidates for all City offices); *Yamada*, 872 F. Supp. 2d at 1035 (Hawaii contractor restriction applied to contributions to any "candidate committee or noncandidate committee"). Further, although the Connecticut ban is "branch-specific"—i.e., it bans only contributions to officials in the government branch with oversight authority over a particular contract—it is hardly targeted at only those public officials with direct oversight over contracting, as plaintiffs demand. The Connecticut law is substantially broader than the federal law in other key respects: (1) it applies not only to the contractor himself, but also to "principals" and immediate family members of the contracting entity (board members, officers, managers and individuals holding at least a 5% interest in the business), *see* Conn. Gen. Stat. § 9-612(f)(1)(F); and (2) its temporal coverage can extend for nearly a year after a contract's termination, *see id.* § 9-612(f)(1)(D). As a whole, Connecticut's statute is more expansive than section 441c.

The Wagner contractors also argue that section 441c is overbroad because it covers contributions to party committees and "challenger" candidates "who have no current power." Wagner Br. 51. First, plaintiffs are shortsighted in characterizing "challengers" as powerless: contractors have an interest in gaining influence over not only current officeholders, but also their likely *successors* in office, many of whom will be "challengers." Further, in claiming that parties and

challengers have no influence over contracting, the Wagner contractors fail to take into account the possibility of transfers between candidates, and between parties and candidates. Federal law allows for unrestricted transfers of funds between, *inter alia*, national and state party committees of the same party; affiliated committees; and from candidate committees to national party committees. *See* 2 U.S.C. § 441a(a)(4); 11 C.F.R. § 110.3(c). And the law allows significant coordinated spending and unlimited independent spending by party committees in support of their nominees. 2 U.S.C. § 441a(d). Consequently, contributions from a contractor to party committees or "challengers" can easily be transferred and spent to benefit officeholders with influence over the relevant contracting process, such as congressional committee chairmen. Indeed, the Supreme Court has recognized the unique capacity of parties in particular to serve as "effective conduits for donors desiring to corrupt federal candidates and officeholders." *McConnell*, 540 U.S. at 156 n.51. Given the "special relationship and unity of interest" between parties and federal officeholders, as well as the transferability of contributions, contractor contributions to party committees pose a clear threat of corruption. *See id*. at 145.[15]

[15] Contractor contributions to unconnected political committees could also be routed to the campaign coffers of officials with oversight over contracting. The Supreme Court has recognized that political committees are vehicles for "circumvention of the other contribution limitations embodied in the Act." *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 199 n.20 (1981).

2. Section 441c Applies to the Contracting Entity Only.

The federal contractor ban encompasses only the contracting entity itself. It is thus narrower than many of the pay-to-play laws in place at the state level, as it does not reach political committees controlled by the contractor, nor individuals associated with or employed by the contractor.

The Wagner contractors contend that, by regulating only the contracting entity, section 441c impermissibly favors corporations over individuals because it allows a corporation to contribute through a PAC or through the individual donations of its officers, directors and employees, whereas individual contractors do not have a comparable option. But as the district court recognized, and the Wagner contractors concede, section 441c applies equally to corporate and individual contractors, and a corporation is legally distinct from its officers, directors, and shareholders, as well as from its PAC. *See* Wagner Br. 28-29.

The Wagner contractors therefore must resort to arguing that a direct contribution from a corporate contractor would be the functional equivalent of a contribution from its PAC because both would be perceived as equally corrupt. *Id.* at 29. But this claim is at odds with settled principles of Supreme Court jurisprudence. As the Supreme Court has held, because a PAC is a "separate association from the corporation," with separate legal rights and obligations and the ability to raise funds only from individuals, a corporate PAC "*does not* allow

corporations to speak." *Citizens United*, 558 U.S. at 337 (emphasis added). *Citizens United* thus directly refutes the Wagner contractors' theory that corporate contributions and corporate PAC contributions are equivalent. The Wagner contractors attempt to dismiss the legal independence of corporations and corporate PACs as having "no relevance," but they ignore the many regulations that separate corporate PACs from their corporate sponsors. Wagner Br. 29. Most significantly, the corporation cannot fund the corporate PAC's political activity with its treasury funds,[16] but instead must solicit *voluntary* and limited contributions from the corporation's administrative and executive personnel and shareholders for this purpose. 2 U.S.C. § 441b(b)(4); 11 C.F.R. § 114.5. Thus, the sponsoring corporation can neither fund the PAC's political activities nor control its receipt of political contributions. This regulatory system means that the direct beneficiary of a government contract—i.e., the corporation—is prevented from funding the very contributions that could influence the grant of federal contracts, thereby reducing in a very practical sense the potential for corruption. Given these barriers between a corporation and its PAC's funding, plaintiffs have no grounds for speculating that outside observers would perceive corporate PAC contributions as equivalent to direct corporate contributions.

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[16] *Citizens United* struck down restrictions on corporate independent expenditures, but did not alter the ban on corporate contributions, including the restriction on the sources of funds used for candidate and party contributions by corporate PACs. 558 U.S. at 357-58.

Similarly, there is no reason to think that there is an identity of interest between a corporation and its officers, employees and shareholders with respect to contracting, as there is when the contractor and the individual are one and the same. Few in the class of officers, employees and shareholders have direct involvement in, or knowledge of, the procurement of their corporation's federal contracts. It is implausible that the majority of a large corporation's shareholders, for instance, are even aware of the details of the corporation's government contracts, much less so invested in the procurement process than they are willing to make quid pro quo contributions. Furthermore, any resultant benefit from a government contract to the class of officers, employees and shareholders is likely to be diffuse. An individual shareholder of the government contractor is unlikely to experience more than a negligible rise in the value of his investment due to a single contract, and it seems equally unlikely that a contract would result in a material change in the terms of employment for most of the contractor's employees. The Wagner contractors offer no reason why the contributions of a corporation's officers, employees and shareholders should be equated with those of a corporate contractor for the purpose of the contractor contribution ban.

3. Section 441c Is a Prohibition Targeted at a Particular Risk.

The Wagner contractors also complain that 441c is a ban, not a limit, on contributions. Wagner Br. 54-55. But multiple courts have upheld state "bans" on

contributions from contractors, lobbyists and other groups that raise a particular risk of corruption. *See* Section I.C. *supra*. And as the district court in *Yamada* explained, the choice of a ban instead of a limit suggests proper tailoring, not overbreadth:

> A choice to completely ban direct government contractor contributions indicates, at some level, the strength of the Legislature's intended message combating a perception that government contracts are awarded to friends based on corruption (i.e., indicative of the tailoring of the restriction to the government interest). That a ban is total, that it has no dollar exceptions, might "eliminate[ ] *any* notion that contractors can influence state officials by donating to their campaigns," and in that sense indicates *closer* tailoring to the important government interest than if contributions to certain types of Legislators were excepted.

872 F. Supp. 2d at 1062 (internal citations and footnotes omitted) (quoting *Garfield*, 616 F.3d at 205).

The Wagner contractors also attempt to analogize section 441c to the ban on contributions from minors that was invalidated in *McConnell*. *See* Wagner Br. 46. But the under-18 restriction barred a vast portion of the population from making political contributions not because the regulated class itself posed a heightened risk of corruption, but because parents might circumvent individual contribution limits by contributing in the names of their children. 540 U.S. at 231-32. The *McConnell* Court did not strike down the ban because it was a *ban*, as plaintiffs allege, but because there was "scant evidence" of such circumvention, and the anti-circumvention interest was fully addressed by a provision barring contributions

made "in the name of another." *Id.* at 232; *see also* 2 U.S.C. § 441f; 11 C.F.R. § 110.4(b). Section 441c, by contrast, does not rely on an *anti-circumvention* interest, but rather targets federal contractors as a class because of their heightened incentive to purchase influence over candidates and officeholders. Otherwise put, the concern animating section 441c is not that others will use contractors as conduits for circumventing contribution limits, but rather that contractors themselves, because of their financial interests, pose a greater risk of *direct corruption* than do other donors. And in contrast to the under-18 contribution ban, the government's anti-corruption interest here cannot be adequately addressed by other measures: generally applicable contribution limits alone have not prevented contracting scandals at the state and local levels.

Finally, although section 441c bans federal contractors from making political contributions, contractors are free to pursue other forms of political expression. Individual contractors may express their political views in a variety of ways, which the district count pointed out are often "more expressive than the act of making a political contribution." J.A. 38. Contractors are permitted to volunteer their time on a behalf of a candidate or party committee, solicit contributions, and hold fundraisers. As a practical matter, it is difficult to see how the maximum individual contribution of $2,600 is more expressive than, for instance, canvassing for a candidate. The mere fact that the Wagner contractors

have elected not to exercise these other forms of political expression in no way demonstrates that section 441c is improperly tailored.

D. Section 441c Is Not Underinclusive.

The Wagner contractors also contend that the federal contractor contribution ban is unconstitutionally underinclusive because it fails to capture all situations that may lead to corruption or its appearance. Wagner Br. 55-59. But a statute is not "invalid under the Constitution because it might have gone farther than it did . . . ." *Buckley*, 424 U.S. at 105. In *Blount*, this Court confirmed that "a regulation is not fatally underinclusive simply because an alternative regulation, which would restrict more speech or the speech of more people, could be more effective." 61 F.3d at 946.

Only when a regulation cannot "fairly be said to advance any genuinely substantial governmental interest" because it provides only "ineffective or remote" support for the asserted goals will it be deemed underinclusive. *FCC v. League of Women Voters*, 468 U.S. 364, 396 (1984). The Wagner contractors point to groups that do not fall within the strictures of section 441c, such as federal grant and loan recipients and military academy students, whom they allege are similarly situated to federal contractors. *See* Wagner Br. 56-59. But the Wagner contractors fail to explain why Congress' decision not to include these disparate groups—for instance, military academy students who generally are obligated to *serve in the*

armed forces in exchange for their free education—renders the federal contractor ban so ineffective as to advance no "substantial governmental interest." Most states and municipalities with pay-to-play statutes have made similar determinations, as very few state laws cover grants or loans, and several state laws cover only limited varieties of contracts. *See* Section I.A *supra*. Congress was plainly not alone in its judgment that campaign activity by government *contractors* was "the phase of the problem which seems most acute." *Buckley*, 424 U.S. at 105.[17]

The Wagner contractors complain in particular that federal employees are not subject to restrictions on political giving comparable to section 441c. Wagner Br. 34-37. But political activity of federal employees—like that of federal contractors—is subject to significant restrictions and prohibitions. Some of those limitations are more severe than section 441c: for instance, federal employees are generally prohibited from holding political fundraisers, 5 C.F.R. § 734.303, and many are also prohibited from engaging in certain volunteer activities for a campaign, such as distributing campaign materials. *Id.* § 734.401, *et seq.*; *see also Less Restricted Employees—Political Restrictions and Prohibited Activities*, U.S. Office of Special Counsel,

[17] In addition, many federal grantees and loan recipients are subject to different limitations on their political activities. *See generally* Jack Maskell, Cong. Research Serv., RL 34725, *Political Activities of Private Recipients of Federal Grants or Contracts* (Oct. 21, 2008).

http://www.osc.gov/haFederalLessRestrisctionandActivities.htm. It is thus far from clear that treating contractors like employees would have the speech-enhancing effect plaintiffs seek. If the Wagner contractors were regulated as if they were employees, they would be subject to more campaign restrictions, not fewer.

Given Congress' stated goal of preventing corruption and its appearance, the decision to ban contributions from federal contractors, but not contributions from other federally subsidized groups, reflects a permissible legislative judgment that the risk of improper influence is greatest for contractors. *See also Ognibene*, 671 F.3d at 191 ("The fact that the City has chosen to focus on one aspect of quid pro quo corruption, rather than every conceivable instance, does not render its rationale a 'challenge to the credulous.'"). As the Supreme Court has long maintained, "[r]eform may take one step at a time." *Buckley*, 424 U.S. at 105.

CONCLUSION

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

Respectfully submitted,

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

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,972 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in Times New Roman 14 point font.

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CERTIFICATE OF SERVICE

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Courtesy copies of the BRIEF *AMICI CURIAE* were sent to the counsel of record via email (where email addresses are available and known).

I further certify that I also caused the requisite number of paper copies of the brief to be filed with the Clerk on August 9, 2013.

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